

## SUBMISSION TO THE SENATE ECONOMICS COMMITTEE, TAX LAWS AMENDMENT (PUBLIC BENEFIT TEST) BILL 2010

BY THE NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

### INTRODUCTION

The University of Melbourne Law School's Not-for-Profit Project is a three-year research project which is funded by the Australian Research Council. This project will be the first comprehensive analysis of the legal definition, regulation, and taxation of not-for-profit organisations, and will include an analysis of the concept of the 'public benefit'. Further information on the project and its members is attached to this submission.

The members of the Not-for-Profit Project consider that there is clearly a need for legislative reform of the definition, regulation and taxation of the not-for-profit sector. However, it is our submission that the Tax Laws Amendment (Public Benefit Test) Bill 2010 is not an appropriate way of achieving such reform, as there are a significant number of issues around the question of public benefit which require consideration in a holistic manner.

We consider that the Committee may be assisted by Dr Matthew Harding's article on the question of public benefit in the law of England and Wales<sup>1</sup> in the context of religious trusts, published in the *Modern Law Review* in 2008.<sup>2</sup> (Senator Xenophon, when introducing the bill, referred to legislation in the United Kingdom as a precedent for this bill.) While the article is attached to the submission, the salient points of that article are extracted below.

### THE CONCEPT OF 'PUBLIC BENEFIT'

It is well-established in the common law that a trust can only be charitable in law if its purposes will benefit the public. However, in relation to trusts falling for the relief of poverty, the advancement of education, or the advancement of religion (the first three 'heads' of charity under the common law test), public benefit is presumed, unless the contrary is proved.

The United Kingdom has changed this common law position in the *Charities Act 2006* by removing the presumption of public benefit, so that all charitable organisations must prove 'public benefit'.

The removal of this presumption, however, should be read in the larger context of the *Charities Act 2006*. That Act also:

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<sup>1</sup> The *Charities Act 2006* (UK) as a whole affects only England and Wales, although certain provisions extend to Scotland and Ireland: s 80.

<sup>2</sup> Matthew Harding, "Trusts for Religious Purposes and the Question of Public Benefit," *Modern Law Review* 71, no. 2 (2008): 159–182.

- defines ‘charity’ for the purposes of the law in England and Wales (s 1);
- provides a statutory list of ‘charitable purposes’ (s 2(2));
- provides for a single regulator, the Charity Commission, for England and Wales (s 6);
- gives to the Charity Commission the objective of promoting ‘awareness and understanding of the operation of the public benefit requirement’, and the function of determining whether institutions are charities (s 7);
- requires the Charity Commission to give guidance on the operation of the public benefit test (s 4);
- requires the registration of charities (s 9); and
- gives the Charity Commission power to issue advice and guidance to charities (s 24).

Unlike the present Bill before the Committee, therefore, the *Charities Act 2006* (UK) is a comprehensive regulatory scheme. Pursuant to its statutory obligations, the Charity Commission of England and Wales has issued both general guidance on public benefit, and supplementary guidance on particular aspects of public benefit, including relevantly the advancement of religion.<sup>3</sup> It has also recently conducted research into charities’ awareness, understanding and attitudes towards the public benefit requirement.<sup>4</sup>

**In contrast, the present bill appears to provide no assistance to the large number of charitable organisations which will be affected by it, and does not address any of the wider regulatory issues which have been raised by charities in the recent review of the sector by the Productivity Commission,<sup>5</sup> or in the Henry Review.<sup>6</sup>**

## PROBLEMS WITH APPLYING PUBLIC BENEFIT

In his article, Dr Harding examines the role of the presumption of public benefit in relation to religious trusts. He concludes that a presumption of public benefit had ‘assisted courts to a considerable degree and in several ways in cases on trusts for religious purposes.’<sup>7</sup> The presumption enabled courts to determine cases where there was little or no evidence of public benefit, or mixed evidence, or where there was evidence weighing against public benefit but insufficient to rebut the presumption.

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<sup>3</sup> See Charity Commission of England and Wales, ‘Charitable purposes and Public Benefit’, <[http://www.charity-commission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/default.aspx#supp](http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx#supp)>.

<sup>4</sup> This research showed that while 41% of the charities that responded to its survey knew a fair amount or a great deal about the public requirement, 35% said they did not know very much and 24% that they knew nothing at all. In the absence of a Charity Commission in Australia with a similar duty to promote awareness, it is likely a higher proportion of Australian charities will be unaware of the implications of this test.

<sup>5</sup> Productivity Commission, *Contribution of the Not-for-Profit Sector*, Research Report, February 11, 2010, <<http://www.pc.gov.au/projects/study/not-for-profit/report>>.

<sup>6</sup> Treasury and Australia's Future Tax System Review Panel, *Australia's Future Tax System—Final Report*, May 2, 2010, <[http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm)>.

<sup>7</sup> Harding, “Trusts for Religious Purposes and the Question of Public Benefit,” 165.

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Dr Harding considered the likely effect of removing the presumption would be for the courts to evaluate the evidence as to whether there was a public benefit.<sup>8</sup> However, in his view, this would create difficulty where the evidence was of an intangible public benefit. It is difficult to provide sufficient evidence that a charity contributes, for example, to 'moral improvement'. In relation to religious trusts, it is especially difficult to assume intangible public benefit in a community characterised by religious diversity. If expert evidence was brought in relation to the intangible public benefit, difficulties would arise. Most importantly, it would be difficult for those who do not share the religious beliefs of the expert to accept the decision, violating the liberal principle that a judge must provide reasons for a decision that must be accepted regardless of differing religious beliefs.<sup>9</sup> **A test of 'public benefit' for religious organisations is therefore likely to prove problematic in the context of a diverse community sharing different religious beliefs.**

It should also be noted that Ireland recently passed a *Charities Act 2009*, which also requires 'public benefit' (s 3(2)). In contrast to the United Kingdom Act, however, this expressly applies the presumption that a gift for the advancement of religion is of public benefit, unless the contrary is proved (s 3(4)). It also provides that the consent of the Attorney-General is required before the Charities Regulatory Authority determines a gift for the advancement of religion is not of public benefit. Finally, it also provides that a gift 'is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult' which either has the principal object of making profit, or which employs 'oppressive psychological manipulation' of its followers, or for the purpose of gaining new followers (s 3(10)). The latter two requirements were introduced during the passage of the bill.<sup>10</sup> **This last requirement appears more specifically addressed to the purpose motivating the underlying bill**, namely the desire to restrict tax exemptions in relation to the Church of Scientology. It should also be noted that it is not clear whether the bill before the Committee will have its intended effect, as this will depend on an evaluation of the evidence of the allegations against the Church of Scientology.

In contrast to the Irish provision, the **scope of the present bill is far-reaching and will affect many organisations other than the Church of Scientology**. It should be noted that these organisations have not been consulted on the extent of the compliance burden that will arise. The bill will also place a burden on the Australian Taxation Office which will, in the continued absence of a regulator for charities, be largely responsible for determining whether a charity meets the test of 'public benefit'.

### ***Not-for-Profit Project***

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<sup>8</sup> Ibid., 166.

<sup>9</sup> Ibid., 168-170.

<sup>10</sup> See Houses of the Oireachtas (Ireland), *Parliamentary Debates*, vol 666, no 1, Dáil Éireann, 5 November 2008, <<http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081105.xml&Page=1&Ex=950#N950>>.

## NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

A group of academics from the University of Melbourne Law School is undertaking the first comprehensive and comparative investigation of the definition, regulation, and taxation of the not-for-profit sector in Australia (the Not-for-Profit Project). The Australian Research Council is funding this project for three years, beginning in 2010. The project aims to identify and analyse opportunities to strengthen the sector and make proposals that seek to maximise the sector's capacity to contribute to the important work of social inclusion and to the economic life of the nation. In particular, the project aims to generate new proposals for the definition, regulation and taxation of the not-for-profit sector that reflect a proper understanding of the distinctions between the sector, government, and business.

The project investigators of the Not-for-Profit Project are:

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Ann is Co-Director of Taxation Studies and teaches taxation and securities regulation at the Law School. She is also Special Counsel at Allens, Arthur Robinson and is a member of the Advisory Panel to the Board of Taxation.

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Miranda is Co-Director of Taxation Studies and teaches tax law and policy at the Law School. She is an International Fellow of the Centre of Business Taxation at Oxford University and is on the Tax Committee of the Law Council of Australia. She has previously worked at New York University School of Law, US and as a solicitor and in the Australian Taxation Office.

### **Dr Matthew Harding**

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Matthew is a senior lecturer at the University of Melbourne. His published work deals with issues in moral philosophy, fiduciary law, equitable property, land title registration, and the law of charity. Matthew has also worked as a solicitor for Arthur Robinson & Hedderwicks (now Allens, Arthur Robinson).

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Joyce is the Research Fellow on the Not-for-Profit Project. She has worked at the Australian Law Reform Commission, the Federal Court of Australia, and the Victorian Court of Appeal.

More information on the project can be found on the website of the [Melbourne Law School Tax Group Not-for-Profit Project](#).

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