

SUBMISSION TO BOARD OF TAXATION EXPOSURE DRAFT CHARITIES BILL 2003

by
Country Fire Authority of Victoria (**CFA**)

1. INTRODUCTION

- 1.1 CFA welcomes the Government's exposure draft *Charities Bill 2003* (**Bill**) and the opportunity to comment upon it. CFA 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 .
- 1.2 CFA 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**), such as CFA, as it has been explained to CFA by the Treasurer's office.
- 1.3 This submission explains the problems arising out of the definition of 'government body' in the Bill for CFA and suggests amendment to the Bill and consequential amendments to improve the workability of the Bill in accordance with the Government's policy intention. CFA 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 closely linked to the concept of charity – as a result 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**), CFA has its Deductible Gift Recipient (**DGR**) status by virtue of the fact that it is 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 such as CFA are entitled to DGR status.
- 2.6 The Commissioner asserts that some of these organisations including CFA 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 the statutory arrangement in place which governs the activities of the CFA's brigades and which brings them under the umbrella and control of the Authority, a body corporate 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 (*GST 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. ANALYSIS

3.1 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.

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

The Country Fire Authority is appointed by the Governor in Council under section 6 of the *Country Fire Authority Act 1958 (CFA Act)*. Pursuant to section 6A, the Authority is subject to the general direction and control of the Minister in the performance of its functions and exercise of its powers.

Under section 14, the control of the prevention and suppression of fires in the country area of Victoria² is vested in the Authority.

The actual prevention and suppression of fires in the country area of Victoria is undertaken by approximately 60,000 volunteers organised into approximately 1,225 volunteer Fire Brigades.³ Those brigades are not separate legal entities from the Authority.

Under Section 26 of the CFA Act, every association of persons operating as a fire brigade in the country area of Victoria and all of its officers and members must be registered with CFA under section 23, under which the Authority may also establish and disband brigades.

Section 27 provides that, subject to the general powers and directions of the Authority, every brigade and group of brigades and all officers and members of brigades and groups of brigades are subject to the orders and control of the Chief Officer, who is appointed by the Authority under section 17.

Therefore, the individual brigades will not be eligible for PBI status for the following reasons:

- 3.1.1 The individual brigades do not constitute an 'institution' in their own right. Rather, they are a part of CFA. This conclusion is supported by the fact that CFA is vicariously liable for the actions of its brigades.
- 3.1.2 The individual brigades are subject to government control in the same way as CFA.

3.2 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 such as CFA and other VESOs with similar structures from the definitions of charity, charitable institution and charitable body in all Commonwealth Acts.

² Which is defined to be that part of Victoria outside of the metropolitan fire district and excluding state forests and national parks.

³ As the "country area of Victoria" includes outer Melbourne suburbs such as Dandenong and large regional cities such as Geelong, Ballarat and Bendigo, CFA also has a number of Urban Fire Brigades staffed by professional fire fighters serving alongside volunteers.

CFA is currently accepted to be a PBI by the Commissioner of Taxation. PBI was also considered by the Inquiry into the Definition of Charities and Related Organisations (**CDI**), to which CFA had made an extensive submission on these issues, and has been the subject of recent consideration in several Full Federal Court decisions,⁴ 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 and an Assistant Commissioner of Taxation has confirmed to CFA that CFA will no longer be accepted to be a PBI after 1 July 2004.⁵ 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 as outlined above and may lead to inconsistency in entitlements between different organisations despite having similar purposes.

Accordingly, CFA and its brigades and all other VESOs may no longer be able to access benefits currently available to them under Commonwealth law as a result of their PBI status, or as a charity, such as:

- 3.2.1 DGR status under Division 30 (item 4.1.1 of the table in section 30-45) of the ITAA 1997 – CFA estimates that donations of money and vital equipment and other brigade fund raising activities have contributed to the acquisition of approximately \$16 million worth of operational and transport vehicles over the last 5 years. Such donations are often made by the volunteer members of brigades themselves;
- 3.2.2 access to ITEC status under division 50 of the ITAA97 and associated benefits flowing from it;⁶
- 3.2.3 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)* – CFA's brigades raise significant amounts of funds for equipment in their local communities by way of sausage sizzles, chook raffles and similar fund raising activities;
- 3.2.4 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.
- 3.2.5 the ability to group brigades under the non-profit sub-entities provisions of Division 63 of the GST Act;

⁴ *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

⁵ Meeting between an Assistant Commissioner of Taxation and CFA and AFAC 11 September 2003.

⁶ although the Authority itself will continue to be an Income Tax Exempt entity (but not an Income Tax Exempt Charity) under section 50-25.

- 3.2.6 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 in regional areas of Victoria and home garaging of CFA owned vehicles including emergency response vehicles;
- 3.2.7 exemption from or concessional treatment of a range of statutory fees and charges such as radio spectrum licence fees and telecommunication line rental.

Collectively, CFA estimates that it saves \$5.4 million per annum as a result of being a PBI and ITEC, as summarised in attached Table 2.

4. ACHIEVING GOVERNMENT'S POLICY OBJECTIVE

The Commonwealth Treasurer's office has confirmed to CFA⁷ 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 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:

4.1 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:

"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"

⁷ Meeting between Treasurer's Taxation Advisor and CFA and AFAC, 4 September 2003.

4.2 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.

CFA 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 CFA, the New South Wales Rural Fire Service and South Australian Country Fire Service.

4.3 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 CFA and other VESOs retain the benefit of section 40-160 and division 63 of that Act.

5. ALTRUSIM

As noted above, CFA is currently accepted by the Commissioner of Taxation to be a PBI, however it may no longer be accepted from 1 July 2004.

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.⁸ 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).

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

⁸ *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.

CFA 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."⁹

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

**CFA
30 SEPTEMBER 2003**

⁹ Report of Inquiry into Definition into the Definition of Charities and Related Organisations, June 2001, p125