



**Submission to the
Not-for-Profit Sector Tax Concession Working Group**

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Executive Summary

The Australian Christian Lobby (ACL) represents a significant constituency in the Australian community. Its supporters are mainly Christians who come from a wide range of Christian denominations across the Catholic, Orthodox, Evangelical and Pentecostal traditions.

ACL adopts substantially the recommendations of the January 2010 Productivity Commission Research Report, *Contribution of the Not-For-Profit Sector*, and submits that its recommendations, informed by the definition of 'basic religious charity' offered in the new *Australian Charities and Not-for-Profits Commission Act 2012* ('ACNC Act'), might lead to a fairer, simpler and more effective tax concession regime for Australia. The following submissions are made so far as Christian religious organisations are concerned:

- In relation to **income tax exemption**, it is submitted that the current arrangements should continue.
- In relation to **deductible gift recipient (DGR) status**, it is submitted that there should be a staged approach consistent with the Productivity Commission recommendation, but that the stages follow the division between charities set out in the ACNC Act, not the common law heads of charity. The two simple, mutually exclusive and collectively exhaustive classes of charity in the ACNC Act provide an easy division for staged implementation of deductibility: 'basic religious charities', and other charities. It is submitted that all charities, other than basic religious charities, should enjoy DGR status initially, with deductibility for basic religious charities added on an opt-in basis at a future time.
- In relation to **fringe benefits tax (FBT) concessions**, it is submitted that the current arrangements should continue in so far as they affect religious institutions and religious practitioners. It is submitted that the case for change with respect to religious practitioners has not been made out. Concerns of competitive neutrality do not apply, and the quantum of the concession is small as a percentage of the whole. The alternative of funding religious practitioners through direct grants, whilst common in Europe, should not replace the established regime in Australia. Further, FBT concessions to religious institutions and religious practitioners cost government less than direct grants of equivalent value.

In summary then, whatever the language used to define the institutions and persons presently entitled to income tax exemption and FBT concessions as religious institutions or religious practitioners, it is submitted that these should continue. Second, a two stage approach to extending entitlement to deductibility and linking it to the concept of Basic Religious Charity might overcome some of the concerns raised.

Given the complex nature of the issues involved in this review and the potential for unintended consequences, ACL is continuing to look into these issues and is open to further discussion of them.

As the extent of tax concessions extended to religious organisations and practitioners internationally and the reasons for those concessions are not widely appreciated, the submission explores the international context in some detail.

Submissions are not made in relation to refundable franking credits, and goods and services tax concessions.

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Introduction

The Australian Christian Lobby ('ACL') represents a significant constituency in the Australian community. Its supporters are mainly Christians who come from a wide range of Christian denominations across the Catholic, Orthodox, Evangelical and Pentecostal traditions.

The ACL is incorporated as a company limited by guarantee, and is currently endorsed as exempt from income tax.

This submission substantially affirms the recommendations of the January 2010 Productivity Commission Research Report, *Contribution of the Not-For-Profit Sector*. Accordingly, we begin by briefly listing the recommendations of the Productivity Commission on the issues which are the subject of this submission: income tax exemption, fringe benefits tax (FBT) concessions for religious practitioners, and deductible gift recipient (DGR) status. The international context is then considered, before outlining the current Australian concessions. This leads to a discussion of reasons for favouring religious organisations and practitioners, including meeting two common objections against favouring religion. We then provide brief answers to the Discussion Paper consultation questions, based on the substantive reasoning which comprises the bulk of this submission, before providing a summary conclusion.

Submissions are not made in relation to refundable franking credits, and goods and services tax concessions.

The Productivity Commission

Income tax exemption

In so far as religious organisations are concerned, the Productivity Commission did not recommend any changes to the current arrangements.¹ The ACL adopts this approach and suggests that the exemptions currently enjoyed by religious organisations should continue.

Deductibility

Recommendation 7.3 related to deductibility and was in the following terms:

The Australian Government should progressively widen the scope for gift deductibility to include all endorsed charitable institutions and charitable funds. Consistent with the Australian Taxation Office rulings on what constitutes a gift, payments for services should not qualify as a gift.²

In explaining the reason for the progressive widening, the Productivity Commission pointed to the issue of 'greatest concern' being the 'inclusion of donations to religious organisations', perhaps because they are such a large proportion of total donations.³ The cost of extending deductibility to all charities based on 2006-07 figures was \$577 million, of which \$359 million (62%) would be attributable to religious organisations.⁴

¹ Productivity Commission Research Report (January 2010), *Contribution of the Not-For-Profit Sector*, Chapters 7-8.

² Ibid p xlvi.

³ Ibid p 179.

⁴ Ibid p 178.

The Productivity Commission did not explain how this staged approach is to be implemented, but, mindful that more heads of charity might be brought forward with a new statutory definition of charity, it suggested that one approach might be to take each 'head of charity separately'.⁵

Noting that the common law heads of charity are not mutually exclusive and have proved conceptually difficult, the ACL submits that a better subdivision of charitable entities, at least initially, would be that set out in the *Charities and Not-for-Profits Commission Act 2012* (ACNC Act): 'basic religious charities',⁶ and other charities. ACL submits that deductibility be extended to all charities registered with the ACNC, other than basic religious charities, at this time. Deductibility can be extended to basic religious charities, should they wish to have it, at a later date.

This gives effect to the staged approach recommended by the Productivity Commission based on concerns about the quantum of religious giving, but provides a tidy basis for segmentation. It is also a division easily understood by reference to an entity's status on a public register. Whilst the ACNC Act definition of 'basic religious charity' and the definition of 'religion' in the Productivity Commission report will not align perfectly, it is noteworthy that the Productivity Commission defined religion in the following terms: congregations (including churches, synagogues, mosques, shrines, monasteries & seminaries); associations of congregations'.⁷ Conceptually, at least, this would seem to be the intended subject matter of the definition of 'basic religious charity'.

FBT

The Productivity Commission set out some concerns regarding FBT concessions.⁸ It did not, though, recommend any change to FBT arrangements for religious practitioners. ACL submits that the reasons raised for change in the Discussion Paper, namely administrative expense, concerns about competitive neutrality and abuse of uncapped benefits, do not apply to FBT concessions for religious practitioners. Summarising the principle, the practice and the general rule, the Productivity Commission explained the issues in a way that makes it clear that the concerns do not apply to religion:

- In principle, concessions are distortionary whenever an eligible organisation is in competition with a for-profit provider, or an NFP not eligible for the concessions.
- In practice, only a few areas pose a concern. These include NFP hospitals and public hospitals which have a significant competitive advantage over for-profit hospitals.
- As a rule, it would be preferable for services to be funded in a transparent fashion and not rely on input tax concessions that can be relatively complex, costly and distortionary.⁹

For-profit providers are not in competition with religious practitioners. The Productivity Commission expressly refers to religion as a 'non-market' area.¹⁰ The FBT arrangements for religious practitioners are different from those applying to the hospitals. As to funding in the context of religion, for reasons we will come to, it is clearly preferable for state support to continue to be provided by way of concessions, not by way of direct grants.

⁵ Ibid p 179.

⁶ Australian *Charities and Not-for-Profits Commission Act 2012* (Cth) s 205-35.

⁷ Productivity Commission above n 1, p xvii.

⁸ Ibid Chapter 8.

⁹ Ibid p 197.

¹⁰ Ibid p xxv.

The Productivity Commission did not recommend changes to the FBT arrangements for religious practitioners, and they should remain as they are, except that FBT concessions should be extended to employees of religious organisations beyond religious practitioners. Currently FBT concessions are available to employees in some charities but not for employees beyond religious practitioners within the religious sub-sector.

Additional Productivity Commission comments

Before leaving the observations of the Productivity Commission, two additional comments can be usefully mentioned as they lead into the next two sections. First, with respect to deductibility:

the scope of eligible activities is narrow in Australia relative to that in comparable overseas countries. For example, donations to all charities ... are eligible for Gift Aid in the UK, while in Australia only 40 per cent of all tax concession charities are DGRs.¹¹

Second, the rationale for not-for-profit (NFP) tax concessions generally has never been clearly set out by government, but there is 'a general understanding that tax concessions are granted to support NFPs because they serve the community and their activities provide positive public benefits'.¹² ACL adopts and affirms this understanding, but notes that in the context of religious organisations, freedom of religion provides a separate, stand-alone justification.

The international context

Introduction to the international context

The purpose of this section is threefold. First, it demonstrates that favouring religion through the avenue of the tax system is an international phenomenon, applying across a wide variety of church-state constitutional frameworks. Second, it illustrates that the ways in which religion can be favoured are many and varied. Third, it sets up the platform for an argument that Australia is a jurisdiction that could, and should, extend considerably more favour to religious organisations through taxation mechanisms if it is to achieve parity with international standards.

Church-State constitutional premises are irrelevant

To begin, it will be helpful to clear away the common misconception that the relationship between church and state must control whether and how the state supports religion. This is not the case in practice. Church-state constitutional arrangements have not prevented even strictly separationist countries from supporting religion.

It is easily assumed that church-state constitutional arrangements will significantly inform the extent to which tax favours are extended to religious organisations. The research, at least from Europe, suggests that it is irrelevant whether or not there is an established church (as in England), a strict separation (as in France), or a system of 'positive neutrality' between church and state (as in Holland). Sophie van Bijsterveld, who has researched this question, concluded in relation to the established church in England that 'it may sound paradoxical but apart from the position of the established Church of England one could say that the system in England functions much like a system of separation of church and state'.¹³ In Denmark,

¹¹ Ibid p 171.

¹² Ibid p 156.

¹³ Sophie van Bijsterveld (2010) 'The Dutch Model of Positive Neutrality in European Context' *The Review of Faith and International Affairs* 8(2) pp 29-30.

there is an established church, and more support is evident.¹⁴ In Greece, there is also an established church, the Greek Orthodox Church, and it is 'for all practical purposes, completely looked after financially by the state'.¹⁵ Van Bijsterveld opens her analysis by stating that in all 'Western European states some sort of financial state support to church and religion exists'.¹⁶ She concludes the survey with the observation that all Western European countries find a way to support churches and other religious organisations, irrespective of constitutional arrangements and formal relationships between church and state.¹⁷

Torfs closes his review of the funding of religious organisations in Europe with a similar conclusion:

...[it] goes on, and very often it does so in the same way as it did during the previous decades or centuries. Yet, looking slightly deeper we see the same formal rules are underpinned by shifting political assumptions.¹⁸

The same is arguably true of Australians. The Charities Definition Inquiry began its report on advancement of religion with the observation: 'The advancement of religion, in one form or another, has been part of charity throughout the history of charity law.'¹⁹

Within the Australian community, there are a range of views regarding the importance of the separation of church and state, and the funding of religious activities by tax concessions or otherwise. The seeming irrelevance of church-state models in this diversity of European examples demonstrates that nations with very different constitutional relations for church and state can, and do, extensively favour religious organisations. The validity of Australian church-state relations does not, therefore, predicate a particular view or approach to tax favours extended to religious entities.

Tax favours for religious organisations are international and diverse in nature

In this section, we survey a variety of international approaches to tax favours for religious organisations, referencing 12 countries in alphabetical order. Limited time and resources have confined the review mainly to secondary sources, particular points of interest and general rather than technical observations. This is enough, though, we submit, to illustrate the general point that religious organisations are favoured in a variety of ways, and that this is an international phenomenon consistent across very different constitutional arrangements.

Belgium

In Belgium, there is a state-recognised religion and the state contributes to the salaries of clergy. 'Clergy' is understood expansively and can include the 'humanist movement'.²⁰

Canada

Donations in Canada to religious organisations are tax-deductible, and religious organisations enjoy income tax exemption.²¹

¹⁴ Ibid p 30.

¹⁵ Ibid pp 30-31.

¹⁶ Ibid p 29.

¹⁷ Ibid p 34.

¹⁸ Rik Torfs (2010) 'The Religion-State Relationship in Europe' *The Review of Faith and International Affairs* 8(2), p 19.

¹⁹ Charities Definition Inquiry (June 2001) *Report of the Inquiry into the Definition of Charities and Related Organisations*, available at <http://www.cdi.gov.au/html/report.htm>, p 175.

²⁰ van Bijsterveld above n 13, p 31.

²¹ *Income Tax Act* (Can) (1985) c 1 (5th Supp) s 110.1(1)(a)(ii), 118.1(1)(b) and s 118.1(3), and 149(1)(l).

Denmark

Denmark has an established church. Religious entities are favoured with at least the following:²²

- payment of clergy salaries;
- income tax exemption; and
- income tax deductibility.

Finland

In Finland, there are two recognised establishment religions. About 82% of the population belongs to the Evangelic Lutheran Church, with the other established church, the Finnish Orthodox Church, comprising 1.1% of the population.²³

Torfs explains that the recognition of the Orthodox Church is 'a tribute to [its contribution to] the birth of the Finnish nation'.²⁴ As a consequence of being recognised religions, these denominations enjoy direct government funding.²⁵ The state also collects 'church taxes' for these churches.²⁶

France

France, which has embedded church-state separation in its constitution and 'considers itself radically separationist',²⁷ also favours religious entities. The state pays for chaplaincy for the armed forces, and for persons in penitentiaries, in aged care and in private schooling.²⁸ France also gives significant state financial support for maintenance of religious buildings.²⁹

Germany

There is no established church in Germany, but church 'taxes' are collected by government on behalf of churches.³⁰ It appears that this is part of a recognition of the independence of the church from the state, with churches classed as 'Körperschaften des öffentlichen Rechts' ('public corporations'). These are considered public bodies in the same sense as governments are public bodies, with the power to legislate rules for their sphere of jurisdiction and levy taxes.³¹

Holland

Holland also does not have an established church. The Dutch government did at one stage pay clergy salaries.³² Now, religious entities enjoy at least:³³

- income tax exemption;

²² van Bijsterveld, above n 13, pp 29-30.

²³ Eroa Kirkosta, 'Status of the Finnish State Church in 2007' available at http://www.eroakirkosta.fi/media/english/status_of_the_finnish_state_church_in_2007.html, accessed 29 November 2012.

²⁴ Torfs above n 18, p 18.

²⁵ Ibid.

²⁶ Eroa Kirkosta, above n 10.

²⁷ Torfs above n 18, p 15.

²⁸ van Bijsterveld above n 13, p 30.

²⁹ Ibid p 31.

³⁰ Ibid.

³¹ Torfs above n 18, p 15.

³² van Bijsterveld above n 13, p 30.

³³ Ibid pp 33-34.

- state funding for chaplaincy for the armed forces, for persons in penitentiaries and hospitals or homes for the elderly; and
- significant financial support for maintenance and restoration of religious buildings.

Van Bijsterveld makes the point that in a Dutch context, there is a preference for indirect rather than direct support of churches, with the dominant philosophy being a concept of 'benign friendly separation'.³⁴

Hungary

In 1996, Hungary introduced what have become known as 'Percentage Laws', which allow taxpayers to allocate a percentage of their income tax to specific not-for-profit organisations. Initially, this did not include churches, but this changed a year later in 1997.³⁵ By 2004, the idea had also been adopted in Slovakia, Lithuania, Poland and Romania.³⁶

The concept 'originates in policies established during the 19th century to resolve dilemmas of church financing after the separation of state and church'.³⁷ There are some challenges to consider in relation to this concept but it seems that it has 'a significant effect on philanthropic behaviour in transitional societies', such as those emerging from communism in Eastern Europe.³⁸

New Zealand

In New Zealand, churches enjoy both income tax exemption *and* tax deductible status for donations.³⁹

Singapore

Singapore prides itself on being a meritocratic society.⁴⁰ There is an established constitutional commitment to being a democratic secular state.⁴¹ Li-ann Thio, analysing the relationship, points out that 'being secular does not mean being *secularist*' [emphasis in original].⁴² By this, she means that religious entities participate with government in public life, but they do not control the state. They work with the state in what has been described as an East Asian or Confucianist welfare model.⁴³ Religious entities in Singapore are favoured with at least the following:⁴⁴

- income tax exemption;
- income tax deductibility (if the entity is also an Institution of Public Character (IPC));
- double tax deduction (if the entity is also an IPC and satisfies other criteria);

³⁴ Ibid p 34.

³⁵ Nilda Bullain (2004) 'Explaining Percentage Philanthropy: Legal Nature, Rationales, Impacts' *The International Journal of Not-for-Profit Law* 7(1), available at http://www.icnl.org/research/journal/vol6iss4/art_3.htm#_ednref7, accessed 29 November 2012.

³⁶ Marianna Török (2004) 'Percentage Laws: Transition to Philanthropy' *Social Economy and Law Journal* Winter 2003-Spring 2004, available at <http://www.ceetrust.org/article/148/>, accessed 29 November 2012.

³⁷ Bullain above n 35.

³⁸ Ibid.

³⁹ *Income Tax Act 2007*, (NZ) s CW 41 and LD3.

⁴⁰ Li-Ann Thio (2009) 'The Cooperation of Religion and State in Singapore: A Compassionate Partnership in Service of Welfare' *The Review of Faith and International Affairs* 7(3), p 37, citing the Singapore Government's "Shared Values" White Paper (Cmd. 1 of 1991) [31].

⁴¹ Ibid p 33.

⁴² Ibid.

⁴³ Thio above n 40, p 38.

⁴⁴ Ibid pp 34-35, 39.

- gifts of land from the government for pursuit of religious purposes; and
- statutory body assistance in collection of the Muslim taxes known as *zakat* and *fitrah*.⁴⁵

In relation to IPCs, the Singaporean government has experimented with up to 250% deductibility for donations, with the expressed intent being ‘to encourage more donors to come forward, to give larger donations, and to cultivate lasting relationships with the beneficiaries’.⁴⁶

We mention in passing that in 1981, the Australian government adopted a strategy similar to the double tax deduction to encourage investment in the Australian film industry. The then Division 10BA allowed investors a write-off of up to 150% of capital expenditures, as well as tax exemption for up to 50% on net earnings from that investment.

A similar arrangement presently endures in relation to research and development investment in Australia,⁴⁷ but to date it would seem only Singapore has used it to encourage philanthropic giving.

United Kingdom

In the United Kingdom, where there is an established church, religious entities have access to income tax exemption and income tax deductibility (Gift Aid).⁴⁸

United States of America

The United States’ Constitution has provisions similar to section 116 in our own Constitution (albeit differently understood). Nonetheless, religious entities still enjoy income exemption under section 501(c)(3) of the *Internal Revenue Code*, and income tax deductibility for donations.⁴⁹ Religious bodies are not required to apply for income tax exempt status – they are considered exempt automatically.⁵⁰

Also noteworthy about the American regulatory environment is that death duties remain in place, with exemptions for philanthropic donations. This includes donations to religious organisations, and is intended to be an inducement to philanthropic giving.⁵¹

An interim summary

Direct assistance and indirect favours are common and diverse across these very different national and cultural contexts. Direct support to churches in particular, and more generally, religious institutions, comes packaged in a variety of forms. These range from direct payment of clergy and chaplains, to support for the maintenance of buildings, to more general direct grants. In some countries, the state collects taxes on churches’ behalf.

⁴⁵ Thao 34-35 For more information on this entity and its arrangements see <http://www.muis.gov.sg/cms/aboutus/default.aspx> accessed 23 November 2012

⁴⁶ Ministry of Finance Singapore, ‘2012 Tax Deductions for Donations’, available at <http://app.mof.gov.sg/TemSub.aspx?pagesid=20090918631688379339&pagemode=live&&AspxAutoDetectCookieSupport=1>.

⁴⁷ Asia Pacific Centre for Philanthropy and Social Investment (February 2005) *Encouraging wealthy Australians to be more philanthropic* (Report for The Petre Foundation), available at <http://www.petrefoundation.org.au/docs/IncreasingPhilanthropy.pdf>, p 6.

⁴⁸ *Income Tax Act 2007* (UK) c 3, s 521-523.

⁴⁹ Brett G. Scharffs (2009) ‘Volunteerism, Charitable Giving, and Religion: The U.S. Example’ *The Review of Faith and International Affairs* 7(3) p 65.

⁵⁰ *Ibid* p 66.

⁵¹ Productivity Commission above n 1, p 183.

Tax deductibility for donations to churches is very common. The form this takes varies, from the Gift Aid arrangements in the United Kingdom, through to simple deductibility such as in the United States, Canada and New Zealand, and the percentage tax favoured more recently by some Eastern European countries. A Singaporean variation on deductibility is to allow more than 100% deductibility for some donations, operating in the space between direct grants and deductibility.

In other words, exemption of churches from taxes, deductibility of donations to churches and other ways of funding religious practitioners seems to be the norm. These concessions are augmented by various forms of direct grants.

A snapshot of the situation in Australia

Turning to Australia, it is clear that churches, religious practitioners and donors to Christian ministries are not treated as favourably as elsewhere in the world. As the Working Group is aware, however, there are still many forms of direct and indirect assistance provided to religious organisations in Australia. This has been the case from the beginning of federal tax arrangements.⁵² Below, we provide a brief summary in lay terms to contextualise our later submissions.

Dealing firstly with exemptions, almost all genuinely religious organisations are entitled to income tax exemption, on the basis of being either a religious institution, a charity pursuing the advancement of religion or as a contemplative religious order under the terms of the *Extension of Charitable Purposes Act 2004* (Cth).

Turning to deductibility, we find that many of the ministries of religious organisations of any size, other than the performance of acts of worship, fall within categories otherwise entitled to deductibility. Principal among these are:

- conducting a public benevolent institution;
- conducting a health promotion charity;
- conducting a community services institution;
- providing a public library, public museum or public art gallery; and
- providing religious education in schools.

It has not been the practice of many religious institutions to claim deductibility under all of the available heads, but it is arguable that more aggressive tax planning could bring a much greater percentage of religious institutions' activity within purposes that entitle them to deductibility. Extending deductibility to all charities other than basic religious charities as a first step is a way of harmonising and simplifying arrangements. It also allows time for basic religious charities to assess their position, and work out if they wish to move towards deductibility should that opportunity arise.

Religious organisations and religious practitioners also enjoy a range of benefits under the FBT regime.

⁵² Ann O'Connell (2010) 'Charitable Treatment? – A (Potted) History Of The Taxation of Charities In Australia', Conference Paper presented at July 2010 Tax History Conference, Centre for Tax Law, University of Cambridge, pp 2-4, 8.

In summary, the concessions provided to Australian religious organisations and religious practitioners are considerably less generous than in many overseas jurisdictions. As a general rule, religious organisations do not enjoy income tax deductibility.

In deciding whether the envelope of concessions available to religious entities should be expanded, it is essential to understand the reasons why religious organisations are and should be favoured. This is the subject of the next section.

Reasons for favouring religious organisations

At page 9, the Discussion Paper helpfully and simply sets out three rationales for providing tax concessions. Whilst these do apply expressly to religious organisations, it is our submission that the first two factors (acknowledged as being ‘closely related’ in the paper) are best addressed as one, under the rubric of ‘public benefit’.

Further, in a religious context, there is an extensive literature linking freedom of religion and tax concessions. A more comprehensive discussion of these reasons for tax concessions is therefore warranted, as this substantially strengthens the rationales set out in the Discussion Paper when considering religious organisations. If Australia is to maintain the current exemption from income tax and FBT exemptions for religious practitioners, and possibly extend income tax deductibility to donors to religious charities, it is important to clearly articulate the rationale for these concessions. It is not enough to simply cite the more expansive arrangements of other jurisdictions.

For that reason, we now explore the two distinct rationales of freedom of religion and public benefit. From the international survey above, it is apparent that either may be used as the basis for not only income tax exemption or deductibility, but also for direct grants, payment of clergy, gifts of land, and so on.

Tax favours are an extension of religious freedom

From the outset of our legal tradition, there has been a recognition that religious organisations must be free to self-regulate. As one author summarised:

Freedom to associate, particularly for religious purposes, separate from sovereign control, is founded in the common law that precedes the signing by King John of the *Magna Carta Libertatum* at Runnymede in 1215. In the tenth century, King Edgar had declared that ‘the church must have its law’. This freedom of the church to self regulate was adopted as part of the law of England by William the Conqueror following his accession to the throne of England in 1066. These fundamental freedoms were codified, initially in the *The Charter of Liberties* of Henry I. Similar statements of freedom of religious association were made by succeeding English monarchs. Most of the provisions of *Magna Carta* have been repealed, but the first chapter, which guarantees the freedom of the English Church, remains in force – at least in England. The conclusion to be drawn is that there is a fundamental freedom inherent in the common law to associate to pursue, at the least, religious charitable purposes.⁵³

This independence has deep historical roots, therefore, and provides an explanation for why the ‘income’ of religious organisations and their personnel has been excluded from the income tax net. It is derived from recognising a body as a religious entity and thus as entitled to independence. Even though intended for freedom, governments have used ‘recognition’ as a tool for control and discrimination between religions. Alain Garay notes:

⁵³ Matthew Turnour (2009) *Beyond Charity: Outline of a Jurisprudence for Civil Society*, PhD Thesis, Queensland University of Technology, pp 269-279 (footnote references removed).

Unfortunately, this power to tax organizations (and the contributions organizations receive) will not necessarily be exercised by the state in a way that is strictly neutral and consistent with the ideals of religious freedom and equality under the law.⁵⁴

The point here, though, is not that there are abuses, but that the intent is that tax concessions are intended to support religious freedom. Pursuing a similar enquiry, Rik Torfs acknowledged that it may seem strange to consider the religion-state relationship in Europe as unified or cohesive when there is such diversity of constitutional arrangements.⁵⁵ He concluded, though, that there were two general principles underpinning the variety of approaches: 'a desire for far-reaching religious freedom combined with cooperation and state support'.⁵⁶

In a US context, Evelyn Brody has advanced a similar idea of independent spheres of power regarding the tax arrangements. She has suggested that the theoretical foundation for tax favours lies in a notion of sovereignty.⁵⁷ Summarising in her usually unambiguous way, she declared: 'charities go untaxed because Caesar should not tax God (or the modern secular equivalent)'.⁵⁸ This is not to say that she endorses this view. She states there are clear limits to this notion, but she sets it out for theoretical consideration.

The third rationale at page 9 of the Discussion Paper is therefore capable of significant expansion. It is not just the fact that religious organisations exist for the public benefit that warrants their exemption from income tax. It is also that they are a sector separate from the state – independent – and so they are outside the net of income tax. Citizens across the world, operating under diverse constitutional regimes, have chosen to preserve this independence. We submit that religious organisations have only been included conceptually within the tax net because of their inclusion in the NFP sector, and the relatively new concept of 'tax expenditures' which emerged in the late 20th century.⁵⁹ There is a strong case, therefore, from both domestic history and from the international example, for exclusion of religious bodies from the income tax regime on the basis of independence as well as public benefit.

In the United States and throughout much of Europe, religious entities not only enjoy income tax exemption for their income, but donors to such organisations also enjoy income tax deductibility for their gifts. Exemption is a clear expression of independence.

The recognition of freedom of religion in the Australian Constitution arguably supports the broadest possible support being given to religious organisations, as is the case in the United States.⁶⁰ Many, indeed most, common law jurisdictions extend deductibility to religious organisations. All of these factors weigh in favour of Australia extending income tax deductibility to religious organisations on the basis of religious freedom alone.

⁵⁴ Alain Garay (2010) 'Taxing Religious Organizations: A European Perspective' *The Review of Faith and International Affairs* 8(2) pp 49-50.

⁵⁵ Torfs above n 18, p 16; also see Bijsterveld above n 13, p 30.

⁵⁶ Torfs above n 18, 19.

⁵⁷ Evelyn Brody (1998) 'Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption' *The Journal of Corporation Law*, Summer, p 586.

⁵⁸ Ibid.

⁵⁹ Matthew Turnour, Myles McGregor-Lowndes and Elizabeth Turnour (2011) 'Not for profit income tax exemption: Is there a hole in the bucket, dear Henry?' *Australian Tax Forum* vol 26 pp 601, 607.

⁶⁰ *Walz v Tax Commission of the City of New York* 397 U.S. 664 (1970).

Tax favours and public benefit

Quality of life requires not only private goods but public goods as well. People work through both governments and their religious institutions, charities and NFPs, to achieve public goods and public benefits. In this section, three of the rationales linking tax favours and public benefit are explored. Division of labour is addressed first, followed by the role of religion in promoting good, and finally, the problem of restraining evil. After that, two objections to tax concessions for religious organisations are considered.

A division of labour

At its simplest, the idea that public benefits are sometimes supplied by churches and other not-for-profits, rather than governments, is an expression of a concept of division of labour between cooperating but distinct sectors. Some public goods are best supplied through government, and others through voluntary associations and charities such as churches. As Lester Salamon has observed, the weaknesses in voluntary sector supply of services 'correspond[s] well with government's strengths', and vice versa, so at both a theoretical and practical level, a framework exists for 'government-non-profit cooperation'.⁶¹

This introductory point is sometimes explained in terms of meeting different needs. Thus, in 2001, the *Charities Definition Inquiry Report* explained the public benefit of religion in terms of meeting a spiritual need. The Charities Definition Inquiry panel concluded their chapter on religion as a head of charity with this observation:

It is clear that a large proportion of the population have a need for spiritual sustenance. Organisations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community. Religious organisations satisfy these needs by providing systems of beliefs and the means for learning about these beliefs and for putting them into practice.⁶²

The state is limited in meeting this need (due in part to section 116 of the Constitution), but it can assist religious organisations to meet this need. Tax concessions are one way of doing so. The direct funding of chaplaincy, as in France and other places, is another.

The positive contribution of religion

A second, more complex public benefit of religion is its role in providing moral underpinnings and foundations for civility. Murray Gleeson, whilst Chief Justice of the High Court, made the *ex curia* observation that religion continues to be relevant in Australian society because it is a bridge between 'private conscience' and 'the general acceptance of values that sustains the law and social behaviour'.⁶³

This notion sometimes has a stronger expression, as in Singapore, where religion is viewed as a 'constructive social force'.⁶⁴ This theme finds expression in the common law in the oft-quoted dicta of Lord Cross, that the law 'assumes that any religion is at least likely to be better than none'.⁶⁵ Lord Devlin observed that no society has yet solved the problem of how to teach morality without religion.⁶⁶ The famous humanists Ariel and Will Durant admitted

⁶¹ Lester Salamon (1987) 'Of Market Failure, Voluntary Failure, and Third Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' *Journal of Voluntary Action Research* 16 pp 35, 43.

⁶² Charities Definition Inquiry above n 19, p 178.

⁶³ H. R. Sorensen and A. K. Thompson (2001) 'The Advancement of Religion is Still a Valid Charitable Object', Paper presented at the Charitable Law in the Pacific Rim Conference, Queensland University of Technology, October 2001, p15.

⁶⁴ Thio above n 40, p 37.

⁶⁵ *Neville Estates Ltd v Madden* [1962] 1 Ch 832, 853.

⁶⁶ Patrick Devlin (1965) *The Enforcement of Morals* p 42.

that no society has created morality without reference to religion.⁶⁷ Almost all religion has some variant expression of what is known in Occidental societies as the Golden Rule: 'do to others as you would have them do to you'.⁶⁸

Tax favours are justified for religious organisations because they provide so many with a moral compass in engaging in constructive public behaviour. A window into the significance of this role for religion in encouraging constructive behaviour and the delivery of public benefits is highlighted now by briefly touching upon some of the available evidence.

Religious people are the most generous givers of money and, it would seem, of their time. This is not only in giving to religious organisations, but also to secular organisations. Religious giving in Australia has been valued by the Productivity Commission at \$1.121 billion annually, and is not deductible.⁶⁹ To put this in context, giving to educational purposes in the same year was only \$208 million, but of that, only \$50 million is not claimable as a tax deduction.⁷⁰ In this regard, Australia is similar to the United States, where religious giving in 2008 comprised more than one third of total giving, with education coming second at 13%.⁷¹

As to generosity of the amounts given, the Australian research suggests that religious Australians give more than irreligious Australians. This is consistent with the research in the United States.⁷² The most recent rigorous Australian study in this area, the 2005 *Giving Australia* report, showed that on average, each Australian gave \$424 per year to charitable causes, but religious organisations received a higher figure of \$529 per giver.⁷³ This would seem to indicate that donors to religious causes are more generous.

Whilst the average donation was \$424 per year, the median donation was only \$100.⁷⁴ The *Giving Australia* report noted that religious donations significantly lift the average, because the 'proportion of those donating to religious institutions is high and the total proportion of donations to these higher still'.⁷⁵

Religious people not only give more, they give more than the non-religious to non-religious causes such as foreign aid. Reviewing a number of different data sets from the United States, Corwin Smidt found that 'approximately one-half of church members volunteer through their congregations and nearly half of such volunteer time is directed toward activities that reach beyond congregational members.'⁷⁶ Brett Scharffs' analysis of US data was to similar effect. He pointed out that:

It is important to stress here that religiosity is not just associated with giving to religious charities, but with donating to secular charities as well. Religious giving is positively correlated with non-religious giving. Those who give to religious organizations are more likely to donate

⁶⁷ Will Durant and Ariel Durant (1967) *Rousseau and Revolution: A History of Civilization in France, England and Germany from 1756 and in the Remainder of Europe from 1716 to 1789*, p184.

⁶⁸ *The Holy Bible* (New International Version) (1984), Luke 6:31.

⁶⁹ Productivity Commission above n 1, Appendix H, H.4.

⁷⁰ *Ibid* H.4-H.5.

⁷¹ Scharffs above n 49, 62.

⁷² Scharffs above n 49, Corwin E. Smidt (2009) 'The Social Service Activities of Religious Congregations in America' *The Review of Faith and International Affairs* 7(3).

⁷³ Department of Family and Community Services (2005) *Giving Australia: Research on Philanthropy in Australia*, available at http://cms.qut.edu.au/__data/assets/pdf_file/0007/87379/Giving-Australia-Report_Oct-2005.pdf pp 7, 12, 24.

⁷⁴ *Ibid* p 7.

⁷⁵ Department of Family and Community Services above n 76, p 24.

⁷⁶ Smidt above n 75, p 48.

to non-religious organizations than are those who do not give to religious organizations. Out of those who give to churches, over 85 percent also support secular organizations. Indeed, this group provides three-fourths of the total philanthropic support that those secular organizations receive.⁷⁷

We are not aware of Australian research that analyses religious giving to non-religious causes, but anecdotal evidence drawn from overseas aid suggests that they do, and religious Australians are certainly more active volunteers.

Overseas aid, which is the second largest and second highest class of giving at \$234 per person and 13.3% of giving,⁷⁸ is supplied principally through Christian organisations that draw donors *inter alia* from those that share their Christian worldview.⁷⁹

As to volunteering by Australian Christians there is some evidence available for Australia. The 2011 *National Church Life Survey*, which draws data from 23 denominations, as well as independent churches, found that church attenders have consistently offered high levels of volunteer service to the wider community and that this engagement has increased over the last decade. The survey explains that:

In the past decade there has been a shift in the balance between church-based and community-based services. Attenders involved in their church's activities of community service, social justice and welfare has markedly increased from 19% in 2001 to 25% in 2011.⁸⁰

Discussing the research results on ABC Radio National, the Director of the National Church Life Survey, Professor Ruth Powell, gave Amnesty International and Meals on Wheels as two examples of organisations through which religious people served.⁸¹

It is not just in participation but also in formation and development of organisations that religious persons make a significant contribution. Anne Robinson and Brian Lucas have pointed out that 22 of the largest 25 community service organisations in Australia are religiously rooted, and this may indicate that historically, Christians have engaged through faith-based organisations.⁸²

Perhaps the best example of this division of work between government and churches is found in community crises. Smidt noted:

Many analysts argue that, in addressing most human needs, congregationally-based social services not only respond more quickly and efficiently than governmentally-based social services, but that they are also better able to customize their responses to particular circumstances of those in need. At a minimum, the presence of various congregational programs can provide recipients options, allowing them to find and choose programs that best fit their needs.⁸³

⁷⁷ Scharffs above n 49, pp 63-64.

⁷⁸ Department of Family and Community Services above n 76, p 24.

⁷⁹ National Church Life Survey 2011.

⁸⁰ National Church Life Survey, First Impressions Results from the National Church Life Survey 2012.

⁸¹ Andrew West (Wednesday 28 November 2012 5:45PM) 'Australia's National Church Life Survey' *Religion and Ethics Report*, transcript available at <http://www.abc.net.au/radionational/programs/religionandethicsreport/australia27s-national-church-life-survey/4397166>.

⁸² Ann Robinson and Brian Lucas (2010) 'Religion as a head of charity' in *Modernising Charity Law: Recent Developments and Future Directions*, eds. Myles McGregor-Lowndes and Kerry O'Halloran, pp 189-191.

⁸³ Smidt above n 75, p 51.

An obvious example is the way Australian and particularly Queensland churches responded in the wake of the 2011 Queensland floods. Churches were opened to refuge seekers immediately, providing what then-Premier Anna Bligh called 'safe havens' for people in need.⁸⁴ By May 2011, the Lutheran Church alone had raised nearly \$900,000 to assist flood victims.⁸⁵

The conclusion to be drawn from this brief discussion is that, far from being inward focused and principally self-interested, religious people in Australia and their institutions make a significant contribution to the social fabric that goes well beyond their congregational involvement. The evidence supports the centrality of religion to public benefit.

In their book *Driven by Purpose*, Stephen Judd, Anne Robinson and Felicity Errington point out that 'the lack of acknowledgement of the role of faith in the charity scene is remarkable'.⁸⁶ The reasons would seem to be that whilst their faith is 'critical' to their decision to give or to volunteer, religious people are reluctant to ever say so⁸⁷. Summarising this point Wendy Scaife observed that 'Interestingly, religion, faith-based and cultural reasons to give are almost never mentioned but when present are critical to the giving decision.

She cites one interviewee as stating that:

*...the defining piece for us is our Christian faith and...things...flow from that...a sense of gratitude and...a sense of some responsibility for using resources wisely...because of the faith element it actually drives a bit more thinking about that.*⁸⁸

The time has come, ACL submits, to give religion's contribution to public benefit due acknowledgement, by at least maintaining income tax exemption for religious organisations and FBT concessions for religious practitioners, and extending deductibility to religious charities that wish it.

This recognition of underlying religious motivation is important because the desirable 'fruit' of pro-social behaviour cannot be severed from the tree from which it comes. Singapore, a society that is avowedly secular and multi-religious, acknowledges the nature of religion as a 'constructive social force'. If we wish to encourage the generosity and positive social contributions made by Australia's religious, tax concessions and other favours to religious organisations generally can easily be justified on the basis of public benefit.

Again, it is Judd, Robinson and Errington who point out why. It is because 'motivation is intimately entwined with **identity** and **purpose**, and when it is eroded the result is the emasculation of what the charity does'.⁸⁹ It seems that the link between the tree and its fruit is internationally accepted. Tax favours are extended to religious organisations in their own right rather than only to their community service arms. Once it is appreciated that the tree is

⁸⁴ Glenine Hamlyn (28 January 2011) 'Churches pray together for flood-affected', Queensland Churches Together, available at http://www.qct.org.au/index.php?option=com_content&view=article&id=843:churches-pray-together-after-floods&catid=1:latest&Itemid=39

⁸⁵ Linda Macqueen (24 April 2011) 'Disaster appeal tops \$880, 000', Lutheran Church of Australia, available at <http://www.lca.org.au/disaster-appeal-tops-880000.html>.

⁸⁶ Stephen Judd, Anne Robinson and Felicity Errington (2012) *Driven by Purpose: Charities that make the difference*, p 85.

⁸⁷ *Ibid* p 93.

⁸⁸ Scaife, Wendy A., Williamson, Alexandra, McDonald, Katie, & Smyllie, Susan (2012) *Foundations for giving : why and how Australians structure their philanthropy*. Queensland University of Technology, Brisbane, QLD. (In Press) 8.

⁸⁹ *Ibid* p 95.

essential to the fruit, favours to religious organisations *per se* become much more easily understood. It follows that favours can be extended to religious organisations as religious organisations, not simply to their services.

Religion as a restraint on anti-social behaviour reducing the need for the state

There is a third benefit that religion brings. It is summarised well by de Tocqueville, who reflected on the role of religion in the United States and declared: 'Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust'.⁹⁰

This is different from the good people do because they are religious; it is the bad they are restrained from doing. There is a role played by religion, then, in reducing the need for state coercion. Gary Richardson, focused on guilds in the Middle Ages, but with an eye to the present, underscored the role religion plays in bringing people into voluntary associations that promote trust and cooperation. In such a context, '[c]oercion hovered in the background to force the recalcitrant to contribute their share and to reassure the compliant', but it was the religion that unified and restrained.⁹¹

Every young person who is encouraged to comply with the social order due to religious youth group involvement, rather than engaging in delinquent behaviour, is expense saved in law enforcement and reparation. The value of support for religion in such a context becomes immeasurable, as the more religious a society, the less socially destructive behaviours are pursued. This is a related second reason for favouring religion.

Bringing these last two points together in a legal sense are three old United States cases cited by Hubert Picada.⁹² In *Holland v Peck*, the court held that religion was 'the surest basis on which to rest the superstructure of social order'.⁹³ In *People ex rel Seminary of Our Lady of Angels v Barber*, religion was described as necessary to the advancement of civilisation and the promotion of the welfare of society.⁹⁴ In *Gass and Bonta v Wilhite* it was held that religion is a 'valuable constituent in the character of our citizens'.⁹⁵ The *Nathan Report* of 1952-53 made a similar connection.⁹⁶ In such a context, tax favours are an obvious expression of a nation's commitment to building a better society.

Two objections

We come now to two objections to tax favours for religion. Firstly, there are some religious organisations which promote harm rather than good, so arguably it is not the characteristic of 'religion', but some other characteristic that warrants tax favours. Secondly, there are some liberal philosophical objections that warrant brief comment.

What about bad religious organisations?

An understandable concern of some is that religion can be used as a cloak for harmful pursuits and as a vehicle for private benefit. The two principal concerns are religion being used to back terrorist activities, and religion being used to abuse children.

⁹⁰ Alexis de Tocqueville *Democracy in America*, Great Books of the Western World (George Lawrence trans, first published in 1835, 1992 ed).

⁹¹ Gary Richardson (2005) 'Craft Guilds and Christianity in Late-Medieval England' (2005) *Rationality and Society* 17(2), p 177.

⁹² Hubert Picada (1999) *The Law and Practice Relating to Charities* (3rd ed) p 84.

⁹³ *Holland v Peck* (1842) 37 NC 255, 258.

⁹⁴ *People ex rel Seminary of Our Lady of Angels v Barber* (1886) 3 NY St Rep 367 affirmed in (1887) 13 NE 936.

⁹⁵ *Gass and Bonta v Wilhite* (1834) 32 Ky 170, 180.

⁹⁶ See Charitable Trusts Committee (UK) (1952-53) *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, Cmd 8710.

Religious organisations, like any others, can be vehicles for criminal activity. In fact, they are ideal targets, because they engender high levels of trust, and consequently less vigilant scrutiny. The ACL's position is that organisations supporting terrorism or child abuse should be severed from access to tax concessions on the basis that they are proven as an organisation not to be pursuing advancement of religion but another purpose.

There is already a basis for excising such organisations under the law of charities. The common law already excludes organisations that are, in the words of the old case of *Cocks v Manners* 'adverse to the very foundation of all religion'⁹⁷ or in the words of *Thornton v Howe*, 'subversive of all morality or religion' from the definition of charity.⁹⁸ This principle, it is submitted, is a sufficient basis to find that organisations which are fronts for terrorism or child abuse are not advancing religion.

The real problem, then, is not the adequacy of the law, but the adequacy of its enforcement. The inactivity of state Attorneys-General in regulating charities has arguably left the sector vulnerable to charlatans and the risk of the tax base being abused. The extensive powers given to the new ACNC may go some way toward remedying this procedural defect.

Our point here is that tax policy must continue to focus upon sound tax principles, centred on the concept of purpose, determined in a holistic way. There are very good reasons for not only continuing to favour religious organisations, but to extend those favours. The illegal activities of some individuals may lead to a determination that the organisation is not pursuing a religious purpose. If that is so, then tax favours should be denied. They will be denied, though, on the basis that the purpose pursued is not charitable.

We come finally to ideological objections on liberal philosophical grounds.

Liberal philosophy

It has sometimes been contended that support for religious organisations is inherently inconsistent with maintaining a liberal society. There is, however, an emerging literature both nationally and internationally that rejects this, again from a liberal philosophical perspective. Stephen Maize, who focused on the liberal and religious democracy of Israel in surveying the arguments, concluded that:

A liberal state may decide to engage in funding for religious causes not in order to recognize that a particular religion is the true religion, and not to endorse particular religious practices or beliefs, but out of an objective concern for the things that citizens themselves happen to value. If something is important to a citizen, then, it is potentially important to the state as well—not because that something has innate value, or because the state itself finds value in it, but because a citizen ascribes value to it. A certain disinterested approval for citizens enjoying success in their life plans leads states to fund a range of activities, from health care to university studies, from sports programs and scientific research to art and music. There is no *a priori* reason why religion should not be added to this list.⁹⁹

The ACL adopts this argument in these submissions.

⁹⁷ *In Re Watson, Decd Hobbs v Smith and Others* [1973] 1 WLR 1472, 1473.

⁹⁸ *Thornton v Howe* (1862) 31 Beav 14.

⁹⁹ Steven V. Maize (2004) 'Rethinking Religious Establishment and Liberal Democracy: Lessons from Israel' *The Brandywine Review of Faith and International Affairs* 2(2) p 9. For similar conclusions in an Australian context, see Matthew Harding (2012) 'Religion and the Law of Charity: A Liberal Perspective', (Conference Paper presented at the Defining, Taxing and Regulating Not-for-Profits in the 21st Century, 29-30 July 2012, University of Melbourne), available at <http://www.law.unimelb.edu.au/tax/research/current-research-projects/defining-taxing-and-regulating-not-for-profits-in-the-21st-century/conference/program-and-abstracts/flushcache/1/showdraft/1>

Mutuality

ACL actively lobbies on the issue of problem gambling, and in particular poker machines. There are over 200,000 poker machines in Australia, the seventh highest number in the world, with one for every 108 Australians. Of these, nearly half are in New South Wales, and many are in large NFP clubs.

The Productivity Commission's 2010 *Gambling* report found there are:

- 115,000 problem gamblers in Australia, 95,000 of whom are poker machine problem gamblers
- 280,000 further gamblers at “moderate risk” of developing a gambling problem
- 600,000 weekly users of poker machines
- Losses of \$5 billion each year from 95,000 poker machine problem gamblers alone – 40% of total losses on poker machines from just 15% of users

These are significant problems and have a devastating effect on some of the most vulnerable parts of the community. The Federal Government has indicated its willingness to be involved in gambling reform with the recent *National Gambling Reform Bill*, which placed modest curbs on existing regulations of poker machines, including the technology to move from voluntary to mandatory pre-commitment “at the flick of a switch”.¹⁰⁰ This indicates that the government is looking at long-term solutions to problem gambling.

This being the case, the issue of gaming activities in NFP clubs and societies should be considered a natural part of a broader review of gambling. It makes sense for the government to take the opportunity given by the tax reform to make positive changes related to gambling reform.

The 2009 *Australia's Future Tax System* report noted the benefits of the mutuality principle, but commented on the competitive advantages it can give to large NFP clubs operating in direct competition with restaurants and hotels, which do not enjoy tax exemptions on the same activities. The issue of competitive advantage aside, the report also noted that receipts from gambling and alcohol are tax exempt.

Recommendation 44 of the report said:

*Simple and efficient tax arrangements should be established for clubs with large trading activities in the fields of gaming, catering, entertainment and hospitality. One option is to apply a concessional rate of tax to total net income from these activities above a high threshold. For clubs below the threshold, no tax would be applied to income from these activities.*¹⁰¹

ACL supports this recommendation as a way to help address the scourge of problem gambling, particularly poker machine problem gambling. It may, at the least, go some way to curbing an attitude of indifference among clubs who make huge profits at the cost of devastating losses for vulnerable problem gamblers.

¹⁰⁰ *National Gambling Reform Bill 2012*. For a summary, see the *Sydney Morning Herald* (November 30, 2012), ‘Poker machine reforms pass, but clubs win two-year delay’, <http://www.smh.com.au/opinion/political-news/poker-machine-reforms-pass-but-clubs-win-twoyear-delay-20121129-2airf.html>

¹⁰¹ Commonwealth of Australia (December 2009), *Australia's Future Tax System: Report to the Treasurer*, Part Two – Detailed Analysis volume 1 of 2, Recommendation 44, p 212.

The recommendation allows for the mutuality principle to continue to appropriately benefit small clubs and societies while addressing the concern about large NFP clubs who benefit from tax exempt gambling revenue.

ACL turns now to the particular questions that bear on the submission made so far.

Answers to consultation questions

Q 1 *What criteria should be used to determine whether an entity is entitled to an income tax exemption?*

In so far as this relates to religious organisations, the current well-established basis in charity law should continue.

Q 2 *Are the current categories of income tax exempt entity appropriate? If not, what entities should cease to be exempt or what additional entities should be exempt?*

In so far as this relates to religious organisations, the current inclusion of religious organisations within the class of exempt organisations is appropriate and should not be changed.

Q 3 *Should additional special conditions apply to income tax exemptions? For example, should the public benefit test be extended to entities other than charities, or should exemption for some types of NFP be subject to different conditions than at present?*

In so far as this relates to religious organisations, the current well-established basis in charity law should continue and the common law public benefit presumption should continue to apply.

Q 11 *Should all charities be DGRs? Should some entities that are charities (for example, those for the advancement of religion, charitable child care services, and primary and secondary education) be excluded?*

In so far as this relates to religious organisations, the recommendations of the Productivity Commission should be introduced in the staged way proposed in this submission so as to extend deductibility to all charities over time. This should commence with all charities except for 'basic religious charities' (as defined in the *Australian Charities and Not-for-Profits Commission Act 2012*).

Q 12 *Based on your response to Q11, should charities endorsed as DGRs be allowed to use DGRs funds to provide religious services, charitable child care services, and primary and secondary education?*

In so far as this relates to religious organisations, if a religious organisation is granted DGR status, it should be allowed to use its DGR funds for any legitimate activity in pursuit of its purpose, including providing religious services. If the entity is a 'basic religious charity' it will not, if this submission is accepted, be entitled to deductibility in this first phase in any event.

Q 14 *If DGR status is extended to all endorsed charities, should this reform be implemented in stages (for example, over a period of years) in line with the PC's recommendations, or should it be implemented in some other way?*

The endorsement as a DGR should be undertaken in stages. The first stage should include all current charities except for basic religious charities. The second stage should include basic religious charities (but only if they wish to be included).

Q 28 Assuming that the current two tiered concessions structure remains (see Part B), what criteria should determine an entity's eligibility to provide exempt benefits to its employees?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 29 Also assuming that the current two tiered concession structure remains (see Part B), what criteria should determine an entity's eligibility to provide rebateable benefits to its employees? Should this be restricted to charities? Should it be extended to all NFP entities? Are there any entities currently entitled to the concessions that should not be eligible?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 30 Should there be a two tiered approach in relation to eligibility? For example, should all tax exempt entities be eligible for the rebate, but a more limited group be eligible for the exemption?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 31 Should salary sacrificed meal entertainment and entertainment facility leasing benefits be brought within the existing caps on FBT concessions?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 32 Should the caps for FBT concessions be increased if meal entertainment and entertainment facility leasing benefits are brought within the caps? Should there be a separate cap for meal entertainment and entertainment facility leasing benefits? If so, what would be an appropriate amount for such a cap?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 33 Are there any types of meal entertainment or entertainment facility leasing benefits that should remain exempt/rebateable if these items are otherwise subject to the relevant caps?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 34 Should there be a requirement on eligible employers to deny FBT concessions to employees that have claimed a concession from another employer? Would this impose an unacceptable compliance burden on those employers? Are there other ways of restricting access to multiple caps?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 36 Should the limitation on tax exempt bodies in the minor benefits exemption be removed? Is there any reason why the limitation should not be removed?

In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 37 Is the provision of FBT concessions to current eligible entities appropriate? Should the concessions be available to more NFP entities?

Yes. The current arrangements are appropriate in so far as they relate to religious organisations. The current FBT arrangements should continue, for the reasons set out earlier in the submission.

The FBT arrangements should also be extended within religious organisations beyond religious practitioners to all employees within the religious organisation.

Q 38 Should FBT concessions (that is, the exemption and rebate) be phased out?

No. The FBT concessions should not be phased out in so far as they relate to religious organisations and religious practitioners. The current FBT arrangements for religious organisations and religious practitioners should continue, for the reasons set out earlier in the submission.

Q 39 Should FBT concessions be replaced with direct support for entities that benefit from the application of these concessions?

No. Direct state support for religious organisations and religious practitioners is much less appropriate than concessions, at least in an Australian context. In so far as FBT arrangements relate to religious organisations and religious practitioners, they should continue, for the reasons set out earlier in the submission.

Q 40 Should FBT concessions be replaced with tax based support for entities that are eligible for example, by refundable tax offsets to employers, a direct tax offset to the employees or a tax free allowance for employees?

No. The current FBT arrangements for religious organisations and religious practitioners should continue, for the reasons set out earlier in the submission.

Q 41 Should FBT concessions be limited to non-remuneration benefits?

No. In so far as this relates to religious organisations and religious practitioners, the current FBT arrangements should continue, for the reasons set out earlier in the submission.

Q 42 If FBT concessions are to be phased out or if concessions were to be limited to non-remuneration benefits, which entity types should be eligible to receive support to replace these concessions?

The case for phasing out FBT concessions in some situations, particularly where there may be competitive neutrality concerns, is understandable. No such concerns arise in relation to religious organisations and religious practitioners, so the current FBT arrangements should continue, for the reasons set out earlier in the submission. There is a compelling case for treating religious organisations as separate from others in a FBT context.

Q 50 Should the gaming, catering, entertainment and hospitality activities of NFP clubs and societies be subject to a concessional rate of tax, for income greater than a relatively high threshold, instead of being exempt?

Yes. This may help address the scourge of problem gambling, particularly poker machine problem gambling. At the least, it may go some way to curbing an attitude of indifference among clubs who make huge profits at the cost of devastating losses for vulnerable problem gamblers.

Conclusion

In conclusion, then, ACL submits that:

- There should be preservation of the general tax exemption provisions, to ensure the independence of religion from the state. This can be justified on the basis of the freedom of religion head alone, but is also supported by the public benefit provided by religious charities.
- Deductibility should be extended to all charities, including religious organisations that are not basic religious charities, as a first step. Extension to include basic religious charities should follow, but DGR status should be optional. In so far as it relates to religious organisations, this extension might be justified both on the basis of freedom of religion, and on the basis of public benefit.
- The current FBT arrangements for religious organisations and religious practitioners should continue, and be extended beyond religious practitioners to include all employees of religious organisations. This can be justified principally on the basis of freedom of religion, but is bolstered by the public benefit provided by religious charities.

In making these submissions, the ACL adopted substantially the recommendations of the January 2010 Productivity Commission Research Report, *Contribution of the Not-For-Profit Sector*, and has sought to show how those recommendations might be more simply and fairly applied in light of the recent definition of 'basic religious charity' in the ACNC legislation. There are very good reasons for favouring religious organisations and religious practitioners, but in a context where not all Australians appreciate the enormous contribution of Christians and Churches to Australian society, it is important to clearly set out the basis for these tax concessions. If ACL can be of further assistance in this regard, please do not hesitate to contact us.

The ACL wishes the Working Group all the best in its consideration of this and other proposals and trusts that this submission assists in developing a fairer, simpler and more effective tax concessions regime for the not-for-profit sector, particularly in so far as it relates to religious organisations and religious practitioners.

Yours Sincerely



Jim Wallace
Managing Director
Australian Christian Lobby