



THIRTY-NINTH PARLIAMENT

REPORT 26
STANDING COMMITTEE ON LEGISLATION
TAXATION LEGISLATION AMENDMENT
BILL 2014

Presented by Hon Robyn McSweeney MLC (Chair)

November 2014

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Robyn McSweeney MLC (Chair)

Hon Sally Talbot MLC (Deputy Chair)

Hon Donna Faragher MLC

Hon Dave Grills MLC

Hon Lynn MacLaren MLC

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Glossary

1601 Statute	(IMP) <i>Statute of Charitable Uses 1601</i>
ACNC Register	The Australian Charities and Non-Profits Commission register of charities
AIM	The Australian Institute of Management Western Australia
AIMHDR	The Australian Institute of Management Human Resources Development Inc
CBH	Co-operative Bulk Handling Limited
CCI	The Chamber of Commerce and Industry of Western Australia
Commissioner	Commissioner of State Revenue
Ministerial determination	The beneficial body determination mechanism proposed in the Bill providing the Minister for Finance with the discretion to reinstate taxation exemption to bodies excluded from taxation exemption by the Bill
Fourth limb charity	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)
Minister	Minister for Finance
OSR	Office of State Revenue, Department of Finance
SAT	State Administrative Tribunal of Western Australia
SAT decision	<i>Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue</i> [2012] WASAT 146 (18 July 2012)
Supplementary Notice Paper No. 1	Supplementary Notice Paper No. 86, Issue No. 1, made available by Hon Peter Collier MLC in the Legislative Council, dated 23 September 2014
The Curtin Report	Penny Knight and David Gilchrist, <i>Australian Charities 2013: The first report on charities registered with the Australian Charities and Not-for-profits Commission</i> , Australian Government, Australian Charities and Not-for-profits Commission and Curtin University, 24 September 2014
Three State taxes	Land duty, land tax and payroll tax imposed by the three taxation Acts
Three taxation Acts	The <i>Duties Act 2008</i> , <i>Land Tax Assessment Act 2002</i> and <i>Pay-roll Tax Assessment Act 2002</i>
WACOSS	Western Australian Council of Social Service Inc

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

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 pre-emptive 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.’*¹

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.

¹ *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.**

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

1.1 On 23 September 2014, the Legislative Council referred the Taxation Legislation Amendment Bill (**Bill**) to the Standing Committee on Legislation (**Committee**) for its consideration and report.

1.2 The Order of referral states:

That —

(a) the Taxation Legislation Amendment Bill 2014 be discharged and referred to the Standing Committee on Legislation for consideration and report not later than Thursday, 13 November 2014; and

(b) the committee examine the bill for the purpose of ascertaining whether the bill imposes unintended consequences, if any, on legitimate fourth-limb charities.

1.3 On 23 October 2014, the Committee applied for an extension of time to report which was granted by the Legislative Council. The Legislative Council agreed to extend the time to report to Thursday, 20 November 2014.²

1.4 The debate prior to the referral of the Bill identified possible ‘unintended consequences’ on ‘legitimate’ fourth limb charities.

1.5 In particular, several members referred to the following concerns of the Western Australian Council of Social Service Inc (**WACOSS**), that the Bill:

- Applies a ‘*catch all*’ and broad test with the definition of ‘relevant body’ which includes a charity with a purpose of promoting ‘trade, industry or commerce’, rather than narrowly defining industry bodies for which exemption from land duty, land tax and payroll tax (**the three State taxes**) is being denied.
- Gives the Minister for Finance discretion to reinstate taxation exemption to charities which ‘*could leave the door open to the politicisation of decision making about charitable status*’.³

² Legislative Council, *Parliamentary Debates (Hansard)*, 23 October 2014, p7800.

- 1.6 Issues were also raised about the potential effect of the Bill on agricultural associations, growers' associations and cooperatives.⁴
- 1.7 On 23 September 2014, Hon Peter Collier MLC, the Minister representing the Minister for Finance, distributed Supplementary Notice Paper No. 86, Issue No. 1 (**Supplementary Notice Paper No. 1**) proposing amendments to the Bill with the '*intent of addressing the issues concerned*'.⁵
- 1.8 In late September and early October 2014, the Committee sought submissions from stakeholders, advertised the inquiry in Saturday's *The West Australian* and notified the Minister for Finance and the Treasurer of the inquiry. The Committee received nine submissions and held eight public hearings on 16 October 2014. Stakeholders invited to make a submission, submissions received and the witnesses who appeared at the public hearings are listed at Appendix 1. The Committee thanks all witnesses who provided assistance during this inquiry.

THE COMMITTEE'S APPROACH AND THE CHALLENGES IN UNDERTAKING THE INQUIRY

- 1.9 The Committee's objective in this inquiry, under the referral terms of reference, is to inquire into the potential unintended consequences of the Bill, if any, on fourth limb charities. The Committee presents its research, findings and recommendations to the Legislative Council for its consideration, so that the House has this information available when it next considers the Bill.
- 1.10 There were a number of challenges in fulfilling the Committee's task in this inquiry, including:
- It is often difficult to identify in detail and with certainty the 'intended' consequences of the Bill, and of particular clauses of the Bill. The intention of the Bill and clauses is often stated in general terms, rather than by specifying organisations that will or are likely to be impacted.
 - The term 'legitimate' fourth limb charity (as stated in the referral) has no known or certain meaning in charity law or otherwise.

A charity is either a charity or not at common law.

The Committee does not know and can find no way of establishing what types of organisations were intended to be included in the term 'legitimate' charity. Therefore, the Committee in this inquiry considered the impact of the Bill on all fourth limb charities.

³ Letter from Steve Joske CSC, President, WACOSS, Legislative Council Tabled Paper No. 1942, p1.

⁴ Hon Colin Holt MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2014, p6640.

⁵ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2014, p6640.

- There is no publicly available list of fourth limb charities operating in this State.⁶ Furthermore, the Committee was not able to obtain from the Office of State Revenue, Department of Finance (**OSR**) any names of fourth limb charities currently exempt from the three State taxes.
- It is difficult to reconcile the evidence of OSR with other witnesses' evidence and submissions at times because OSR did not provide the names of organisations that they consider may potentially be affected by the Bill, and because of the complexity of charity and taxation law.
- The referral was based on the assumption that the Bill affected only fourth limb charities, and professional associations which are fourth limb charities. The Committee considered it appropriate to bring to the attention of the House circumstances where first to third limb charities are potentially impacted by the Bill.
- The Committee had limited time in which to report to the House.

1.11 It is difficult for the Committee to state with precision which charities (or at times, classes of charities) will be impacted by the Bill because:

- The Committee could not obtain the names of organisations OSR considers may potentially be affected by the Bill.
- An assessment of whether the Bill applies to a particular charity would involve an examination of the constituent documents and the activities and purposes of individual organisations.
- Charity law and taxation law is complex, as is the legislative scheme the Bill proposes, and determining the effect of the Bill involves challenges of interpreting often broad terms in the proposed law.

1.12 The Committee focused on the impact of the proposed definition of 'relevant body' in the Bill in potentially denying fourth limb charities taxation exemption, reflecting witnesses' concern (see Chapter 3). The Committee considered:

- The potential impact of paragraphs (b) to (f) of the definition of 'relevant body' on fourth limb charities, not only paragraphs (c) and (d) which were the subject of comment in the Second Reading Speech and on referral.
- The proposed amendments to the Bill in Supplementary Notice Paper No. 1 and to what extent these amendments address the unintended consequences of the Bill on fourth limb charities (see Chapter 4).

⁶ Assistant Professor Ian Murray, Faculty of Law, University of Western Australia, *Transcript of Evidence*, 30 October 2014, p5.

- The proposed beneficial body determination mechanism providing the Minister for Finance with the discretion to reinstate taxation exemption (**Ministerial determination**) (see Chapter 5).
- 1.13 The Committee recommends a few amendments to the Bill. These recommendations are set out in a narrative style (describing the purpose and desired outcome of the recommended amendment), rather than a statutory style of amendment (identifying the exact words to be inserted into or deleted from the Bill, and at what point of the text in the Bill the insertion or deletion is to be made). This narrative style is appropriate in this report given the technical nature of the amendments, the complexity of charity and taxation law, and OSR's advice that they were seeking Parliamentary drafting advice in relation to the amendments they have agreed to make.
- 1.14 In undertaking its scrutiny role, the Committee has chosen to have regard to the Fundamental Legislative Principles listed at Appendix 2. The principles relevant to the current inquiry include principles 1 to 3, 11, 12 and 13.

Information provided by OSR

- 1.15 OSR advised they had identified that 34 fourth limb charities may '*potentially*' be affected by the Bill.⁷ However, the Committee was constrained in assessing the consequences of the Bill on fourth limb charities because OSR refused to name those charities⁸ on the basis of State Solicitor's Office (SSO) advice that the confidentiality provisions in section 114 of the *Taxation Administration Act 2008* prevented them from providing certain answers to a Committee of the Parliament.⁹
- 1.16 On this legal point, the Committee advised OSR and the Minister for Finance that it did not accept the submission that the requirement of confidentiality contained in section 114 of the *Taxation Administration Act 2003* is applicable to persons providing information to either House of Parliament or its duly authorised Committees. The Committee also advised that there is no express or implied abrogation or limitation of parliamentary privilege contained in the *Taxation Administration Act 2003* and the Committee asserted that the rights and privileges accruing to the Parliament, its Houses and Committees by common law and statute, are quite settled.
- 1.17 The Committee decided not to summons the names or identifying particulars of the charities. In making this decision, the Committee noted the short timeframe of conducting this inquiry and the comments made by the Standing Committee on Procedure and Privileges in its Report 26, *Reference from the President – Possible*

⁷ Answers to Questions on Notice, OSR, 5 November 2014, p1. See paragraphs 2.23 to 2.24 and Appendix 3.

⁸ '*I cannot tell you the names of charities recorded*': Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p6.

⁹ The Committee did not summons or view a copy of the legal advice, which the OSR refused to provide when asked for a copy during a hearing: *Ibid*, p12.

Contempt: Report No. 37 Standing Committee on Estimates and Financial Operations. In that report, the Procedures and Privileges Committee expressed its concern about the short timeframes that the Standing Committee on Estimates and Financial Operations imposed in summonses issued to a witness.¹⁰

- 1.18 The Minister for Finance did, however, provide the Committee details of a sample of three entities that are the intended target of the measures contained within the Bill (deprived of identifying features for this purpose).

CHARITY LAW AND FOURTH LIMB CHARITIES

- 1.19 An understanding of charity law and the scope of fourth limb charities is required to understand the impact of the Bill. An understanding of charity law is important as the Bill refers to the different categories of charities. The Bill, in effect, proposes to superimpose an exclusion clause on State laws that currently provide all fourth limb charities with State taxation exemption.
- 1.20 The law on charities in Australia derives substantially from England and may be traced back to the enactment of the (IMP) *Statute of Charitable Uses 1601 (1601 Statute)*. The preamble of this law listed nine categories of ‘charitable purposes’ including those for the ‘*relief of aged, impotent and poor people*’, ‘*maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities*’, and ‘*aide or ease of any poor inhabitants*’. Charity law is derived from the 1601 Statute either directly or by being within the ‘spirit and intendment’ of that statute.
- 1.21 The term ‘fourth limb’ charity refers to the fourth limb of the four categories of charities established in common law in the case of *Commissioner for Special Purposes of Income Tax v Pemsel (Pemsel)*.¹¹ The four categories of charities encompass organisations that promote:
- the relief of poverty;
 - the advancement of education;
 - the advancement of religion;
 - **other purposes considered beneficial to the community.**
- 1.22 The last category of charity is commonly known as a fourth limb charity, the subject of the inquiry. The first three categories of charity are known as first, second or third limb charities respectively. Therefore, a fourth limb charity is a category of charity

¹⁰ Legislative Council, Standing Committee on Procedure and Privileges, Report 26, *Reference from the President – Possible Contempt: Report No. 37 Standing Committee on Estimates and Financial Operations*, 14 December 2012, pp5, 6.

¹¹ *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

that promotes purposes considered beneficial to the community that is not a first to third limb charity.

- 1.23 Fourth limb charities cover the broadest possible range of charitable purposes including organisations that promote economic, social and community development, emergency and aid relief, social services, mental and physical health, protecting or preserving the environment, animal protection, preventing disease in livestock, promoting agriculture and agricultural societies, sports and recreation, and culture and the arts.¹²
- 1.24 The Australian Charities and Not-for-profits Commission register of charities (**ACNC Register**) suggests that at least 3000¹³ fourth limb charities are operating in Western Australia although these are not all liable to pay the three State taxes.¹⁴
- 1.25 The Bill must be understood in the context of the diversity and complexity of charities and the services that they often provide in one or more areas. The ACNC Register lists approximately 60 000 charities¹⁵ and it has been estimated that 38 per cent of charities at a national level aimed to advance two or more categories of charitable purposes.¹⁶
- 1.26 Charity law is complex. The technical legal meaning of the word ‘charitable’ is difficult to define and is not synonymous with the common usage of the word. Also, there are purposes which may be regarded as being charitable in the common usage

¹² These examples are sourced from Halsbury’s Law of Australia online, Lexis Nexis (viewed on 5 November 2014), and Penny Knight and David Gilchrist, *Australian Charities 2013: The first report on charities registered with the Australian Charities and Not-for-profits Commission*, Australian Government, Australian Charities and Not-for-profits Commission and Curtin University, 24 September 2014 (**The Curtin Report**), p31.

¹³ Assistant Professor Murray advised that 3000 is a conservative estimate. This number is calculated by determining the total number of registered charities that operated in Western Australia with a fourth limb purpose that did *not* also list themselves as a public benevolent institution or have any purpose of advancing religion, or advancing education on the ACNC Register. It is conservative because it omits public benevolent institutions and many charities have multiple purposes: Submission No. 4b from Assistant Professor Ian Murray, Faculty of Law, 7 November 2014, pp1-2.

¹⁴ The ACNC register is posted on the Australian Government, Australian Charities and Non-for-profits Commission website at www.acnc.gov.au. While OSR advised of the limitations of the ACNC Register, and it reflects the Commonwealth charity law, it is the best information available to gain a sense of the numbers of charities and the broader context in which this Bill operates. The Commonwealth law for charities largely codifies the common law.

¹⁵ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p3.

¹⁶ ‘The data relating to classifications [that is, the four classifications of charity] provides an indication of the breadth of the charitable aims of organisations in the sector. Charities that completed the [survey] ... were asked to identify all their charitable purposes and 35,450 responded to this question. Of these, 22 084 (62%) provided a single purpose, 8,758 (25%) two purposes, and 4,608 (13%) provided three or more purposes’: The Curtin Report, p26. The 38 per cent for two or more purposes noted in the above text combines the 25 per cent for two purposes and 13 per cent for three or more purposes. Also, ‘Nearly 70 per cent of charities reported that they worked in one or more areas in addition to that of their main activity – on average these charities nominated three additional areas. Again, this data highlights the diversity and complexity of the services provided by individual charities and of the sector as a whole’: The Curtin Report, p31.

- sense of the term which are not within the technical legal categories of charity. For example, gifts for a ‘benevolent purpose’ may not be categorised as charitable.
- 1.27 Legal criteria must be met to qualify as a charity at common law and therefore become entitled to a range of Commonwealth and State taxation concessions. There are also Government processes of endorsing charities for the purposes of tax concessions.
- 1.28 The purpose of a fourth limb charity must be beneficial to the community, and within the spirit and intendment of (or analogous with) the Preamble to the 1601 Statute.
- 1.29 ‘Beneficial to the community’ must be affirmatively proved to the court for a body to qualify as a fourth limb charity. The range of purposes beneficial to the community is a dynamic concept to be answered by reference to relevant matters existing at that time. Beneficial to the community has been interpreted as being a benefit for an appreciable important class of the community.
- 1.30 It is fundamental that a fourth limb charity exist for the public benefit. All charities must be directed to the benefit of the public or a section of the public as distinct from ‘private purpose’. CBH, a recognised fourth limb charity, commented at a hearing that it *‘is not that simple or easy to receive a charity endorsement’*.¹⁷
- 1.31 Charities are constituted through a variety of legal structures, including incorporated associations and unincorporated associations, charitable trusts, a company limited by guarantee and entities created under special statute or letters patent. Many charities and not-for-profit charities¹⁸ are incorporated associations.¹⁹ The regulatory regime that applies to a charity is determined by its legal form. For example, incorporated associations are regulated by the Department of Commerce and *Associations Incorporation Act 1987*.
- 1.32 State and Commonwealth tax concessions apply to charities under various legislation and charities are endorsed by Commonwealth and State agencies.
- 1.33 Concession from paying the three State taxes involves an application to the Commissioner of State Revenue (**Commissioner**), who examines the charitable status of an applicant.²⁰ Under Commonwealth law, charities are exempt from income tax,

¹⁷ Anthony Liaw, Group Tax Manager, CBH, *Transcript of Evidence*, 30 October 2014, p4.

¹⁸ Not-for-profit is a broader descriptor than charity. For a not-for-profit to be a charity it must be established to pursue one or more charitable purpose. Therefore, while many not-for-profit organisations are a charity, not all not-for-profit organisations are charities. Many not-for-profit organisations are small unincorporated entities that largely fall outside the regulatory system, although they may access taxation concessions: Australian Government, The Treasury, *Final Report: Scoping study for a national not-for-profit regulator*, April 2011, p21.

¹⁹ An incorporated association must not be formed for the purpose of obtaining a profit: Section 4(4) of the *Associations Incorporation Act 1987*. At a national level 41 per cent of charities are incorporated associations and 33 per cent are unincorporated associations. Twenty per cent are classified as Public Benevolent Institutions or Health promotion charities: The Curtin Report, p51.

²⁰ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, pp3-4.

fringe benefits tax and may be granted deductible gift recipient (DGR) status.²¹ The Committee was advised that if a charity meets the relevant tests for Commonwealth exemptions, it is usually endorsed as a charity for state taxation purposes as well.²²

- 1.34 The Bill impacts on a subset of charities and their payment of the three State taxes, namely land duty, land tax and payroll tax (all referred to as State ‘taxes’ in this report). Assistant Professor Ian Murray, Faculty of Law, University of Western Australia (UWA), noted at a hearing that while most states give a full range of taxation concessions to most charities it is not uncommon for states to remove state taxation concession from certain charities. For example, although universities are regarded as charitable organisations, they are not eligible for payroll tax concessions in this State.²³

Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue

- 1.35 In 2012, in the State Administrative Tribunal of Western Australia (SAT) matter of *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 (**SAT decision**), the Chamber of Commerce and Industry of Western Australia (CCI) sought exemption from the payment of payroll tax on the basis that it came within the definition of a ‘charitable body or organisation’ for the purposes of the *Payroll Tax Assessment Act 2002* after the Commissioner of State Revenue concluded that they were not taxation exempt as a fourth limb charity.
- 1.36 SAT examined the constitution of the CCI, and its activities, and found that CCI was a fourth limb charity. The Tribunal concluded:

*Having regard to the general law definition of charitable purpose, and taking an holistic view of the Constitution and activities of the organisation, ... the Chamber was carried on mainly for a purpose beneficial to the community in the sense included with one of the classification of charitable purposes, and accordingly was entitled to exemption.*²⁴ [Committee emphasis]

- 1.37 While there is an avenue of appeal from SAT to the Supreme Court of Western Australia, the Commissioner did not appeal the SAT decision.

²¹ The *Charities Act 2013* (Cth) regulates charities at a national level. It lists 12 charitable purposes and two additional subtypes—Health Promotion Charity and Public Benevolent Institution and effectively provides a codification of the charities law relating to the recognition of charities: The Curtin Report, p26.

²² Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p3.

²³ Ibid, pp3-4.

²⁴ *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 at [2].

- 1.38 Following the SAT decision, CCI became eligible for payroll tax (refunded over a number of preceding years), land tax and transfer duty exemptions. OSR refunded \$56.7 million to eight similar organisations. The Government has cited the SAT decision as the reason for the enactment of the Bill.
- 1.39 OSR provided the information attached at Appendix 3, which notes that 995 exemptions for the three State taxes were granted to fourth limb charities between 1 July 2009 and 31 October 2014. It is not possible to extract from this data with any certainty how many fourth limb charities received State taxation exemption during this period.
- 1.40 OSR are of the view that only a ‘*very small number*’ of charities will be excluded from exemptions because they will be denied taxation exemption under the definition of ‘relevant body’ in the Bill.²⁵ OSR added that 34 fourth limb charities may ‘*potentially*’ be affected (see paragraphs 2.23 and 2.24 and Appendix 3).

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.

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.

²⁵ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p7.

CHAPTER 2

THE LEGISLATIVE SCHEME OF THE BILL AND ITS INTENDED CONSEQUENCES

THE LEGISLATIVE SCHEME AND OUTLINE OF THE BILL

2.1 The Bill amends the *Duties Act 2008* (Part 2 of the Bill), *Land Tax Assessment Act 2002* (Part 3 of the Bill), *Pay-roll Tax Assessment Act 2002* (Part 4 of the Bill) (**the three taxation Acts**) and the *Taxation Administration Act 2003* (Part 5 of the Bill).

2.2 The Bill proposes to:

- Narrow the scope of the existing State taxation exemptions for land duty, land tax and payroll tax (the three State taxes) that apply to fourth limb charities by providing that if a fourth limb charity is a ‘relevant body’, as defined in the Bill, it is not taxation exempt *unless* a ‘beneficial body determination’ is made by the Minister for Finance. (The Bill proposes to insert the same definition of ‘relevant body’ into the three taxation Acts – see Chapter 3 of this report).
- Insert a ‘beneficial body determination’ process to provide for the Minister for Finance, with the concurrence of the Treasurer, to make a determination that a ‘relevant body’ is taxation exempt if the Minister *‘is of the opinion that it is in the public interest to do so and after considering any information that the Minister considers relevant’* (the Ministerial determination). (The Bill proposes to insert the same Ministerial determination provisions into the three taxation Acts – see Chapter 5 of this report).

2.3 The Government’s amendments in Supplementary Notice Paper No. 1 propose to amend the meaning of ‘relevant body’ by reinstating tax exemption to ‘public benevolent institutions’ (see Chapter 4 of this report).

2.4 The essential elements of the legislative scheme are:

All fourth limb charities	A ‘relevant body’ as defined in the Bill	Public benevolent institutions	If the Minister makes a Ministerial determination
Currently entitled to State taxation exemption under the three taxation Acts	Will be excluded from State taxation exemption under the Bill	Will remain taxation exempt under the amendments in Supplementary Notice Paper No. 1.	Taxation exemption status will be retained under the Bill

- 2.5 The Bill represents an important shift regarding those fourth limb charities that have access to State tax concessions. At present, under the test of exemption in the three taxation Acts, the question of whether or not an organisation is a charity is a legal question determined by the Courts. Therefore, access to State taxation exemption is not subject to Ministerial discretion. The Bill proposes to change the test that determines which fourth limb charities (at common law) qualify for State taxation exemption. Under the Bill, State taxation exemption will be denied to a charity that is a ‘relevant body’, with the Minister having a discretion to reinstate the taxation exempt status of a charity. The Bill, at paragraph (e) of the definition of ‘relevant body’, also proposes to provide the Executive with the power to determine classes of charities’ taxation status by regulation in the future.
- 2.6 However, the above summary of the legislative scheme does not reflect the complexity of the Bill. For example, The Law Society of Western Australia described the Bill and the proposed amendments in Supplementary Notice Paper No. 1 as a ‘*very convoluted legislative scheme*’ which:
- starts out with a taxation exemption;
 - then excludes ‘relevant bodies’ from the exemption;
 - then defines ‘relevant body’ in inclusion and exclusion terms and by membership to certain defined groups which requires an understanding of the relevant taxation Act;
 - then adds specific exclusions for ‘public benevolent institutions’;
 - then inserts ‘*quite elaborate*’ provisions for a beneficial body determination.²⁶
- 2.7 The Committee acknowledges that the Executive had a difficult task of drafting a Bill that excluded a sub set of fourth limb charities (as recognised at common law) for which a State taxation exemption would be considered ‘*inappropriate*’,²⁷ without affecting the taxation exemption status of other charities. The legislative scheme takes an expansive approach to achieve the stated objectives. OSR advised that excluding organisations by name was ‘*considered inappropriate*’.²⁸
- 2.8 The issue raised in evidence is that the exclusion mechanism (the definition of ‘relevant body’) is too broad and therefore, if the Bill is enacted, there will be an over-reliance on the inclusion mechanism (the Ministerial determination), which is not subject to review or appeal. Witnesses consider that the Bill by its very design appears to unnecessarily impact on many fourth limb charities and too many charities will be

²⁶ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, pp1, 2.

²⁷ See paragraph 2.17.

²⁸ Submission No. 2 from OSR, 14 October 2014, p4.

excluded. Assistant Professor Murray considers that a narrower exclusion mechanism could be used to achieve the stated intention of the Bill.²⁹

- 2.9 The expansive approach in drafting the Bill with the ‘safeguard’ of the Ministerial discretion appears to have been taken in an attempt to eliminate avoidance opportunities. However, some witnesses considered a more cautious drafting approach appropriate to minimise the risk of unintended consequences,³⁰ while others considered that the Bill should be rejected in its entirety.³¹

Threshold provisions in the three taxation Acts

- 2.10 It is important to emphasise that the Bill, if enacted, will impact on:

- fourth limb charities, as the Bill proposes to (in effect) superimpose on the existing charity exemptions in the three taxation Acts that a ‘relevant body’ is not taxation exempt unless a beneficial body determination is in force; and
- fourth limb charities that are liable to pay the three State taxes because they meet the liability quantum thresholds applying to a particular tax (see paragraph 2.13).

- 2.11 While fourth limb charities are noted above, the Committee notes that the Bill will potentially impact on first to third limb charities in certain circumstances (see paragraphs 3.33 to 3.39, 3.113 to 3.116, and 4.17 to 4.23). The same threshold provisions apply to these charities.

- 2.12 The Bill proposes to amend the following exemption provisions in the *Duties Act 2008*, *Land Tax Assessment Act 2002* and *Pay-roll Tax Assessment Act 2002*.

²⁹ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p5.

³⁰ For example, Leading Age Services suggested an amendment to the Bill to narrow paragraph (d) (see paragraph 3.65) and Assistant Professor Murray suggested amendments to the Bill (for example, see paragraph 3.27).

³¹ For example, CBH, Engineers Australia and Unions WA: Submissions No. 5, 6 and 8 respectively.

Box 1***Duties Act 2008***

Clause 5 of the Bill proposes to amend section 95 of the Duties Act 2008. Insertions to section 95 are underlined.

95. Transactions for charitable etc. purposes

- (1) Duty is not chargeable on a dutiable transaction that has been entered into or occurred for charitable or similar public purposes.
- (2) However, subsection (1) does not apply if the person liable to pay duty on the dutiable transaction is a relevant body, or is related to a relevant body as referred to in subsection (3), unless a beneficial body determination is in force for the purposes of this Act in respect of the relevant body.
- (3) A person liable to pay duty on a dutiable transaction is related to a relevant body if —
 - (a) the person holds the dutiable property the subject of the transaction as trustee of a trust; and
 - (b) the relevant body is a beneficiary under the trust, whether the relevant body has a vested share or is contingently entitled or is a potential beneficiary under a discretionary trust.

Box 2***Land Tax Assessment Act 2002***

Clause 8 of the Bill proposes to replace section 37. The proposed new section 37(2) is in the same terms as the current section 37.

37. Land owned by public charitable or benevolent institutions, exemption for

- (1) In this section —
public charitable or benevolent institution does not include an institution that is a relevant body, unless a beneficial body determination is in force for the purpose of this Act in respect of the relevant body.
- (2) Land is exempt for an assessment year if at midnight on 30 June in the previous financial year, the land is —
 - (a) owned by, vested in or held in trust for a public charitable or benevolent institution; and
 - (b) used solely for the public charitable or benevolent purposes for which the institution was established.
- (3) This section applies to an assessment year that commences on or after 1 July 2015.

Box 3

Pay-roll Tax Assessment Act 2002

Clause 13 of the Bill proposes to insert section 41(1A) and (3A) (among other insertions) into the Pay-roll Tax Assessment Act 2002. Sections 41(1) and (2) are not amended.

41. Exempting charitable bodies or organisations

(1A) A charitable body or organisation is exempt under this section from liability to pay-roll tax if —

(a) an exemption given by the Commissioner under subsection (2) is in force ... or;

(b) it is a relevant body in respect of which a beneficial body determination is in force for the purposes of this Act.

(1) A charitable body or organisation may apply to the Commissioner for exemption from liability to pay-roll tax.

(2) The Commissioner may, by giving notice to the charitable body or organisation exempt it from liability to pay-roll tax.

(3A) However, a charitable body or organisation that is a relevant body cannot be given an exemption by the Commissioner under subsection (2).

2.13 Further, the Bill impacts only on charities that are liable to pay State taxes because they meet liability thresholds. The three State taxes and applicable liability thresholds are:

- Payroll tax is assessed on the wages paid by an employer in Western Australia. The current threshold for payroll tax liability is wages of \$800 000.
- Land tax is an annual tax based on the ownership and usage of land owned at midnight on 30 June levied in respect of the financial year immediately following that date. A person is liable if they own land, which OSR says is ‘*not common*’³² for charities, and the land value is above the current threshold of \$300 000 based on unimproved value for land tax purposes.
- Land duty is payable in relation to a transaction over dutiable property. The rate of duty applying to dutiable transactions is assessed on the dutiable value of the transaction.

2.14 OSR advised that a ‘*vast majority of charities*’ do not pay State taxes because they do not meet the taxation thresholds.³³

³² Answers to Questions on Notice, OSR, 5 November 2014, p2.

³³ Ibid.

WHAT ARE THE INTENDED CONSEQUENCES OF THE BILL ON FOURTH LIMB CHARITIES?

- 2.15 A challenge with the inquiry's terms of reference is that it requires a detailed understanding of what are the 'intended' consequences of the Bill and particular provisions of the Bill in order to comment confidently on whether the Bill imposes unintended consequences.
- 2.16 The Committee's understanding of the intended consequences of the Bill is sourced from the Second Reading Speech, the Bill and its Explanatory Memorandum, statements made by Hon Peter Collier MLC, the Minister representing the Minister for Finance in the Legislative Council, and OSR evidence.
- 2.17 The Bill is a response to the State Government's concern with the precedent created by the SAT decision, and its concern about the '*potential extension to other organisations for which a State taxation exemption is considered inappropriate*'.³⁴ As OSR added, the Bill is a response to the evolution in the common law, and a wider number of charities qualifying for State tax exemption. The Bill is trying to 'pull back' to where the common law was before the SAT decision.³⁵ The Government expressed the view that only a '*very small number*' of fourth limb charities will be impacted. The Second Reading Speech reads:

[The intention of the Bill is] *to improve the efficacy of existing state tax exemptions for charitable institutions. ...*

I stress 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. ...

*It is expected that these amendments will result in only a very small number of fourth limb charities being excluded from receiving a state tax exemption. ... It is expected that these state taxation integrity measures will have an immaterial or no impact on the budget forward estimates.*³⁶

³⁴ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5723.

³⁵ [The Bill] '*is more a response to an evolution in law. The courts' views of what constitutes a charity have been evolving in recent times ... Because the legislation is framed currently on the basis that all organisations that are charities get a state tax exemption, the broadening of the common law means that a wider number of charities will qualify for the exemption. This bill is really about trying to pull that back to where it was before the CCI case, in a more historical context*': Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p2.

³⁶ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, pp5723-24.

2.18 OSR added that:

*The intention of the Bill is to exclude a subset of fourth-limb charities with similar characteristics to those considered in the CCI case, [the SAT decision] along with professional associations.*³⁷

2.19 On referral, the Minister added that *‘the government never intends a piece of legislation to result in unintended consequences, particularly for charitable organisations’*.³⁸ While comments made in the House focused on the main purpose of the Bill being to exclude a body with a purpose of ‘trade, industry or commerce’ from taxation exemption, and professional bodies were mentioned in passing, the Bill potentially impacts on charities through other provisions.

2.20 Based on the evidence before the Committee it appears that the intended consequences of the Bill are to:

- Exclude the CCI (a fourth limb charity at common law) and fourth limb charities with *‘similar characteristics to those considered in the CCI case’* (see paragraph 2.18) from State taxation exemption.
- Exclude a fourth limb charity with a purpose of ‘trade, industry or commerce’ (paragraph (d) of the definition of ‘relevant body’) from State taxation exemption.
- Exclude professional associations (which may also be charities) (paragraph (c) of the definition of ‘relevant body’) from State taxation exemption.
- Exclude organisations, such as unions and political parties, from State taxation exemption, in the event that the common law expands to include these organisations as fourth limb charities in the future.
- Provide the Executive with the power to, by regulation, exempt classes of charities from taxation exemption (paragraph (e) of the definition of ‘relevant body’).
- Exclude bodies related to any of the organisations above from taxation exemption (paragraph (f) of the definition of ‘relevant body’).

2.21 It appears that the Bill was not intended to affect public benevolent institutions and the classes of organisations WACOSS was concerned about losing taxation exemption.³⁹ The Committee concludes this based on the Government’s proposed amendments to the Bill set out in Supplementary Notice Paper No. 1.

³⁷ Answers to Questions on Notice, OSR, 5 November 2014, p2.

³⁸ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2014, p6640.

³⁹ Charities involved in disability employment, the economic development of disadvantaged people, community housing and social enterprises. See paragraph 4.10.

OSR evidence on the number of charities that may potentially be affected by the Bill

- 2.22 OSR are of the view that only a ‘*very small number*’ of charities will be excluded from exemptions because they will be denied taxation exemption under the definition of ‘relevant body’ in the Bill.⁴⁰
- 2.23 OSR advised that 34 fourth limb charities may ‘*potentially*’ be affected. A copy of their advice is attached at Appendix 3.
- 2.24 OSR advised that:
- 22 organisations were identified from post 1 July 2009 data (see Appendix 3).
 - 8 organisations were identified from a ‘*cursory*’ examination of payroll exemptions (only) provided prior to 2009.
 - 22 of the 30 organisations noted in the two bullet points above are excluded on the basis of being a charity that promotes ‘trade, industry or commerce’ (paragraph (d) of ‘relevant body’) and the remaining 8 on the basis that they are a professional association (paragraph (c)).
 - 4 further organisations are currently or potentially under objection that have claimed charity status but have not yet been approved.⁴¹
 - This number (34) may increase slightly as applications are received and determined.⁴²
- 2.25 It appears to the Committee based on OSR advice that 30 charities receiving taxation exemption will potentially lose their tax exemption if the Bill is passed. However, the Committee notes that the figures provided by OSR necessarily rely on their interpretation of the provisions in the Bill. A number of witnesses, however, including Assistant Professor Murray, pointed to a broader interpretation of the Bill.⁴³
- 2.26 OSR acknowledges that there are a number of circumstances where ‘legitimate’ charities (other than the WACOSS charities) may be unintentionally excluded by the Bill, but on all occasions considers that the Ministerial determination mechanism mitigates this:

⁴⁰ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p7.

⁴¹ The information in the four bullet points above is sourced from Answers to Questions on Notice, OSR, 5 November 2014, p1, and the table at Attachment A, copied at Appendix 3 of this report.

⁴² Answers to Questions on Notice, OSR, 5 November 2014, p2.

⁴³ For example, Assistant Professor Murray considers that the definition of the term ‘promote trade, industry or commerce’ in the Bill ‘*creates a risk for any charity*’ because it requires a charity to look at its purposes and activities whereas OSR interpret this definition more narrowly (see paragraphs 3.41 to 3.46). Leading Age Services is concerned about the potential impact of the Bill on not-for-profit aged care providers, although OSR have a different view on the impact of the Bill on not-for-profit aged care providers (see paragraphs 3.64 to 3.71). Also, AIM is concerned about the impact of the Bill on its second limb charity, although the above data does not suggest that OSR consider that any second limb charity will be impacted by the Bill (see paragraph 3.114).

Based on the policy intent and application of the amendments, it is only expected that a small number of charities will be excluded from the exemptions and not of the class to which WACOSS refers.

However, based on the design features of the amendments ... it is possible that a 'legitimate' charity may unintentionally be excluded from the exemptions. This possibility is mitigated through a discretion to allow the Minister to reinstate the exempt status of an excluded charity based on the circumstances of each case.⁴⁴ ... It was accepted in framing the amendments, because of all of the complexity in the common law, that it is possible that charities other than fourth-limb charities could be affected. I guess that has been the difficulty right from the start—to try to target the exclusion capacity in a way that does not bring in too many organisations that you are not seeking to target.⁴⁵

2.27 A concern was also raised that the numbers of charities affected was not known at the late stage of the hearing with OSR.⁴⁶

2.28 One reservation concerning the Bill noted by Assistant Professor Murray is that the Bill was tabled without complete information on fourth limb charities:

My first concern is that changes are being made without complete information about the charity sector in Western Australia and ... in particular without full information being known about the number of fourth-limb charities in Western Australia that undertake a purpose of promoting trade, industry or commerce ... we are operating in somewhat uncharted territory to a large degree.⁴⁷

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.

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.

⁴⁴ Submission No. 2 from OSR, 14 October 2014, p7.

⁴⁵ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p3.

⁴⁶ A concern was raised in response to the Commissioner's comment that she was not certain, without consulting her systems officers, what could be pulled out of the system but would endeavour to assist the Committee: Hon Sally Talbot MLC, Member, OSR hearing, *Transcript of Evidence* 30 October 2014, p5.

⁴⁷ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p1.

CHAPTER 3

CHARITIES EXCLUDED FROM TAXATION EXEMPTION

3.1 The main issue with the Bill is the scope of the definition of ‘relevant body’, which has been called the ‘exclusion’ mechanism in this Bill.

3.2 The main concerns identified by witnesses were that the definition of ‘relevant body’ is broad, unclear in its terms and application and potentially captures more than the ‘*very small number*’ of fourth limb charities intended. Therefore, the Bill establishes a legislative regime that will place considerable reliance on the Ministerial determination process to reassess taxation exemption status. This has also raised a number of concerns. (See Chapter 5 regarding the determination process).

3.3 Adjunct Professor Greg McIntyre SC, who appeared before the Committee representing The Law Society of Western Australia, stated on the scope of the Bill:

*the legislation needs to focus on when a body is engaged in a charitable activity and when it is not, rather than grabbing the net covering the lot regardless of what it is they are doing at a particular time ... That may require quite a bit of rejigging of the legislation.*⁴⁸

3.4 As OSR advised on the difficulties of drafting these exclusion clauses:

*The complex nature of charities law means that it is difficult to precisely define the characteristics of organisations that should be excluded without creating avoidance opportunities and the likelihood of disputes about the threshold test for excluding a charity.*⁴⁹

3.5 As previously noted at paragraph 1.5, WACOSS raised concerns about the ‘*catch all*’ test relating to the purpose to ‘promote trade, industry or commerce’ at paragraph (d) of the definition of ‘relevant body’. However, this Chapter examines paragraph (d) and well as paragraphs (b) to (f) of the definition of ‘relevant body’ because witnesses submitted that these paragraphs also potentially impose unintended consequences on charities.

3.6 The Committee notes, again, that it is difficult for the Committee to state with precision which organisations or classes of organisations will or may be exempt under the Bill and if there are any unintended consequences for the reasons noted in paragraphs 1.10 and 1.11.

⁴⁸ Adjunct Professor Greg McIntyre SC, Council Member, Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p5.

⁴⁹ Answers to Questions on Notice, OSR, 5 November 2014, p2.

DEFINITION OF ‘RELEVANT BODY’

- 3.7 The Bill proposes to insert the following definition of ‘relevant body’ into the three taxation Acts.

Box 4**What is a relevant body**

Clauses 6, 9 and 14 of the Bill insert the following definition of ‘relevant body’ into the three taxation Acts.

A reference to a relevant body is to any of the following —

- (a) a political party;
- (b) a trade union;
- (c) a professional association;
- (d) a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the sole or dominant purpose of the body is —
 - i. the relief of poverty; or
 - ii. the advancement of education; or
 - iii. the advancement of religion.
- (e) a body that is a member of a class of bodies prescribed for the purposes of this paragraph.
- (f) a body that —
 - i. is a member of a group, as defined in the *Pay-roll Tax Assessment Act 2002* Glossary, of which a body referred to in another paragraph is also a member; or
 - ii. is a related body corporate, as defined in the *Corporations Act* section 9, of a body referred to in another paragraph; or
 - iii. has as its role or dominant purpose or object the conferral of a benefit, whether financial or non-financial, on a body referred to in another paragraph.

A BODY THAT PROMOTES TRADE, INDUSTRY OR COMMERCE

- 3.8 The Bill proposes to insert the following clause (d) of ‘relevant body, exempting a body that promotes trade, industry or commerce’, and the following definition of ‘promote trade, industry or commerce’ into the three taxation Acts.
- 3.9 The scope of this clause in denying fourth limb charities taxation exemption is the main issue of contention, but not the only issue witnesses identified with this Bill.

Box 5 A body that promotes trade, industry or commerce

A reference to a relevant body is to any of the following —

- (d) a body, other than a body referred to in paragraph (a), (b), (c), or (e) that **promotes trade, industry or commerce, unless the sole or dominant purpose** of the body is —
 - i. the relief of poverty; **or**
 - ii. the advancement of education; **or**
 - iii. the advancement of religion.

promote trade, industry or commerce includes **to carry out** an undertaking **a purpose** of which includes the **promotion of**, or the advocacy for, trade, industry or commerce, whether generally or in respect of any particular kind of trade, industry or commerce [Committee emphasis, with the exception that the terms ‘promote trade, industry or commerce’ in the definition are in italics and bold in the Bill]

3.10 The OSR recognised that this exception ‘*may result in some charities being inappropriately excluded*’ and this is why the Ministerial determination process is proposed.⁵⁰

3.11 In summary, the issues raised by witnesses in relation to paragraph (d) of the definition of ‘relevant body’, which they believe have the compounding effect of making the exclusion clause too broad, are:

- 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.
- 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 (d) is too broad and may exclude first to third limb charities from taxation exemption.
- Clause (d) and the definition of ‘promote trade, industry or commerce’ confuses activities and purposes and therefore is broad in its application.

3.12 The following paragraphs deal with each of these issues in turn. As these issues are interrelated, the Committee’s conclusions, findings and recommendation in relation to

⁵⁰ Ibid.

paragraph (d) are noted at paragraphs 3.47 to 3.50, after the Committee's consideration of all issues relating to paragraph (d).

- 3.13 Assistant Professor Murray submitted that paragraph (d) could be narrowed to achieve the intended consequences of the Bill.⁵¹

The terms 'promote', 'trade', 'industry' and 'commerce'

- 3.14 These terms are not defined and take their ordinary meaning. OSR consider that the ordinary meaning of those words is '*well understood*'.⁵²

- 3.15 In evidence to the Committee, Assistant Professor Murray said that these terms have '*relatively wide meanings of uncertain ambit*'.⁵³

- 3.16 The *Macquarie Dictionary* defines:⁵⁴

- 'Promote' to mean:
 1. to advance in rank, dignity, position, etc.
 2. to further the growth, development, progress, etc., of; encourage.
 3. to help to found; originate; organise; launch (a financial undertaking, publicity campaign, etc.).
- 'Trade' in 17 ways including the following:
 1. the buying and selling, or exchanging, of commodities, either by wholesale or by retail, within a country or between countries: domestic trade; foreign trade.
 2. a purchase, sale, or exchange.
 3. a form of occupation pursued as a business or calling, as for a livelihood or profit.
 4. a skilled occupation, especially one requiring manual labour: the trade of a carpenter; the trade of a printer.
 5. people engaged in a particular line of business: a lecture of interest only to the trade.
 6. traffic; amount of dealings: a brisk trade in overcoats.
 7. market: the tourist trade.
 8. commercial occupation (as against a professional).
- 'Industry' to mean:
 1. a particular branch of trade or manufacture: the steel industry.
 2. any large-scale business activity: the tourist industry.
 3. manufacture or trade as a whole: the growth of industry in underdeveloped countries.
 4. the ownership and management of companies, factories, etc.: friction between labour and industry.
 5. systematic work or labour.
 6. assiduous activity at any work or task.

⁵¹ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p9 and Submission No. 4a from Assistant Professor Ian Murray, 15 October 2014, p3.

⁵² Answers to Questions on Notice, OSR, 5 November 2014, p4.

⁵³ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p3.

⁵⁴ *Macquarie Dictionary* online at www.macquariedictionary.com.au (viewed on 8 November 2014).

- ‘Commerce’ to include:
 1. *interchange of goods or commodities, especially on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce or internal commerce); trade; business.*
 2. *social relations.*

3.17 OSR noted that *Black’s Law Dictionary* defines:

- ‘Promote’ to mean to contribute to growth, enlargement, or prosperity of; to forward, to further; to encourage; to advance.
- ‘Trade’ to mean the act of business of buying and selling for money; traffic; barter.
- ‘Industry’ to mean any department or branch of art, occupations, or business conducted as a means of livelihood or for profit; especially one in which employees must labour and capital and is a distinct branch of trade.
- ‘Commerce’ to mean the exchange of goods, productions, or property of any kind; selling, and exchanging of articles.

3.18 Assistant Professor Murray submitted that Justice Hayne of the High Court of Australia stated, during the hearing for special leave to appeal in the matter of *Commissioner of Taxation v Word Investments Ltd*, that ‘the expression ‘commercial enterprise’ is intrinsically ambiguous’.⁵⁵

A body promotes trade, industry or commerce if a purpose includes promoting or advocating for trade, industry or commerce

3.19 The definition of ‘promote trade, industry or commerce’ requiring that only a purpose of a body must be to promote trade, industry or commerce has been described as broad and unnecessarily excluding charities.⁵⁶

3.20 The Committee was advised that the ‘a purpose’ requirement was a ‘*deliberate design feature of the legislative scheme to ensure there was no scope for dispute about the threshold test that would exclude an organisation from the exemption*’.⁵⁷ OSR advised that the test ‘*minimises opportunities that would otherwise be available to structure an*

⁵⁵ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p5, referring to the hearing for special leave to appeal in *Commissioner of Taxation v Word Investments Ltd* (2007) 164 FCR 195.

⁵⁶ Ibid, p3, and Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p9. AIM also advised that it could be a relevant body under the ‘*broad definition*’ of ‘*industry, trade or commerce*’: Submission No. 9 from AIM, 6 November 2014, p2.

⁵⁷ Submission No. 2 from OSR, 14 October 2014, p5.

organisation's objectives and operations to fall within the boundaries of the exemption'.⁵⁸

- 3.21 OSR confirmed that the effect of this amendment is that a fourth limb charity will be excluded under paragraph (d) even if the purpose of promoting trade, industry or commerce is a *minor or incidental purpose* of the charity (unless the reinclusion mechanism in paragraph (d) applies).⁵⁹
- 3.22 OSR also acknowledges that the '*a purpose*' threshold test '*may result in some legitimate charities being inappropriately excluded from exemption*'.⁶⁰ Therefore, the determination mechanism was introduced.
- 3.23 Concerns were raised by a number of witnesses and in submissions that this amendment will have a range of unintended consequences. For example:

- WACOSS submitted that:

The Council is concerned that the Bill appears to apply a 'catch-all' test relating to a purpose to 'promote trade industry or commerce' from which organisations then need to seek an individual exemption (rather than narrowly defining industry bodies). Standing Committee members should consider whether the administrative interpretation of this test could see it potentially apply to legitimate charitable organisations engaged in activities involving trade or commerce as a means of delivering better outcomes for vulnerable or excluded groups – for example, disability employment, Aboriginal organisations and others promoting the economic development of disadvantaged groups, community housing providers and charities developing or promoting social enterprise.⁶¹

- Assistant Professor Murray also provided the following examples of entities that may be impacted by paragraph (d):

I can give you a specific example of a regional development charity. This is a regional development charity that is meant to improve conditions of a community in a region of Western Australia. ... The charity is Regional Development Australia—Pilbara Inc. You

⁵⁸ Ibid.

⁵⁹ When asked by Hon Robyn McSweeney MLC 'would a fourth-limb charity be excluded under paragraph (d) even if the purpose of promoting trade, industry or commerce is a minor or incidental purpose of the charity?', OSR responded 'Yes, that would be the case and that is the reason that ministerial discretion is in place'. Nicki Suchenia, Acting Commissioner, OSR, and then Hon Robyn McSweeney MLC, Chair, Standing Committee on Legislation, *Transcript of Evidence*, 30 October 2014, p11.

⁶⁰ Submission No. 2 from OSR, 14 October 2014, p5.

⁶¹ Submission No. 7 from WACOSS, 7 October 2014, p2.

have in front of you an extract from the ACNC register, which indicates that it is registered as a charity and operates in Western Australia ... it is a charitable institution endorsed to access the following tax concessions. If it was a public benevolent institution, that would be indicated there and it is not. ... This is an example of exactly the sort of charity that I think is at risk. ... its aim is to support the growth and development of Australia's regions. ... I would be very surprised if you could not interpret those objects as including a purpose of promoting trade, industry or commerce. I think this is an example of an organisation that will clearly be out, and is going to have to reapply to come back in. ... [This] is the Pilbara, and there seem to be about seven or eight different regions in WA with bodies like this. ... [And] that is just one specific example.

[Another example is] the Argyle Diamond mine trust. That is an Indigenous trust operating in Western Australia. I know from my time in practice that there are quite a few Indigenous charitable trusts in Western Australia. Not many of them are currently registered as public benevolent institutions, and the purposes of most of those trusts are to improve the economic wellbeing of the local Indigenous population. Again, I think they are all at risk from these changes and would have to seek a beneficial body determination to come back into the state tax concessions.

*Are we basically saying that charities carrying out market activity are now at risk? So, universities, hospitals, ambulance services—the list could go on—aged care, retirement villages, child-care centres; they all carry out marketing activities. Some of them may be public benevolent institutions and saved, but certainly not all of them.*⁶²

- 3.24 The necessity of the scope of this definition as an anti-avoidance measure was questioned by Assistant Professor Murray, who stated:

If you have a narrow [exclusion] test, there will be some entities that structure themselves so that they are pretty close to the line, and they still have a purpose that is not insignificant. They could have a 40 per cent purpose of promoting trade, industry or commerce. If the test was that you must have a principal purpose of promoting trade, industry or commerce, and you had 60 per cent something else and 40 per cent trade industry or commerce, you would probably pass the test and you would not be excluded. There must be an integrity concern about organisations like that. I guess my suspicion is that it is probably going to be a small number of organisations, and there are

⁶²

Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, pp7, 10.

*general anti-avoidance rules that exist in some of these bits of state tax legislation anyway. Why do we not just rely on those general anti-avoidance rules? Why are we setting up a system that potentially is going to catch a whole lot of charities that really do not have any significant trade industry or commerce purposes at all?*⁶³

- 3.25 While all charity witnesses expressed a general concern about the width of the definition, witnesses were specific in their suggestions that it would be better to adopt a narrower exclusion for the definition of ‘promote trade, industry or commerce’. For example, Assistant Professor Murray suggested amending the definition of ‘promote trade, industry or commerce’ to provide that a ‘principal purpose’ was the threshold test for this exclusion.

- 3.26 If this amendment was made, the definition of ‘promote trade, industry or commerce’ in the three taxation Acts would read:

promote trade, industry or commerce *includes to carry out an undertaking a **principal** purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce, whether generally or in respect of any particular kind of trade, industry or commerce.*

- 3.27 Assistant Professor Murray considered that this amendment would achieve the intention of the Bill (to exclude a ‘subset of fourth-limb charities with similar characteristics to those considered in the CCI case’ as noted at paragraph 2.18), while narrowing the scope of this clause to avoid unintended consequences of the Bill. On this point, Assistant Professor Murray commented that:

I think the aim of the bill is to exclude charities that promote trade, industry or commerce, so why not say that in the bill, rather than saying something different to that? If the bill is aimed at charities with that purpose, then that must be their principal purpose. There might be arguments about charities that have 50 per cent that purpose and 50 per cent another purpose, which was raised in the Office of State Revenue submission. I would suggest that that is a pretty high-risk strategy for a charity to adopt if you are relying on a 50–50 argument, and that most charities would not set themselves up to be in that position, and that they either would have a principal purpose of promoting trade, industry and commerce or not. If they do not, then why should they be excluded under these changes?⁶⁴ ... [The] principal purpose (cautious approach) would exclude CCI.⁶⁵

⁶³ Ibid, p10.

⁶⁴ Ibid, p9.

⁶⁵ Ibid, p11.

- 3.28 According to Assistant Professor Murray, this narrower definition of promote trade, industry or commerce referring to a ‘*principal purpose*’ would have many benefits:

*The benefit of a narrower definition like this is that it would significantly reduce the preliminary concern noted above about poverty/education/religion charities with mixed poverty, education and religious purposes [see paragraphs 3.33 to 3.40 of this report] – that may not be able to establish that one of these purposes is the sole or dominant purpose. Further, it avoids the confusion between purposes and activities ... [see paragraph 3.42] as it is clear that the focus is on a purpose of promoting trade, industry or commerce. Finally, a narrower exclusion clause will mean that there is less work for the re-inclusion mechanism of a beneficial body determination [the Ministerial determination] ... there are some potential problems with this re-inclusion mechanism and so the less it is relied upon, the less problems are raised.*⁶⁶

- 3.29 Another proposed benefit of an amendment to the definition to refer to ‘*principal*’ purpose is that charities with a minor or incidental purpose of promoting trade, industry or commerce would not fall within the scope of this amended definition.
- 3.30 OSR advise that the legislative scheme is in response to the SAT decision and is intended to exclude CCI and charities with ‘*similar characteristics*’. OSR oppose inserting the term ‘dominant’ or ‘principal’ purpose in the definition:

*I suppose in the SAT’s case, the SAT found the CCI’s dominant purpose was promoting trade, industry or commerce. If we focused on dominant only, the provisions could easily be defeated, and we have already had situations where organisations have said that they have purposes of equal importance. If you go for dominant and you have equal importance, you are out of the threshold straightaway ... And the provisions do not work*⁶⁷ ...

The CHAIR: [How] About principal purpose?

Mr Hancock: “Principal” is much the same as “dominant”.⁶⁸

- 3.31 OSR were not, based on their legal advice, prepared to provide comment to the Committee about whether amending the definition to refer to a ‘dominant purpose’

⁶⁶ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p3.

⁶⁷ Nicki Suchenia, Acting Commissioner and Murray Hancock, Director, Legislation Training and Review, OSR, *Transcript of Evidence*, 30 October 2014, p11.

⁶⁸ Nicki Suchenia, Acting Commissioner, OSR, and Hon Robyn McSweeney MLC, Chair, Standing Committee on Legislation, *Transcript of Evidence*, 30 October 2014, p12.

would exclude CCI. This was on the basis that CCI are an individual taxpayer ‘*and in terms of the confidentiality provisions, I cannot comment on their affairs*’.⁶⁹

- 3.32 It was also suggested by Assistant Professor Murray that ‘*one could go further*’ and the definition of ‘promote trade, industry or commerce’ could be amended to include the words ‘sole or dominant’ purpose so that it reads ‘sole or dominant purpose of promoting trade, industry or commerce’.⁷⁰

The retention mechanism in paragraph (d) applies if ‘the sole or dominant purpose’ of a body is the relief of poverty, or advancement of education or advancement of religion

- 3.33 Many charities have dual purposes. As previously noted, a review of the ACNC Register reported that 38 per cent of charities have two or more purposes, with 25 per cent of charities having two purposes and 13 per cent having three or more purposes.⁷¹
- 3.34 Concern was raised that paragraph (d) of the Bill (see Box 5) has the potential unintended effect of denying taxation exemption to dual purpose charities (including those with a mix of first to third limb charitable purposes) if they have as ‘*a purpose*’ the promotion of trade, industry or commerce *but* they do not meet the high ‘*sole or dominant purpose*’ retention mechanism in paragraph (d). This is because this retention mechanism in (d) requires that the body have as ‘a sole or dominant purpose’ the relief of any of the stated first, or second or third limbs of charity.
- 3.35 For example a charity with ‘a purpose’ of promoting trade, industry or commerce and a dual purpose of relieving poverty and advancing education (charity purposes 1 and 2) may lose taxation exemption. Another example of a mixed purpose charity is the Argyle Diamond Mine Trust, a charitable trust with many purposes including fourth limb purposes. Other Indigenous charitable trusts operate in Western Australia and few are currently registered as public benevolent institutions. Assistant Professor Murray is of the view that these organisations are at risk from the amendment in the Bill and would have to seek a beneficial body determination to receive state taxation concessions.⁷²
- 3.36 The Law Society of Western Australia advised that the ‘*sole or dominant purpose*’ test is a ‘*very difficult test*’ because many organisations have ancillary purposes and saw merit in changing this test.⁷³

⁶⁹ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p12.

⁷⁰ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p3.

⁷¹ The Curtin Report, p26.

⁷² Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p7.

⁷³ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p4.

- 3.37 OSR consider that if you remove the ‘*sole or dominant*’ test, it becomes too easy to avoid the provisions and the policy intent of the legislation cannot be achieved.⁷⁴
- 3.38 As previously noted, the inquiry was referred to the Committee on the assumption that the Bill would only affect fourth limb charities. Given the complexities of the Bill and charity law, the Bill may impact on first to third limb charities in certain circumstances.
- 3.39 OSR acknowledged the unintended consequences of this aspect of paragraph (d) on dual purpose charities whose purposes cover first to third limb charitable purposes and agreed to seek drafting advice to narrow the potential impact of paragraph (d) on these charities:

*I also recognise that it may be possible for an organisation to have multiple purposes of equal importance that straddle the first three limbs of the charitable purpose and, in that case, it means they do not have a dominant purpose and therefore means that they fall outside of the amendments. I think, while it is relatively rare, an amendment ... would provide some further clarity and place less reliance on the minister in relation to the excluded body determinations.*⁷⁵

*I believe there is a potential to make minor amendments to paragraph (d) to narrow its impact without detracting from the safeguards against avoidance that have been incorporated into the design. ... we have had a look at the nature of those amendments ... that would be something that we would need to seek [Parliamentary Counsel] ... advice on how be to achieve that.*⁷⁶

- 3.40 One amendment that could be considered to address the issue of first to third dual purpose charities being caught by paragraph (d) is to insert the words ‘*one or more of the following*’ into paragraph (d), which would then state:

A reference to a relevant body is to any of the following — ...

*a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the sole or dominant purpose of the body is **one or more of the following** —*

- (i) the relief of poverty; or*
- (ii) the advancement of education; or*
- (iii) the advancement of religion.*

⁷⁴ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, pp11-12.

⁷⁵ *Ibid*, p12.

⁷⁶ Answers to Questions on Notice, OSR, 5 November 2014, p4.

Definition of ‘promote trade, industry or commerce’ refers to purposes and activities

- 3.41 As previously noted, the following definition of ‘promote trade, industry or commerce’ (the central terms in paragraph (d)) is inserted into the three taxation Acts:

promote trade, industry or commerce includes to carry out an undertaking a purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce, whether generally or in respect of any particular kind of trade, industry or commerce

- 3.42 In his submission, Assistant Professor Murray considered that this definition ‘seems to require a charity to look first at its activities and then to the range of purposes of those activities, which inevitably creates a risk for any charity carrying out trading or commercial activities’ to lose tax exemption.⁷⁷

- 3.43 The Committee understands that OSR’s decision to refer to both the purpose and activities of an organisation when assessing its status was intentional. OSR does not consider that the reference in the definition ‘to carry out an undertaking’ in conjunction with the reference to ‘purpose’ is problematic.⁷⁸ This understanding is based on the following:

Ms Suchenia: there is a perception that [the definition of ‘trade, industry or commerce’] ...is mixing “activities” with “purpose”. We do not consider that the references in the legislation to “carry out an undertaking” in conjunction with the reference to “purpose” are problematic. The reason behind that is in applying the charity law principles, it is necessary to consider both the purposes and the activities. ... From our point of view, we do not see that the activities determine the purpose of the body, but rather they shed light on the purposes for which the activities are undertaken. The goal is to identify the organisation’s real purposes and all the activities in conjunction with those other things are taken into account in determining what the real purposes are of the body ...

Hon SALLY TALBOT: There is a sense in which you would accept what Professor Murray is saying. What you are indicating is that you have deliberately included both “purpose” and “activities”.

*Ms Suchenia: I do not think you can have one without the other.*⁷⁹

⁷⁷ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p1.

⁷⁸ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p7.

⁷⁹ Ibid, and Hon Sally Talbot, Member, Standing Committee on Legislation, pp7-8.

3.44 However, OSR went on to advise the Committee that it intends to issue a Revenue Ruling to address any misunderstandings. A Revenue Ruling is a statement providing an analysis of the Commissioner's interpretation of certain provisions of the legislation administered by OSR. The Commissioner advised that:

*I think there is an onus on the commissioner to clarify the difference between the promotion of trade, industry or commerce, and actually engaging in those activities.*⁸⁰

3.45 OSR further stated that:

*the distinction between the concept of the promotion of trade, industry or concept [sic, this should read commerce] and the concept of engaging in trade, industry or commerce has been a matter of some misunderstanding, and I have given an undertaking during discussions with the Western Australian Council of Social Service Inc (WACOSS) to use a revenue ruling, with relevant examples, to address this potential area of misunderstanding. It is envisaged that this would discuss the meaning of these words in an ancillary manner.*⁸¹

3.46 OSR also added:

- *We have not yet commenced drafting the revenue ruling, so we're unable to comprehensively indicate what it will say.*
- *Bearing the above point in mind, I imagine that the ruling will make the distinction between the promotion of trade, industry and commerce and engaging in trade, industry and commerce based on the former involving an organisation assisting others to grow or advance their commercial interests and the latter involving the organisation actually conducting business activities on its own account. It is only the first class of organisations that would come within the term 'promote trade, industry or commerce'.*
- *The definitions for the words 'trade', 'industry' and 'commerce' will be discussed in the context of setting out the meaning of 'promote trade, industry or commerce'. Their meaning will most likely be drawn from dictionary definitions and possibly supplemented with any common law meaning that those terms may have accrued in the relevant context.*⁸²

⁸⁰ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p3.

⁸¹ Answers to Questions on Notice, OSR, 5 November 2014, p4.

⁸² Email from Murray Hancock, Director, Legislation Training and Review, OSR, 12 November 2014, p1.

Committee conclusions in relation to paragraph (d) of the definition of ‘relevant body’

3.47 All members of the Committee make the following findings.

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.

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

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.

3.48 A majority of the Committee makes the following recommendation.

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).

3.49 All members of the Committee make the following finding.

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’.

Conclusions of a minority of the Committee in relation to paragraph (d) of the definition of ‘relevant body’

3.50 A minority of the Committee makes the following findings and recommendations.

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.’*⁸³

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.

⁸³ *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.

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.

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 ...’.

Other matters

- 3.51 Finally, as the amendments in Supplementary Notice Paper No. 1 were made to address issues raised by WACOSS in relation to paragraph (d), WACOSS’s concerns are discussed in Chapter 4.

- 3.52 The scope of paragraph (d) is a central issue in this inquiry. Assistant Professor Murray is of the view that there is a potential for more than a small number of charities to be impacted by paragraph (d), given that there are at least 3000 fourth limb charities in Western Australia.⁸⁴ As previously noted, OSR advised that, in their view, 22 organisations ‘*may potentially*’ be impacted by the Bill as a result of paragraph (d) of the definition of ‘relevant body’ (see paragraph 2.24 and Appendix 3).
- 3.53 The following parts of this report outline specific examples of charities that are concerned about the potential impact of paragraph (d) of the definition of ‘relevant body’ in the Bill on their organisations. These examples are relevant to the Committee’s task of determining whether the Bill imposes unintended consequences on fourth limb charities.

Agricultural associations, growers’ associations and cooperatives

- 3.54 During the referral debate, Hon Colin Holt MLC inquired whether ‘*agricultural associations, growers’ associations and cooperatives*’ are affected by the Bill.⁸⁵
- 3.55 CBH, ‘*Australia’s biggest cooperative*’,⁸⁶ is a fourth limb charity currently exempt from State taxes.⁸⁷ CBH opposes the Bill, claiming that it ‘*would likely*’ be affected by the Bill ‘*due to its purpose being for the promotion of trade, industry or commerce (i.e. promotion of the grain industry)*’.⁸⁸ This would result in CBH losing State taxation exemption unless the Minister makes a determination to retain its exempt status.
- 3.56 The Committee was advised that CBH invests in supply chain infrastructure and undertakes its business operations in order to ensure Western Australian grain growers are part of an efficient, well-managed supply chain that contributes to their farm-gate returns. Over the last five years, CBH has invested over \$805 million⁸⁹ in grain supply chain infrastructure and over \$28 million on grain related research and development.⁹⁰ Under its rules, its objectives include to promote and foster the development of the Western Australian grain industry both in Australia and overseas and to promote,

⁸⁴ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p2.

⁸⁵ Hon Colin Holt MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2014, p6640.

⁸⁶ Ibid, p1.

⁸⁷ On a State taxation level, CBH has been retrospectively endorsed as a charity since 2008. It received State taxation exemption after the SAT decision. The ATO has endorsed CBH as a charity, retrospectively with effect from 1 July 2000. CBH is listed on the ACNC Register. See Anthony Liaw, Group Tax Manager, CBH, *Transcript of Evidence*, 30 October 2014, pp3 and 5, and Submission No. 8 from CBH, 29 October 2014, p3.

⁸⁸ Submission No. 8 from CBH, 28 October 2014, p3.

⁸⁹ Karlie Mucjanko, General Manager, Grower and External Relations, CBH, *Transcript of Evidence*, 30 October 2014, p2.

⁹⁰ Submission No. 8 from CBH, 28 October 2014, p2.

present and advocate the Australian grain industry in discussion and negotiation with all levels of Government.⁹¹

3.57 CBH's charitable status was affirmed by the Full Court of the Federal Court of Australia in *Commissioner of Taxation v Cooperative Bulk Handling Ltd* in 2010, which involved legal argument as to whether CBH was eligible for income tax exemption under Commonwealth law.⁹² The Court determined that CBH was established primarily for the purpose of promoting the development of Australian agricultural resources and was therefore eligible for income tax exemption.

3.58 CBH estimates that should it lose its taxation exempt status, the impact would be approximately \$8.5 million a year in payroll tax, \$1 million a year in land tax,⁹³ and an increase in grower's supply chain costs by around \$1 per tonne.⁹⁴ CBH further advised in both its submission and at a hearing:

Removal of these exemptions would add significant cost back into the Western Australian grain sector that is fundamentally dependent on exporting grain to an increasingly competitive world grain market.

These additional costs are ultimately borne by grain growers with compounding negative economic and social impact on regional Western Australian communities.

*The existing exemptions in conjunction with CBH's co-operative structure provide a key framework from which the organisation is able to support and indeed enhance Western Australia's \$3.5 billion grain industry.*⁹⁵

⁹¹ Rules of Co-operative Bulk Handling Limited ABN 29 256 604 947, at paragraphs 3.2(a) and (f), pp8-9 published at www.cbh.com.au/about-cbh/membership/membership-rules (viewed on 5 November 2014). CBH is prohibited from directly or indirectly paying any income to its members by way of dividend or bonuses.

⁹² In *Cooperative Bulk Handling Ltd v Commissioner of Taxation* [2010] FCA 508 (decision delivered on 25 May 2010), Justice Gilmour of the Federal Court of Australia found that CBH was entitled to tax exemption under s50-1 of the *Income Tax Assessment Act 1997* (Cth) on the basis that the principal, dominant or main purpose of CBH was to promote development of Australian agricultural resources by promoting development of the grain growing industry of Western Australia. The Full Court of the Federal Court dismissed the appeal by the Commissioner of Taxation in *Commissioner of Taxation v Cooperative Bulk Handling Ltd* (2010) 189 FCR 322 (decision delivered on 17 December 2010), confirming that CBH was established for the purpose of promoting the development of Australian agricultural resources and not carried on for the profit of members. The Commonwealth law is different to State taxation laws but in substance codifies common law charity law.

⁹³ Submission No. 8 from CBH, 28 October 2014, p2 and Edward Kalajzic, Chief Financial Operator, CBH, *Transcript of Evidence*, 30 October 2014, p3.

⁹⁴ Karlie Mucjanko, General Manager, Grower and External Relations, CBH, *Transcript of Evidence*, 30 October 2014, p3.

⁹⁵ Submission No. 8 from CBH, 28 October 2014, p2.

*[It is] crucial that for Western Australia to continue to enjoy the benefits of a strong export grain industry, grain growers must have access to a low-cost, efficient supply chain and healthy communities from which to live and work.*⁹⁶

*[As] you have seen with other supply chains in [the] east coast, when you stop reinvesting in the network, you have a longer term problem. ... [We] are always going to be a very strong export focused state; therefore, having a competitive supply chain for our growers is critical.*⁹⁷

3.59 In its view, the Bill misses the ‘larger picture’ in that the beneficiary of the exemption is not really CBH but the grower and rural communities;⁹⁸ that is, community benefit.

3.60 OSR did not affirmatively answer the Committee’s question as to whether the Bill would adversely affect CBH. However, in its view CBH ‘would likely’ be within the intent and effect of the Bill. OSR advised:

*it is the intention of Government to exclude from the exemptions any fourth-limb charity that has as a purpose the promotion of trade, industry or commerce. Accordingly, if a future assessment of the facts and circumstances finds that CBH was a charity and exceeds the thresholds that trigger a State tax liability, then based on the terms of its current constitution and other publicly available information, it would likely to be [sic] within the Government’s intent.*⁹⁹

3.61 CBH noted that the amendments proposed by the Government in Supplementary Notice Paper No. 1, to retain tax exemption for public benevolent institutions, will not apply to it.

3.62 Taking into account the advice from OSR, the Committee believes that CBH would likely fall within the scope of paragraph (d) and therefore be a ‘relevant body’ because a purpose of CBH is to promote trade, industry or commerce. A ‘relevant body’ loses its taxation exemptions under paragraph (d).

3.63 Despite questions to CBH and OSR, the Committee was unable to determine if any other agricultural associations, growers’ associations and cooperatives would be adversely impacted by the Bill. Notwithstanding this, OSR advised the Committee in

⁹⁶ Karlie Mucjanko, General Manager, Grower and External Relations, CBH Group, *Transcript of Evidence*, 30 October 2014, p3.

⁹⁷ Edward Kalajzic, Chief Financial Operator, CBH, *Transcript of Evidence*, 30 October 2014, p3.

⁹⁸ Anthony Liaw, Group Tax Manager, CBH, *Transcript of Evidence*, 30 October 2014, p4.

⁹⁹ Answers to Questions on Notice, OSR, 5 November 2014, p12.

relation to the Bill's potential impact on agricultural associations and growers' associations and cooperatives:

It is not possible to identify which agricultural associations and growers' associations and cooperatives are fourth-limb charities without the constituent documents and actual activities and purpose of each particular organisation being examined ... In order to be a fourth-limb charity, these organisations would need to establish their charitable status by proving they have a dominant purpose that is beneficial to the community at large (as distinct from just its members). ...

It is possible that some agricultural associations and grower's associations and cooperatives will be adversely affected by the amendments [assuming they are charities and meet tax liability thresholds].¹⁰⁰

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.

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.

Not-for-profit aged care providers

3.64 The Committee received evidence from Leading Age Services Australia, Western Australia (**Leading Age Services**) which highlighted its concerns that the Bill 'could' deny not-for-profit aged care providers which are charities State taxation

¹⁰⁰ Ibid, p3.

exemption.¹⁰¹ Leading Age Services advised the Committee at a hearing that, in its view, aged care falls within the fourth limb of charity:

*aged care falls into the fourth-limb category, because we are not covered by the other three areas, so that is a concern for us.*¹⁰²

*With the way it [paragraph (d)] is currently worded, I just do not have confidence that we will be protected from it. So, it is about security for the sector, it is about security for the people they care for, that we will not have an unexpected change in the business environment we all operate in.*¹⁰³

- 3.65 Leading Age Services further advised that the impact of paying payroll tax on its members, which include suppliers of homecare, residential care and retirement villages, *‘would have huge ramifications for aged care providers and the people they care for’*.¹⁰⁴ They added that over *‘16,000 Western Australians receive residential aged care in Western Australia, all of whom are impacted by any reduced funding through removed tax exemptions’*.¹⁰⁵ To address any doubt that aged care providers are impacted by the Bill, Leading Age Services recommend inserting into paragraph (d) of the definition of ‘relevant body’ (which excludes poverty, education and religion charities from that clause), the following subparagraph (iv) exception, to retain taxation exemption for bodies with the sole or dominant purpose of:

(iv) the provision of aged care services.

- 3.66 In response to the concerns raised by Leading Age Service, OSR advised the Committee that *‘it is not the intention of the Government for not-for-profit aged cared providers to be excluded from the exemptions’*.¹⁰⁶ As such, the Committee is of the view that any impact on not-for-profit aged care providers would be an unintended consequence of the Bill.

¹⁰¹ Submission No. 1 from Leading Age Services, 9 October 2014, p1. The Bill would only impact on not-for-profit aged care providers that are charities currently receiving taxation exemptions. The Committee understands that private providers are unlikely to meet the legal criteria of a charity if they distribute profits to private persons. Leading Age Services emphasised the adverse cost and real world impact of the Commonwealth Government’s decision to remove \$653 million in payroll tax subsidy from entities in the industry subject to this tax. This impact is comparable to charities losing State taxation exemption. The Curtin Report noted that 13 per cent of charities were active in aged care: The Curtin Report, p31.

¹⁰² Elizabeth Cameron, Chief Executive Officer, Leading Age Services, *Transcript of Evidence*, 30 October 2014, p3.

¹⁰³ Ibid, p5.

¹⁰⁴ Submission No. 1 from Leading Age Services, 9 October 2014, p2.

¹⁰⁵ Elizabeth Cameron, Chief Executive Officer, Leading Age Services, *Transcript of Evidence*, 30 October 2014, p2.

¹⁰⁶ Answers to Questions on Notice, OSR, 5 November 2014, p12.

3.67 OSR does not consider the suggested amendment necessary because, in their view, it is ‘*highly unlikely that first limb charities or PBIs [public benevolent institutions] would fall within the scope of paragraph (d)*’ and, in the ‘*unlikely event that they did, the Minister has the discretion to reinstate their exempt status*’.¹⁰⁷ OSR considers it likely that aged care providers would *not* be excluded from taxation exemption because:

- they would pursue purposes under the first limb (the ‘relief of poverty’ exemption) to paragraph (d) and therefore the exclusion would not apply, or
- if the amendments in Supplementary Notice Paper No. 1 were enacted (which propose to delete the first limb of the paragraph (d) exemption), they are ‘*highly likely*’ to be a ‘public benevolent institution’ and therefore taxation exempt.

3.68 As OSR explained:

To the extent that aged care providers may promote industry, trade or commerce and pursue charitable purposes primarily under the fourth limb, they would be excluded under paragraph (d). However, it is far more likely that aged care providers would be pursuing purposes under the first limb.

The purpose of care for the aged is accepted as falling within the ‘relief of poverty’ limb. In charities law, the term ‘relief of poverty’ is a shorthand reference to the first limb. It encompasses more than poverty in the limited sense of that work, including the relief for the aged and impotent. ...

[A search of aged care service providers on the ACNC Register noted] [all] but one were listed as public benevolent institutions (PBIs), with the other pending further classification.

*Assuming the proposed [Supplementary Notice Paper] ... amendments to specifically exclude PBIs and like organisations or a redrafted alternative is included [the Supplementary Notice Paper No. 1 amendments] it is considered highly unlikely that first limb charities or PBIs would fall within the scope of paragraph (d) of the definition of ‘relevant body’.*¹⁰⁸

3.69 On the question of whether the amendments to Supplementary Notice Paper No. 1, which propose to reinstate taxation status to public benevolent institutions, would

¹⁰⁷ Ibid, p5.

¹⁰⁸ Answers to Questions on Notice, OSR, 5 November 2014, p5. Footnotes in the response are omitted.

impact on aged care providers, Assistant Professor Murray was of the view that most, but not all, would be ‘saved’ by these amendments:

*I only spoke to several advisers, but the several advisers that I did speak to all thought of several examples they had of current clients that were non-public benevolent institutions doing these sorts of things, so whether it was aged care, retirement villages, provision of unemployment assistance, most will be saved as public benevolent institutions, but not all, and it is not an insignificant number that are going to fall outside of that public benevolent institution.*¹⁰⁹

- 3.70 Leading Age Services was of the view that the proposed public benevolent institution inclusion would not apply to not-for-profit aged care homes, which are listed as charities.¹¹⁰
- 3.71 This difference in views regarding the potential impact of the Bill on not-for-profit aged care providers demonstrates the complexity of charity law and the context in which the Bill operates.

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.

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’.

¹⁰⁹ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, pp8-9.

¹¹⁰ Elizabeth Cameron, Chief Executive Officer, Leading Age Services, *Transcript of Evidence*, 30 October 2014, p6.

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.

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.

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.

PROFESSIONAL ASSOCIATIONS

3.72 The Second Reading Speech stated that one of the main purposes of the Bill was to exclude professional associations from taxation exemption. The OSR also stated in its submission that *‘it was also considered appropriate that professional associations be excluded from the exemptions on the basis that such organisations are generally heavily focused on providing services to members.’*¹¹¹

3.73 As previously noted, OSR identified eight organisations that *‘may potentially’* be impacted by the Bill as a result of paragraph (c) of the definition of ‘relevant body’ (see paragraph 2.24 and Appendix 3).

3.74 The Bill proposes to insert the following exclusion clause and definition of ‘professional association’ into the three taxation Acts.

¹¹¹ Submission No. 2 from OSR, 14 October 2014, p4.

Box 6**Professional Associations**

A reference to a relevant body is to any of the following —

(c) a professional association

Professional association means a body or organisation, whether incorporated or unincorporated, having as **one of its objects or activities** the promotion of the interests of its members in any profession. [Committee emphasis]

- 3.75 The effect of the Bill, as noted in the Explanatory Memorandum to the Bill, is that a ‘*professional association claiming to have a dominant purpose being the advancement of education* [that is, a second limb charity] *would still be a relevant body and not eligible for an exemption.*’¹¹²
- 3.76 The definition of ‘professional association’ in the Bill is clearly drafted broadly to exclude any professional association that is a charity from taxation exemption if *one* of its objects *or* activities is the promotion of the interests of its members. It is difficult to imagine a professional association that would not fall within the scope of this definition. OSR considered that the broad and clear definition is intended and achieves the Government’s policy that professional bodies should not be entitled to taxation exemption. They noted that if ‘sole or dominant’ was the threshold test in the definition, it becomes relatively easy to avoid the provisions.¹¹³
- 3.77 Assistant Professor Murray advised the Committee that ‘*not an insignificant number of ... [professional associations which are charities] will be picked up as professional associations*’ in the Bill (assuming that they are liable to pay State taxes because they meet the relevant taxation thresholds).¹¹⁴ Assistant Professor Murray added that ‘*there are a number of health-related professional associations—royal colleges of surgeons, physicians and nursing—whose main purpose has been found to be to relieve human suffering, not to benefit their members. ... So there are quite a few professional associations that are charities*’.¹¹⁵
- 3.78 The Australian Institute of Management Western Australia (AIM), a fourth limb charity, submitted that it may be a ‘relevant body’ under the ‘*all encompassing*’¹¹⁶ definition of a ‘professional association’ in the Bill because *an* object of AIM is to promote the interests of its members (paragraph (c)). (They also consider that they

¹¹² Explanatory Memorandum to the Bill, p4.

¹¹³ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, pp10-11.

¹¹⁴ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p8.

¹¹⁵ Ibid. The Committee is aware that the Royal College of Surgeons and Australian College of Nursing Ltd are listed on the ACNC Register.

¹¹⁶ Submission No. 9 from AIM, 6 November 2014, p1.

may also fall under the ‘*broad definition*’ of ‘trade, industry or commerce’ and therefore be denied taxation exemption under paragraph (d)).¹¹⁷

3.79 AIM also raised that a consequence of this characterisation would be that the *second limb* charity they operate, the Australian Institution of Management Human Resources Development (AIMHDR)¹¹⁸ would also lose its tax exemption status because AIM and AIMHDR are in the same payroll group. (This is dealt with further under paragraph (f) of the definition of ‘relevant body’).

3.80 The Committee also received evidence from Engineers Australia who believes that it will lose its State taxation status as a consequence of the Bill.¹¹⁹ Engineers Australia is constituted by Royal Charter to advance the science and practice of engineering for the benefit of the community. Engineers Australia advised the Committee that it runs Australia’s largest outreach program *EngQuest*, a community school program to advance education, and is involved in the education sector through the accreditation of university courses.¹²⁰

3.81 A central concern of Engineers Australia is that:

*The Bill employs the most narrow and misleading definition of ‘professional association’ that grossly misstates their role in society and looks to deliberately and simplistically focus on service to individuals (i.e. members) over the very obvious and long-standing community services and collective service roles that we perform.*¹²¹

3.82 They also explained:

*There are professional associations that are member focused and deliver primarily services to members and exist for their members. Engineers Australia is not one of those; Engineers Australia actually exists for the community and for the benefit of the community.*¹²²

¹¹⁷ AIM operates to promote the management profession in Western Australia: Submission No. 9 from AIM, 6 November 2014, p1.

¹¹⁸ The submission advised that AIMHDR has been recognised by the OSR. The resources of the AIM group are predominantly allocated towards AIMHDR: Submission No. 9 from AIM, 6 November 2014, p2.

¹¹⁹ Engineers Australia is exempt from payroll tax in Western Australia, and is payroll and income tax exempt in other jurisdictions in Australia. When notified of payroll exemption in Western Australia, in the last 12 months, Engineers Australia was not advised under what head of charity it was exempted under but this is likely to be under the fourth limb of charity: Michael Allen, Executive General Manager, Corporate Services, Engineers Australia, *Transcript of Evidence*, 30 October 2014, pp 3, 4.

¹²⁰ Michael Allen, Executive General Manager, Corporate Services, Engineers Australia, *Transcript of Evidence*, 30 October 2014, p3.

¹²¹ Submission No. 5 from Engineers Australia, 15 October 2014, p2.

¹²² Michael Allen, Executive General Manager, Corporate Services, Engineers Australia, *Transcript of Evidence*, 30 October 2014, p3.

3.83 Engineers Australia submitted that:

*the Bill will have unintended consequences for the Western Australian community and economy ... by making Western Australia less attractive for certain charities to operate, it can only have negative consequences on the Western Australian community.*¹²³

[The Bill] could strongly and fundamentally challenge the operations of many organisations, including organisations like Engineers Australia ...

*With governments across Australia now openly recognising the critical importance of supporting education in the areas of science, technology, engineering and mathematics (STEM), organisations like Engineers Australia will play an ever-increasing role in promotion and growth in this area.*¹²⁴

- 3.84 In relation to the intended consequences of this exception in the Bill, it appears that because professional associations are, in the words of OSR, ‘*generally heavily focused on providing services to members*’ (see paragraph 3.72), the Bill has adopted an expansive drafting approach in the broad definition of ‘professional association’. This excludes *all* such associations, including those that are fourth limb charities from State taxation exemption, unless the Minister determines otherwise.
- 3.85 Excluding all professional associations was an intended consequence of the Bill. As noted above, it appears from evidence that the basis of this exclusion is that these associations are ‘*generally heavily focused on providing services to members*’. However, this may not accurately reflect the activities of all professional associations.
- 3.86 Unlike, a trade union or political party (paragraphs (a) and (b) of ‘relevant body’), a professional association that is a fourth limb charity may apply to the Minister for a determination to retain their taxation exempt status.

¹²³ Michael Allen, Executive General Manager, Corporate Services, Engineers Australia, *Transcript of Evidence*, 30 October 2014, p1. Mr Allen also stated that Engineers Australia is committed to having an on-the-ground presence in Western Australia, even if the Bill is enacted: *Ibid*.

¹²⁴ Submission No. 5 from Engineers Australia, 15 October 2014, p1.

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.

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.

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.

TRADE UNIONS

3.87 The Bill proposes to insert the following exclusion clause and definition of ‘trade union’ into the three taxation Acts.

Box 7

Trade unions

A reference to a relevant body is to any of the following —

(b) a trade union

Trade union means any of the following —

(a) an organisation registered under the *Industrial Relations Act 1979*;

- (b) an association of employees registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);
- (c) an association of employees registered or recognised as a trade union (however described) under the law of another State or a Territory;
- (d) an association of employees a principal purpose of which is the protections and promotions of the employees' interests in matters concerning their employment.

3.88 The Second Reading Speech states that:

*Although trade unions and political parties do not currently fall within the common law definition of a charity, the legislation will specifically exclude these organisations from obtaining an exemption in the event of any future expansion of the definition of a charity to these classes of organisations.*¹²⁵

3.89 That is, this is preemptive legislation that proposes to 'remove' a tax exemption that does not exist *in the event* of any future expansion of the definition of charity. As Assistant Professor Murray noted, trade unions '*are not going to be charities*' (see paragraph 3.93).

3.90 The Committee heard evidence from UnionsWA, which raised concerns that trade unions were inappropriately and unfairly targeted in the Bill, because:

- they are the subject of preemptive legislation;¹²⁶ and
- there are possible unintended consequences of the Bill on union *related* entities that operate as charities.

3.91 The Committee recognises that the Government's policy decision to include unions in preemptive legislation is not part of the referral. However, the Committee received evidence of possible unintended consequences on union related entities that operate as fourth limb charities.

3.92 UnionsWA was concerned that charities related to a trade union would be denied taxation exemption because of the 'related provisions' in paragraph (f) of the definition of 'relevant body'. In particular, they noted that the trade union exclusion (at paragraph (c)), read with paragraph (f)(ii) of the definition of 'relevant body' denies a body that is 'a related body corporate', as defined in the *Corporations Act*

¹²⁵ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5723.

¹²⁶ UnionsWA submitted that '*there is no suggestion in case law that unions may be regarded as charities now or at any point in the future*': Submission No. 6 from UnionsWA, 15 October 2014, p2.

2001 (Cth) section 9, of a trade union taxation exemption. That is, that a charity related to a union would be a ‘relevant body’ and denied taxation exemption solely because it is related to a trade union. Unions WA argue that if trade unions were not excluded in the Bill, then these related charities which do not promote trade, industry or commerce would remain taxation exempt.

- 3.93 In relation to the pre-emptive aspect of excluding trade unions and the potential of capturing charitable related bodies solely because of their trade union connection, Assistant Professor Murray stated:

*Why are we referring to political parties and trade unions? They are not going to be charities. But the problem is if we include them, then any related body that is a charity to them is excluded as well. It would not be unheard of for trade unions to have linked affiliated educational charities, for instance. Why are we now excluding those from getting state tax concession benefits just because they are a related entity to a trade union? So, including trade unions and political parties does not seem to add much, apart from picking up all the related bodies that would otherwise be charities eligible for state tax concessions.*¹²⁷

- 3.94 In relation to the concern regarding charities related to unions, UnionsWA advised that it is ‘relatively common for organisations to establish separate legal entities that deal with specific purposes, which may be charitable’,¹²⁸ and that:

Trade unions in particular have a long history of being involved in providing aid, [and] support ... For example, the ACTU has established an overseas aid organisation known as APHEDA. APHEDA does not operate in Western Australia or pay payroll tax, but it is indeed an example of trade unions being involved in charitable works and having organisations and related bodies that undertake that. In Western Australia, our predecessor, the Trades and Labour Council, established an organisation, commonly known as the Welfare Rights and Advocacy Service, as a way of providing assistance and relief to people, not in the context of their workplace, but in the context of their broader place in society. Individual unions are also engaged in community and charitable works. I will briefly mention two. The CFMEU provides support through an organisation called Mates in Construction, which is around addressing mental health and suicide issues for people involved in construction work.

¹²⁷ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p11.

¹²⁸ Submission No. 6 from UnionsWA, 15 October 2014, pp2-3.

*Another organisation, the AMWU, is involved in charitable works in alleviating hunger amongst children.*¹²⁹

3.95 While UnionsWA stated that it is ‘*easily conceivable*’ that the amendments in the Bill will impact on charities established by unions in the future, preventing bodies from establishing purely charitable, but related, organisations.¹³⁰ The Committee is also aware that Mates in Construction and Feed the Little Children are listed on the ACNC Register.

3.96 OSR confirmed that charities related to a trade union are themselves a ‘relevant body’ and therefore lose their taxation exemption. However, OSR advised that, unlike trade unions, a charity related to a trade union will be able to seek a Ministerial discretion to retain taxation exemption. OSR advised:

The assessment of UnionsWA is correct. The provisions operate to exclude a related body of a trade union ... from the exemption in the first instance.

A charitable organisation that is related to a trade union ... can apply to the Minister for a beneficial body determination (reinstatement of their exempt status).

*It is an intended outcome of the legislation for the reasons set out in ... my letter dated 4 November 2014. [This stated that ‘the purpose of paragraph (f) is to prevent an organisation from splitting its activities into multiple entities in order to continue to claim the exemptions indirectly, either in whole or part, or that are established to fund the excluded body’]*¹³¹

*To be affected by the amendments, the related body would need to be a charity and have a liability in its own right.*¹³²

3.97 OSR confirmed that a related body can seek a Ministerial determination as it is categorised as a paragraph (f) ‘relevant body’, not a paragraph (b) ‘relevant body’.¹³³

3.98 The SAT decision stated that ‘*there is no general doctrine in Australian law that excludes ‘political objects’ from charitable purposes*’.¹³⁴

¹²⁹ Meredith Hammat, Secretary, UnionsWA, *Transcript of Evidence*, 30 October 2014, p3.

¹³⁰ Ibid, p3. Ms Hammat was not aware of the legal structures of these organisations and if they were charities or not. They were provided as examples of the broad range of work that unions are involved in. Ms Hammat was unable to state if any union in Western Australia would presently be affected by the Bill: Ibid, pp3-4.

¹³¹ Answers to Questions on Notice, OSR, 4 November 2014, p8.

¹³² Email from Murray Hancock, Director, Legislation Training and Review, OSR, 18 November 2014, p3.

¹³³ Ibid at footnote 2.

- 3.99 A minority of the Committee therefore questions why trade unions (and political parties) are the only category of relevant bodies in the Bill denied the opportunity to seek a Ministerial determination.

Finding 13: The Bill excludes trade unions from State taxation exemption as a pre-emptive 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.

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.

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.

¹³⁴ *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 at [11].

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.

RELATED BODIES ARE ALSO A ‘RELEVANT BODY’

3.100 The Bill proposes to insert the following ‘related body’ exclusion clause into the three taxation Acts.

Box 8**Related bodies**

A reference to a relevant body is to any of the following —

- (f) a body that —
- i. is a member of a group, as defined in the *Pay-roll Tax Assessment Act 2002* Glossary, of which a body referred to in another paragraph is also a member; or
 - ii. is a related body corporate, as defined in the *Corporations Act* section 9, of a body referred to in another paragraph; or
 - iii. has as its role or dominant purpose or object the conferral of a benefit, whether financial or non-financial, on a body referred to in another paragraph.

3.101 The effect of paragraph (f) is that certain related bodies are themselves a relevant body. That is, an entity will lose taxation exemption if it is related (as defined) to another entity that falls within another category in the definition of ‘relevant body’. Therefore, the non-exempt status of a trade union, professional association, a body with a purpose of trade, industry or commerce or any class of bodies excluded by regulation, has the effect of making the related body also not taxation exempt (unless a Ministerial determination is in force).

3.102 Many witnesses, including The Law Society of Western Australia, expressed concerns about the scope and rationale of paragraph (f) in denying taxation exemption.¹³⁵ Issues relating to this clause have also been noted in other parts of this Chapter.

3.103 OSR advised that clause (f) is an anti-avoidance measure:

¹³⁵ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p4.

I think the provisions in related organisations are driven very much by us sitting down and saying, “If these provisions are put in, what is the next step of these organisations to try to avoid them?” The related entity is a very obvious example. If you have an organisation that is itself going to be subject to these provisions, then you set up a subsidiary and make the subsidiary the charitable organisation and suddenly you have defeated the purpose of the exemption. The related entity provisions in here are about us looking at it. You try to deal with the threshold issue. Next, how do we deal with the avoidance opportunities?¹³⁶

[The purpose of paragraph (f) is] to prevent an organisation from splitting its activities into multiple entities in order to continue to claim the exemptions indirectly, either in whole or part, or that are established to fund the excluded body.¹³⁷

- 3.104 OSR acknowledged that ‘it is possible that a body that is related to a relevant body may unintentionally be excluded from the exemption under paragraph (f)’, but that the Ministerial discretion to retain taxation exemption exists.¹³⁸ This, again, is a recurrent theme in the legislative scheme of the Bill: that there may be unintended consequences but the discretion exists. (A minority of the Committee’s views on the problems with the Ministerial discretion process are discussed further at Chapter 5)
- 3.105 None of the organisations on the list of 30 fourth limb charities currently taxation exempt which OSR considers may potentially lose their taxation exemption under the Bill were stated to be as a result of the related body provisions in paragraph (f) (the list in Appendix 3 only refers to paragraph (c) and (d) entities potentially being denied exemption).
- 3.106 The impact of the related body provisions in paragraph (f) is partly determined by the scope of the other paragraphs in the definition of ‘relevant body’. For example, the broader the scope of the ‘promote trade, industry or commerce’ exception at paragraph (d), the greater the potential for (f) to capture more ‘related bodies’.
- 3.107 The two previous considerations only exacerbated the concerns of a minority of the Committee that the Bill had been poorly informed as a result of the incomplete information about the charity sector in Western Australia (see paragraph 2.27).

¹³⁶ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p9.

¹³⁷ Answers to Questions on Notice, OSR, 5 November 2014, p8.

¹³⁸ Ibid.

- 3.108 The grouping provisions in paragraph (f)(iii) were described as ‘*reasonably narrowly targeted*’ and are not discussed further in this report.¹³⁹

Paragraph (f)(i) — Payroll tax grouping

- 3.109 The effect of proposed paragraph (f)(i) is that a charity that is a member of a group, as defined in the *Pay-roll Tax Assessment Act 2002* Glossary, related to a ‘relevant body’ will also be denied taxation exemption under this provision.
- 3.110 The complexity of this clause, and the grouping provisions in taxation law it refers to, were described by Assistant Professor Murray as follows:

The grouping provisions raise real risks for charities that operate in groups, as is common for many of the larger charities. After all, many of the reasons, such as risk quarantining and management focus, that underpin the use of corporate groups in the for-profit sector can apply to charities carrying out activities. ...

*Grouping provisions are in fact very complicated and potentially very broad. By way of example, employees that are shared between charities may put both at risk of being grouped.*¹⁴⁰

- 3.111 Assistant Professor Murray noted that while paragraph (f) may be proposed for integrity (anti-avoidance) reasons, land tax, land duty and payroll tax, at least primarily, are the liability of the entity itself, not the members of the group.

*It is only if that entity does not pay that you start looking to other members of the group. So, again, it is not entirely clear why we are grouping. If you have a separate legal entity that is a charity, and it has got a purpose that does not come within those provisions, why are we grouping and excluding them? That just was not clear.*¹⁴¹

- 3.112 In response to these concerns, OSR advised that it considers that very few grouped entities would be impacted:

It is very unusual for charities, there will be some, to have—if they are genuine charities, they would be exempt anyway. It would not be common for them to have multiple or subsidiary-type organisations. But for payroll tax purposes, if they are, we could identify them, but I

¹³⁹ Submission No. 4b from Assistant Professor Ian Murray, Faculty of Law, UWA, 7 November 2014, p3.

¹⁴⁰ Ibid, p2.

¹⁴¹ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p11.

*doubt whether we would have any grouped at the moment, or potentially one.*¹⁴²

3.113 The impact of grouping under proposed clause (f)(i) is not limited to fourth limb charities. Any charity that falls within paragraph (f) is denied taxation exemption status.

3.114 The Australian Institute of Management Western Australia (AIM), a fourth limb charity, advised the Committee that it believed that an unintended consequence of this clause of the Bill would be to deny the *second limb* charity it operates, the Australian Institution of Management Human Resources Development (AIMHDR) tax exemption, if AIM is a ‘relevant body’.¹⁴³ This is because AIM and AIMHDR are in the same payroll group. (See paragraph 3.78 as to why AIM considered it may be a relevant body).

3.115 If the Bill impacts on first to third limb charities, the Committee believes that this would be an unintended consequence of the Bill because the Bill was referred to the Committee on the assumption that only fourth limb charities were impacted. As the Second Reading Speech stated:

*I stress 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.*¹⁴⁴

3.116 As AIM submits:

*the stated intention of this Bill ... is to restrict ‘fourth-limb’ charities from accessing state tax concessions. The impact on AIMHRD is an example of an unintended consequence of the Bill, where a body which is entirely charitable as an education institution will be caught by the amendments to the fourth limb charity definition.*¹⁴⁵

¹⁴² Murray Hancock, Director, Legislation Training and Review, OSR, *Transcript of Evidence*, 30 October 2014, p9.

¹⁴³ As noted at footnotes 116 and 117, AIM operates to promote the management profession in Western Australia and the resources of the AIM group are predominantly allocated towards AIMHDR. AIMHDR has been recognised by the OSR: Submission No. 9 from AIM, 6 November 2014, pp1, 2.

¹⁴⁴ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5723.

¹⁴⁵ Submission No. 9 from AIM, 6 November 2014, p1.

Paragraph (f)(ii) — Corporations Act grouping

3.117 Paragraph (f)(ii), inserted into all three taxation Acts, provides that a body that is ‘a related body corporate, as defined in the Corporations Act section 9, of a body referred to in another paragraph’ is also a relevant body.

3.118 OSR advised that this related body test:

is generally determined based on the control of the composition of the board of the entity, voting control or holding more than half of the issued share capital of a body. Specifically, it extends the inclusion to incorporated and unincorporated bodies that may not otherwise be captured by sub-paragraphs (i) and (iii).¹⁴⁶

3.119 Unions WA submitted that where a related body entity exists:

it is unclear why that relationship should strip the related body corporate of its charitable status provided that it continues to carry on a charitable purpose ... so long as an organisation carries on a charitable purpose as defined at law, it should be entitled to the applicable tax status.¹⁴⁷

3.120 It is not known if the Government considered the impact of the Bill on any charity that is related to a professional association, which, under the Bill, will also be denied taxation exemption.

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.

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).

¹⁴⁶ Answers to Questions on Notice, OSR, 5 November 2014, p8.

¹⁴⁷ Submission No. 6 from UnionsWA, 15 October 2014, p3.

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.

THE IMPACT OF PROPOSED AMENDMENTS TO THE *DUTIES ACT 2008* ON CHARITABLE TRUSTS

3.121 A further grouping issue with the Bill is the unintended consequence of the amendments to the *Duties Act 2008* on discretionary trusts. The OSR has agreed to amend the Bill to address this issue.

3.122 As well as relevant bodies being excluded from land duty transaction exemption, a body *related* to a relevant body is excluded from accessing the land duty exemption by the proposed amendments to sections 95(2) and (3) of the *Duties Act 2008* (see Box 1). OSR described this as an important anti-avoidance provision, to avoid the situation, for example, where a buyer asks a trustee to purchase property to avoid land duty.¹⁴⁸

3.123 However, the amendments appear to put all charitable discretionary trusts at risk from losing land duty exemption if they have a ‘relevant body’ *potential* beneficiary because:

- There are no exclusions provided in the *Duties Act 2008*, and a beneficial body determination is not possible as the related body is not itself a relevant body. Therefore, if any beneficiary or potential beneficiary of the trust is a relevant body then the exemption from land duty is denied to *all* related bodies.

¹⁴⁸ Murray Hancock, Director, Legislation Training and Review, OSR, *Transcript of Evidence*, 30 October 2014, p10.

- Many charitable trusts confer on the trustees a discretion to distribute to any charitable entity. These trusts are, in the view of The Law Society of Western Australia, ‘*very common and include trusts established under wills, trusts established as charitable foundations and trusts established as ancillary funds*¹⁴⁹ to attract concessions under the Commonwealth Tax Acts’.¹⁵⁰

3.124 The Law Society added in evidence and at a hearing:

[These trusts] *usually concentrate on a specific area of interest to people. It might be Indigenous welfare, it might be education, it might be music scholarships, but they have this wide range.*¹⁵¹

*Any of these [trusts] might buy or hold land for use in its charitable purposes or as an investment to provide income to be applied for its chosen charitable purposes.*¹⁵²

3.125 The Law Society of Western Australia representatives noted the society as an example of an organisation that administers trusts with charitable purposes, including its administration of a Public Purposes Trust, which distributes grants through an independent process, and the Chief Justice’s Youth Appeal Trust, which applies money to charitable purposes relating to legal issues. Its concern was the ‘*vast range of charitable bodies out in the community who may not even be aware that they are being affected by this legislation*’.¹⁵³

3.126 If a potential beneficiary of a discretionary trust is a ‘relevant body’, the effect of the Bill would be to deny the land duty exemption to the charitable trust in these circumstances, even if there is no realistic possibility the relevant body will ever receive a distribution from the charitable trust.

3.127 OSR considered that charitable organisations set up in the discretionary trust legal framework are ‘*relatively rare*’,¹⁵⁴ but The Law Society of Western Australia stated that there are a number of trusts set up in this manner.¹⁵⁵

¹⁴⁹ Assistant Professor Ian Murray noted that every ancillary fund in Australia that has used the model trust deed (there are currently approximately 3000 ancillary funds) would likely automatically be excluded from land duty under the Bill (assuming they met thresholds to pay duty under the Act): Submission No. 4b from Assistant Professor Ian Murray, Faculty of Law, UWA, 7 November 2014, p3.

¹⁵⁰ Document tabled by The Law Society of Western Australia, 30 October 2014, p1

¹⁵¹ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p2.

¹⁵² Document tabled by The Law Society of Western Australia, 30 October 2014, p2.

¹⁵³ Adjunct Professor Greg McIntyre SC, Council Member, Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, pp3-4.

¹⁵⁴ Nicki Suchenia, Acting Commissioner, OSR, *Transcript of Evidence*, 30 October 2014, p10.

- 3.128 OSR has agreed that an amendment to the *Duties Act 2008* to provide the Commissioner with the discretion to determine that the trustee is *not* related to the relevant body could address the issue identified by The Law Society of Western Australia.
- 3.129 Without providing the proposed terms of an amendment, The Law Society of Western Australia initially suggested an amendment to section 162 of the *Duties Act 2008* but also considered that amending section 95(3) of the *Duties Act 2008*, to insert provisions similar to the Commissioner's discretion in relating to discretionary trusts provided in section 158,¹⁵⁶ as suggested by OSR, would be an acceptable alternative.¹⁵⁷ The Law Society added that another alternative was to legislate that a trust is not to be taken to be related if there is no realistic possibility that a relevant body might benefit.¹⁵⁸ A third alternative is to amend the 'related body' provisions in the 'relevant body' definition inserted into the *Duties Act 2008* at paragraph 96A(f)(ii) (see Box 1).

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.

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'.

¹⁵⁵ For example, '*The ancillary funds only exist to dole money out to other charities; they are not allowed to undertake the charitable activities themselves. But, of course, they may buy land as an investment so they can get the income to distribute to the charities. But there are an awful lot of these ancillary funds out there*': Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, pp2-3.

¹⁵⁶ Section 158, '*Extent of interest in discretionary trust*', provides the Commissioner with the discretion to determine, in a particular case, if it would be inequitable for a potential beneficiary to be treated under law as having a 100 per cent interest in the discretionary trust, that the beneficiary has no interest in the trust (or have a less than 100 per cent interest in the trust).

¹⁵⁷ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, pp2, 4.

¹⁵⁸ *Ibid*, p2.

THE REGULATION MAKING POWER

- 3.130 Paragraph (e) of the definition of ‘relevant body’ proposes to insert into the three taxation Acts the following regulation making power:

Box 9 Regulation making power

A reference to a relevant body is to any of the following —

(e) a body that is a member of a class of bodies prescribed for the purposes of this paragraph.

- 3.131 There are a number of interrelated legislative principles that apply to questions of taxation.
- 3.132 By definition, taxation is a compulsory exaction of money for public purposes, not in exchange for goods or services and not as payment of fines or penalties.¹⁵⁹ The overriding legislative principle relating to taxation is that the State derives its power to tax by consent of the people. This power to tax is subject to the constraints and limitations of the rule of law. In general terms, the rule of law is enforced through the application of appropriate checks and balances by the legislature setting the taxation law, the Executive Government administering the taxation law and the judiciary interpreting and enforcing the taxation law.
- 3.133 It is generally accepted that, because of the peculiar sensitivities of taxation law, relevant regulation making powers should be limited to purely administrative matters. The Committee acknowledges that this may not have always been the case as OSR advised that the Minister approved charity payroll taxation exemptions between 1984 and 1997.¹⁶⁰ However, this point is reflected in Fundamental Legislative Principle 12 (at Appendix 2 of this Report). The Committee has applied this generally understood evaluative standard to the regulation making power provided in the Bill.
- 3.134 Paragraph (e) of the definition of ‘relevant body’ in the Bill proposes that the Executive Government should determine which classes of entities should lose a recognised common law right to charitable status exemption from taxation. The Committee notes that this is at variance with established practice with respect to taxation status in two respects:
- Firstly, the power to change the taxation status of charities would be located in regulation and not primary legislation, as is currently the case.
 - Secondly, the interpretation of individual taxpayer taxation status would be transferred from the judiciary to a Minister or their delegate.

¹⁵⁹ *Matthews v Chicory marketing Board (Vic)* (1938) 60 CLR 263 at 276 per Latham CJ.

¹⁶⁰ Submission No. 2 from OSR, 14 October 2014, p7.

3.135 In addition, the Committee notes that the regulation making power proposed in the Bill is very wide. This would mean that individual determinations would be unlikely to be reviewable by a Court.

3.136 The Committee notes that the proposed mechanism is well intentioned. Both the Second Reading Speech and Explanatory Memorandum explain why the approach adopted in the Bill has been used. It is suggested in these documents that a ‘quick response’ to future developments in the common law by regulation has great efficiency benefits as follows:

*a regulation-making power will allow other classes of organisations to be excluded from the exemptions. This will allow the Government to quickly respond to any continued expansion of the fourth limb charity category to other types of organisations for which a state tax exemption is considered inappropriate.*¹⁶¹

*It is not intended at this time to make any such prescriptions. However, should the common law definition of a charity expand in the future to include other classes of organisations, the regulation making power will allow a quick response to exclude a class of organisation in respect of which it is not considered appropriate that it should benefit from the exemption.*¹⁶²

3.137 In this respect, the OSR also raised timing issues and revenue concerns as reasons why the regulation methodology should be preferred. The OSR noted that the regulations would be subject to the scrutiny of both Houses of Parliament. OSR also indicated that providing legislative guidelines to the regulation making power is ‘problematic’:

Amending the Act has long time lags associated with it, resulting in potential revenue leakage. Discussion on this has already taken place during the LA debate. ... The regulation making process requires the scrutiny of both Houses of Parliament and there remains the power of the Minister to reinstate the exempt status of an organisation that is unintentionally excluded from the exemptions.

[With guidelines] there is a risk that being too prescriptive in these matters will result in not being able to use the legislation to implement the desired Government policy, which would be a perverse and undesirable outcome. Lastly, any such guidelines would have to

¹⁶¹ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5723.

¹⁶² Explanatory Memorandum to the Bill, p4.

*conclude with a wide, catch-all provision, and this would arguably defeat the intent of any guidelines that may be put in place.*¹⁶³

3.138 The Committee has carefully considered these propositions. Nevertheless, the Committee remains concerned about the current methodology in the Bill on the basis of the principles of taxation legislation noted above.

3.139 In particular, a minority of the Committee draws the attention of the House to the following:

- Taxation generally and the taxation status of common law charities in particular is not an appropriate subject matter for regulations.

Under our constitutional arrangements, the peculiar status of taxation legislation is reflected in the fact that it can originate only in the Legislative Assembly, only a single subject matter of taxation can be legislated for in a single Act and each taxation measure is contained in a separate taxation assessment Act. As indicated above, our common law heritage of adherence to the rule of law and separation of government powers is very much respected in relation to taxation legislation. Placing the power to determine taxation status, legislate that status and administer the taxation status with a single branch of government is a significant change in the established separation of powers applying to taxation.

In addition, in the Committee's view, the proposed methodology runs contrary to Fundamental Legislative Principle 12: *'Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?'* (see Appendix 2). The Commonwealth *Legislation Handbook* provides that *'provisions imposing taxes or levies'* should be implemented only through Acts of Parliament.¹⁶⁴

- Taxation status is not a minor or administrative issue, particularly for affected organisations. It is an issue that requires full Parliamentary scrutiny.

The scrutiny of delegated legislation is necessarily limited. Typically, the principal scrutiny of regulations relates to whether or not the regulation comes within the legislative power to regulate. Also, in this instance, where the legislative power to regulate is expressed in such broad terms, there would be little added scrutiny by the Joint Standing Committee on Delegated Legislation as this Committee largely considers if a regulation is *'within power'* of the legislation under its terms of reference.

¹⁶³ Answers to Questions on Notice, OSR, 5 November 2014, p7.

¹⁶⁴ Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Legislation Handbook*, 1999, p3, available at www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf.

- Considerations of flexibility and executive convenience are important. However, with respect to subject matters as important as taxation legislation and status, they are not determinative. Other considerations such as the rule of law, transparency, accountability and certainty are higher order considerations that must be given proper weight when establishing or amending a system of taxation. Assistant Professor Murray advised the Committee as follows:

*While it is understandable that the State wishes to retain flexibility to deal with future unexpected broadenings of the class of fourth limb charities in a timely fashion, again, on rule of law grounds, this does not seem best practice. The Bill ought to clearly identify a specific basis upon which future classes of fourth limb charities are to be removed, or else leave the decision, at the relevant time, to Parliament.*¹⁶⁵

- In the context of the considerable debate and disagreement on the Bill, which is centred on which charities are excluded from tax exemption, the proposed regulations could effectively circumvent this process by legislating (with no automatic requirement for Parliamentary debate) these central issues — classes of bodies who will become taxation exempt.
- The other categories of relevant ‘body’ set out in the Bill have been defined relatively broadly. The regulation making power is proposed in addition to those categories.

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.

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.

¹⁶⁵

Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p7.

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’.

CHAPTER 4

THE AMENDMENTS PROPOSED IN SUPPLEMENTARY NOTICE PAPER NO. 1

- 4.1 As previously noted, WACOSS raised concerns about potential ‘unintended consequences’ of the Bill on fourth limb charities. In response, the Government circulated the proposed amendments to the Bill in Supplementary Notice Paper No. 1.
- 4.2 The Committee considered the terms of these amendments and to what extent the proposed amendments addressed the unintended consequences of the Bill.

THE PROPOSED AMENDMENTS TO THE DEFINITION OF ‘RELEVANT BODY’

- 4.3 The Supplementary Notice Paper No. 1 amendments propose to amend the definition of ‘relevant body’ as noted in Box 10.

Box 10 *The Supplementary Notice Paper No. 1 amendments*

Marked up amendments to the definition of ‘relevant body’ in the Bill proposed by the Supplementary Notice Paper No. 1, which proposes to delete (d)(i) and insert a new paragraph (2). Deletions are struck out and insertions underlined.

What is a relevant body

A reference to a relevant body is to any of the following —

- (d) a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the sole or dominant purpose of the body is —
- i. ~~the relief of poverty; or~~
 - ii. the advancement of education; or
 - iii. the advancement of religion. ...

(2) However, none of the following is a relevant body —

(a) a public benevolent institution; [or] [Committee notation]

(b) a body —

- i. the main purpose of which is a public benevolent purpose; and
- ii. that would be a public benevolent institution if all incidental or minor purpose of the body were purposes incidental to that main purpose.

- 4.4 The effect of the proposed amendment is that a public benevolent institution, or a body, the main objective of which is a public benevolent purpose *and* a body that

would be a public benevolent institution if all secondary or minor purposes of the body were purposes incidental to its main purpose, will be State taxation exempt under the three taxation Acts. OSR has advised that proposed paragraphs (2)(a) and (2)(b) are to be read separately.¹⁶⁶

4.5 Hon Peter Collier MLC, the Minister representing the Minister for Finance, advised the Legislative Council that these amendments ‘*have the intent of addressing the issues*’ raised during the House debate, which focused on the concerns raised by WACOSS.¹⁶⁷ It was not the intention of the Bill to impact on these bodies.

4.6 OSR clarified that the purpose of the amendments is as follows:

The purpose of the ... amendment is to ensure that first limb charities were not affected by the amendments.

*I believe that the amendments largely achieve this objective, however, minor amendments to address the technical issues raised by Assistant Professor Murray relating to charitable trusts and charities that have multiple purposes within the first three limbs of charitable purposes none of which are separately dominant, would improve the operations of the amendments.*¹⁶⁸

*The proposed [Supplementary Notice Paper No. 1] ... is to ensure that tax relief extends to organisations established to provide relief to the aged and impotent. Most of these organisations would be PBIs, [public benevolent institutions] which are a subset of first limb charities that provide direct relief to these classes of persons.*¹⁶⁹

4.7 Consistent with the Bill, the effect of the proposed amendments requires an understanding of the legal term ‘public benevolent institution’ and charity law.

4.8 A public benevolent institution is a subcategory that falls within the first division of *Pemsel’s* charitable purposes as an organisation that provides direct relief from poverty, sickness, disability, destitution, helplessness or other distress. Examples of institutions that may be public benevolent institutions include:

- Charities for the relief of poverty, sickness, destitution or helplessness, Indigenous organisations where their primary purpose and predominant

¹⁶⁶ Answers to Questions on Notice, OSR, 5 November 2014, p8. Paragraph (2)(b) of the amendment ‘*was to extend the exemption to organisation that carry on some other activities, but for which they would be PBIs*’: Ibid, p9.

¹⁶⁷ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2014, p6640.

¹⁶⁸ Answers to Questions on Notice, OSR, 5 November 2014, p8.

¹⁶⁹ Ibid, p9.

activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness.

- Legacy organisations that provide benevolent services to the dependants of deceased ex members of the armed forces, and youth clubs and women's health centres.¹⁷⁰
- Charities assisting with economic development for disadvantaged persons, charities with the purpose of relieving disadvantage by means of economic development and charities to benefit Indigenous persons.¹⁷¹

4.9 Assistant Professor Murray advised the Committee that for land tax and payroll tax, public benevolent institutions already have separate exemptions, so the amendment will not necessarily make a large difference for those taxes, but will make a '*big difference*' for stamp duty concessions.¹⁷²

WACOSS

4.10 Again, the referral debate identified WACOSS's concerns that the '*catch all*' test relating to the purpose to 'promote trade, industry or commerce' (paragraph (d) of the definition of 'relevant body') could potentially apply to:

- charities engaged in disability employment;
- Indigenous organisations and others promoting the economic development of disadvantaged people;
- community housing providers; and
- charities developing or promoting social enterprises.¹⁷³

4.11 In relation whether the Bill will potentially impact on WACOSS, OSR informed the Committee that:

Without making a specific assessment on all of WACOSS' operations the question cannot be categorically answered at this point. However,

¹⁷⁰ The Commissioner of Taxation ruling TR 2003/5 (Income tax and fringe benefits tax: public benevolent institutions) notes many examples of public benevolent institutions, while stating that the particular circumstances of each organisation must be considered to determine whether it is a public benevolent institution. The examples noted in the above bullet point are referred to at paragraphs 137, 145, 148 and 158 to 159 of TR 2003/5.

¹⁷¹ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p5.

¹⁷² Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p8.

¹⁷³ Letter from Steve Joske CSC, President, WACOSS to Hon Sue Ellery MLC, Leader of the Opposition in the Legislative Council, 4 September 2014, p2, Legislative Council Tabled Paper No. 1942.

... it is highly unlikely that the Bill will have application to WACOSS.¹⁷⁴

- 4.12 OSR advised that the above conclusion took into account that the Constitution of WACOSS does not disclose a specific objective of promoting trade, industry or commerce.¹⁷⁵

- 4.13 In relation to the organisations referred to by WACOSS, OSR advised:

It is difficult to comment with precision on the status of the classes of organisations to which WACOSS refers without examining the constituent documents and activities and purposes of individual organisations. However, by their description, it is likely that most would fall within the first limb of charitable purpose and would not be affected by the amendments.

In the unlikely event that any organisations of this nature are affected as fourth-limb charities by reason that they have as a purpose the promotion of trade, industry and commerce, the Ministerial discretion would be available to reinstate the exemption.

The Committee [Supplementary Notice Paper No. 1] amendments relating to PBIs and the like and other minor amendments discussed at the hearing would further reduce the likelihood of impact of the Bill on organisations of this nature.¹⁷⁶

- 4.14 The proposed Revenue Ruling to clarify the Commissioner's interpretation of paragraph (d) of the meaning of 'relevant body' also arose from WACOSS's concerns about the broad terms of paragraph (d) (see paragraphs 3.44 to 3.46).

- 4.15 Assistant Professor Murray commented in his submission that the proposed amendments in Supplementary Notice Paper No. 1 represent a 'significant improvement in relation to [the] concern about charitable purposes of [entities] assisting with economic development for disadvantaged persons',¹⁷⁷ and added in evidence at a hearing:

The proposed amendments to the bill will basically say that if you are a public benevolent institution, these changes will not affect you. It is a big change for duties. In terms of the organisations listed by

¹⁷⁴ Answers to Questions on Notice, OSR, 5 November 2014, p6.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p1.

WACOSS, most of those will probably be public benevolent institutions, but not all. ...

There is recognition that, generally, those bodies listed by WACOSS ... probably will be public benevolent institutions, or can be, but not always. Whilst the majority will be saved by that public benevolent institution category, not all will. I corresponded with some advisers in some of the national law and accounting firms to get a sense of how many they thought would fall outside of this. I only spoke to several advisers, but the several advisers that I did speak to all thought of several examples they had of current clients that were non-public benevolent institutions doing these sorts of things, so whether it was aged care, retirement villages, provision of unemployment assistance, most will be saved as public benevolent institutions, but not all, and it is not an insignificant number that are going to fall outside of that public benevolent institution category.¹⁷⁸

I know from my time in practice that there are quite a few Indigenous charitable trusts in Western Australia. Not many of them are currently registered as public benevolent institutions, and the purposes of most of those trusts are to improve the economic wellbeing of the local Indigenous population. Again, I think they are all at risk from these changes and would have to seek a beneficial body determination to come back into the state tax concessions.¹⁷⁹

- 4.16 The Committee accepts that the proposed amendments in Supplementary Notice Paper No. 1 represent a significant improvement in relation to the concerns raised by WACOSS.

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.

ISSUES

- 4.17 While the Committee accepts that the amendments proposed in Supplementary Notice Paper No. 1 represent a material improvement and go some way to addressing concerns raised about the scope of the ‘relevant body’ exclusion in the Bill, the amendments have raised a number of issues.
- 4.18 OSR confirmed that the effect of the proposed amendments is that an ‘organisation may lose its status as a public benevolent institution if it carries out secondary and

¹⁷⁸ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p8.

¹⁷⁹ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p7.

independent activities, such as promoting agriculture, to its dominant and benevolent purpose'.¹⁸⁰ Therefore, again, this provision is more likely to impact on dual purpose charities. For example, Assistant Professor Murray added at a hearing that '*an institution that would be a public benevolent institution but for also having other purposes, and one of ... those purposes is promoting the prevention or the control of diseases in human beings—a health promotion charity*' may be affected by the Bill despite these proposed amendments.¹⁸¹

4.19 Assistant Professor Murray also informed the Committee of his concerns with the proposed amendments:

- While most organisations involved with aged care, retirement villages or provision of unemployment assistance will be public benevolent institutions, not all will. Assistant Professor Murray considered that '*not an insignificant number*' of these organisations will fall outside of that public benevolent institution category (see the quote at paragraph 4.15).
- Not '*all charities with the purpose of economic development for disadvantaged persons will be PBIs* [public benevolent institutions]'.¹⁸²
- There will be '*a degree of uncertainty about the level of disadvantage required and whether it might change over time, so as to affect the PBI characterisation*'.¹⁸³
- Fourth limb charities that carry out commercial activities that affect the charity's purpose might not be public benevolent institutions. For example, '*an institution that conducts business activity solely for the purpose of providing training and employment opportunities for people suffering from disabilities who would otherwise find it difficult to obtain training and employment*' might not be a public benevolent institution.¹⁸⁴
- Many peak bodies are '*unlikely to be PBIs* [public benevolent institutions] *as their objects typically do not involve sufficiently targeted relief to come within the PBI concept*'.¹⁸⁵

4.20 While the intention of Supplementary Notice Paper No. 1 is to address the concerns raised by WACOSS, it has been argued that the amendments do not entirely address the issues raised.

¹⁸⁰ Submission No. 2 from OSR, 14 October 2014, p6 (at footnote 8).

¹⁸¹ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p6.

¹⁸² Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p5.

¹⁸³ Ibid.

¹⁸⁴ Ibid, p6. Assistant Professor Murray was referring to Australian Taxation Office TR 2011/4.

¹⁸⁵ Submission No. 4b from Assistant Professor Ian Murray, Faculty of Law, UWA, 7 November 2014, p4.

First limb charitable trusts are excluded by the proposed amendments

- 4.21 OSR agreed that one issue with the proposed amendment in Supplementary Notice Paper No. 1 is its unintended consequence on poverty charitable *trusts*, as raised by Assistant Professor Murray.
- 4.22 Under the amendments in Supplementary Notice Paper No. 1, poverty charitable trusts, if they fall within the scope of the ‘promote trade, industry or commerce’ limb of the definition of ‘relevant body’, will no longer be able to claim exemption under the reinclusion clause at paragraph (d)(i) and will *not* regain taxation exemption under the proposed public benevolent institution amendments in Supplementary Notice Paper No. 1 because they are not ‘institutions’. Mere trusts or simple trustees do not ordinarily come within the meaning of ‘institution’, even where the trust has the force of an Act of Parliament or has a corporate trustee.
- 4.23 The OSR has agreed to address this issue in legislation should the amendments in Supplementary Notice Paper No. 1 be enacted.

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.

Other drafting issues

- 4.24 If the amendments in Supplementary Notice Paper No. 1 are adopted, the Committee notes the following potential drafting issues:
- If the amendments insert a paragraph (2) into the definition of ‘relevant body’ in the Bill, should a (1) be inserted at the beginning of the definition of ‘relevant body’?
 - If, as OSR has advised, proposed paragraphs (2)(a) and (2)(b) are to be read separately, should an ‘or’ be inserted after (2)(a) to make the legislation clearer?

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.

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.

CHAPTER 5

THE MINISTERIAL DETERMINATION

- 5.1 The Bill contains what has been described as an ‘inclusion’ mechanism which provides that a ‘relevant body’ excluded from tax exemption under the Bill, other than a political party or trade union, may apply to the Minister for Finance for a ‘beneficial body determination’ to retain or reinstate (in the case of a charity seeking taxation endorsement for the first time) its taxation exemption status (the Ministerial determination).
- 5.2 The Bill proposes to insert sections into each of the three taxation Acts outlining the proposed process for applying for a ‘beneficial body determination’ and under what circumstances a Ministerial determination may be made.¹⁸⁶ Any determination made by the Minister to reinstate the taxation exempt status of an organisation will apply to all three State taxes.
- 5.3 The Second Reading Speech described this mechanism as follows:

*Safeguards have been built into the proposed amendments to enable the Minister for Finance, in consultation with the Treasurer, to reinstate the exempt status of an organisation, other than a trade union or political party, which has been excluded from the relevant category of exemptions because of the operation of these amendments.*¹⁸⁷

- 5.4 The Law Society of Western Australia described the proposed Ministerial determination process as ‘quite an elaborate scheme.’¹⁸⁸
- 5.5 It is clear that the intention of the Bill is to provide the Minister with a broad discretion.

WHEN CAN AN EXCLUDED CHARITY APPLY FOR A MINISTERIAL DETERMINATION?

- 5.6 The Bill proposes a two stage process to obtain a Ministerial determination, namely:

¹⁸⁶ The Bill proposes to insert substantially the same provisions into the three taxation acts, and provides for substantially the same process, with differences in terminology in the Bill reflecting different processes and terminology currently in each taxation act.

¹⁸⁷ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5724.

¹⁸⁸ Grahame Young, Barrister, The Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p4.

- The Commissioner makes a decision on whether a body is a ‘relevant body’ (and therefore excluded from taxation exemption).
 - If the Commissioner makes an adverse decision, a person may apply to the Minister for a Ministerial determination to reinstate taxation exemption.
- 5.7 The application to the Minister for a Ministerial determination may only be made after the Commissioner makes a decision, and review and objection rights relating to this decision are ‘*exhausted, discontinued or finally determined*’¹⁸⁹ or an organisation surrenders its rights of objection or review under the proposed new section 34B of the *Taxation Administration Act 2003*¹⁹⁰ to, the Second Reading Speech stated, ‘*expedite the process for making an application to the minister.*’¹⁹¹

THE APPLICATION TO THE MINISTER FOR A BENEFICIAL BODY DETERMINATION

- 5.8 The Bill proposes to insert the following clause into the three taxation Acts:

Box 11

Beneficial body determination

Clauses 6, 9 and 14 of the Bill propose to insert into the three taxation Acts.

- (1) On an application under section [96B, 38AB or 42B depending on the applicable taxation Act] the Minister, with the Treasurer’s concurrence, may determine that a relevant body is a beneficial body for the purposes of the taxation Acts.
- (2) The Minister, with the Treasurer’s concurrence, may amend or revoke a beneficial body determination.
- (3) **The Minister may make, amend or revoke a beneficial body determination only if the Minister is of the opinion that it is in the public interest to do so and after considering any information that the Minister considers relevant.** [Committee emphasis]
- (4) The Minister is to publish notice of the making, amendment or revocation of the beneficial body determination in the *Gazette*.
- (5) A beneficial body determination is subject to the conditions specified in the determination (if any).

¹⁸⁹ Clauses 6, 9 and 14 of the Bill propose to insert into the three taxation Acts in the ‘Application for beneficial body determination’ provisions at paragraph (2)(a) the requirement that any objection to the Commissioner’s decision and any subsequent review processes must be ‘*exhausted, discontinued or finally determined*’.

¹⁹⁰ Clause 18 of the Bill proposes to insert a new section 34 into the *Taxation Administration Act 2003* which provides the option to surrender the right of objection or review to the Commissioner’s decision. Clauses 6, 9 and 14 of the Bill, in the ‘Application for beneficial body determination’ provisions at paragraph (2)(b) proposed to insert the option of surrendering rights rather than pursuing objection and review.

¹⁹¹ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5724.

5.9 OSR describes this determination process as an ‘*open and transparent process*’ that operates in a similar manner to payroll tax exemptions between 1984 and 1997.

5.10 The Law Society of Western Australia questioned why the Ministerial determination process has been established, as it is of the view that:

*it is better to have somebody who is expert in the field at least making a primary decision, which you then get a set of reasons for, ideally, which you can then examine to see whether you ought to challenge it rather than leave it as a broad ministerial discretion.*¹⁹²

The exercise of the Ministerial discretion

5.11 On the issue of how the Minister is to exercise their discretion and what matters must be considered, the proposed Bill only provides at clause (3) that:

The Minister may make, amend or revoke a beneficial body determination only if the Minister is of the opinion that it is in the public interest to do so and after considering any information that the Minister considers relevant. [Committee emphasis]

5.12 The Bill provides the Minister with a broad discretion, as intended, as OSR advised:

*The application of the public interest test operates appropriately as drafted and reflects the policy intention of the Government in that it provides the Minister with a broad discretion.*¹⁹³

5.13 OSR has suggested that the policy of the Bill will be relevant to any application for a Ministerial determination:

*Where a charity is excluded but it is a charity which the Government policy motivating these amendments considers should benefit from tax relief, the Minister has discretion to reinstate the exemption from liability for State taxes. The outcome in any specific case would be dependent upon examination of all the relevant information.*¹⁹⁴

5.14 A majority of the Committee is of the view that beyond a general discussion about the Ministerial discretion, further comment on the Ministerial determination process is beyond the scope of the inquiry.

¹⁹² Adjunct Professor Greg McIntyre SC, Council Member, Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p5.

¹⁹³ Answers to Questions on Notice, OSR, 5 November 2014, p11.

¹⁹⁴ Ibid, p3.

- 5.15 However, a minority of the Committee are of the view that the Ministerial determination process is a central concern that must be considered by the Committee given the terms of the referral and because the Ministerial determination process has been conceived by the Government as a mechanism for addressing the unintended consequences of the Bill.

The concurrence of the Treasurer

- 5.16 A minority of the Committee questions whether it is appropriate for the Bill to propose the Treasurer as the person who must concur with the Minister's decision to make, amend or revoke a determination.
- 5.17 A minority of the Committee noted that there is a conflict between this role, to consider the public interest in relation to the application for taxation exemption, and the Treasurer's role as the Minister responsible for government revenue and expenditure.
- 5.18 OSR describe this reinstatement mechanism as being:

*cast with checks and balances to ensure transparency in relation to these Ministerial approvals, namely that the Treasurer's concurrence is required and the Ministerial determination must be published in the Gazette.*¹⁹⁵

- 5.19 The Bill proposes to provide that the Minister, with the Treasurer's concurrence, may make a determination and may amend or revoke a beneficial body determination. A minority of the Committee notes that if the concurrence mechanism is retained, it is not acceptable that the Treasurer is the concurring Minister.
- 5.20 A minority of the Committee is of the view that the Minister for State Development may be an appropriate concurring Minister if the concurrence mechanism is retained in the Bill, as the test is a public interest test rather than a test about revenue and expenditure.
- 5.21 Further, it is noted by a minority of the Committee that the Treasurer's concurrence is required to make, amend or revoke an application but not (on our reading of proposed clauses (1) and (2)), to reject an application. Rather than being a check and balance for the applicant, an applicant who is ultimately successful in their application must persuade two Ministers of the merit of their claim for taxation exemption, whereas it appears that one Minister only can decide to refuse the application. There is concern that by having the Treasurer agree to approve any application, the check and balance relates to protecting state revenue.

¹⁹⁵

Answers to Questions on Notice, OSR, 5 November 2014, p10.

Minority Finding 11:

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

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.

Issues raised about the Ministerial determination process

5.22 Witnesses were concerned about a number of aspects of the Ministerial determination mechanism, including:

- The discretion is a largely subjective, broad discretion and the Bill provides no guidelines for making the Ministerial determination other than that the Minister being required to be of the opinion that it is in the public interest. (For example, see the quote from The Law Society of Western Australia at paragraph 5.26).
- The broad and largely subjective nature of the discretion creates unnecessary uncertainty.¹⁹⁶
- The ‘*broad administrative discretion, in conjunction with the lack of specific guidance about how it is to be exercised tends to detract from the rule of law*’.¹⁹⁷

Laws should be ‘*prospective, open and clear*’ and ‘*relatively stable*’ so as to permit people to be ‘guided’ by the law.¹⁹⁸ The same laws should apply to all persons, so that they are treated equally. As Assistant Professor Murray added:

it is not best practice in terms of rule of law. So if we want people to know what the law is, to be able to follow it and to be

¹⁹⁶ For example, Leading Age Services are concerned about the impact of this process on not-for-profit aged care providers taxation exemption: Submission No. 2 from Leading Age Services, 9 October 2014, p2.

¹⁹⁷ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p7.

¹⁹⁸ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence*, 30 October 2014, p12.

*able to predict what is going to happen, then best practice would be to set out what the grounds are for that decision being made, at least to some extent, particularly when charities have to be for the public benefit anyway. So it is not entirely clear what slightly different public benefit is going to be applied when this test is applied.*¹⁹⁹

Assistant Professor Murray advised the Committee that in his view the Bill moves against the general trend to incorporate the guiding principles for relief. He argued that it would be preferable for guidance outlining key considerations on the exercise of the determination discretion, preferably in legislation.

- Some witnesses raised concerns about how the ‘public interest’ criteria are intended to operate.²⁰⁰

In this regard, OSR advised that this is a matter for the Minister and the Treasurer to determine. However, they added that *‘charities law is complex and I would expect that the process would need to take into account more factors than a cost benefit analysis based on only two factors involving revenue implication and public benefit’*.²⁰¹

- The amendments *‘could leave the door open to the politicisation of decision making about charitable status’*.²⁰²

Engineers Australia commented that *‘Tax exemptions at the whim of the minister the day ... would not be an ideal outcome’*.²⁰³

UnionsWA’s view was that pressure may lead to the process being distorted:

I think people would be rightly concerned that there were perhaps considerations that led to an exemption being granted that are not necessarily related to the charity work that that organisation might be involved in. So, I think that kind of

¹⁹⁹ Ibid, p12. Assistant Professor Murray also noted that the requirement to have the Australian Taxation Office and the Treasurer make an endorsement decision on ancillary funds was replaced in the last few years with regulations, which set out in great detail the criteria that must be met to be an ancillary fund (a charitable trust that accepts donations and passes them on): Ibid, p12.

²⁰⁰ For example, Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p7, Submission No. 8 from CBH, 28 October 2014, p4, and the evidence of Adjunct Professor Greg McIntyre SC, Council Member, Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, p4.

²⁰¹ Answers to Questions on Notice, OSR, 5 November 2014, p10.

²⁰² Letter from Steve Joske CSC, President, WACOSS, Legislative Council Tabled Paper No. 1942, p1.

²⁰³ Michael Allen, Executive General Manager, Corporate Services, Engineers Australia, *Transcript of Evidence*, 30 October 2014, p3.

*mechanism is flawed, and for a minister exercising that discretion, I think people would be concerned about what kinds of considerations, what kind of pressure might be brought to bear to lead to some organisations being granted exemptions and others not.*²⁰⁴

- The mechanism ‘may create a perception for relevant charities that they cannot act contrary to the interests of the current government – especially for advocacy organisations.’²⁰⁵

AIM submitted that any ‘submission to the Minister for Finance would be at the expense of AIMWA and involve considerable resources’.²⁰⁶

Leading Age Services submitted that the determination process of applying to the Commissioner, then the Minister will be ‘an administrative burden that will detract resources from care’²⁰⁷ and it is ‘the small guys that do not know the right people to get a political consideration of their exemption’.²⁰⁸

5.23 Hon Peter Collier MLC said in the Second Reading Speech:

*I stress 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.*²⁰⁹

5.24 However, the Committee notes throughout this report that there is the potential that organisations other than the 34 organisations that OSR identified as potentially impacted by the Bill (under paragraphs (c) and (d) of the definition of ‘relevant body’ - see paragraph 2.24) will be excluded from taxation exemption by the Bill. These organisations that are unintentionally affected will experience the burden and red tape of the Ministerial determination process.

5.25 OSR noted that it is for the Minister and the Treasurer to determine whether they require guidelines to be established. However, OSR raised the following concerns about guidelines:

²⁰⁴ Meredith Hammat, Secretary, UnionsWA, *Transcript of Evidence*, 30 October 2014, p5.

²⁰⁵ Submission No. 4a from Assistant Professor Ian Murray, Faculty of Law, UWA, 15 October 2014, p2.

²⁰⁶ Submission No. 9 from AIM, 6 November 2014, p2.

²⁰⁷ Elizabeth Cameron, Chief Executive Officer, Leading Age Services, *Transcript of Evidence*, 30 October 2014, p6.

²⁰⁸ Ibid.

²⁰⁹ Hon Peter Collier MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, pp5723-5724.

*Although it would be possible, the nature of the matters that need to be considered, I think, require flexibility and judgement to be achieved, and there is some difficulty in trying to devise guidelines that include all of the necessary elements. If your guidelines are not comprehensive enough, you always then rely on a catch-all provision that sits at the bottom that says “anything else that the minister or the Treasurer may take into account or consider appropriate”, and you really then have to say, “What is the benefit of the guidelines if they can take anything they like into account?”*²¹⁰

- 5.26 The Law Society of Western Australia submitted that it is appropriate for Parliament to include by way of regulation guidelines to guide the exercise of the Minister’s discretion, and added that it can comment on these when developed. Adjunct Professor Greg McIntyre SC, representing The Law Society of Western Australia, advised the Committee at a hearing that:

The society was concerned that section 96C(1) just says that on application, the minister, with the Treasurer’s concurrence, may determine that a relevant body is a beneficial body. It gives the minister no other guidance as to what criteria he or she might use to make that determination. Just as a matter of good administrative law, we thought it was probably that some guidance be provided to the minister as to what criteria might be applied. It could be as simple as saying that the minister shall take into account whether the sole or dominant purpose of the body is —

- (i) the relief of poverty; or*
- (ii) the advancement of education; or*
- (iii) the advancement of religion;*

*which are words taken from 96A(d) [paragraph (d) of the definition of relevant body] of the proposed amendment. That makes his discretion more obviously directed towards that purpose. In our written submission, we proposed that it be by guidelines, or guidelines by regulation. That is one way of doing it. That was the compromise that we arrived at when we filed the submission. My personal view, I should say, is that I think it would be better if it was in the legislation, and you could readily put that sort of provision into section 96C(1)(a). I will leave you with that set of words.*²¹¹

²¹⁰ Answers to Questions on Notice, OSR, 5 November 2014, p10.

²¹¹ Adjunct Professor Greg McIntyre SC, Council Member, Law Society of Western Australia, *Transcript of Evidence*, 30 October 2014, pp4-5.

- 5.27 CBH also considers that guidelines should be provided by legislation.²¹² Assistant Professor Murray considers that guidelines in legislation or, at least, delegated legislation were appropriate.²¹³

Conclusions

- 5.28 As noted at Box 11, Clauses 6, 9 and 14 of the Bill propose to insert the following into the three taxation Acts:

(4) The Minister is to publish notice of the making, amendment or revocation of the beneficial body determination in the Gazette.

- 5.29 The Committee is of the view that the Minister must provide reasons for any decision to reject, make, amend or revoke a beneficial body determination. The Committee, however, is aware that identifying individual taxpayers may be difficult given the requirements of the *Taxation Administration Act 2003* and section 114 in particular.

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.

- 5.30 A minority if the committee is of the view that if the Government refuses to include in the Bill an indication of what the Minister may or will consider, guidelines in the form of regulations should be drafted.
- 5.31 A minority of the Committee notes that the absence of the most minimal guidelines applying to the Ministerial determination leads to uncertainty among charities as to what matters the Minister will or may consider. This does not reflect good administrative law or the principles of the rule of law.
- 5.32 A minority of the Committee is concerned that the Ministerial discretion may be exercised in a manner that contradicts the stated policy of the Bill, which is to (among other things) exclude organisations that promote trade, industry or commerce. Without guidelines, there is uncertainty as to whether the policy of the Bill will be a consideration in exercising Ministerial discretion. For example, CBH, who has a present taxation exemption, advised the Committee that it should fall within the ‘public interest’ test applying to the Minister’s discretion to reinstate taxation status. However, a minority of the Committee notes that given the OSR statement that CBH would likely fall within the intent of the Bill (see paragraph 3.60) and the terms of paragraph (d) of the ‘relevant body’ exception, it would be anomalous if the

²¹² Anthony Liaw, Group Tax Manager, CBH, *Transcript of Evidence*, 30 October 2014, p6.

²¹³ Assistant Professor Ian Murray, Faculty of Law, UWA, *Transcript of Evidence* 30 October 2014, p12.

determination process retained taxation exemption status to a body the Bill was designed to deny taxation exemption.

- 5.33 A recurrent theme in the legislative scheme of the Bill reported by OSR is that there may be unintended consequences, but this is '*mitigated*' by the Ministerial discretion to '*reinstate*' taxation exemption (see paragraphs 2.26, 3.10, 3.96, 3.104 and 4.13). To give one example, OSR has acknowledged that '*it is possible that a body that is related to a relevant body may unintentionally be excluded from the exemption under paragraph (f)*', but that the Ministerial discretion to reinstate taxation exemption exists.²¹⁴ However, the discretion only reinstates taxation exemption if it is exercised in favour of the applicant (who has unintentionally been denied taxation exemption).
- 5.34 The result is that some bodies that promote trade, industry or commerce will be granted tax exemption while other bodies that promote trade, industry or commerce will not be granted tax exemption. The only basis on which the decision is made is a public interest test that is not defined.
- 5.35 A minority of the Committee noted that witnesses raised concerns about an overreliance in the legislative scheme of the Bill on this discretion because of the range of potential unintended effects of the Bill. In relation to the exercise of the discretion, witnesses are concerned about the process being subjective, lacking guidelines, lacking transparency, causing unnecessary uncertainty, imposing further administrative burden or red tape on charities and politicising the taxation system.
- 5.36 A minority of the Committee is of the view that the Ministerial determination process is flawed. The legislative scheme is likely to place considerable reliance on the Ministerial determination mechanism because of the unintended consequences of the Bill. A number of 'legitimate' first to fourth limb charities will be forced to apply to the Minister to reinstate their taxation exemption.
- 5.37 A minority of the Committee is of the view that establishing guidelines reflects good administrative law and rule of law principles, and may contain or limit uncertainty about the Ministerial determination process. Guidelines reflect a more open, just and transparent process. Guidelines may address, to some extent, the genuine concern about the Ministerial discretion, which must be relied on for charities that, as an unintended consequence of the Bill, lose taxation exemption.
- 5.38 Without guidelines charities have no idea about the purpose of the process and relevant matters the Minister may consider. A minority of the Committee does not accept that including a 'catch all' consideration means that there is no value in having guidelines. Even if a 'catch all' provision is required, the guidelines provide some assurance to charities about the purpose of the process and relevant matters the

²¹⁴

Answers to Questions on Notice, OSR, 5 November 2014, p8.

Minister may consider and minimises concerns about the uncertainty and the political nature of the process.

5.39 The guidelines need not be drafted in a manner that constrains the Minister in the exercise of their discretion.

5.40 Given the potential for unintended consequences of the Bill, efforts should be made by the legislators to ensure this inclusion mechanism process is open, just and transparent.

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.

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.

The Ministerial determination process does not apply a trade union but does apply to charities related to a trade union

5.41 A minority of Committee notes that, unlike other categories of ‘relevant body’ the Bill proposes to exclude from taxation exemption (other than political parties), the Bill does not provide trade unions with the right to apply to the Minister for a Ministerial

determination to reinstate taxation exemption.²¹⁵ (As noted at paragraph 3.96, a charity related to a union does have the right to apply for the determination, although this charity is denied taxation status as a right solely on the basis of being related to a union), not because it promotes trade, industry or commerce

- 5.42 A minority of Committee notes that UnionsWA advised the Committee that it strongly objected to trade unions not being provided with a right to seek a determination. UnionsWA questioned the rationale for this:

*Again I reiterate the point that there seems to be no sound reason for us to be excluded from having those decisions reviewed by the minister. The only conclusion we can come to is that in fact it is probably a partisan consideration, because there does not seem to be any other grounds on which you would exclude trade unions or political parties.*²¹⁶

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.

- 5.43 A minority of the Committee refers to Minority Recommendation 5 which recommended that:

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

THE BENEFICIAL BODY DETERMINATION IS FINAL

- 5.44 Clause 18 of the Bill proposes to insert into the *Taxation Administration Act 2003* the following proposed section 34A:

²¹⁵ This is the effect of clauses 6, 9 and 14 of the Bill which propose to insert the 'Application for beneficial body determination' provision into the three taxation Acts. Clause (1)(b) of this provision provides that the Ministerial determination process only applies to Commissioner decisions made on the basis that the applicant is a 'relevant body' within paragraphs (c), (d), (e) or (f) of the definition of 'relevant body'. Therefore, political parties and trade unions - referred to in paragraphs (a) and (b) of the definition of 'relevant body' - have no right to seek a Ministerial determination after the Commissioner's decision that they are a 'relevant body'.

²¹⁶ Meredith Hammat, Secretary, UnionsWA, *Transcript of Evidence*, 30 October 2014, p5.

Box 12 Proposed amendment making the beneficial body determination final**34A. Beneficial body determinations**

- (1) A decision to make, or not to make, or to revoke or amend, a beneficial body determination is final and not subject to objection or review under this Act or to any other form of appeal or review.
- (2) No action can be brought in any court or tribunal to compel the Minister to make a beneficial body determination.

5.45 OSR has acknowledged that the above provision that a decision is not subject to appeal is to be read in the context of the legal framework in which it operates. OSR advised the Committee that:

It is accepted that there will be circumstances in which the provisions will not limit the power of the Supreme Court to review the decision of the Minister, such as whether the Minister is alleged to have taken into account irrelevant considerations as highlighted in the Kirk v Industrial Relations Commission (NSW) case.²¹⁷

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.

²¹⁷

Answers to Questions on Notice, OSR, 5 November 2014, p11.

CHAPTER 6

CONCLUSION

- 6.1 The referral for this inquiry asked the Committee to consider if the Bill imposed unintended consequences on ‘legitimate’ fourth limb charities.
- 6.2 It is accepted by the Government and OSR that the Bill does impose unintended consequences (see paragraphs 2.26, 3.10, 3.96, 3.104 and 4.13), with the effect that ‘legitimate’ fourth limb charities will have to successfully apply to the Minister for a determination to retain or reinstate their taxation exemption status should it be removed. It is because of the anticipated unintended consequences that the Bill proposes this Ministerial determination ‘inclusion’ mechanism.
- 6.3 A majority of the Committee recommends:

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

- 6.4 In conclusion, a minority of the Committee finds and recommends:

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.

Minority Recommendation 10:

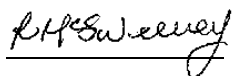
A minority of the Committee recommends that:

- 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.

6.5 I commend the report to the House.



Hon Robyn McSweeney MLC

Chair

20 November 2014

APPENDIX 1

LISTS OF STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION, SUBMISSIONS RECEIVED AND WITNESSES

Stakeholders invited to provide a submission

1. Office of State Revenue, Department of Finance (OSR)
2. Department of Finance
3. Western Australian Council of Social Service (WACOSS)
4. UnionsWA
5. Chamber of Commerce and Industry of Western Australia Inc (CCI)
6. The Law Society of Western Australia
7. Assistant Professor Ian Murray, Faculty of Law, University of Western Australia
8. Professor Dale Pinto, School of Law, Curtin University
9. Australian Charity Law Association

Submissions received

1. Leading Age Services Australia – Western Australia
2. Office of State Revenue, Department of Finance (OSR)
3. The Law Society of Western Australia
4. Assistant Professor Ian Murray, Faculty of Law, University of Western Australia
 - 4a: Submission dated 15 October 2014
 - 4b: Submission dated 7 November 2014
5. Engineers Australia
6. Unions WA
7. Western Australian Council of Social Service Inc (WACOSS)
8. Co-operative Bulk Handling Ltd. (CBH)
9. Australian Institute of Management (AIM)

Witnesses

Public hearings with the following witnesses were held on 30 October 2014. The transcripts of the hearings are available at the Committee's website at www.parliament.wa.gov.au/leg

1. Assistant Professor Ian Murray, Faculty of Law, University of Western Australia.
2. Office of State Revenue, Department of Finance (OSR):
 - Nicki Suchenia – Acting Commissioner of State Revenue
 - Murray Hancock – Director, Legislation Training and Review

3. Department of Treasury:

- Michael Court, Acting Deputy Under Treasurer
- Ivan Basei, Assistant Director, Revenue and Intergovernmental Relations

4. The Law Society of Western Australia:

- Adjunct Professor Greg McIntyre SC
- Grahame Young, Barrister

5. UnionsWA:

- Meredith Hammat, Secretary
- Dr Tim Diamond, Organising and Strategic Research Officer

6. Leading Age Services Australia Western Australia:

- Elizabeth Cameron, Chief Executive Officer
- Tirzah Anglin, Business Development Manager

7. Engineers Australia:

- Michael Allen, General Manager, Corporate Services

8. Co-operative Bulk Handling Ltd (CBH):

- Karlie Mucjanko, General Manager, Grower and External Relations
- Edward Kalajzic, Chief Financial Officer
- Anthony Liaw, Group Tax Manager

APPENDIX 2

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?
--

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

Western Australian legislation committees have used FLPs as a framework for scrutinising bills since 2004 when the Uniform Legislation and General Purposes Committee (which scrutinised uniform and other bills) considered these principles. During the 37th and 38th Parliaments, the Standing Committee on Legislation and Standing Committee on Uniform Legislation and Statutes Review (established in 2005) continued the practice of considering whether a bill abrogated or curtailed FLPs.

APPENDIX 3

OSR EVIDENCE ON THE NUMBER OF ORGANISATIONS THAT MAY POTENTIALLY BE AFFECTED BY THE BILL

The following information is provided to assist the Committee to understand the basis for determining that the amendments are only likely to affect a small number of organisations.

As outlined during the evidence provided to the Committee, the computerised records of exemptions approved by the Commissioner do not list the basis of the charitable exemptions (i.e., under which limb the charitable exemption was provided).

Using a combination of these high-level exemption records, cross-checked with a manual spreadsheet that has been kept since 2010 and further manual extraction and examination of individual files, the information contained in Attachment A is provided in relation to exemptions granted from 1 July 2009 to 31 October 2014.

Initial examination of the 155 charities who have been granted a pay-roll tax exemption indicates that there are 19 that may potentially be relevant bodies, with 14 being on the basis of a purpose of the promotion of trade, industry or commerce, and five on the basis of being a professional association.

In addition to this 19, of the 184 taxpayers who received 1487 land tax exemptions, one additional potential relevant body was identified on the basis of the promotion of trade, industry and commerce.

Of the 518 taxpayers who received duties exemptions for 1090 transactions, a further two potential relevant bodies were identified on the basis of having a purpose of the promotion of trade, industry or commerce.

The total number of bodies from this cross-match identified 22 potential relevant bodies.

A further cursory examination of payroll tax exemptions provided prior to 2009 has occurred, indicating that an additional eight organisations will require examination to determine their status, with five being on the basis of a purpose of the promotion of trade, industry or commerce, and three being on the basis of being a professional association.

In addition, there are currently 4 matters under, or potentially under, objection from organisations that have claimed charitable status that has not been approved. If these objections (or any subsequent State Administrative Tribunal appeals, if applicable) are allowed, these organisations may be subject to the new provisions.

Exemptions granted							
1 July 2009 – 31 October 2014							
	Duties ¹	%	Land Tax ²	%	Pay-roll Tax ³	%	Total
First limb	389	35.69%	807	54.27%	44	28.39%	1240
Second limb	143	13.12%	16	1.08%	21	13.55%	180
Third limb	266	24.40%	17	1.14%	3	1.94%	286
Fourth limb	273	25.05%	641	43.10%	81	52.25%	995
Mixed			1	0.07%	6	3.87%	7
Unknown	19	1.74%	5	0.34%	0		24
Total	1090		1487		155		2732
							100.00%

¹ 1090 duties transactions exempted for 518 taxpayers

² 1487 items of land exempted for 184 taxpayers

³ Public benevolent institutions are automatically exempt under the *Pay-roll Tax Assessment Act 2002* and are not required to apply to the Commissioner for exemption. They have been excluded because they do not have a charitable exemption under the *Pay-roll Tax Assessment Act 2002*.