



Law Council
OF AUSTRALIA

Legal Practice Section

14 December 2023

Director
Not-for-profit Unit
Treasury
Langton Crescent
Parkes ACT 2600

By email: charitiesconsultation@treasury.gov.au

Dear Director

CHARITIES (STATE OR TERRITORY GOVERNMENT ENTITY) INSTRUMENT 2023

1. This submission has been prepared by the Charities and Not-for-Profits Committee of the Law Council of Australia's Legal Practice Section (the **Committee**). The Committee welcomes the opportunity to make a submission in relation to the proposed Charities (State or Territory Government Entity) Instrument (the **2023 Instrument**).
2. The Committee is highly supportive of the proposed change in the 2023 Instrument: namely, the removal of the prescribed entity described in current section 3(c) (**Office of Profit Entity**) of the Charities (Definition of Government Entity) Instrument (**2013 Instrument**). The Committee is aware of unforeseen and anomalous consequences due to the inclusion of the Office of Profit Entity, and agrees that this prescribed entity should be removed as a priority.
3. The Committee notes that the 2013 Instrument was introduced without public consultation during a time when government policy was to abolish the Australian Charities and Not-for-profits Commission (**ACNC**). As a result, there has not been a proper opportunity to provide submissions on whether the provisions in the 2013 Instrument, which have been reproduced in the 2023 Instrument, are fit for purpose and consistent with stated policy objectives.
4. There are concerns about the meaning of 'government entity' under both the Legislative Instrument and in the *Charities Act 2013* (Cth). Many of these concerns are complex, and require a longer period of consultation than is currently available.
5. Given the importance of removing the Office of Profit Entity, this broader consultation should not hold up that change.

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Recommendation

6. The Committee recommends that:
 - (a) The 2023 Instrument be adopted with a sunset date of one year.
 - (b) Within that year, a broader consultation be undertaken on amending the definition of 'government entity' within the Charities Act, and putting in place a new (different) Legislative Instrument.

Summary of concerns with current definition

7. There are a number of issues with the current definition. We have listed some here as headlines for further consultation, and provided greater explanation of some of them further below. Issues include:
 - (a) The current definition of government entity does not reflect the stated policy intent (see below) and it is confusing and inconsistent with common law.
 - (b) Under the current definition of 'government entity', there is a much narrower test applied to Commonwealth-controlled entities than to State-controlled entities. In other words, an entity controlled by the Commonwealth could be eligible for charity registration in circumstances where an entity controlled by the State in the same way, would not be. Again, this is inconsistent with the policy intent of the legislation and with the common law.
 - (c) The reference in the Charities Act to 'an entity established under a law by a State or Territory' causes interpretation problems, is not relevant, and excludes trusts from coming within the definition.
 - (d) Consideration should be given to whether, and if so why, it is appropriate to align the definition of 'government entity' under *A New Tax System (Australian Business Number) Act 1999* (the **ABN Act**) with the meaning of government entity as it applies in a charity law context.
 - (e) There is complexity in determining whether an entity has all of the privileges and immunities of the Crown unless this is expressly stated in the statute.
8. Consultation is needed as to whether the definition of 'government entity' should reflect the common law, and if so, how that can best be done. While proposed section 6(c) of the 2023 Instrument¹ is intended to reflect the common law, there are a number of interpretation issues with the wording in that provision which increase complexity and increase costs to charities and the regulator.

¹ Current section 3(d) of the 2013 Instrument.

What is the policy intent of the ‘government entity’ definition?

9. The general intent of the Charities Act was to ‘provide greater clarity and certainty for charities, the public and regulators in determining whether an entity is charitable’.²
10. In relation to the ‘government entity’ definition in the Charities Act, the [Explanatory Memorandum](#) to the Charities Bill 2013 (Cth) (**EM**) explains:
 - [1.52] The purposes of government in carrying out its functions and responsibilities are not charitable and a government entity cannot be a charity. However, the definition of a government entity and, in particular, its boundaries, has remained uncertain in the common law, with various factors, particularly government control, being considered as determining factors.
 - [1.53] To give greater certainty about what is a government entity, the Bill provides that the term has the same meaning as ‘government entity’ within the meaning of the A New Tax System (Australian Business Number) Act 1999 (ABN Act). **[Paragraph 4(1)(a)]**
 - [1.54] As state and territory laws describe ‘government entity’ in various ways, the Bill enables the Minister to prescribe additional classes of government entities to allow the Government to list the state and territory equivalents to Commonwealth concepts already incorporated into the ABN Act definition and to allow those terms to be more easily kept up to date. The Bill gives an example of those entities likely to be prescribed, such as the state and territory equivalents of Commonwealth executive and statutory agencies **[Paragraph 4(1) (b) and subsection 4(2)] [Emphasis added]**
11. From the above, it is clear that the intention was to:
 - (a) create greater certainty about the meaning of ‘government entity’ than exists under the common law, which involves a weighing up of various factors, including government control; and
 - (b) allow the public, charities and regulators to more easily and readily determine whether an entity is charitable.
12. In relation to the government entity definition in the Charities Act, this was done by referencing the definition of ‘government entity’ within the ABN Act. As we have noted above, further consideration should be given as to whether this is the correct approach, and the policy reasons for it.
13. The purpose of the Legislative Instrument was to ensure that the State and Territory *equivalents* to Commonwealth concepts of government entity in the ABN Act definition were aligned.

² See Preamble to Charities Act, and The [Explanatory Memorandum](#) to the Charities Bill 2013 (Cth) – paragraph 1.8.

The Charities Act and Legislative Instrument does not achieve the policy intent

14. The Charities Act and Legislative Instrument are inconsistent with the policy objective of moving away from the common law, of providing clarity and certainty about whether an entity is eligible for charity registration, and of aligning State/Territory concepts with Commonwealth concepts.
15. As a first step before the Legislative Instrument is considered, the Charities Act requires the entity (which is not a government entity within the ABN Act) to be established under a law by a State or Territory. This reference causes interpretation problems as is clear from the ACNC's Commissioner's Interpretation Statement on the meaning of 'government entity' (CIS).³ The ACNC does not interpret this phrase according to its ordinary meaning. Instead, the ACNC interprets the phrase to mean 'established under a law by a State or Territory as the relevant prescribed body'.
16. In addition, as a result of this wording, the ACNC cannot consider whether a trust controlled by government is a government entity (since it is not established by a law).⁴ The form of an entity should not be conclusive as to whether it is a government entity. The phrase 'established under a law by a State or Territory' is not relevant or necessary to the meaning of government entity.
17. The Legislative Instrument attempts to reinstate the common law analysis of weighing up various factors (section 6(c) of the 2023 Instrument⁵). The draft Explanatory Statement to the 2023 Instrument acknowledges this:

Consideration of the degree of government control and the function of the entity is consistent with the current factors that must be considered in determining whether an entity is a government entity (and therefore not a charity) under the common law. It is intended that the status of entities under the legislative instrument will generally be consistent with the status of entities as they have been determined under the common law.
18. While the Committee does not necessary disagree with reflecting the common law in the definition of 'government entity', further consultation is needed since:
 - (a) this is a departure from the initial policy position set out in the EM;
 - (b) the way in which this is done could be improved upon and clarified (see from paragraph 20 below); and
 - (c) the treatment of State and Commonwealth entities should be consistent.
19. Section 6(b) of the 2023 Instrument⁶ refers to an entity that has the privileges and immunities of the Crown. Absent an express provision to this effect in a statute, it is not always clear whether an entity will meet this description, as it involves an analysis of the entity's connection to the Crown. Many of the factors t are used to determine whether an entity has the privileges and immunities of the Crown overlap with the control factors that the ACNC must consider in section 6(c) of the 2023 Instrument.⁷ As such, the ACNC has taken the position that it will only determine that an entity has

³ See paragraph 4.4 of the CIS.

⁴ CIS 4.11.

⁵ Current section 3(d) of the 2013 Instrument.

⁶ Current section 3(b) of the 2013 Instrument.

⁷ Current section 3(d) of the 2013 Instrument.

the privileges and immunities of the Crown if it is expressed in statute that the entity does so. This is a practical approach and, absent a wholesale re-drafting of the legislation and instrument, the wording of the 2023 Instrument should at minimum reflect that approach as this would create certainty and clarity as to the application of proposed section 6(b).

20. Section 6(c) of the 2023 Instrument⁸ requires further review to ensure that it reflects the common law (and to consider whether this is the intent) and provides a clear test that can be readily applied by the ACNC. At present, the Committee identifies the following issues:
- (a) The section refers to how an entity pursues its 'objectives'. It is unclear why the term 'objectives' is used when the term 'purposes' is the common formulation for charities. Is 'objectives' intended to be different from 'purposes'?
 - (b) Section 6(c)(i) of the 2023 Instrument⁹ directs attention to whether the Crown can exercise control over the 'governance and operations' of the entity. The use of the word 'governance' could imply that the Crown's ability to appoint the board reflects control over the entity's governance. This is not consistent with common law, or the general approach taken by the ACNC. Presumably this implication is not intended, as is indicated by the government removing the Office of Profit Entity in the 2023 Instrument, though this should be made clear. The ACNC's approach has been to interpret 'control over governance' as control over the actual decision-making of the entity (rather than over the identity of the decision-makers). Again, absent a wholesale re-drafting of the legislation and instrument, the wording of the instrument should at least be changed to clarify that the ability to appoint a board is not an important factor of control.
 - (c) Section 6(c)(ii) of the 2023 Instrument¹⁰ asks the ACNC to consider whether an entity was established with the objective of fulfilling a function or responsibility of the Crown. As explained in the ACNC CIS, the courts have recognised that it is increasingly difficult to determine what matters are the responsibility of the Crown and what are not.¹¹ As such, the ACNC does not apply this factor according to the plain meaning (ie, by considering whether the entity is fulfilling a function or responsibility of the Crown). Instead, the ACNC simply looks at factors that point towards the 'governmental nature' of an entity. However, these factors should and can instead be considered under section 6(d)(iii) of the 2023 Instrument,¹² which has little or no work to do under the ACNC's approach.
21. The ACNC has taken a practical and purposive approach to administering the definition of government entity. However, the inherent ambiguity in the legislative instrument and the possible variations in interpretation of the definition are unsatisfactory. The law should be clear without relying on a regulator applying the most practical of a range of possible interpretations of the law. This current uncertainty is detrimental to the charity sector.

⁸ Current section 3(d) of the 2013 Instrument.

⁹ Current section 3(d)(i) of the 2013 Instrument.

¹⁰ Current section 3(d)(ii) of the 2013 Instrument.

¹¹ CIS 6.40.

¹² Current section 3(d)(iii) of the 2013 Instrument.

22. The Committee would welcome the opportunity to discuss this submission with you. In the first instance, please contact the Chair of the Committee, Bridgid Cowling on BCowling@abl.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to be 'G Provis', written in a cursive style.

Mr Geoff Provis
Chair