

# EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

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## EXECUTIVE SUMMARY

- 1 On 23 September 2014, the Legislative Council referred the Taxation Legislation Amendment Bill 2014 (**Bill**) to the Standing Committee on Legislation for its consideration and report.
- 2 The Committee was given the task of examining the Bill to ascertain whether it imposes unintended consequences on ‘legitimate’ fourth limb charities.
- 3 A fourth limb charity is a category of charity that promotes purposes considered beneficial to the community, which is not a first to third limb charity (see paragraphs 1.21 and 1.22).
- 4 All fourth limb charities currently receive taxation exemption in relation to land duty, land tax and payroll tax (**the three state taxes**) under the current provisions in the *Duties Act 2008*, *Land Tax Assessment Act 2002*, and *Pay-roll Tax Assessment Act 2002* (**the three taxation Acts**).
- 5 The Bill amends the three taxation Acts to deny fourth limb charities who fall within the scope of the definition of ‘relevant body’ in the Bill taxation exemption in relation to the three state taxes (this has been termed the ‘exclusion mechanism’ in the Bill) *unless* a ‘relevant body’ is successful in their application to the Minister for Finance for a ‘beneficial body determination’ to retain taxation exemption (this Ministerial determination has been described as an ‘inclusion mechanism’). The Bill also amends the *Taxation Administration Act 2003* to make administrative amendments in support of the proposed legislative scheme.
- 6 The Office of State Revenue, Department of Finance, has recognised that there are potential unintended consequences of this Bill on charities. It is for this reason that the Ministerial discretion is proposed in the Bill.
- 7 The Committee also considered the amendments in the Supplementary Notice Paper No. 86, Issue No. 1 distributed by Hon Peter Collier MLC proposing amendments to the Bill with the intention of addressing issues raised by the Western Australian Council of Social Service Inc (**WACOSS**).
- 8 The Committee’s conclusions are outlined in the following findings and recommendations.

**FINDINGS AND RECOMMENDATIONS**

9 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

Page 9

**Finding 1: A fourth limb charity is a category of charity that promotes purposes considered beneficial to the community, which is not a first to third limb charity.**

Page 9

**Finding 2: There are at least 3000 fourth limb charities in Western Australia, although it is not known how many fourth limb charities receive State taxation exemption.**

Page 19

**Finding 3: OSR has identified 34 fourth limb charities that may potentially fall within the scope of the definition of ‘relevant body’ in the Bill and therefore lose State taxation exemption.**

Page 19

**Finding 4: OSR accepts that ‘legitimate’ charities may unintentionally be excluded from taxation exemption but considers that this is mitigated through the Ministerial discretion in the Bill to reinstate taxation exemption.**

Page 34

**Finding 5: The terms ‘promote’, ‘trade’, ‘industry’ and ‘commerce’ in paragraph (d) of the definition of ‘relevant body’ have relatively wide meanings and can lead to some uncertainty.**

Page 34

**Finding 6: The Bill will impact on first to third limb charities in certain circumstances.**

Page 34

**Finding 7: The proposed narrow exception to paragraph (d) of the definition of ‘relevant body’ (the ‘trade, industry or commerce’ paragraph) has unintended consequences in that it potentially denies taxation exemption to dual purpose charities whose purposes cover first to third limb charitable purposes.**

**OSR have agreed to amend the Bill to address this issue and will seek drafting advice in this regard.**

Page 34

**Recommendation 1:** A majority of the Committee recommends that the Government move to amend clauses 6, 9 and 14 of the Bill to amend paragraph (d) of the definition of ‘relevant body’ to address the issue of first to third dual purpose charities falling within the scope of paragraph (d).

Page 34

**Finding 8:** OSR has given an assurance that they will make a Revenue Ruling on the Commissioner’s interpretation of paragraph (d) (the ‘promote trade, industry or commerce’ paragraph) of the definition of ‘relevant body’.

Page 41

**Finding 9:** Agricultural associations, growers’ associations and growers’ cooperatives that are a fourth limb charity may fall within the scope of paragraph (d) of the definition of ‘relevant body’, if a purpose of the body is to promote trade, industry or commerce.

Page 44

**Finding 10:** Leading Age Services is concerned that not-for-profit aged care providers could be impacted by the Bill because they perceive that these entities will fall within the scope of paragraph (d) of the definition of ‘relevant body’.

However, OSR advised that not-for-profit aged care providers are not fourth limb charities and are ‘*highly unlikely*’ to fall within the scope of the Bill and, therefore, lose taxation exemption.

Page 44

**Finding 11:** A majority of the Committee is reassured by OSR’s advice that ‘*the purpose of care for the aged is accepted as falling within the relief of poverty limb*’ (the first limb of charity) and that aged care providers are ‘*far more likely*’ to be ‘*pursuing purposes under the first limb*’ than the fourth limb of charity. A majority of the Committee has also taken into account the preamble to the (IMP) *Statute of Charitable Uses 1601* which refers to the ‘*relief of aged, impotent and poor people*’ and the advice from OSR that its search of aged care service providers on the ACNC Register noted that all ‘*but one were listed as public benevolent institutions (PBIs), with the other pending further classification*’.

Page 45

**Recommendation 2:** The Committee recommends that the Government confirm that not-for-profit aged care providers do not fall within the scope of the Bill and therefore will not lose taxation exemption.

Page 49

**Finding 12:** The Bill excludes a professional association that is a fourth limb charity from State taxation exemption if one of its objects or activities is the promotion of the interests of its members in any profession.

Excluding all professional associations is an intended consequence of the Bill, although the Committee has identified that the characterisation of professional associations as being '*generally heavily focused on providing services to members*', which is given as the reason for this exclusion, may not accurately reflect the activities of all professional associations.

Page 53

**Finding 13:** The Bill excludes trade unions from State taxation exemption as a preemptive measure in the event of any future expansion of the definition of a charity to these classes of organisations. Excluding trade unions from taxation exemption (that does not currently apply) is an intended consequence of the Bill.

Page 58

**Finding 14:** The impact of grouping under proposed clause (f) of the definition of 'relevant body' is not limited to fourth limb charities. Any charity that falls within paragraph (f), because it is related to a body referred to in another paragraph of 'relevant body', is denied taxation exemption unless it successfully applies for a Ministerial determination to retain its taxation exemption.

Page 58

**Finding 15:** The proposed grouping provisions in paragraph (f) may have unintended consequences in that first to third limb charities may fall within the scope of paragraph (f).

Page 61

**Finding 16:** Clause 5 of the Bill, which amends section 95 of the *Duties Act 2008*, imposes unintended consequences on discretionary trusts.

The Committee recognises that OSR has agreed to amend the Bill to provide the Commissioner of State Revenue with the discretion to determine that a trustee is not related to a ‘relevant body’.

The Committee finds that such an amendment will address the issue raised.

Page 61

**Recommendation 3:** The Committee recommends that the Government move to amend the Bill to amend the *Duties Act 2008* to provide the Commissioner of State Revenue with the discretion to determine that a trustee is not related to a ‘relevant body’.

Page 65

**Finding 17:** The Committee has carefully considered the regulation making power in the Bill at paragraph (e) of the definition of ‘relevant body’. The Committee remains concerned about the use of regulations for imposing a tax on a new class of charity instead of achieving this legislative objective through primary legislation.

Page 71

**Finding 18:** The proposed amendments in Supplementary Notice Paper No. 1 will retain the taxation exemption for all public benevolent institutions. However, not all organisations named by WACOSS are public benevolent institutions.

Page 73

**Finding 19:** First limb charitable trusts are excluded by the proposed amendments to the Bill in Supplementary Notice Paper No. 1 because they are not ‘institutions’. OSR has agreed to amend the Bill to address this issue, should the amendments in Supplementary Notice Paper No. 1 be adopted.

Page 74

**Recommendation 4:** The Committee recommends that the Legislative Council pass the amendments in Supplementary Notice Paper No. 1, which propose to amend the definition of ‘relevant body’ at clauses 6, 9 and 14 of the Bill, subject to the following amendments:

- That Supplementary Notice Paper No. 1 be amended to ensure that poverty charitable trusts retain taxation exemption.
- Other amendments noted in paragraph 4.24.

Page 83

**Recommendation 5:** The Committee recommends that the Government move to amend clauses 6, 9 and 14 of the Bill to insert a provision requiring the Minister to give reasons for any decision to reject, make, amend or revoke a beneficial body determination.

Page 87

**Finding 20:** The Committee accepts OSR’s advice that despite the terms of proposed section 34A(1) of the *Taxation Administration Act 2003*, the Bill does not change the status quo in regards to the Supreme Court of Western Australia’s power to review administrative decisions.

Page 89

**Recommendation 6:** The Committee recommends that the Bill be adopted subject to the amendments recommended in recommendations 1, 3, 4 and 5.

**MINORITY FINDINGS AND RECOMMENDATIONS**

- 10 Findings and Recommendations of a minority of the Committee, comprising Hon Sally Talbot MLC and Hon Lynn MacLaren MLC, are grouped as they appear in the text at the page number indicated:

Page 35

**Minority Finding 1:**

**A minority of the Committee notes that the Second Reading Speech states that the intent of the Bill is to narrow the scope of existing tax exemptions as they apply to fourth limb charities. Specifically, this narrowing is in response to the SAT decision that found CCI to be a charitable organisation. It should be noted that the Bill does NOT change the definition of the CCI as a charity (except in a narrow sense in relation to land tax). Therefore, a minority of the Committee has concluded that the intent of the Bill is to ONLY to narrow the scope of tax exemptions, where exemption is considered ‘inappropriate’.**

**The Bill attempts to do this by excluding ALL fourth limb charities and/or professional associations that promote trade, industry or commerce (with certain reinclusion mechanisms referring to first, second and third limb charities activities). The consequence of adopting such a broad exclusion test is that, by the Government’s own admission, too many charities are captured. As the SAT decision noted, while a study of case law shows how immensely complex, numerous and sometimes contradictory decisions about what ‘the question of charity’ means, a view can be reached that *‘the promotion of trade and commerce generally is capable of being a charitable purpose.’*<sup>1</sup>**

**Because the inevitable exclusion of ‘appropriate’ charities is NOT an intended consequence, the Bill has to include a Ministerial Determination — a process entirely devoid of guidelines or regulations and therefore totally without openness, accountability and transparency and beyond any parliamentary or judicial scrutiny — by which the Minister can grant tax exemptions on the basis of ‘the public interest’ as defined by the Minister. The ‘appropriateness’ of tax exemptions to fourth limb charities promoting trade, industry or commerce will, under the terms of this Bill, be determined henceforth solely by this process.**

**A minority of the Committee, while agreeing with the stated intent of the Bill to narrow the scope of existing tax exemptions, is of the view that paragraph (d) is so broad in scope that it potentially has a vast range of unintended consequences for a wide range of first, second, third and fourth limb charities.**

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<sup>1</sup> *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 at [96].

**Minority Finding 2:**

In addition to the general observations made in Minority Finding 1, a minority of the Committee finds specifically that:

**Paragraph (d) of the definition of ‘relevant body’ as drafted presents four specific problems:**

- **The terms ‘promote’, ‘trade’, ‘industry’ and ‘commerce’ are not certain terms and may be interpreted broadly.**
- **The definition of ‘promote trade, industry or commerce’ providing that only a purpose, rather than the ‘principal purpose’ or ‘sole or dominant’ purpose being to promote trade, industry or commerce, is broad and may unnecessarily exclude charities. This definition will exclude charities from taxation exemption if a minor or incidental purpose of the charity is to ‘promote trade, industry or commerce’.**
- **The exception clause in paragraph (d), requiring that the charity have ‘the sole or dominant purpose’ of relief of poverty, advancement of education or advancement of religion’, is too narrow, with the effect that the exclusion in paragraph (d) is too broad and may exclude first to third limb charities from taxation exemption.**
- **Paragraph (d) and the definition of ‘promote trade, industry or commerce’ refers to both the activities and purposes of an organisation and is therefore too broad in its application.**

**Minority Finding 3:**

With respect to the four specific problems noted in Minority Finding 2, a minority of the Committee finds that:

**While OSR has agreed to:**

- **amend the Bill in an attempt to address the narrow exception to paragraph (d) of the definition of ‘relevant body’, which has unintended consequences in that it potentially denies dual purpose and/or multipurpose charities whose purposes cover first to third limb charitable purposes taxation exemption; and**
- **issue a Revenue Ruling on the interpretation of ‘promote trade, industry or commerce’,**

**these actions do not resolve all the specific construction problems with paragraph (d) which, when viewed in the context of the general observations in Minority Finding 1, are of such concern that it is not appropriate to adopt the Bill in its current form.**



Page 37

**Minority Recommendation 1:**

A minority of the Committee recommends that:

**The Government should move to amend clauses 6, 9 and 14 of the Bill to delete paragraph (d) of the definition of ‘relevant body’ and insert a positive Ministerial discretion to deny taxation exemption in accordance with the policy intention of the Bill.**

**In conjunction with this positive Ministerial discretion to deny taxation exemption, the Bill should also be amended to provide definitive criteria for the exercise of Ministerial discretion. These criteria should be drafted with sufficient clarity to avoid capturing fourth limb charities that are beyond the express policy intent of the Bill and ensure that Ministerial discretion is exercised in a way that is open and transparent and consistent with the rule of law and administrative law principles.**

Page 37

**Minority Recommendation 2:**

A minority of the Committee recommends that:

**In the event that Minority Recommendation 1 is not adopted, it is recommended that:**

- **Committee Recommendation 1 be adopted, namely that:**

*The Minister amend clauses 6, 9 and 14 of the Bill at paragraph (d) of the definition of ‘relevant body’ to address the issue of first to third dual purpose charities falling within the scope of paragraph (d).*

- **The Minister amend, at clauses 4, 11 and 16, the definition of ‘promote trade, industry or commerce’ to insert the word ‘principal’ after ‘to carry out an undertaking a’.**

**The effect of this amendment is that the definition of ‘promote trade, industry or commerce’ would include ‘to carry out an undertaking a principal purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce ...’.**

Page 41

**Minority Finding 4:**

A minority of the Committee finds that:

**A minority of the Committee formed the deliberative view based on information received during the inquiry that CBH falls within the scope of paragraph (d) and therefore is a ‘relevant body’ because a purpose of CBH is to promote trade, industry or commerce.**

**A minority of the Committee further understands that this is an intended consequence of the Bill. It is therefore difficult to see how CBH could be granted taxation exemption under the Ministerial determination process without contradicting the policy intention of the Bill.**

Page 45

**Minority Finding 5:**

**A minority of the Committee notes the contradictory evidence about whether or not not-for-profit aged care providers are fourth limb charities.**

**A minority of the Committee understands that the loss of taxation exemption for not-for-profit aged care providers would be an unintended consequence of the Bill.**

**The proposed public benevolent institution amendments in Supplementary Notice Paper No. 1 will not address this problem. Not-for-profit aged care providers who are not public benevolent institutions will still be excluded from taxation exemption. These bodies will therefore be reliant on the Ministerial discretion to retain taxation exemption.**

Page 45

**Minority Recommendation 3:**

**A minority of the Committee recommends that not-for-profit aged care providers are exempted specifically from the scope of the Bill.**

Page 49

**Minority Finding 6:**

A minority of the Committee finds that:

**The definition of ‘professional association’ in requiring only that *‘one of its objects or activities must be the promotion of the interests of its members in any profession’* is broad and captures all professional associations including those whose principal purpose is providing a public benefit.**

Page 49

**Minority Recommendation 4:**

A minority of the Committee recommends that:

**Where the provision of services to members is a minor or incidental object and a public benefit is the principal object of a professional association, State taxation exemptions should not be removed.**

Page 53

**Minority Finding 7:**

A minority of the Committee finds that:

**A charity related to a trade union under the terms of paragraph (f) of the definition of ‘relevant body’ in the Bill will be a ‘relevant body’ under the Bill solely because it is related to a trade union. Such charities will be excluded from taxation exemption.**

**However, a charity related to a union may seek a Ministerial determination because it is classified as a paragraph (f) ‘relevant body’, not a paragraph (c) (trade union) ‘relevant body’. A trade union itself (paragraph (c)) may not seek a Ministerial determination.**

Page 53

**Minority Finding 8:**

A minority of the Committee finds that:

**While the inclusion of a trade union as a relevant body is an intended consequence of the Bill, the result of this inclusion is the unintended consequence that a charity related to a trade union will lose its taxation exemption, even if it does not promote trade, industry or commerce, unless it successfully applies for a Ministerial determination.**

**This creates more red tape for charities which do not promote trade, industry or commerce because and only because they are related to a trade union.**

**It is an unintended consequence of the Bill to capture and deny taxation exemption to genuine charities that are related to trade unions. If paragraphs (a) and (b) were not included in the definition of ‘relevant body’, charities related to trade unions would not fall within the scope of the Bill.**

Page 54

**Minority Recommendation 5:**

A minority of the Committee recommends that:

**The Government move to amend clauses 6, 9 and 14 of the Bill to delete paragraph (b) ‘a trade union’ from the definition of ‘relevant body’. This will address an unintended consequence of the Bill.**

Page 59

**Minority Recommendation 6:**

A minority of the Committee recommends that:

**The Government move to amend clauses 6, 9 and 14 of the Bill to delete paragraph (f) of the definition of ‘relevant body’.**

**This amendment will have the effect of resolving the unintended consequences of excluding first to fourth limb charities from taxation exemption solely because they are related to any of the following:**

- a trade union;
- a professional association;
- a body that promotes trade, industry or commerce; or
- a body prescribed in regulations.

Page 65

**Minority Finding 9:**

A minority of the Committee finds that:

**Any determination removing taxation exemption from an entity or class of entities should be stated in primary legislation, not in regulation, and requires full Parliamentary scrutiny. A failure to do so gives insufficient regard to the institution of Parliament and detracts from the rule of law.**

**There are potential unintended consequences to charities if proposed paragraph (e) (providing a taxation regulation making power) is enacted and regulations determine taxation law without the highest level of Parliamentary scrutiny given the complexity of the Bill and charity and taxation law, as demonstrated by the scrutiny of this Bill.**

Page 66

**Minority Recommendation 7:**

A minority of the Committee recommends that:

**The Government move to amend clauses 6, 9 and 14 of the Bill to delete paragraph (e) of the definition of ‘relevant body’.**

Page 73

**Minority Finding 10:**

**A minority of the Committee agreed with Assistant Professor Ian Murray that a ‘*not insignificant*’ number of charities may be denied taxation exemption despite the amendments proposed in Supplementary Notice Paper No. 1.**

Page 79

**Minority Finding 11:**

**A minority of the Committee finds that the Treasurer is not the appropriate concurring Minister.**

Page 79

**Minority Recommendation 8:**

A minority of the Committee recommends that:

**The Government move to amend clauses 6, 9 and 14 of the Bill (at paragraphs (1) and (2) of the beneficial body determination provision) so that if the concurrence mechanism for a Ministerial determination is retained, and a concurring Minister is deemed appropriate, that the concurring Minister is not the Treasurer.**

Page 85

**Minority Finding 12:**

A minority of the Committee finds that:

**The legislative scheme is likely to place considerable reliance on the Ministerial determination mechanism as a number of ‘legitimate’ first to fourth limb charities will be required to apply to the Minister to reinstate their taxation exemption.**

**Witnesses are concerned about the Ministerial determination process being subjective, lacking guidelines, lacking transparency, causing unnecessary uncertainty, imposing further administrative burden or red tape on charities and politicising the taxation system.**

**Establishing guidelines for the exercise of the discretion reflects good administrative law and rule of law principles, and may address some unnecessary uncertainty about the Ministerial determination process. The guidelines need not be drafted in a manner that constrains the Minister in the exercise of their discretion.**

Page 85

**Minority Recommendation 9:**

A minority of the Committee recommends:

**That the Government move to amend the Bill to insert into clauses 6, 9 and 14 the requirement that the Minister establish guidelines in regulation outlining matters the Minister may take into consideration when exercising the Ministerial discretion to reconsider the taxation exemption of charities.**

Page 86

**Minority Finding 13:**

A minority of the Committee finds that:

**There is absolutely no discernible consequence of excluding trade unions from seeking a Ministerial determination that could be perceived as an intended consequence of the Bill.**

Page 89

**Minority Finding 14:**

A minority of the Committee finds that:

**The ‘exclusion’ mechanism in the Bill (the definition of ‘relevant body’) is too broad and has a number of unintended consequences. In particular, paragraph (d) of the definition of ‘relevant body’ (the ‘promote trade, industry or commerce’ paragraph) does not directly address the primary issue identified by the Executive as requiring resolution; the narrowing of the taxation exemptions for fourth limb charities.**

**While a minority of the Committee agrees with the primary intention of the Bill, to exclude CCI and organisations with similar characteristics to CCI from State taxation exemption, the Bill and paragraph (d) is not a resolution of this issue, being so broad in scope that it potentially has a vast range of unintended consequences for first to fourth limb charities.**

**The legislative amendments and Revenue Ruling that OSR has agreed to make are not a resolution of the central issues with paragraph (d), which are of such significance that it is not appropriate to pass the Bill in its current form.**

**Further, the Ministerial determination mechanism is flawed. The legislative scheme is likely to place considerable reliance on the Ministerial determination mechanism because a number of ‘legitimate’ first to fourth limb charities will have to apply to the Minister to reinstate their taxation exemption. Witnesses have expressed concerns about the Ministerial determination process being subjective, lacking guidelines, lacking transparency, causing unnecessary uncertainty, imposing further administrative burden or red tape on charities and politicising the taxation system.**

**Because the Minister said specifically that *‘these amendments will affect only professional associations and those fourth limb charities that promote trade, industry or commerce. Other charities will not be affected in any way by these amendments; nor will they experience any additional burden or red tape’* (see paragraph 2.17), these concerns are clearly unintended consequences of the Bill.**

**Given the issues outlined in the Minority Findings in this report, the issues with the Bill cannot be resolved.**

Page 90

**Minority Recommendation 10:**

A minority of the Committee recommends that:

- **The Government withdraw the Bill and replace it with a Bill that provides a positive Ministerial discretion to deny taxation exemption in accordance with the policy intention of this Bill.**

**In conjunction with this positive Ministerial discretion to deny taxation exemption, the new Bill should also provide definitive criteria for the exercise of the Ministerial discretion as set out in paragraph 2 of Minority Recommendation 1.**

- **If the above recommendation is not adopted, a minority of the Committee recommends the amendments to the Bill outlined in Minority Recommendations 1 to 9.**