

**INQUIRY INTO RURAL FIRES AMENDMENT (NSW RFS
AND BRIGADES DONATIONS FUND) BILL 2020**

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**Submission to the Inquiry into the Rural Fires Amendment (NSW RFS and Brigades
Donations Fund) Bill 2020**

I have been invited to make submissions regarding the Inquiry into the Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020. By way of background, I am a lecturer at the University of Sydney Law School, with expertise in trust law and charities. I have been quoted in the Guardian and News Ltd press on these subjects in the context of the 2019-2020 Australian bushfires, and have, accordingly, followed the events concerning the NSW Rural Fire Service and Brigades Donations Fund (“the RFS Trust”) with particular interest.

Relevant background to the proposed amendment

1. The proposed amendment to the *Rural Fires Act 1997* represented by the *Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020* (“the Bill”) proceeds by way of the insertion of a single section, s 137A.
2. The background as to why this amendment is sought to be made is well-known, and was recently summed-up by Slattery J in *In the matter of the New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604. However, it is worth briefly going over this background so as to properly frame the issues that the Bill gives rise to.
3. The intent of the Bill is, clearly, to allow donations made to the RFS Trust, through the PayPal Giving Fund, to be used in accordance with the supposed wishes of donors to the Facebook fundraiser set-up by Celeste Barber in response to 2019-2020 Australian Bushfires.¹
4. The fundraiser’s purpose was stated by Ms Barber to be ‘raising money for The Trustee for NSW Rural Fire Service & Brigades Donations Fund’.² This was clearly stated on the fundraiser’s Facebook page.
5. However, despite the fundraiser’s clearly stated purpose, Ms Barber subsequently proceeded to make public representations that the moneys raised (which far exceeded her initial fundraising goal) would be used to support a broader range of purposes, such as the support

¹ [2020] NSWSC 604 at [14]-[17].

² Facebook, *Fundraiser for The Trustee for NSW Rural Fire Service & Brigades Donations Fund by Celeste Barber* (3 January 2020) < <https://www.facebook.com/donate/1010958179269977/>>.

of wildlife and bushfire victims³ These broader purposes are now represented by the terms of the Bill under the proposed s 137A.⁴

6. Therefore, the issues are whether:
 - a. The moneys should be applied to these broader purposes; and
 - b. The Bill is an appropriate means of achieving these goals.

Should the moneys raised be applied beyond the current scope of the RFS Trust?

7. The terms of the RFS Trust currently permits trust funds to be expended on, put simply, the maintaining and equipping of the 'Brigades', which means brigades established under the *Rural Fires Act 1997*.⁵
8. Slattery J in *In the matter of the New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604 at [83] stated that these purposes encompassed training and equipping firefighters, which included providing mental health services, and supporting injured firefighters and the families of injured or deceased firefighters.
9. However, Slattery J also held, at [83], that 'paying money to other charities or rural fire services, whether in NSW or the other Australian States and Territories, to assist in providing relief to persons and animals affected by bushfires' was not permitted under the terms of the RFS Trust. This clearly represents the hurdle that the Bill seeks to overcome. But should it?
10. While the intent behind the Bill is laudable, the answer is no. This is because, despite Ms Barber's later public pronouncements as to what else should be done with donations when the fundraiser exceeded her expectations, the objectively stated terms of the fundraiser were clear and unaltered throughout its duration: as stated in its very title, it was a 'Fundraiser for The Trustee for NSW Rural Fire Service & Brigades Donations Fund'.⁶
11. While many donors may have thought, as a result of Ms Barber's later statements, that their moneys could be utilised for communities and wildlife impacted by the bushfires more broadly, it is also well known that many other donors did not: instead, these donors stated that they did actually intend for their donations to go the RFS Trust to be used to support the Brigades. Indeed, various comments on the fundraiser's Facebook page are themselves

³ Naaman Zhou, 'Legal questions complicate how Rural Fire Service can spend donated millions', *The Guardian* (online, 14 January 2020); Matthew Benns, 'Comedian's bid for charity funds could be up in smoke', *The Daily Telegraph* (Sydney, 17 February 2020) 7; Matthew Benns, 'Meet fails to end fire cash war', *The Daily Telegraph* (Sydney, 19 February 2020) 17.

⁴ Pallavi Singhal, 'New bill will seek to change how RFS can spend \$51 million raised by Celeste Barber', *The Sydney Morning Herald* (Sydney, 26 February 2020).

⁵ [2020] NSWSC 604 at [37].

⁶ See also [2020] NSWSC 604 at [15] and [58].

representative of these differing intentions. One can also easily find similar divergent views on other social media forums, such as Twitter and Reddit.

12. Further, and most importantly in the context of the over \$50 million raised by Barber's fundraiser, it is impossible to know the intentions of the vast majority of donors; i.e. most of the people who donated to the fundraiser did not go online to announce to the world what they thought the fundraiser was for. This means that we only have the clearly stated purposes of the fundraiser itself in order to determine what these donors wanted.
13. The issue is, therefore, as to whether it is acceptable to override the clearly, and simply, stated terms of a fundraiser because a vocal minority of donors claim that they did not understand what they were donating to.
14. The law has always placed great weight on what it can be objectively shown that people understand, and only looks beyond this in exceptional circumstances; for example, where one person has unconscionably taken advantage of another.⁷ This unpins the law of contracts, wills, trusts, charitable donations, etc.
15. The reason the law takes this view is that, simply put, people are not mind readers, and can only know what another person is thinking by what that person says or does at the time.
16. This is especially true in this context where we cannot know what the vast, silent, majority of donors understood, other than what they read when making their donations to the fundraiser: that is, this was a 'Fundraiser for The Trustee for NSW Rural Fire Service & Brigades Donations Fund'.
17. In a time when public charity is needed more than ever in recent memory, and when public trust in charities is not high,⁸ it is important that people know that who and what they donate to will be the recipient of their moneys. They can only know this through the clearly stated terms of fundraisers and charities.
18. If parliaments go messing with this, then while they may pacify a vocal minority, they will further undermine the trust that is an inherent part of public giving. For example, in the US, there was widespread outrage when the PayPal Giving Fund there directed donations to charities that were different from those that donors specified their moneys should originally be sent to. This was argued to be within the PayPal Giving Fund's terms, but nevertheless the public felt betrayed, and quite rightly.⁹ We saw similar outrage in Australia when it was

⁷ *Byrnes v Kendle* [2011] HCA 26; (2011) 243 C.L.R. 253 at [15], [17] and [114]-[115].

⁸ Matthew Benns, 'Where's all the money gone?', *The Daily Telegraph* (Sydney, 1 February 2020) 34 and 55.

⁹ Zoe Fergusson, 'PayPal faces class action over undelivered charity money', *ABC News* (1 March 2017) < <https://www.abc.net.au/news/2017-03-01/paypal-faces-class-action-over-undelivered-charity-money/8316024>>.

believed that the Red Cross and other charities were not distributing funds to Australian bushfire victims, and were instead planning to distribute those funds elsewhere.¹⁰

19. Therefore, it would be a dangerous precedent to override the objectively ascertainable intentions of most donors in favour of the subjective intentions of a vocal minority, and I would recommend against the Bill for these reasons.

Is the Bill appropriate?

20. The second issue is, despite the above, whether the Bill in its current form is the appropriate means of achieving its goals.
21. First, the date range that the proposed s 137A adopts is problematic: the Barber fundraiser was established on 3 January 2020, but the Bill takes in the preceding two months. Why should funds received by the RFS Trust prior to Barber's fundraiser be subject to anything regarding it?
22. Secondly, the terms of s 137A would also encompass funds that were raised through other means and fundraisers that had nothing to do with Barber's fundraiser even while it was afoot.
23. This means that donations that had nothing to do with the fundraiser would be subject to having the intentions of their respective donors completely thwarted; i.e. there is no discernable reason for this given the mischief that the Bill seeks to address is in relation to Barber's fundraiser, and this would only serve to further erode the public's confidence in making charitable donations.

Conclusions

24. For the reasons given above, I do not believe that the Bill is appropriate; both as to its current form and the intentions—permitting moneys to be used for purposes not stated in the fundraiser's clear terms—that appear to motivate it.
25. In overriding the clearly stated, objective terms of Barber's fundraiser, donations that were intended to go to the RFS Trust could be made available to purposes that were, perhaps, never actually intended by many donors to the fundraiser. This is only made worse when considering funds that were donated to the RFS Trust through other fundraising means, which definitely had nothing to do with Barber's fundraiser, would also be subject to the proposed s 137A.

¹⁰ Kelly Burke, 'Red Cross under fire for withholding two thirds of bushfire donations' *7News.com.au* (23 January 2020) < <https://7news.com.au/news/bushfires/red-cross-under-fire-for-withholding-two-thirds-of-bushfire-donations-c-660715>>.

26. Clarity and certainty are essential requirements for charities to continue and prosper, both of which would be eroded by the terms of the Bill, and I would, therefore, recommend against it.