

SUBMISSION TO BOARD OF TAXATION EXPOSURE DRAFT CHARITIES BILL 2003

by
Australasian Fire Authorities Council (**AFAC**)

1. INTRODUCTION

- 1.1 AFAC welcomes the Government's exposure draft *Charities Bill 2003* (**Bill**) and the opportunity to comment upon it. AFAC has previously made direct submissions to the Commonwealth Treasurer upon the impact of the proposed Bill, together with the Commissioner of Taxation's approach to the concept of Public Benevolent Institution. Further, AFAC has read the submission made to the Board of Taxation on the Bill by the Country Fire Authority and agrees with it.
- 1.2 AFAC believes that, as currently drafted, the exposure draft Bill does not implement the intent of the Government's policy in relation to volunteer emergency service organisations (**VESOs**) as it has been explained to it by the Treasurer's office.
- 1.3 This submission explains the problems arising out of the definition of 'government body' in the Bill for VESOs and suggests amendment to the Bill and consequential amendments to improve the workability of the Bill in accordance with the Government's policy intention. AFAC requests the Board to report to the Treasurer accordingly.

2. SUMMARY

- 2.1 All Australian volunteer fire fighting services and most VESOs are controlled or notionally subject to control by government under statute.
- 2.2 The definition of charity in the Bill excludes any entity which is the subject of government control from being a charity.
- 2.3 Public Benevolent Institution (**PBI**) status is a body linked to the concept of charity – the definition of charity in the Bill will result in a number of entities subject to government control which already have that status no longer being eligible.
- 2.4 Under division 30 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) a number of fire fighting authorities have Deductible Gift Recipient (**DGR**) status by virtue of the fact that they are a PBI.
- 2.5 Division 30 has no general category to permit the Commissioner of Taxation (**Commissioner**) to make a declaration that VESOs or fire fighting services are entitled to DGR status.
- 2.6 The Commissioner asserts that some of these organisations may have 'entities' within them which are different from the organisation subject to government control (i.e. local bushfire brigades). In which case, the

Commissioner may grant those 'entities' PBI status. However, this approach does not fit comfortably with most of the statutory arrangements in place which govern the 'entities' activities and which brings them under the umbrella of a body corporate, usually created by legislation.

- 2.7 Amendment to the definition of charity has other flow through effects including:
- 2.7.1 Loss of access to be an income tax exempt charity (ITEC) under division 50 of the *Income Tax Assessment Act* and the associated benefits flowing from it.
 - 2.7.2 Loss of input tax treatment of low value supplies made in the course of fundraising under section 40-160 of the new tax system (*Goods and Services Tax Act 1999*)
 - 2.7.3 Loss of GST-free treatment of supplies made for less than 50% of market value or the supplier's cost (or less than 75% of the value or supplier's cost of accommodation) under section 38-250 of the *GST Act*.
 - 2.7.4 Loss of the ability by groups of brigades and other organisations to benefit from the non-profit sub-entity provisions of division 63 of the *GST Act*.
 - 2.7.5 Loss of limited exemptions from fringe benefits under the *Fringe Benefits Tax Assessment Act*.
 - 2.7.6 Loss of an exemption from all concessional treatment of a range of statutory fees and charges on items like radio spectrum licence fees and telecommunication line rental.

3. CONSEQUENCES FOR VOLUNTEER BRIGADES AND UNITS IN THE FE&S OF CHARITIES BILL

- 3.1 It is now widely accepted that volunteers serving in volunteer emergency service organisations, including in the fire and emergency services sector (FESS), make very significant social and economic contributions to the Australian community and economy. A number of Commonwealth and State/Territory leaders, including the Prime Minister, the Attorney General and the Chief of the Australian Defence Forces, along with several State/Territory Premiers or Chief Ministers have recently, in public, expressed their thanks to volunteers, on behalf of the community, for the work done by volunteers, particularly during emergencies such as the recent bushfires in Canberra, Sydney and Victorian.
- 3.2 It is not only the work done by volunteers in often dangerous and difficult conditions, but the risk of death and injury, the time spent in training and study, in preparation and standby, in repair and maintenance of equipment, the personal sacrifices of family time, out of pocket expenses, the use of private transport, communication equipment and clothing, which volunteers make when they give themselves in the service of their communities.
- 3.3 While words of thanks and appreciation from leaders are welcome by the FESS volunteers, the Charities Bill in its present form, runs the risk of

alienating these volunteers through the lack of formal recognition, within the Bill itself, of emergency service volunteers as a class of persons deserving of recognition as contributing to charitable activity.

- 3.4 It is conservatively estimated that the national economic contribution made by FESS volunteers is in the order of \$2.5 billion per annum (and more in a bad season). The Commonwealth and State/Territory governments derive significant economic benefit from the contributions made by FESS volunteers.
- 3.5 It is widely recognised, both within and outside government circles, that the emergency services could not provide the current level of services to the community in the absence of the volunteer work force, not could they afford to provide the services through other means. As there is no substitute for FESS volunteers, the agencies have come to recognise their 'obligate dependency' on these volunteers.
- 3.6 While the giving of time and effort by FESS volunteers is part of the Australian ethos of volunteering, the continued lack of adequate and formal recognition in Commonwealth and state legislation, runs the risk of alienating volunteers. Given the social and economic pressures on FESS volunteers, there is evidence that the numbers of FESS volunteers are declining, particularly in regional and rural Australia.
- 3.7 In its present form, it is considered that impacts of the Charities Bill discussed in this submission would:
- 3.7.1 Further disenfranchise FESS volunteers, many of whom, may in consequence, choose not to participate in volunteer activities
 - 3.7.2 Loose volunteer brigades and units money, thus making it harder for them to operate and survive
 - 3.7.3 Deprive many local communities (particularly in regional and rural Australia), of the essential services provided by volunteer brigades and units
 - 3.7.4 Precipitate significant political pressure and activism.
- 3.8 In the light of the above, the amendments to the Charities Bill discussed in this submission, warrant detailed and positive consideration by the Board of Taxation.

4. ANALYSIS

4.1 Nature of VESOs

All Australian volunteer fire fighting activities are controlled by government under statute and will thus be excluded from the definition of charity, charitable institution, charitable body and charitable purpose as the Bill is currently drafted. Many other VESOs like the New South Wales SES will be similarly affected.

The State and Territory statutes¹ regulating volunteer fire fighting each provide for a central state or territory authority or council appointed by the state or territory government to coordinate and control volunteer fire fighting in the state or territory.

Under those statutes, all volunteer fire fighting brigades must be registered with the relevant authority or council or a local government authority. Volunteer brigades are subject to the control of a state or territory Chief Officer or equivalent, who is appointed by the authority or council.

4.2 VESOS as charities and PBIs

As stated in paragraph 1.21 of the Explanatory Memorandum, the test of government control is the ability of a government to exercise control over the operations and activities of the entity.

It is submitted that the definition of **government body** contained in section 3 in the Bill, which includes "(b) a body controlled by the Commonwealth, a State or a Territory", will exclude all Australian volunteer fire fighting authorities and brigades and other VESOs with similar structures from the definitions of charity, charitable institution and charitable body in all Commonwealth Acts.

PBI was also considered by the Inquiry into the Definition of Charities and Related Organisations (**CDI**) and has been the subject of recent consideration in several Full Federal Court decisions,² several of which are referred to in the context of definition of government body in the Explanatory Memorandum to the Bill.

However, the Commissioner of Taxation in paragraph 55 of ruling TR 2003/5 has made it clear that no VESO will in the future be accepted to be a PBI. Whether the Commissioner will declare individual brigades as PBIs given they are part of a body corporate is a matter which is being considered however such treatment would be inconsistent with the statutory scheme of these organisations and may lead to inconsistency in entitlements between different organisations despite having similar purposes.

Accordingly, Australian volunteer fire fighting brigades and other VESOs may not be able to access benefits under Commonwealth law as a result of PBI status, or as a charity, such as:

- 4.2.1 DGR status under Division 30 (item 4.1.1 of the table in section 30-45) of the ITAA 1997 – volunteer fire fighting brigades and other VESOs rely on significant donations of money and vital equipment, which are often made by the volunteer members of brigades themselves;;
- 4.2.2 access to ITEC status under division 50 of the ITAA97 and associated benefits flowing from it

¹ See Table 1 for a list of statutes establishing and regulating volunteer fire fighting in Australia.

² *Metropolitan Fire Brigades Board v FC of T* (1990) 27 FCR 279; *Mines Rescue Board of New South Wales v Commissioner of Taxation* [2000] FCA 1162 and *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* [2003] FCAFC 161

- 4.2.3 input taxed treatment of low value supplies made in the course of fund-raising under section 40-160 of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* – volunteer fire fighting brigades and other VESOs raise significant amounts of funds for equipment in their local communities by way of sausage sizzles, chook raffles and similar fund raising activities;
- 4.2.4 GST-free treatment of supplies made for less than 50% of market value or the supplier's cost (or less than 75% of the value or supplier's cost of accommodation) under section 38-250 of the GST Act.
- 4.2.5 the ability to group brigades under the non-profit sub-entities provisions of Division 63 of the GST Act;
- 4.2.6 limited exemption from Fringe Benefits Tax under the *Fringe Benefits Tax Assessment Act 1986 (FBT Act)* on taxable fringe benefits made available to employees - such as housing and home garaging of vehicles;
- 4.2.7 exemption from or concessional treatment of a range of statutory fees and charges such as radio spectrum licence fees and telecommunication line rental.

5. ACHIEVING GOVERNMENT'S POLICY OBJECTIVE

The Commonwealth Treasurer's office has confirmed to AFAC³ that it is not the Government's policy intention to tax volunteers performing essential community activities such as bush fire fighting or to impose a further administrative compliance burden upon them, in addition to the significant amount of their personal time already dedicated to serving their communities.

Equally the Commonwealth Treasurer's Office has confirmed the Bill is proposed to codify the common law on PBIs which whilst limiting most entities which are subject to government control from PBI status but has not at this time excluded all government entities from such status. The issue that courts grapple with is the degree of government control.

Accordingly, in order to ensure that the Government's policy objective is met by the Bill and the consequential amendments bill also foreshadowed by the Treasurer, it is submitted that the Board should make the following recommendations for amendments to the Bill and inclusions in the consequential amendments bill:

5.1 Amendments to Charities Bill 2003

The draft Bill should be amended so that paragraph (b) of the definition of "government body" reads:

- "(b) a body **substantially** controlled by the Commonwealth, a State or a Territory; or" (amendment emphasised)

and a new definition should be inserted in section 3:

³ Meeting between Treasurer's Taxation Advisor and CFA and AFAC, 4 September 2003.

"**substantially controlled** in relation to a body controlled by the Commonwealth, a State or a Territory means a body subject to actual regular control by the Commonwealth, a State or a Territory to the extent that it is entitled to the same privileges and immunities of the Crown as the Commonwealth, a State or Territory, rather than the mere existence or exercise of powers to appoint members to or issue directions to the body"

5.2 Public Benevolent Institution

On 29 August 2002 in the press release announcing the Government's response to the report of the CDI the Treasurer also announced that the Government had decided that from 1 July 2004, PBIs will need to be endorsed by the Commissioner of Taxation in order to access all relevant taxation concessions.

AFAC submits that a specific category of Volunteer Emergency Services Organisations should be created in the legislation establishing this PBI endorsement regime, setting out :

- A general category of VESO (such as volunteer fire fighting authorities, State Emergency Services organisations, volunteer ambulance services), which are eligible to be endorsed as PBI's, whether subject to government control or not; and
- specific VESO authorities which are PBIs , such as the New South Wales Rural Fire Service, South Australian Country Fire Service and Victorian Country Fire Authority.

5.3 Deductible Gift Recipient and Income Tax Exempt Charities

Also in the consequential amendments bill, a new categories of DGR and ITEC should be inserted in divisions 30-B and 50 of the ITAA97 under the heading Voluntary Emergency Services Organisations, setting out the same general categories and specific authorities as proposed above. There should be consequential amendment to the GST Act to ensure that VESOs retain the benefit of section 40-160 and division 63 of that Act.

6. ALTRUSIM

The key term in consideration of a body's eligibility to be a PBI is "benevolent". This term has been extensively considered by courts, including the High Court and Full Federal Court on many occasions.

The legal test of benevolence established by the cases considering the eligibility of Emergency Services Organisations to be PBIs, is the **degree** to which a body is subject to government control, rather than the fact of government control simpliciter.⁴ Whilst this distinction has been overlooked or misunderstood by the Commissioner of Taxation in TR 2003/05, it was accepted by the Treasurer in the Explanatory Memorandum to the Bill (at paragraphs 1.18 to 1.24).

⁴ *Mines Rescue Board of New South Wales v Commissioner of Taxation* [2000] FCA 1162 at paragraph 44 and *Ambulance Service of New South Wales v Deputy Commissioner of Taxation* [2003] FCAFC 161 at paragraph 45.

It is not clear what, if any, distinction is intended between the concepts of "altruism" and "benevolence" in the public benefit test.

AFAC queries the need to add yet another concept to the already complex lexicon of not for profit law. In its report the CDI recommended that:

"Recommendation 7

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

However, the CDI also stated that:

"Overall, the Committee considers that while the concept of altruism needs to be emphasised, it is not necessary to define the term more precisely for the purposes of clarifying public benefit. In our view the concept of altruism is sufficiently understood within the community."⁵

AFAC respectfully disagrees with the CDI in this regard.

If the purpose of the Bill is to clarify and give certainty to the meaning of the terms charity, charitable institution, charitable body and charitable purpose, this intention is defeated by the introduction of an undefined term which, to the best of our research, has not been previously considered by Australian courts.

Accordingly, AFAC submits that the Board should recommend that no additional requirement of altruism be inserted into the test for public benefit.

AFAC
30 SEPTEMBER 2003

⁵ Report of Inquiry into Definition into the Definition of Charities and Related Organisations, June 2001, p125