

The Senate

Economics
Legislation Committee

Tax Laws Amendment (Public Benefit Test)
Bill 2010

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Senate Economics Legislation Committee

Members

Senator Annette Hurley, Chair	South Australia, ALP
Senator Alan Eggleston, Deputy Chair	Western Australia, LP
Senator David Bushby	Tasmania, LP
Senator Doug Cameron	New South Wales, ALP
Senator Louise Pratt	Western Australia, ALP
Senator Nick Xenophon	South Australia, IND

Participating Members participating in this inquiry

Senator Mary Jo Fisher	South Australia, LP
Senator the Hon Ursula Stephens	New South Wales, ALP

Secretariat

Mr John Hawkins, Secretary
Ms Sandra Kennedy, Principal Research Officer
Mr Joshua See, Executive Assistant/Research Officer
Ms Hanako Jones, Executive Assistant

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

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Glossary

ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ATO	Australian Taxation Office
COAG	Council of Australian Governments
Competitive Neutrality	The principle that promotes the equal treatment by government of competing organisations to achieve a level playing field by removing artificial advantages.
Cult	A religious or pseudo-religious movement, characterised by the extreme devotion of its members, who usually form a relatively small, tightly controlled group under an authoritarian and charismatic leader. (Source: Macquarie Dictionary)
DGR	Deductible gift recipient
FBT	Fringe benefits tax
GDP	Gross domestic product — an estimate of the total value of goods and services produced in a country in a specified time, usually a year.
GST	Goods and services tax
ITAA	Income Tax Assessment Act
National Compact	An agreement between Government and the Third Sector to provide a framework for working together. The Compact includes principles for action and identifies area requiring reform.
NFP	Not-for-Profit
Ordinary income	Ordinary income is income earned according to ordinary concepts directly or indirectly from all sources in or out of Australia during a financial year.
Public benevolent	A public benevolent institution is a non-profit institution organised for the direct relief of such

institutions poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community.

RoLIA Rule of Law Institute of Australia

Statutory income Statutory income is income that is not ordinary income but is included in your assessable income by legislative provisions.

Third sector Third Sector organisations include charities, churches and religious organisations; sporting organisations and clubs; advocacy groups; community organisations; cooperatives; trade unions; trade and professional associations; chambers of commerce; welfare organisations; and service providers. These organisations sit alongside the government and private sectors. They may receive government funding to provide public services, but are not part of government. Similarly, they may charge for business services, but are not part of the business sector.

Source: Senate Economics Committee, *Disclosure regimes for charities and not-for-profit organisations*, December 2008, p. 11.

Summary and recommendations

Religions and charities, and other not-for-profit organisations in the 'third sector',¹ play an important role in the community and in the economy. They receive significant tax concessions. It is therefore important that they are transparent and appropriately accountable. The bill before the Committee goes some way to address this requirement and promote confidence that religious and charitable organisations receiving tax concessions generate a net benefit to the public, not just to their own members. The Committee views the bill, however, as too narrow to respond to the broad range of issues identified by the Committee.

The Committee regards 'charities' as altruistic bodies which seek to help members of the community in need. The role of charities is to mobilise their members and supporters to help *others*, not to just act in their members' private interests. Their motives mean that all true charities are not-for-profit organisations (but not all not-for-profit organisations are charities). Charities provide some social and community services that governments cannot provide at all or cannot provide as effectively. The Committee agrees with the view that the work of charities therefore reduces the burden on taxpayers of providing social services.

A national commission

The Committee notes the previous inquiries conducted by parliamentary committees, the Productivity Commission and the recent Henry Review. Notwithstanding their work, there remains a serious lack of information in relation to the not-for-profit sector; for example, estimates of the value of tax concessions range from \$1 billion to \$8 billion.

The earlier inquiries all recommended various changes to the regulatory oversight of the not-for-profit sector. The Committee believes the incoming government should increase transparency and accountability in the sector. A national commission, which incorporates a public benefit test in the broader regulatory framework, should be established, consistent with international best practice.

The commission should not be regarded as an additional bureaucratic impost; it would rather replace a complex array of state and territory regulatory bodies, streamlining processes for charities and reducing their compliance costs. It would increase public confidence in charities by improving their transparency as well as being a source of advice and assistance to charities.

The Committee agrees with the view expressed to it that there comes a time when a government has to make a decision either to do something or to stop saying that it is

1 The 'third sector' refers to organisations that are neither part of the private sector nor the government sector.

going to do something, because the matter has been on the agenda for many years. It is now time for action.

Recommendation

The Committee recommends that the incoming government work through COAG to establish a single independent national commission for not-for-profit organisations. The incoming government should establish a working group, or use the COAG Business Regulation and Competition Working Group. The working group should consult extensively with the sector in a timely manner to address issues arising from the establishment of a commission which applies a public benefit test. The Australian model should draw on the Charity Commissions in the United Kingdom and New Zealand.

Recommendation

The Committee recommends that the working group consider the functions and role of an Australian commission which should include, but not be limited to, the following:

- **promote public trust and confidence in the charitable sector;**
- **encourage and promote the effective use of charitable resources;**
- **develop and maintain a register of all not-for-profit organisations in Australia using a unique identifying number (for example an ABN) as the identifier;**
- **develop and maintain an accessible, searchable public interface;**
- **undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis;**
- **educate and assist charities in relation to matters of good governance and management;**
- **facilitate, consider and process applications for registration as charitable entities;**
- **process annual returns submitted by charitable entities;**
- **supply information and documents in appropriate circumstances for the purposes of the Tax Acts;**
- **monitor charitable entities and their activities to ensure that registered entities continue to be qualified;**
- **inquire into charitable entities and persons engaging in serious wrongdoing in connection with a charitable entity;**
- **monitor and promote compliance with legislation;**

- **consider, report and make recommendations in relation to any matter relating to charities; and**
- **stimulate and promote research into any matter relating to charities.**

The Committee would expect a commission to adopt a tiered reporting system to ensure that small not-for-profit organisations are not overburdened by the costs of compliance.

The Committee would expect legislation establishing a commission to be referred to it in due course.

A public benefit test

The Committee supports the application of a public benefit test in the context of broader reform.

The Committee agrees, however, with the preference expressed by the Scrutiny of Bills Committee that it would be better for a public benefit test to be in legislation, where it would be subject to more parliamentary scrutiny, than be set by a minister through regulations, as proposed by the bill.

Recommendation

The Committee recommends that the incoming government should follow the emerging international best practice and work with the Council of Australian Governments to amend legislation governing not-for-profit entities to include a definition and test of 'public benefit'.

Cults

In relation to the activities of cult like organisations and the consequences for individuals and society of failing to take steps to protect the community from unacceptable behaviour by cult like organisations, the Committee believes that sufficient evidence was put before it to suggest that the behaviour of cults should be reviewed with a view to developing and implementing a policy on this issue that goes beyond taxation law. The Committee notes the evidence in relation to the response of the French government and the establishment of Miviludes.

Recommendation

The Committee recommends that the Attorney-General's Department provide a report to the Committee on the operation of Miviludes and other law enforcement agencies overseas tasked with monitoring and controlling the unacceptable and/or illegal activities of cult-like organisations who use psychological pressure and breaches of general and industrial law to maintain control over individuals. The report should advise on the effectiveness of

Miviludes and other similar organisations, given issues that need to be addressed to develop an international best practice approach for dealing with cult-like behaviour.

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.

Chapter 2

Australia's not-for-profit sector and recent reviews

2.1 This chapter presents an overview of the not-for-profit sector in Australia and recent reviews of it. While these reviews have provided useful insights, quantifying the sector remains difficult.

The estimated size of the sector and the value of tax concessions

2.2 Little is known about the size of the not-for-profit sector in Australia. A survey of not-for-profit organisations published by the Australian Bureau of Statistics (ABS) in 2009 was the first time it had surveyed this sector of the economy (Table 2.1).

Table 2.1: Statistics on selected not-for-profit organisations: June 2007

	Number of organisations (thousands)	Employees (thousands)	Volunteers (thousands)	Income (billions)	of which: donations etc ^a (billions)	Expenses (billions)
Religion	8.8	41	470	4	1.4	3
Philanthropic etc ^b	7.3	110	361	11	3.2	10
Culture & recreation	8.3	103	576	13	1.2	12
Education & research	5.7	218	204	16	d	15
Hospitals	0.1	56	7	5	d	5
Health	0.8	100	62	6	d	5
Social services	5.8	222	255	12	d	10
Unions & associations ^c	2.0	22	56	4	d	4
Other	2.2	18	193	6	d	6
Total	41.0	890	2182	76	7.2	70

a. Donations, sponsorship and fundraising. b. Environment, development, housing, employment, law, philanthropic, international. c. Business and professional associations and unions. d. Not separately identified.

Source: Secretariat, based on data from ABS, *Not-for-profit Organisations, Australia, 2006-07*, Cat. No. 8106.0, 12 June 2009.

2.3 The ABS collected data from almost 60,000 not-for-profit entities in a national accounting exercise which found that the sector had income of \$77 billion and added more than \$40 billion (over 4 per cent) to annual 'value' or GDP in 2006-07. Within this, religions were identified as having income of over \$3 billion, but 'charities' were not separately identified.¹

2.4 In the 2009 *Tax Expenditures Statement*, the value of the revenue forgone through the income tax exemption for religious, scientific, charitable or public educational institutions and funds (expenditure item B23) was stated as 'unquantifiable'.² Treasury put the order of magnitude as over \$1 billion a year,³ one of the largest of the unquantifiable expenditures.⁴

2.5 The Productivity Commission commented:

...the value of tax concessions given to the NFP sector and donors of deductible gifts is estimated to be at least \$4 billion in 2008-09 for those concessions which have been quantified. However, there are a number of significant concessions in all jurisdictions that have not been quantified which, if included, could feasibly double the \$4 billion estimate.⁵

Committee view

2.6 The Committee considers that where a public policy decision has been made to direct public funding to a particular sector of the community, in all cases, the government should periodically review those decisions to ensure that the policy aims being supported are in fact being realised through ongoing and considered debate of issues including what is taxed and what is not and the broader question of how government should support different sectors of the economy:

- through grants and one-off payments that require parliamentary consideration; or
- through the tax system which although not enabling the Government to control the amount of funding received allows the community to have a more direct involvement in the decision making process by choosing to whom they will lend their financial support.

2.7 The Committee is of the view that government should be able to clearly identify where funds are being directed and the quantity of those funds in the not-for-profit sector.

1 ABS, *Australian National Accounts: Non-profit Institutions Satellite Account*, Cat. No. 5256.0, 18 September 2009.

2 Treasury, *2009 Tax Expenditures Statement*, January 2010, p. 74.

3 Treasury, *2009 Tax Expenditures Statement*, January 2010, p. 29.

4 Treasury, *2009 Tax Expenditures Statement*, January 2010, p. 6.

5 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, p. E7.

Recent reviews

2.8 The not-for-profit sector, particularly religious and charitable institutions, has been the subject of four inquiries over the past decade.

2.9 Each inquiry sought to provide government with a better understanding of the sector and its operation but although the need for change was consistently identified, and in particular, the establishment of a commission specific to the industry was suggested, consultation with the sector has slowed change and lack of information has impeded progress.

(1) Inquiry into the definition of charities and related organisations

2.10 This inquiry, established to consider whether the common law approach to defining a charity could be improved to serve the interests of charities, government and the public better,⁶ made 27 recommendations and noted that although the environment in which charities and related entities operate was changing, the continuing reliance on the common law meaning of charity was affecting the ability of the entities to respond to the changes.⁷ The Committee recommended:

- the introduction of a statutory definition of charitable purpose;
- that 'religion' be defined, requiring it to be based on the principles established by the High Court in its 1983 decision involving *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Vic)*; and
- that the Government, with the agreement of all of the states and territories, establish an independent administrative body for charities and related entities.⁸ (An extract of that Report's recommendations is attached at Appendix 3.)

2.11 In response to the inquiry the then Government announced that it would enact legislation which set out a definition of charity incorporating a majority of the Inquiry's recommendations for the definition.⁹ After public consultation the Government abandoned the bill.¹⁰ The law was however amended to give effect to one of the report's recommendations: that the common law meaning of charitable purpose be extended to include not-for-profit child care providers, certain self-help groups and certain closed and contemplative religious orders.¹¹

6 Treasury, *Inquiry into the Definition of Charities and Related Organisations*, 2001, pp 21-22.

7 Treasury, *Inquiry into the Definition of Charities and Related Organisations*, 2001, p. 4.

8 Treasury, *Inquiry into the Definition of Charities and Related Organisations*, 2001, pp 15-18.

9 The Hon Peter Costello, Commonwealth Treasurer, Government Response to Charities Definition Inquiry, 29 August 2001, Press Release No. 49, p. 1.

10 The Board of Taxation, *Consultation on the Definition of Charity—A Report to the Treasurer, 2003*, Chapter 2, pp 10-11. www.taxboard.gov.au viewed 15 July 2010.

11 Treasury, *Inquiry into the Definition of Charities and Related Organisations*, 2001, p. 14.

(2) Senate Economics Committee—Disclosure regimes for charities and not-for-profit organisations

2.12 The Senate requested that the Committee undertake an examination of the not-for-profit sector in Australia with reference to:

- the relevance and appropriateness of the sector's disclosure regimes;
- models of regulation and legal forms that would improve governance and management of these entities; and
- other measures that would assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds.¹²

2.13 Like the 2001 inquiry, the report tabled identified the need for broad-reaching reform to improve transparency and accountability and simplify the tax laws relevant to the sector.

2.14 Like the earlier inquiry, it again called for the implementation of a single independent national regulator for the sector. (An extract of the recommendations of the Committee in that report are detailed in Appendix 4.)

(3) Productivity Commission – The Contribution of the Not-for-Profit Sector

2.15 In March 2009, the Government requested that the Productivity Commission study the not-for-profit sector to assess its contribution to the wider economy and impediments to the sector's continued development.¹³ The very broad terms of reference are in Appendix 5.

2.16 In its report, published in January 2010, the Productivity Commission identified that wide ranging reform was needed and made 38 recommendations, many consistent with the recommendations of the preceding reviews and aimed at achieving the desired regulatory reform.

2.17 The Productivity Commission also again called for the establishment of a new independent national regulator.¹⁴ In addition, it also suggested:

- a new legal form for not-for-profit entities; and
- the introduction of a statutory definition of charitable purpose.¹⁵

12 Senate Standing Committee on Economics, *Disclosure regimes for charities and not-for-profit organisations*, December 2008, p. 5.

13 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, p. iii.

14 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, pp 113, 117, 119, 144, 148-152 and 156.

15 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, pp 113, 117, 119, 144, 148-152 and 156.

(4) Australia's Future Tax System (The Henry review)

2.18 In its 2008-09 Federal Budget the Government announced that it would initiate a comprehensive review of Australia's tax system.¹⁶

2.19 In December 2009, the Secretary to the Treasury, and Chair of the review panel Dr Ken Henry, delivered the *Australia's Future Tax System -- Report to the Treasurer* (the Henry Review). Among the comprehensive analysis and recommendations of the report the review group considered the taxation arrangements specific to the not-for-profit sector.

2.20 In noting the sector's contribution to the community and identifying that much of the support it receives occurs indirectly through tax concessions, the report noted the complexity of the existing tax system.¹⁷ The report also commented on the inconsistent regulatory regimes faced by these organisations at the state, territory and local government levels.

2.21 The review panel recommended the establishment of a national charities commission to monitor, regulate and provide advice to the sector, suggesting that such a body would address the issues that prove problematic to the sector.¹⁸

Committee view

2.22 The Committee notes the consistent recommendations of the four previous inquiries, particularly the call to establish a national independent commission to oversee all aspects of the not-for-profit sector. The Committee believes that the absence of a national commission has led to insufficient information being available on the sector, difficulty in consultation and consequently delays in reform.

16 *Australia's Future Tax System—Report to the Treasurer, Part One—Overview*, December 2009, pp v–vii.

17 *Australia's Future Tax System—Report to the Treasurer, Part Two—Detailed Analysis*, December 2009, p. 205.

18 *Australia's Future Tax System—Report to the Treasurer, Part Two—Detailed Analysis*, December 2009, p. 212.

Chapter 3

Charities and tax treatment

Definitions of a charitable organisation

3.1 The Committee regards 'charities' as altruistic bodies which seek to help members of the community in need. They work for those who lack the resources to provide a comfortable existence for themselves, be they Australians, people overseas or animals. As well as providing physical assistance, they counsel and empathise with those in distress. The role of charities is to mobilise their members and supporters to help *others*, not to just act in their members' private interests. Their motives mean that all true charities are not-for-profit organisations (but not all not-for-profit organisations are charities).

3.2 This view accords with the definitions of 'charity' in the *Shorter Oxford Dictionary* and the *Macquarie Dictionary*:

Beneficence, liberality to or provision for those in need or distress;
alms-giving.

Almsgiving; the private or public relief of unfortunate or needy persons;
benevolence.

3.3 The Committee regards this conception of 'charities' as being widely shared within the community and it was reflected in some submissions:

...the primary purpose of any charitable institution is to provide assistance to a section of society that is in some way disadvantaged and/or experiencing hardship.¹

3.4 It became apparent, however, that there was some disjuncture between such popular understandings of 'charity' and legal and other technical understandings of the term. In particular, there seemed to be a difference of view as to whether a charity's focus is on the *disadvantaged*, or just on anyone outside its membership. Father Lucas put to the Committee:

Caring for rich people is as charitable as caring for poor people.²

3.5 It may help in clarifying this difference to distinguish between the provision of tangible goods and services that are also available in private markets (such as food and accommodation) on the one hand, and less tangible forms of support such as counselling and sympathy that cannot be purchased. The Committee would expect that

1 Ms Tanya Smith, *Submission 32*, p. 1.

2 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Committee Hansard*, 29 June 2010, p. 18, repeated p. 20.

a charity would provide the latter to all but provide physical goods only to those who otherwise cannot afford them.

3.6 This difference of interpretation may be a legacy of the legal meaning of charity deriving from a 400-year-old statute passed in the final years of the reign of Elizabeth I and associated case law (UK and Australian).

3.7 In Australia, as in many other jurisdictions, the operation of the not-for-profit sector relies on the application of common law, which since 1891 has categorised 'charity' and 'charitable purpose' under four heads:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.³

3.8 The common law includes a presumption that charities operating under the first three heads of charity provide a public benefit and only those that carry out activities for other purposes beneficial to the community have to demonstrate public benefit when seeking to qualify as a charitable organisation.⁴

3.9 Treasury explains that the presumption of public benefit has arisen:

...because of the difficulties faced by the courts in deciding whether or not particular activities are providing a public benefit.⁵

3.10 The bill before the Senate, by introducing a 'public benefit test' would reverse this presumption. This would bring the situation in Australia closer to that in New Zealand where the Charities Commission makes an assessment:

...all charities must have public benefit. When we look at that, we look at, firstly, whether there is a benefit, which means that we will also look at whether there are harms that are caused; and, secondly, we look at the extent to which the charity is accessible to the public.⁶

3 Department of the Treasury, *Submission 82*, June 2010, pp 4-5. The four heads were set out by Lord Macnaughton in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

4 Department of the Treasury, *Submission 82*, pp 4-5.

5 Department of the Treasury, *Submission 82*, p. 3.

6 Mr Trevor Garrett, Chief Executive, Charities Commission New Zealand, *Committee Hansard*, 28 June 2010, p. 25.

Defining public benefit

3.11 Some confusion is evident around the use of the adjective 'public' in 'public benefit'; while members of an organisation are also members of the 'public', if the organisation only provides a benefit to these members, the organisation is only providing a 'private benefit' not a 'public benefit'. One suggestion is to replace 'public benefit' with 'community benefit' but this may suffer from the same potential ambiguity.⁷ Also, a 'public benefit' does not have to benefit *every* member of the public.

3.12 The bill explicitly seeks to ensure that an assessment of public benefit also takes account of 'any detriment or harm'. In this it borrows from the practice of the Charity Commission for England and Wales. They explained to the Committee:

Yes, the detriment and harm question is part of our public benefit test and one of our key principles of public benefit is that any benefits that might arise to the public must not be outweighed by any significant detriment or harm. That is a fundamental part of the public benefit test...⁸

...we give some examples of what might constitute detriment or harm. We look at a lot of those sorts of issues about whether there is any evidence about coercive tactics or any encouragement of violence or hatred, for example, towards individuals or anything like that...⁹

3.13 Consideration of detriment or harm raises the issue of how to deal with the behaviour of individual miscreants within large organisations. Recent cases of child abuse by clergy were raised during the inquiry in the context of how widespread such behaviour must be before it is taken as indicative of a culture that condones such behaviour within an organisation.¹⁰ One indicator may be how the hierarchy of the organisation responds: do they investigate matters promptly and refer them to the police, or seek to cover up the allegations and press members not to go public with information?

3.14 The Charity Commission of England and Wales explained their approach:

It is really a question of how the organisation itself manages those sorts of issues. Obviously, in any organisation things can arise and it is all about whether the trustees who deal with those situations had policies and procedures in place to mitigate risk of detriment or harm... If it was endemic throughout the organisation and affected its ability to operate for the public benefit...that is when it would become an issue...it could affect

7 Mr David Graham, *Submission 7*, p. 1.

8 Ms Joanne Edwardes, Head, Status and Public Benefit Policy, Charity Commission for England and Wales, *Committee Hansard*, 28 June 2010, p. 68.

9 Ms Joanne Edwardes, Charity Commission for England and Wales, *Committee Hansard*, 28 June 2010, p. 68.

10 Name withheld, *Submission 13*, p. 1.

the organisation's ability to demonstrate that it satisfies the public benefit requirement.¹¹

3.15 Some submissions propose a very narrow test of public benefit:

If a test is to be applied to religious groups it should be limited to questions of Law, i.e., "Are the activities of this group within the Law". In cases where it is proven that certain religious groups are conducting illegal activities their tax exemption status could be suspended...¹²

3.16 It seems an odd argument to make that anything which is not illegal deserves a subsidy.

Charity versus commercial enterprise

3.17 An important consideration in distinguishing between a charity and a commercial enterprise is whether goods and services are provided free or at a market price. This principle has been applied by the Charity Commission for England and Wales in the context of applying its public benefit test, and they concede:

...one of the greatest areas of discussion and debate around the public benefit requirements in England and Wales has been around the question of the effect of fees and charities charging fees for their services.¹³

3.18 Similarly, in New Zealand the extent of charging for services affects charitable status:

One of the things we would say, as part of a public benefit, is that the public should have a reasonable opportunity to get a benefit from the charity and the charging of fees may hinder that ability. For example, we register sports organisations. There is a difference between golf where at some places it is \$500—we would probably say that is reasonable—but if someone charged \$20,000—we would say that the public does not have a reasonable opportunity to participate, so we would not register them.¹⁴

3.19 The Committee notes a number of submissions emphasise this distinction between commercial enterprises and charities:

Any organisation that doesn't provide the bulk its services freely and openly to those who do not donate to it is not a charity...¹⁵

11 Ms Edwardes, Charity Commission of England and Wales, *Committee Hansard*, 28 June 2010, pp 63-64.

12 Southland Vineyard Church, *Submission 12*, p. 2.

13 Ms Joanne Edwardes, Head, Status and Public Benefit Policy, Charity Commission for England and Wales, *Committee Hansard*, 28 June 2010, p. 65.

14 Mr Trevor Garrett, Chief Executive, Charities Commission New Zealand, *Committee Hansard*, 28 June 2010, p. 28.

15 Mr Alan Low, *Submission 18*, p. 1. A very similar view was put in *Submission 3*, p. 1.

If an organisation “charged” for services and restricted who could access their services by ways of monetary obligations, I would suggest this organisation was acting in a commercial capacity and not in the interest of the public.¹⁶

Any church claiming that they have a philosophy of “exchange” requiring payment be made for services may be a church or a religion but not one that warrants charity status because such a philosophy is the anti-thesis of charity.¹⁷

3.20 Some submitters were wary of bans or excessive restrictions on commercial activity but emphasised that:

...any such commercial enterprise should be incidental to the main purpose of the organisation...¹⁸

3.21 There can be cases of initially charitable organisations that over time mutate into commercial operations, such as:

...hospitals which began as genuinely charitable institutions run by orders of nuns whose work was voluntary and ‘seen as part of their vocation’. They relied entirely on donations for their survival. Today, they are essentially business operations. Ministering to the sick and destitute is a substantially different thing from providing high quality health care for those able to afford it.¹⁹

Legal definition of religion

3.22 As the term 'religion' is not defined in Australia's tax legislation, its meaning is determined by the common law definition.

3.23 In Australia, the High Court gave its interpretation of religion in the 1983 case of *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*:²⁰

...for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the

16 Mrs Cassandra Kelsey, *Submission 38*, p. 1.

17 Name withheld, *Submission 3*, p. 1.

18 Vision Australia, *Submission 51*, p. 5.

19 Anglicare Australia, *Submission 69*, citing former Senator Andrew Murray and Mary O’Donovan, *One Regulator, One System, One Law: the case for introducing a new regulatory system for the not-for-profit sector*, Canberra, July 2006.

20 154 CLR 120. Department of the Treasury, *Submission 82*, p. 5. The High Court was hearing an appeal against a decision by the Supreme Court of Victoria about whether an organisation was a genuinely religious organisation; Dr Stephen Mutch, *Submission 16*, Attachment 1, pp 61-65; *Confidential Submission 23*. One submitter went so far as to call the High Court's ruling 'the definitive legal decision on freedom of religion in the world'; *Confidential Submission 74*, p. 2.

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.²¹

3.24 This ruling by the Court is sometimes put forward as implying that any organisation claiming a belief in a supernatural being, thing or principle should unquestionably receive a tax benefit.²² But while there is probably a consensus that a broad definition of religion is perfectly appropriate in determining the right to express religious views, it does not follow that there are always sound public policy grounds for other taxpayers to subsidise such an organisation.

3.25 This difference between a right to believe in a religion and a justification for taxpayer subsidy for it is particularly important given that Justices Mason and Brennan commented in their judgement:

...charlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.²³

Competitive neutrality²⁴

3.26 As identified in Chapter 2, the existing tax concessions probably reduce tax revenues by between \$1 billion and \$8 billion, or possibly more. A recent court case may increase the cost of these concessions and also raises concerns about competitive neutrality.

3.27 The Committee agrees with the Henry Review's statement of principle that:

Tax concessions for NFP organisations...should not undermine competitive neutrality where NFP organisations operate in commercial markets.²⁵

3.28 The High Court decision in the *Word Investments Case*²⁶ significantly broadened the ability of charitable institutions to carry on commercial activities on an income tax exempt basis:

21 Dr Matthew Turnour, *Submission 1*, Attachment 1, p. 7.

22 Ms Louise McBride, *Submission 66*, Attachment 1, pp 8-10.

23 This comment was highlighted by Dr Stephen Mutch, *Submission 16*, Attachment 1, pp 74-75.

24 Competitive neutrality is the principle that promotes the equal treatment by government of competing organisations to achieve a level playing field by removing artificial advantages. It is a key aspect of promoting strong competition.

25 *Australia's Future Tax System—Report to the Treasurer—Part Two, Detailed Analysis*, December 2009, p. 206.

Under that case an organisation—say, an aged care home for wealthy retired merchant bankers—could be set up on a fee-paying commercial basis. They could be considered charitable if they are giving all of their profits, say, to a charity. This entity could be considered under the Word Investments case a charitable entity, even though it itself does not have charitable activities...as long as its money is going to a charitable purpose—that is, it is being given to a separate entity or it itself is undertaking a separate charitable purpose.²⁷

3.29 Recent reports of both the Productivity Commission and Henry Review have been relaxed about the implications for competitive neutrality of the case:

...on balance, income tax exemptions are not significantly distortionary as not-for-profit [entities] have an incentive to maximise returns on their commercial activities that they then put towards achieving their community purpose.²⁸

The NFP income tax concessions do not generally violate the principle of competitive neutrality where NFP organisations operate in commercial markets.²⁹

Income tax exemption

3.30 In recognition of the long held view that the services provided by the not-for-profit sector are worthy of public funding and that the sector can often provide those services at a lesser cost than government, not-for-profit entities, including charities and religions, qualify for a range of tax and other exemptions at both the state and federal level.

As was noted in the Productivity Commission's report there is a general understanding that tax concessions are granted to NFPs because they serve the community and their activities provide positive public benefits and the greater the benefit, the larger the range of exemptions.³⁰

Who is relieved from the tax burden that the rest of us have to bear? ...tax relief is granted to activity that delivers such common good outcomes that it may otherwise have to be paid for by the government directly.³¹

26 2008 HCA55, 3 December 2008. Word Investments operated a commercial funeral business to fund its translations of the Bible.

27 Ms Sandra Roussel, Manager, Philanthropy and Exemptions Unit, Department of the Treasury, *Committee Hansard*, 29 June 2010, p. 49.

28 Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010 p. 197.

29 *Australia's Future Tax System—Report to the Treasurer—Part Two, Detailed Analysis*, December 2009, p. 209.

30 Anglicare Sydney, *Submission 46*, p. 2.

31 Mr Andrew Lind, Partner, Corney and Lind Lawyers, *Committee Hansard*, 28 June 2010, p. 35.

3.31 At a national level the income tax legislation provides that the income of charities and religious institutions is exempt from income tax. Section 11-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) lists those entities that are exempt from income tax and identifies the provisions of the legislation under which the exemption is granted. In the case of religious and charitable institutions, exemption is granted pursuant to Division 50 of the ITAA 1997.

3.32 Section 50-5 specifically lists charitable and religious institutions as being income tax exempt at items 1.1 (charitable institutions) and 1.2 (religious institutions). Section 50-50 explains the special conditions that attach to the tax exempt status of charities and religious institutions. It provides that:

50-50 Special conditions for items 1.1 and 1.2

An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15 [ie a Deductible Gift Recipient]; or
- (c) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or
- (d) is a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia.

3.33 Section 50-52 goes on to specify that unless a charitable institution has been endorsed,³² it will not be income tax exempt and further specifies that an entity seeking endorsement must apply in accordance with the requirements of Division 426 of the *Taxation Administration Act 1953* (TAA 1953).³³ Subsequently, provided a charitable institution meets the definition of charity, satisfies one of the tests set out in section 50-50 and is endorsed by the Commissioner, it will be income tax exempt and not required to lodge income tax returns unless otherwise specified.³⁴

3.34 By way of contrast, although the application of the common law treats the advancement of religion as a charitable purpose, the entitlement of a religious institution to income tax exemption does not hinge on it carrying out charitable pursuits. Rather, a religious organisation's eligibility to income tax exemption is put beyond doubt by item 1.2 of section 50-5 of the ITAA 1997, and therefore excludes

32 The responsibility for endorsement of charities rests with the Commissioner of Taxation.

33 Division 426 of the TAA 1953 sets out the procedural rules relating to endorsement of charities and other entities. These rules cover matters such as the application for and revocation of endorsement, and the entry of the details of endorsement on the Australian Business Register.

34 Australian Taxation Office, *Income tax guide for non-profit organisations*, NAT 7967-03.2007, 2007, p. 63.

those organisations from having to seek endorsement as charities. As a result, where an institution self assesses that it is a religious institution and it also meets one of the tests of section 50-50 it will be exempt from income tax and not required to lodge income tax returns.³⁵

3.35 Although the tax laws specifically provide that charities and religious institutions are eligible for these tax exemptions, the income tax laws do not define the terms 'charity' or 'religion' leaving the common law to determine eligibility. In addition to the common law, the Commissioner issues interpretive aids to assist self-assessing entities to apply the common law.

The Commissioner of Taxation and current administration

3.36 To assist self-assessment and inform entities as to how he will in fact administer the law, the Commissioner of Taxation has issued guidance in an extensive *Taxation Ruling, TR 2005/21—Income tax and fringe benefits tax: charities*.

3.37 The ruling sets out that:

- charities are not-for-profit;³⁶
- 'charitable purpose' has an intention of benefit or value—and notes that the benefit that the entity provides is required to be real or substantial, it must not be negligible but must be of overall benefit and on balance cannot be harmful;³⁷
- the entity's activities must benefit the community (although it need not benefit the whole community provided it is for an 'appreciable section' of the public);³⁸ and
- the sole purpose of a charity must be charitable although it may have purposes which in isolation would not be charitable (but may be commercial or business-like) provided they are not more than incidental or ancillary to the charitable purpose.³⁹

3.38 The published guide which complements the ruling further explains that whether or not an institution seeking charitable status is a charity is to be determined by looking at the purpose of the entity and identifies that evidence supporting the

35 Australian Taxation Office, *Income tax guide for non-profit organisations*, NAT 7967-03.2007, 2007, p. 21.

36 ATO, *Income tax guide for non-profit organisations*, 2007, p. 33.

37 Australian Taxation Office, *Taxation Ruling TR 2005/21—Income tax and fringe benefits tax: charities*, para 43 and pp 8-11.

38 *Taxation Ruling TR 2005/21*, para 50 and 58, pp 13-14.

39 *Taxation Ruling TR 2005/21*, paras 128-131, pp 34-36.

purpose would be sought by reference to the governing documents of the entity (for example, trust deeds or constitutions), annual reports, financial statements, minutes of meetings, or the activities it is undertaking.⁴⁰

3.39 In advising that TR 2005/21 does not apply to religious institutions that do not conduct charitable activities, the ATO confirmed that the Commissioner has not released any public ruling concerning the income tax exemption and how it applies to religious institutions.

Mr Hardy—On just the question of religious organisations, there is no particular ruling on that question. It is a particular category in the taxation legislation as to whether a religious organisation, if it is one, can be exempt from tax. That is a self-assessment option as opposed to approaching the tax office to also be granted charitable tax concession.

Senator XENOPHON—Has the tax office considered giving a ruling in terms of religious organisations, giving guidance?

Mr Hardy—No. We tend to provide public rulings where there is a large public demand or uncertainty. We have not been approached by entities that have found it concerning enough to seek public guidance.⁴¹

3.40 It is noted that the Commissioner's *Income tax guide for non-profit organisations* draws on the High Court ruling in identifying that:

An institution will be a religious institution if:

- its objects and activities reflect its character as a body instituted for the promotion of some religious object; and
- the beliefs and practice of the members constitute a religion.

[and]...to be a religion there must be:

- belief in a supernatural being, thing or principle, and
- acceptance of canons of conduct that give effect to that belief, but that do not offend against the ordinary laws.⁴²

3.41 Religious organisations therefore self-assess their status thereby gaining an exemption from income tax without having to engage with the Commissioner of Taxation:

If the nature of their activities in relation to goods and services tax, for example, were below the thresholds for registration, they would not be registered for goods and services tax purposes. If they did not have

40 Australian Taxation Office, *Income tax guide for non-profit organisations*, NAT 7967-03.2007, 2007, p. 33.

41 Mr Michael Hardy, Assistant Commissioner, Australian Taxation Office, *Committee Hansard*, 29 June 2010, p. 41.

42 Australian Taxation Office, *Income tax guide for non-profit organisations*, NAT 7967-03.2007, 2007, p. 20.

employees they would have no requirement to engage with the tax office in the fringe benefits tax space, and so they may in fact be technically invisible to the tax office in any formal sense.⁴³

3.42 At present, organisations claiming exemptions self-assess eligibility and are only audited if a concern is raised with the ATO. Given the right to privacy of information is the foundation of taxation law in Australia, unless the ATO makes a ruling in a particular case, the wider public has no idea as to whether or not there has been impropriety.

3.43 The Tax Office did state however that self-assessment does not mean that religious institutions will never come to the attention of the Commissioner of Taxation as the Commissioner does have powers of inquiry that can be invoked if there is reason to believe that a self-assessing organisation were making an incorrect assessment.⁴⁴ The Treasury pointed out that:

...the Commissioner of Taxation can and does revoke endorsement of organisations where there is factual evidence available that the organisation does not provide a public benefit.⁴⁵

3.44 Although the ATO currently has the power to revoke charitable status, it has neither the mandate nor the resources to act beyond its functions as a revenue collection service.⁴⁶

3.45 As many religious institutions carry out charitable activities and therefore seek tax exemption pursuant to item 1.1 of section 50-5 as a charity rather than a religious organisation under item 1.2 of section 50-5, it was suggested by submitters to the inquiry that reform is perhaps more necessary in respect of item 1.2 rather than 1.1 of section 50-5:

The bill...seeks to amend items 1.1 and 1.2 of section 50-5...Within 1.1 of course, we have the four heads of charity...in which religious institutions can be included. Item 1.2 does not have a similar charitable test. It allows the endorsement as tax-exempt...religious institutions that do not have [a] charitable purpose...perhaps reform is needed more in relation to 1.2 than it is to 1.1 because in 1.1 charitable institutions are already subject to a test of having to be charitable...Religious institutions under 1.2 currently are not required to be charitable.⁴⁷

43 Mr Michael Hardy, Assistant Commissioner, Australian Taxation Office, *Committee Hansard*, 29 June 2010, p. 40.

44 Mr Michael Hardy, Australian Taxation Office, *Committee Hansard*, 29 June 2010, p. 40.

45 Department of the Treasury, *Submission 82*, p. 5.

46 Dr Stephen Mutch, *Committee Hansard*, 28 June 2010, p. 2.

47 Mr Andrew Lind, Partner, Corney and Lind Lawyers, *Committee Hansard*, 28 June 2010, p. 36.

It now appears the religious institutions category may be an inoperative category, or is currently only accessed by a limited number of organisations that are not able to be endorsed as charitable institutions.⁴⁸

Committee view

3.46 The Committee acknowledges the limitations on the Commissioner in administering the myriad of tax laws which necessarily requires that his limited resources be spread across the whole of the tax system. This makes it impractical to look in detail at every religious or charitable institution claiming income tax exemption but requires that he apply resources:

...where we perceive the most risk and advantage, consistent with the parliamentary intention of various tax laws the commissioner administers.⁴⁹

3.47 The Committee also notes the evidence provided by the Treasury and Tax Office representatives that, in terms of requiring information and ensuring compliance with Division 50 of the ITAA 1997:

...in the end it probably comes down to policy choices by different governments—indeed, by different parliaments—from time to time about where the appropriate place to strike the balance might be at any particular time... There are policy choices involved in deciding when it is appropriate to allow an entity to self-assess as the basis for accessing a particular concession... and when it is appropriate instead for particular processes to be set in place which require more active steps by the relevant entity to seek access to the concession by approaching the ATO and seeking some form of endorsement.⁵⁰

3.48 Administering any public benefit test may not always be a case of merely applying precedent. Policy decisions may also need to be made. While the ATO is well-placed to make decisions relating to revenue matters, issues beyond that need to be dealt with elsewhere.

3.49 Australia's federal system of government further complicates reform in this sector as charitable and religious organisations are also subject to state and territory laws that affect their operations. For example, much of the behaviour alleged of cults actually falls within the ambit of state and territory laws.

3.50 The Committee takes the view that as this sector is relied on to deliver vital services to the community often in the place of government service delivery, and is funded by public money to do so these entities should be subject to a higher level of

48 Department of the Treasury, *Submission 82*, p. 6.

49 Mr Michael Hardy, Assistant Commissioner, Australian Taxation Office, *Committee Hansard*, 29 June 2010, p. 40.

50 Mr Michael Willcock, General Manager, Personal and Retirement Income Division, Department of the Treasury, *Committee Hansard*, 29 June 2010, p. 36.

transparency. Requiring a higher level of accountability is not viewed by the Committee as an unjust impost given:

There is a kind of covenant that charities have with society: charities bring public benefit and, in their turn, are accorded high levels of trust and confidence and the benefits of charitable status. These mutual benefits are considerable: charities receive significant tax advantages; they can access funds which others - even other voluntary organisations - cannot; volunteers and donors give, respectively, time and money.⁵¹

3.51 The Committee does not consider that the ATO is in a position to administer a public benefit test with the aim of regulating inappropriate behaviour and guaranteeing accountability and transparency.

Recommendation 1

3.52 The Committee recommends that the incoming government should follow the emerging international best practice and work with the Council of Australian Governments to amend legislation governing not-for-profit entities to include a definition and test of 'public benefit'.

Cults

3.53 In the discussion of whether detriment should be taken into account when considering whether an organisation would pass a 'public benefit' test for tax concessions, there was discussion of the behaviour of cults.

3.54 It is a matter of concern that allegations of grossly inappropriate behaviour continue to be made, and arouse concern, yet there is no systematic means of dealing with these allegations, especially where no specific criminal offence has been committed.

3.55 The Cult Information and Family Support Group told the Committee that:

CIFIS can confidently estimate that there are many hundreds—if not more; perhaps thousands—of groups operating within Australia that claim tax exemption simply because they claim a religious status. Yet these groups would show on examination that basic human rights and the freedoms that we take for granted here in Australia are not afforded to their members and indeed would contravene all that freedom and democracy are about... We have also heard of the horrendous long-lasting harm caused to individuals and to families by authoritarian, elitist, exclusive groups of all shapes and sizes. They use psychological manipulation, insidious and coercive techniques and the dynamics known as thought reform or mind control to indoctrinate and keep members obedient and compliant.⁵²

51 Charity Commission for England and Wales, *Submission 41*, p. 2.

52 Mrs Roslyn Hodgkins, President, Cult Information and Family Support, *Committee Hansard*, 28 June 2010, p. 19. See also their *Submission 14*.

3.56 There has been no inquiry into this issue, although the Standing Committee of Attorneys-General contemplated in 1988 creating an offence of recklessly or intentionally causing harm to a person's mental health.⁵³

3.57 In France there is an agency Miviludes (Mission Interministérielle de Vigilance et de Lutte contre les Derives Sectaires) charged with monitoring the activities of cults.⁵⁴

Committee view

3.58 The Committee believes that sufficient evidence was put before it to suggest that the behaviour of cults should be reviewed with a view to developing and implementing a policy on this issue that goes beyond taxation law.

Recommendation 2

3.59 The Committee recommends that the Attorney-General's Department provide a report to the Committee on the operation of Miviludes and other law enforcement agencies overseas tasked with monitoring and controlling the unacceptable and/or illegal activities of cult like organisations who use psychological pressure and breaches of general and industrial law to maintain control over individuals. The report should advise on the effectiveness of the operation of Miviludes and other similar organisations, given issues that need to be addressed to develop an international best practice approach for dealing with cult-like behaviour.

53 Dr Stephen Mutch, *Submission 16*, p. 6.

54 Interministerial Mission of Vigilance and Combat Against Sectarian Aberrations. The organisation is referred to by Dr Stephen Mutch, *Submission 16*, p. 6.

An English translation of their 2006 annual report is available at http://www.miviludes.gouv.fr/IMG/pdf/Report_Miviludes_2006.pdf.

Chapter 4

An alternative to the bill – a national commission

Need for broader reform

4.1 Much of the evidence gathered by the present inquiry reiterated that the previously identified issues of transparency, accountability, complexity and inconsistency remain problematic:

... people who are doing public good...should receive tax concessions. We are very strong about that. But we also say they should be accountable.¹

...transparency is both needed and wanted. So the imperative for reform there must be to ensure that transparency is achieved but not in a way that imposes undue burdens compliance wise.²

...charities should demonstrate levels of transparency, accountability and governance which are beyond reproach, particularly when they are dealing with the most vulnerable in our communities and utilising funds from the public to deliver their services.³

4.2 Many submitters took the view that reform should only be pursued on a broad basis, rather than 'piecemeal', and raised the establishment of an independent national commission as an alternative means of achieving reform:

The Henry Review and the Productivity Commission Research Report 'Contribution of the not-for-profit Sector' both raise issues regarding the tax concessions extended to the not-for-profit sector. The issues raised in this Bill are best addressed in the context of that broader inquiry. Any changes to the status requirements for religious organisations and charities should be a part of overall package of taxation law reform that improves the enabling and regulatory environment of the sector.⁴

Redefining what constitutes charity, and how this definition fits with the overall not-for-profit sector, is a complex issue which over the past decade has been the subject of much debate and two lengthy and complex Government inquiries...This is proof that the redefinition of charity is an issue which needs to be addressed as a whole, rather than piecemeal.⁵

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- 1 Mr David Nicholls, President, Atheist Foundation of Australia Incorporated, *Committee Hansard*, 28 June 2010, p. 58.
 - 2 Dr Matthew Harding, Senior Lecturer, Not-for-Profit Project, Melbourne Law School, University of Melbourne, *Committee Hansard*, 29 June 2010, p. 30.
 - 3 Uniting Care Australia, *Submission 60*, p. 1.
 - 4 Dr Matthew Turnour, *Submission 1*, p. 3.
 - 5 Philanthropy Australia, *Submission 42*, p. 1.

A public benefit test should never be legislated in isolation, particularly in a Bill that contains little detail of how, and by whom, it would be administered. The objects of the proposed public benefit test, if determined to be valid, should be examined within the broader context of reform to the not-for-profit sector, as raised in the Productivity Commission report and the Henry Tax Review.⁶

Limitations of the bill

4.3 Although the consensus is that greater transparency and accountability is needed and the proposed bill is a possible avenue for achieving such reform, not all submitters are in favour of it being progressed given its narrow focus.

4.4 The bill proposes the introduction of a new section, section 50-51, to Division 50 of the ITAA 1997. This section introduces a new requirement that would result in an entity seeking income tax exemption under either item 1.1 or 1.2 of the ITAA 1997, needing to meet a public benefit test. Therefore, in addition to satisfying the special condition requirements of section 50-50 and section 50-52, charitable and religious institutions would also need to satisfy this public benefit test before qualifying for income tax exemption.

4.5 The bill is however very limited in its coverage. No other entities identified in section 50-5 or the remaining sections of Division 50 will be affected. An extract of Division 50 is attached as Appendix 6.

4.6 The Committee noted that individual submitters to the inquiry tended to favour the bill and its introduction of a public benefit test on the basis that it would improve the status quo.⁷

I write to you in support of the Tax Laws Amendment (Public Benefit Test) Bill 2010. I would like to see this Bill passed unchanged...In these turbulent economic times, proper tax collection without waste is paramount. This bill is needed so honest charitable organisations can claim tax exemption and at the same time deny that benefit to groups who would abuse it.⁸

I am seeking to lend my support to there being a public benefit test (PBT) for an organisation to gain tax-free status. An organisation that operates tax-free is effectively subsidised by the taxpayer, since vital taxes must be levied against other things, or at higher levels to make up the shortfall. It is therefore right that the taxpayer should be assured that there is genuine

6 Australian Christian Lobby, *Submission 48*, p. 4.

7 In addition to those quoted here, submissions supportive of the bill included Vision Australia, *Submission 51*; Australian Skeptics, *Submission 31*; Ms Natascha Fareed, *Submission 57*; Mr Chris Lavery, *Submission 64*; Mr Nevin Cartwright, *Submission 45*; and *Submissions 13, 17, 29,30, 34, 54, 70, 71 and 72* from persons who requested their names be withheld.

8 Mr Dane Weber, *Submission 15*, p. 1.

public benefit from each such organisation—particularly at a time when money is tight for many families.⁹

I write this in wholehearted support of the Tax Laws Amendment (Public Benefit Test) Bill 2010, proposed by Independent Senator Nick Xenophon. I recommend that this Bill be passed unchanged. As it stands, the amendment will benefit the public by ensuring a greater deal of scrutiny on organizations that apply for tax free/exempt status.¹⁰

4.7 Organisational and academic submitters however tended to criticise the bill suggesting that it may not be the best way to achieve the necessary reform, particularly in light of the recent reports by both the Productivity Commission and the Henry Review.

4.8 In giving evidence to the Committee at its public hearing, Dr Matthew Harding from the University of Melbourne Law School's Not-for-Profit Project stated:

...our point is that that reform has already been the subject of detailed scrutiny and recommendation from numerous bodies over the years but that reform is a larger reform than what this bill is directed at. The danger of the bill is, in our view, that it will enact part of the reform in isolation from the whole and then there will be distortions and effects that were not intended.¹¹

4.9 This view was consistent among organisational submitters who although supportive of reform are concerned that passage of the bill may undermine the work of the previous inquiries. The predominant view is that reform should be informed by the finding of these recently completed reviews:

The proposed Bill follows a wide ranging inquiry into the Not-for-Profit sector by the Productivity Commission and of taxation matters by the Australia's Future Tax System Review Panel. It is noteworthy that neither of these inquiries has recommended a public benefits test as part of proposed reforms. It is concerning that the proposed Bill represents a fundamental shift in the way that the tax status of charities would be assessed without clarification as to how it fits within the broader approaches already recommended by these inquiries.¹²

PilchConnect has made detailed submissions to the multiple inquiries that have considered the issue of what organisations should receive concessional taxation treatment, and what the appropriate body is to determine status for this and other purposes... We assume that the Committee will be fully appraised of the seminal 2001 Charity Definition Inquiry Report where these issues were considered in a holistic way, with considerable input from

9 Mr Julian Moller, *Submission 27*, p. 2.

10 Mr Hudson Carrad, *Submission 65*, p. 1.

11 Dr Matthew Harding, *Committee Hansard*, 29 June 2010, p. 32.

12 Anglicare Diocese of Sydney, *Submission 46*, p. 3.

the NFP sector and consideration of overseas models. In short, PilchConnect again recommends that:

- any taxation reform should be underpinned by a rational policy basis for charity and NFP taxation exemptions and other incentives;
- this underpinning was carefully considered in the 2001 Charity Definition Inquiry and we endorse the recommendations arising from that Inquiry's report;
- the current Senate Inquiry, in line with the 2008 Senate Disclosure Regimes for Charities and Not-for-Profit Organisations, endorses the recommendations of 2001 Charity Definition Inquiry; and
- implementation of these reforms to legislative treatment of charities occurs after, or in conjunction with the establishment of a new, independent, specialist NFP regulator.

... It is our view that the draft Bill would serve as yet more piecemeal reform that would do more harm than good to an already complex and unfit regulatory framework for Australia's economically and social significant NFP sector.¹³

The present bill...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, or in the Henry Review.¹⁴

[The Asia-Pacific Centre for Social Investment and Philanthropy] is concerned however that the introduction, in isolation, of the provisions of the proposed Bill could have considerable unintended consequences.¹⁵

...it is considered that the appropriate process to review the relevance of any 'public benefit test' for charitable organisations is in the context of the Federal Government's detailed response (as yet not released) to the reports provided by the Australian Government Productivity Commission into the contribution of the not-for-profit sector and the Australia's Future Tax System Review...These reviews contained a number of recommendations that could possibly affect the charitable and not-for-profit sector and in this light it is prudent not to introduce new legislation that has not been considered in conjunction with any recommendations or debates relating to these reviews.¹⁶

4.10 When advocating that change be informed by the previous inquiries, submitters supported the recommendations made by those inquiries which, if adopted,

13 PilchConnect, *Submission 81*, pp 2-3.

14 Not-for-Profit Project, University of Melbourne Law School, *Submission 47*, p. 2.

15 Asia-Pacific Centre for Social Investment and Philanthropy, *Submission 53*, p. 2.

16 The Salvation Army (Eastern Territory), *Submission 61*, p. 1.

would see Australia's not-for-profit sector embark on reform consistent with the emerging practice in international jurisdictions.

4.11 The examples of the approach taken in foreign jurisdictions received much attention throughout the inquiry, many organisations complimentary of the reform that has been achieved, particularly in England and Wales and in New Zealand.

Committee view

4.12 The Committee is of the view that the taxation and regulatory arrangements of the not-for-profit sector, including, but not limited to, charitable and religious institutions, is in need of urgent reform.

4.13 The Committee shares the view of many submitters that the scope of the bill before the Senate is too narrow and that the bill inappropriately delegates legislative power.

4.14 The Committee takes the view that this inquiry has only served to highlight the urgent need for broader reforms within the sector. This has been a recurring theme in all previous inquiries dealing with possible regulation of not-for-profit organisations. The Committee considers it appropriate that any incoming government initiate broader sector-wide reform, following an extensive consultation process. The Committee believes that reform of the sector can no longer be ignored as reform would provide much needed support, transparency and accountability within the not-for-profit and charitable sector.

There comes a point where a government...has to make a decision either to do something or to stop saying that it is going to intend to do something, because this matter has been on the agenda for many, many years.¹⁷

The experience overseas

4.15 Throughout the inquiry the practices that apply to the not-for-profit sectors in foreign jurisdictions were consistently cited by submitters as examples of reform achieved in other countries. These examples were cited as being both relevant to the consideration of a public benefit test and suggestive of the need for broader reform as the framework which governs Australia's not-for-profit sector is derived from the English tradition.

4.16 The Committee notes that its previous report *Disclosure regimes for charities and not-for-profit organisations* (December 2008) extensively considered the regulatory frameworks governing the not-for-profit sectors in foreign jurisdictions, specifically those of England and Wales, and New Zealand. The Committee does not see another detailed analysis as necessary and would rather examine how the experiences of those jurisdictions apply to the continued development of the sector

17 Father Brian Lucas, General Secretary, Australian Bishops Conference, *Committee Hansard*, 29 June 2010, p. 25.

within Australia. The Committee has attached the relevant chapter of its 2008 report as Appendix 8.

England and Wales—Charities Act 2006

4.17 The United Kingdom has a strong history of legal reform of the charitable sector that includes a complicated mix of case law, common law and legislation. In the UK the pinnacle of this reform was the *Charities Act 2006 (UK)* ('The English Act'). The Act followed previous legal reforms that had been undertaken since the evolution of case law beyond the original four heads of charity.

4.18 The UK previously legislated with respect to charities in 1958, 1992 and 1993. A review of the entire charities sector commissioned by then British Prime Minister Tony Blair in July 2001 recommended the modernisation of charity law, with an emphasis on enhancing accountability and transparency.¹⁸ At that time in the UK, charities and religions were operating in a similar framework to that which applies in Australia today.

4.19 The review recommended several reforms including the establishment in legislation of a definition of 'charitable purpose', enhanced accountability and transparency, improved powers of the regulator (the Charity Commission for England and Wales) and the establishment of a Charity Tribunal within the British court hierarchy.

Joint Committee Report 2004

4.20 The British Government published the draft bill in May 2004. A Joint Committee comprised of members of both Houses examined the draft legislation, publishing their report after extensive consultation with stakeholders across the UK in September 2004.¹⁹

4.21 That report included over 50 recommendations, finding that law reform in this area was 'well overdue'²⁰ and recognising that the establishment of a Charity Tribunal would encourage transparency and accountability and ultimately assist the charity sector's growth.²¹

18 The Charities Bill, [HL] Research Paper, 06/18, p.9; Religions Working Together (UK), *Submission 86*, p. 1.

19 The Charities Bill, [HL] Research Paper, 06/18, p.11.

20 The Charities Bill, [HL] Research Paper, 06/18, p.11.

21 The Charities Bill, [HL] Research Paper, 06/18, p. 12.

Charities Act 2006 (UK)

4.22 The Committee notes with interest that the Charity Commission for England and Wales existed prior to the *Charities Act 2006 (UK)*.²² The 2006 Act played an important role in harmonising the powers of the Charity Commission as the sole regulator of the sector, allowing higher levels of scrutiny and accountability with public monies.

4.23 The English Act did not override the Statute of Elizabeth as suggested, but further developed the heads of charities²³ and removed the presumption of public benefit,²⁴ through the introduction of section 3 of the Act:

Section 3 The 'public benefit' test

- (1) This section applies in connection with the requirements in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
- (2) In determining whether that requirement is satisfied in relation to any such purpose, it is not presumed that a purpose of a particular description is for the public benefit...²⁵

Charities and Trustee Investment (Scotland) Act 2005

4.24 In Scotland, the *Charities and Trustee Investment (Scotland) Act 2005* ('the Scottish Act') provides for the establishment of the Office of the Scottish Charity Regulator (OSCR) as well as the implementation of similar provisions to those found in the English Act. As previously mentioned, the Scottish and English Acts operate complementarily of each other, which allows for greater consistency both across and within the UK.

4.25 The Scottish Act however does not override the common law with respect to charities. Section 7 defines a charity test and charitable purpose.²⁶ It also includes provisions which enable the Judiciary to interpret charitable purpose as required.²⁷

4.26 The Scottish Act, like the English Act, explicitly removes the common law presumption of public benefit, contained in Section 8(1):

No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.²⁸

22 Dr Stephen Mutch, *Cults, Religion and Public Policy*, PhD thesis, University of New South Wales, March 2004, pp 365-366. Indeed, it traces its origins back to the 19th century.

23 As found in the *Charities Act 2006 (UK)*, ss 2(2)-(4).

24 Ms Joanne Edwardes, Head, Status and Public Benefit Policy, Charity Commission for England and Wales, *Committee Hansard*, 28 June 2010, p. 62.

25 *The Charities Act 2006 (UK)*, s 3(1)-(4).

26 *Charities and Trustee Investment (Scotland) Act 2005*, s7(1)-(2).

27 *Charities and Trustee Investment (Scotland) Act 2005*, s7(2)(p).

4.27 Similarly, the Scottish Act provides legal redress for decisions of the OSCR to be examined by the Scottish Judiciary.²⁹ Section 34 provides explicit avenues for the OSCR to legally address concerns about compliance within Scottish charity and not for profit law. This process is commenced in the Scottish Court of Session, significantly departing from the English model, which was the establishment of a sector specific Charity Tribunal.

Charities Act 2005 (New Zealand)

4.28 Prior to the passage of the *Charities Act 2005 (New Zealand)* the Inland Revenue Service assisted charities in a similar manner to the ATO's dual regulator/tax collector role in Australia.³⁰

4.29 The New Zealand legislation also includes a definition of serious wrongdoing, which may be useful for Australian drafters wanting to include a 'detriment' provision:

- (a) an unlawful or a corrupt use of the funds or resources of the entity; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to the public interest in the orderly and appropriate conduct of the affairs of the entity; or
- (c) an act, omission, or course of conduct that constitutes an offence; or
- (d) an act, omission, or course of conduct by a person that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.³¹

4.30 Legislation establishing a Charities Commission was introduced in New Zealand with the passage of the *Charities Act 2005 (New Zealand)*. This Act, introduced by the former Clark Government, was sent to the House of Representatives (NZ) Social Services Committee for inquiry and report. The inquiry received a total of 753 submissions, and held public hearings in Auckland over two days.³²

4.31 The Social Services Committee report recommended substantial changes to the bill, broadly supporting the establishment of the Charities Commission as a Crown entity but changing the Commission's focus to include one of guidance and education so as to increase flexibility of registration.³³ Flexibility was a specific concern raised and noted in the report, as organisations raised concerns about financial costs associated with compliance mechanisms.³⁴ The bill itself was highly contentious, both

28 *Charities and Trustee Investment (Scotland) Act 2005*, s8(1).

29 *Charities and Trustee Investment (Scotland) Act 2005*, s34.

30 Hon Judith Tizard, *House of Representatives Hansard (NZ)*, 12 April 2005, p. 19940.

31 *Charities Act 2005 (NZ)*, section 2(1).

32 Ms Georgina Beyer, *House of Representatives Hansard (NZ)*, 12 April 2005, p. 19944.

33 Hon Judith Tizard, *House of Representatives Hansard (NZ)*, 12 April 2005, p. 19940.

34 Ms Judith Collins, *House of Representatives Hansard (NZ)*, 12 April 2005, p. 19943.

before and after the Social Services Committee's report and the subsequent passage through the House of Representatives on 12 April 2005.³⁵ The bill was amended to reflect some changes originally proposed by the Social Services Committee, to ensure its passage through the Parliament.

Charities Act 2009 (Ireland)

4.32 The Irish parliament has also recently revised its legislation relating to charities. One provision in this seeks to prevent support going to dangerous cults. Section 3(10) reads as follows:

For the purposes of this section, a purpose or a gift is not a purpose or a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult—

- (a) the principal object of which is the making of profit, or
- (b) that employs oppressive psychological manipulation—
 - (i) of its followers, or
 - (ii) for the purpose of gaining new followers.

International best practice

4.33 Informed by the above jurisdictional comparisons, the Committee notes with interest that these recent reforms were preceded by much debate and public consultation. Reform, however, in all cases has largely been consistent. This supports the concept of an emerging best practice for the not-for-profit sector.

4.34 Mr Trevor Garrett, the Chief Executive of the New Zealand Charities Commission, in response to the question of an emerging international best practice, cited the United Kingdom (England, Wales, Scotland) and Ireland, each of which has moved to implement a 'charity commission-type system'.³⁶ The United Kingdom has in fact had some form of charity commission since the 19th century.³⁷

4.35 Evidence provided by Mr David Locke of the Charity Commission of England and Wales further suggests that it is these jurisdictions which are leading reform in this sector of the economy.

We do have some links with the Charities Commission of New Zealand. There is an international regulators forum which has now met on three occasions... We also have an international program at the charity commission. It has been in operation since 2003-04 and in that context we

35 Hon Judith Tizard, *House of Representatives Hansard (NZ)*, 12 April 2005, p. 19973.

36 Mr Trevor Garrett, New Zealand Charities Commission, *Committee Hansard*, 28 June, p. 27.

37 Ms Joanne Edwardes, Charity Commission of England and Wales, *Committee Hansard*, 28 June 2010, p. 60.

work with a number of different governments and regulatory authorities across the world.³⁸

Committee view

4.36 The Committee considers that reform in the Australian not-for-profit sector should be guided by international best practice and notes the success of England and Wales in setting a precedent and taking a leading role in international reform of the sector.

4.37 The Committee considers that the UK model informed New Zealand in the design of its commission.

4.38 The Committee also notes the approach taken in Scotland where in addition to introducing statutory definitions of 'charity' and 'charitable purpose' the ability of an entity to seek guidance from the courts was preserved in the Act. The Committee considers that if Australia should introduce statutory definitions of 'charity' and 'charitable purpose', the inclusion of such a clause could help allay the concerns of organisations currently receiving the benefits of charitable status, but which were not expressly covered by the definitions contained in a statute.

4.39 The Committee considers that the establishment of a Charity Tribunal is preferable to the automatic referral of compliance issues to a court within the Australian judiciary. Due to the risk of compliance burdens being imposed, the Committee finds it preferable that adjudication by the judiciary occur in a separate Charity Tribunal in the first instance, with appellate jurisdiction to a higher court available if necessary. The Committee is of the view that the Administrative Appeals Tribunal would be an ideal model to either adopt separately or have a Charity Tribunal incorporated into, to ease costs of regulator establishment.

4.40 The introduction of section 20 of the Scottish Act tends to confirm the concerns raised with the Committee by Treasury officials that the Commonwealth may not have sufficient authority under section 51 of the Constitution to enact legislation introducing a Charities Commission in Australia:

...my understanding is that there is not sufficient constitutional power for the Commonwealth to seek to cover that whole field and that it would therefore be necessary for the Commonwealth to act in concert with the states and territories through either a COAG process or some other process.³⁹

4.41 The Committee takes the view that legislation for the not-for-profit sector needs to apply across all charities and religious groups evenly and operate across state and territory jurisdictions. As a result, given the experience of Scotland, the

38 Mr David Locke, Charity Commission of England and Wales, *Committee Hansard*, 28 June, p. 66.

39 Mr Michael Willcock, Treasury, *Committee Hansard*, 29 June 2010, p. 35.

Committee sees value in referring to the experiences of other countries when enacting legislation of this type, especially a country like the United Kingdom where, like Australia, devolved powers require cross jurisdictional arrangements. The Committee suggests that, should moves to enact a national commission in Australia be taken, negotiation through COAG would be required.

4.42 'Charity Commission' may be too narrow a name for a regulator whose role encompasses other not-for-profit organisations. The Committee also considers that the term 'Not-for-Profit Commission' is negative as it defines organisations by what they are not and is somewhat ambiguous given that government departments and entities such as the Reserve Bank of Australia are not-for-profit entities but would not be covered. Other possible names for the independent commission include 'Third Sector Commission'⁴⁰, 'Tax Exempt Entities Commission', 'Community Organisations Commission' or 'Social Enterprise Commission'.

4.43 The introduction of a national commission should not be regarded as an additional bureaucratic impost; it would rather replace a complex array of state and territory regulatory bodies, streamlining processes for charities and reducing their compliance costs. It would increase public confidence in charities by improving their transparency as well as being a source of advice and assistance to charities.

4.44 The Committee would expect a commission to adopt a tiered reporting system to ensure that small not-for-profit organisations are not overburdened by the costs of compliance.

4.45 The Committee sympathises with the frustrations of some witnesses that a commission has been recommended by a number of reports, but not implemented.

There comes a point where a government, probably not before the next election but whoever might be the government after the next election, has to make a decision either to do something or to stop saying that it is going to intend to do something, because this matter has been on the agenda for many, many years: should we have a charities commission or not? What structure should we have in place? We had an Industry Commission [report] in 1995. We have had extensive consultation with the sector

40 As detailed in the 2008 Report scholarly literature often divides society into four sectors: Business (First Sector); Government (Second Sector); Not-For-Profit, non-government, voluntary, intermediary (Third Sector); and Family (Fourth Sector). The Third Sector in Australia sits alongside the government and private sectors. Third Sector organisations may receive government funding to provide public services, but they are not part of government. Similarly, Third Sector organisations may charge for business services, but are not part of the business sector because their primary aim is not to generate profits for their owners. Broadly, Third Sector organisations comprise charities, churches and religious organisations; sporting organisations and clubs; advocacy groups; community organisations; cooperatives; trade unions; trade and professional associations; chambers of commerce; welfare organisations; and service providers, which can be divided into three clear classes of organisations (i) Mutuals, (ii) Social Enterprises and (iii) Not-For-Profits. Source: Senate Economics Committee, *Disclosure regimes for charities and not-for-profit organisations*, 2008, p. 11.

leading to the charities definition bill. It is a goldmine for the lawyers because they like to entice you into using them to make submissions. We then had the Productivity Commission. Most recently, we had the Henry tax review. All of the major charitable organisations in this country, the major churches, have made submissions to all of those. It is not my place to give direction to government, but it would be good to either say, 'Here is a model that we can consult about, that we can actually get into the detail of and see whether it is workable or not and how we finetune it,' or leave the status quo but not continue this process of creating uncertainty.⁴¹

4.46 The Committee believes it is time for action. It expects legislation establishing a commission to be referred to it in due course.

Recommendation 3

The Committee recommends that the incoming government work through COAG to establish a single independent national commission for not-for-profit organisations. The incoming government should establish a working group, or use the COAG Business Regulation and Competition Working Group. The working group should consult extensively with the sector in a timely manner to address issues arising from the establishment of a commission which applies a public benefit test. The Australian model should draw on the Charity Commissions in the United Kingdom and New Zealand.

Recommendation 4

The Committee recommends that the working group consider the functions and role of an Australian commission which should include, but not be limited to, the following:

- **promote public trust and confidence in the charitable sector;**
- **encourage and promote the effective use of charitable resources;**
- **develop and maintain a register of all not-for-profit organisations in Australia using a unique identifying number (for example an ABN) as the identifier;**
- **develop and maintain an accessible, searchable public interface;**
- **undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis;**
- **educate and assist charities in relation to matters of good governance and management;**

41 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Committee Hansard*, 29 June 2010, p. 25.

- **facilitate, consider and process applications for registration as charitable entities;**
- **process annual returns submitted by charitable entities;**
- **supply information and documents in appropriate circumstances for the purposes of the Tax Acts;**
- **monitor charitable entities and their activities to ensure that registered entities continue to be qualified;**
- **inquire into charitable entities and persons engaging in serious wrongdoing in connection with a charitable entity;**
- **monitor and promote compliance with legislation;**
- **consider, report and make recommendations in relation to any matter relating to charities; and**
- **stimulate and promote research into any matter relating to charities.**

**Senate Annette Hurley
Chair**

Additional Comments by Senator Xenophon

Introduction

1.1 There have been numerous inquiries into the not-for-profit sector over the past decade, all consistently calling for reform of regulation of the not-for-profit sector in order to ensure greater transparency and accountability.

1.2 This Senate inquiry was a beneficial and successful opportunity to continue this discussion and heard from a range of experts, charities and religions and members of the public through the submissions and public hearings process.

1.3 The Committee's recommendations for the establishment of a single independent national commission for not-for-profit organisations, similar to the Charity Commission for England and Wales; and for the Government to inquire into the operation of MILVILUDES in France to learn how it monitors the activities of cults, with a view to establish a similar agency in Australia, should both be initiated as soon as possible.

The need for reform

1.4 Not-for-profit organisations, including charities and religions, are currently afforded tax exempt status due to the presumption that they provide the community with services and assistance that is of benefit. Subsequently, these entities are not required to lodge income tax returns unless otherwise specified.

1.5 According to the Mr Michael Hardy, Assistant Commissioner of Taxation with the Australian Tax Office,

"There are about 55,000 organisations that have some sort of charitable tax concession endorsement. We receive around 6,000 applications per year, which are reviewed."

1.6 Of those, however, Mr Hardy acknowledged that, given resource limitations, not all of these applications are closely scrutinised.

"There is certainly a fast tracked assessment process. Realistically, with the staff available and to work through the number of applications per year, perhaps in the order of 70 percent of applications work through the risk assessment as being relatively fast processed through the system. Some of

those are tagged for subsequent, after-the-event review. The remaining ones would be subject to more careful scrutiny upon application."¹

1.7 Perhaps more concerning, however, is that charities and religions are also able to self-assess their income tax status and may therefore be income tax exempt and operate completely unknown to the Tax Office.

Mr Hardy—If they make that self-assessment, which also then allows for them to be exempt from income tax, they would not make themselves known to the tax office. They would not be required to make themselves known to the tax office. If the nature of their activities in relation to goods and services tax, for example, were below the thresholds for registration, they would not be registered for goods and services tax purposes. If they did not have employees or they did not have any fringe benefits tax arrangements in relation to employees, they would have no requirement to engage with the tax office in the fringe benefits tax space, and so they may in fact be technically invisible to the tax office in any formal sense.

ACTING CHAIR—That in a way answers the question which I was going to ask, and that is: since groups can self-assess as a religion, what quantum, what number, of religions would you say are out there whereby, unless they become visible to you from some of their activity, you would not know they existed as such? For a group to claim tax exemption there must be a point where they put in a tax return or an exemption is claimed, and therefore it must be possible to make some sort of assessment of the numbers.

Mr Hardy—The only tax concession that could be accessed without an approach to the tax office by a religious organisation would be to self-assess that they were a religious organisation, which makes them exempt from income tax. The practical consequence of that is that they do not have to lodge an income tax return. If they have no reason to have a dealing with the tax office in any other capacity then they have no dealing with the tax office.

ACTING CHAIR—Do they have to advise you of their self-assessment?

Mr Hardy—No. Self-assessment is that. They self-assess.

ACTING CHAIR—In other words, they are left alone. They have self-assessed and you do not have any reason to monitor them whatsoever.

Mr Hardy—No. The legislation does not provide for that. They are potentially invisible to us as a taxation entity or an entity that has an interaction with the tax system.

Senator XENOPHON—Mr Hardy, further to Senator Eggleston's line of questioning, that means that once an organisation has a tax free status as a religion, for instance, and they self-assess, there is no scope to look into the books of that organisation?

1 Mr Michael Hardy – Australian Taxation Office, *Proof Committee Hansard – Tuesday 29 June 2010*, p. 37.

Mr Hardy—There could be for an organisation, and not just in the charity sphere, because the tax system is premised along self-assessment. If the tax office became aware of an organisation that was self-assessing as a religious organisation and we had reason to believe that they may have made an incorrect assessment, we certainly do have powers of inquiry to make contact with them and to gather information. We might be able to advise them that they were incorrect in their assessment and that perhaps they were not a religious organisation, in which case they may be part of the tax system in some other fashion.

Senator XENOPHON—But if they are classified as a religious organisation, they are invisible—you used the word ‘invisible’ earlier—for the purpose of being subject to pay tax; therefore, you cannot look. Once they have got the status of religion you cannot really look behind that.

Mr Hardy—Once they are a religious organisation and they self assess, they are exempt from income tax and therefore have no obligation to lodge an income tax return.²

1.8 There is a clear need, therefore, for greater scrutiny and accountability of organisations which receive income tax exemption.

1.9 The establishment of a national independent commission for not-for-profit organisations as recommended by the Committee will address this issue, as well as broader concerns facing the sector.

The need for a Public Benefit Test

1.10 The Senate inquiry heard from a number of former members of the Church of Scientology, an organisation which is provided with charitable status in Australia and is thereby income tax exempt.

1.11 These individuals recounted their experiences while they were members of the organisation, and explained why, based on their experiences, they do not believe the organisation should be tax exempt.

Some examples of the evidence provided include:

Mr Anderson—One should be able to clearly identify groups who do good works, because they see the results. If one cannot see those results, that particular group should be deemed to be highly suspect and should be treated as such. I guarantee if you asked the same taxpayer what good works Scientology do and what they are known for, they would actually struggle to give you an answer. I know I do. That was one of the things I found very difficult to reconcile in my association with Scientology over 25

2 Mr Michael Hardy – Australian Taxation Office, *Proof Committee Hansard – Tuesday 29 June 2010*, p. 40.

years. I in fact found them to be quite self-serving and not really directed at the external environment.³

Mrs Underwood—... as a former Scientologist I believe that the Church of Scientology is a prime example of why this tax amendment is required. As I outlined in detail in the attachment to my submission, the Church of Scientology is a tax-exempt organisation which, one, enjoys tax-exempt status while it only serves itself at the detriment of others. It does not even serve its members. Its members actually serve it. Two, it is fraudulent. It deceives and heavily coerces its people in order to obtain so-called donations. It often does not deliver what is promised, and in some cases it uses those funds for purposes other than what is stated. This is fraud and it is a crime. Three, it is an organisation which threatens its people with ‘pay up or else’. This is extortion.⁴

Ms Vonthehoff—The experiences include bullying and harassment; two coerced abortions; Scientology justice procedures, including court hearings resulting in removal of freedoms; forced financial donations; severe financial stress; working a minimum of 40 hours and up to 70 hours a week for no pay; removal of my Australian passport while studying for Scientology in the US, so I was unable to leave; working under duress all night on many occasions while my young children were forced to stay at the office and sleep on the lounge; threats of loss of my family if I tried to leave; psychological abuse; being forced to sign a suicide waiver, freeing Scientology of all responsibility if I caused myself any harm, when I made it clear how much I wanted to leave; and interrogation regarding my personal life and sex life.⁵

1.12 The Committee's recommendation that a Public Benefit Test, such as the one proposed in the *Tax Laws Amendment (Public Benefit Test) Bill 2010*, will therefore ensure that an organisation's aims and activities are for the 'public good' and is weighed against any harm caused, such as the test in effect in the United Kingdom.

1.13 Furthermore, the recommendation that the Government provide a report into the operation of France's MILVILUDES agency (which monitors the operation of cult-like organisations), and similar international bodies, with a view to establishing a similar agency in Australia, will ensure that cult-like activities are closely monitored and appropriate laws are introduced to combat these groups who use psychological pressure and breaches of general and industrial law to maintain control over individuals.

3 Mr James Anderson, *Proof Committee Hansard – Monday 28 June 2010*, p. 11.

4 Mrs Carmel Underwood, *Proof Committee Hansard – Monday 28 June 2010*, p. 12.

5 Ms Jannette Vonthehoff, *Proof Committee Hansard – Monday 28 June 2010*, p. 13.

Conclusion

1.14 The Committee's recommendations go further than the scope of the *Tax Laws Amendment (Public Benefit Test) Bill 2010*, by recommending a Charities Commission using a Public Benefit Test to provide appropriate and fair scrutiny of not-for-profit organisations and, with this, much greater protection for individuals.

1.15 Given some of the horrific stories heard within the Inquiry, it is important that any legislation to establish a Charities Commission and/or a MILVILUDES equivalent in Australia be introduced as soon as possible and by no later than 30 June 2011.

Nick Xenophon
Independent Senator for South Australia

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Dr Matthew Turnour
2	Corney & Lind
3	Name Withheld <ul style="list-style-type: none">• Supplementary Submission
4	Name Withheld
5	Confidential
6	Mr Stewart Payne
7	Mr David Graham <ul style="list-style-type: none">• Supplementary Submission (Confidential)
8	Name Withheld
9	Apostolic Church Australia
10	Anglican Church Diocese of Sydney
11	Name Withheld
12	Southland Vineyard Church Inc.
13	Name Withheld
14	Cult Information and Family Support (NSW)
15	Mr Dane Weber
16	Dr Stephen Mutch
17	Confidential
18	Mr Alan Low
19	Mr Adrian Kelsey <ul style="list-style-type: none">• Supplementary Submission (Confidential)
20	Mr Lachlan McKenzie
21	Confidential
22	FamilyVoice Australia
23	Confidential
24	Confidential
25	Atheist Foundation of Australia Inc
26	Mr Brett Richardson
27	Mr Julian Moller
28	Name Withheld
29	Name Withheld

30	Name Withheld
31	Australian Skeptics Inc
32	Ms Tanya Smith
33	Mr David Westaway
34	Name Withheld
35	Mrs Michelle Sterling
36	Confidential
37	Anglican Diocese of Armidale
38	Mrs Cassandra Kelsey
39	Mr Graeme Webber
40	Name Withheld
41	Charity Commission (UK)
42	Philanthropy Australia
43	Ms Linda Vij
	• Supplementary Submission
44	Mr John Gillespie
45	Mr Nevin Cartwright
46	ANGLICARE Sydney
47	Not-for-Profit Project, Melbourne Law School
48	Australian Christian Lobby
49	Reverend Mary Anderson
50	Name Withheld
51	Vision Australia
52	Mr Tom Grimshaw
53	Asia-Pacific Centre for Social Investment and Philanthropy
54	Name Withheld
55	Confidential
56	Name Withheld
57	Ms Natascha Fareed
58	Australian Evangelical Alliance
59	Name Withheld
60	UnitingCare Australia
61	The Salvation Army (Eastern Territory)
62	Mr Paul Paxton-Hall
63	Australian Catholic Bishops Conference
64	Mr Chris Lavery
65	Mr Hudson Carrad
66	Church of Scientology

67	Ms Peggy Daroesman (reloaded)
68	Secular Party of Australia
69	Anglicare Australia
70	Confidential
71	Name Withheld
72	Name Withheld
73	DF Mortimer and Associates Pty Ltd
74	Confidential
75	Rule of Law Institute of Australia
76	Mrs Dorothy Soffe
77	Confidential
78	Mr James Graham
79	Association of Neighbourhood Houses and Learning Centres
80	Name Withheld
81	Public Interest Law Clearing House (PILCH)
82	Treasury
83	Rationalist Society of Australia
84	Mr Ron Steele
85	International Commission of Jurists (Western Australian branch)
86	Religions Working Together
87	Mr R Burrell
88	Confidential

Additional Information Received

TABLED DOCUMENTS

Canberra, Monday 28 June 2010

- Document tabled by the Charities Commission of New Zealand: 'Guidance on the Public Benefit Test'.
- Documents tabled by Ms Louise McBride: opening statement and curriculum vitae.
- Document tabled by the Church of Scientology: statement regarding Today Tonight story about the Church of Scientology.
- Document tabled by the Church of Scientology: Virginia Stewart's opening statement.
- Document tabled by the Cult Information and Family Support (CIFS): list of groups that CIFS has had enquiries about from individuals that have concerns.
- Document tabled by the Cult Information and Family Support (CIFS): 'The After-Effects of Cult Involvement as Experienced by Former Members: An Investigation' [2006].
- Document tabled by the Cult Information and Family Support (CIFS): 'Destructive Manipulative Groups Using Mind Control' (brochure).
- Document tabled by Dr Stephen Mutch: 'World Religious Movements: Religion, Secularism and the State'.
- CD tabled by Dr Stephen Mutch containing 500 page book 'Cults, Religion and Public Policy: a comparison of official responses to scientology in Australia and the UK'.

Canberra, Tuesday 29 June

- Correspondence tabled by Senator Xenophon sent by Senator Xenophon to the Commissioner of Taxation and Commissioner for Consumer Affairs.

ANSWERS TO QUESTIONS ON NOTICE

- Received from Cult Information and Family Support on 5 July 2010; answers to Questions on Notice taken at a public hearing on 28 June 2010 in Canberra.
- Received from Dr Matthew Turnour on 7 July 2010; answers to Questions on Notice taken at a public hearing on 29 July 2010 in Canberra.
- Received from the Australian Christian Lobby on 9 July 2010; answers to Questions on Notice taken at a public hearing on 29 June 2010 in Canberra.
- Received from Ms Louise McBride on 21 July 2010; answers to Questions on Notice taken at a public hearing on 29 June 2010 in Canberra.
- Received from James Anderson on 7 July 2010; answers to Questions on Notice taken at a public hearing on 28 June 2010 in Canberra.
- Received from the Church of Scientology on 14 July 2010; answers to Questions on Notice taken at a public hearing on 28 June 2010 in Canberra.
- Received from the Treasury on 12 August 2010; answers to Question on Notice taken at a public hearing on 29 June 2010 in Canberra.

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, 28 June 2010

ANDERSON, Mr James Alexander,
Private capacity

EDWARDES, Ms Joanne, Head, Status and Public Benefit Policy,
Charity Commission for England and Wales

FERRISS, Mr Michael Victor, Church of Scientology, Secretary, Church of
Scientology New Zealand, Church of Scientology

GARRETT, Mr Trevor David, Chief Executive,
Charities Commission New Zealand

GORDON, Reverend Michael, Legal Director,
Church of Scientology

HODGKINS, Mrs Roslyn Ann, President,
Cult Information and Family Support Inc.

LIND, Mr Andrew John, Partner,
Corney and Lind Lawyers

LOCKE, Mr David, Executive Director, Charity Services,
Charity Commission for England and Wales

MACKEY, Mr Kevin,
Private capacity

McBRIDE, Ms Louise,
Private capacity

MUTCH, Dr Stephen Bruce,
Private capacity

NICHOLLS, David, President,
Atheist Foundation of Australia Inc.

SCHOFIELD, Mr Paul,
Private capacity

SMITH, Mr Anthony, Member,
Cult Information and Family Support Inc

SMITH, Mr Peter, Member,
Cult Information and Family Support Inc

STEWART, Ms Virginia, Social Reform Division,
Church of Scientology

UNDERWOOD, Ms Carmel Delia,
Private capacity

VONTHENTHOFF, Ms Janette,
Private capacity

CANBERRA, 29 June 2010

BRENNAN, Mr Lawrence Harold,
Private capacity.

CHIA, Dr Joyce, Research Fellow, Not-for-Profit Project, Melbourne Law School,
The University of Melbourne

HARDING, Dr Matthew, Senior Lecturer, Not-for-Profit Project, Melbourne Law
School, The University of Melbourne

HARDY, Mr Michael, Assistant Commissioner of Taxation,
Australian Taxation Office

LUCAS, Father Brian Joseph, General Secretary,
Australian Catholic Bishops Conference

McGREGOR-LOWNDES, Professor Myles,
Private capacity

ROUSSEL, Ms Sandra, Manager, Philanthropy and Exemptions Unit, Department of
the Treasury

SHELTON, Mr Lyle, Chief of Staff,
Australian Christian Lobby

TURNOUR, Dr Matthew Dwight, Managing Director, Neumann and Turnour
Lawyers, and Senior Research Fellow, Australian Centre for Philanthropy and
Nonprofit Studies

WILLCOCK, Mr Michael Thomas, General Manager, Personal and Retirement
Income Division, Department of the Treasury

WILLIAMS, Mr Benjamin, Research Officer,
Australian Christian Lobby

APPENDIX 3

Recommendations of the 2001 inquiry into the definition of charities and related organisations

Summary of Recommendations

Principles to define a charity

Recommendation 1 (Chapter 11)

That the term ‘not-for-profit’ be adopted in place of the term ‘non-profit’ for the purposes of defining a charity.

Recommendation 2 (Chapter 11)

That the term ‘entity’ be adopted to describe charities, and that the definition of ‘entity’ include: a body corporate; a corporation sole; any association or body of persons whether incorporated or not; and a trust;

and exclude: an individual; a political party; a partnership; a superannuation fund; and the Commonwealth, a State, or a body controlled by the Commonwealth or a State.

Recommendation 3 (Chapter 12)

That a charity must have a dominant purpose or purposes that are charitable, altruistic and for the public benefit. If the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes.

Recommendation 4 (Chapter 12)

That an entity be denied charitable status if it has purposes that are illegal, are contrary to public policy, or promote a political party or a candidate for political office.

Recommendation 5 (Chapter 12)

That the activities of a charity must further, or be in aid of, its charitable purpose or purposes. Activities must not be illegal, contrary to public policy, or promote a political party or a candidate for political office.

Recommendation 6 (Chapter 13)

That the public benefit test, as currently applied under the common law, continue to be applied; that is, to be of public benefit a purpose must:

- be aimed at achieving a universal or common good;
- have practical utility; and
- be directed to the benefit of the general community or a 'sufficient section of the community'.

Recommendation 7 (Chapter 13)

That the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic.

Recommendation 8 (Chapter 13)

That self-help groups which have open and non-discriminatory membership be regarded as having met the public benefit test.

Recommendation 9 (Chapter 13)

That where closed or contemplative religious orders regularly undertake prayerful intervention at the request of the public, their purposes be held to have met the public benefit test.

Recommendation 10 (Chapter 13)

That public benefit does not exist where there is a relationship between the beneficiaries and the donor (including a family or employment relationship); and that this principle extend to purposes for the relief of poverty, which the common law currently regards as being exempt from the need to demonstrate public benefit.

Defining charitable purpose

Recommendation 11 (Chapter 14)

That there be no requirement that charitable purposes fall either within the 'spirit and intendment' of the Preamble to the Statute of Elizabeth or be analogous to one or more of its purposes.

Recommendation 12 (Chapter 16)

That the principles enabling charitable purposes to be identified be set out in legislation.

Recommendation 13 (Chapter 16)

The Committee has considered five options for defining charitable purpose as set out in Chapter 16. It concludes that three options are viable, but recommends the following preferred option (Option 5):

Charitable purposes shall be:

- the advancement* of health, which without limitation includes:
 - the prevention and relief of sickness, disease or of human suffering;
- the advancement* of education;
- the advancement* of social and community welfare, which without limitation includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, support and protection of the aged and people with a disability;
 - the care, support and protection of children and young people;
 - the promotion of community development to enhance social and economic participation; and
 - the care and support of members or former members of the armed forces and the civil defence forces and their families;
- the advancement* of religion;
- the advancement* of culture, which without limitation includes:
 - the promotion and fostering of culture; and
 - the care, preservation and protection of the Australian heritage;
- the advancement* of the natural environment; and
- other purposes beneficial to the community, which without limitation include:
 - the promotion and protection of civil and human rights; and
 - the prevention and relief of suffering of animals.

(* Advancement is taken to include protection, maintenance, support, research, improvement or enhancement.)

Recommendation 14 (Chapter 20)

That the definition of religion be based on the principles established in the *Scientology* case, namely:

- belief in a supernatural Being, Thing or Principle; and
- acceptance and observance of canons of conduct in order to give effect to that belief.

Application of the principles

Recommendation 15 (Chapter 24)

That the encouragement of sport and recreation for purposes of amusement or competition not be a charitable purpose, it being noted that the advancement of health, education, social and community welfare, religion, culture or the natural environment through the encouragement of sport and recreation would be considered a charitable purpose.

Recommendation 16 (Chapter 25)

That the care, support and protection of children and young people, including the provision of child care services, be considered a charitable purpose.

Recommendation 17 (Chapter 26)

That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.

Recommendation 18 (Chapter 27)

That commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes.

Recommendation 19 (Chapter 28)

That the current approach of denying charitable status to government bodies be maintained. The Committee agrees with the principles set out in the *Fire Brigades* case and the *Mines Rescue* case for determining whether an entity is a government body, namely that the entity is constituted, funded and controlled by government.

Other categories in the framework

Recommendation 20 (Chapter 29)

That there be a definitional framework to distinguish altruistic entities from other not-for-profit entities.

Recommendation 21 (Chapter 29)

That in the recommended definitional framework, the category of public benevolent institution be replaced by a subset of charity to be known as Benevolent Charity, that

is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.

Recommendation 22 (Chapter 30)

That the framework recommended in this Report should not include the terms ‘religious institution’, ‘scientific institution’ and ‘public educational institution’, as altruistic entities with religious, scientific or public educational purposes and that are for the public benefit are covered by the categories in the recommended framework.

Recommendation 23 (Chapter 31)

That there be a category, known as ‘Altruistic Community Organisations’, that are entities that are not-for-profit and have a main purpose that is altruistic. That is, they can have secondary purposes that are not altruistic, and that do not further, or are not in aid of, or are not incidental or ancillary to, their main altruistic purpose.

Administering the definitions

Recommendation 24 (Chapter 32)

That the Government seek the agreement of all State and Territory Governments to the adoption nationally of the definitional framework for charities and related entities recommended in this Report.

Recommendation 25 (Chapter 32)

That the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment.

Recommendation 26 (Chapter 32)

If an independent administrative body is not established:

- that the Government set up a permanent advisory panel, including members from the charitable and related sector, to advise the Australian Taxation Office on the administration of the definitions relating to charities and related entities, and to advise the Government on the definitions of charity and related terms; and
- that the endorsement processes currently undertaken by the Australian Taxation Office be extended to include the endorsement of charities and related entities in order to access all the taxation concessions to which they are variously entitled.

Recommendation 27 (Chapter 32)

That the Government commit to a comprehensive public information and education campaign to inform the charitable and related sector of any changes arising from its consideration of this Report.

APPENDIX 4

Recommendations of the 2008 inquiry into disclosure regimes for charities and not-for-profit organisations

Summary of Recommendations

Recommendation 1

The committee recommends that all Australian Governments agree on common terminology for referring to organisations within the Sector. Governments should also develop a common meaning for terms referring to the size of these organisations, including 'micro', 'small', 'medium' and 'large'. This standard terminology should be adopted by all government departments.

Recommendation 2

The committee recommends that the Government establish a unit within the Department of Prime Minister and Cabinet specifically to manage issues arising for Not-For-Profit Organisations. The unit should report to a Minister for the Third Sector.

Recommendation 3

The committee recommends that there be a single independent national regulator for Not-For-Profit Organisations.

Recommendation 4

The committee recommends that the Australian National Regulator for Not-For-Profit Organisations should have similar functions to regulators overseas, and particularly in the UK, including a Register for Not-For-Profit Organisations with a compulsory sign-up requirement. The committee recommends consultation with the Sector to formulate the duties of the National Regulator.

As a minimum, the Regulator should:

- a) Develop and maintain a Register of all Not-For-Profit Organisations in Australia. Once registered, the Commission should issue each organisation with a unique identifying number or allow organisations with an ABN to use that number as their Not-For-Profit identifier. This could be enabled using existing ASIC website resources.
- b) Develop and maintain an accessible, searchable public interface.
- c) Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis.

- d) Secure compliance with the relevant legislation.**
- e) Develop best practice standards for the operation of Not-For-Profit Organisations.**
- f) Educate / Advise Not-For-Profit Organisations on best practice standards.**
- g) Investigate complaints relating to the operations of the organisations.**
- h) Educate the public about the role of Not-For-Profit Organisations.**

The voluntary codes of conduct developed by ACFID and FIA respectively should be considered by the Regulator when implementing its own code of conduct.

Recommendation 5

The committee recommends that the Commonwealth Government develop the legislation that will be required in order to establish a national regulator for Australia.

Recommendation 6

The committee recommends that, once a Register is established and populated, this information should be provided to the ABS, who should prepare and publish a comprehensive study to provide government with a clearer picture of the size and composition of the Third Sector.

Recommendation 7

The committee recommends that a single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some not-for-profit organisations, the legal structure must be developed in full consultation with these organisations.

Recommendation 8

The committee recommends that the Henry Review include an examination of taxation measures affecting Not-For-Profit Organisations with a view to simplifying these arrangements and reducing confusion and cost of compliance for these organisations.

Recommendation 9

The committee recommends that a National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth.

This Act should include the following minimum features:

- It should apply nationally.
- It should apply to all organisations.

- It should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised.
- It should include a provision for the granting of a license.
- It should clearly regulate contemporary fundraising activities such as internet fundraising.

Recommendation 10

The committee recommends that a tiered reporting system be established under the legislation for a specialist legal structure.

Recommendation 11

The committee recommends that the tiers be assigned to organisations based on total annual revenue.

Recommendation 12

The committee recommends that the Commonwealth Government work with the Sector to implement a standard chart of accounts for use by all departments and Not-For-Profit Organisations as a priority.

Recommendation 13

The committee recommends that a new disclosure regime contain elements of narrative and numeric reporting as well as financial, in acknowledgement that the stakeholders of the Sector want different information to that of shareholders in the Business Sector. The financial reporting should be transparent and facilitate comparison across charities.

Recommendation 14

The committee recommends that the national regulator investigate the cost vs benefit of a GuideStar-type system (a website portal that publishes information on the aims and activities of Not-For-Profit Organisations) in Australia to encompass all Not-For-Profit Organisations.

Recommendation 15

The committee recommends that a Taskforce be established for the purposes of implementing the recommendations of this report. The Taskforce should report to COAG. Its membership should include:

- a government representative from the Commonwealth;
- a COAG-elected representative to speak for states and territories;
- one or more qualified legal experts with expertise with the major pieces of legislation affecting Not-For-Profit organisations;

- a representative from an organisation which manages private charitable foundations;
- an accountant with not-for-profit expertise; and
- a number of representatives from the peak bodies of Not-For-Profit Organisations, including a representative from a peak body for social enterprises.

The Taskforce should actively seek to ensure that the measures of reform that it implements do not impose an unreasonable reporting burden on small and micro Not-For-Profit Organisations.

APPENDIX 5

Productivity Commission's terms of reference for its inquiry into the contribution of the not-for-profit sector



Australian Government
Productivity Commission

Contribution of the
Not-for-Profit Sector

Productivity Commission
Research Report

January 2010



Terms of reference

Review of the Contribution of the Not-for-Profit Sector

Background

The Australian Government is committed to an active policy of social inclusion oriented to ensuring the economic and social participation of all Australians irrespective of their circumstances. Community (not for profit) organisations play an important role in combating social exclusion and enhancing the economic, social, cultural and environmental wellbeing of society.

The Government is committed to finding the best solutions to problems of social exclusion by ensuring the not for profit, private and government sectors work together effectively, and by using evidence-based programs and policies. In this context, measurement of the contributions of community organisations, and identification of ways to enhance those contributions, are important.

Further, the Government acknowledges the changing relationships between government, business and community organisations and wants to explore their impacts and future opportunities for optimising such relationships to further the well-being of society.

The not for profit sector has evolved considerably since past examinations, including the Report of the former Industry Commission in 1995 on *Charitable Organisations in Australia* and the ABS's work in 2002 within the national accounting framework, *Non-Profit Institutions Satellite Account*.

Scope of the review

The Productivity Commission is requested to undertake a research study on the contributions of the not for profit sector with a focus on improving the measurement of its contributions and on removing obstacles to maximising its contributions to society. In undertaking the study, the Commission is to:

- assess the extent to which the not for profit sector's contributions to Australian society are currently measured, the utility of such measurements and the possible uses of such measurements in helping shape government policy and programs;
- consider alternatives for, or improvements in, such measurements or further quantitative and/or qualitative means of capturing the not for profit sector's full contribution to society;

- identify unnecessary burdens or impediments to the efficient and effective operation of community organisations generally, including unnecessary or ineffective regulatory requirements and governance arrangements, while having regard to the need to maintain transparency and accountability;
- consider options for improving the efficient and effective delivery of government funded services by community organisations, including improved funding, contractual and reporting arrangements with government, while having regard to the need for transparency and accountability;
- examine the changing nature of relationships between government, business and community organisations in recent times, their general impacts, and opportunities to enhance such relationships to optimise outcomes by the sector and its contribution to society;
- examine the extent to which tax deductibility influences both decisions to donate and the overall pool of philanthropic funds; and
- examine the extent to which tax exemptions accessed by the commercial operations of not-for-profit organisations may affect the competitive neutrality of the market.

In conducting the study, the Commission is to:

- adopt in its considerations a broad definition of the not for profit sector to encompass most categories of not for profit organisations, including Australian based international aid and development agencies;
- seek public submissions and consult widely with State and Territory Governments, government agencies, the community sector, business, and other interested parties;
- have regard to the Government's Taxation Review headed by Dr Ken Henry and the Inquiry into the Definition of Charities and other organisations commissioned in 2002, but, other than as explicitly required by these terms of reference, not to examine in detail matters covered by those reviews; and
- have regard to any other relevant current or recent measurements and reviews conducted in Australia and internationally.

The Commission is to produce and publish a draft report and final report by the end of 2009.

Chris Bowen

[17 March 2009]

APPENDIX 6

Extract of ITAA1997 – Division 50

Part 2-15—Non-assessable income

Division 50—Exempt entities

Table of Subdivisions

- 50-A Various exempt entities
- 50-B Endorsing charitable entities as exempt from income tax

Subdivision 50-A—Various exempt entities

Table of sections

- 50-1 Entities whose ordinary income and statutory income is exempt
- 50-5 Charity, education, science and religion
- 50-10 Community service
- 50-15 Employees and employers
- 50-20 Funds contributing to other funds
- 50-25 Government
- 50-30 Health
- 50-35 Mining
- 50-40 Primary and secondary resources, and tourism
- 50-45 Sports, culture, film and recreation
- 50-50 Special conditions for items 1.1 and 1.2
- 50-52 Special condition for items 1.1, 1.5, 1.5A, 1.5B and 4.1
- 50-55 Special conditions for items 1.3, 1.4, 6.1 and 6.2
- 50-57 Special condition for item 1.5
- 50-60 Special conditions for items 1.5A and 1.5B
- 50-65 Special conditions for item 1.6
- 50-70 Special conditions for items 1.7, 2.1, 9.1 and 9.2
- 50-72 Special condition for item 4.1
- 50-75 Certain distributions may be made overseas
- 50-80 Testamentary trusts may be treated as 2 trusts

50-1 Entities whose ordinary income and statutory income is exempt

The total *ordinary income and *statutory income of the entities covered by the following tables is exempt from income tax. In some cases, the exemption is subject to special conditions.

Note 1: Ordinary and statutory income that is exempt from income tax is called exempt income: see section 6-20. The note to subsection 6-15(2) describes some of the other consequences of it being exempt income.

Note 2: Even if you are an exempt entity, the Commissioner can still require you to lodge an income tax return or information under section 161 of the *Income Tax Assessment Act 1936*.

50-5 Charity, education, science and religion

Charity, education, science and religion		
Item	Exempt entity	Special conditions
1.1	charitable institution	see sections 50-50 and 50-52
1.2	religious institution	see section 50-50
1.3	scientific institution	see section 50-55
1.4	public educational institution	see section 50-55
1.5	fund established for public charitable purposes by will before 1 July 1997	see sections 50-52 and 50-57
1.5A	trust covered by paragraph 50-80(1)(c)	see sections 50-52 and 50-60
1.5B	fund established in Australia for public charitable purposes by will or instrument of trust (and not covered by item 1.5 or 1.5A)	see sections 50-52 and 50-60
1.6	fund established to enable scientific research to be conducted by or in conjunction with a public university or public hospital	see section 50-65
1.7	society, association or club established for the encouragement of science	see section 50-70
1.8	Global Carbon Capture and Storage Institute Ltd	only amounts included in assessable income: (a) on or after 1 July 2009; and (b) before 1 July 2013

Note 1: Section 50-52 has the effect that certain charitable institutions, funds and trusts are exempt from income tax only if they are endorsed under Subdivision 50-B.

Note 2: Section 50-80 may affect which item a trust is covered by.

50-10 Community service

Community service

Item	Exempt entity	Special conditions
2.1	society, association or club established for community service purposes (except political or lobbying purposes)	see section 50-70

50-15 Employees and employers

Employees and employers

Item	Exempt entity	Special conditions
3.1	(a) employee association; or (b) employer association	the association: (a) is registered or recognised under the <i>Fair Work (Registered Organisations) Act 2009</i> or an *Australian law relating to the settlement of industrial disputes; and (b) is located in Australia, and incurs its expenditure and pursues its objectives principally in Australia
3.2	trade union	located in Australia and incurring its expenditure and pursuing its objectives principally in Australia

50-20 Funds contributing to other funds

Funds contributing to other funds

Item	Exempt entity	Special conditions
4.1	fund established by will or instrument of trust solely for a purpose referred to in paragraph (a) or (b) of the column headed "Recipient" in item 2 of the table in section 30-15 (and not covered by item 1.5, 1.5A or 1.5B of the table in section 50-5)	see sections 50-52 and 50-72

50-25 Government

Government

Item	Exempt entity	Special conditions
5.1	(a) a municipal corporation; or (b) a *local governing body	none
5.2	a public authority constituted under an *Australian law	none
5.3	a *constitutionally protected fund	none

Note: The ordinary and statutory income of a State or Territory body is exempt: see Division 1AB of Part III of the *Income Tax Assessment Act 1936*.

50-30 Health**Health**

Item	Exempt entity	Special conditions
6.1	public hospital	see section 50-55
6.2	hospital carried on by a society or association	not carried on for the profit or gain of its individual members, see also section 50-55
6.3	private health insurer within the meaning of the <i>Private Health Insurance Act 2007</i>	not carried on for the profit or gain of its individual members

50-35 Mining**Mining**

Item	Exempt entity	Special conditions
7.1	the Phosphate Mining Company of Christmas Island Limited (incorporated in the Australian Capital Territory)	none
7.2	the British Phosphate Commissioners Banaba Contingency Fund (established on 1 June 1981)	none

50-40 Primary and secondary resources, and tourism**Primary and secondary resources, and tourism**

Item	Exempt entity	Special conditions
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Primary and secondary resources, and tourism

Item	Exempt entity	Special conditions
8.1	a society or association established for the purpose of promoting the development of: (a) aviation; or (b) tourism	not carried on for the profit or gain of its individual members
8.2	a society or association established for the purpose of promoting the development of any of the following Australian resources: (a) agricultural resources; (b) horticultural resources; (c) industrial resources; (d) manufacturing resources; (e) pastoral resources; (f) viticultural resources; (g) aquacultural resources; (h) fishing resources	not carried on for the profit or gain of its individual members
8.3	a society or association established for the purpose of promoting the development of Australian information and communications technology resources	not carried on for the profit or gain of its individual members

50-45 Sports, culture, film and recreation

Sports, culture, film and recreation

Item	Exempt entity	Special conditions
9.1	a society, association or club established for the encouragement of: (a) animal racing; or (b) art; or (c) a game or sport; or (d) literature; or (e) music	see section 50-70
9.2	a society, association or club established for musical purposes	see section 50-70

Sports, culture, film and recreation		
Item	Exempt entity	Special conditions
9.3	the Australian Film Finance Corporation Pty Limited (incorporated under the <i>Companies Act 1981</i> on 12 July 1988)	none
9.4	the Commonwealth Games Federation	only income * derived on or after 1 January 2000 and before 1 July 2007

50-50 Special conditions for items 1.1 and 1.2

An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or
- (d) is a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia.

Note 1: Certain distributions may be disregarded: see section 50-75.

Note 2: The entity must also meet other conditions to be exempt from income tax: see section 50-52.

50-52 Special condition for items 1.1, 1.5, 1.5A, 1.5B and 4.1

- (1) An entity covered by item 1.1, 1.5, 1.5A, 1.5B or 4.1 is not exempt from income tax unless the entity is endorsed as exempt from income tax under Subdivision 50-B.

Note: The entity will not be exempt from income tax unless it also meets other conditions: see section 50-50 (for an entity covered by item 1.1), 50-57 (for an entity covered by item 1.5), 50-60 (for an entity covered by item 1.5A or 1.5B) or section 50-72 (for an entity covered by item 4.1).

- (3) This section has effect despite all the other sections of this Subdivision.

Note: This means that an entity covered both by an item other than 1.1, 1.5, 1.5A, 1.5B or 4.1 and by one of those items is not exempt from income tax unless the entity is endorsed under Subdivision 50-B as

exempt from income tax and the entity meets the requirements of whichever of sections 50-50, 50-57, 50-60 and 50-72 is relevant.

50-55 Special conditions for items 1.3, 1.4, 6.1 and 6.2

An entity covered by item 1.3, 1.4, 6.1 or 6.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident.

Note: Certain distributions may be disregarded: see section 50-75.

50-57 Special condition for item 1.5

A fund covered by item 1.5 is not exempt from income tax unless the fund is applied for the purpose for which it was established.

Note: The fund must also meet another condition to be exempt from income tax: see section 50-52.

50-60 Special conditions for items 1.5A and 1.5B

A fund covered by item 1.5A or 1.5B is not exempt from income tax unless the fund is applied for the purposes for which it was established and:

- (a) incurs, and has at all times since 1 July 1997 incurred, its expenditure principally in Australia and pursues, and has at all times since 1 July 1997 pursued, its charitable purposes solely in Australia; or
- (b) is a fund which is referred to in a table in Subdivision 30-B or in item 2 of the table in section 30-15; or
- (c) distributes solely, and has at all times since 1 July 1997 distributed solely, to either or both of the following:
 - (i) a charitable fund, foundation or institution which, to the best of the trustee's knowledge, is located in Australia and incurs its expenditure principally in Australia and pursues its charitable purposes solely in Australia;
 - (ii) a charitable fund, foundation or institution that, to the best of the trustee's knowledge, meets the description and requirements in item 1 or 2 of the table in section 30-15.

Note 1: Certain distributions may be disregarded: see section 50-75.

Note 2: The fund must also meet other conditions to be exempt from income tax: see section 50-52.

50-65 Special conditions for item 1.6

A fund covered by item 1.6 is not exempt from tax unless the fund is applied for the purposes for which it was established and is:

- (a) a fund that is located in, and which incurs its expenditure principally in, Australia and that is established for the purpose of enabling scientific research to be conducted principally in Australia by or in conjunction with a public university or public hospital; or
- (b) a scientific research fund that meets the description and requirements in item 1 or 2 of the table in section 30-15.

Note: Certain distributions may be disregarded: see section 50-75.

50-70 Special conditions for items 1.7, 2.1, 9.1 and 9.2

An entity covered by item 1.7, 2.1, 9.1 or 9.2 is not exempt from tax unless the entity is a society, association or club that is not carried on for the purpose of profit or gain of its individual members and that:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or
- (b) is a society, association or club that meets the description and requirements in item 1 of the table in section 30-15; or
- (c) is a prescribed society, association or club which is located outside Australia and is exempt from income tax in the country in which it is resident.

Note: Certain distributions may be disregarded: see section 50-75.

50-72 Special condition for item 4.1

(1) A fund covered by item 4.1 is not exempt from income tax unless the fund:

- (a) is applied for the purposes for which it is established; and
- (b) distributes solely, and has at all times since the time mentioned in subsection (2) distributed solely, to a fund, authority or institution that:
 - (i) meets the description and requirements in item 1 of the table in section 30-15; and
 - (ii) is an *exempt entity.

- (2) The time is the start of the income year after the income year in which the *Tax Laws Amendment (2005 Measures No. 3) Act 2005* receives the Royal Assent.

50-75 Certain distributions may be made overseas

- (1) In determining for the purposes of this Subdivision whether an institution, fund or other body incurs its expenditure or pursues its objectives principally in Australia, distributions of any amount received by the institution, fund or other body as a gift (whether of money or other property) or by way of government grant are to be disregarded.
- (2) In determining for the purposes of this Subdivision whether an institution, fund or other body incurs its expenditure or pursues its objectives principally in Australia, distributions of any amount from a fund that is referred to in a table in Subdivision 30-B and operated by the institution, fund or other body are to be disregarded.
- (3) In determining for the purposes of section 50-60 whether a fund:
 - (a) incurs, and has at all times since 1 July 1997 incurred, its expenditure principally in Australia and pursues, and has at all times since 1 July 1997, pursued its charitable purposes solely in Australia; or
 - (b) distributes solely, and has at all times since 1 July 1997 distributed solely, to a charitable fund, foundation or institution described in subparagraph 50-60(c)(i) or (ii);distributions of any amount received by the fund as a gift (whether of money or property) or by way of government grant are to be disregarded.

50-80 Testamentary trusts may be treated as 2 trusts

- (1) If:
 - (a) a trust (the *existing trust*) covered by item 1.5 was in existence immediately before 1 July 1997; and
 - (b) on or after 1 July 1997 one or more assets are given to the existing trust (other than in return for valuable consideration) or become part of the trust property under a will;then, for the purposes of this Subdivision and Subdivision 50-B, the existing trust is taken to be 2 separate trusts (the *new trust* and the *old trust*) as follows:
 - (c) the new trust is taken to be a trust created after the start of 1 July 1997 that consists of so much of the trust property as

consists of those assets together with any income *derived from those assets; and

(d) the old trust is taken to be a trust created before 1 July 1997 that consists of the remainder of the trust property.

(2) Where an asset is received in substitution for another asset, subsection (1) applies as if the substituted asset were the other asset.

Subdivision 50-B—Endorsing charitable entities as exempt from income tax

Guide to Subdivision 50-B

50-100 What this Subdivision is about

This Subdivision sets out rules about endorsement of charitable institutions and trust funds for charitable purposes as exempt from income tax. Such entities are only exempt from income tax if they are endorsed.

Table of sections

Endorsing charitable entities as exempt from income tax

50-105 Endorsement by Commissioner
50-110 Entitlement to endorsement

Endorsing charitable entities as exempt from income tax

50-105 Endorsement by Commissioner

The Commissioner must endorse an entity as exempt from income tax if the entity:

- (a) is entitled to be endorsed as exempt from income tax; and
- (b) has applied for that endorsement in accordance with Division 426 in Schedule 1 to the *Taxation Administration Act 1953*.

Note: For procedural rules relating to endorsement, see Division 426 in Schedule 1 to the *Taxation Administration Act 1953*.

50-110 Entitlement to endorsement*General rule*

- (1) An entity is entitled to be endorsed as exempt from income tax if the entity meets all the relevant requirements of this section.

Which entities are entitled to be endorsed?

- (2) To be entitled, the entity must be an entity covered by item 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 or item 4.1 of the table in section 50-20.

Requirement for ABN

- (3) To be entitled, the entity must have an *ABN.
- (4) However, for a trust:
 - (a) covered by item 1.5 of the table in section 50-5 because the trust is covered by paragraph 50-80(1)(d); or
 - (b) covered by item 1.5A of the table in section 50-5 (because the trust is covered by paragraph 50-80(1)(c));to be entitled, the existing trust mentioned in paragraph 50-80(1)(a) must have an *ABN.

Requirement to meet special conditions

- (5) To be entitled:
 - (a) the entity must meet the relevant conditions referred to in the column headed “Special conditions” of whichever of items 1.1, 1.5, 1.5A and 1.5B of the table in section 50-5 and item 4.1 of the table in section 50-20 covers the entity; or
 - (b) both of the following conditions must be met:
 - (i) the entity must not have carried on any activities as a charitable institution (if the entity is covered by item 1.1 of the table in section 50-5) or for public charitable purposes (if the entity is covered by item 1.5, 1.5A or 1.5B of that table);
 - (ii) there must be reasonable grounds for believing that the entity will meet the relevant conditions referred to in the column headed “Special conditions” of whichever of items 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 covers the entity; or
 - (c) if the entity is covered by item 4.1 of the table in section 50-20 and has not made any distributions—there must be reasonable grounds for believing that the entity will satisfy section 50-72.

- (6) To avoid doubt, the condition set out in section 50-52 (requiring the entity to be endorsed under this Subdivision) is not a relevant condition for the purposes of subsection (5