



Queensland
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Dear Ms Derbyshire

Rural fire brigades - status and application of the *Financial Accountability Act 2009*

We refer to your email dated 10 November 2011 seeking advice about the legal status of Rural Fire Brigades ('the Brigades') and their members under the *Fire and Rescue Services Act 1990* and about the application of the *Financial Accountability Act 2009* to the Brigades.

Summary

A Brigade is an unincorporated association. It is merely a group of persons with a mutual agreement or understanding to be part of an association on the terms set out in the rules for the Brigade. A Brigade is not a separate legal entity.

Brigades are not part of the Queensland Fire and Rescue Service ('QFRS'). The QFRS comprises the Commissioner and fire services officers. Members of Brigades are not fire service officers under ss 8A and 25 of the *Fire and Rescue Services Act*.

The *Financial Accountability Act* imposes obligations on accountable officers and statutory bodies. A Brigade does not have an accountable officer and is not a statutory body so the provisions of the *Financial Accountability Act* imposing requirements on accountable officers and statutory bodies do not apply to the Brigades.

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A department's accountable officer is required to account for public moneys, public property, non-public moneys, other property and other resources administered or controlled by the department under s 69(1)(a) of the Financial Accountability Act. The Director-General would be required to account for property owned by the State which is used by the Brigade. However, property owned by the Brigade is not administered or controlled by the Department and the Director-General is not required to account for that property.

A department's accountable officer is required to comply with the requirements in *Accounting Standard AASB 127 Consolidated and Separate Financial Statements* under s 69(1)(b) of the Financial Accountability Act. That standard requires a parent entity to present consolidated financial statements including all subsidiaries of the parent. Brigades are not subsidiaries of the Department under that standard so the Department's financial statements are not required to include the Brigades.

Background

There are approximately 1,450 Brigades in Queensland made up of approximately 34,000 volunteers. Brigades provide services to help keep Queensland communities safe, including community education, fire prevention through hazard reduction burns and fighting fires.

Brigades raise funds through fundraising activities and providing services for fees, for example a Brigade may charge a fee for carrying out a hazard reduction burn at the request of a landowner. Approximately 500 Brigades are currently endorsed by the Commissioner of Taxation as deductible gift recipients. Some Brigades also receive funds from local governments. Under s 128A of the Fire and Rescue Service Act, a local government can levy special rates or charges and contribute amounts raised to Brigades operating in its local government area.

Page 20 of the Auditor-General's 'Report to Parliament No. 3 for 2008 – Management of Rural Fire Services in Queensland' states that the Brigades 'are part of the QFRS and not individual entities in their own right'. Recommendation 7 of that report is that QFRS review the financial accountability and audit requirements of the Brigades to reflect their status as part of QFRS.

Paragraph 75 of the Public Accounts and Public Works Committee's 'Report No. 11, June 2011 – Management of Rural Fire Services in Queensland' states that the Auditor-General advised the Committee that, at the time the 2008 report was written, the Queensland Audit Office ('QAO') was of the opinion that the Brigades were part of the Department but the Auditor-General now considers that the Brigades are not controlled by the Department and they appear to be unincorporated bodies. Recommendation 1 on page 16 of that report is that the Minister for Police, Corrective Services and Emergency Services undertake a comprehensive legal review in order to clarify the legal position of the Brigades and their members.

Audit Recommendation 7 of the Auditor-General's 'Report to Parliament No. 8 for 2011 – Follow up of 4 audits completed in 2008 and 2009' is that the QFRS review the financial accountability and audit requirements of Rural Fire Brigades to reflect their status as part of the QFRS. Paragraph 2.2.2 of that report states that it is critical that the relationship between the Department and the Brigades be clarified to ensure that the Department has effective control over volunteer resources and assets under Brigade custody. It states that this is to ensure that the Department can fulfil its responsibilities under the Fire and Rescue Service Act.

QFRS requires advice on the legal status of Brigades and their members and whether the Financial Accountability Act applies to Brigades and their members.

Advice

Legal status of Brigades

Section 79 of the Fire and Rescue Service Act provides:

79 Formation of rural fire brigade

- (1) Any group of persons may apply to the commissioner for registration as a rural fire brigade.
- (2) The commissioner may grant or refuse an application and, in the case of the granting of an application, must assign a registration number to the rural fire brigade.
- (3) The commissioner may at any time cancel the registration of a rural fire brigade.

Under s 79, any group of persons can apply to the Commissioner for registration as a Brigade. If the Commissioner grants the application, the Commissioner must assign a registration number to the Brigade.

The group of persons registered as a Brigade is not incorporated as a corporation. No separate legal entity is created.

The group of persons would be an unincorporated association. An unincorporated association has no separate legal status – *Carlton Cricket and Football Social Club v Joseph* [1970] VR 487.

An unincorporated association has been described as a group of persons with a mutual agreement or understanding to form an association – *Conservative and Unionist Central Office v Burrell* [1980] 3 All ER 42 at 47-49 and 58. There is no requirement that the agreement or understanding be in writing, although unincorporated associations typically have written rules or a constitution. The group of persons applying to the Commissioner for registration as a Brigade might be an unincorporated association at the time they apply to the Commissioner for registration because they have a mutual agreement or understanding about applying to become a Brigade. Once registered as a Brigade, any previous agreement or

understanding would be replaced by rules made under s 80 of the *Fire and Rescue Service Act*. Section 80 provides as follows:

80 Rural fire brigade may make rules

- (1) A rural fire brigade may make rules, not inconsistent with this Act, for the purpose of regulating its proceedings and the conduct of its operations including the acquisition, vesting and disposal of its property and funds.
- (2) A rule has no effect unless approved by the commissioner.
- (3) The commissioner may at any time direct a rural fire brigade to amend, revoke or make rules in the manner and for the purpose specified in the direction.

Section 80 of the Fire and Rescue Service Act, sets out how a Brigade may make rules. By necessary implication, the procedure for making rules set out in s 80 of the Fire and Rescue Service Act is the only way a Brigade may make rules.

Section 80(3) provides that the Commissioner may direct a Brigade to amend, revoke or make rules in the manner and for the purpose specified in the direction. The requirement that the direction be to amend rules ‘in the manner and for the purpose specified in the direction’ indicates that it is intended that the Brigades retain autonomy regarding the specific terms of the rules they make. However, the meaning of s 80(3) is unclear. Where a provision in an Act is ambiguous or obscure consideration may be given to extrinsic material including the explanatory notes and second reading speech. The explanatory notes in relation to s 80 merely states that s 80 ‘authorises rural fire brigades to make rules for their management’ and the second reading speech does not assist. In any event, the Commissioner cannot impose rules on Brigades or amend or revoke rules; only Brigades can do that.

The functions of a Brigade are set under s 82 of the Fire and Rescue Service Act. That section provides as follows:

82 Functions of a rural fire brigade

- (1) The functions of a rural fire brigade are fire fighting and fire prevention and such other functions as the commissioner may direct.
- (2) The commissioner must notify a rural fire brigade of the area for which and the circumstances in which the brigade is in charge of fire fighting and fire prevention.
- (3) In this section—
fire prevention includes taking measures in readiness for fire so as to reduce potential danger to persons, property or the environment.

Sections 81 and 83 of the Fire and Rescue Service Act provide as follows:

81 Officers of rural fire brigade

- (1) A rural fire brigade must elect a first officer to be in charge of the brigade.
- (2) A rural fire brigade may also elect such other officers as it considers necessary.
- (3) Any election must be conducted in accordance with the commissioner's directions and has no effect unless approved by the commissioner.
- (4) A person holds office for the period specified by the commissioner.
- (5) The commissioner may dismiss a person from any office held with a rural fire brigade or may disqualify a person from holding any office.

83 Powers of first officer

- (1) Where, pursuant to notification given under section 82(2), a rural fire brigade is in charge of operations for controlling and extinguishing a fire, the first officer of the brigade has, for that purpose—
 - (a) the powers of an authorised fire officer, subject to any limitation imposed by the commissioner; and
 - (b) the control and direction of any person (including any fire officer) whose services are available at the fire.
- (2) Any power exercisable by the first officer of a rural fire brigade may be exercised by any person acting at the direction of the first officer.
- (3) Any person exercising a power or discharging a function under this section must comply with any code of practice and with any direction of the commissioner.
- (4) In this section—

first officer includes, where the first officer of a rural fire brigade is unavailable to act, the next senior officer of the brigade who is available.
- (5) Where a rural fire brigade is assisting in operations for controlling or extinguishing a fire, the person who pursuant to this Act or any direction given by the commissioner is in charge of those operations has the control and direction of the members of the rural fire brigade.

Under s 81, the Brigade elects a first officer to be in charge of the Brigade. The Brigade may also elect other officers. The election of officers is subject to the Commissioner's approval and once appointed, the Commissioner may dismiss a person from office.

Under s 83, if a Brigade is given notice that it is in charge of operations for controlling and extinguishing a fire, the first officer has the powers of an authorised fire officer. Under part 6 of the Fire and Rescue Service Act, an authorised fire officer's powers include taking reasonable measures to protect persons from danger caused by fire, including entering premises and closing roads.

Section 84 of the Fire and Rescue Service Act provides as follows:

84 Equipment for rural fire brigade

- (1) The chief executive may provide any rural fire brigade with equipment for carrying out its responsibilities or may, for that purpose, subsidise the purchase of equipment by a rural fire brigade.
- (2) All equipment provided by, or the purchase of which is subsidised by, the chief executive is and remains the property of the State and may at any time be repossessed by the chief executive.
- (3) A justice, acting upon the complaint of the commissioner, may issue a warrant authorising any person named in it or belonging to a class of person specified in it to search for and seize any equipment that pursuant to subsection (2) is the property of the State.
- (4) A person authorised to execute a warrant may, for that purpose—
 - (a) enter any premises in which the person believes the equipment may be located;
 - (b) break open anything the person believes may contain the equipment.
- (5) In this section—

equipment, without limiting the meaning of the term, includes plant and any liquid or gaseous substance.

Under s 84, equipment provided by or subsidised by the Director-General remains the property of the State and may be repossessed. Section 84 does not apply to all of the equipment of the Brigade. Accordingly, if the group of persons comprising the Brigade purchase equipment from funds they have raised themselves, that equipment would not be the property of the State under s 84. It would remain the property of the group of persons and would be held by them in accordance with the rules of the Brigade. The Brigade could deal with that property as it decides, provided the dealing is not inconsistent with the Brigade's rules.

Section 85 of the *Fire and Rescue Services Act* provides as follows:

85 Chief executive's role relating to rural fire brigades

The chief executive is responsible for the efficiency of rural fire brigades and may provide training and other assistance to them.

The provision for the Director-General to provide training and other assistance to Brigades is consistent with the Brigades' status as groups of persons separate from the QFRS and the Department.

Brigades are not part of the QFRS

Sections 8 and 8A of the Fire Rescue Service Act provide that the QFRS is established and that it consists of the Commissioner and fire service officers. 'Fire service officer' is defined in schedule 6 of the Fire Rescue Service Act to mean a person employed under s 25. Under

s 25, the Director-General may employ the persons the Director-General considers necessary to perform the QFRS' functions. The groups of persons comprising Brigades are not employed by the Director-General. The Brigades are not part of the QFRS.

Legal status of Brigade members

The members of Brigades are members of unincorporated associations. The main consequences of being an unincorporated association are as follows:

- Entry into contracts – A Brigade is not a legal entity so it cannot be a party to a contract. If a member of a Brigade enters into a contract for the Brigade then the member may be taken to act as the agent of the Brigade's first officer, the Brigade's management committee or as agent of all members of the Brigade.
- Ownership of property – A Brigade cannot buy or own property because it is not a legal entity. The Brigade's property would be either held by trustees on behalf of members of the Brigade, or owned jointly by all the members. Property would be held subject to the provisions of the Brigade's rules.
- Legal proceedings – A Brigade is not a separate legal entity so it cannot sue or be sued in the Brigade's name. Where a Brigade has a small membership all the members may be joined as parties to court proceedings. Where legal action relates to property held by trustees, the trustees may be sued. If a Brigade sues another person, some members may be able to commence a representative action on behalf of all members.

Brigade members have the benefit of the following statutory provisions:

- They may be covered by workers' compensation insurance. Under s 15 of the *Workers' Compensation and Rehabilitation Act 2003*, WorkCover may enter into a contract of insurance with QFRS to cover volunteer fire fighters for those volunteers to be entitled to compensation for injury sustained only while attending at a fire, or practising, or performing any other duty, as a volunteer.
- Under s 27(1) of the *Civil Liability Act 2003* and s 4 of schedule 1 of the *Civil Liability Regulation 2003*, civil liability does not attach to a Brigade in relation to an act done or omitted in the course of rendering assistance to a person in distress if the assistance is given while performing duties to enhance public safety in an emergency and without reckless disregard for safety. Given the Brigade is an unincorporated association, this protection would likely be construed as applying to the individual Brigade members.

Application of the *Financial Accountability Act*

Brigades do not have accountable officers and are not statutory bodies

The Financial Accountability Act imposes obligations on accountable officers and statutory bodies.

‘Accountable officer’ is defined in schedule 3 of the Financial Accountability Act as the person who is, or is appointed as, an accountable officer under ss 65, 66 or 67 of the Financial Accountability Act.

Under s 65(1), the chief executive of a government department is the accountable officer of the department. A Brigade is obviously not a department.

Under s 65(2), the Treasurer may appoint a person to be the accountable officer of an entity which is not part of a department, if the entity is established for a purpose connected with the government of the State and the entity’s expenditure is payable at least partly out of amounts paid to a department from the consolidated fund or the controlled receipts of a department. The Treasurer has not appointed a person to be the accountable officer of any Brigade.

Under s 65(3), a regulation may prescribe the accountable officer of an entity mentioned in the regulation. The *Financial Accountability Regulation 2009* does not prescribe any accountable officers for Brigades.

Sections 66 and 67 do not apply because they relate to the Clerk of the Parliament and the official secretary to the Governor.

Under the definition of ‘statutory body’ in s 9 of the Financial Accountability Act, a statutory body is an entity established under an Act, which has control of funds and whose governing body includes at least one member who is appointed under an Act by, or whose appointment is approved by, the Governor in Council or a Minister.

A Brigade does not have an accountable officer and is not a statutory body.

Department is not required to account for property owned by Brigades

Under s 69(1)(a) of the Financial Accountability Act, a department’s accountable officer is required to account, under the *Financial and Performance Management Standard 2009*, for public moneys, public property, non-public moneys, other property and other resources administered or controlled by the department.

‘Public moneys’ is defined in schedule 3 of the Financial Accountability Act as moneys received or held by a person for the State or moneys that, under the Financial Accountability Act or another Act, are directed to be paid to, or to form part of, the consolidated fund or a departmental financial institution account, other than non-public moneys. A Brigade’s moneys are not public moneys because a Brigade doesn’t receive or hold them for the State

and an Act does not require them to be paid, or form part of, a departmental financial institution account.

Occasionally, a Brigade member might receive money on behalf of the State. For example, a first officer, in the course of exercising the powers of an authorised fire officer under s 83 of the Fire and Rescue Service Act, might receive money on behalf of the State. Those monies would be public moneys.

‘Non-public moneys’ is defined in schedule 3 as moneys received or held by the Treasurer, an accountable officer or other officer or employee of a department in the course of his or her official duties, but not received or held for the State. Money received by a Brigade member would not be received by an accountable officer or other officer or employee of a department in the course of his or her official duties.

There are no provisions in the Fire and Rescue Service Act requiring the Commissioner or the Department to administer or control money and other property owned by Brigades. Property owned by Brigades is administered and controlled by the group of persons comprising the Brigade.

However, the accountable officer of the Department would be required to account for the property owned by the State which is used by the Brigades, including equipment provided by, or subsidised by, the Director-General under s 84 of the Fire and Rescue Service Act. However, the accountable officer is not required to account for property owned by Brigades.

Section 69(1)(a) refers not only to money and other property but also to ‘other resources’. ‘Resources’ is not defined in the Fire and Rescue Service Act or the *Acts Interpretation Act 1954* and would be given its ordinary meaning in the context in which it appears. ‘Resources’ is defined in the ‘Oxford English Dictionary’, Oxford University Press, Second edition, 1989, in part, as ‘stocks or reserves of money, materials, people, or some other asset, which can be drawn on when necessary’. The group of persons comprising the Brigade could be considered a resource. However, that resource is not administered or controlled by the Department.

The group of persons comprising the Brigade is administered by an individual or individuals in that group: the officers or management committee of the Brigade. The Commissioner has powers in relation to certain aspects of the Brigade but those powers are not sufficient for the Commissioner to control the Brigade.

Financial reporting requirements

Under s 69(1)(b) of the Financial Accountability Act, the accountable officer is required to produce financial statements required under the prescribed requirements. Under schedule 3 of the Financial Accountability Act, ‘prescribed requirements’ include requirements prescribed under the Financial and Performance Management Standard. Section 42(1) of the Financial and Performance Management Standard requires the accountable officers to comply with the minimum reporting requirements mentioned in the document called

‘Financial reporting requirements for Queensland Government agencies’ published by Queensland Treasury. Page 7 of Part B of that document states that AASB 127 is a prescribed requirement.

Interpretation of accounting standards

AASB accounting standards are made by the Australian Accounting Standards Board (AASB) by legislative instrument under s 334 of the *Corporations Act 2001* (Cth). However, under s 227(1)(c) of the *Australian Securities and Investments Commission Act 2001* (Cth), AASB’s functions include formulating accounting standards for other purposes and AASB standards include provisions applicable only to the public sector.

A court may enter into a detailed consideration of an accounting standard and interpret it in a way similar to the interpretation of statutes. For example, in *Stanilite Pacific Ltd (in liq) v Seaton* (2005) 55 ACSR 460 the New South Wales Court of Appeal considered in detail how *AASB 1009* applied to a company.

A court is likely to rely on expert opinion evidence of accountants in the interpretation of an accounting standards but a court must always have the last word, according to Ford’s *Principles of Corporation Law*, LexisNexis at [10.090] and *Duple Motor Bodies Ltd v Inland Revenue Cmrs* [1961] 2 All ER 167 at 175. In *Chemeq Ltd v Shepherd Investments Int’l Ltd* (2007) 62 ACSR 359 at 381-2, the court said that expert opinion evidence about the ordinary meaning of words using in accounting standards is inadmissible.

AASB 127

Paragraphs 9 and Aus9.1 of AASB 127 require a parent entity to present consolidated financial statements including all subsidiaries of the parent.

‘Control’ and ‘subsidiary’ are defined in paragraph 4 of AASB 127 as follows:

Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.

...

A *subsidiary* is an entity, including an unincorporated entity such as a partnership, that is controlled by another entity (known as the parent).

Paragraphs 4, 9 and Aus9.1 are in bold type and the note on page 4 of AASB 127 states that paragraphs in bold type state the main principles. Paragraphs 13 to Aus17.10 are in light text and set out information about the meaning of ‘control’ in the nature of commentary. However, the note on page 4 of AASB 127 says that all the paragraphs have equal authority.

In our view, a Brigade is not a subsidiary of the Department under the main principles in paragraphs 4, 9 and Aus9.1 because Brigades are not controlled by the Department. Under the definition of ‘control’ in paragraph 4 of AASB 127, the parent must have the power to

govern the financial and operating policies of the subsidiary. 'Govern' is not defined in AASB 127 and would be given its ordinary meaning. 'Govern' is defined in the 'Oxford English Dictionary', in part, as follows:

govern, v. **1. a.** *trans.* To rule with authority, esp. with the authority of a sovereign; to direct and control the actions and affairs of (a people, a state or its members), whether despotically or constitutionally; to rule or regulate the affairs of (a body of men, corporation); to command the garrison of (a fort). ...

The Commissioner's powers under division 3 of part 7 of the Fire and Rescue Service Act do not enable the Commissioner to govern the financial and operating policies of the Brigade. Under ss 80 and 81 of the Fire and Rescue Service Act, rules made by the Brigade and elections of officers do not have effect unless approved by the Commissioner. Additionally, the Commissioner can direct a Brigade to amend or revoke rules and can remove Brigade officers. However, the Commissioner can not make rules for the Brigade or appoint officers for the Brigade.

Under s 83(3) of the Fire and Rescue Service Act, members of the Brigade must comply with the Commissioner's directions when the Brigade is in charge of operations for controlling and extinguishing a fire. This gives the Commissioner some power to govern some operations of the Brigade, but it does not give the Commissioner power to govern all operating policies of the Brigade or the power to govern financial policies of the Brigade.

Section 84 of the Fire and Rescue Service Act requires equipment provided by or subsidised by the Director-General to remain the property of the State, but that has no application to other property owned by the Brigade.

Information about the meaning of 'control' in the nature of commentary in AASB 127 includes the following:

- Control is presumed to exist when the parent owns more than half of the voting power of an entity unless, in exceptional circumstances, it can be clearly demonstrated that such ownership does not constitute control – paragraph 13 of AASB 127.
- Control exists when the parent owns half or less of the voting power of an entity when there is:
 - power to govern the financial and operating policies of the entity under a statute or an agreement; or
 - power to appoint or remove the majority of the members of the board of directors – paragraphs 13(b) and (d) of AASB 127.
- In the public sector, a parent/subsidiary relationship could be established in the manner outlined in paragraph 13 of AASB 127 or, as is more frequently the case, control of another entity by the government may be indicated by the following two factors:

- the other entity is accountable to Parliament, or to the Executive, or to a particular Minister; and
 - the government has the residual financial interest in the net assets of the other entity – paragraph Aus17.2 of AASB 127.
- One or more of the following indicates that an entity is accountable to Parliament, or to the Executive, or to a particular Minister:
 - directions can be given to the governing body of that entity so that the entity acts as an agent of the government to achieve government policy objectives;
 - Ministerial approval is required for operating budgets;
 - the government can veto operating and capital budgets of the entity;
 - the government has broad discretion to appoint or remove a majority of members of the governing body;
 - the entity is required to submit to Parliament reports on operations; and
 - the mandate of the entity is established, or limited, by its enabling legislation – paragraph Aus17.3 of AASB 127.
 - The government has a residual financial interest in the net assets where:
 - the government is exposed to the residual liabilities of the entity; or
 - the government has the right to receive the residual net assets of the entity if that entity is dissolved – paragraph Aus17.4 of AASB 127.

The voting power for a Brigade depends on the rules adopted by the Brigade. The Brigade Management Rules in section D1.4 of the Rural Fire Brigade Manual 2011 do not include any voting power for the Commissioner or Departmental officers.

Brigades are not accountable to Parliament, or to the Executive, or to a particular Minister in the sense described in paragraphs Aus17.2(a) and Aus17.3(a) to (f). Election of Brigade officers is subject to the Commissioner's approval and officers may be removed by the Commissioner under section 81 of the Fire and Rescue Services Act. However, that is not a broad discretion to appoint and remove members of the Brigade's governing body because the officers are elected by the members and the Commissioner could not appoint any member or other person the Commissioner chooses.

The Department does not have a residual financial interest in the net assets of the Brigade and is not exposed to its residual liabilities. Under clause 31(b) of the Brigade Management

Rules, on dissolution of Brigades which have made those rules, surplus property of the Brigade are to be given to another Brigade. Also, the Department is not responsible for financial liabilities of Brigades.

Under both the main principles in paragraphs 4, 9 and Aus9.1 of AASB 127 and the other text in paragraphs 13 to Aus17.10 of AASB 127, Brigades are not subsidiaries of the Department and the Department is not required to present consolidated financial statements which include the Brigades.

We note that s 5(2) of the *Auditor-General Act 2009* has a definition of 'control' which is different from the definition in AASB 127. Under the Auditor-General Act, the auditor-general is required to audit all 'public sector entities' and a public sector entity includes an entity if it is subject to the control of a department. If you would like us to provide advice on the application of that definition please contact us.

Please contact Christopher Maxwell on 3239 6996 if you wish to discuss any aspect of this advice.

Yours sincerely



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