

Chapter 1

Inquiry into Tax Laws Amendment (Public Benefit Test) Bill 2010

The referral

1.1 On 13 May 2010, the Tax Laws Amendment (Public Benefit Test) Bill 2010 was introduced into the Senate as a private member's bill. Following its second reading, debate was adjourned. On the advice of the Selection of Bills Committee, the Senate later resolved that the bill be referred to the Senate Economics Legislation Committee for immediate inquiry and report by 31 August 2010. The announcement of the federal election led the Committee to present an interim report requesting an extension in the reporting date to 7 September 2010.

Background

The bill

1.2 On introducing the bill, Senator Xenophon stated:

This bill seeks to introduce a public benefit test for religious and charitable organisations seeking tax exempt status. What this bill proposes is nothing new. In the United Kingdom a public benefit test exists to make sure that organisations receiving support from the public through tax exemptions do more good than harm.¹

1.3 The bill seeks to make these changes by amending the existing provisions that relate to income tax exempt entities to introduce a public benefit test against which the aims and activities of an entity seeking tax exempt status would be assessed.²

1.4 The bill proposes that the test would be set out in regulations and would be required to include the following key principles:

- there must be an identifiable benefit arising from the aims and activities of an entity;
- the benefit must be balanced against any detriment or harm; and
- 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.³

1 Senator Nick Xenophon, Second Reading Speech, *Senate Hansard*, 13 May 2010, p. 3.

2 Tax Laws Amendment (Public Benefit Test) Bill 2010, proposed subsection 50-51(1), lines 8-10, p. 3.

3 Tax Laws Amendment (Public Benefit Test) Bill 2010, proposed subsection 50-51(2), lines 11-17, p. 3.

1.5 The bill also provides that the test, to be set out in regulations, may also contain provisions that relate to the manner in which it is applied, to the aims and activities of an entity, as well as ancillary and incidental provisions.⁴

1.6 If passed, the bill will commence on the day after it receives Royal Assent and will apply in relation to income years that commence on or after 1 July 2010.

Scrutiny of Bills Report

1.7 The Senate Standing Committee for the Scrutiny of Bills provided comment on the bill in their *Alert Digest No. 7* of 2010 published on 23 June 2010.

1.8 The Scrutiny of Bills Committee noted that the proposed application of a test did not raise concerns under their terms of reference nor conflict with the limits imposed on the Commonwealth in respect of religion by section 116.⁵

Constitutional issues

1.9 Some constitutional objections were raised to the bill, and to the Committee's consideration of it. Specifically it was suggested that the bill;

- imposes taxation and is therefore contrary to sections 53 and 55 of the Constitution;
- when read with the Explanatory Memorandum is in breach of section 116 of the Constitution and amounts to group libel and should be referred to the Senate Privileges Committee; and
- is in breach of the rule of law and is an undesirable use of Parliament's powers to delegate in the form of regulations.⁶

Section 53⁷

1.10 The Committee notes Ms McBride's assertion that:

...the Bill is a bill that imposes taxation and is therefore subject to the limits imposed by s53 and 55.⁸

4 Tax Laws Amendment (Public Benefit Test) Bill 2010, proposed subsection 50-51(3), lines 18-23, p. 3.

5 Scrutiny of Bills Committee, *Alert Digest*, No. 7 of 2010, 23 June 2010, p. 12.

6 Ms Louise McBride, *Submission 66*, Attachment 1; *Proof Committee Hansard*, 28 June 2010. Similar objections were raised by Mr James Graham, *Submission 78*, and the Western Australian branch of the International Commission of Jurists, *Submission 85*, and Rev. Mary Anderson, *Submission 49*.

7 Section 53 of the Constitution states: 'Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate...'

8 Ms Louise McBride, *Submission 66*, Attachment 1, p. 1.

1.11 The Committee obtained advice from the Clerk of the Senate, Dr Rosemary Laing, who drew the Committee's attention to the understanding that the operation of section 53 is for the Parliament to determine. It does not deal with matters that can be adjudicated by a court because it refers explicitly to proposed laws.⁹ Section 53 is an administrative provision.

1.12 Further, the notion of 'imposing taxation' in section 53 while not justiciable has been subject to discussion by the High Court. In *Re Dymond* Taylor J asserted that:

...to me it seems clear that a law may deal with the imposition of taxation and yet not, itself directly impose taxation.¹⁰

1.13 The Clerk suggested strongly that an exemption is a privilege, not a right. The bill proposes a test that must be passed in order to qualify for an exemption from taxation. Imposition of the tax is located elsewhere in the *Income Tax Assessment Act 1997*. The liability to pay tax already exists. This bill affects the administration of exemptions, without removing the exemption of a class of taxpayers.¹¹

*Section 55*¹²

1.14 The Committee notes Ms McBride's reference to section 55 of the Constitution at the public hearing, her questioning of whether the legislature had consulted the executive regarding the inquiry process, and her broad reference to a non-existent 'constitutional bills committee'.¹³

1.15 The bill was reviewed by the Selection of Bills Committee and referred accordingly in line with standard Senate procedure. It was also reviewed by the Scrutiny of Bills Committee. No concerns were raised regarding possible violations of section 55 (or 53) of the Constitution.

*Section 116*¹⁴

1.16 The Committee received both written and verbal evidence from witnesses broadly accusing the bill of violating section 116 of the Constitution and suggesting

9 *Permanent Trustee Australia v Commissioner of State Revenue (Victoria)*, 2004, 220 CLR 388, pp 408-410.

10 *Re Dymond*, 1983, 101 CLR 23.

11 Laing, R, *Advice: Tax Laws Amendment (Public Benefit Test) Bill 2010*, p.4.

12 Section 55 of the Constitution states 'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect...'

13 Ms Louise McBride, *Committee Hansard*, 28 June 2010, p. 49.

14 Section 116 of the Constitution states 'The Commonwealth shall not make any law for establishing any religion...or prohibiting the free exercise of any religion...'

that it introduces discrimination contrary to the High Court's decision in the 1983 case of *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*.¹⁵

1.17 The contrary view was put to the Committee, particularly by witnesses such as Mr Andrew Lind:

Does freedom of religion mean freedom from tax? Do the words in section 116 of the Constitution, free exercise of any religion, mean freedom from income and other taxes? It is strongly arguable, in my view, that freedom of religion does not mean freedom from tax.¹⁶

1.18 This view was also held by Dr Stephen Mutch who suggested that definitions of religions and charities aside, the state should be able to determine which activities of charities or religions it subsidises.¹⁷

Inappropriate delegation of legislative power

1.19 Although the bill amends the tax law to introduce a public benefit test, the bill itself does not define the test; it provides that the Minister determine the test and that it then be set out in regulations. This aspect of the bill was criticised throughout the inquiry.¹⁸

1.20 The Rule of Law Institute of Australia (RoLIA) suggested that delegating the test to regulations is an over-delegation of powers and brought the following concerns to the attention of the Committee.

The separation of powers principle requires the Parliament, not the Executive, to determine the laws...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...It must be determined by parliament and subject to the same scrutiny and debate as any other law.¹⁹

1.21 It was suggested that if the bill were to pass it would be preferable that the test be set out in the text of the legislation.²⁰

15 Ms Louise McBride, *Submission 66*, Attachment 1, p. 2.

16 Mr Andrew Lind, Partner, Corney & Lind, *Committee Hansard*, 28 June 2010, p. 35.

17 Dr Stephen Mutch, *Committee Hansard*, 28 June 2010, p. 7.

18 Examples include Anglican Church Diocese of Sydney, *Submission 10*; Mr Tom Grimshaw, *Submission 52*; and DF Mortimer and Associates, *Submission 73*.

19 Rule of Law Institute of Australia, *Submission 75*, p. 3.

20 This point was made in a number of submissions including those received from Corney & Lind, *Submission 2*, p. 2, Mr Paul Paxton-Hall, *Submission 62*, p. 2, and Family Voice, *Submission 22*, p. 4.

1.22 The bill's delegation of the test making power to regulations also caught the attention of the Scrutiny of Bills Committee²¹ which, in *Alert Digest* No. 7 of 2010, noted their preference that important matters are set out in primary legislation to increase the level of parliamentary scrutiny.²² They also advised that, if the bill proceeds to further stages of debate, they would like Senator Xenophon to explain whether the test could be described in the primary legislation or why it is not possible to do so noting that as the provisions currently stand, they may be considered to delegate legislative powers inappropriately.²³

Committee view

1.23 The Committee is satisfied that there are no constitutional problems with the bill. The Committee is comfortable that the concerns raised throughout the inquiry have no basis.

The National Compact

1.24 During 2008 and 2009 the Government undertook widespread consultation with the not-for-profit sector to develop a National Compact between itself and the Third Sector. The Compact that was developed provides a framework for the Government and not-for-profit sector to work together to address the many issues facing Australian society.²⁴

1.25 In identifying guiding principles for action and the areas requiring attention, the Consultation Report highlighted the role that tax treatment plays in the sector:

Another important area identified for ensuring Sector sustainability was the recognition of donations and tax arrangements for Sector organisations.²⁵

21 The role of this committee is to scrutinise the clauses of bills introduced into the Senate and advise whether a bill, among other things, inappropriately delegates legislative power.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No. 7 of 2010, 23 June 2010, p. 11.

23 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest* No. 7 of 2010, 23 June 2010, p. 12.

24 Department of Families, Housing, Community Services and Indigenous Affairs, *A new relationship between the Australian Government and the Third Sector—National Compact between the Australian Government and the Third Sector*, February 2010.

25 Department of Families, Housing, Community Services and Indigenous Affairs, *A new relationship between the Australian Government and the Third Sector—National Compact between the Australian Government and the Third Sector*, February 2010, p. 8.

Conduct of the inquiry

1.26 The Committee advertised the inquiry in the national press and invited written submissions by 18 June 2010. Details of the inquiry were published on the Committee's website. The Committee also wrote to a number of organisations and stakeholders inviting submissions.

1.27 The Committee accepted 89 of the submissions (including a 'form letter' from 24 parties) it received. Submissions were received from a range of church groups, other charitable organisations, interest groups, and interested individuals. Of the submissions received, 11 were treated as confidential, and 17 were made by submitters who requested that their names be withheld. A lot of interest was also received from overseas parties but most of those were treated as correspondence as they did not address the terms of reference. A list of the submissions accepted appears in Appendix 1.

1.28 The Committee held two public hearings in Canberra on 28 and 29 June 2010. The witnesses who appeared before the Committee are listed in Appendix 2.

1.29 The Committee wishes to thank all those who submitted to and participated in the inquiry.

Structure of the report

1.30 This report comprises four chapters:

- Chapter 2 provides an overview of the not-for-profit sector in Australia and examines the reviews that have taken place over the last 10 years.
- Chapter 3 discusses the nature of charities and the meaning of 'public benefit'. It also examines the taxation arrangements that currently apply to not-for-profit organisations.
- Drawing on the evidence presented in earlier chapters, Chapter 4 identifies and discusses advancing reform through the establishment of an independent commission for the sector.