# The danger of making a rule from an exception

## Submission in response the currently proposed Public Benefit Test for Charities

### *Tax Laws Amendment (Public Benefit Test) Bill 2010 (the "Bill")*

This is a submission in response to the Bill proposed by Senator Nick Xenophon.

We make this submission as lawyers who advise not for profit and charitable bodies on a daily basis about operations, including whether they are charities, in the Australian legal system.

### Stated Purpose of the Bill

The Explanatory Memorandum of the Bill states its purpose as follows:

"The purpose of this Bill is to insert a public benefit test into the *Income Tax Assessment Act 1997* which will require religious and charitable institutions seeking tax exemption to demonstrate public benefit through its aims and activities.

This Bill follows allegations from former members of the Church of Scientology about coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few.

Given this, the tax exempt status of the Church of Scientology should be subject to a Public Benefit Test as to whether or not it is appropriate that it is afforded taxpayer support.

Similarly, any and all organisations which receive tax exempt status should be subject to this test."

### An exception not a rule

We submit that - a rule for *all* should never be made out of an exception of *one*. The exception should be dealt with, yes, but as an exception.

### The meaning of *charity* in Australia

The meaning of Charity in Australia has consistently been affirmed by our courts as deriving from the Statute of Elizabeth[i] and the decision of the Privy Council in *Commissioners for Special Purposes of the Income Tax v Pemsel* [ii]. The majority of the High Court affirmed this in 2008 in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd.*[iii]

Pemsel's case and Word Investments are authority for the summary proposition that –

A public not for profit body will be charitable in Australia if its main purpose and activities are for:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community.

We submit that the existing, robustly tested, current meaning of charity in Australia, as consistently applied and clarified through the courts, in response often to unique and exceptional circumstances, should be the test that remains.

Alternatively, if settled judicial authority is to be disturbed, legislative intervention of general application should only be after considered broad ranging consideration and debate. A response time of just over one month for submissions, with proposed application less than two months later is inappropriate.

**"Public benefit" is already required**

We submit that the requirement for a body to be for the *public benefit* is already a well settled implied part of the meaning of charity.

The Bill suggests that the *relief of poverty, the advancement of religion or the advancement of education* can no longer be assumed to be for the public benefit. This is a major philosophical change from pillars of public understanding that have long existed in Australia. Again if this is to be disturbed a broad ranging considered public debate must be had.

The meaning of *relief of poverty, the advancement of religion or the advancement of education* have also been considered and determined by the courts over the years and those decisions mean that not every organisation that says its exists for those purposes will be ultimately be considered to be so.

**Existing facility to remove charitable endorsement**

Endorsement as a *Tax Concession Charity* under the *Income Tax Assessment Act 1997* is at the discretion of the ATO and it has the power to review or audit endorsements at any time. It is already engaged in an active program of such reviews.

Endorsement as a charity requires that both the main purposes **and** activities of the organisation are charitable.

If significant detrimental activities are occurring the endorsement may be revoked based on the activities test. This revocation can be disputed through the courts and then it is up to courts to robustly examine the purposes and activities of the organisation to determine whether they are charitable.

The ATO, Tribunals and Courts take public policy considerations into account in making their decisions.

**Broader implications need to be considered**

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

Urgent broad brush changes often prove to be very expensive in the fixes required later.

**Key legislative meaning should not be delegated to regulation**

Finally we submit that if a legislative test for public benefit is to be adopted then the test should be set out in the legislation and not delegated to the regulation maker, the Treasury Department, which is not subjected the same robust debate as that which occurs in our houses of parliament.

Sincerely

**Graham Corney, Andrew Lind and Alistair Macpherson**
Partners - Corney & Lind Lawyers | http://www.corneyandlind.com.au | 27 May 2010

Additional commentary and background:

Andrew Lind recently presented another relevant recent paper to the annual CPA Not for Profit conference. A copy of that paper can be viewed on our Legal Resource Centre on our web site:

Not for Profit - Tax Endorsements, Audit, Reporting and Compliance Guidance
(http://www.corneyandlind.com.au/resource-centre/not-for-profit/keeping_tax_endorsements)

[i] 43 Eliz I c 4 (*Charitable Uses Act* 1601).
[ii] [1891] UKHL 1; [1891] AC 531 at 581-582
[iii] [2008] HCA 55 at para. 78