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Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

Reference: Tax Laws Amendment (Public Benefit Test) Bill 2010

TUESDAY, 29 JUNE 2010

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Tuesday, 29 June 2010

Members: Senator Hurley *(Chair),* Senator Eggleston *(Deputy Chair),* Senators Cameron, Joyce, Pratt and Xenophon

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Cameron, Eggleston and Xenophon.

Terms of reference for the inquiry:

To inquire into and report on: Tax Laws Amendment (Public Benefit Test) Bill 2010

WITNESSES

BRENNAN, Mr Lawrence Harold, Private capacity **34**

CHIA, Dr Joyce, Research Fellow, Not-for-Profit Project, Melbourne Law School, The University of Melbourne **29**

HARDING, Dr Matthew, Senior Lecturer, Not-for-Profit Project, Melbourne Law School, The University of Melbourne **29**

HARDY, Mr Michael, Assistant Commissioner of Taxation, Australian Taxation Office **35**

LUCAS, Father Brian Joseph, General Secretary, Australian Catholic Bishops Conference **18**

McGREGOR-LOWNDES, Professor Myles, Private capacity **10**

ROUSSEL, Ms Sandra, Manager, Philanthropy and Exemptions Unit, Department of the Treasury **35**

SHELTON, Mr Lyle, Chief of Staff, Australian Christian Lobby **2**

TURNOUR, Dr Matthew Dwight, Managing Director, Neumann and Turnour Lawyers, and Senior Research Fellow, Australian Centre for Philanthropy and Nonprofit Studies **10**

WILLCOCK, Mr Michael Thomas, General Manager, Personal and Retirement Income Division, Department of the Treasury **35**

WILLIAMS, Mr Benjamin, Research Officer, Australian Christian Lobby **2**

Committee met at 9.08 am

ACTING CHAIR (Senator Eggleston)—I declare open this second hearing of the Senate Economics Legislation Committee inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010. The bill was referred to the Senate Economics Legislation Committee for inquiry on 13 May 2010. The committee is due to report on 31 August 2010.

These are public proceedings although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

I also emphasise that the terms of reference of this inquiry are limited to the examination of the provisions of the Tax Laws Amendment (Public Benefit Test) Bill 2010. The committee acknowledges that there has been public commentary concerning particular organisations; however, the operation of individual organisations is not within the terms of reference of this committee. The committee does not have the authority to deliberate on such matters because they are not relevant to the terms of this inquiry. I ask all members of the committee and witnesses to ensure that questions and comments are relevant to the terms of reference of inquiry. A copy of the bill is available from the secretariat if you require guidance in this regard.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request may of course also be made at any other time. I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

[9.12 am]

SHELTON, Mr Lyle, Chief of Staff, Australian Christian Lobby

WILLIAMS, Mr Benjamin, Research Officer, Australian Christian Lobby

ACTING CHAIR—Welcome. Would you like to make an opening statement?

Mr Shelton—Our thanks to the committee for the opportunity to be here today, we really do appreciate it. We will just make a brief opening statement to augment that which we have said in our submission. We do not intend to take much of the committee's time although we are happy to answer questions.

For the record I would like to state that the Australian Christian Lobby is a not-for-profit company limited by guarantee. ACL pays company tax, fringe benefits tax and GST. ACL does not benefit from any tax concessions. Our supporters cannot receive tax deductions for their donations unlike some other groups which lobby in the parliament. I wanted to make that statement so that the committee is aware that we have no material interest in this although many of our supporters and those who support our organisation work in the religious charitable sector doing good in the community and they would obviously be affected by a potential impost that might come as a result of this amendment.

It is often said that hard cases make bad law. I think it could equally be said that the use of extreme examples could lead to the making of bad law. The Church of Scientology cult's alleged criminal activities, according to lawyers who have made submissions to the inquiry, are reason enough for that group's tax-exempt status to be revoked under existing law. The Agape cult has already had its tax-exempt status revoked under our existing law. There is no need for a catch-all law to be enacted without proper debate and consideration of the consequences, intended or otherwise, seemingly all because of the activities of a couple of fringe groups. Churches and Christian charities use tax-exempt status to maximise their ability to provide services to the poor, the mentally ill and the disadvantaged in our community. It is well known that the public benefit test in the United Kingdom was not needed in order for the Church of Scientology to be denied tax-exempt status there despite media reporting as late as yesterday reinforcing a contrary perception.

Australia's charitable sector does not need yet another layer of bureaucracy imposed on it because of the bizarre and allegedly criminal behaviour of cults. Just as a public benefit test was not needed in the UK to deny tax-exempt status to groups like the Church of Scientology neither is it needed here. A public benefit test for charities sounds well and good but the reality is that tax-exempt status is not available under existing laws unless rigorous requirements are met.

The lack of consultation surrounding this bill is a major concern to the sector. A public benefits test for charity sounds wonderful, and arguing against it almost sounds like arguing against motherhood. But the idea that Australia needs one implies that somehow charities and religious groups are receiving tax concessions now without adequate scrutiny. This is simply not the case. If there was no remedy for the anomalies in tax exemption status that Senator Xenophon has rightly identified, a case could be made for such a law as that which is before the Senate now. But the reality is that remedies exist here in Australia to deny the Church of Scientology tax-exempt status, just like they did in the UK, long before a public benefits test was introduced there.

However, ACL admits that the serious alleged abuses that Senator Xenophon has rightly given profile to go way beyond the rorting of tax laws. Eliot Ness got Al Capone not because he was a murderous gangster but because he could prove that he cheated on his taxes. It is disappointing that it seems that the Senate Economics Legislation Committee is the only recourse available to the senator to raise valid concerns about the alleged abuse of people at the hands of a strange cult. As former Scientologist James Anderson was reported to have told this committee yesterday:

> There are a large number of extremely worthwhile charitable organisations and they do fantastic work. And I don't think that they should be punished because of the allegations levelled at a particular organisation of which I was a member for 25 years.

ACL could not agree more with that. Thanks very much.

ACTING CHAIR—I will ask you a question following on from what you have just said. You focused very much on Scientology and the denial of their tax-deductible status, but establishing a public benefit test and a charities commission would do far more than just deal with an organisation which might have undesirable practices. There are other issues. It seems that a lot of money passes through the hands of charities and yet

there is no public accountability and there is a lack of transparency around about their operations. Yesterday we looked at the websites of the charities commissions in New Zealand and the United Kingdom. There is a great deal of detail provided on those websites about various charities and it is openly accessible to the public. I personally think it is probably a public good that that kind of information is available. I just wondered if you would like to comment on that. Is there a need for greater transparency in the operation of charities and greater public accountability of their expenditure?

Mr Shelton—Obviously charities operate under various legal structures. Some operate as companies limited by guarantee or as incorporated associations or the like. We have Australian law to deal with that. I think that our existing laws do provide opportunity for scrutiny. There are audit processes. The large charities, especially, go through rigorous audit processes by law. Perhaps there could be opportunities for greater disclosure on websites. All of that could be looked at. The implication is that somehow charities are getting some sort of public benefit without proper scrutiny, just because there have been a couple of anomalies. I do not think that that is the case. There is a widespread perception out in the community, rightly or wrongly, that this has been motivated largely by the anomalies that have been, rightly, unearthed in some organisations. But I think it would be unfair for the rest of the sector to be tarred with a similar brush.

ACTING CHAIR—You mentioned some organisations. There has been a lot of emphasis on Scientology. But surely there is a pattern of change around the world? There are charities commissions in the United Kingdom, Ireland, Scotland, New Zealand and Singapore. I think Canada is going down that path, but I am not quite sure about that. So there is a movement around the world which is not unique to Australia. We are in fact lagging behind, it would seem. What do you say to that? Should we not catch up with the rest of the world, if that is where the rest of the world has seen the public interest to be: to establish charities commissions and public benefit tests?

Mr Shelton—That could well be worthwhile. This is something which is coming up as an amendment in the Senate. There has not been a consultation process with the sector. I think that if there are to be changes there should be a consultation process. We are still going through a very big public debate in this country about the mining super profits tax, which was floated for a particular sector, again without consultation. I think the lesson from that is that there should be proper consultation. I do not think that has been the case. I am not making a judgment statement there; I think that is just the reality. Senator Xenophon's motivation is well intended, and I am not critical of that at all, but I think this sort of change to the way that charities operate and the potential for future impost on them, when there is already a very high compliance burden, is something which should go through a proper process.

ACTING CHAIR—I do not disagree with that. There could should be consultation about new laws. I agree with that. But this is not a government initiative; this is a private member's bill. The Senate committee system is the beginning, very often, of a process of public discussion about issues. In your submission you made reference to both the Henry review and the Productivity Commission's review into the contribution of the not-for-profit sector and you said that the contents of the bill would be more appropriately addressed in a broader reform of the sector. How would you like to see the government implement the recommendations of those reviews and, in doing so, give effect to the aims of the bill currently before this committee? Do you have any comments that you could offer the committee there?

Mr Williams—In relation to those reports that you referred to, the Henry tax review and the Productivity Commission report, we would like to see a general consultation with the sector taking place. We are not against, necessarily, the idea of a public benefit test. We have not come to a position within ACL in relation to a charities commission. We know that there are many not-for-profit organisations who would be supportive of a commission, understanding that there is a duplicity of regulation in the sector across the country. But we also understand that there are other organisations that operate in the sector who are against the idea of charities commission. We would like to see a broader consultation that draws together all of these issues, including a public benefit test, so that the sector can address them in a more targeted fashion.

ACTING CHAIR—I see. Thank you very much.

Senator CAMERON—Mr Williams, I am confused, because you have said that you have not come to a view on a public benefit test or a commission. That is not the tenor of your written submission to this committee. Have you changed your mind between the written submission and where you are now?

Mr Williams—Thank you for your question. No, we certainly have not changed our position. We are saying that, at this point in time, given that there are a couple of other reports floating about that have not been addressed, we feel that it would be better for those reports to be addressed and for the particular bill that has

been put before the Senate and the public benefit test to be addressed in that broader context. We are not necessarily opposed to a public benefit test, as I stated. We are opposed to it being introduced at this time, when there is a lot of uncertainty going into the future about how the sector is to be regulated.

Senator CAMERON—How many organisations are affiliated with the Australian Christian Lobby?

Mr Shelton—We do not have organisations affiliated with us. We have a supporter base of people who support our work. It is not a case of having organisations affiliated, unlike the structures of advocacy groups.

Senator CAMERON—And those supporters would belong to mainstream religion around the country?

Mr Shelton—Yes, that is right.

Senator CAMERON—Do you have any idea of how much public funding, through tax breaks, goes to those mainstream religions for charity work?

Mr Shelton—I would not know off the top of my head, but it would be a great deal. Many of the organisations which support us, churches et cetera, are involved in a great deal of charitable work in the community. Many individual churches, as well as the big care organisations, are involved in community care work and would be adversely affected by the potential extra bureaucratic impost if this bill were to take effect.

Senator CAMERON—Is it the case that you do not know that off the top of your head or you just plain do not know?

Mr Shelton—I do not know.

Senator CAMERON—That is more accurate, because even the Productivity Commission, with all their economists, could not tell us. Don't you think that is a problem?

Mr Shelton—I am not sure if it is a problem. It is probably something that should be measured. We would not be opposed to having it measured.

Senator CAMERON—I am not arguing that we should not be making proper funding or giving support to charities, but are you saying that the public should make those donations and that it is not a problem if you do not know how much the community is donating in taxes to charities? That is not a problem?

Mr Shelton—I think it is something the government should measure but I am not sure that that is the subject of this bill. That is a wider public debate and it is a valid one.

Senator CAMERON—But the bill does say that there has to be an identifiable benefit. If there has to be an identifiable benefit, you have to measure the benefit against the costs, surely. So we are entitled to deal with that as part of the bill.

Mr Williams—That would also depend on the way that the public benefit test is framed. It says in the bill that that is to be determined by regulation. We have not actually seen the contents of this particular test, and that leaves a degree of uncertainty for the sector of how and by whom the test itself is to be administered. It is a point that ACL has raised in its submission.

Senator CAMERON—We will come to administration in a minute. You also say in your written submission and in the verbal submission that you gave this morning that an extremely bad example should not be used to make a law. Is that a position that the Australian Christian lobby uses consistently? Are you consistent in that position, or is that just a position when it comes to churches?

Mr Shelton—No. I think that is a general principle.

Senator CAMERON—Did the Australian Christian Lobby make any comment about the ABCC legislation when it was implemented? That legislation took away the rights of workers. A bad example was used to set laws for the whole of the building industry. Did the Christian Lobby make any comment about that?

Mr Shelton—ACL is on the record as saying that the Howard government's Work Choices legislation went too far.

Senator CAMERON—What about the ABCC?

Mr Shelton—We did not get into the—

Senator CAMERON—That is different legislation from Work Choices but it is part of the—

Mr Shelton—We have not gone into that particular legislation. Unfortunately, we do not have the resources to cover every aspect of policy that goes through.

Senator CAMERON—Your submission this morning was that charities should not be punished. I want to explore that a bit more, because the principles outlined in this bill are that there must be an identifiable benefit arising from the aims and activities of an entity. Do you have any problem with that?

Mr Shelton—No, not at all.

Senator CAMERON—And that the benefit must be balanced against any detriment or harm. Do you have a problem with that?

Mr Shelton—No. I guess our contention is that there is a process in place before tax exemption status is given by the authorities, and we are concerned that this could lead to an extra bureaucratic impost. Our concern is not with the idea in principle; it is with the process.

Senator CAMERON—I am asking you a question on principle here. We can come to the detail later. If you could just—

Mr Shelton—As we have said that in principle we are not opposed to—

Senator CAMERON—You support the second main principle of the bill. The third is that the benefit must be to the public or to a significant section of the public and not merely to individuals with a material connection to the entity. Do you support that in principle as well?

Mr Shelton—Yes, in principle.

Senator CAMERON—If those principles were applied, how would they punish a charity?

Mr Shelton—It should not in principle punish any charity. I guess what we do not know is what the administrative and compliance impost of that would be, given that there are already standards in place for allowing tax exemption status. Our concern is that there could be an extra impost where perhaps none is needed and where anomalies, such as those that have been highlighted, could be dealt with in other ways than through the catch-all approach here.

Senator CAMERON—How that impost works with the commissions operating overseas is, as understand it, that you have to be more accountable. The impost is that you have to have a public benefit. Why is that a punishment? I am just not sure why you would describe that as a punishment.

Mr Shelton—I would say that the impost already exists under our current arrangements. The fact that a couple of organisations have slipped through the cracks is a problem but, as I said in my statement, there are remedies available.

Senator CAMERON—That is not what I am asking you. I am asking you why it would be a punishment to implement principles that you agree with.

Mr Shelton—If it led to an extra bureaucratic and compliance impost, that would be a punishment, just as the former Scientology member stated here yesterday.

Senator CAMERON—Given that you have come here to give evidence, you have put in a submission, have you looked at the British, the Irish, the Scottish or the New Zealand commissions and how they operate?

Mr Shelton—I will let Ben make some comments on that. I have not personally looked into them in great detail, but my concern is, as I said, not with the principles—

Senator CAMERON—I have not finished yet. Have you looked at how they operate, and do you believe that they operate as a punishment against charities?

Mr Shelton—We do not know. Our concern is the lack of consultation in the process. If there are going to be changes to the way the sector operates—

Senator CAMERON—That is not what I am asking you—

Mr Shelton—That is the basis of our concern.

Senator CAMERON—Please, I have not got a lot of time.

ACTING CHAIR—You must answer the question. That is what politicians do: they basically give a standard answer, and you seem to be doing that.

Mr Shelton—I am certainly not—

Senator CAMERON—We know when you are doing it, you see.

Mr Shelton—Mr Chairman, it is certainly not my intention to be in any way evasive.

ACTING CHAIR—No, but you are doing it very well. If you would kindly answer the question.

Mr Shelton—I would not for a minute want the committee to think that I was in any way trying to evade the senator's questions. I would be very upset if that were the case.

ACTING CHAIR—There is no chance of doing that before this committee, I assure you. Your answering the question would be appreciated.

Senator CAMERON—Given that those organisations are established overseas and that organised religious bodies and charities operate under the guidelines and the laws that applies to them, where is the punishment in New Zealand, Ireland, Scotland or England in terms of those organisations?

Mr Shelton—We do not know is the answer. And we would like a proper consultation process to find out before an amendment was passed by the parliament.

Senator CAMERON—I agree with you in terms of a consultation process. That has been a consistent position put by people who have appeared before the committee. You have to have a focus for that consultation and this is the only focus we have at the moment. But what has emerged are these established commissions overseas. Would that be a more appropriate thing to consult over rather than this bill?

Mr Shelton—I believe so, and then the community could look at the costs of setting up such commissions and the compliance burden that may or may not be applied to the sector and whether further levels of compliance are needed. We all want to have transparency. We all want to demonstrate a public benefit. I do not think there is anyone in the sector who does not. If there are concerns in the community about that, they need to be addressed. But I think by going down this path of passing this amendment would be a grave concern to us.

Senator CAMERON—Did you listen to any of the evidence from yesterday?

Mr Shelton—I have only seen media reports online.

Senator CAMERON—The evidence from the Charity Commission for England and Wales and the Charities Commission New Zealand is that all the concerns that you have raised here were raised when the legislation was put forward for the charity commissions in those countries. After a consultation period and with the operation of those commissions those concerns seem to have disappeared and the charities and religious groups operate effectively under those operations. Have you looked at that at all?

Mr Shelton—No, we have not. That may well be the case. As I said, we would be happy to cooperate in any consultation process in the future. But our concern is with the bill that is before the parliament now.

Senator CAMERON—Sure. But this is not the only way forward. This is an opportunity for us to address all the issues. I am pretty keen to question you not just on this bill specifically but on what is happening overseas. Given that you are basically saying 'maintain the status quo'—

Mr Shelton—With respect, we have covered this Senate inquiry based on the terms of reference of the inquiry and the particular bill that is before the parliament. Quite rightly, the Senate is a forum for wider debate and obviously there is a place for that, but our focus has been on this particular amendment and our concern that it might find support in the Senate notwithstanding the fact that it is a private member's bill without that wider process.

Senator CAMERON—I understand that, but Senate inquiries do not confine themselves to the very narrow aspects of a bill. If people make submissions in relation to what has happened overseas, we take that on board. I would have thought you would have taken that on board because it was clear from the list that both those charity commissions were submitters. I am surprised that, given your opposition to moving from the status quo, you have not looked at that. That is just a general comment.

Mr Shelton—Our opposition is to this proposed amendment to the tax laws. We are not necessarily against a change to the status quo; we are against the change in this manner and the lack of consultation. That has been our focus. Do I read all submissions that come before a Senate inquiry? No. Should I? Perhaps. But we have focused our attention on this. I am not aware of the intricacies of how the Senate conducts its committee process. We just heard an opening statement from the chair which warned us to confine our comments to the issue at hand, so I am not sure what liberties we are allowed to take.

Senator CAMERON—Not too many.

Mr Shelton—That is right, so I do not know what scope I have to address the issues you have raised.

Senator CAMERON—There is a public benefit test applied at the moment, and you are complaining about added layers of bureaucracy. On notice, can I ask that you have a look at those overseas commissions that operate for charities. Given that you have indicated that you have not looked at them, can you have a look at them and advise the committee whether you believe they are additional bureaucracy and whether they tend to punish genuine charities in terms of their operation? I would like you to give it a considered view. You said you have not looked at them, but I think you should have a look because you are asking for consultation and consultation would include that type of approach.

Mr Shelton—We would be very happy to do that.

Senator XENOPHON—Where is your boss, Mr Wallace, today?

Mr Shelton—He is taking a well-earned break, Senator. He works very hard.

Senator XENOPHON—I am sure he does. How many supporters does the Australian Christian Lobby have?

Mr Shelton—We would have close to 10,000.

Senator XENOPHON—So it is not constituent churches, as such?

Mr Shelton—No. It is individual, grassroots people who support our organisation. There is no joining fee or anything like that. It is probably a little similar to the GetUp! organisation. People give their e-mail address and sign up online and decide to be a part of our organisation. It is very grassroots. We are not a peak body for the church, but we represent our supporter base and the broader constituency.

Senator XENOPHON—I want to get this right. In relation to the 1999 decision of the Charity Commission you said that it was not a public benefit decision as such. What were you saying about that decision by the UK Charity Commission, involving the Church of Scientology?

Mr Shelton—Our understanding is that the public benefit test was not enacted in legislation until 2006.

Senator XENOPHON—Have you read the 1999 decision?

Mr Shelton—No, I have not.

Senator XENOPHON—I suggest that you do because it makes explicit reference to the public benefit test. I think you have given inaccurate evidence to the committee in relation to that and I suggest you read the decision, because the 2006 legislation codified the issue of public benefit.

Mr Shelton—That was in 2006, Senator? The decision was in 1999?

Senator XENOPHON—Yes.

Mr Shelton—You could understand us coming to that view.

Senator XENOPHON—I suggest you read the decision before making an assertion on it, because the decision was quite clear. It did make reference to the issue of public benefit and it weighed up various factors for public benefit. The 2006 law was a codification of the common law, in a sense. I want to understand where the Australian Christian Lobby stands on the need for greater transparency and accountability of religious organisations before they obtain a tax-free status, because obtaining a tax-free status is a privilege, isn't it?

Mr Shelton—Yes, it is.

Senator XENOPHON—You say a bad example should make for bad law, or words to that effect—

Mr Shelton—'Would make', and yes.

Senator XENOPHON—Are you saying that you do not think the Church of Scientology should have a tax-free status?

Mr Shelton—I am saying that, if there are abuses or if it is not providing a public benefit, that should be investigated and remedied. I believe there is recourse for that under existing law. If there are anomalies, they should be looked at. But, as I said, we are concerned about the process that has led to this current amendment before the Senate.

Senator XENOPHON—The fact is that they still have a tax-free status and there does not appear to be a mechanism for people to deal with complaints. Does that not indicate to you that the current system is not working as it should, that there is a lack of transparency and that there is a lack of recourse for those who have complaints about an organisation that has a tax-free status?

Mr Shelton—I agree that is a problem. This is a very large sector. There are many churches and religious and other charities that have tax concessions, yet we are not hearing of systemic failures or systemic rorting of the system. I am not convinced that it is a widespread problem that would need this approach at this time to remedy it.

Senator XENOPHON—Let me get this straight: the Australian Christian Lobby does not want to have a formal public benefit test in legislation at this stage?

Mr Shelton—Not at this stage—not without consultation and not without a process where the sector can have some input.

Senator XENOPHON—We are consulting with you now, in a sense. What is your view on having a public benefit test?

Mr Shelton—We would need to study the charities commissions and the overseas examples. We would need the time to look into it more rigorously, more than the time we have had between when this amendment was first floated and when this committee was set up. I think, out of respect for a very important sector of our community which does a lot of good and is motivated by very altruistic reasons, that it should have that opportunity. I guess what we are trying to do here is put the brakes on the process not necessarily the motivation behind it, which I think is right. No-one wants to evade scrutiny or transparency, which must always be adequate, particularly when public money is at stake. It is the process.

Senator XENOPHON—Let us leave process to one side and look at general principles. I want to put a hypothetical example to you. Do you agree that, if an organisation is obtaining tax-free status and there are systemic problems, for instance, child abuse—in other words, whilst the hierarchy of the organisation may not have been aware of it occurring in the first place, they were involved in covering it up—that sort of thing should be subject to scrutiny in the context of the tax-free status of that organisation?

Mr Shelton—I would hope that the authorities would have investigated that well before we got to questions of tax-free status. You are talking about issues of criminality. That is like the example of Eliot Ness that I mentioned before. They could not get Al Capone for murder; instead, they got him for tax evasion.

Senator XENOPHON—I am not talking about Eliot Ness or Al Capone.

Mr Shelton—I think that is way down the track.

Senator XENOPHON—I am not talking about tax evasion; I am talking about tax-free status.

Mr Shelton—I understand that, but you are talking about examples of criminality.

Senator XENOPHON—Sure, but as a general principle, if there is evidence that an organisation, at the top, is systematically covering up issues of child abuse, do you think that organisation deserves to keep its tax-free status?

Mr Shelton—I would not think so but, as I say, I think that should have been investigated by the authorities long before we look at the question of tax status.

Senator XENOPHON—I am not talking about the authorities. There is an issue of criminality, there is an issue of attempting to pervert the course of justice and all those sorts of issues—they are separate. But in terms of that privilege of having a tax-free status, do you think that—

Mr Shelton—I think you have to look at the wider organisation—

Senator XENOPHON—I did not finish my question.

Mr Shelton—I am not sure where you are going with this question.

Senator XENOPHON—I did not finish my question.

Mr Shelton—My apologies.

Senator XENOPHON—Don't you think, though, that having a public benefit test, having a charities commission—we heard evidence from New Zealand and the United Kingdom on this yesterday—would be a good thing for those organisations which are not doing the right thing and which could give other organisations a bad name? Would it not be a safeguard, a check and balance on that sort of behaviour? Won't it cause organisations to do things a little differently, to perhaps manage risks and manage bad behaviour in a completely different way if they know that their tax-free status would be at risk?

Mr Shelton—That could well be a benefit of such a charities commission, but we do not know because we have not had a chance to look at it in detail. I do not know that a charities commission is the subject of this particular bill.

Senator XENOPHON—No, but it has been raised in evidence.

Mr Shelton—In terms of the wider public debate, these are valid issues which could well be important in going forward and ensuring public confidence in the tax-free status of organisations.

Senator XENOPHON—Leaving aside issues of criminality, do you think that if an organisation, for instance, raises $10 million but it spends an inordinate amount on administration, on overseas trips for its executives or hierarchy and that very little is going down to the grassroots to help the needy, that that sort of thing ought to be considered?

Mr Shelton—Absolutely. No-one would want to see that occurring. I guess the question has to be asked: are there ways to expose that sort of abuse under the existing system or do we need extra layers of compliance to ensure public confidence. I guess that is what the wider consultation would need to show.

Senator XENOPHON—I would appreciate your evidence on this but do you acknowledge that, under the current system, we do not have the same level of transparency and accountability that the New Zealand and UK systems have where there are charity commissions in place?

Mr Shelton—As I said to Senator Cameron, we have not investigated that thoroughly. At face value, it would seem that a charities commission would provide that but I would want to be sure that, even with a charities commission in place, there would not be scope for abuses.

Senator XENOPHON—Perhaps, Mr Shelton, you could take this on notice.

Mr Shelton—We are very happy to.

Senator XENOPHON—We are reporting on this matter at the end of August—I do not know what Senator Cameron's view or the chair's view is on this—but I would be grateful if you could consider this very issue: do you consider that there will be a greater degree of transparency and accountability by having a public benefit test? And your views would be valued on what Senator Cameron has put to you about having a charities commission type approach.

Mr Shelton—We would be very happy to take that on notice.

Senator CAMERON—I will take that as the first step in our process of consultation.

ACTING CHAIR—Gentlemen, we thank you for appearing this morning.

[9.48 am]

McGREGOR-LOWNDES, Professor Myles, Private capacity

TURNOUR, Dr Matthew Dwight, Managing Director, Neumann and Turnour Lawyers, and Senior Research Fellow, Australian Centre for Philanthropy and Nonprofit Studies

Evidence from Professor McGregor-Lowndes was taken via teleconference—

ACTING CHAIR—Welcome to this inquiry. I invite you to make an opening statement. Do you have any comments to make on the capacity in which you appear?

Dr Turnour—I do not have an opening statement beyond hearing what was said at the outset. I will let Myles introduce himself.

Prof. McGregor-Lowndes—I am the Director of the Centre for Philanthropy and Nonprofit Studies. My apologies for not being there in person today, but I have some important professional appointments.

ACTING CHAIR—Do you wish to make an opening statement?

Prof. McGregor-Lowndes—No, I have no opening statement.

Dr Turnour—Having heard the evidence of the last witnesses and the extent of cross-examination in relation to charities commissions and so on I did not make any significant comment in my submissions on that. However, I thought it may be helpful to the committee if I make a comment to begin in relation to that.

ACTING CHAIR—Please do.

Dr Turnour—Last year this Senate economics committee looked into accountability and transparency, including of not-for-profit organisations. It recommended, from my memory—I did not come prepared on this point—a commission for the whole of the not-for-profit sector, not for charities. I do not hold a concluded view, but my initial view is that that is probably the preferred approach to endeavour to scope the whole of the sector. I would look at a charities commission as a fallback position rather than as a first starting point. I think that if we could look at the sector as a whole, that would be a better and more constructive way of doing it. If we are dealing with exemptions, which, in part, we are in this discussion, I would have thought all of the organisations falling within the scope of division 50 of the Income Tax Assessment Act may help to define those entities. Beyond that I have nothing to add to by way of introduction to what I have already written in my submissions.

Senator CAMERON—The Executive Summary, in the addendum to your submission, says:

> … if any organisation including one pursuing the religious purposes of Scientology is in fact pursuing illegal purposes then that organisation is not entitled to the status of either a charity or a religious institution and consequently is not entitled to income tax exemption.

I would have thought that that was stating the bloody obvious. I do not know any organisations and I have not seen any evidence here that any organisation which has appeared, including the Church of Scientology, are systematically out there pursuing illegal purposes. That is not what we are here for. That is a hugely high bar. Why would an organisation, which is receiving financial support from the public purse, and which cannot behave in a fair and reasonable manner, not be entitled to the benefits of tax-free status? Senators come in here and talk about the trade union movement. The trade union movement and its registration processes have huge obligations in terms of behaviour. There are huge penal provisions in relation to bad behaviour. That is not just systematic; it is just that bad behaviour takes place. Why do you set the bar for charities so high that they have to be ‘pursuing’ bad behaviour? Why is there no check and balance on bad behaviour per se?

Dr Turnour—There is a lot in what you have just said and I will endeavour to take them in pieces if I can, because it will take us straight into the heart of many of the issues in the debate. I have jotted down five issues from what you have said. One is entitlement to financial support and the tax breaks associated with that. The second one is the fair and reasonable manner, and I think that tied in with your last one in relation to the height of the bar. A number of issues are tied around the height of the bar and public purpose and it ties in with some questions you put to the last witness in relation to a standard of activities as against purposes. The third one, I think, was in relation to accountability standards for trade unions and others—why should charities have a lower standard? I will endeavour to address those matters one by one, if I can, and then you can take me further with questions from there.

With respect to the first issue of financial support, I do not think there is any debate of significance out there in the literature or generally that where an organisation receives tax deductibility that they receive financial support. I think there is a debate to be had in the Australian community over whether exemption from income tax is in fact a preference or a favour or whether it is not. There are significant aspects of Australian conduct which is not taxed, such as mutual income. To bring it into the current context, if a group of non-Scientologists wish to get together and put their money into a hat, that is mutual income and it is not taxed. There is a debate about what is and what is not an exemption. The lowest level is where people do not receive any tax breaks, such as the Australian Christian Lobby. What level of accountability should they have if they are a not-for-profit organisation? So there is a debate to be had in relation to financial support and what levels and what accountability is attached to them.

The second issue was with respect to the level of the bar in relation to public benefit. The common law has always required public benefit to be established with respect to charities. The difference has been the level and the requirements. In relation to religion there has been a deeming—sorry, a presumption—of the advancement of religion being for the public benefit. That presumption is relatively easily rebutted and there are cases involving particularly contemplative religious orders, where the presumption of public benefit has been absent.

The debate in Europe, which was raised, is that England and Scotland and Wales or require religious organisations to prove that they are for the public benefit since 2006. The Scottish legislation was a year or two later—I have forgotten the date. I think the 'deeming' word came from the Irish legislation. I think in the Irish context they do use the word 'deeming', but I could be wrong on that. The presumption is that the advancement of religion is for the public benefit. Then you need to have some evidence that you are not satisfied that presumption and then lose the status of a charity.

I might just add a further comment in relation to that. Part of the reason I think the common law has taken that approach is because proving public benefit for the advancement of religion is incredibly difficult. You either set a low bar and say, 'Opening up your doors to public worship is for public benefit' or you have to set another standard. It is not in a general proposition that the problem lies, but in identifying when the advancement of religion is for public benefit and when it is not. I have followed the debate in England and I have read the more recent ruling in relation to public benefit and religion that has come out of the English and Wales charities commission and I am not yet sure—and I think time will tell on this—whether it has actually changed things at all. There has been a lot of debate, a lot of thanks to, a lot of grief and all those sorts of things but I am not actually sure that when we distil it right down we have actually made any significant difference. The struggle is going to be: what do we require of organisations that are pursuing religious purposes to demonstrate they are for the public benefit? When the last witnesses were speaking I do not think they articulated that particularly clearly. There are a lot of ordinary folk out there in small congregations in rural contexts, for example, and for them to show they are for public benefit could be quite an onerous task when they don't know what they have got to do to prove it. If opening their doors for public worship is enough, then we might as well leave the status quo as it is. If it is not, we need to tell those congregations clearly: 'You've got to do X, Y and Z.'

On that point—and this I think is significant and it comes out in a number of submissions to this inquiry; and I should say that I have not read them all but I have read a lot of them and I have read some of them at higher and deeper levels than others—one things that came out of the evidence which I read was that the Church of Scientology is going to be able to make sure that it ticks the boxes for public benefit in terms of its commitment to humanitarian activities, drug relief, education or whatever. There seems to be evidence that it would make sure it fell within the scope of whatever the public benefit in the legislation might require. That comes out in what I will call the Scientology case—the case of the Church of the New Faith v Commissioner of Pay-roll Tax in Victoria.

Can I therefore take you, senators, where I think the debate really should go on this, and that is not about what the heart of it is but where the boundary is, which really is a different way of stating what Senator Cameron was asking before about me setting the bar very high. It is about when we exclude organisations. We should not be saying, 'When are we at the centre of the inquiry of what is public benefit', but 'What is not public benefit?' So we work on a definition of exclusion. There are some cases on that point, and the common law has already done that. If it is for private benefit, for example, it is excluded. If it is for illegal purposes, it is excluded. If it is for purposes that are completely antithetical to religion generally, it is excluded. So I am not sure that that is not the right place to focus the bar. To follow on from Senator Cameron's point, it is really a matter for public debate as to how high or low we want to set that bar.

The last point is the obligations in relation to reporting that you have raised. I say again that I do not think one size fits all. I think your arguments with respect to the trade union movement are very helpful in this context. Can I just lay out some parameters or frameworks that I think should apply. As a general proposition, if an organisation does not seek any income tax exemptions and is happy to pay tax and be a not-for-profit organisation, the level of accountability might be low or nil. I really think that we have got to encourage freedom of association in our society. If there are organisations or people that might be fearful of even being known that they are meeting and having to lodge returns, there would be times when it is appropriate not to require those organisations to report at all. Obviously, if people are fearful of cult activity, the fact that they are meeting as a group and that there registered office is X and here is the list of members is the kind of information that they may not want in the public domain. Provided they are willing to fall outside of the net of exemption or deductability, then there is an argument for complete freedom.

The second level is that there is an argument to be had about levels of accountability when you are getting tax breaks. What tax breaks are is a matter for debate, but I think there is a debate to be had in that context. The third point that I would make there—and I pick trade unions as an example of the non-profit exempt kinds of organisations that are associations of people for non-commercial purposes. They fall within the scope, potentially, of this sector that we are talking about. The general proposition should be that the regulation should be as low as possible to encourage and facilitate free association. Then you say, 'We regulate because it will encourage free and voluntary association.' Where there is fundraising, for example—raising funds from the public—we might want a structure around that to give public trust but we should not simply be introducing legislation and regulation because we can introduce legislation and regulation. It all must be purposive and proportional. That would be the proposition that I would start from at principles level.

They are the issues that I picked up out of Senator Cameron's questions and my responses to them by way of introduction. I am happy to take any of them further if that is helpful.

Senator CAMERON—I have one last question before we move to Senator Xenophon. Does Neumann Turnour carry out work for charities?

Dr Turnour—Yes.

Senator CAMERON—Is that a significant part of your legal work?

Dr Turnour—It is a significant part of my personal practice. We have a fairly broad practice, in answer to your question, but I have experience in acting for a number of charities personally, yes.

Senator CAMERON—So you have a vested interest in this, have you?

Dr Turnour—The cynic would say I have a vested interest in a whole lot of grief, because the more grief there is the more likely I am to be retained in sorting out the grief. That would probably a lawyer's answer to that question. If you are saying, 'Do I have a vested interest in it?' I have been actively involved in not-for-profit organisations since my adolescent years, and that would be where my passion comes from.

Senator CAMERON—We have had other submissions from consultants to the charities 'industry', if you want to use the term crudely, and if there is a charities commission established a lot of the requirement for external expert legal and consultative advice might disappear.

Dr Turnour—I spoke against my interest in it—didn't I?—when I said at the outset that I think a commission, as recommended by this committee last year, is in the best interests of the country. I have come at this from a number of angles. I think that we could develop the Attorney-General's role and that there are other things that could be done, but ultimately I think a body separate from government and the tax department is prudent.

Senator XENOPHON—This question is to Dr Turnour and if Professor McGregor-Lowndes wants to chip in I am happy for that too. Dr Turnour, in your submission you argue that a public benefit is a conceptually difficult concept. Given the way that it has evolved with the charities commission in the UK prior to the codification of the public benefit test in 2006 and also the way it is evolving in New Zealand with their charities commission, it does not seem to have caused, at a practical level, the difficulties that seem implicit in your submission.

Dr Turnour—That might be. First of all, I think it is a little early to say. The UK charities commission legislation came in in 2006—

Senator XENOPHON—But the charities commission has been around for much longer.

Dr Turnour—Myles could probably give you the year. I cannot remember. It has been around a long time, hasn't it, Myles? How far would you go back?

Prof. McGregor-Lowndes—To the 1860s.

Dr Turnour—And probably before that you would go back to the statutes and when those commissioners were first commissioned. The conceptual difficulties are these. Under the common law we had charities gathered into four heads of advancement of religion, advancement of education, the relief of poverty and essentially welfare related things, and other purposes for the public benefit. The case law struggled. The judges frequently wrote about the difficulties of saying what level of public benefit is required to satisfy this, and they made a decision on the particular issue. I am not sure that there has been a huge difference in the context of religion at least, moving from the common law position, as a result of the addition of many other heads of charity, because the charities commission is now dealing with 13 heads of charity in the UK and what level of public benefit is required to satisfy each of these heads is the real issue. I am saying that in the context at least of religion, which is what we are focused on here, I think that it is a quite difficult area to define when a religion does and does not satisfy the public benefit test if you use a positive, as distinct from a negative, test.

Senator XENOPHON—You do not see more safeguards in the UK test where it says that there is no presumption of a public benefit for a religion and that it just has to show that? It does not seem as if the sky has fallen in. Organisations continue to get tax-free status by virtue of being a religion. It does not seem to be that onerous in practical application.

Dr Turnour—But I do not think the law has particularly changed that much, which is my contention. I am not sure; that is what I am saying. When all this is done I am not sure that we really have got much beyond the common law position.

Senator XENOPHON—So the codification in 2006 is more of a tweaking. The threshold is still there. It is just that you show the public benefit rather than presume the public benefit, but that does not seem to be onerous in a practical sense, does it?

Dr Turnour—Myles might be able to answer this better than I can. My impression is that there has not been much change because of the December 2008 ruling that came out of the charities commission. But why pass the law if there is not any significant or substantive change? What I am doing, as best as I can see it conceptually at the moment, is argue for the negative; that is, as soon as an organisation looks like it is not actually for the advancement of religion you put it on test to prove that it is and that it is not for a purpose which is not charitable.

Senator XENOPHON—The UK approach is to say, 'Show us your public benefit,' and in the act a public benefit can be a place for people to worship in terms of spiritual enlightenment and a whole range of associated issues. Can I go to this issue. You said in your submission, under the heading 'The Common Law', that 'the pursuit of business purposes is not charitable at common law'. How does that work in with the High Court's decision in the Word Ministries case? What is your understanding of that decision?

Dr Turnour—The Word case essentially involved obviously an organisation whose purposes were stated clearly to be for the advancement of religion and essentially the provision of money to another organisation that carried out missionary translation work overseas, Wycliffe Bible Translators. In that decision the court said that if the purpose of the organisation is the advancement of religion then it is clearly for a charitable purpose. Everything that Word Investment did was for the purpose of funding the worker with the Bible translations. There was no doubt that its purposes were for the advancement of religion.

Senator XENOPHON—But where does that end though? Those businesses ran with the benefit of a tax-free status—that is correct. Leaving Word to one side, does that decision mean that as long as your profits are going for the advancement of religion or some other charitable purpose you could run a printing business, you could run a catering business and you could run all sorts of businesses? Isn't there an unfairness in terms of those businesses that have to compete in the marketplace without the benefit of a tax-free status?

Dr Turnour—Putting aside FBT because I think there are some debates to be had about FBT, as a general proposition any organisation in Australia that puts all of its resources to charitable purposes is entitled to exemption however it is structured. Are you with me?

Senator XENOPHON—Yes.

Dr Turnour—So if that is so then there is no benefit, aside from the FBT debate to be had, because any organisation—my firm, for example, if it traded as a trust and funnelled all of its money to charity as Word Investment did—would have the same net effect. So the debate is always about purposes, not about activities.

Senator XENOPHON—But there could be problems in terms of unfairness in the marketplace as to a commercial business that does not have to pay its taxes like everyone else.

Dr Turnour—But where is the disadvantage if any organisation that gives its money to charitable purposes gets the same breaks? I do not think there is necessarily any—

Senator XENOPHON—This is a trade practices issue in that they can undercut the competitors that are paying tax like everyone else.

Dr Turnour—Where is the undercutting or benefit? It is not there other than in the FBT debates regarding hospitals and so on. I do not think that holds up to theoretical argument. Can I direct you to a couple of authors on that point?

Senator XENOPHON—Sure.

Dr Turnour—This debate has been fought in the US in particular. Professor Rob Atkinson out of the University of Florida has done some good work on business tax. There is another paper that came out recently.

Senator XENOPHON—Perhaps take it on notice, Doctor Turner.

Prof. McGregor-Lowndes—There is Evelyn Brody and Debra Morris from the UK. I think the issue is that the industry commission in 1985, which was made up of economists, and also the Productivity Commission said that the economic arguments about undercutting were not significant and in fact that they could find no predatory pricing in current markets. I suggest that if predatory pricing, because of the income tax exemption, were to occur then we might have an issue. But the commissions found that charities were just charging up to the market rate, so that was in effect no appreciable competition.

Senator XENOPHON—I will not take it any further, Professor McGregor-Lowndes. I will ask you this, Professor. You are an expert on the regulation of not-for-profits. Are you aware of any serious problems with the public benefit test in the UK? Has it led to organisations widely recognised as providing a public benefit being denied appropriate status?

Prof. McGregor-Lowndes—No, not to this stage. My understanding is that the commission and the sector are taking it very cautiously. The commission does not want to act capriciously or quickly and its documentation suggests that it would give organisations a fair lead time in order to change their practices to bring themselves within the law. I think the context is important here in that the charity commission has really ridden ahead of the law in many aspects. For probably the mid-nineties it took a fairly adventurous view about its interpretation of the law and had ticked off on many purposes which would not have made the grade in Australia.

I will give you one example—non-profit child care. My understanding is that the ATO was reluctant to tick off on non-profit child care as being charitable. There had not been a case in Australia litigated on that point. There was some case law in Singapore, but in the UK it was taken for granted and there was no case law, although the charity commission had said that it thought it was okay.

There are very few cases that have actually gone to court from charity commission decisions. I think this is because it is expensive to go to court and the charity commission has consulted with the sector and the major stakeholders and talked through these issues. Their rationale for taking the law in the direction it has been taken, or their interpretation, has been largely agreed by people and there has been relatively little contra to their decision making.

So the charity commission's interpretation of the law has crept forward. The recent act has put a statutory basis under much of that creep. We have not had that creep in Australia. Basically, the ATO has been a pretty good guardian of the very traditional and conservative view of charities, so we have not seen some of the innovations there. That provides a bit of context to that.

Will we see some trouble in the future? I am very interested in seeing what the new government does with charities—whether there is in fact any politicisation of the definition of 'charity' now that it is sort of out of the hands of common-law judges and there is a statute and that statute can quite properly be changed by parliament and whether it does arise that they actually change the definition of what is actually in and out.

Senator CAMERON—The evidence that we have had from the UK charity commission is that they rely on case law and there is also an appeal process available. That appeal process goes to two levels. One of those levels is a High Court judge. I am getting the impression from you that all this common-law approach has been ditched but, if you have a High Court judge sitting in an appeal process, I am sure that the common law will not be dismissed.

Prof. McGregor-Lowndes—That is right. The charity tribunal—and I think they have had a handful of cases—is a new institution before you have to go through the ordinary courts. There was little to no significant cases for the last decade going through the British courts. My view is that England has not codified their law. They have allowed the common law to still form a basis under it, provided that statute law will override where it conflicts. That is not a code like the classic French code that is the law and judges interpret that, but not in relation to the common-law principle. I notice that Treasury in their submission used the word 'codified' considerably. I am not sure they used it in the technical legal sense that you only refer to the code and the words in that rather than the underlying common law, provided that it does not conflict with parliament's intention.

Senator CAMERON—I am not a lawyer. I wonder how absolutely crucial some of these more academic legal arguments are and whether we may be getting off to the side a bit, not dealing with the practicalities of making sure there is accountability and transparency and bad behaviour is not rewarded. Are you saying that, if we consider establishing a commission, some of these more academic, high-level legal debates have to be addressed? I am not sure if that has been done in those other jurisdictions. Maybe you can enlighten me on that.

Prof. McGregor-Lowndes—I think accountability, from my point of view, occurs when you have a forum for accountability where people can be called to account and sanctioned. In a trade union, if your members are not happy with the way the executive are working, in the elections and in the meetings that occur the members will call the union to account and take appropriate action. With many charities in particular, they have no membership to call them to account, so that vital forum of accountability is missing. What replaces that? You can have the public as long as the public are willing to invest time and energy to try to call people to account, but it is very difficult to sue a charitable trust, because you have to convince the Attorney-Generals to do it themselves or lend their names to you while you fund it. You may have some government regulator do it. In Australia we do not have a charity commission or body which specialises in providing that forum to publish the information that is necessary to come to a considered view about whether organisations are doing things appropriately. We do not put in a tax return to the tax office; it is all self-assessment.

So, in my view, what we are missing is a forum of accountability where these organisations can be called to account and where it is done in a way that you do not have to mortgage your house in order to take them on through the legal system. I do not think our press is as vigilant as it could be with calling charities to account. I think our popular press, when they do run shallows about charities, are pretty shallow in comparison with the investigative journalism that you will get in the UK, US or Canada with respect to misdeeds of charitable organisations. What we are missing, basically, is a forum which is workable and which will call organisations to account, particularly those that do not have any membership or active membership.

Senator XENOPHON—You talked about a forum of accountability and had a go at the media for shallow reporting in relation to this, but isn't the media hamstrung in this country because, unlike the UK and now New Zealand, where organisations have to provide information and make it publicly available on the web, there is not that degree of openness that can lead to scrutiny of an organisation? We do not have that easy access to information on charities and religious organisations.

Prof. McGregor-Lowndes—Yes. Clearly there has to be access to information. It is a matter of how you do that cheaper, better and faster in order not to put a burden on those organisations, many of which do their best, contribute mightily to our community and without which we would all be the poorer. So it is a matter of coming up with smarter, better and cheaper ways to have that disclosure and transparency. We have a whole range of countries that have tried to modernise their non-profit-sector disclosure regimes, and I think we are in the box seat to learn from t heir successes and mistakes. I think it is not beyond the wit of the Australian community, government and those in the sector to design such an institution, but what we are missing at the moment is the will to do so.

Senator XENOPHON—We are running out of time, but I want to follow up a couple of issues with both of you. In assessing whether a religion provides a public benefit, is it relevant to consider whether it allows the community to participate freely in communal worship, provides its texts and teaching at low or no price and

makes available its clergy to counsel community members? If it charges large amounts for such services, does that go against the concept of the public benefit?

Dr Turnour—The common law position on this is that it excludes from 'religion' those organisations that are pursued for private benefit. I know Senator Cameron a moment ago said not to keep it too theoretical, but this does come down to theoretical issues. If you are concerned about religion charging lots of money, that is really about private benefit. It is not about public benefit, because what is happening is the people in the religion are getting the benefit, so it is really a way of feeding into the private benefit debate. I would not say that charities should not be charging for their services, because there are obviously times when that is appropriate, but you have certainly hit upon the traditional classifications. What you have said back to me in many ways is the common law position. I have just reframed the charging of fees in terms of private benefit in this context.

Senator XENOPHON—I put a final line of questioning to you both with regard to the issue of a forum for accountability. I think Professor McGregor-Lowndes said that right now there is a gatekeeper: you have the tax office doing a reasonable job. But in terms of the role of the ATO, if a former member of an organisation says, 'This isn't right; they shouldn't be getting a tax-free benefit because of this, this and this'—because of the way they are conducting themselves, the way they are treating their followers or whatever—what mechanism is there for a person to challenge that? As I understand it, right now all they can do is make a representation to the ATO. Is there a transparent process to deal with those sorts of concerns?

Prof. McGregor-Lowndes—The ATO has avenues where people can give them information about tax-abusive behaviour. I do that when I receive information which I think is credible about tax-abusive behaviour, particularly tax-planning rorts in charity sector, which over the last decade have been fairly few and far between on a planned basis. But the ATO will receive those complaints. My experience with the ATO is that I receive an acknowledgement of that but not more. Given the privacy of our tax system, perhaps that is why you do not get more information back to the complainant. That probably underlines why the tax office is not the best choice to be a surrogate regulator for the sector. Again I note the theme running through other submissions that tax policy is used for all sorts of levers other than collecting tax. It is often a very blunt tool, and I would encourage more appropriate legislation which deals with the activities of cults rather than using the blunt tool of the tax office.

Senator XENOPHON—So you would agree that the fatal flaw in the current regulatory approach, if you want to call it that, is that if there is a complaint, because of the privacy provisions in relation to the tax office—notwithstanding that these organisations obtained the benefit of a tax-free status, which all taxpayers subsidise—you just do not know what is happening with that complaint? There is no way of working out how it is being dealt with, whether it has been tested or whether evidence has been gathered in order to deal with it.

Prof. McGregor-Lowndes—It is not a fatal flaw. It is what we trade off for having a tax system which is based on confidentiality and privacy.

Senator XENOPHON—But you could not tax an aggrieved party. I do not know the answer to this question: would they have an administrative right to issue a writ of mandamus or prohibition to say that you have failed in your duty to deal with the tax ruling to do with religious and charitable organisations?

Prof. McGregor-Lowndes—That is well beyond my knowledge.

Senator XENOPHON—It is beyond mine as well. I do not know, Dr Turnour, if you—

Prof. McGregor-Lowndes—But, having served as a member of the Charities Consultative Committee, the feeling that I got from dealing with the officers, whom I have respect for, in the non-profit section of the ATO, I believe that they would deal fairly and conscientiously with any credible information they received. That would be just my impression. I could—well, I would not be happy to be proved wrong, but I could be proved wrong. But that is just my impression from dealing with them.

Senator XENOPHON—We just would not know about it, though, under the current rules?

Prof. McGregor-Lowndes—No.

Dr Turnour—That would be an argument for a separate commission, if that is where you are headed with that, Senator. People would be able to put evidence before the commission and say, 'We are concerned that this is not a charity,' and there could be more transparent inquiry into whether or not the organisation was a charity, if that is the issue for debate—if we take matters out of the hands of the tax department for determining, essentially, what the definition is.

Prof. McGregor-Lowndes—The Charity Commission for England and Wales meets according to the US sunshine laws—that is, all their commission meetings are open to the public, and in fact at the end of each meeting I believe they take questions from anybody who is attending and answer them.

ACTING CHAIR—Thank you. That concludes this segment. We will now break for morning tea.

Proceedings suspended from 10.31 am to 10.56 am

LUCAS, Father Brian Joseph, General Secretary, Australian Catholic Bishops Conference

CHAIR—Welcome. Would you like to make an opening statement?

Father Lucas—Thank you very much. There are a number of issues that are connected precisely with the bill as it is drafted and a number of much broader issues relating to the regulation and organisation of the not-for-profit sector. Perhaps I could assist the inquiry by focusing on one particular aspect to do with the way the UK charities commission operates. We have made a comment in our submission to say that the approach that it has taken to the public benefit test is problematic. By that I mean it is not fully resolved and it is still very early days.

I think what has happened in the way in which the UK charities commission has set out its guidelines is that it has moved its understanding of what we mean by public away from what we believe is the proper common law understanding, which is that public is the opposite of private. In other words, if you are engaged in some activity that is of a private nature, that is not charitable. The basis for that is the very meaning of the word charity itself, from its origins in caritas and its translation as love. Charity by its very definition is about the other. If you do something for yourself, good though that might be, that is not charitable. So charity is about the other. Hence the common law understanding of public benefit was always to disqualify organisations and institutions which were operating purely for some particular private benefit.

What I think has happened as the word ‘public’ has been more broadly understood is that the UK charities commission has started to look at the public as meaning everyone, so it looks at questions, for example, of access. There are, from memory, 12 organisations listed on the UK charities commission website that have been audited or assessed. I notice one of them was a Jewish aged-care home. It is a very small home with 42 beds set up for the care of Orthodox Jews. It failed to meet the public benefit test because it could not demonstrate that its fee structure gave sufficient access to those who had less means. That is a shift in the understanding of ‘public’ from providing merely a private benefit to a group that the institution controls to a different understanding of ‘public’. So I think that is a matter that needs still some further reflection and understanding. It has done the same with respect to fee-paying schools, where it starts to measure public benefit in terms of how many scholarships, how much access to playing fields and the like. So it is different understanding of ‘public’ as they have developed their guidelines. So in that sense it is problematic.

I think also we have the difficulty always of measuring what we mean by ‘benefit’. How do you quantify it? That is particularly the case with respect to religious organisations—how do you judge and measure benefit? Whether the church is left open for public worship or whether the particular religious institution has a different worship structure does not seem to me to be the point of the test. The point of the test is whether or not the benefit is open in the sense that it is non-private.

I make that observation because I think that, if we are working towards a more comprehensive regulation and structures of accountability for the not-for-profit and charitable religious sector in Australia, we need some clearer thinking about just what exactly we understand the public-private distinction to mean and what expectations we have of organisations. That Jewish home that looks after Orthodox Jews is, in my view, a charitable institution because it is looking after people who are beyond simply a private activity. The fact that those people need to be people of some means because a small home requires a fee structure that excludes poorer people, in my view, does not exclude it from being charitable. Caring for rich people is as charitable as caring for poor people. There will be different organisations within a broad section of the community, and we will need to do both. I make that as an opening observation to take that particular point a little further because I think it does provoke the need for some further discussion and reflection.

ACTING CHAIR—Thank you very much, Father Lucas. There are now charities commissions in a number of common-law countries that are very much like Australia, including the United Kingdom, Scotland, Ireland and New Zealand. What has been the experience of the mainstream churches in those jurisdictions under charities commissions administering a public benefits test?

Father Lucas—The experience has been mixed. Obviously different institutions and different organisations will have their own particular experiences. As far as I am aware, there has been no significant outrage, if I could use that rather extreme word, but there would be particular organisations that in particular instances have had some difficulty. In particular, there is the question—and this varies from country to country because the reporting requirements, of course, are different—of the cost associated with the level of reporting that may be required in some places.

ACTING CHAIR—But you would have to bear those costs anyway in having accounting done and annual returns prepared, wouldn't you? The difference is that now it is made public.

Father Lucas—It depends on whether or not those reports that are already being prepared can simply be delivered or whether different sets of reports are required. If I could digress just for a moment, we have an enormous problem in this country with the level of reporting that different parts of the charitable sector are required to do. The 19 most significant Catholic social welfare organisations in Australia administer in excess of 600 government contracts, all of which have to be reported separately and differently.

ACTING CHAIR—Yes, that is an interesting point to make. In your submission you talk about the United Kingdom Charity Commission as problematic, which is something I asked the UK group about last night. You may have heard that. I read this paragraph:

> Having reversed the presumption of public benefit it has sought to develop criteria to measure public benefit. For example, with respect to independent fee paying schools, it assesses public benefit by reference to such matters as community access to facilities and availability of scholarships for those who have insufficient means to pay the fees. Such criteria are arbitrary: How much access? How many scholarships?

That would suggest that the mainstream churches have had some difficulties in the United Kingdom, would it not?

Father Lucas—Not so much the faith based church schools. The schools that were knocked back—and these are on the UK Charity Commission website—were the fee-paying independent, or what they would call 'public', schools, which, because of the way the particular schools were organised and structured, failed to meet the test as the UK commission set it out. It comes back to my point, I think, that that way of understanding what we mean by 'public'—in other words, access to a large number of people or a particular group of people—misses the point of what the public benefit test in the common law was originally intended to explain.

ACTING CHAIR—Very well, thank you.

Senator CAMERON—My experience of Catholic schools was in Scotland. Scotland is a much different proposition than here; the Catholic schools there are funded by the state and they have a different curriculum. So we are not comparing apples with apples. I want to ask you about the public benefit test and the example you gave in the UK. If a group of merchant bankers sets up a retirement home and says it is a charitable organisation, does that meet the test?

Father Lucas—It depends on what the purpose of the group of merchant bankers—

Senator CAMERON—It is to look after burnt-out merchant bankers.

Father Lucas—If the group of merchant bankers establishes an institution that meets all the not-for-profit tests and is open to a wide range of burnt-out merchant bankers, not simply the few merchant bankers who have set it up and run it and control it, it could meet the test. Perhaps I can give an example in the schools area which was put to me hypothetically in another forum. Suppose that a mining company in a remote area town establishes a school that is only for the children of the employees of the mining company. Would that be capable of being endorsed as a charity? Distinguish that from a mining company that sets up a school in a mining town because it sets up all the infrastructure in the mining town and every child in that town is entitled to go to that school if they wish to. The fact that the only children who are there are the children of employees of the mining company is irrelevant. One has a purpose that is limited according to the normal common law test of private benefit; the other is open in the sense that it is not limited simply to those who are under the control of those who have set it up.

Senator CAMERON—That is an extremely hypothetical example and it is nothing like what happens in practical terms. Maybe if the miners paid a bit more tax it would not be an issue. Mining companies do not set up schools; that is the reality. Your example about a retirement home is more relevant. All I am saying is that you can have multimillionaire retired merchant bankers come together and establish a 'charitable' trust, live out their lives in absolute luxury and be subsidised by the public purse. Is that fair?

Father Lucas—It depends on how they are structured and whether or not they are going to be subsidised by the public purse. If the merchant bankers are setting up this institution only for themselves, under the common law there is no way that that would be regarded as being charitable. There is a case on this very point—and I am sorry that I do not have the reference with me. The matter was tested in the Victorian Supreme Court. My recollection is that it was the City of Geelong, though I will stand corrected if my memory has failed me there. It was precisely a case on the very point of whether or not an aged-care facility that looked after what we

might call rich people could be charitable, and the court determined that it could be. It is not so much about the wealth of the people you are looking after; it is about whether those you are looking after are other than yourself. That is the test of charity. It is the otherness of the activity that is crucial to the test.

I think we would have to say that caring for rich people who might need some care can be just as charitable as caring for poor people, though they may need a different sort of care. I had the experience, in my parochial experience, of moving from one of the poorest parishes in the Archdiocese of Sydney to one of the richest. It was quite a change from one day to the next, but I can assure you, Senator, that—as we would all know—wealth in itself does not take away many aspects of human need.

Senator CAMERON—But it does provide the material means to have support without relying on the public purse.

Father Lucas—In some instances, and so you would look then at the particular institution.

Senator CAMERON—But, if you are wealthy, surely you can look after yourself without requiring help from the public purse.

Father Lucas—It would depend on the nature of the need, I would say, with respect, and the nature of the organisation that is providing the care.

Senator CAMERON—It is an interesting concept, and it is one that I have not considered in the context that you have raised—and I am glad you have. Could I just move to another issue that has been discussed in the course of this inquiry, and that is the issue of public benefit and the actions of individuals and the vicarious liability of the organisation that individuals are employed in. If I can cut straight to the point: you would know that this is the issue of: should an organisation where there is significant child abuse have the benefit of support from government in terms of charitable status? I am sure that it is something the church has turned its mind to. I am asking about the issue of: when does this vicarious liability kick in to say that the damage is so great that the benefit to the public of the charitable purpose is diminished and it should not be there?

Father Lucas—I am not sure how that would be measured. The law of vicarious liability, as you know, excludes—generally speaking—criminal behaviour. An employer is generally not vicariously liable for the criminal actions of an employee, under the general principles of law. Can I say this, though—and I understand exactly the question that you are asking—

Senator CAMERON—We cannot just set a test for Scientology—as some have claimed we are trying to do, which we are not. I want a test that applies across all faith based charities.

Father Lucas—I appreciate what you are saying. Can I say, this, though—and this muddies the water of what is an important question that you have asked: we tend to look at faith based organisations as one organisation. If you take the church that I represent, the Catholic Church in Australia, if you put the word ‘Catholic’ into the Australian business name register search, there are 5,900 listed organisations—and they are not all of the Catholic organisations; they are only the ones with ‘Catholic’ in the name. There are a few in there that are in fact private organisations that for some reason have the word ‘Catholic’ in them that are nothing to do with the church. There are very few of those. So you cannot simply say there is one organisation when you start talking about faith based organisations. The organisation in fact is a collection of organisations. So you have to drill down and look at the particulars there. Each one of those 5,900 entities—and, as I said, that is not all of them; they are just the Catholic organisations with the word ‘Catholic’ in the name—is separately endorsed according to a separate set of criteria, so the benefit and detriment discussion that you engage in has to be particular to each one of those organisations.

Senator CAMERON—Even though there is an overarching faith and an overarching set of values and principles?

Father Lucas—But you cannot import to the particular organisation that overarching set of principles, because that is not measurable.

Senator CAMERON—But don’t you try to do that by setting standards for religious faith, teachers and all that?

Father Lucas—You would certainly want to have a certain ethos within which those organisations operated, but to say that we wish to look at the entire 5,000 or more organisations and make some general judgment about the benefit of all of them as against the detriment caused by whatever bad behaviour has been perpetrated by particular individuals is not an exercise that I am able to give any measure to.

Senator CAMERON—Sure. Let us come back to those 5,000-odd. If one of those organisations does not meet the standards, if it breaches the law, how do you deal with that company? Not how does the church deal with it; how do you deal with it in terms of charitable status?

Father Lucas—If an organisation in the way it fulfils its purposes, depending on what the purposes are, does not meet the test for public benefit—in other words, its purposes are contrary to public policy; its purposes are illegal; its purposes are contrary to the standards of the community—then that organisation in no sense should be endorsed as a charitable institution.

Senator CAMERON—This comes back to this test, again, when you talk about the purpose. I am not arguing that the purpose of any of those 5,000-odd Catholic organisations is about child abuse. That is a nonsense. This argument that the purpose has to be about child abuse I cannot understand, to be honest. But if child abuse is part of the operation, not the purpose, how do you deal with that? If it is there because some people are bad people, how do you deal with that?

Father Lucas—If there are individuals in any organisation that are engaged in child abuse, that is a grievous crime and they need to be prosecuted to the full extent of the law. Now, to say: is the organisation responsible for what they have done? If the organisation itself promotes it—and one could hypothesise; I have heard of organisations that talk about sexual relations between adults and children as not being problematic and of such organisations promoting that view—that is contrary to the law in this country. That organisation in no way could be endorsed.

The difficulty we have—and I understand the import of your question—is the point at which you say that this particular activity, the child abuse that is going on, is endemic to or systemic within that particular organisation. Firstly, how do you establish that and what do we mean by ‘endemic in’ and ‘systematic in’? To what extent does it so permeate that particular organisation as to in fact be part of its purpose? And if that is in fact the evidence in the matter, then there is no question in my mind that such an organisation ought not be endorsed as a charity. It is contrary to public policy.

Senator XENOPHON—Can I ask a supplementary to Senator Cameron’s line of questioning. I take your point if it is not the teachings or it is not systemic in the organisation, in terms of the issue of child abuse. But what happens in circumstances where there are allegations or evidence of child abuse, the hierarchy of the organisation becomes aware of that and they do not act appropriately—they either do not report it to the authorities, which would be an offence in terms of the requirement to notify that in most states, or they actually cover it up? This is a slightly different question to that put to you by Senator Cameron. Do you think it is reasonable that in those circumstances the organisation should be held to account in the context of the public benefit test?

Father Lucas—If we have got the leader of an organisation behaving badly, criminally, that leader ought to be prosecuted to the full extent of the law.

Senator XENOPHON—That is not quite what I asked, though.

Father Lucas—I know, but that is the answer I am giving because that is in fact what needs to happen. The organisation itself need not necessarily have its charitable status put at risk because it has, at that particular time, a bad leader. If that bad leader, who has done whatever wicked thing is alleged the leader has done, needs to be replaced and needs to be prosecuted, that in itself ought not necessarily affect the charitable status of the organisation that he has ineptly led.

Senator XENOPHON—Thank you for your answer. If it is a case where it is established that there has been a cover-up in the organisation of allegations or evidence of child abuse not being reported to the authorities and a warning is given to that organisation saying, ‘You must do this differently; you cannot hide these allegations any further’—if there has been fair warning given and the systems do not change for reporting and ensuring that those responsible are brought to account, would you then say in those circumstances that the public benefit of that organisation is compromised if they do not change their ways?

Father Lucas—The difficulty in answering your question is knowing who the ‘they’ are who have not changed their ways.

Senator XENOPHON—I am putting it to you in hypothetical terms—

Father Lucas—And I am answering—

Senator XENOPHON—and the ‘they’ would be those responsible at a senior level where the protocols and the processes of an organisation do not change to ensure that there is mandatory reporting, for instance, and

that people are brought to account to the authorities. If a blind eye continues to be turned, would that compromise the whole issue of public benefit?

Father Lucas—Of the organisation?

Senator XENOPHON—Yes.

Father Lucas—Not necessarily, because you have got to then draw the connection between the organisation itself, how big it is, who the other parties to the organisation are and what other people within the organisation can do to remedy the ineptitude of a particular group who have acted illegally. The connection between the inept, illegal, criminal, wicked activity of a leader, if such is the case, and the consequences for the organisation that they have ineptly led needs to be drawn more precisely, with respect.

Senator XENOPHON—I will let Senator Cameron ask some questions and if I have a chance I will follow that up.

Senator CAMERON—I am going to move on, Father, because I am not trying to have some sort of public trial of the Catholic Church!

Father Lucas—Senator Cameron, if I could perhaps put your mind at rest. I was certainly aware it was possible you might raise such a question, even though this is about a particular bill relating to public benefit. But, if you want more detail of my views on this matter, I gave evidence to the New South Wales police royal commission on this subject, and you can read that evidence and the report of that royal commission, which more than adequately covers all these sorts of issues.

Senator CAMERON—Thanks. In relation to the Catholic Church generally in Australia, have you got any idea what the financial benefits of tax-free status are to the church?

Father Lucas—No.

Senator CAMERON—It is a trick question, because nobody knows!

Father Lucas—It is a question that is often asked. The other question that is asked is: what is the wealth of the church? Every year or two *Business Review Weekly* publishes a league table, and I think Catholic organisations are eight of the top 10 or thereabouts. We have 1,699 schools. Every single one of those gives an absolute accounting, down to the last dollar, to the department for not only the money that comes by way of government grants but also its private income. In Australia the Catholic Church conducts 75 hospitals; 21 of those are public hospitals. Every single one of those gives an absolute accounting down to the last dollar. The church has some hundreds of organisations involved in aged care, in excess of 9,000 aged-care beds, and the reporting requirements in the aged-care industry are enormous—

Senator CAMERON—Are these charitable organisations?

Father Lucas—every single one of them—and they are required to give a very detailed accounting. I think we have to look then at tax benefit in a number of different ways. Some of our organisations are public benevolent institutions and they get certain tax benefits that are different from those that charitable institutions get. Some are deductible gift recipients and many are not, and each of those has a different structure in terms of what we might measure as the cost to the public purse.

I was present when Dr Turnour was asked questions about competitive neutrality and the like, and Professor Myles McGregor-Lowndes gave an answer to that. It is a commonly asked question, but it goes back to a much more complex philosophical question as to what exactly in Australia we decide we want to tax. We do not tax the mutual funds. We do not tax a child's pocket money. We do not tax money that is received by way of a gift. If you win the lottery, you do not pay tax on that—because we have a view about what we tax, and we tax income. With respect to the revenue of charitable organisations, we have got to firstly decide whether we consider it to be in the same category as income, and that is a matter for debate and discussion.

Senator XENOPHON—It is not pocket money, though.

Father Lucas—The amount is not the point; it is the principle. But where does the money come from? If it comes from the generosity of the people who are part of the organisation itself and they have built up the institution through their generosity, that is one aspect that has to be taken into account. But then we have to consider, and I think this is always the key to the discussion about the tax status of organisations: where does the money go? I heard Senator Xenophon, rightly, ask a question in the earlier session: if a particular organisation is simply a front for enriching the people who run it, with lavish overseas trips or heavy personal

income—notwithstanding they may pay personal income tax on that income—then such an organisation is a sham and would not meet the common-law test for public benefit as it stands.

Senator CAMERON—What about maintaining an unnecessarily high standard of accommodation such as the merchant bankers retirement home? Why should that be subsidised if it is of an unnecessarily high standard?

Father Lucas—With the merchant bankers retirement home we are not sure what level of subsidy is involved. It might be tax free but because if it is structured as a cooperative it may not have any income on which there would be any income tax paid anyway, so its tax-free status is irrelevant. The question of whether it is eligible for fringe benefits tax, again depending on what sort of structure it has, is a different question.

Senator CAMERON—This is a problem. You are talking about the commission being problematic. I think it is problematic where we are at the moment because there is a complete lack of transparency in terms of the expenditure of public money. If all the economists employed by the Productivity Commission cannot tell us the cost to the public purse, I think there is a problem. The way that can be resolved is through a commission.

Father Lucas—That is perhaps one way that some of it may be able to be resolved. Can I take issue with respect to the assumption that there is a complete lack of transparency. My 1,699 schools give the most detailed accounting to the government to the last dollar—absolute accountability and absolute transparency. You put that through the health sector and the aged care sector. I think it is not fair to assume that the charitable sector as such lacks transparency.

Senator CAMERON—But you are not simply a charity in terms of the operation of your schools or hospitals. You actually trading in an industry and you do get benefits because of the benefits that provides generally, not just to the Catholic schools but to other schools as well. Schools are not a good example in terms of charity.

Father Lucas—If by charity you mean welfare organisations, all of the welfare organisations the Catholic Church conducts that receive any dollar of government grants give the most detailed accounting back for those grants.

Senator CAMERON—I am not talking about grants I am talking about tax-free status as a charity. It seems to me that if the Productivity Commission and I do not even think Treasury—I will ask the question this afternoon if they are listening in—cannot tell us the cost to the public purse of charitable status then we need to do something. The evidence that we had from the New Zealand Charities Commission yesterday was that they can tell you exactly the cost to the public purse. They can do an analysis on the benefits to the public of charitable status. They can provide government with information and remove the information asymmetry that applies to this whole area of public expenditure. Why is that not a good thing?

Father Lucas—I have not necessarily said that it is not a good thing.. There is nothing in our submission that is either for or against a charity commission in whichever model you establish it.

Senator CAMERON—You described it as problematic.

Father Lucas—I talked about the way in which the UK commission was problematic on the public benefit test. I think there are two issues running here in this committee’s discussions. One is the bill, which is about a particular type of public benefit test and issues relating to how that is drafted about which we have not said anything yet, but there is this broader question of how the charitable sector is regulated. It is regulated very differently in different countries. The academics will argue for a long time whether the New Zealand model is better than the UK model is better than the Northern Ireland model is better than the Irish model, the USA model or the Canada model. Treasury’s submission has got all that detail in it. That is a matter of considerable and worthwhile academic debate and I am quite neutral about which of those models—

Senator CAMERON—We should have an Australian model that does the business here.

Father Lucas—We could probably do the best of all of them, and that might be a very good thing. When I said the UK issue was problematic, it was that particular issue about the way they have, I believe, extended the meaning of ‘public’ and created some of these other issues.

Senator CAMERON—Sure, but there is an appeals process in the UK.

Father Lucas—And I understand those charities that have been knocked back are in that process, and those matters are still to be resolved.

Senator CAMERON—That appeals process goes even to the extent of a High Court judge, who would take into account the legal precedents that have been in place for 400 years—that is my understanding. So there is a check and balance. I get the impression that you—and I do not want to misrepresent you—are saying, 'This is a problem, and that is maybe a reason why we shouldn't go there,' but you have not outlined how that problem is to be dealt with.

Father Lucas—I think the problem is because of the way they have approached that particular understanding of the public.

Senator CAMERON—But you do concede that there is a process of appeal?

Father Lucas—And that may or may not work itself out. Essentially, as I understand it, the UK test kept the common-law test, but the commission published its guidelines. The question then will be for someone to assess the extent to which those guidelines accurately reflect the common-law test, and that was what I thought was problematic. As to whether or not we resolve that particular problem through this bill, I am not sure that this bill actually directs itself to that particular question. As to checks and balances and appeals and so forth, that is a matter entirely for the design of the structure.

Senator CAMERON—As the committee has been receiving evidence, a number of propositions have been put forward. One is the need for consultation, which I think this process is starting. It has to be a much more sophisticated and detailed consultation position. But advanced economies are moving away from the information asymmetry that applies to charities and putting processes in place that make charities accountable and transparent and ensure that they are acting in the public interest. I do not think that is a problem, is it?

Father Lucas—I do not have any difficulty with any of those propositions at all. With due respect, I think that is just good government. But as to how you do it and make it work, how you make it work fairly, and how you minimise the administrative red-tape burden that comes with that—those questions are, I think, very challenging. That is why these other countries that have gone down this route most recently have not all gone the same way.

Senator CAMERON—You see, the evidence from the UK Charity Commission was that all the arguments you have put forward here about problematic issues were put forward there—I would assume, by the Catholic Church in the UK and other charities. But as the Charity Commission has come into play it has operated effectively. It has got an educational role, a support role and an advisory role, and all these roles are coalescing to the point where charities are now saying, 'This is a good thing.' Is that a possibility here, if we can get the best of all of it?

Father Lucas—It is certainly a possibility, if we can get the best of all of it. As I said, our submission is quite agnostic on the structure. I simply raised one particular problematic issue, which has led to some organisations that thought they were providing public benefit discovering they were not.

Senator XENOPHON—Did you say 'agnostic on the structure'?

Father Lucas—Yes.

Senator XENOPHON—That's all right. I was just—

Father Lucas—It is a fairly general word.

Senator XENOPHON—It is. It is just a nice use of language.

Senator CAMERON—Have you had discussions with the Catholic Church in the UK in relation to this issue?

Father Lucas—Yes I have. There is a group of my equivalents from England and Wales—which is a separate bishops conference from that of Scotland, as you would be aware—France, Germany, Switzerland, Canada and the United States, and we meet every couple of years and have established some relationships where we talk about these matters.

So much of the way we assess, and a particular organisation assesses its acceptance of, the structure has to do with background and culture. In these meetings we have, some are aghast at the way in which other countries do things just because that is not the custom that they are used to. So that is not a fair test. Some will sit more easily with certain burdens because they are what they have been accustomed to, which are different from those in other places. I think we need to approach that question here in Australia with a very open mind.

You mentioned consultation. This sector has been consulted—I will not say ‘to death’, because we are very much alive, but there have been an enormous number of inquiries and consultations and very serious academic work done on the way in which you regulate and structure the charitable sector.

Senator CAMERON—I am happy to go to that point, but I want to come back to the point about your discussions with the Catholic Church in the UK.

Father Lucas—I am sorry; I was a little distracted.

Senator CAMERON—Basically, what is their view about how this operates? The Scientologists said yesterday that it would destroy Scientology. Is there a view in the Catholic Church in the UK that this structure will destroy any—

Father Lucas—Certainly not. The Catholic Church in the UK sits comfortably but at some expense, because the level of reporting required is a burden. Every dollar spent on that is a dollar that is not spent on something else, so it comes at a cost, at an expense.

Senator CAMERON—But isn’t there an obligation, if you receive funding support from government, to report for accountability? You cannot get away from some expense on that.

Father Lucas—That is certainly true to a point, but you have to remember that the level of support of charities in the United Kingdom is very different from here. Not all charities in Australia are deductible gift recipients. Again, you have to structure the level of reporting proportionately to the size of the organisation and the extent to which that impacts on the public purse. That is where there is a difference between the United Kingdom and Australia.

Senator CAMERON—I assume you are not saying that you do not want to be consulted on this, given your remarks about being ‘consulted to death’. I am sure you want to continue the consultation process.

Father Lucas—There comes a point where a government, probably not before the next election but whoever might be the government after the next election, has to make a decision either to do something or to stop saying that it is going to intend to do something, because this matter has been on the agenda for many, many years: should we have a charities commission or not? What structure should we have in place? We had an industry commission in 1995. We have had extensive consultation with the sector leading to the charities definition bill. It is a goldmine for the lawyers because they like to entice you into using them to make submissions. We then had the Productivity Commission. Most recently, we had the Henry tax review. All of the major charitable organisations in this country, the major churches, have made submissions to all of those. It is not my place to give direction to government, but it would be good to either say, ‘Here is a model that we can consult about, that we can actually get into the detail of and see whether it is workable or not and how we finetune it,’ or leave the status quo but not continue this process of creating uncertainty.

If I could perhaps make one further comment: when this inquiry was announced, the bursar of one of the Catholic schools rang me in terror, because regrettably the bursar had been misinformed that this bill, Senator Xenophon’s draft bill, would mean that the school would now lose its charitable status. Ten minutes on the phone reassured him and all was well.

Senator XENOPHON—And that was a letter from the Church of Scientology or an offshoot?

Father Lucas—It may have been; I do not know where that came from. But fortunately, before he went to the lawyer to get some advice about this, we were able to resolve his problem. It is the uncertainty in the sector that I would suggest ought to be taken into account, particularly when we are proposing significant change such as the presumption to the public benefit test without knowing what the criteria will be, what the background will be or what will be required, because that does create a cost.

ACTING CHAIR—We are going to go for an extra 10 minutes on this because we started 10 minutes late.

Father Lucas—I am sorry if I have spoken too long.

Senator XENOPHON—I only have one line of questioning. I think Senator Cameron has covered a number of the concerns very adequately. Father Lucas, you have said that the UK test is problematic. You referred to an Orthodox Jewish retirement home in your evidence. You said there was a problem in relation to an aged-persons facility in the UK.

Father Lucas—Yes.

Senator XENOPHON—And that is the Penylan House—

Father Lucas—Jewish, yes.

Senator XENOPHON—And you have read the decision of the charities commission in relation to that?

Father Lucas—Yes.

Senator XENOPHON—The charities commission did not actually knock out the Penylan House Jewish retirement and nursing home. They said it was a charity but it was not operating for the public benefit because the trustees had not adequately demonstrated that the charity is currently operating for the public benefit because their policy on assistance with fees was not clear, open and transparent, and they did not have a funding strategy to ensure that its benefits are more widely accessible. They actually said, 'Come back to us in three months time to put a plan in place to meet the requirement and submit the plan within a further nine months.'

Father Lucas—Yes.

Senator XENOPHON—That is not terribly draconian or anything, is it?

Father Lucas—It is not the question of whether the test is draconian, it is the questions that they are asking. That was the point of why I say the test was problematic. They said 'In the absence of a clear budgeted plan of target of assistance to helping cases where top-up fees cannot be afforded'.

Senator XENOPHON—What is unreasonable about that?

Father Lucas—Because that is not what public benefit means. Public benefit is not about whether or not a particular group of people have access to the institution. The public benefit test in the common law is in fact, because it is disqualifying test, if this Jewish home only looked after the people that the people who ran the home were connected with, it would fail the public benefit test. Public benefit is the opposite of private benefit. It is not a question of whether or not there is open access or fee support. That is the point I am making. Yes, this organisation can tick the box by going through the motions of having some fee subsidy. The point I am saying about it being problematic is that, with due respect to the guidelines of the UK charities commission, they have moved away from the common law test.

Senator XENOPHON—Can we go back a step? You have got a report in the media that senior Jewish welfare figures do not believe that the commission's finding in Cardiff would affect their institutions. You have the chief executive of Jewish Care, Simon Morris, saying, 'Our understanding is that the Charity Commission are concerned to ensure that where charities charge for services, they communicate clearly to people that they can use their services, even if they can't afford to pay for them, and how they can do this.' Leon Smith, the chief executive of the South London home Nightingale, commented, 'We have looked at the report very carefully and are not concerned. We don't see this as a major problem for the sector. Nobody would be precluded from coming to our home because of finance. We make it clear in our literature.' I do not see why you so concerned about this decision.

Father Lucas—What I am saying is that the test they have applied, with due respect, is not the right test. They can be not unhappy and they can tick the boxes. What I am suggesting is that if we are going to design a good public benefit test we need to distinguish the common law public benefit test as explained in tax ruling 2005/21, which is about excluding organisations that are privately controlled where the benefit is private. The public benefit test was never about open access or access to a wide number of people. That was never the common law test.

Senator XENOPHON—The decision is not saying that, though.

Father Lucas—With due respect, that is precisely one of the criteria that they require. They said 'In the absence of a clear, budgeted plan of targeted assistance to help in cases where top-up fees cannot be afforded'. In other words, they have to have a system whereby they allow people who otherwise cannot afford the fee structure to have access. But that is not what public benefit was ever meant to mean.

Senator XENOPHON—But this organisation had quite significant net assets, but it was just a question of saying, 'Tell us what your processes are. Be open and transparent about it.' What is wrong with that?

Father Lucas—Whether it is right or wrong, that is not what the public benefit test in the common law meant.

Senator XENOPHON—Leaving aside the issue of the common law public benefit test, do you consider that unreasonable or onerous, to require a level of transparency about how you charge for fees and what level of assistance you can provide for people who cannot afford your fees?

Father Lucas—It is problematic if for whatever reason you do not provide a level of assistance.

Senator XENOPHON—Not necessarily. It is a question of being open about it, given the constraints of your organisation.

Father Lucas—But there is an expectation that they will provide that assistance. I am saying that that is not what ‘public benefit’ means.

Senator XENOPHON—Perhaps we will agree to disagree about the interpretation of the decision.

Senator CAMERON—I am just having a look at the Treasury submission. I think it concisely outlines the common-law definition of ‘charity’. It goes to the Statute of Elizabeth, moves to Special Purpose Commissioners v. Pemsel and then outlines the four heads of charity. The first is the relief of poverty, and the merchant bank retirement home would not come under that. The second is the advancement of education, and the merchant bank retirement home would not come under that. The third is the advancement of religion. It would depend whether they were all Catholic merchant bankers—I am not sure—but it probably would not come under that. The fourth is ‘other purposes beneficial to the community not falling under any of the preceding heads’. How is it beneficial to the community for people of substantial means to be given tax-free status for a retirement home? I just cannot understand this, to be honest.

Then it goes into the other areas: not to act unlawfully, not to be predominantly engaged in political advocacy, not to provide private benefits and to be operating in the ‘public benefit’. It seems to me that, if you do Pemsel, you have to come back to public benefit. I am struggling to understand why a retirement home for merchant bankers would qualify under the public benefit when it is costing the public money.

Father Lucas—Firstly, we have to establish whether this retirement village is costing the public money. We have to determine how that retirement village is structured. A series of self-care independent living units is one structure. But these merchant bankers might be suffering dementia and require some measure of sophisticated medical care. With due respect, rich people with dementia are as much in need as poor people with dementia.

Senator CAMERON—Sure.

Father Lucas—The fact that the rich person with dementia may have some personal means that would assist and subsidise the level of care may be a factor in how the organisation structures its arrangements, but I do not think we would be seriously saying that caring for old people, who have a need because of their age, is not a charitable purpose.

Senator CAMERON—I think the ordinary punter out there would think that charity is about the relief of poverty.

Father Lucas—That has not ever been the definition of ‘charity’.

Senator CAMERON—But I think most people would think that that would be the most important aspect of charity—to provide some relief from poverty. If we are starting to get to a position where ‘charity’ is defined to cover retired merchant bankers even if they have dementia then maybe we do need a thorough reassessment of the common law and how it operates in a modern society.

Father Lucas—We have the difficulty that ‘charity’ is a subset of the broader not-for-profit sector. There is a distinction between the relief of poverty, which is one aspect of charitable activity, and other forms of care for the other. The very meaning of the word ‘charity’ from its origin is about what we do to meet the needs and to promote human wellbeing of the other. We promote that wellbeing in a number of different ways. No-one would suggest that a hospital is not an activity that comes within the meaning of ‘charity’, so can we look after the knee replacements for the merchant bankers? At what point does the worth of health care get measured by the means of the recipient?

Senator CAMERON—I am not sure you are convincing me in this argument, but that does not matter.

Senator XENOPHON—So you are saying that giving food to poor people is an act of charity.

Father Lucas—It could be an act of charity, depending on whether giving them food is in fact doing them good. This would depend on what their needs are. There may be better ways of helping a person in need other than by simply giving them food. It depends on the need, assessing the need and so forth.

Senator XENOPHON—We all need food at some time.

Father Lucas—But it may be that that perpetuates a problem that needs to be dealt with in a more sophisticated way.

Senator XENOPHON—In terms of what you said to Senator Cameron, giving away food to poor people is an act of charity and selling food to rich people could also be an act of charity.

Father Lucas—Simply selling food to rich people does not seem to meet the test of charity. But if that is leading to the question of how a dementia care unit structures itself where meals are part of the provision of care, you have to look at it holistically. I do not think you can pick out particular aspects and say, 'This part of what we do is charitable and this part of what we do isn't charitable.' I think you have to look holistically at what the particular structure or organisation is meant to do. In popular language, as Senator Cameron rightly said, the word 'charity' is associated with the care of the poor. We have had endless debates going back to the definition of charity. Which organisations in the community merit which particular sorts of structure with respect to the tax system, the legal system and community support? That is by no means a one-size-fits-all solution.

ACTING CHAIR—Thank you, Father Lucas.

[11.52 am]

CHIA, Dr Joyce, Research Fellow, Not-for-Profit Project, Melbourne Law School, The University of Melbourne

HARDING, Dr Matthew, Senior Lecturer, Not-for-Profit Project, Melbourne Law School, The University of Melbourne

ACTING CHAIR—Welcome. I invite you to make an opening statement.

Dr Harding—Thank you very much for inviting us to come and speak today. I will reiterate a handful of points that are in our written submission but first I will give you a bit of background. Dr Chia and I are members of a team that has been given an ARC discovery grant for 2010 through to 2012. The grant will fund research into the definition, regulation and taxation of the not-for-profit sector in Australia. Obviously one of the key dimensions of the research will be the law of charity. We are still in the early stages; we have only been working on the project for a few months. But we have already established some directions for the research, and I think that is in part reflected in the submission.

The first thing we would like to note today is that we decided to embark on the project because we think there is an urgent need for reform of the regulation of the not-for-profit sector. That takes in definitional, regulatory and tax issues. I do not think that is a controversial proposition to be making in this day and age. But we do note that reform in this area needs to be both considered and extensive; it needs to be undertaken in a holistic manner, not a piecemeal manner. Obviously the reason is that there are a range of issues surrounding the reform process which bear upon each other, and the only way to ensure that they are weighed and balanced and taken into account in the correct manner is to ensure that they are all being reviewed at the one time. For that reason we are of the view that the present bill, being piecemeal reform to the tax statute rather than part of a wider package of reforms, is not an appropriate way to reform the law in this area.

One illustration of that point has, I think, been brought out in other submissions and was the subject of discussion a few minutes ago. A public benefit test which is not administered by an independent regulator with an advisory and a guiding function is liable to represent considerable additional compliance burdens on the sector. For that reason alone, we think that the bill as it stands is not appropriate.

There are a couple more points which come out of the submission and, more specifically, a journal article that I wrote in 2008, which is an appendix to what we submitted. These points relate to the resources that are in the common law already which are capable of meeting some of the concerns which would appear to underlie the bill as proposed. Some of these points have been made by other submissions. One, of course, is that the presumption of public benefit is just that—it is a presumption. It operates in place of findings of fact in circumstances where there is insufficient evidence for those findings of fact to be made. So, of course, being a presumption, it can be rebutted where there is evidence of detriment to the public that will result from purposes being carried out. So, if an organisation has purposes that are contrary to law or to public policy, that evidence clearly outweighs the presumption of public benefit and rebuts it.

What we also find in the common law is scepticism about certain types of claims of benefit that are made by religious organisations. These are claims of spiritual benefit. Most of these cases come from the English courts, but the same treatment is discernible in Australian common law. The leading case here is Gilmour v Coats, the House of Lords decision from the early 1950s about a Carmelite nunnery in London, where the House of Lords said that the nuns' claim to be benefiting the public by intercessory prayer for other people could not be subjected to standards of proof in a court of law and, for that reason, the public benefit test was not met. Interestingly in those cases, courts administering the common law have not applied a presumption of public benefit, and so there is a tradition of insisting on a public benefit test in all of its full rigour in certain cases where claims to public benefit are made by religious organisations. It is only one tradition, and alongside it is the tradition of the line of cases in which public benefit has been presumed, but it is important to see that there are resources in the common law for both of those lines of thought.

In a sense, those cases of illegal, immoral purposes and, on the other end of the scale, spiritual purposes or spiritual benefit are not difficult cases. The difficult cases are in the middle, cases where claims to intangible benefits are made but where there is no clear evidence of detriment or harm to the public from purposes being carried out. It is here that the presumption of public benefit has traditionally done its work, and that is what I outlined in my paper from the *Modern Law Review*. As an illustration of that, I take the case of Watson, which is referred to at page 165, I think, of the paper. This was an English case from the 1970s. It involved a

testamentary trust for publishing religious literature. The testatrix—the person whose will it was—had belonged to a small non-denominational Christian group, and the literature was propounding the views of that group. The judge, who was called upon to determine the validity of this trust, called expert evidence on the merits of these writings, and the evidence was given by an Anglican clergyman, who was a member of a different denomination than the one these writings were aimed at. The expert declared that the worth of the writings was nil. Nonetheless, the judge applied the presumption of public benefit to uphold the trust. Had the presumption of public benefit not been available to the judge in that case, the expert's testimony would surely have found it a finding of detriment or no benefit from the purpose being carried out, and the trust would have been struck down.

In those difficult cases—and this is a good illustration, I think—the removal of the presumption of public benefit arguably creates a difficult position for decision makers, where they are required to either make evaluative assessments of the merits of religious doctrines and beliefs or rely on expert assessments. If you are relying on expert assessments, you can only be relying on either the assessment of people who are not adherents of the religious faith in question—as was the case in Watson—or the views of those who are adherents; in other words, deferring to those views. If you move down that path, then you have done away with the public benefit test altogether, because you are basically telling people: 'If you think what you are doing is for the public benefit, then it is.'

That is all set out in the paper. We think that, in those difficult cases, this conundrum that decision makers have about how to evaluate religious doctrines and beliefs represents the possibility of violation of principles of liberal neutrality, and this is a serious matter that we think needs to be given proper consideration in the appropriate forum.

To reiterate: we do support reform of the sector. We do not yet have a view on whether a public benefit test is appropriate, all things considered. That is one of the matters we want to pursue with our research. But we do say that, at this stage, piecemeal reform of the tax statutes without a wider view being taken is not appropriate, and we remind the committee of the considerable resources that the common law already has to deal with some of the concerns that perhaps underlie the bill. I do not know if Dr Chia wants to add anything else.

Dr Chia—I think that sums up our view.

Senator CAMERON—Dr Harding, before we go to some of the analytical approaches that you have adopted, how do you think we should deal with the information asymmetry that applies to charities?

Dr Harding—I suppose this question goes to regulation more generally and regulatory framework more generally. This is a question we want to pursue further with the research. We do not have any settled views on it yet. But our guiding principle in this—and it is something that has been said to us by members of the not-for-profit sector in our consultative activities on our project and so on—is that transparency is both needed and wanted. So the imperative for reform there must be to ensure that transparency is achieved but not in a way that imposes undue burdens compliance wise. There, I would think—although we are not at the stage of research yet where we can say this with certainty—that some sort of staggered approach is appropriate; that is, the compliance burden increases, becomes more demanding, as an organisation becomes larger and more complex. So those would be two imperatives that need to be in play but, beyond that, we cannot say we have settled views on that at this early stage.

Senator CAMERON—Do you have any idea of what the cost to the public purse is of charitable organisations?

Dr Harding—No, we do not.

Senator XENOPHON—Is that something you are looking at in the context of your research project?

Dr Harding—The project is more directed at the legal framework rather than the factual basis on which those reforms need to be considered. We took the view, when we developed the project, that so much work has been done, particularly by the Productivity Commission, in setting out that factual framework that it would just be unnecessary for us to repeat that.

Senator CAMERON—As I understand the evidence we have received from the UK charities commission, the public benefit test is based on the 400 years of law that has taken place in the UK. Do you have any different view on that than the UK?

Dr Harding—No. Our understanding is that the UK position is exactly that—that the Charities Act, if you like, imports the common-law test into statute and removes the presumption of public benefit to the extent that it previously applied but does no more than that.

What I would add, though, is that given the regulatory framework that was also established in the UK, in the form of the Charity Commission, the interesting feature of the UK model is not so much the content of the test; it is rather the application of the test. In this regard we think it is very significant that the Charity Commission issues guidance on its understanding of the meaning of the test. That does not, of course, conclude the legal question of what is in that test but, as a practical matter, it ensures that those who are subject to the test can get greater comfort about what they are supposed to do to satisfy it. That can only be a good thing.

Taking that line of thought further—and we have not really thought this through in any degree of detail—it would stand to reason that, once the regulator issues guidance and indicates its willingness to consult after the test has been implemented and imposed on an ongoing basis, that surely must have an indirect impact eventually on the content of the test. That is something that would have to be subjected to detailed analysis, but it would stand to reason that that kind of indirect result would issue from the test being interpreted and guidance being given on it by the commission.

Senator CAMERON—Have you looked at it in the context of the argument that has been put to us—I must say by a minority of the religious organisations—that introducing a public benefit test has implications for freedom of religion?

Dr Harding—I would state it slightly differently. I think the concern is not so much one of freedom of religion as such. That might be to make the point too large, if you like. The concern is rather with the mechanics of the application of the test. This is what I tried to bring out in the article, based on my reading of the English cases. The test, once the presumption is removed, demands in all cases that, whoever is applying it, whoever is administering it, must make assessments—or, if you want to put it in the language of the law, findings of fact—as to whether the test is met on a particular set of facts or not.

Once the facts that are under evaluation include claims about religious belief or doctrine or even more diffuse claims, such as that the knowledge that people are performing acts of worship, whether in public or in private, is edifying to others of the same faith—and that argument has come up in the courts too—once those sorts of claims are made, of intangible benefits, the decision maker with the responsibility of administering the test is put in a very difficult position.

Yes, you can make your evaluation—no problem—but on what grounds will you make it and what implications does that have for our understanding of the way that the authorities of the state, be they the courts or the tax office or whatever, must deal with religious diversity and differences of religious opinion? Will the officials of the ATO be assessing the merits of particular articles of faith or will that ultimately be the job of the courts? Once the courts have hold of it, then will it be done by admitting expert testimony from academics who are experts in religion or will it be done by seeking evidence from theologians from within the faith in question? We have seen both of those options being taken up in different cases. Both of those paths lead to problems once you admit the sort of fundamental principle that in these matters the state must be neutral.

Senator CAMERON—As I understand it, the law here is that the presumption if you are a religious body is there, so you qualify for a certain tax status if you are a religious body but there is another test as well that goes to whether you actually operate as a charity.

Dr Harding—On my understanding of the common-law test if we apply it to religion, there are three stages to it. The first one is the threshold question: are the purposes that are under scrutiny religious in character? As we know, the High Court indicated it views as to what constitutes a religion in the Scientology case in the mid-1980s. So that is one threshold that needs to be met. Interestingly, in Australian law that threshold test is a very flexible one—that first gate, if you like, that you must pass through is quite a wide gate. Again an interesting comparison could be made with the UK where, before the enactment of the Charities Act in 2006, the threshold test, 'Are you a religion?' was actually more rigorously applied and there had to be a belief in a god and worship of that god. That has been relaxed in the UK, and it remains relaxed here.

The second phase is whether the purposes under scrutiny are advancing the religion in question. My reading of the cases indicates that that has come up in not very many cases. The most famous one is the Lawlor case, from the 1930s, where the High Court was divided over whether the running of a Catholic daily newspaper was an advancement of religion or simply reporting the news. They could not really come to a view on that.

Then the third test is the public benefit test. It is there that the presumption has traditionally kicked in, but not all cases of religious purposes have attracted the presumption, and that is the point I made in the paper about spiritual claims, where the presumption has not traditionally been applied.

Senator CAMERON—Yes. The tax office says:

It now appears the religious institutions category may be an inoperative category, or is currently only accessed by a limited number of organisations that are not able to be endorsed as charitable institutions.

Is that your understanding, that it really is a very limited approach on the question of getting tax-free status because you are a religion?

Dr Harding—Are you asking whether there is a meaningful distinction to be drawn between a religious institution and a charitable institution for the purposes of—

Senator CAMERON—No, I am not asking that because I think there is. What I am asking you about is the comment from the tax office that this question of a religious group applying so they do not have to put in tax returns is inoperative. Is that your understanding from the research you have done?

Dr Harding—I would not be able to give you a view on that because I have not looked at that particular question.

Senator CAMERON—Is it a question that you would want to look at?

Dr Harding—To the extent that you have categories in relevant statutes that may potentially have no application, that is something we would want to look at, yes. One of the aims of our project is to make proposals about how to simplify the tax framework for not-for-profit activity. My colleagues who are not here, both tax experts, will be focusing on those questions.

Senator CAMERON—There is never going to be an operation of definitions of charities that is not controversial, whether it is a trust or the ATO or some other body that does it. There are always going to be arguments, aren't there?

Dr Harding—Absolutely. One fundamental insight is exactly that: everywhere you turn you will end up running into something that is intractable. Once you accept that, it becomes a question of how competing interests and concerns get weighed and balanced. I think that is precisely what the presumption of public benefit has traditionally been aimed at doing—sorting out how you reach decisions about charitable status in circumstances where it is just not clear, one way or the other, what to do on the basis of the evidence. Where it is clear, then the presumption really has no role to play. That is where those cases about illegal or immoral purposes come into their own. The difficult grey area is where on the one hand there is no evidence that what is being done is harmful to the public but on the other hand any evidence that there is a benefit takes the form of claims of intangible benefit, which is difficult to evaluate and assess. It is in that grey area that the presumption has operated and been effective up to date.

Senator CAMERON—The UK Charity Commission operate within the common law that has operated for 400 years, and they then apply that in a more open and transparent way. Is that a good way to describe how they operate?

Dr Harding—Yes, I would say so.

Senator CAMERON—In Australia, if there were an assessment of the 400 years of common law, it is not transparent, is it?

Dr Harding—As the law stands, no, it is very far from transparent. Indeed, there are inconsistencies in the law and in some respects it is incoherent, so that is of very grave concern. Our point is not at all that the common-law definition of charity is satisfactory. I think we would favour a statutory definition and we would favour something that removes some of the more egregious excesses of inconsistency that we have found in the law to date. For the purposes of the current inquiry, our point is that that reform has already been the subject of detailed scrutiny and recommendation from numerous bodies over the years, but that reform is a larger reform than what this bill is directed at. The danger of the bill is, in our view, that it will enact part of the reform in isolation from the whole and then there will be distortions and effects that were not intended.

Senator CAMERON—So do you see the UK Charity Commission, the New Zealand Charities Commission and those other charities commissions as providing appropriate checks and balances that may not be in this bill?

Dr Harding—I am not familiar with the New Zealand system in detail. I cannot really—

Senator CAMERON—Let us deal with the one you know about it in the UK.

Dr Harding—I would make the point first of all that, since the Charities Act has been brought into effect and the Charity Commission has issued its guidance on public benefit and continues to consult on that, we have not yet seen a flurry of litigation about definitional issues in the UK. Perhaps that is coming, but to date it seems that that system has worked fairly well. The absence of litigation usually does indicate that something is working well, and to that extent it is an attractive model to think about. If we were to see a whole lot of cases coming before the UK courts in which definitional issues were being disputed, perhaps that view would have to be revised. But, apart from that, as a sort of underlying principle, there being an independent regulator which has a guidance- and advice-issuing function is a very attractive feature of that model.

Senator CAMERON—Very quickly, because I am running out of time: as I understand it, there is an appeal process in the UK Charity Commission. Is that appeal process appellable to the higher courts?

Dr Harding—Yes. My understanding is that you could appeal those matters all the way to the Supreme Court of the United Kingdom.

Senator CAMERON—So the checks and balances are there?

Dr Harding—Yes.

Senator XENOPHON—I just have one question, Drs Harding and Chia. At the moment, if there is a question mark over whether or not an organisation provides a public benefit or if there are complaints—an organisation may have easily qualified for a public benefit with the Australian Taxation Office but then there may be issues at a systemic level of that organisation—you can make a complaint to the ATO but, because of the nature of the confidentiality of the affairs of taxpayers, you do not know anything more about it. Is that a fair summary of one of the inadequacies in the current system in terms of transparency?

Dr Harding—That to my mind is yet another argument for there being an independent regulator of the sector. The arguments for and against regulation independently or within an existing organ of government have been canvassed elsewhere, but our view is that the appropriate regulation is done independently and transparently. Again, we would just reiterate the point that the UK model is a good one. The website of the Charity Commission in the UK contains a whole raft of information that is simply not accessible in this country as matters stand. To see that information there and to realise that it is possible to achieve that is quite an eye-opener.

Senator XENOPHON—Finally, your study through the Australian Research Council is a three-year project. When will that be concluded?

Dr Harding—In 2012.

Senator XENOPHON—Will there be an interim reports coming out?

Dr Harding—Yes, we will issue publications as we go. We are holding workshops—one is coming up in August—and there will be an international conference next year. We hope to produce a volume of essays from that and there will be reports. Our first port of call, if you like, is on definitional issues, which will take in some of the matters that have been raised here. Among those of course will be the question whether we need a public benefit test. As I said at the outset, our view is not that a public benefit test is inappropriate but that it needs to be considered in a wider view than is proposed in the bill.

ACTING CHAIR—Thank you for appearing.

[12.24 pm]

BRENNAN, Mr Lawrence Harold, Private capacity

Evidence was taken via teleconference—

ACTING CHAIR—I welcome Mr Larry Brennan to today's hearing. Before inviting you to make an opening statement, I would like to remind you that the protections of parliamentary privilege cannot extend to jurisdictions outside Australia. Your evidence should be made knowing the limitations of the Australian Senate in protecting you legally outside of the Australian jurisdiction in terms of any comments you may make.

I also emphasise that the terms of reference of this inquiry are limited to examination of the provisions of the Tax Laws Amendment (Public Benefit Test) Bill 2010. The committee acknowledges that there has been public commentary concerning particular organisations. However, the operation of individual organisations is not within the terms of reference of the committee, and the committee does not have the authority to deliberate on such matters where they are not relevant to the bill. I ask all members of the committee and Mr Brennan to ensure that questions and comments are relevant to the terms of reference of this inquiry.

These are public proceedings, although the committee may agree to a request to hear evidence in camera or may determine that certain evidence should be heard in camera. Mr Brennan, would you care to make an opening statement?

Mr Brennan—Yes, I would. I wanted to do a little summary of my background so it could be clear why I am testifying and to also do a brief summary of what is behind—although I will be talking about the Church of Scientology in the context of the public benefit test and the bill at hand. I am getting feedback here, so I hope you can hear me clearly.

ACTING CHAIR—Yes, we can hear you.

Mr Brennan—Okay, good. What I thought I would do first, with your leave, is address a couple of things brought up yesterday by Senator Xenophon, where he had asked about 'fair game' policy and policies with respect to compliance with the laws in Scientology, and no-one there could give him an answer. I do have that information at hand. It would only take about 30 seconds to read the relevant parts, if he wants them. Secondly, the other unfinished business was that one of the representatives of organised Scientology, the woman with the blonde hair—

ACTING CHAIR—Mr Brennan, could I just interrupt you briefly. The secretary of the committee has suggested that, before we proceed any further, we should have a private meeting.

Mr Brennan—Okay.

ACTING CHAIR—So if you can just excuse us for a few minutes.

Mr Brennan—Sure thing.

Proceedings suspended from 12.27 pm to 12.31 pm

ACTING CHAIR—The committee has decided to hear this evidence in camera, which means that everybody except the committee secretariat and officials of the parliament will have to leave the room. Thank you.

Evidence was then taken in camera but later resumed in public—

Proceedings suspended from 1.05 pm to 2.03 pm

HARDY, Mr Michael, Assistant Commissioner of Taxation, Australian Taxation Office

ROUSSEL, Ms Sandra, Manager, Philanthropy and Exemptions Unit, Department of the Treasury

WILLCOCK, Mr Michael Thomas, General Manager, Personal and Retirement Income Division, Department of the Treasury

ACTING CHAIR—Welcome. You do not usually make opening statements, but I will ask you if you wish to.

Mr Willcock—I do not want to make an opening statement on behalf of the Australian Treasury, thank you.

ACTING CHAIR—We will proceed to questions.

Senator CAMERON—Mr Willcock, the summary of the Charities Bill in the UK says that the bill is:

… to provide a legal and regulatory environment which will enable all charities, to realise their potential as a force for good in society …

The second point is:

… to encourage a vibrant and diverse sector independent of government …

The third is:

… to sustain high levels of public confidence in charities through effective regulation …

Are there any of those aims that may be a problem given our current configuration of dealing with charities through the tax office? It is a bit of self-criticism—

Mr Willcock—Thank you for your question. I think the way I would answer that is to note that of course Australia is a federation and that in Australia at the Commonwealth government level the main connection that we have to the not-for-profit sector generally, including the charity sector, is through the tax system, in relation especially to the level of concessionality that the sector is able to access. So, unlike some other countries where the interactions between the state and the not-for-profit or the charitable sector might be gathered into a set of law and be administered by a particular body which deals with the whole gamut of the interactions between the state and that sector, in Australia, of course, as a federation, there are particular aspects of the not-for-profit or charitable sector regulation which are undertaken at the state or territory level, and then there are some that are undertaken at the federal level. As I have mentioned, the bulk of those I think really relate to the access to concessionality.

Senator CAMERON—So, if a charities commission were to be established in Australia, there would have to be a COAG process undertaken?

Mr Willcock—Well, some process—again, depending on what the scope of such a charities commission might be, what its role, responsibilities, functions and powers might be. If people were to contemplate a commission that would, as I said, cover the whole range of interactions between the state and that sector then my understanding is that there is not sufficient constitutional power for the Commonwealth to seek to cover that whole field and that it would therefore be necessary for the Commonwealth to act in concert with the states and territories through either a COAG process or some other process. It would probably resort to, for example, mirror legislation or referral of powers or some other sets of arrangements to achieve the creation of a body that did have such a wide remit.

Senator CAMERON—The reason that I am talking about a commission is that it has been a consistent flavour for this inquiry even though it is not in the bill, but it has arisen from the debate and discussions in relation to Senator Xenophon's bill. One of the issues I am particularly interested in is the information asymmetry that exists in relation to charities. The best guess we have, as I understand it, is the Productivity Commission analysis of the cost to the public purse in supporting charities, and that ranges anywhere from $1 billion to $8 billion. Do you have any better understanding of the cost to the public purse of the support of charities?

Mr Willcock—I think the Productivity Commission is probably as authoritative as any body in seeking to put an estimate on those costs, insofar as it is seeking to estimate costs not just to the Commonwealth level but indeed across all jurisdictions. Within the Commonwealth itself, there is a process which results in the production annually of a so-called tax expenditure statement. That looks at estimating the cost of the tax concessions or the tax expenditures at the Commonwealth level. My colleague probably could speak a little bit

more authoritatively, but I note that what is in that statement tends to be identified at the level of fairly wide ranges. Do you have anything to add, Sandra?

Ms Roussel—In the tax expenditure statement, the itemisation for charities is unquantifiable, but—not in the tax expenditure statement—the range of a billion dollars is something that has been bandied around in the past. There is no official number.

Senator CAMERON—A billion dollars just seems a bit convenient. I am not making any comment about that, but it just does seem a nice round figure. But it is in the billions of dollars—billion or billions—is it?

Ms Roussel—It will depend on which tax concessions we are talking about. The billion dollars is about the income-tax concession for charities, but there are other tax concessions for charities. Some have figures; some do not.

Senator CAMERON—Are there any other areas of government expenditure that are so information poor?

Ms Roussel—I think there are a few.

Mr Willcock—I would not hazard a guess. I would not want to get into the business of trying to compare—

Ms Roussel—But there are other areas in the tax expenditure statement where the figures are unquantifiable.

Senator CAMERON—But do you concede that there is an information asymmetry in relation to charities?

Ms Roussel—In terms of the information that is available to charities versus the information that is available to the government?

Senator CAMERON—I am asking about the information that is available to legislators and available to government.

Mr Willcock—As I mentioned, the main interaction between the Commonwealth and this sector is through the tax system.

ACTING CHAIR—I should separately acknowledge Mr Hardy as a representative of the ATO rather than the Treasury; I am sorry.

Mr Willcock—I suppose, just generally speaking, whenever the government imposes some obligation on an element of or indeed the whole community, effectively there is some sort of trade-off as to the cost of that—in this particular case, information provision and the benefits that might flow. I think in the tax system it may often be the case that the production of more and better information may well indeed come at a cost. Therefore an assessment of what is the right place to strike that trade-off can differ from time to time and from individual to individual.

Senator CAMERON—There was some evidence in relation to costs in the UK and costs in New Zealand and, given the amount of money we are talking about, it did not seem to me to be a huge impost on the public purse to either work within the charity budget that is there or add a small proportion to get more information to the public and to legislators, to the parliament, in general.

Mr Willcock—I think the points of view that you are putting are certainly quite valid. As I said, though, I think that in the end it probably comes down to policy choices by different governments—indeed, by different parliaments—from time to time about where the appropriate place to strike the balance might be at any particular time. I note, for example, that, in relation to this particular sector, which of course has different components, some of the components of the sector are able to access various concessions on the basis of processes which involve an approach to the ATO and a decision by the ATO. So to access those concessions there is already a recognition that individual entities will have to take some proactive steps to ensure that they reveal themselves to the ATO and that the ATO can make certain judgments. Therefore, in relation to those sorts of entities, presumably there is more and better information available than there might be in relation to other entities where a self-assessment process is allowed. Necessarily, on a self-assessment basis, some of those entities might be below the radar screen and not as evident to not just the ATO but the general populace. There are policy choices involved in deciding when it is appropriate to allow an entity to self-assess as the basis for accessing a particular concession—we are talking the concession world here; there are other areas where it may not relate to accessing a concession—and when it is appropriate instead for particular processes to be set in place which require more active steps by the relevant entity to seek access to the concession by approaching the ATO and seeking some form of endorsement.

Senator CAMERON—The evidence we have from the UK charity commission is that they have 460 employees and a budget of $29 million per annum.

Senator XENOPHON—Pounds.

Senator CAMERON—Sorry—£29 million, yes; it does make a difference—though not as much as it used to! What is the budget within the ATO on charities and how many employees are allocated to dealing with monitoring charities?

Mr Hardy—In terms of working on the not-for-profit sector?

Senator CAMERON—Yes.

Mr Hardy—The budget is not a distinct line budget. There are about 65 staff that work in the not-for-profit area. They deal with new applications for charitable or not-for-profit concessions and inquiries by people seeking product rulings about questions of status or interpretation of law. They deal with quite a strong public information, public support and advice outwards function and also with the risk monitoring and with coordinating the review functions that we have as well. We can draw in, if necessary, some additional staff from time to time if we want to undertake a more involved review or something of that nature, but there is a standing staff level of about 65 that look after the sector on a fairly continuous basis.

Senator CAMERON—It seems to me that is not a very substantial amount of people when you are dealing with billions of dollars of public money. If you take the example of the ABCC, there are 85 investigators for one sector of the building and construction industry. It just seems to me to beggar belief that there are only 65 staff. How do you monitor whether charities are doing the right thing?

Mr Hardy—In the absence of a distinct charity regulator, the tax office have to undertake some of the functions of assessing a new applicant if they have a charitable purpose before we move on to perhaps the primary role of the tax office which would be to grant the access to the tax concessions. Primarily when we look at the new applications of people that approach us for endorsement we look to the nature of what they are going to provide, whether it fits within charity law and, if it does so, whether it fits into one of the concessional categories in the tax legislation that can be granted.

As Mr Willcox was saying, there have been policy decisions from time to time with various governments and parliaments as to whether we seek charities and not-for-profits to provide regular information to the tax office, like an income tax return or something of that nature. The decisions have been not to, in terms of the perceived impost on that sector. So, working with other forms of information that we can, we keep a monitoring eye on the sector and if necessary we can go and make our outbound inquiries to an entity that seems to be showing evidence of drifting off its charitable purpose. Our inquiries can lead to either corrective action with that entity about changing their behaviour or losing their endorsement if they are unable to move back into a charitable space.

Senator CAMERON—Can I stop you there because there are some issues you have raised that I want to pursue. An assessment is made of a new applicant, so you would assume that every charitable organisation has been assessed at one stage or another?

Mr Hardy—Yes. I would have to say that historically, prior to the new tax system legislation changes in 2000, there was no specific requirement for charities to approach the tax office for any sort of endorsement regime. So at around that time all of the pre-existing charities that had no formal endorsement by the tax office needed to be quickly brought into the system. I would have to say that the speed and the expectations by which charities were brought into the endorsed system meant that perhaps the checking was more limited at that time, on a risk assessed basis, but certainly since that time there has been more careful review of applications.

Senator CAMERON—I want to ask you to explain about your monitoring. Before you do that, how many charities have been assessed? Is there a register within the ATO?

Mr Hardy—All the organisations that have been granted some sort of charitable tax concession are shown with that tax concession on the Australian Business Register, so that could compile the entirety of those organisations that have been granted endorsed status. There are about 55,000 organisations that have some sort of charitable tax concession endorsement. We receive about 6,000 applications per year, which are reviewed. Not all are successful, and not all are successful on their first iteration, but we often discuss the purposes with the organisation and they make adjustments and then they may subsequently meet charitable purpose and can be endorsed for tax concessions.

Senator CAMERON—If a charity applies for endorsement, how many hours are involved going through an endorsement? Is there an average?

Mr Hardy—There probably is an average, which we do not have at hand. But I could perhaps find that. It does vary. We do use a risk-assess process in looking at the 6,000 applications. Some will be perhaps relatively straightforward. where there is perhaps no hesitation or doubt about their charitable purpose and that they can meet rather clearly the legislative requirements for tax concessions. Others are less clear, and so there is more time spent in having a conversation with the applicant about further detail or understanding exactly what they do.

Senator CAMERON—There are 6,000 application a year. Do you have any idea how many would fall into the 'tick the box, they are okay' approach? I am generalising. I do not know how else you would describe them.

Mr Hardy—'Tick the box' is slightly too light, but, yes, there is certainly a fast tracked assessment process. Realistically, with the staff available and to work through the number of applications per year, perhaps in the order of 70 per cent of applications work through the risk assessment as being relatively fast processed through the system. Some of those are tagged for subsequent, after-the-event review. The remaining ones would be subject to more careful scrutiny upon application.

Senator CAMERON—So that 1,800 would, roughly 30 per cent, would require scrutiny?

Mr Hardy—More involved inquiry.

Senator CAMERON—What is 'more involved'? Is that a day's work for an individual tax office, is in three day's work?

Mr Hardy—Again, that would vary in terms of the intensity. If you compressed it, it may be a day or two days work, but it might in fact be spread over several weeks of activity with the applicant.

Senator CAMERON—Given that you have 1,800 of them, it is quite a substantial amount of work that the tax office is undertaking?

Mr Hardy—When we need to, yes.

Senator CAMERON—That is the fast tracked endorsement approach we have dealt with, so there is a fair bit of work there. Then we come to monitoring, which is pretty important. How much effort is put into monitoring the charities—that they are still charities and meeting their requirements?

Mr Hardy—We do not receive anything like an income tax return for an annual report for most charities. There is one particular exception category, which is private ancillary funds. For most we do not. However, many charities access part of the GST systems and lodge business activity statements, or they are part of the fringe benefits tax system and lodge fringe benefits tax returns. So we use information that we receive regularly from those avenues into our risk engine. We keep track of media reporting and other sources of public information for matters that might be of some concern or raise doubts and questions and feed that also into our risk assessment processes. We work with other organisations, be they state revenue organisations or other bodies, as to whether they encounter concerns around fundraising or other issues which might have relevance for us from a charity perspective.

Senator CAMERON—So there is no proactive if I could use the word 'quality-control' in terms of where the charities are actually operating as charities; it is a reactive situation really?

Mr Hardy—'Proactive' I would say, yes, in terms of a deliberate assessment of charities, particularly where one of the fundamentals of a charitable endorsement is to actually apply the resources they have to some charitable purpose. We certainly monitor that there is apparent evidence of application of what is charitable purpose.

Senator CAMERON—What is 'apparent' evidence? I am not a lawyer. Is that different from evidence?

Mr Hardy—Say an organisation had no expenditure in a year in the information that it might report to us. It is obviously not expending its money on a charitable or any other purpose, which would raise questions immediately. Where someone does have expenditures it is not known necessarily whether they are on charitable or non-charitable purposes, so the evidence is somewhat weaker there. There is certainly some proactive monitoring of the activities from the information available to us. But when we become aware from a third-party source, that is when we may be more attuned to make an approach to a charity. That is probably a fair observation in many cases as well.

Senator CAMERON—I am sure you have had a look at the submission from Treasury. Were you part of that? Is this a joint submission or is it simply a Treasury submission?

Mr Hardy—We certainly provided some material and comments for them as they were drafting.

Senator CAMERON—So I can take this as a submission that you can comment on?

Mr Hardy—Yes.

Senator CAMERON—The submission goes to the developments overseas. I must say it is excellent. It is really helpful. Thanks for that. But it raises more questions than it answers, in my mind. One is that we seem to still be relying on 400 years of common law when other modern societies are moving to a different way of dealing with charities. Are there any lessons for us from what is happening overseas, in your view?

Mr Hardy—From an administration perspective, if you look particularly at those countries that share a legal history with the British Isles they have generally moved to having a distinct charity or not-for-profit sector regulator separated from their taxation authority. I think that they still place great weight on the 400 years of charity law. Just from my observations, if you examine some of the statutory arrangements they have introduced they are often restating, maybe with more contemporary English and maybe with a more precise, granular approach, fairly much the historic four heads of charity. Even if they are numbered up to 13 or 14, they largely cover the same thing. I imagine you have had evidence that they largely cover the same sorts of things that are traditionally covered by the four heads of charity established 400 years ago.

Senator CAMERON—The overseas regulators are not simply regulators, are they? They are regulators, educators and arbitrators. They may do other things as well. So it is a far more broad based approach to dealing with charities than we have in our non-federal approach to it, isn't it? It is far more sophisticated than what we have in terms of an organisation. I am saying not sophistication of the law but sophistication as an organisation. We do not have an equivalent.

Mr Hardy—No. As Mr Willcock pointed out, some of it relates to the legal and constitutional structures in other countries that do not have the same federal arrangements we have. Canada, for example, has perhaps a similar structure to us. Their charity regulation entity is within the revenue agency.

Senator CAMERON—So do they do education?

Mr Hardy—I believe Canada do, as does the Australian Taxation Office. Basically, of necessity, in the absence of a distinct charity regulator, to assist the sector to understand what is required, we do undertake quite a bit of an educational or advisory function to support the sector.

Senator CAMERON—I am not hung up on this issue of federal versus the UK system. That can be fixed through COAG. So that is not an impossible position to deal with. If we wanted to take Senator Xenophon's bill a step further and move to a commission type structure, what would the implications be for the tax office in terms of your employees? Would some of your employees be in a position to move to a commission and provide advice and operate a commission effectively?

Mr Hardy—On the presumption that the model of a charity regulator for Australia lifted some of the existing functions that are currently undertaken by the tax office to that regulator, yes, the tax office would have less need for performing those functions. As to whether any particular staff would move, I would imagine that they would make their own choices. But I would imagine that the tax office would be prepared to offer whatever support it could to a new regulator with our experience and expertise gained to date.

Senator CAMERON—As to a commission's independence from government, it has not been said explicitly here but I get the feeling that there is a view that the Australian Taxation Office is not sufficiently divorced from government to be truly independent. I am not making the assertion, but I get the feeling that there is a view there that taxation is about revenue; therefore, your approach cannot be truly independent because your focus is on government revenue. How do you respond to that?

Mr Hardy—I have certainly seen the disquiet in some submissions that there may be a perceived conflict of interest with the revenue agency having to determine charity status before it can look to the tax concessions and that there might be a perceived conflict of interest about revenue bias. That is perhaps different to independence from government. I guess any government body will have accountability to government. The tax office, of course, is accountable to the parliament as opposed to a minister. So it is a little bit different to some agencies. My reading of some of the submissions was that the concern was that we would have a conflict of

interest about recognising charity status which might be seen to deplete the revenue base—and therefore our revenue bias, as opposed to any government bias. That was the way I read the submissions.

Senator CAMERON—With 65 employees, how can we be confident that the full range of appropriate monitoring and appropriate checks for new charities are being undertaken? For an industry—if we call it that—worth between $1 billion and $8 billion million, a monitoring organisation of 68 people seems to me to be miniscule. Maybe you want to think about that and come back, but I am really interested in how it would be done. If you were a cynic you would have to say that it is a tick-a-box and there is very little monitoring because the resources are just not there—as the resources are in the UK. I do not know whether you want to comment on that now.

Mr Hardy—As to the historical arrangements, in about 2000 with the new tax system legislation coming in, the tax office was expected merely to grant and monitor tax concessions. It has found itself, by perhaps happenstance, in a position of having to undertake a wider range of functions. We have to apply the resources available to the tax office across the whole of the tax system where we perceive the most risk and advantage, consistent with the parliamentary intention of various tax laws the commissioner administers.

Senator CAMERON—I want to come back on this, but we will move on.

ACTING CHAIR—I would like to ask a question in relation to that in general. We understand that many religious organisations run charitable groups. But if a religious group does not have an affiliated charitable organisation, what checks and balances is it subject to?

Mr Hardy—It is possible for a religious organisation under the law to self-assess—

ACTING CHAIR—Yes, I was going to go to that next.

Mr Hardy—If they make that self-assessment, which also then allows for them to be exempt from income tax, they would not make themselves known to the tax office. They would not be required to make themselves known to the tax office. If the nature of their activities in relation to goods and services tax, for example, were below the thresholds for registration, they would not be registered for goods and services tax purposes. If they did not have employees or they did not have any fringe benefits tax arrangements in relation to employees, they would have no requirement to engage with the tax office in the fringe benefits tax space, and so they may in fact be technically invisible to the tax office in any formal sense.

ACTING CHAIR—That in a way answers the question which I was going to ask, and that is: since groups can self-assess as a religion, what quantum, what number, of religions would you say are out there whereby, unless they become visible to you from some of their activity, you would not know they existed as such? For a group to claim tax exemption there must be a point where they put in a tax return or an exemption is claimed, and therefore it must be possible to make some sort of assessment of the numbers.

Mr Hardy—The only tax concession that could be accessed without an approach to the tax office by a religious organisation would be to self-assess that they were a religious organisation, which makes them exempt from income tax. The practical consequence of that is that they do not have to lodge an income tax return. If they have no reason to have a dealing with the tax office in any other capacity then they have no dealing with the tax office.

ACTING CHAIR—Do they have to advise you of their self-assessment?

Mr Hardy—No. Self-assessment is that. They self-assess.

ACTING CHAIR—In other words, they are left alone. They have self-assessed and you do not have any reason to monitor them whatsoever.

Mr Hardy—No. The legislation does not provide for that. They are potentially invisible to us as a taxation entity or an entity that has an interaction with the tax system.

Senator XENOPHON—Mr Hardy, further to Senator Eggleston's line of questioning, that means that once an organisation has a tax free status as a religion, for instance, and they self-assess, there is no scope to look into the books of that organisation?

Mr Hardy—There could be for an organisation, and not just in the charity sphere, because the tax system is premised along self-assessment. If the tax office became aware of an organisation that was self-assessing as a religious organisation and we had reason to believe that they may have made an incorrect assessment, we certainly do have powers of inquiry to make contact with them and to gather information. We might be able to

advise them that they were incorrect in their assessment and that perhaps they were not a religious organisation, in which case they may be part of the tax system in some other fashion.

Senator XENOPHON—But if they are classified as a religious organisation, they are invisible—you used the word 'invisible' earlier—for the purpose of being subject to pay tax; therefore, you cannot look. Once they have got the status of religion you cannot really look behind that.

Mr Hardy—Once they are a religious organisation and they self assess, they are exempt from income tax and therefore have no obligation to lodge an income tax return. They may or may not have other interactions with the tax system, but if they try to claim exemptions in any other form of tax or concession they do need to approach the tax office about fringe benefits tax, GST or other sorts of concessions.

Senator XENOPHON—Let us stick to the issue of income tax. The only way a religious organisation would be subject to income tax would be if there was an inquiry as to their status as a religion and that was taken way from them.

Mr Hardy—Yes. If they were found not to be a religious organisation, they could not continue to claim that status and then you would look at them as to what they are. They still may not be a business—for example, they may have no income that is assessable—but they could perhaps no longer claim to be exempt as a religious organisation.

Senator XENOPHON—And you would be guided by that in relation to taxation ruling 2005/21.

Mr Hardy—Yes.

Senator XENOPHON—That ruling makes reference to a charity being for the benefit of the community, so if an organisation which has tax-free status by virtue of being a religion were charging a high amount in fees for services—and the fact that fees are charged is not in itself determinative, as I understand it—would you look into the extent of the fees that are being charged and whether you consider them to be reasonable not?

Mr Hardy—There is an overlap there between a religious organisation claiming to be exempt but not claiming any charity concessions and that particular ruling, which is more about charity concessions. So there is a slight mismatch of conversation. As for a charitable organisation, religious or otherwise, that had fees for some of the services it performed, potentially if it had particularly large or non-commercially large fees for a particular service that might be an area of concern for the tax office to look at as to whether their activities were truly charitable.

Senator XENOPHON—What are the rulings we could go to apart from this one for religious and charitable organisations?

Mr Hardy—There are a number of rulings. You referred to tax ruling 2005/21. Tax ruling 2005/22 also discusses some aspects of charity. There are a number I can provide.

Senator XENOPHON—If you could take that on notice. Also, in terms of religious organisations, which is the main ruling that you say would be relevant?

Mr Hardy—On just the question of religious organisations, there is no particular ruling on that question. It is a particular category in the taxation legislation as to whether a religious organisation, if it is one, can be exempt from tax. That is a self-assessment option as opposed to approaching the tax office to also be granted charitable tax concession.

Senator XENOPHON—Has the tax office considered giving a ruling in terms of religious organisations, giving guidance?

Mr Hardy—No. We tend to provide public rulings where there is a large public demand or uncertainty. We have not been approached by entities that have found it concerning enough to seek public guidance.

Senator XENOPHON—Looking at the issue of charitable status in terms of charity being for the benefit of the community, if an organisation were giving counselling services and the going rate to see a psychologist or a psychiatrist were $200 an hour, say—just picking a figure out of the air—and if that organisation were charging three or four or five times that, would that be a factor that would be considered?

Mr Hardy—Potentially. However, people often make their own judgments about what they think is a fair price for a particular service. So long as they are not placed in a monopoly situation of only a single provider or they are under duress about being extorted, for example, for the payment of funds—we do respect that some

people choose to buy very expensive vehicles, for example, and some people choose to purchase less expensive vehicles. So people make choices about what they are prepared to pay for a service.

Senator XENOPHON—Sure, although the vehicle analogy may not be the most apposite given that there is a difference between a Yaris and a Roller in size and quality and the like, in what you get for your money. In terms of an organisation, you have talked about the issue of people handing over their money readily because they are happy to. To what extent would the ATO look at issues of duress, unconscionability, in terms of the contract, in a sense, to hand those fees over if they are way beyond what is the norm for those sorts of services? To what extent do you take that into account?

Mr Hardy—Those matters tend to drift towards questions of criminality.

Senator XENOPHON—Unconscionability is not a criminal matter, it is a civil matter.

Mr Hardy—Yes. Perhaps it is contractual and not specifically a taxation question. So why would we have regard to it? It would not be a primary function of the tax office to examine whether contracts between parties were necessarily unconscionable or perceived by others to be unconscionable.

Senator XENOPHON—But wouldn't that be relevant in considering whether they ought to have tax-free status?

Mr Hardy—It would be a relevant factor. However, the process by which someone might establish that any particular contract is unconscionable is not prima facie the function of the tax office in looking at the tax concessions granted to charities.

Senator XENOPHON—That alludes to matters that Senator Cameron raised with you. The unconscionability of a transaction where money is handed over for services by a charity may be a factor in determining whether it has tax-free status. But you are saying that the tax office does not have the ability to determine that because it goes outside its functions. Is that a fair summary?

Mr Hardy—Yes, it is probably a fair summary of my inelegant explanation.

Senator XENOPHON—I am not suggesting that you have been inelegant at all. What I think is inelegant is the system: unconscionability could be a factor but the ATO does not have an ability to determine unconscionability.

Mr Hardy—It would perhaps be clearer if I explained it in terms of a matter of criminal behaviour by an organisation. Short of it being a taxation crime, it would be up to the police or the Department of Public Prosecutions to determine whether an organisation was criminal. If that was shown and proven then the tax office could easily respond to that circumstance. The tax office would not necessarily criminal proceedings. It is not its role to undertake the pursuit of a criminal matter.

Senator XENOPHON—But I am not talking about criminal matters. I am talking about unconscionability, which is a concept defined in civil law and under the Trade Practices Act as well. If there was a court case against an organisation for unconscionable conduct, and there was a finding against that organisation, would that be a factor that could be taken into account if there was a court judgment?

Mr Hardy—Certainly. As you said, under the Trade Practices Act, which is a piece of legislation that is administered by another organisation, they would have primary carriage of that determination.

Senator XENOPHON—But you are hamstrung. This is not a criticism of you or the ATO. Under the way the rules operate now, you are hamstrung to make those findings because you do not have the resources or the structure to do so.

Mr Willcock—It is more a matter of the order of process, isn't it? A person can allege that another person has done something wrong, be it criminal or civil, but the ATO is probably not very well placed to determine whether that person's allegation is right or wrong. The person can go off and pursue the ordinary remedies or the avenues of complaint and redress that might be available to them. If it is a criminal matter, they can go to the police. If it is a civil matter, they can go to the relevant government consumer protection organisations or they can go to law themselves and sue the persons they have made allegations about. As a result of taking that action, the complainant is then able to go to the ATO and say, 'My complaint has been upheld, so you do not have to make a judgment about the complaint I'm making.' Some other institution or processes has already reached a finding on that particular element of it, so then it is up to the ATO to, amongst other things, determine whether the person who has done the wrong thing was acting as an individual or was part of a course of conduct that was condoned by the relevant entity.

That is, if you like, where I think the ATO will most critically need to come to judgments, rather than taking the member of the public's initial allegation at face value and then pursuing that, because the ATO's role is not to pursue every complaint that any member of the public has about any other individual and whether or not that other individual has done them wrong.

Senator XENOPHON—Sure. But, Mr Willcock, isn't the problem that the ATO, for instance, under ruling 2005/21, has to consider a number of factors in terms of the tax-free status of an organisation? There are a number of factors that it needs to tick off, so it needs to make a determination in respect of those; but, if there is an allegation of a breach, it cannot undertake the same exercise. There does seem to be a disconnect between the approval process and, if you like, the disapproval process. It is not a criticism. There just seems to be a disconnect.

Mr Hardy—I can understand your observation. For the approval process, or the endorsement process, an organisation will approach us with of course their best presentation of all the things that they do which are perhaps charitable—

Senator XENOPHON—And you need to make an assessment of that.

Mr Hardy—We do. They are unlikely to say, 'Oh, and we're also under investigation by trade practices or consumer protection.' However, if that was known, if that had been publicised as a court finding, that would be public information relevant to us.

Senator XENOPHON—I will not take this any further because I want to move on—I have got a number of other questions to ask of both the Treasury and the ATO—but it seems that under the current rules you need to make an assessment as to whether it gets approval, and you seem to have the capacity to do that, but you do not have the capacity to determine whether it ought to have its tax-free status removed, for the reasons that both you and Mr Willcock have outlined. I will not take it any further, but that does seem to be a dilemma, from my point of view. And it is not a criticism; it is just a dilemma.

Mr Hardy—I understand your dilemma.

Senator XENOPHON—Well, I think it is a much broader public dilemma. In ruling 2005/21, under 'Benefits for owners', paragraph 76 states:

An organisation is not charitable if it is carried on for the purposes of profit or gain to particular persons including its owners or members. This is known as the non-profit requirement.

My question to you is: if, for example, the hierarchy of an organisation was going on overseas trips—in itself, not a bad thing—or it seemed that a significant proportion of the revenue of the organisation was going to things like that or there was significant enrichment of particular individuals, is that a factor? Also, in so far as we are dealing with Australian income and Australian revenue, assets in the Australian jurisdiction, if an organisation is sending money overseas, wherever that might be—to the head office or the head church—to what extent can, should and does the ATO look into those factors?

Mr Hardy—Certainly, the factors of private benefit or private enrichment, or enrichment of the organisational leaders, would be a concern. It would be inconsistent with charitable purposes and it would be something which we could take into account as to whether an organisation continued to have charitable status.

Senator XENOPHON—Where do you draw the line? Do you say that a reasonable salary is the modest stipend of a union official, as Senator Cameron used to be, or that of the chief executive of a major bank?

Mr Hardy—That is, in practice, a very difficult judgment call to make.

Senator XENOPHON—But it is a call you have to make, isn't it?

Mr Hardy—We do, from time to time. A charity may well be of a magnitude of operations that it might be comparable to some of the largest companies in Australia.

Senator XENOPHON—So you take the revenue of a charity into account?

Mr Hardy—Well, it might not be revenue per se. The financial structure of a charity is, typically, different to that of a corporation. But, if a charity was able to operate on an Australia-wide basis and was visibly active in large-scale charitable activities in numerous, simultaneous locations at once, you can imagine that the sort of leadership expertise they might require, and therefore might need to reimburse for, might be more significant than that required by a more locally run, single-purpose organisation.

Senator XENOPHON—So what you are saying is that it is not unreasonable to assess it against a benchmark in the marketplace—that if you need to run an organisation with a multimillion dollar turnover,

with complex operations, you need to attract a good person to run the organisation well, and their salary should be commensurate with what they could get in the private sector.

Mr Hardy—Not necessarily with the private sector—there is no rigorous benchmark test—but certainly it is a factor to be given some consideration. It is an element that requires some degree of judgment and often debate with the relevant entity if we are having that conversation with them.

Senator XENOPHON—But if it is seen to be disproportionate to the nature of the organisation and what someone, for instance in the private sector, could be getting, is that something you would take into account?

Mr Hardy—Certainly.

Senator XENOPHON—You may want to take this on notice—and this is to you, Mr Willcock and Ms Roussel, and to you, Mr Hardy. If a person has a complaint about the running and the tax-free status of an organisation, and it goes to the ATO, then because of the very nature of the ATO, in terms of the privacy foundation to the way that the ATO carries out its work, that complainant will never really know what happens to that, unless of course they hear about it publicly—is that correct?

Mr Hardy—That is correct.

Senator XENOPHON—Under either this ruling, 2005/21, or other rulings relating to charities, or, indeed, in terms of the tax-free status of a religious organisation, is this something that is justiciable, in the sense that it could be subject to a writ of mandamus or certiorari—in other words, someone bringing an administrative law action saying, 'You have not done your job to assess that this organisation has tax-free status'? Is that something that could be the subject of a court action? I do not know the answer. I am wondering whether you need to take that on notice or whether you could proffer an answer now.

Mr Hardy—I will have to take that on notice. Just to understand the question: would this be someone who had perhaps made some complaint or referred some information to the tax office and was concerned that we had taken no action—

Senator XENOPHON—Yes.

Mr Hardy—or had disregarded it, and might take some action against the office for maladministration or failing to act upon information—something of that nature?

Senator XENOPHON—I would not say 'maladministration'; I would say that it would be more a case of a writ of—I am just thinking of my administrative law from 33 years ago! It would be a case of failing to act. A writ of mandamus would say, 'We require you to act in this way to fulfil the requirements of a ruling or your obligations under the act.'

Mr Hardy—I would have to take it on notice. But my observation, just off the top of my head, would be that, depending on the nature of the information, you could perhaps position the tax office, or any other agency, into being compelled to act to the expectations of a member of the public, and the public would then start to direct the activities of the tax office, if that were taken to its extreme.

Senator XENOPHON—No, I am not suggesting that. I am saying that you have, for instance, a ruling—it might even be an action saying, 'You haven't even begun to undertake the process.' What the outcome will be will be up to the tax office but, if the process has not been undertaken, the question is whether that will be subject to a prerogative writ.

Can I just ask you, Mr Willcock, a question in relation to your submission. At page 7, under 'International comparisons,' you make reference to England and Wales. You say:

Unlike the proposed Bill—

this bill—

it—

that is, the England and Wales position—

does not require a weighing of the benefits against any detriment or harm.

Is that still your position?

Mr Willcock—My understanding is that the arrangements in the UK certainly remove the existing—well, as it applies in Australia, the existing Commonwealth presumption of a public benefit in relation to the first three heads of charity. But it did continue that that Charities Act of 2006 effectively continued the existing common law in relation to a public benefit.

Indeed, later in our submission, on page 17, there is an excerpt of the legislation that applies in England and Wales. At paragraph 3, under ‘The “public benefit” test’, you can see:

… any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

I understand that is simply providing statutory backing to the existing or prevailing common law in relation to public benefit. So, as I understand it, what that sentence is attempting to say is that, while in England and Wales the common law in relation to public benefit has been preserved by statute, effectively the provisions in the bill that you have introduced move somewhat away from the common law of public benefit.

Senator XENOPHON—It was not a trick question. Can I put this to you. Last night I put this in a question to Ms Joanne Edwardes, Head of Status and Public Benefit Policy of the Charity Commission for England and Wales:

That means that of necessity if there is an inquiry into the public benefit an organisation provides it could look at the issue of detriment in balancing whether the public benefit test is fulfilled.

The response from Ms Edwardes was:

Yes, the detriment and harm question is part of our public benefit test and one of our key principles of public benefit is that any benefits that might arise to the public must not be outweighed by any significant detriment or harm. That is a fundamental part of the public benefit test, so we would look at that anyway in the course of considering public benefit for any organisation.

Does that change your view at all or is that not inconsistent with your view?

Mr Willcock—I think the point that we were wanting to make is that the common law in relation to public benefit is preserved under the English and Welsh legislation—

Senator XENOPHON—which of necessity involves a look at detriment—

Mr Willcock—and what the common law of public benefit is I will not go to. If anyone were to go to it on this side of the table I would be asking Mr Hardy to do so.

Senator XENOPHON—Sure.

Mr Willcock—Whilst the legislation that the committee is considering does not simply preserve the common law in relation to public benefit in the terms that the provision that I referred to—on page 17 of our submission—does, the question then becomes, I suppose: what is the scope of public benefit under the common law and how might that differ from the scope of public benefit that might be put in place if the bill that you have introduced were to be legislated? That is an open question. Indeed I think we would say that either implicitly or explicitly throughout the submission there is a concern raised about what the potential implications of the legislation might be, not just for the ATO but for the regulated entities under it.

Senator XENOPHON—I thank you for that. But, Mr Willcock and Mr Hardy, do you both concede, in the context of what the Charity Commission for England and Wales has said, that in order to determine a public benefit that of necessity involves looking at any detriment or harm that an organisation may cause?

Mr Hardy—I certainly understand that is the evidence that they have provided to you and that they would be much more well versed with their own legislation, so I could not gainsay them. I would be interested to understand, in the absence of talk about public detriment in their legislation, how they become aware of or how they are empowered to secure evidence of detriment. I would imagine that at least upon application a new charity would present the public benefits it has. It may not perceive itself, or it may be quiet about, any potential detriment. Unless that were in the public domain or in the awareness of the Charity Commission for England and Wales, I do not know how they would become aware of the detriment perspectives.

Senator XENOPHON—This goes back to what Senator Cameron said—and, Acting Chair, for now I will finish up on this as I am concerned about time constraints.

ACTING CHAIR—You may continue asking questions, Senator.

Senator XENOPHON—Thank you. It is just that I knew Senator Cameron had that look in his eye! So if I can finish off on that.

ACTING CHAIR—Yes.

Senator XENOPHON—But that is a problem, isn’t it? You go through this process of assessing whether an organisation gets tax-free status, which all of us who pay tax in effect pay for. The public policy intent is a good one. A witness yesterday said that, if that charity did not do those good works, the government would

have to pick up the tab. That is one way of looking at it—it would cost us all more money. That was one perspective. But at the moment, isn't the ATO hamstrung if, after you have ticked the boxes to say it can get the tax-free status, you are presented with allegations of abuse, corruption or fraud? What protection is there for taxpayers then other than what both you and Mr Willcock said I think quite fairly? You gave an exposition of what is occurring now. You basically said that, short of criminal charges being laid, criminal findings being made or there being a court case against that organisation in the civil courts, it is business as usual.

Mr Hardy—That is not necessarily quite true. An endorsed charity may start undertaking activities that are not charitable. That is the most common reason why we review them and, if necessary, remove their charitable endorsement.

Senator XENOPHON—But how? What do you do? Do you actually investigate them? Do you audit them?

Mr Hardy—Yes.

Senator XENOPHON—But you do not have much by way of resources.

Mr Hardy—As I said, we can if necessary for an involved review bring in other resources from the tax office more broadly. Typically that review will be that they have strayed from charitable purposes and are pursuing private benefit or other things which are clearly more consistent with the expertise of the tax office to draw conclusions about as opposed to matters of criminality perhaps.

Senator XENOPHON—So, for instance, with the letter I wrote to the taxation commissioner about the Church of Scientology organisation that is based in South Australia I will only know about a response if there is a public response from the tax commissioner? That is the protocol, isn't it?

Mr Hardy—Without discussing a particular taxpayer, I am sure the commissioner will respond to your letter as best he can without breaching the secrecy provisions. If your letter did result in any change of the status of the organisation, for example, you would probably only be aware through public record evidence.

Senator XENOPHON—Thank you.

Mr Willcock—I have just flicked to another page of our submission and have spotted some material that might assist. You drew attention to a sentence on page 7 but, as you would know, the relevant provision in the bill that probably helps illuminate this somewhat is proposed paragraph 50-51(2)(b) which says:

> The public benefit test must include the following key principles:
>
> … … …
>
> (b) the benefit must be balanced against any detriment or harm …

That provision is discussed for about half a page on page 11 of our submission. It notes that at the moment the weighing of public benefit against public detriment or harm is not required. I would add now that I have read it again 'in all cases' at the end of that sentence because the paragraph goes on to note:

> … the ATO advises that these considerations are, at times, taken into account …

The difference, in other words, is that what we are saying is that, at the moment, under common law, it is not necessary to weigh these issues in all cases. But the second paragraph under that heading on page 11 says:

> The Bill would require an explicit balancing of public benefit against detriment or harm in all cases.

So, as I mentioned earlier, there is an issue about the extent to which the existing common law relates to public benefit. We understand it has been preserved by the relevant legislation in the UK. The material on page 11 highlights that the UK charities commission has produced guidelines about how it will interpret the public benefit and how it will apply it. We note that there are cases where the detriments are significant and therefore will actually have an impact.

Senator XENOPHON—I appreciate that. Ms Edwardes from the Charity Commission for England and Wales did say that the detriment and harm question is part of their public benefit test and is one of their key principles of public benefit. She went on to say more. So the practice seems to be that they do look at detriment.

Mr Willcock—That being the case, I think it really does become a question of administration. It may be difficult for the ATO to say exactly how it would apply this particular test, because the test itself would still need to be formulated and put into regulations before the ATO would be able to say exactly what the implication would be.

Senator XENOPHON—You can see my point that the practice in the UK looks at detriment in weighing it up.

Mr Willcock—Indeed, but as that particular material on page 11 was seeking to point out—and what Mr Hardy has also been saying—in many cases it would be very difficult for the commissioner, without making very active inquiries in all particular cases that in and of itself would then have fairly significant resource implications for the ATO, to have any material going to the alleged detriment or harm that might be created by an applicant. So the bottom line is that, in one regard, depending on how the test is formulated and then how the ATO go about administering it, it might be an extremely resource intensive requirement for the ATO to make active inquiries in relation to every application to determine whether or not there is any detriment and harm. On the other hand, you might end up with the situation where, again, unless something is already known to the ATO it effectively simply acts on the basis of the information that is already in its hands. Unless the relevant applicant actually highlights the detriment or harm that it engages in, the ATO may not be in any better position than it already is at the moment.

Senator XENOPHON—I understand the issue of resources. The UK and New Zealand charities commissions made the point that if it is a complaint based mechanism, rather than trawling through every organisation and saying, 'What is the detriment here?' if information is given that points to harm then surely the ATO should have the adequate resources to appropriately assess whether there is harm that should be taken into account? I will not take it any further than that. Thank you.

Senator CAMERON—Mr Hardy, you indicated that religions self-assess. Is there a form that they fill in?

Mr Hardy—No. As long as they do not seek charitable endorsement, they just self-assess. There is no form. There is no interaction necessary with the tax office.

Senator CAMERON—So you just say, 'I am a religion'?

Mr Hardy—You say, 'I am a religious organisation. I see in the tax legislation that, if I am that, I am exempt from income tax. I therefore do not need to lodge an income tax return form.' On the assumption that the organisation has no other need to interact with the tax office, they would not have any interaction with us.

Senator CAMERON—So you could worship a fairy at the bottom of the garden, as has been quoted to the committee, and say, 'That's my religion. I want tax exemption because that's my religion.' Then you could carry out charitable—

Mr Hardy—'Charitable' is different to just being a religious organisation. To use your example of worshipping a fairy at the bottom of my garden, if that was my religion, I might purport that to be the case but, if that is all that I do and I have no income from that process anyway, there would be no income tax.

Senator CAMERON—But what if you bring people in and say, 'I want to show you where the fairy lives and I'm going to charge you for that'?

Mr Hardy—Then I guess whilst they purport that that is a religion—and we of course have some indications from the High Court in Australia as to concepts of religion—and it fit the guidance of the courts as to what a religion is, that would be acceptable. If, however, it was not a religion, then it appears to be a commercial undertaking to view the fairy at the bottom of the garden.

Senator XENOPHON—The alleged fairy.

Senator CAMERON—They obviously believe there is a fairy. I think it was Mr Willcock who indicated that there had been decisions made to ignore recommendations from various inquiries about charities.

Mr Willcock—I did not say that, Senator.

Senator CAMERON—I thought earlier in the piece you spoke about some of the inquiries but that no decisions had been—

Ms Roussel—No. We have not spoken about inquiries during this session.

Senator CAMERON—Has there been any deliberative government decisions not to make changes to charitable definitions arising out of recent inquiries?

Mr Willcock—Do you mean this particular government or governments generally?

Senator CAMERON—The previous government and this government.

Mr Willcock—There have indeed been a number of reviews, inquiries or public processes that have looked at the not-for-profit sector generally, including the charity sector. A list of ones that I have got before me include a 1995 industry commission—

Senator CAMERON—I know those, Mr Willcock.

Mr Willcock—I personally have not had such an extensive involvement in this particular area of public policy as to know the background of all of those. A significant process was the 2001 charities definition inquiry, which did result in legislation that was introduced into the parliament that was relatively broad in seeking to provide statutory definition of 'charitable purposes' and, indeed, went broader than that. I am not aware of why, but I know that that particular legislation did not pass the parliament and instead narrower legislation which extended the definition of 'charitable purposes' in relation to a couple of categories—which, no doubt, you already know about—took place.

The most recent processes of course are the Productivity Commission's report at the beginning of the year about the contribution of the not-for-profit sector. My understanding is that the government is still considering that report and has yet to give its response to that. The Australia's Future Tax System review also covered briefly not-for-profit issues and made various recommendations, including the establishment of a charities commission. The government's response to that whole review process was released on 2 May. On that, the government's response simply noted that, in relation to the not-for-profit sector, it was not going to make any changes to the tax system, including removing the benefit of tax concessions, raising gift deductibility threshold or changing income tax arrangements for clubs. More generally, the government did note that there is an awful lot in that particular report and the government was just doing particular things now and there would be more reform initiatives following in due course.

Senator CAMERON—Okay. I am running out of time, so I would like to move. Mr Hardy, I have a question about monitoring actions, if I can call them that. Most people would call them investigations. Before I ask the question, what do you call them?

Mr Hardy—Reviews. There are a range of different activities, but reviews of one form or another.

Senator CAMERON—How many reviews do you carry out in a year?

Mr Hardy—Probably in the order of 2,000, maybe 2,500—it varies. As we discussed before, there are perhaps 1,800 or so of the new applicants which are scrutinised more carefully than others, so there is a review process upon application.

Senator CAMERON—That is new applicants. I am talking about existing.

Mr Hardy—Yes, so the balance might be another 200 to 400 perhaps of pre-existing endorsed entities where we check their progress against their status.

Senator CAMERON—So that is 200 to 400 out of 60,000?

Mr Hardy—In that order, yes. I think it is about 55,000 in terms of charitable—

Senator CAMERON—Is that viewed as statistically good enough?

Mr Hardy—It is a risk assessed situation. Of course there are grades of charities, from very, very small, almost trivial in their activities, through to much more substantive ones. And, of course, the tax office needs to balance the resource it has available to it against all of the obligations of the commissioner.

Senator CAMERON—Sure, and that is the point we have been trying to make, given that you have got 68 employees, you are looking after 50,000 charities, you are checking them when they come in and you are supposed to monitor them as they go through their activities. It is a big task, isn't it?

Mr Hardy—Is a big task.

Senator CAMERON—I will leave it at 'a big task'. I have just had a look at the research paper from the House of Commons library which explains the bill that established the commission. It has a definition of 'charity', and one part of that is: 'the relief of those in need by reason of youth, age, ill health, disability, financial hardship and other disadvantage'. I had an exchange with Father Lucas earlier—I am not sure if you were here or you monitored that exchange.

Mr Hardy—No.

Senator CAMERON—Father Lucas said that caring for rich people is as charitable as caring for poor people. I was a bit surprised and said that I thought charity was about caring for those who did not have the

means to look after themselves. I may want to get your view on that. But I then went on to ask him if a retirement home for burnt-out merchant bankers would meet the test of tax-free status. Father Lucas said, basically, yes. I am a bit appalled about that. I wonder if a group of rich people can come together with obvious means, not in need of charity, and establish an aged-care home with the best of everything available to them, living out their life in luxury, and get a tax-free status. Is that possible?

Mr Hardy—I respect that Father Lucas has his own opinion. I think it is improbable. This is perhaps a good example of where the public benefit test might already be applied by the tax office because we do recognise the public benefit test as it does have application in common law, and there are two elements: the public and the benefit. If you had such a fictitious merchant bankers retirement home and they were all wealthy—which is not necessarily saying that all merchant bankers are wealthy, but let us assume they are all wealthy people—and the ability to enter that retirement home is somewhat exclusive, then it may not in fact be sufficiently 'public' to really be charitable. However, I imagine there may be some charitable organisations that perhaps do care for someone who may otherwise be considered wealthy as part of the range of otherwise charitable purposes and activities they undertake.

Senator CAMERON—Is the definition of 'charity' and 'charitable purpose' in the UK consistent? We were told that this was based on 400 years of law, which ours is—the same basic laws. Is this definition consistent with how you would assess it?

Mr Hardy—That seems to be a somewhat modernised restatement of the Statute of Elizabeth type purposes.

Senator CAMERON—Do we need to modernise the statement here so people can understand it? Because obviously if what you are saying is correct then Father Lucas may have it wrong. Does that not say that the education role of the Taxation Office needs to be either upgraded or some other form of education needs to be in place?

Ms Roussel—Before you answer, can I clarify an aspect there, which I think Father Lucas was actually talking about. He was referring to the Word Investments case, which has—

Senator CAMERON—So you did hear it, did you?

Ms Roussel—I heard a snippet. I did hear him talking about fee charging.

Senator CAMERON—Well let us hear the snippet that you heard then.

Ms Roussel—In the bit I heard he was talking about charitable purposes but he also went on to talk about a fee-paying entity.

CHAIR—Yes.

Ms Roussel—So I think he was referring to an organisation which under the Word Investments court case could be considered charitable. Under that case an organisation—say, an aged care home for wealthy retired merchant bankers—could be set up on a fee-paying commercial basis. They could be considered charitable if they are giving all of their profits, say, to a charity. This entity could be considered under the Word Investments case a charitable entity, even though it itself does not have charitable activities. I am using my words carefully. But as long as its money is going to a charitable purpose—that is, it is being given to a separate entity or it itself is undertaking a separate charitable purpose—

CHAIR—I agree with Ms Roussel's comment, because he was talking about a tax effective structure.

Ms Roussel—Yes, and I think that is what he was getting at. I think he does understand the difference. I am pretty sure that is what he was getting at. So that would explain to you—

Senator CAMERON—I do not want to misrepresent what he said.

Ms Roussel—Yes. I agree with Mr Hardy in that we have very similar charitable purposes as defined in the UK and as they applied here, but there is a difference with the charities and commercial activities because of the Word Investments case.

Senator CAMERON—I must say I am still confused about how it was being put forward. You are saying that the merchant bankers can set up, they can charge a fee and the profits can then be—

Ms Roussel—Can I explain the Word Investments case very quickly to you.

Senator CAMERON—Yes.

CHAIR—Please do for the record.

Ms Roussel—In this particular case there was a funeral business being set up by a Bible society. I am not quite sure what they were doing, but they were translating the Bible.

Senator CAMERON—I think we heard about this one.

The **Ms Roussel**—They were considered to have a charitable purpose, but they had set up, in effect, a fundraising arm, which was a funeral business. It was fee-paying; anyone could go and buy a funeral service. The money that was raised under those activities were then put towards Word Investments—the Bible translation activities—and under the Word Investments case the court decided that Bethel Funerals, the funeral business, was considered charitable because it had a charitable purpose; that is, giving money to another charitable entity.

Mr Willcock—It is the cross-subsidisation of commercial activities for the charitable activity.

Senator CAMERON—But Father Lucas went further than that. He also said that looking after rich people was a charitable purpose as well as looking after poor people. That is where I am a bit confused, given that the statutory definition of ‘charity’ that is used in the UK, where our laws emanate from, says that it is about the relief of those in need. That is a different position.

Ms Roussel—I did not hear his statement on that, but there may be services being provided that are not in the context of financial need that in the context of other need—say, spiritual need.

Senator CAMERON—I do not have *Hansard* on it yet, but it is reported in the media under quotations, so someone was monitoring it. That is the argument: if you are rich, you can still be entitled to charity. It is a foreign consideration to me, I must say.

Mr Hardy—Without the benefit of seeing the transcript or the exchange, I could not comment further.

Senator CAMERON—Can I ask you then, when *Hansard* is available, to have a look at it and advise me what your view is on that?

Mr Hardy—I will but, as I said before, my first inclination is to think it is improbable that a merchant banker’s retirement home, on the assumption that the merchant banker is wealthy, would be charitable.

Senator CAMERON—Father Lucas also told the inquiry that an organisation should not lose its tax privileges if its leaders turned a blind eye to child abuse. Is this a consideration of the Taxation Office?

Mr Hardy—Once again, to the degree that child abuse is a criminal matter, of course criminality questions are for the police. There will be many organisations where members of the organisation commit crimes, but it does not necessarily mean that the organisation is criminal in its operations. So, while that will be something that we would perhaps have to turn our minds to in considering charitable endorsement for tax concessions, the fact that any particular member of a religion commits a crime does not necessarily mean that the religion itself is established on a criminal basis.

Senator CAMERON—But, if the leaders of that religion are turning a blind eye to the criminal offences, isn’t that a higher test?

Mr Hardy—That would certainly seem to be a higher test. Again, the criminality aspect perhaps would be that, if the criminal justice system did not feel that the turning of a blind eye was sufficient to secure some sort of criminal prosecution of those turning a blind eye, it is very difficult to put the administration of a tax concession into the position of making that judgment call.

Senator CAMERON—In conclusion from me, the modernisation of the language that is happening in the UK, New Zealand and other administrations has not happened here?

Mr Hardy—Not to the same extent. There have been some extensions in Australia.

Senator CAMERON—And there is no legal impediment other than the need for COAG to deal with the establishment of a commission if it is the desire, the recommendation or the political will of a government to try to implement one?

Mr Willcock—More generally, and even separately from the issue of setting up a charities commission or not, to the extent that it would be desirable either to completely replace or at least to set down now in statute our current understanding of the common law of charities in terms of the definition of ‘charitable purposes’ et cetera, it presumably would be desirable for that law to be relevant not just in the Commonwealth’s jurisdiction but in the state and territory jurisdictions so that such entities are able to operate under a regime where what is charitable is the same in both state and Commonwealth jurisdictions. As I said, it is not just a matter of seeking cooperation with the states and territories if there were a decision to set up a charities

commission. It would also be necessary to have the cooperation of the states and territories if we were seeking to develop a whole new statute that sought to define charitable activities and so on.

Senator XENOPHON—I have a supplementary question for Mr Hardy and also Treasury to take on board. In terms of an organisation that has tax-free status here in Australia remitting money overseas to a head office—we are not talking about whether its primary aim is to be like World Vision, Caritas or other organisations—where do you draw the line? Are there any guidelines in relation to that? Is there a policy position on the part of Treasury that it has to be a reasonable amount that goes overseas to the head office for their administration and that there must be some benchmark or some line in the sand?

Ms Roussel—Before we get into how it is administered, the government has made an announcement in this space in response again to the Word Investments case. The issue of how much money can be spent in Australia was considered in that case. There was some lack of clarity, potentially, coming out of that case. The government has stated that it will reclarify the law, to clarify that charities must spend their moneys in Australia—that there will be an in-Australia test. We are developing that at this point.

Senator XENOPHON—That is very helpful to the committee. But it does not affect those organisations where their principal aim is to provide assistance overseas, does it?

Ms Roussel—If their principal aim is to assist overseas and they are 'siphoning' all that money overseas—to use the language—that would fail the in-Australia requirement, unless they were endorsed by the tax office as an overseas aid fund—

Senator XENOPHON—That is right.

Ms Roussel—or prescribed in regulations.

Senator XENOPHON—Sorry, yes. And I want to make it very clear that the very good work that organisations such as Caritas, World Vision and Oxfam do is incredibly valuable.

Ms Roussel—There are some provisions in the law to enable that; I can let Michael Hardy talk about them. There is a balance there—there is a principal purpose: you must spend your principal amount in Australia.

Senator XENOPHON—Would you mind giving the committee further information on that?

Ms Roussel—Sure.

Senator XENOPHON—And also: if an organisation is not there for the purpose of overseas aid but is remitting a fair proportion of its revenue overseas, is that a factor that is taken into account? And what line in the sand do you draw? Again, I am happy for that question to be taken on notice.

Ms Roussel—Yes.

Senator XENOPHON—Thank you for that, Ms Roussel.

ACTING CHAIR—I think we are drawing to a close. Although Senator Cameron has gone, on the subject of Father Lucas: I think he did not quite say 'an organisation which condoned child abuse'. He talked about an organisation in which there might be some individuals who did do that sort of thing. So it was not a systemic feature of the organisation. I think, in fairness, that probably needed to be clarified.

To our current witnesses: thank you for appearing. That has been very useful. With that, we close this inquiry. I thank committee staff, Hansard and the witnesses.

Committee adjourned at 3.37 pm