



15 October 2014

Hon Robyn McSweeney MLC
Chair, Standing Committee on Legislation
Legislative Council
Parliament House
PERTH WA 6000

UNIONSWA

WA's PEAK UNION BODY

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Attention: Samantha Parsons, Committee Clerk

By email: lccl@parliament.wa.gov.au

Dear Mrs McSweeney

RE: Inquiry into the Taxation Legislation Amendment Bill 2014

Enclosed is UnionsWA's submission to the *Taxation Legislation Amendment Bill 2014*.

Please feel free to contact me on 9328 7877 or mhammat@unionswa.com.au if you have any queries or would like to discuss the submission.

Yours sincerely

Meredith Hammat
Secretary



UNIONSWA SUBMISSION TO THE
INQUIRY INTO THE TAXATION LEGISLATION AMENDMENT BILL 2014
STANDING COMMITTEE ON LEGISLATION
LEGISLATIVE COUNCIL, PARLIAMENT OF WESTERN AUSTRALIA

1.0 Background

UnionsWA is the peak union body in Western Australia, representing over 30 affiliated unions which have over 150,000 members.

UnionsWA understands that the introduction of the Taxation Legislation Amendment Bill 2014 (**Bill**) was motivated primarily by the decision of the State Administrative Tribunal in *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 (**SAT Decision**), which found that the Chamber of Commerce and Industry of Western Australia was exempt from certain state taxes as a charitable organisation.

Nonetheless, the Bill makes specific references to unions that appear inconsistent with both existing jurisprudence on charitable purposes and the approach adopted in other jurisdictions. Furthermore, UnionsWA believes that there are likely to be unintended consequences caused by the broad drafting employed in the Bill.

2.0 Approach in the case law

As noted in both the Explanatory Memorandum and the Minister's Second Reading Speech, unions have not traditionally been regarded as charities by the courts. That is primarily because of a view taken by the courts that unions operate to advance the interests of their members,¹ rather than to provide a general public benefit that falls within any of the categories outlined in *Pemsel*.²

While the activities of unions have significant benefits for the public at large, it has generally been accepted that indirect benefits to the community are not sufficient to transform an organisation that primarily provides benefits to members into a charitable organisation.³ In this regard, unions have been treated in the case law analogously to professional associations.

Furthermore, limits are placed on the membership of unions both by the rules of the relevant union and by statute. Under current federal and state industrial relations laws, unions are only eligible to represent members and employees over whom they have constitutional coverage; in turn, the constitutional coverage of the union, which determines its membership

¹ *In Re Mead's Trust Deed; Briginshaw & Ors v National Society of Operative Printers and Assistants & Anor* [1961] WLR 1244.

² *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

³ *Income tax and fringe benefits tax: charities* ATO Taxation Ruling 2011/4, [246].

requirements, is provided by the rules of the union. Restrictive membership rules tend to militate against the proposition that an organisation is a charity because it implies that the members of the organisation are not benefiting as ‘members of the public’ in the relevant sense demanded by the case law.⁴

In some cases, restrictive membership rules have not prevented an organisation from gaining charitable status. However, these cases have generally reconciled a finding that the purpose of the organisation is charitable with a finding that the restrictive membership rules were somehow relevant to the advancement of that charitable purpose.⁵

In contrast, UnionsWA is not aware of any circumstance in which a court has found that the restrictive membership rules of unions are relevant to an individual union’s advancement of a general, public benefit.

Given that there is no suggestion in the case law that unions may be regarded as charities now or at any point in the future, it is entirely unclear why the Bill specifically excludes them.

3.0 Approach in other jurisdictions

UnionsWA has conducted a preliminary review of the approach taken to the definition of charities in other common law jurisdictions. While s 11 of the *Charities Act 2013* (Cth) excludes unlawful or particular political purposes from the definition of a charitable purpose, no explicit exclusion is provided for unions or similar organisations.

Indeed, UnionsWA could only identify one statute in which unions were explicitly excluded: the *Charities Act 2009* of Ireland.⁶ However, the Irish legislation provides further, more prescriptive exclusions, such that it also excludes ‘a representative body of employers’ or ‘a chamber of commerce’. In this regard, the Irish legislation is consistent in excluding both employee and employer organisations in a manner that the Bill is not.

Curiously, the Irish legislation found no obstacles to explicitly excluding Chambers of Commerce as charities, and yet the current Bill, even where its genesis was in a decision regarding a Chamber of Commerce, makes no explicit mention of such organisations at all.

4.0 Unintended consequences

As a final matter, UnionsWA notes that the category proposed in draft s 42A(f)(ii) of the *Pay-roll Tax Assessment Act 2002* (WA) is likely to cause significant unintended consequences.

It is relatively common for organisations to establish separate legal entities that deal with specific purposes, which may be charitable. For example, in *Re Australian Institute of Management (Vic) and Commissioner of State Revenue (Vic)* 9 VAR 222, the Australian Institute of Management established a separate college that provided educational services.

⁴ *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570.

⁵ *Victorian Women Lawyers’ Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318.

⁶ *Charities Act 2009* (Ire), s 2.

Despite being under the control of the Institute, the Court found that the college, as a separate legal entity, carried on a charitable purpose in the advancement of education and was, accordingly, a charity.

Where such a separate entity exists, even if it is a related body corporate as defined in the *Corporation Act 2001* (Cth) to a non-charitable organisation, it is unclear why that relationship should strip the related body corporate of its charitable status provided that it continues to carry on a charitable purpose.

UnionsWA is specifically concerned that this further category would prevent unions, as explicitly excluded bodies, from establishing separate, charitable organisations, even if those organisations provide publicly available services that address poverty, education or religion.

The linkage proposed under draft s 42A(f)(ii) appears to be without justification, and would unfairly prevent explicitly excluded organisations such as unions from establishing purely charitable, but related, organisations. UnionsWA submits that, so long as an organisation carries on a charitable purpose as defined at law, it should be entitled to the applicable tax status.

5.0 Conclusion

Having regard to these submissions, UnionsWA is concerned that the Bill is drafted to inappropriately and unfairly target unions. This is particularly so in a context where the Bill's introduction was motivated by a finding made in relation to an employer organisation, and where other jurisdictions have acted consistently in the treatment of unions and employer organisations.

It is clear that the Bill favours employer organisations over unions, and is specifically against the intent of the guarantees of freedom of association provided for in the *International Covenant on Civil and Political Rights* and other international instruments. In explicitly targeting and penalising unions, the Bill's justification is inconsistent with prevailing case law, the SAT Decision, and the approach adopted by other jurisdictions.

For these reasons, UnionsWA submits that the Bill must be withdrawn and redrafted.