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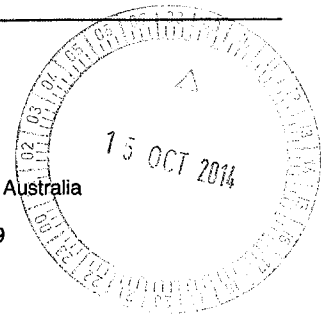
## Faculty of Law

M253  
University of Western Australia  
35 Stirling Highway  
CRAWLEY WA 6009

T +61 8 6488 8520  
F +61 8 6488 1045  
M +61 402 786 519  
E [ian.murray@uwa.edu.au](mailto:ian.murray@uwa.edu.au)  
[www.law.uwa.edu.au](http://www.law.uwa.edu.au)

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BY EMAIL



15 October 2014

### Ms Samantha Parsons

Committee Clerk  
Standing Committee on Legislation  
Legislative Council  
Parliament House  
PERTH WA 6000

Dear Ms Parsons

### Submission to the Standing Committee on Legislation Inquiry into the Taxation Legislation Amendment Bill 2014

Thank you for the opportunity to make a submission to the Committee's inquiry into the Taxation Legislation Amendment Bill 2014 (**Bill**).

I have focussed my submissions below on the terms of inquiry, which ask the Committee to examine the Bill 'for the purpose of ascertaining whether the bill imposes unintended consequences, if any, on legitimate fourth-limb charities'. My main submissions are:

- 1) The mechanism for excluding charities from State tax concessions (finding them to be a 'relevant body') coupled with a re-inclusion mechanism ('beneficial body' determination) by its very design appears to unnecessarily impact on many fourth limb charities. Too many charities will be excluded under the first part of the mechanism, which will result in significant reliance on the re-inclusion mechanism, because the:
  - a) terms 'trade', 'industry' and 'commerce' have relatively wide meanings of uncertain ambit;
  - b) definition of 'promote trade, industry or commerce' includes a purpose of promoting or advocating for trade, industry or commerce, even if it is a minor or incidental purpose; and
  - c) definition of 'promote trade, industry or commerce' also seems to require a charity to look first to its activities and then to the range of purposes of those activities, which inevitably creates a risk for any charity carrying out trading or commercial activities.
- 2) It would therefore be better to adopt a narrower exclusion for trade, industry or commerce charities in the first place. For instance, 'a body, other than a body referred to in paragraph (a), (b), (c) or (e), **the sole or dominant** purpose of which is the promotion of trade, industry, or commerce'.
- 3) However, the proposed amendments to the Bill to preserve tax concessions for all public benevolent institutions (PBIs) represent a material improvement and go some way to addressing these concerns.

- 4) The processes for re-including charities within State tax concessions by way of a 'beneficial body' determination and for excluding future classes of charities by way of regulations, detract from the rule of law and may create a perception for relevant charities that they cannot act contrary to the interests of the current government – especially for advocacy organisations. Further, the blanket non-reviewability of the 'beneficial body' determination mechanism may be invalid.

In addition, there is a preliminary point that might be seen as going to broader issues. That is, **the Bill will also impact on charities that are not 'fourth limb' charities**. This is likely to occur in two key ways. First, it may impact on charities that pursue more than one of the first three limbs of relief of poverty, advancement of education or advancement of religion (but no fourth limb purpose). It may not be easy for an organisation that pursues all three, or two of the three to be able to establish that its 'sole or dominant purpose' is, eg, the advancement of education. The Argyle Diamond Mine Participation Agreement – Indigenous Land Use Agreement, which is publically available on the ATNS website,<sup>1</sup> provides for payments to the trustee of a charitable trust. The charitable trust had the purpose of benefitting Indigenous Persons by:

- ...providing grants [and other assistance]... for their education, including vocational training and economic and enterprise training; ...
- for community development; ...
- for the conduct and promotion of their art, law and culture; ...
- for the relief of, alleviation of, or prevention of poverty, disadvantage, sickness or affliction; and ...
- enhancement of the natural environment...'<sup>2</sup>

If the fourth limb purposes had been left out, it would not have been easy for the trustee to determine whether the relief of poverty or advancement of education was the dominant purpose. Further, the purposes clearly show how easy it might be for an incidental trade, industry or commerce purpose to be included. The proposed savings provision for PBIs would go some way to addressing this issue, but there are still some limits, as discussed below.

Second, some charitable trusts that have the relief of poverty as their sole or dominant purpose may be included as a 'relevant body'. The proposed amendments to the Bill would remove the exclusion from the definition of 'relevant body' of charitable trusts (or institutions) for the relief of poverty and replace it with an exclusion for public benevolent **institutions**.<sup>3</sup> PBIs would generally include charities for the relief of poverty. However, some charitable trusts for the relief of poverty may not be 'institutions' if the trustees simply manage and make distributions from a fund of money. This potentially means that charitable trusts for the relief of poverty that do not amount to institutions may be 'relevant bodies' if they carry out any activity or have as an incidental purpose, the promotion of trade, industry or commerce. For instance, would a charitable trust to relieve poverty for the families of persons made redundant in the mining industry fail this test?

This second point is relevant to the *Duties Act 2008* (WA) – the exemption in s 95 is available to the trustee of a charitable trust - and the *Pay-roll Tax Assessment Act 2002*

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<sup>1</sup> <http://www.atns.net.au/agreement.asp?EntityID=2591>

<sup>2</sup> Schedule 1 of the Charitable Trust Deed in Schedule 10 of the Agreement  
<<http://www.atns.net.au/objects/Agreements/Argyle%20ILUA.pdf>>.

<sup>3</sup> Or bodies that would be PBIs if incidental and minor purposes were incidental purposes – this extension does not impact on this point.

(WA) – the exemption in s 41 may be available,<sup>4</sup> although it would likely only be in rare circumstances that a body subject to pay-roll tax is not an institution.<sup>5</sup>

### Exclusion and re-inclusion mechanism

The mechanism that the Bill adopts is to rely on a relatively broad exclusion by defining the trade, industry or commerce charity limb of the 'relevant body' definition very broadly and then providing a process for re-inclusion within the State tax concessions by means of a 'beneficial body' determination. However, by its very design this mechanism appears to unnecessarily impact on many fourth limb charities. As discussed below, too many charities will be excluded under the first part of the mechanism, which will result in significant reliance on the re-inclusion mechanism, because the:

- terms 'trade', 'industry' and 'commerce' have relatively wide meanings of uncertain ambit;
- definition of 'promote trade, industry or commerce' includes **a** purpose of promoting or advocating for trade, industry or commerce, even if it is a minor or incidental purpose; and
- definition of 'promote trade, industry or commerce' also seems to require a charity to look first to its activities and then to the range of purposes of those activities, which inevitably creates a risk for any charity carrying out trading or commercial activities.

If the Government is concerned that the *Chamber of Commerce and Industry of WA* decision broadened the group of charities for the promotion of trade, industry or commerce beyond that which ought to receive State tax concessions, then a narrower exclusion mechanism could be used. For instance, the proposed definition of 'trade union' in clauses 4, 11 and 16 of the Bill refers, amongst others, to 'an association of employees **a principal purpose of which** is the protection and promotion of the employees' interests in matters concerning their employment'.

A trade, industry or commerce fourth limb charity could likewise have been defined as:

A body, other than a body referred to in paragraph (a), (b), (c) or (e), **a principal purpose of which** is the promotion of trade, industry, or commerce.

The benefit of a narrower definition like this is that it would significantly reduce the preliminary concern noted above about poverty/education/religion charities with mixed poverty, education and religious purposes – that may not be able to establish that one of these purposes is the sole or dominant purpose. Further, it avoids the confusion between purposes and activities discussed below, as it is clear that the focus is on a purpose of promoting trade, industry or commerce. Finally, a narrower exclusion clause, will mean that there is less work for the re-inclusion mechanism of a beneficial body determination. As identified below, there are some potential problems with this re-inclusion mechanism and so the less it is relied upon, the less problems are raised.

One could go further and adopt language similar to that used for poverty/education/religion charities and define a trade, industry or commerce fourth limb charity as:

A body, other than a body referred to in paragraph (a), (b), (c) or (e), **the sole or dominant purpose of which** is the promotion of trade, industry, or commerce.

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<sup>4</sup> On the basis that such a trust could still amount to a 'charitable body or organisation'.

<sup>5</sup> Section 37 *Land Tax Assessment Act 2002* only exempts public charitable or benevolent **institutions**, so the issue does not arise.

This would avoid assertions that a 'principal' purpose is something less than a 'dominant' purpose and would eliminate the need to exclude poverty/education/religion charities from the definition. It would also remove (rather than just reduce) the concern about mixed poverty/education/religion purpose charities. It is acknowledged that it would permit charities with a minor trade, industry or commerce purpose to pass the test, although so too would the 'principal' purpose definition. Nevertheless, this should be weighed against the inconvenience of excluding too many charities as 'relevant bodies'.

Both of these definitions would also require an amendment to the definition of 'promote trade, industry or commerce' to remove the link to activities in that definition.

#### *Width of 'trade', 'industry' and 'commerce'.*

The Bill contains no definition of 'trade', 'industry', or 'commerce'. These are not technical legal terms and so they are likely to be interpreted in accordance with their ordinary meaning,<sup>6</sup> including as it changes over time.<sup>7</sup> Resort to the Macquarie Dictionary Online definitions of the relevant nouns demonstrates that their ordinary meaning is fairly wide and that their ambit is likely to change, depending on which part of the definition is focussed upon.

##### **Trade**

1. the buying and selling, or exchanging, of commodities, either by wholesale or by retail, within a country or between countries: domestic trade; foreign trade.
2. a purchase, sale, or exchange.
3. a form of occupation pursued as a business or calling, as for a livelihood or profit.
4. a skilled occupation, especially one requiring manual labour: the trade of a carpenter; the trade of a printer.
5. people engaged in a particular line of business: a lecture of interest only to the trade.
6. traffic; amount of dealings: a brisk trade in overcoats.
7. market: the tourist trade.
8. commercial occupation (as against professional)...

##### **Industry**

1. a particular branch of trade or manufacture: the steel industry.
2. any large-scale business activity: the tourist industry.
3. manufacture or trade as a whole: the growth of industry in underdeveloped countries.
4. the ownership and management of companies, factories, etc.: friction between labour and industry.
5. systematic work or labour.
6. assiduous activity at any work or task

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<sup>6</sup> For similar comments on the interpretation of 'in trade or commerce' in the consumer protection context, see, eg, *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

<sup>7</sup> For a recent reminder of the ambulatory nature of the ordinary meaning of words in a not-for-profit law context, see, eg, *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 (13 June 2014).

### Commerce

1. interchange of goods or commodities, especially on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce or internal commerce); trade; business.
2. social relations.
3. sexual intercourse.

Indeed, during the High Court hearing for special leave to appeal from *Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 194, Hayne J noted that 'the expression "commercial enterprise" is intrinsically ambiguous'.

Returning to the Argyle Diamond Mine Trust example provided at the start of this submission, one of the sub-purposes was to advance 'education, including vocational training and economic and enterprise training'. This would seem to fall within, at least, items 3, 4 and 8 of the definition of trade and potentially items 2 and 3 of 'industry', if viewed in the context of the relevant Indigenous Persons as a whole. To the extent that the sub-purpose of advancing 'community development' is interpreted as having an economic dimension, then this also may come within the definitions of trade, industry or commerce.

This highlights the danger that any organisation that is working to assist with economic development for disadvantaged people might be characterised as having a purpose,<sup>8</sup> amongst its various charitable purposes, of promoting trade, industry or commerce. As the Argyle Diamond Mine Trust example shows, charities which aim to close the gap for Indigenous people are clearly at risk. Similarly, charities working to address disadvantages faced by rural, regional and remote communities are at risk – which may affect some community foundations given the range of purposes usually pursued by those foundations.

The proposed amendments to the Bill represent a significant improvement in relation to this concern about charitable purposes of assisting with economic development for disadvantaged persons. The proposed amendments exclude PBIs from the definition of 'relevant body'. The term PBI includes 'an institution which is organized or conducted for, or promotes the relief of poverty or distress' and that 'conducts itself in a public way towards those in need of benevolence, however that exercise of benevolence may be manifested'.<sup>9</sup> Accordingly, many charities with the purpose of relieving disadvantage by means of economic development may qualify as PBIs. Indeed, many charities to benefit Indigenous persons may qualify in this way.<sup>10</sup> However, not all charities with a purpose of economic development for disadvantaged persons will be PBIs. Even with the possible expansion of the PBI concession to charities whose main (not sole or dominant) purpose is a public benevolent purpose,<sup>11</sup> charities with multiple charitable purposes, such as the Argyle Diamond Mine Trust, may not be able to establish that the public benevolent objects are their main ones. In addition, there will also be a degree of uncertainty about the level of disadvantage required and whether it might change over time, so as to affect the PBI characterisation.

The examples provided in the ATO's public ruling TR 2011/4 of charities that carry out commercial activities to directly effect the charity's purpose also demonstrate further fourth

<sup>8</sup> There have always been some limits on the extent to which charities can assist with economic development in any event. For instance, to ensure that they do not fail the public benefit test.

<sup>9</sup> *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 (13 June 2014) [66] (Edmonds, Pagone and Wigney JJ).

<sup>10</sup> Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008) 31.

<sup>11</sup> It is not clear that this expansion is necessary as it seems well accepted that minor, non-ancillary purposes do not prevent an institution from being a PBI: see, eg, *Commissioner of Pay-roll Tax (Vic) v Cairnmillar Institute* [1990] ATC 4752, 4767 (McGarvie J).

limb charities that have a purpose of promoting trade, industry or commerce,<sup>12</sup> and that might therefore be affected. For instance, 'an institution that conducts a business activity solely for the purpose of providing training and employment opportunities for people suffering from disabilities who would otherwise find it difficult to obtain training and employment'.

### *A purpose*

It might be argued that uncertainty over the ordinary meaning of 'trade', 'commerce' and 'industry', as well as the PBI exemption, would work itself out in the ordinary course, with litigation and administrative guidance providing some certainty for charities. However, the uncertainty is exacerbated by the proposed definition of 'promote trade, industry or commerce' which clearly states that an entity need only have a purpose, within its broader range of purposes, of promoting or advocating for trade, industry or commerce, whether in general or in relation to a particular kind of trade industry or commerce.

A range of charities are therefore likely to be caught up in this uncertainty. For instance, the Argyle Diamond Mine Trust example discussed above. Further, peak bodies such as ACROSS, or WACOSS, both of which, according to their publicly available constitutions, have purposes that include a focus on assisting the community services sector<sup>13</sup> – which might be characterised as a particular branch of 'industry'. The risk seems greater for peak bodies such as the Community Housing Coalition WA, especially as the housing sector seems better described as amounting to a section of industry. Member community housing charities might also promote industry or trade or commerce. Indeed, any peak body that has a purpose of assisting its members, which would be typical, would be similarly at risk of having a purpose of promoting a specific section of industry if its members could be characterised as such a section.

### *Purposes or activities*

The definition of 'promote trade, industry or commerce' makes it clear that one looks first to the activities carried out by a charity (carry out an undertaking) and then, second, to the range of purposes of those activities (a purpose of which includes...). There is a real risk that any undertaking involving commercial activities will involve a commercial purpose, as one purpose amongst many. For instance, returning to TR 2011/4, the manufacture and sale of animal vaccines in pursuance of a purpose of preventing disease in animals, particularly those used in primary production.<sup>14</sup> Private hospitals in the form of charities represent a broader example. While separate concessions exist for some State taxes (such as pay-roll tax and land tax), there is not a separate concession for duties for hospitals. Likewise, community housing providers might also be seen to be carrying out trading or commercial activities.

### **'Beneficial body' determination**

Under the Bill, if a charity is a relevant body, there is a mechanism that is available for certain types of relevant body (including a trade, industry or commerce limb relevant body) to re-access the State tax concessions. The Bill provides that the Finance Minister, with the concurrence of the Treasurer, may make a determination that a relevant body is a 'beneficial body'. The only guidance provided for making this determination is that:

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<sup>12</sup> At [275].

<sup>13</sup> See, especially, cl 3.1(a) of the WACOSS constitution

([http://www.wacoss.org.au/Libraries/About\\_WACOSS\\_Governance/WACOSS\\_Constitution - adopted\\_01\\_08\\_2014.sflb.ashx](http://www.wacoss.org.au/Libraries/About_WACOSS_Governance/WACOSS_Constitution_-_adopted_01_08_2014.sflb.ashx)); cl 2(k) of the ACROSS constitution

([http://acoss.org.au/images/uploads/ACOSS\\_Constitution\\_AGM\\_2013.pdf](http://acoss.org.au/images/uploads/ACOSS_Constitution_AGM_2013.pdf)).

<sup>14</sup> *McGarvie Smith Institute v Campbell Town Municipal Council* (1965) 11 LGRA 321.

- the Minister is of the opinion that it is in the public interest to do so; and
- after considering any information that the Minister considers relevant.

Pursuant to proposed section 34A of the Taxation Administration Act 2003, that decision is purportedly non-reviewable.

Ex-gratia relief from State taxes is not a new concept (e.g. for matters such as corporate reconstruction relief, as well as for charities), nor are determinations made on public interest (or national interest) grounds. However, the adoption of a broad administrative discretion in conjunction with the lack of specific guidance about how it is to be exercised tends to detract from the rule of law. For instance, that laws should be 'prospective, open and clear' and 'relatively stable' so as to permit people to be 'guided' by the law.<sup>15</sup> Further, that the same laws should apply to all persons, so that they are treated equally.<sup>16</sup> In this light, the Bill seems to be moving against the general trend to incorporate the guiding principles for relief in State taxes legislation, rather than leaving an absolute discretion to the relevant minister. At the Federal level, this trend is evidenced by the inclusion of private and public ancillary fund requirements into legislation (including regulations).

In the context of charity law, there are likely to be a range of divergent opinions about what charitable purposes are in the public interest – indeed, one only needs to pause and reflect that a fourth limb charity, by definition, is a charity with purposes that are beneficial to the community (ie the public). Accordingly, it would be helpful for guidance to be provided, preferably in legislation, about what the key considerations will be. For instance, is the public interest test intended to operate as a cost benefit analysis weighing up the cost of the 'lost'<sup>17</sup> tax revenue against the net public benefit provided by the charity? If so, it may well be harder for bodies that provide less tangible benefits to demonstrate a net benefit in the public interest. For instance, advocacy bodies may find this difficult. So too might religious bodies with mixed purposes, that cannot therefore rely on the exclusion from the trade, industry or commerce limb for charities with a sole or dominant purpose of the advancement of religion. Finally, for the same reasons, it would also be preferable for the determination to be made on the grounds of public interest, rather on the grounds that the Minister is of the **opinion** that it is in the public interest.

More fundamentally, there must be some doubt about the validity of the provisions that provide for the determination and its non-reviewability on the basis of *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531. Removing the possibility of judicial review, at least on grounds of jurisdictional error, may breach the principles in *Kirk*.

### **Removal of further fourth limb charities by way of regulation**

The Bill proposes to permit additional classes of fourth limb charities to be removed by way of regulation. While it is understandable that the State wishes to retain flexibility to deal with future unexpected broadenings of the class of fourth limb charities in a timely fashion, again, on rule of law grounds, this does not seem best practice. The Bill ought to clearly identify a specific basis upon which future classes of fourth limb charities are to be removed, or else leave the decision, at the relevant time, to Parliament. Otherwise there is

<sup>15</sup> See, eg, Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198-202.

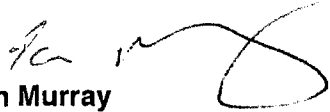
<sup>16</sup> See, eg Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5; TRS Allan, 'The rule of Law as the Rule of Reason: Consent and Constitutionalism' 115 (April) *Law Quarterly Review* 221, 222-3.

<sup>17</sup> There is an on-going debate about whether charity tax concessions are truly tax expenditures.

the potential for a perception on the part of any fourth limb charity engaging in activity that is contrary to the interest of the current government, that it ought not to do so. For instance, charities engaging in advocacy would be particularly affected.

I would welcome any questions or requests for further information and am happy to appear before the Committee to explain any aspects of this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Murray', with a large, stylized loop at the end.

**Ian Murray**  
Assistant Professor  
Faculty of Law, University of Western Australia  
Tel: +61 8 6488 8520 | Email: [ian.murray@uwa.edu.au](mailto:ian.murray@uwa.edu.au)