Rule of Law Institute of Australia

21 June 2010

Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: economics.sen@aph.gov.au

Dear Secretary

Submission RE Tax Laws Amendment (Public Benefit Test) Bill 2010

On behalf of The Rule of Law Institute of Australia (RoLIA),[1] I write to make a submission on the Committee's reference re the *Tax Laws Amendment (Public Benefit Test) Bill* 2010 introduction of a public benefit test to the *Income Tax Assessment Act* 1997. RoLIA is in no way connected to, nor does it endorse the Church of Scientology.

RoLIA is concerned with two issues relating to the Bill, namely, the lack of clarity in the specified 'public benefit' test, and, secondly, the over-delegation of power as a consequence of the substantive test of 'public benefit' being determined by Treasury.

Rule of Law Institute of Australia

RoLIA is an independent non-profit association formed to uphold the rule of law in Australia. RoLIA was established in September 2009 with the following objectives:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

[1] Formerly The Rule of Law Association of Australia, name changed 9 June 2010.

What does the Bill change

The Bill subjects organisations that wish to be tax exempt as charities to a "Public Benefit Test". It gives the power to the Minister to determine the test and its process. It has been freely stated that it is targeted at removing the tax exempt status of the Church of Scientology.

Currently there is a public benefit test but it is a common law principle, and was recently discussed by Chief Justice French, while he was a judge of the Federal Court, in *Victorian Women Lawyers Association Inc v Commissioner of Taxation* (2008) 170 FCR 318 at [133]:

> "For an association to be characterised as a charitable institution it must exist for a public benefit as distinct from the creation of private benefits. The fourth class of charitable trust in *Pemsel* brings in the public benefit requirement through the words "beneficial to the community". As Kenny J said in *The Triton Foundation:*
>
> ... The public may, however, include a section of the public ..."

The purposes of relief of poverty, the advancement of religion and the advancement of education are presumed to be for the public benefit in trust law. This presumption would likely be excluded from charity law by the new Bill, as a public benefit test in the UK removed the presumption there.

Targeting a specific organisation

While it is stated in the Second Reading speech and Explanatory Memorandum that the test will apply to all organisations, a particular target has been identified, the Church of Scientology. RoLIA is strongly opposed to any law that directly or indirectly is aimed at a particular individual or organisation. It is the first principle under the rule of law that laws must to apply equally to all. The targeting of one particular organisation is abhorrent to the rule of law in Australia and sets a negative precedent for future discriminatory legislation.

The use of legislation to target a specific person or group has not been viewed positively by the High Court of Australia, for example in the cases of *Kable* and the *Communist Party Case*. Indirectly targeting an organisation does not alleviate the unfairness. The fact that a Senator or the Parliament may dislike an individual or a group on valid or otherwise grounds is not a reason to pass legislation targeting that individual or group. Laws must be enacted based solely on principle and debated and considered in a cool-headed manner.

Over-delegation of powers

The separation of powers principle requires the Parliament, not the Executive, to determine the laws. Giving the Minister of the Treasury the power to define the test is a serious over-delegation of power, as the Bill allows the Executive to determine the substantive test with no effective guidance

from the Parliament. RoLIA believes that any test must be comprehensively and substantively enunciated in clear and unambiguous terms in the *Income Tax Assessment Act* 1997. It must be determined by parliament and subject to the same scrutiny and debate as any other law.

Lack of clarity of what will be the 'test'

The text of the Bill gives unspecific and limited guidance to the content of the test that the Minister is to formulate:

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

RoLIA sees a 'public benefit' concept as being difficult to define and implement. Under the rule of law, legislation must be clear, precise and fair, and be able to apply equally to all organisations, despite their varying widely in purpose, size and structure. The Minister has far too much freedom to determine the content and process of the test.

Retrospectivity

With the understanding that the test is intended to remove the Church of Scientology's charitable status, RoLIA is concerned about the implied retrospectivity of this test. The High Court has ruled that Scientology is a religion. It has already been granted charitable status. Other organisations are to be subject to this test that have already been granted charitable status. It is a rule of law principle that retrospective legislation should not be introduced, and there are many organisations that would now be subject to this test. RoLIA is concerned for the smaller charitable institutions which may be burdened by these changes, and who may not have the funds or time to satisfy the regulator that they pass the test. The England/Wales Charity Commission has an income test which charities must exceed before they need to register, removing the burden from small charities. Other charities are exempt from registration, which also seems useful for application in an Australian model.

Is this the same as the English/Wales model?

Many submissions and indeed the explanatory memorandum have referred to the purportedly similar test in England and Wales. Firstly that jurisdiction has a Charity Commission and an independent Charity Tribunal which hears appeals from decisions of the Charity Commission. RoLIA

opposes the introduction of any more regulators in an already over-regulated Australia, although we note the Henry Tax Review has recommended a charity commission.

The England/Wales process is different, with the *Charities Act* 2006 defining a charitable purpose, explicitly, as one that falls within a list of thirteen descriptions of purposes and is for the public benefit. Those thirteen purposes are then expanded further using case law and a 'guidance on the public benefit requirement', which is subject to public consultation before being implemented and must be published in full. The two key principles of public benefit, derived from the common law and set out in the guidance, are:

> "Principle 1: There must be an identifiable benefit or benefits
> Principle 1a It must be clear what the benefits are
> Principle 1b The benefits must be related to the aims
> Principle 1c Benefits must be balanced against any detriment or harm
>
> Principle 2: Benefit must be to the public, or a section of the public
> Principle 2a The beneficiaries must be appropriate to the aims
> Principle 2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:
>
> - by geographical or other restrictions or
> - by ability to pay any fees charged
>
> Principle 2c People in poverty must not be excluded from the opportunity to benefit
> Principle 2d Any private benefits must be incidental."

While these seem similar to the proposed requirements the test takes into account, they are derived from the UK common law. This can hardly be compared to the proposed test; where the executive determines the test without required public consultation and with little help from the legislation and no reference to existing case law. Australia has no statutory definition of "charity" or "charitable purpose" to assist the decision makers, and continues to use the Statute of Elizabeth and the 1891 UK House of Lords decision *Commissioners for Special Purposes of Income Tax v Pemsel.*

RoLIA recommends an adoption of a clear definition of charity, perhaps with content similar to the English/Wales model. The "public benefit test" must be included in statute and RoLIA approves of the English/Wales test being used as a starting point, with public consultation as to its application in the Australian context. RoLIA has noted many Australians have concern with organisations that require money to participate. Implementing English/Wales Principles 2b and 2c in Australia should deal with this issue by specifically making those organisations identifiable as not for the public benefit. It should be made clear in legislation whether the test applies to new organisations or all current organisations using the charity exemption.

Recommendations

For the preceding reasons, RoLIA recommends that the Bill not be passed. We would be happy to assist the Committee in preparing an amendment to reflect our suggestion on the test and the definition of charity.

Finally, we thank the Committee for its scrutiny and examination of this matter. Should you need any further information please contact Ms Lydia Griffits on (02) 9251 8000.

Yours sincerely

Malcolm Stewart
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Rule of Law Association of Australia