

**Submission
No 5**

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

Organisation: The Law Society of New South Wales

Date Received: 10 July 2020



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:RH1b1952415

10 July 2020

Committee Chair
Portfolio Committee No 5- Legal Affairs
Parliament House, Macquarie Street
Sydney NSW 2000

By email only: PortfolioCommittee5@parliament.nsw.gov.au

Dear Committee Chair,

Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020

The Law Society of NSW appreciates the opportunity to comment on the draft Bill. The Charities & Not for Profits Committee of the Legal Practice Section of the Law Council of Australia¹ and the Law Society's Business Law Committee contributed to this submission.

New Section 137A(1) Purposes are broader than Charitable Purposes

Section 137A(1) provides the trustees with powers to apply relevant trust money for a range of additional purposes. However, those purposes do not appear to be framed within the limits of accepted charitable purposes either at the state level or under the *Charities Act 2013* (Cth).

In particular:

- (a) providing support or assistance to families of volunteer rural fire fighters does not appear to be constrained to any particular need on the part of those families (so as to be confined to the relief of human distress) and may also go beyond a purpose of promoting the safety and protection of the community;
- (b) while the protection of animals is generally a charitable purpose, the support or assistance to people and organisations providing care to animals is not limited to use for that purpose; and
- (c) support or assistance for people and communities that are significantly affected by bushfires could be better confined to the relief of distress arising from that impact.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Commonwealth level

Maintaining the charitable status (and compliance with the original charitable terms of the NSW Rural Fire Service and Brigades Donations Fund Trust Deed) is relevant for registration with the Australian Charities and Not-for-profits Commission² ("ACNC") and the Australian Taxation Office³ ("ATO") – with failure to comply meaning the potential loss of tax concessions.

For instance, to be registered as a charity with the ACNC, a registered entity must, amongst other things:

- (a) be a charity (*Australian Charities and Not-for-profits Commission Act 2012* (Cth) section 25-5(1)(b)); and
- (b) comply with its [charitable] purposes and its character as a not for profit entity (*Australian Charities and Not-for-profits Commission Act 2012* (Cth) section 25-5(3)(b) and *Australian Charities Not-for-profits Commission Regulations 2013* (Cth) regulation 45.5(2)(c)).

To be endorsed as an income tax exempt charity by the ATO, an endorsed charity must be registered with the ACNC and, amongst other things, 'comply with all the substantive requirements in its governing rules' and 'apply its income and assets solely for the [charitable] purpose for which the entity is established'.⁴

In addition, as the trust appears to be an *Income Tax Assessment Act 1997* (Cth) section 30-102, item 12A.1.3 deductible gift recipient,⁵ then to remain entitled to donation concessions, it would also need to remain 'established and maintained solely for the purpose of supporting the volunteer based emergency service activities of non-profit entities or of Australian government agencies'. However, the added s137A(1) purposes/powers seem to go beyond this.

Resolving these tax concession issues may require amendment to a range of pieces of federal legislation. In particular, these include the *Charities Act 2013* (Cth), the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

State level

Maintaining the charitable status (and compliance with the original charitable terms of the NSW Rural Fire Service and Brigades Donations Fund Trust Deed) is potentially also relevant for NSW state tax purposes. For instance, charities can potentially benefit from payroll tax (though volunteer firefighter bodies can also qualify),⁶ land tax⁷ and duties⁸ concessions.

At the state level, some consideration could be given to phrasing the deeming in proposed section 137A(1) to be a deeming that the trustee is applying the trust funds for the charitable purposes of the trust.

² <https://www.acnc.gov.au/charity/3fa2a436e549c7e5c931ae6b5a110178>

³ <https://abr.business.gov.au/ABN/View/88311702546>.

⁴ *Income Tax Assessment Act 1997* (Cth) s 50-50(2).

⁵ Slattery J describes it as 'a "fire and emergency services" recipient in section 30-102 of the *Income Tax Assessment Act 1997* (Cth)' *Re New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604 [25].

⁶ *Payroll Tax Act 2007* (NSW) s48(1)(c).

⁷ *Land Tax Management Act 1956* (NSW) s10(1)(d).

⁸ *Duties Act 1997* (NSW) s275.

An example provision for this type of deeming already exists in NSW legislation in the form of section 22D(3) of the *Charitable Trusts Act 1993* (NSW):

Without limiting subsection (2):

- (a) neither the existence nor the exercise of the prescribed power affects the validity or status of a charitable trust as a charitable trust, and
- (b) a prescribed trust is to be construed and given effect to in the same manner in all respects as if:
 - (i) the prescribed power were a power exercisable for a charitable purpose, and
 - (ii) any payment or application of the trust property or the trust income, or any part of either of them, in the manner allowed by the power were to or for a charitable purpose, and
- (c) the existence or exercise of the prescribed power does not affect the control of a prescribed trust by the Court in the exercise of the Court's general jurisdiction with respect to charitable trusts, and
- (d) the jurisdiction referred to in paragraph (c) extends to the prescribed power as if the power were exercisable for a charitable purpose.

If any such deeming amendment is made it would be a good opportunity to clarify the nature of the changes in section 137A(1). For instance, is that section merely providing extra permissive powers to the trustees, or is it imposing a new and distinct set of obligations on the trustees in respect of particular trust funds, raising the risk of the creation of a separate trust?

A further issue that should be considered at the state level is whether the legislation might result in any stamp duty liability for the trustees to the extent that the relevant trust money is dutiable property. For instance, by way of amounting to a declaration of trust over dutiable property given the fairly broad wording in section 8 of the *Duties Act 1997* (NSW).

Income on Relevant Trust Money

'Relevant trust money' appears to be defined to apply only to the donations received between 1 November 2019 and 1 February 2020. However, trustees typically have a duty to invest trust funds and so it might be expected that the trustee also holds income derived from the relevant trust money.

This point could be addressed by amending the proposed definition of 'relevant trust money' by adopting wording similar to that proposed by the ATO in its model Public Ancillary Fund Trust Deed for NSW⁹ to the effect of:

relevant trust money means gifts or contributions received by or on behalf of the trust during the period commencing on 1 November 2019 and ending on 1 February 2020, including:

- (a) all income arising from the gifts or contributions (whether accumulated or not); and
- (b) all money, investments and property from time to time representing the gifts or contributions or into which they are converted.

⁹ ATO <https://www.ato.gov.au/Forms/Public-ancillary-fund-model-trust-deed/>.

If you have any questions about this submission, please contact
Lawyer

Principal Policy

Yours faithfully,

Richard Harvey,
President