

STANDING COMMITTEE ON LEGISLATION

TAXATION LEGISLATION AMENDMENT BILL 2014

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 30 OCTOBER 2014**

SESSION TWO

Members

**Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Lynn MacLaren**

Hearing commenced at 10.32 am**Ms NICKI SUCHENIA****Acting Commissioner of State Revenue, Office of State Revenue, sworn and examined:****Mr MURRAY HANCOCK****Director, Legislation, Training and Review, Department of Finance, Office of State Revenue, sworn and examined:**

The CHAIR: Hello. On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or the affirmation.

[Witnesses took the affirmation.]

The CHAIR: You will have signed a document entitled “Information for Witnesses”. Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement to the committee?

Ms Suchenia: Yes, thank you. I would like to thank you for the opportunity to provide a submission today to the Standing Committee on Legislation. In giving evidence today, I would like to point out that I am subject to the confidentiality obligations that exist under the Taxation Administration Act, and they prevent me from disclosing information about the affairs of specific taxpayers. I will try to assist the committee as far as I possibly can within the constraints of that legislation and respond to hypothetical situations and scenarios, but I am unable to provide specific taxpayer information.

I would also like to point out that the Office of State Revenue works very closely with the Department of Treasury in putting together legislative schemes, and particularly in relation to this legislation. We have a delineation within the office which means that we work on the administrative side and the construction of the legislative scheme, but it is the Department of Treasury that is responsible to the Treasurer in relation to the policy issues. Specifically in relation to this bill, it is quite easy, as you go through the specifics of it, to concentrate on the fact that it is about whether an organisation is a charity or not, but I would like to specifically focus on the fact that this is about whether, once being a charity, you have a tax exemption or not. And in that context there are many charities that are used as examples through these proceedings that potentially are not liable to pay state taxes because they do not meet the thresholds in relation to them. For example, the payroll tax threshold involves organisations that have \$800 000 or more of wages in a year, so you are talking about quite substantial organisations. In the context of land tax, the threshold for land tax is an unimproved value of over \$300 000, and obviously duties transactions arise on a case-by-case basis

when you enter into a dutiable transaction, which is essentially the purchase of real property or other dutiable property. So we are looking at this in the context of the taxation liabilities that these organisations might have, not their status as a charitable organisation.

The CHAIR: Thank you. You have some questions in front of you. Your submission to the committee mentions the difficult task of drafting the bill, and it has two dot points. You have the questions, so I do not need to repeat them.

Ms Suchenia: Yes. In relation to the reasons for the legislative scheme, I think it is fairly clearly established that it was in response to the CCI case in the State Administrative Tribunal that found that the CCI had a dominant purpose of the promotion of industry and commerce in Western Australia, and that made it a charity. This made, as a consequence of that, the CCI eligible for various state tax exemptions. Following that case, the Treasurer advised the Parliament that it was government's intention to narrow the scope of the available exemptions, and the scheme has been put together in trying to frame that narrower taxation policy for the purposes of the tax legislation. As outlined in the submission, this has been no easy task. We considered, in putting that scheme together, a number of options that included excluding specific organisations by name; requiring that all charitable exemptions be determined by the minister; or then trying to actually frame some guidelines by which certain organisations could be excluded. That is how the option that is in the legislation now has come about. In achieving that policy intent, it has really been about trying to define the characteristics of the organisations that the government wants to exclude, without opening up avoidance opportunities. When I talk about avoidance, I see avoidance in the context of organisations who, in what you would say would be the traditional sense, were not regarded as charities but through various means, including changing their constitution and directing their activities, are able to put themselves in a position that means that they can access the exemption when, I guess, the traditional community view would be that they would not be a charitable organisation. And, as I said, that has been particularly difficult.

In terms of the second part of that question, whether the bill represents a significant change in taxation policy, I do not see it in the context of being a significant change. I think it is more a response to an evolution in law. The courts' views of what constitutes a charity have been evolving in recent times, and there are cases—the CCI case but including the Word Investments case and the Aid/Watch cases at the federal level—that have meant that the law is shifting. Because the legislation is framed currently on the basis that all organisations that are charities get a state tax exemption, the broadening of the common law means that a wider number of charities will qualify for the exemption. This bill is really about trying to pull that back to where it was before the CCI case, in a more historical context. From that point of view, is it significant? The revenue in the context of the tax base is probably not what you would say is a significant proportion, and I do not believe there are a significant number of charities that will be affected by it, but it is significant for those organisations.

The CHAIR: I guess to me people are really concerned about it. I will use the term “Anglicare”, because that comes to mind—it could be any religious institution—they would have a \$30 million turnover every year, so obviously they would meet the threshold of over \$800 000 in wages. They might have a side business—a business that, say, puts homeless people into a cafe that they own to make money, for education purposes, to teach them how to make coffee and serve the public. I think people are concerned that, yes, they are a charitable organisation, but because they make money—I just use that as a little example—they may get caught. Is that right?

Ms Suchenia: Without responding specifically on the individual organisations but just using them as hypotheticals in what might exist, in the context of this concern, it is something that WACOSS have raised with us in various iterations of different types of organisations. I think that boils back to the difference between what we see as promoting trade, industry or commerce, which is how the bill has been framed, and actually engaging and carrying out activities that could be commercial in

nature. The Word Investments case, I think, is what changed the law that authorised this type of situation to exist. This bill is not about changing the policy in response to the Word Investments case; it is not trying to deal with that issue. It is more about clarifying, as subsequent questions will kind of draw out, and I think there is an onus on the commissioner to clarify the difference between the promotion of trade, industry or commerce, and actually engaging in those activities. The intent is certainly, in those types of examples that you have outlined, that this would not affect those types of organisations.

The CHAIR: Thank you. Can you answer the third question that you have in front of you, that begins: this inquiry was referred on the assumption?

Ms Suchenia: Yes. In specifically asking could charities other than fourth-limb charities be affected by the bill, the amendments were definitely intended to exclude fourth-limb charities and professional associations which may or may not actually be fourth-limb charities themselves. It was accepted in framing the amendments, because of all of the complexity in the common law, that it is possible that charities other than fourth-limb charities could be affected. I guess that has been the difficulty right from the start—to try to target the exclusion capacity in a way that does not bring in too many organisations that you are not seeking to target but still gives an option at the government's level to make sure that you can deal with any that may be brought in; and that is the reason for the ministerial discretion, because it is recognised that it is possible that that might be the case.

[10.45 am]

Mr Hancock: I might just clarify that. As Nicki said, the amendments are intended to exclude fourth-limb charities that have as a purpose the promotion of trade, industry or commerce, and professional associations which may cover different limbs. They targeted those alone, but within that category there might be an organisation, for example, that carries on a very minor aspect of promoting trade, industry or commerce, to which the government may think it is appropriate to provide an exemption. That is what the ministerial discretion was aimed at. The intention of the amendments was not to seek to exclude, for example, organisations that are established for the relief of poverty, advancement of religion or advancement of education, within the context of fourth-limb charities, anyway.

Ms Suchenia: I think probably just the last comment in relation to that point is that the proposed committee amendments that have been put on the notice paper are really aimed at trying to ensure that public benevolent institutions are not unintentionally affected; so that goes some way to dealing with those, although we do acknowledge the comments in the written submission of Assistant Professor Ian Murray that there are a couple of technical issues with those.

The CHAIR: Question 4 is a rather large question starting with: Can you briefly explain the legal framework applying to fourth-limb charities? Are most incorporated associations?

Ms Suchenia: Answering that last bit first, charities are most commonly incorporated associations but they can also take other forms. We are seeing charitable trusts, companies, including companies limited by guarantee. So, while incorporated associations are the most common, there are other possible structures. The legal framework applying to fourth-limb charities follows the general charities law. I think that is outlined in our submission in terms of how we see that. In terms of the processes to obtain a tax exemption under the acts, a taxpayer is required to make an exemption application to the commissioner under the relevant provisions of the act, and they provide the information that is necessary to establish their charitable status. For land tax and payroll tax eligibility purposes, it is based on the charitable status of the taxpayer, and in the land tax case, it also requires them to use the property for a charitable purpose. Duties differs from this in that we look at the charitable purpose of the transaction, not of the people who are entering into the transaction. As part of that process, we look at their status at common law, and we do not require

that they be registered or have any other kind of endorsement. We actually make the examination of that charitable status as part of approving the exemption.

Mr Hancock: Just on that endorsement one, what we also look at, too, is how other regulatory authorities deal with them. I mean, if the Australian Taxation Office or another revenue office has recognised them as a charity, that will give us some comfort also in terms of their eligibility, and I presume also the Australian charities—I cannot remember it now—ACNC.

Ms Suchenia: The national register. In relation to the recordkeeping, we maintain records about taxpayer charities, particularly in relation to fourth-limb charities. As these records identify individual taxpayers, we are not able to provide that to the committee.

Hon SALLY TALBOT: This is the list of currently —

Ms Suchenia: The list that we have within the office of fourth-limb charities.

Hon SALLY TALBOT: What is the reason for not being able to provide it?

Ms Suchenia: Because it lists the individual taxpayers.

Hon SALLY TALBOT: So who can see that list—a minister?

Mr Hancock: No, just the commissioner, and there are certain people under the act whom the commissioner has authorised to —

Ms Suchenia: Under the confidentiality provisions.

Mr Hancock: — release that information to. The minister is not one of those persons.

Hon SALLY TALBOT: Which section of the act?

Mr Hancock: Section 114 of the Taxation Administration Act.

Ms Suchenia: In terms of the decision on a taxation —

Hon SALLY TALBOT: Just before you go on, can you tell us how many there are?

Ms Suchenia: It is not a complete list and it has only been maintained in recent years.

Hon SALLY TALBOT: Why is it not a complete list?

Ms Suchenia: Because it does not cover all limbs. It is dealing with exemptions that we have approved in probably the last four years in relation to fourth-limb charities. So, within our office we will have records at an individual taxpayer level that sit within our system of whether somebody has been granted an exemption or not, but we have not collated those individual records into what we have with the fourth-limb charities that we have been maintaining for the last four years.

Mr Hancock: For example, for payroll tax registrations, we will put a code alongside their registration so we are able to extract that information in report form, but we do not maintain a complete register of all organisations.

Hon SALLY TALBOT: When you run that report, how many are there?

Ms Suchenia: We actually have not run that report. In terms of our spreadsheet, and I am going from memory, but there are over 100 in terms of those recent numbers. I would have to double-check because I have not seen that spreadsheet myself for some time.

Hon LYNN MacLAREN: Those are just exemptions?

Ms Suchenia: Yes.

Mr Hancock: Yes.

Hon LYNN MacLAREN: And you are calling them individuals rather than corporations or companies or —

Ms Suchenia: No, it is everybody. It is also all fourth-limb charities, whether they have been approved on the basis of the promotion of trade, industry or commerce or any one of the myriad factors that would allow a fourth-limb charities to be approved. So, it is a very large list.

Hon SALLY TALBOT: Can we ask you to provide us with the data on notice? Can you go back and run those reports?

Ms Suchenia: I can provide statistical data and I can provide statistical data out of that spreadsheet. I am not certain, without consulting my systems people, what could be pulled out of the system, but I can endeavour to try to do that.

The CHAIR: Whatever you can do under —

Hon SALLY TALBOT: With the greatest respect to you, I just find it rather extraordinary that we have got to this stage with a piece of legislation that is so contentious where we cannot really get a feel for how many people currently claim the exemption.

Ms Suchenia: I can give you the statistical data in terms of what I can pull out of the system, but I guess the difficulty—and it is part of the difficulty that we have had and why we are actually keeping the fourth-limb charities—is there are large numbers of different criteria across the office and reasons why charities would get exemptions. We could provide a very high number of organisations that have a charitable exemption, but the records that we keep in the system do not go down on the basis of listing exactly why each organisation was given an exemption. It will tell you these are the number of exempt organisations that we have, but the data that we can extract from the system will not give you a level of granularity that tells you that we have this many organisations that were given an exemption on the basis of a narrower part of the definition of charities, because it is quite broad.

Hon SALLY TALBOT: Okay. Just one further question, and then I want to clarify what exactly we are asking for on notice. When the office has provided information about the fact that there are likely to be a low number of charities impacted by this bill, how did you arrive at that conclusion?

Ms Suchenia: Over the period since early 2010, the records that we have been keeping in a spreadsheet format have been listing the reasons why we have granted exemption to fourth-limb charities.

Hon SALLY TALBOT: Since 2010?

Ms Suchenia: That is right. So, from that information, we have been able to ascertain the approvals in that process, and we obviously have a much larger number that have had approvals much earlier than 2010, but from that period onwards we have been able to keep track of information in relation to why we granted the approval for fourth-limb charities.

Hon SALLY TALBOT: Do you know how many there have been since 2010 since you have been keeping the spreadsheet?

Ms Suchenia: I would have to go and double-check that. I do not know off the top of my head.

Hon LYNN MacLAREN: In addition, when we were looking at framing this question, you are going to be giving us an idea of the number of exemptions, and I am wondering if we can also get the type of organisation that has been granted the exemption—for example, is it a PBI? So maybe it would be worthwhile getting the types of information that you have access to. So, if you have an organisation, what information do you have about that taxpayer, in addition to the fact that they have been granted an exemption?

Ms Suchenia: Maintained within the system, that information is very limited, particularly in relation to land tax, and we have attempted to try to pull that information out of the system in framing some of the responses on the policy and have not been able to get sufficient information at that level of detail with the statistics, which is why we had to resort to keeping the spreadsheet.

Hon LYNN MacLAREN: I mean, this is one of the issues, is it not, whether a charity qualifies as an institution —

Ms Suchenia: A public benevolent institution.

Hon LYNN MacLAREN: — a public benevolent institution?

The CHAIR: Given that they have to have over \$800 000 in wages. I think you mentioned 100, or thereabouts—you could not be specific—but, really, out of the 3 000 charitable organisations in WA there probably would only be 100 or a very small amount. Given that you are under the privacy provisions that you are under, I guess what my colleagues are asking for is some sort of statistical analysis, which you said you can —

Ms Suchenia: I can give the statistics at the high level, and I will do my best to see what we can do about breaking them down into classifications, but I know for a fact that it does not sit within the reports that we would generate out of the system.

Hon SALLY TALBOT: Basically if you could indicate which are the ones that you do have the information on, so who is on your spreadsheet.

Ms Suchenia: I cannot tell you names of who is on the spreadsheet —

Hon SALLY TALBOT: The types.

Ms Suchenia: Okay, the types. We have broken them down into whether they are professional associations or fourth-limb charities.

Hon LYNN MacLAREN: Would it not be useful also to know, for example, how many exemptions of payroll tax there are, how many exemptions of land tax there are, and how many exemptions of stamp duty there are among these fourth-limb charities?

The CHAIR: Only if the statistics will allow it.

Hon LYNN MacLAREN: They are all different, aren't they?

Ms Suchenia: For duties, you will need to give me a date range, because our system goes back—and duties is a transaction by transaction exemption, so that is very difficult. Payroll tax, I would be looking at our current base of around 18 000 taxpayers and looking at, okay, how many of them are recorded with a charitable exemption status, and the same in relation to 1.3 million land items in the land tax sense.

The CHAIR: We have to be wary about what we are asking the department to do.

Hon LYNN MacLAREN: Just trying to get an idea.

The CHAIR: I think what we asked in the first instance is some statistics and some kind of analysis around that, on those 100 —

Ms Suchenia: I can do my best to give you some statistical information out of our spreadsheet, and later when you talk about the number of organisations that we think will be affected, based on the information from that spreadsheet we think there is in the vicinity of 20 to 30. Of course we still are getting applications from organisations, and that number is growing it. But in a payroll tax sense, you are talking about a base of 18 500 taxpayers. We are talking about 20 to 30. It is a very small number.

Hon SALLY TALBOT: What we need to be clear about as a committee, to do the job we have been given by Parliament, is to be able to understand how you substantiate the claim that there is only a very small number of fourth-limb charities affected by this measure and that in the event that there were fourth-limb charities excluded from the exemption who were not intended to be excluded, that that is a matter that then goes to the minister. But that number, again, is likely to be very small.

[11.00 am]

Mr Hancock: Can I just say something on that: in terms of the fourth limb, we are not talking about every fourth-limb charity. The legislation attempts to exclude only those fourth-limb charities that have as a purpose promoting trade, industry and commerce. We are talking about a subset of fourth-limb charities, not all fourth-limb charities.

Hon LYNN MacLAREN: And activities as well. Our concern is the unintended consequences of how it has been drafted. While it is important to know what the intentions are, we need to get an idea of what the catch-all might be.

Mr Hancock: Yes.

Ms Suchenia: I understand your concerns and I will do my best to get the statistical information to you.

Hon SALLY TALBOT: Have you distinguished between activities and purpose?

Ms Suchenia: Yes. There is a question on that a little later.

The CHAIR: I do not like jumping around, but we will jump to question 13, which is —

Please comment on the point raised by Assistant Professor Ian Murray that the definition of ‘promote trade, industry or commerce’ confuses activities and purposes?

Ms Suchenia: There was also another question, where I have all my notes for it.

The CHAIR: I knew if I jumped around—I am like that!

Hon SALLY TALBOT: I think it might be 11.

The CHAIR: Yes —

A major concern to stakeholders is that paragraph (d) and the definition of ‘promote trade, industry or commerce’ excludes a fourth-limb ...

Ms Suchenia: I understand the context that this has been put up in relation to there is a perception that it is mixing “activities” with “purpose”. We do not consider that the references in the legislation to “carry out an undertaking” in conjunction with the reference to “purpose” are problematic. The reason behind that is in applying the charity law principles, it is necessary to consider both the purposes and the activities. In determining for what purposes a body is established or carried on, it is necessary to refer to the body’s constituting documents and other relevant materials and activities, as well as the body’s history. Much weight, we feel, is given to what the body actually does—that is, its activities—and then what purposes it pursues. From our point of view, we do not see that the activities determine the purpose of the body, but rather they shed light on the purposes for which the activities are undertaken. The goal is to identify the organisation’s real purposes and all the activities in conjunction with those other things are taken into account in determining what the real purposes are of the body. That is where we get to the position of the purpose of trade, industry or commerce. The activities are essentially the operations of the charity that support that purpose.

In the context of our examinations when we go to look at these types of organisations, they are the evidentiary matters that lead to how you put your case forward. In the example that has been used of the CCI, it was the activities of the organisation that were the subject of the case, because that led to the conclusion that the purpose of the organisation was the promotion of trade, industry or commerce. Much of the evidence that was given by the people in the court proceedings was about what their activities were because that led to the determination of what their purpose was.

Hon SALLY TALBOT: There is a sense in which you would accept what Professor Murray is saying. What you are indicating is that you have deliberately included both “purpose” and “activities”.

Ms Suchenia: I do not think you can have one without the other.

The CHAIR: We cannot really.

Hon LYNN MacLAREN: Obviously, the consideration on a case-by-case basis about whether a taxpayer qualifies for an exemption will require a bit of resources. Have you looked at, once the bill goes through, what the likely workload is as you are weighing up whether the activities and purposes qualify an organisation for that exemption?

Ms Suchenia: I have not specifically looked at resourcing. What I do know is that the resourcing that is currently utilised by the office in relation to trying to determine these exemptions is quite high level and can be very intensive. My expectation is that the bill will lessen the resourcing that we need to put into these types of investigations or assessments.

Mr Hancock: It is exactly the same process that we have to go through. We have to make a determination whether they are a charity and we have to look at its purposes and activities and all that to make that decision. I see it as much the same process.

Ms Suchenia: The process is the same. At the moment, our task is to try to show that these organisations, where we do not believe they are a charity, that their dominant purpose is not the promotion of trade, industry or commerce. That is what we have to do at the moment.

Hon LYNN MacLAREN: Is part of this looking at the ones that are already claiming an exemption and determining whether they still fit the bill?

Ms Suchenia: That is our first —

Hon LYNN MacLAREN: How long do you think that will take?

Ms Suchenia: How long is a piece of string? We have a substantial amount of information on a number of those because of our examinations on them to date. We ask for that information as it is coming in on applications at the moment. We have a lot of that information, which I think means that the process is somewhat shortcut, but obviously we still need to revisit that. Given the number that we are looking at, I think it will be a fairly intensive 12 months in getting to the stage where we have examined all of those organisations.

Hon LYNN MacLAREN: We have heard there are in excess of 3 000 charities operating in WA.

Ms Suchenia: As I said, I do not think they all have a state tax liability.

The CHAIR: They do not meet the threshold, though.

Hon LYNN MacLAREN: Some of them may test, though, whether the changes actually impact them.

Ms Suchenia: To be able to do that they have to have a tax liability in the first instance. I cannot see that you would have anywhere near 3 000 charities having a tax liability. In a lot of cases, the organisations that we do exempt are clearly charities; it is not an intensive process to get to the determination. Some of them are very straightforward determinations.

Hon LYNN MacLAREN: But in the case of Anglicare, which the Chair has brought up before, you would not see them having to test this? You would think that they would not need to test this; they could still claim their payroll tax exemption, for example? I know you are not supposed to deal with specifics. In the example of a very large, well-known charity, whose main purpose is poverty —

Mr Hancock: I suppose another way is to say that we have a fair idea of what charities would be. In our opinion it would be promoting trade, industry or commerce, so we would be looking at those types of organisations. For your general traditional type of charities, it would be very unlikely that they would have as a purpose promoting trade, industry or commerce in the context of the CCI-type arrangements.

Ms Suchenia: If you look specifically at those types of organisations that are public benevolent institutions, they are about the aged, they are about the impotent, they are about—I am missing one!

Mr Hancock: And poverty.

Ms Suchenia: They are very straightforward.

Hon LYNN MacLAREN: There are a lot that are not PBIs that are about the aged and poverty and —

Ms Suchenia: And again, they are very straightforward in terms of determining a charitable status.

Hon LYNN MacLAREN: But you would have to determine it.

Ms Suchenia: We have to determine it now. Again, they are still not difficult determinations to make.

The CHAIR: No, because you look at the main purposes of their activities and they are registered with other organisations.

Hon SALLY TALBOT: What about the extension of these provisions to related entities? Have you done any checking of how many related entities might be brought into consideration?

Mr Hancock: If they are large enough to pay payroll tax, there are provisions in the Pay-roll Tax Act for grouping related organisations. It is very unusual for charities, there will be some, to have— if they are genuine charities, they would be exempt anyway. It would not be common for them to have multiple or subsidiary-type organisations. But for payroll tax purposes, if they are, we could identify them, but I doubt whether we would have any grouped at the moment, or potentially one.

Ms Suchenia: Again, I think we might be jumping questions. I think the provisions in related organisations are driven very much by us sitting down and saying, “If these provisions are put in, what is the next step of these organisations to try to avoid them?” The related entity is a very obvious example. If you have an organisation that is itself going to be subject to these provisions, then you set up a subsidiary and make the subsidiary the charitable organisation and suddenly you have defeated the purpose of the exemption. The related entity provisions in here are about us looking at it. You try to deal with the threshold issue. Next, how do we deal with the avoidance opportunities? For some of these organisations, in the frame of the legislation applying to them, the benefit is quite large to be able to make yourself tax exempt. That is why those provisions are there.

The CHAIR: I know we do not like to name organisations, but would CBH and other organisations like that be likely to lose their tax exempt status?

Ms Suchenia: I cannot comment on CBH.

The CHAIR: I know that you cannot comment on CBH, but organisations very similar; I suppose cooperative organisations, agricultural associations and growers’ associations.

Ms Suchenia: I think the threshold question is: are those organisations for charity in the first place? There is a distinction between a not-for-profit organisation and a charity. I think in a lot of examples that have been put forward, these types of organisations are very clearly not-for-profit but they are not charities.

The CHAIR: No; that is right.

Ms Suchenia: The provisions do not even come into play.

Mr Hancock: I suppose as a starting point for you—we cannot give taxpayers’ names; I am sure it might have been mentioned to you already—the ACNC register provides a general list at the national level of charitable organisations and public benevolent institutions. You could plug in some names and that will give you the outcome —

Ms Suchenia: Whether they are a charity or not. Obviously, there is a next step but —

Mr Hancock: The next step in the process is: or do those organisations have as a purpose—you would have to look at their constitutional documents—promoting trade, industry or commerce?

The CHAIR: That is fairly clear in some organisations.

Ms Suchenia: I think we are on the second dot point of question 4—is that correct?

The CHAIR: You have probably covered all of that. There is one there about the Law Society, at question 6. It submitted that clause 5 of the bill proposes to amend section 95.

Ms Suchenia: The question was: would discretionary trusts and fourth-limb charities be affected by the proposed amendment to section 95 of the Duties Act? The inclusion of section 95 in the Duties Act is actually an important anti-avoidance provision in a similar way to the example on payroll tax. It is designed to be able to look at the transaction and be able to make sure that in the context of the transaction itself, which may or may not be entered into by a charitable organisation, if they are going to fall foul of the provisions, how do you avoid the duty? One of the ways that we have identified that that might be possible is setting up a trustee company. The provisions are in here to be able to deal with that scenario in an anti-avoidance sense.

Mr Hancock: Just on that, as Nicki said, it is the actual transaction that is exempt from duty, not the person liable for the party under the legislation. The way the amendments deal with trying to exclude fourth-limb charities, or excluded bodies at least, is the amendments say that where an excluded body is liable for the payment of a duty, then the transaction is not exempt. The way that organisations could defeat that provision is that rather than buying or purchasing the property in their own right, they get a trustee to acquire the property on their behalf. Because it is the transaction that is exempt for a charitable purpose, then that transaction would be exempt. The purpose of these provisions is to counter that avoidance scheme where an excluded body, rather than acquiring the property directly, would get a trustee to acquire it on their behalf. That is the whole purpose of it.

[11.15 am]

Ms Suchenia: The discretionary trust scenario, I think, in the context of the Law Society's submission is relatively rare. We do not see a lot of charitable organisations set up in the discretionary trust format. The amendment essentially is to grant the commissioner a discretion to determine that the trustee is not a relevant body. We believe that, in the rare situations that this scenario may actually come up, that would appropriately address their concerns. However, they have quoted section 162 of the Duties Act as an appropriate model. We think a better model would be section 158.

Mr Hancock: I suppose we see it as a rare event and a technical issue and we see merit in what they suggest.

The CHAIR: Various limbs of the definition of “relevant body” in the bill have caused concern. That is quite a big section.

Ms Suchenia: On the question specifically relating to Engineers Australia describing “professional association” as narrow and misleading, I do not accept that that is the case; it is quite a broad definition. We believe the words in the definition are clear and the practical effects are considered to appropriately achieve the government's policy intent. I would also note that the provision of services to the community does not necessarily make an organisation a charity and that being a professional association also does not make the organisation a charity. So, again, we are in this space of “you have to be a charity with a tax liability in the first instance to be affected by these provisions”.

On the question of would fourth-limb charities be affected by the definition of “professional body”, they obviously then have to be a charity to have to have a tax liability. It will fall within the provisions if it has as an object an activity that involves the promotion of the interests of its members in any profession. Obviously, for the same reasons in relation to fourth-limb charities, there is a ministerial discretion to reinstate the exemption if it is accepted that that type of organisation should receive the exemption. I think it is an intended consequence of the bill because

the policy intent at the threshold level is that professional associations do not receive a tax exemption. In terms of the submission that we made to the committee, the reason for that being the way that it is and structured in the manner it is is that in drafting the amendments, we believe if you put the definition in on the basis of it being the sole or dominant purpose of either a professional association or a fourth-limb charity—instead of “a” purpose, you use the sole or dominant purpose—it becomes a relatively easy proposition to be able to avoid the provisions. From the point of view of how these are structured, “a” purpose has been deliberately used to achieve the government’s policy intent, and if it moves back to a sole or dominant purpose, we do not consider that the policy intent will actually be achieved.

Hon SALLY TALBOT: So this is where we have jumped from the problem caused by the SAT determination on the CCI. Is there a link between this provision of the bill and the SAT determination on the CCI or are we now in a different paddock?

Mr Hancock: Slightly different paddock.

Ms Suchenia: Slightly different paddock. In being able to frame the government policy response to be able to say if you went from a policy position that all charities were exempt, the government wanted to achieve a situation where a tax exemption was available to a narrower set of organisations than all charities, in setting that, it has been determined to try to achieve that aim that it is about trying to exclude those organisations that have as a purpose the promotion of trade, industry or commerce and are a professional association. The view is that professional associations should not be entitled to the tax exemption, and that is the policy position that has been expressed by the government in terms of trying to get to that narrower taxation policy position.

Mr Hancock: I suppose in the SAT’s case, the SAT found the CCI’s dominant purpose was promoting trade, industry or commerce. If we focused on dominant only, the provisions could easily be defeated, and we have already had situations where organisations have said that they have purposes of equal importance. If you go for dominant and you have equal importance, you are out of the threshold straightaway.

Ms Suchenia: And the provisions do not work.

Mr Hancock: So the provisions will not work. Also, if professional associations were dominantly a professional association, they would not be a charity in the first instance and therefore not subject to these provisions. You have to have a starting point test, which we have taken as “a purpose”, and if there are any unintended consequences coming out of that, the minister has the power to reinstate, but the focus is still on professional associations and fourth-limb charities that have as a purpose the promotion of trade, industry and commerce. The discretion is to recognise that, where it may not be, for example—this is only an example—their dominant purpose, there is that flexibility to bring them back in if the government chooses.

The CHAIR: As we are running out of time, question 11 has two dot points about why would a fourth-limb charity be excluded and about amending the definition. After you answer that, there is question 18, and then I will ask you to provide written responses. Question 11 is: would a fourth-limb charity be excluded under paragraph (d) even if the purpose of promoting trade, industry or commerce is a minor or incidental purpose of the charity?

Ms Suchenia: Yes, that would be the case and that is the reason that ministerial discretion is in place.

The CHAIR: Would amending the definition to provide that a principal purpose —

Ms Suchenia: In answer to the first part of that question, no. I think we have outlined the reasons for that on the basis that as soon as you move to the sole or dominant test, it becomes too easy to avoid the provisions and it means that the policy intent of the legislation cannot be achieved. In relation to would this exclude the CCI, I am sorry; I cannot answer that.

Hon SALLY TALBOT: Why can you not answer that?

Ms Suchenia: Because they are an individual taxpayer, and in terms of the confidentiality provisions, I cannot comment on their affairs.

Hon SALLY TALBOT: They are named in the second reading speech.

Ms Suchenia: That is public information. The future application of this legislation to them is not information I am able to talk about.

Mr Hancock: I suppose what we can say is that the legislation has been drafted in response to government's concerns on the implications of that decision.

Hon SALLY TALBOT: Where are you getting that advice from?

Ms Suchenia: On the confidentiality provisions?

Hon SALLY TALBOT: On the section of the act that you just quoted.

Ms Suchenia: The State Solicitor's Office.

Hon SALLY TALBOT: So you have got legal advice.

Ms Suchenia: I have.

Hon SALLY TALBOT: Can you table that legal advice?

Ms Suchenia: It is privileged; I cannot.

The CHAIR: I will ask question 18. On reflecting on stakeholder concerns, do you consider that any amendments to the definition of "relevant body" are required to better target the small number of bodies the bill was intended to affect?

Ms Suchenia: Having reviewed the submissions, I believe there is some scope for some further minor technical amendments to be made to clarify the intent of the operation of the amendments. I acknowledge the technical issue raised by Assistant Professor Murray in relation to the distinction between an institution and a charitable trust. The amendments on the supplementary notice paper were intended to address that particular point, but I accept that, on the basis of his analysis, it has not gone far enough to be able to do that. I also recognise that it may be possible for an organisation to have multiple purposes of equal importance that straddle the first three limbs of the charitable purpose and, in that case, it means they do not have a dominant purpose and therefore means that they fall outside of the amendments. I think, while it is relatively rare, an amendment along the lines of what is suggested by Assistant Professor Murray would provide some further clarity and place less reliance on the minister in relation to the excluded body determinations. I do not agree with the suggestions in relation to a sole or dominant purpose test for the reasons that we have outlined, because I do not think that that type of amendment would actually achieve the government's policy intent. I have also previously mentioned the Law Society issue that was raised in relation to the discretion.

The CHAIR: About principal purpose?

Mr Hancock: "Principal" is much the same as "dominant".

Ms Suchenia: I do not see a huge difference in relation to those terms.

Mr Hancock: Just on that, as we said, we have had instances already where they are suggesting that they have got dual purposes, so you just lose that control there.

Ms Suchenia: We have had a look at the nature of those amendments, but after being drilled by Parliamentary Counsel for the last 20 years that I do not draft amendments, that would obviously be something that we would need to seek their advice on how best to achieve that.

The CHAIR: I will ask question 23 and the two dot points and then we will have to close it up. Is it anticipated that guidelines would be established on the use of the ministerial discretion, and could

guidelines by legislation or regulation be enacted to provide transparency to the process and better reflect rule of law principles?

Ms Suchenia: I think that this is a matter for the Minister for Finance and the Treasurer as to whether they require the guidelines to be established. Although it would be possible, the nature of the matters that need to be considered, I think, require flexibility and judgement to be achieved, and there is some difficulty in trying to devise guidelines that include all of the necessary elements. If your guidelines are not comprehensive enough, you always then rely on a catch-all provision that sits at the bottom that says “anything else that the minister or the Treasurer may take into account or consider appropriate”, and you really then have to say, “What is the benefit of the guidelines if they can take anything they like into account?”

The CHAIR: I always like that provision!

Mr Hancock: It is a good safety net.

Ms Suchenia: I think the evolving nature of the law makes it especially difficult to be able to come up with guidelines, and I think the difficulties that we have had in trying to frame the legislative scheme exist in relation to the guidelines.

Hon LYNN MacLAREN: Chair, did you ask about harmonising?

The CHAIR: No. You can ask.

Hon LYNN MacLAREN: Was that in Professor Murray’s original submission? I just wondered if Western Australia was considering harmonising our charity tax law with the national law in the way that South Australia and Tasmania have already done? Because we are looking at this act now, it would be an opportunity to move toward that, but is that on your work-flow agenda?

Ms Suchenia: It is not an act that we administer.

Mr Hancock: It is perhaps a matter that Treasury may more know. I am not sure about that. I think they will be better positioned to answer that one than us.

The CHAIR: Thank you both for coming. On behalf of all of us, we appreciate the advice that you have given us. Can I just have the questions on notice by next Tuesday?

Ms Suchenia: Yes.

Hearing concluded at 11.28 am
