
**SENATE INQUIRY INTO CHARITIES AND
PUBLIC BENEFIT**

AN INQUIRY ARISING FROM

TAX LAWS AMENDMENT (PUBLIC BENEFIT TEST)
BILL 2010

**Addendum to submission No.1 being a discussion of
the High Court decision of
*The Church of the New Faith v The Commissioner of
Pay-Roll Tax (Victoria)***

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Executive Summary

Early in the inquiry process (on 25 May 2010) I provided a Submission in general terms to this Inquiry in an endeavour to assist in identifying and scoping issues. The submission set out a number of issues around which that debate might focus. Consequent upon that debate I have been encouraged to set out my views on the way that the High Court decision of *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* might be read as compatible with a review of the income tax exempt status of Scientology organisations in Australia. This Addendum sets out that argument.

In the substance of this Addendum I review the judgments in that case concluding that the High Court left open the possibility that 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.

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Background to the Proposed Legislation

It is clear from the Explanatory Memorandum to the Tax Laws Amendment (Public Benefit Test) Bill 2010 that concerns regarding Scientologist being involved in illegal and immoral conduct are significant factors in the bringing forward of the proposed legislation. The Explanatory memorandum suggests 'members of the Church of Scientology' have been involved in 'coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few' offences. In Submission No. 1 to this Inquiry I suggested that the law as it presently stands could be applied to deny organisations that pursue such purposes under the cloak of religion tax exempt status either as a religious institution or as a charity. In this Addendum Submission the High Court decision of *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* is discussed. All citations are from the Commonwealth Law Reports publication [1982-1983] 154 CLR 120 with page numbers cited from that report.

Introducing the decision and its implications

The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria) is a High Court case that was decided in October 1983. In that case the High Court unanimously held that the scientology is a religion. Given this High Court decision it might seem that it is not open to the Australian Taxation Office to now question the right of Scientology organisations to exemption from tax status either as a religious institution or as a charity. In fact the contrary is arguable from the case. The reasons for judgment make it clear that the decision is limited to the particular facts before the court and the limited issues that the parties chose to litigate. The reasons

make it clear that the fact that Scientology is a religion does not make any particular *organisation* purporting to pursue the religion of Scientology a religious organisation. The court affirmed the common law position I stated in the original submission holding that ‘canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion’. Further the reasons make it clear that it was important to the decision reached that ‘the Commissioner [of Pay-roll Tax who was the respondent in the action] disclaimed any reliance upon the proposition, ...that the applicant's claims to be a religious institution were based on illegal purposes and activities upon which it could not be permitted to rely to establish entitlement to the claimed exemption from pay-roll tax’. The High Court expressly left open the possibility that Scientology organisations might be denied religious institution status on the basis that the organisation itself was not pursuing a religious object. In the sections that follow first the judgement of Acting Chief Justice Mason and Justice Brennan is discussed the judgment of Justices Wilson and Deane. Some comment in relation to Justice Murphy’s judgment is made before two final observations close this Addendum Submission.

The joint judgment of Acting Chief Justice Mason and Justice Brennan

Acting Chief Justice Mason and Justice Brennan began by observing that the Commissioner of Pay-Roll Tax ‘conceded’ the factors that were relevant to the ‘character of the corporation’. They held at pages 128-129 that:

The case has been fought throughout as though the answer to the question, "Is Scientology a religion?", furnishes the answer to the question whether the corporation was, during the relevant period, a religious institution. That basis has been adhered to in the argument before this Court, and it ought not to be departed from in determining this application. That is not to say that the basis adopted by the parties raised the relevant question for decision. It does not follow that the common religion of a group stamps a religious character on an institution founded, maintained or staffed by members of that group or that the purpose or activity of such an institution is religious. The basis adopted by the parties in fighting this case has concealed the factors which are relevant to the character of the corporation, namely, the purpose for which the corporation was formed and is maintained and the activities of the corporation. The question whether those factors are religious in nature has not been judicially considered.

Thus special leave is applied for in order to argue on appeal the question chosen by the parties as the issue: Is Scientology a religion?

The question now raised arguably goes to the very issue not decided but rather conceded for the purpose of the appeal, namely whether the particular *organisations* were in fact pursuing religious purposes or where in fact religious institutions. The joint judgment continues at 136 to affirm:

Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the

concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

If the High Court has held that, 'canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion' and the purposes pursued by the scientology organisations in question include 'coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few' then arguably this decision is not a decision that can be relied upon to protect such Scientology organisations but rather one which could be used as a basis for denial of tax exempt status.

Underscoring the importance of the limited evidence – in particular that there was not before the court evidence of illegality or immorality by Scientology organisations but rather sincerity – this joint judgment continues at 147:

However, the motivation of the corporation in promoting auditing and the other aspects of Scientology has not been litigated, and it is material to determine whether

the general group of adherents engage in auditing in order to give effect to their supernatural beliefs. Mrs. Allen's evidence is that auditing is used to help a person shed the things that are stopping him from being as happy and as good as he wishes to be, ...

And at 148

We think an inference should be drawn -- though the material to support it is not compelling -- that the general group of adherents practice auditing and accept the other practices and observances of Scientology because, in doing what Mr. Hubbard bids or advises them to do, they perceive themselves to be giving effect to their supernatural beliefs. The commercial motivation to follow Mr. Hubbard's advice is clear, but the evidence does not permit the conclusion that a desire to give effect to supernatural beliefs is not a substantial motive for accepting the practices and observances contained in his writings.

The Commissioner did not seek to show that auditing is unlawful according to the ordinary law. There was no attempt made to prove that auditing involved a contravention of the ordinary law save for a suggestion, which Mrs. Allen rebutted, that false representations had been made as to the physical cures worked by auditing.

It follows that, whatever be the intentions of Mr. Hubbard and whatever be the motivation of the corporation, the state of the evidence in this case requires a finding that the general group of adherents have a religion. The question whether their beliefs, practices and observances are a religion must, in the state of that evidence, be answered affirmatively. That answer, according to the conventional basis adopted by the parties in fighting the case, must lead to a judgment for the corporation.

These passages from this Joint judgment make it clear that all that the court was deciding was whether or not Scientology was a religion. This joint judgment makes patent that just because scientology is a religion that does not make any particular organisation a religious organisation. That is a separate question. Further, whether or not an organisation is a religious organisation must be determined having regard to the purposes it pursues. If those purposes are illegal or immoral then the organisation is not a religious organisation – even if Scientology itself is a religion. The same conclusion is open from the joint judgment of Justices Wilson and Deane to which I turn next.

The joint judgment of Justices Wilson and Deane

The same significant distinctions and limitations are made, in the joint judgment of Justices Wilson and Deane as in the judgment of the Acting Chief Justice and Justice Brennan. Justices Wilson and Deane held at 165:

Senior counsel for the Commissioner expressly conceded, for the purposes of the appeal, that, if Scientology is properly to be seen as a religion in Victoria, the applicant was, for relevant purposes, a "religious institution". The appeal was argued by both sides on the basis that the only real issue is whether Scientology is, for relevant purposes, a religion in Victoria. With some hesitation, we shall approach the matter on that basis. In so doing however, we should not be understood as indicating a concluded view that that basis is necessarily a completely sound one. In that regard, it is not apparent to us that it is clear beyond argument either that the reference to an "institution", in the context of s. 10(b), should not be construed as a reference to a particular establishment as distinct from the body of members, whether incorporated or unincorporated, of a particular religion or that the adjective "religious"

in the phrase "religious institution" postulates an association between the relevant institution and what can be identified as a particular religion.

In relation to the absence of any challenge to the character of the organisations in question Justices Wilson and Deane made a similar observation to Acting Chief Justice Mason and Justice Brennan that there was not evidence upon which they could rely to disqualify the organisation in question. They held at page 171:

Once it is accepted that the applicant is an Australian organisation of members who believe and follow the teachings and practices of Scientology as set forth in the current literature, it is not critical to the outcome of the present appeal that the members of the applicant in Victoria may be gullible or misguided or, indeed, that they may be or have been deliberately misled or exploited. That is not to deny that there are cases where what is put forward as being a religion cannot properly be so characterized for the reason that it is, in truth, no more than a parody of religion or a sham: the claimed religion of "Chief Boo Hoo" and the "*Boo Hoos*" in *United States v. Kuch* ... provides an obvious example of such a parody. Nor is it to deny that there may be cases in which the fraud or hypocrisy of the founder and leader of a particular system of claimed beliefs and practices constitutes the straw that weighs the balance against characterization as a religion. It involves no more than the conclusion that in the present case, where one has an organisation consisting of thousands of Australians who genuinely believe and follow the current writings and practices of Scientology, the question whether Scientology is a religion in Victoria falls to be answered by reference to the content and nature of those writings and practices and to the part Scientology plays in the lives of its adherents in Victoria rather than by reference to matters such as the gullibility of those adherents or the motives of those responsible for the content of current writings and the form of current practices. As we have noted, the approach of counsel for the Commissioner substantially follows this

approach to the problem. The thrust of his submission is directed to establishing that those writings and practices viewed in their entirety fall short of constituting a religion.

In this joint judgement also, then, the judges make it clear that there are a class of organisations where 'what is put forward as being a religion cannot properly be so characterized'. In this case, though, 'the content and nature of those writings and practices' fell short of that exclusion on the evidence before the Court.

Justices Wilson and Deane close their joint judgement reiterating the point that the Commissioner of Pay-Roll Tax had abandoned reliance upon any argument regarding pursuit of illegal purposes. At 176 continuing 177 the joint judgement reads:

It should be mentioned that the Commissioner disclaimed any reliance upon the proposition, which found favour with Brooking J. in the Full Supreme Court, that the applicant's claims to be a religious institution were based on illegal purposes and activities upon which it could not be permitted to rely to establish entitlement to the claimed exemption from pay-roll tax. ... In the circumstances, it would seem preferable that we refrain from expressing any view in relation to it.

In this joint judgment also, then, the judges seem to have been at pains to point out that the only question before the court was whether Scientology was a religion. Justices Wilson and Deane make the point that not all that purports to be religion is religion. The pursuit of illegal purposes and shams is excluded from the class of religious organisations. Further they make it clear that they were not asked to consider that particular issue in the context of any particular Scientology organisation. The question whether any particular Scientology organisation is entitled to recognition as a charity or a religious organisation is then open for consideration by an Australian court. As was mentioned in the original submission when this

broader question was considered in the England and Wales the Charities Commission there found that the particular organisation was neither a charity nor a religious organisation.

The judgment of Justice Murphy

Justice Murphy was the fifth member of the court and he wrote a separate judgement that did not mention the issues raised above.

Concluding comments

The conclusion that seems at least arguable from this case, is that if the conduct of an organisation, including an organisation purporting to be pursuing the advancement of Scientology or purporting to be a Scientology religious organisation, 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 also mention for completeness two other matters. First, an organisation does not cease to be a charity or a religious organisation merely because it breaks the law in some regard. The *purposes pursued* must be illegal or immoral. It is beyond the scope of this Addendum to discuss this issue but it is appropriate to mention this in this conclusion. Second, I have no way of knowing whether or not the Scientology organisations in question have or have not pursued the illegal or immoral purposes that the Explanatory Memorandum alleges. This analysis is simply intended to show how the concern that organisations that are pursuing illegal or immoral purposes,

even if Scientology organisations, are not protected from loss of status as a religious or charitable organisation by the High Court decision of *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)*. The judgments in that case point, I suggest, in the opposite direction.

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