Law Council
OF AUSTRALIA

Legal Practice Section

Review of Philanthropy

Productivity Commission

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
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About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

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- Mr Andrew Smyth
- Ms Robyn Glindemann
- Mr Luke Barrett
- Mr Pier D'Angelo

Acknowledgement

The Law Council's Legal Practice Section is grateful to its Charities and Not-Profits Committee for its assistance in preparing this submission.

Executive Summary

1. The Law Council's Legal Practice Section is pleased to provide this submission in response to the Productivity Commission's Review of Philanthropy (**Review**), which opened on 23 March 2023.

2. This submission has been prepared by the Charities and Not-for-Profits Committee (**Committee**) of the Legal Practice Section. The Committee's membership includes legal practitioners and academics with significant expertise and experience in the area of charity law in Australia.

3. The Review sought submissions on 11 specific information requests. However, rather than commenting on each information request, the Committee will instead provide 10 key recommendations in relation to several topics, noting the relevant information requests under each heading.

4. The Committee's recommendations are outlined below.

    - **Recommendation 1:** Comprehensive review and reform of the deductible gift recipient (**DGR**) endorsement framework

        - *Recommendation 1.1*: All charities to be made DGRs, subject to some specific carve-outs

        - *Recommendation 1.2*: Review and reform the Public Benevolent Institution (**PBI**) DGR category

        - *Recommendation 1.3*: Introduce a DGR category for volunteering charities

        - *Recommendation 1.4*: Enable community foundations to be Item 1 DGRs

        - *Recommendation 1.5*: Enable entities to be endorsed under more than one DGR category

    - **Recommendation 2:** Clarify and broaden charitable purposes

        - *Recommendation 2.1*: Explicitly recognise charitable purposes in addition to those set out in the *Charities Act 2013* (Cth) (**Charities Act**) list which have been preserved

        - *Recommendation 2.2*: Include 'advancing amateur sport' as a charitable purpose

    - **Recommendation 3:** Simplify structure and governance requirements

        - *Recommendation 3.1*: Remove the references to 'fund' and 'institution' and replace with 'entity'

        - *Recommendation 3.2*: Enable philanthropic structures to be companies

        - *Recommendation 3.3*: Simplify structures and rules for community foundations

        - *Recommendation 3.4*: Simplify and streamline governance requirements for Aboriginal and Torres Strait Islander Australian organisations

- *Recommendation 3.5*: Consider new and optimal legal forms

- **Recommendation 4:** Amend the 'in Australia' special conditions
- **Recommendation 5:** Address issues arising from federated regulation
- **Recommendation 6:** Review provision of housing by charities
- **Recommendation 7:** Clarify incentives for giving
- **Recommendation 8:** Consider law reform necessary to encourage philanthropy in culturally and linguistically diverse (**CALD**) and Aboriginal or Torres Strait Islander Australian communities
- **Recommendation 9:** Review and streamline the current process for the valuation of tax deductible gifts
- **Recommendation 10:** Address other unfinished law reform and improvements

Recommendations

Recommendation 1: Comprehensive review and reform of the DGR endorsement framework

The below comments relate to information requests 4 and 5.

5. For current and prospective philanthropists, DGR endorsement is attractive, regardless of whether they give to a private ancillary fund (i.e., a philanthropic charity) or to a services/activity charity which is DGR endorsed.

6. The Committee is of the view that the review, streamlining and updating of the categories of DGRs and the DGR endorsement regime is long overdue. In particular, the current categories of DGR are outdated, confusing and misunderstood. Accordingly, a comprehensive review is required.

Recommendation 1.1: All charities to be made DGRs, subject to some specific carve-outs

7. The Committee has previously made submissions in relation to the reform of the categories of DGRs and the DGR endorsement regime.[1] Overall, it submits that Recommendations 6.1 to 6.6 of the Not-for-Profit Sector Tax Concession Working Group (**NFP Working Group**) in its 2013 Report, *'Fairer, simpler and more effective tax concessions for the not-for-profit sector*', should be adopted.[2]

8. Moreover, the NFP Working Group states in its Report that:

[1] See Law Council of Australia, Tax Deductible Gift Recipient Reform Opportunities Discussion Paper (Submission, 7 August 2017) <https://www.lawcouncil.asn.au/publicassets/92d8c025-6d22-e811-93fb-005056be13b5/3318%20%20Tax%20Deductible%20Gift%20Recipient%20Reform%20Opportunities%20Discussion%20Paper.pdf>; and Deductible Gift Recipient Reforms (Submission, 21 September 2018) <https://www.lawcouncil.asn.au/publicassets/636d6ab5-d4cb-ea11-9434-005056be13b5/3509%20-%20Deductible%20Gift%20Recipient%20Reforms.pdf>.

[2] NFP Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector (Final Report, May 2023) <https://treasury.gov.au/sites/default/files/2019-03/NFP-Sector-WG-Final-Report.pdf> 26.

- it supports 'the continuation of the DGR framework as the primary way to encourage philanthropy';[3]

- 'reforming eligibility for DGR status by reference to clear criteria would increase certainty and reduce red tape for eligible entities.'[4] The Working Group drew attention to the following shortcomings with the DGR framework that remain pertinent today:

    - The framework has developed in an ad hoc fashion without clear policy rationale, and the categories are arbitrary, leading to inequities and anomalies;

    - The framework is not sufficiently flexible to reflect the way many community organisations, some of which are philanthropic, operate;

    - Specific listing of entities by name creates a two-tiered system, implying that some entities are more deserving of assistance than others; and

- 'for both principled and fiscal reasons',[5] DGR status should be provided to all charities that are registered with the Australian Charities and Not-for-profits Commission (**ACNC**), subject to some restrictions, as described in recommendations 6.1 and 6.2 of the NFP Working Group.[6]

Recommendation 1.2: Review and reform the PBI DGR category

9. Should the review of DGR occur in stages, the Committee recommends that the PBI category be the first to be reviewed and broadened to better reflect modern approaches and application of policy for addressing disadvantage.

10. The current application of PBI is not only outdated, but it also distorts and restricts innovation. The Committee observes that incremental reforms to this category, including by way of judicial decisions or the ACNC's review of the Commissioner's Interpretation Statement, are not keeping pace with social change and the modern approaches and application of policy for addressing disadvantage through philanthropy.[7]

11. Philanthropy can be useful in funding innovative solutions to social issues, but the existing restrictive definition of PBI is a significant barrier. The Committee observes that philanthropists seek to address the causes of disadvantage, and do not wish to be restricted to welfare responses, as required under the current DGR category.

Recommendation 1.3: Introduce a DGR category for volunteering charities

12. If DGR endorsement is not extended to all charities, the Committee recommends that volunteering could be significantly increased and supported, if a DGR category is created for charities with the purpose of encouraging and enabling volunteering.

[3] Ibid 23.
[4] Ibid.
[5] Ibid 24.
[6] Ibid 26.
[7] See Law Council of Australia Legal Practice Section, Why is defining Public Benevolent Institutions so fraught and possible policy solutions (Attachment to submission, 30 August 2022) <https://www.lawcouncil.asn.au/publicassets/e202fcf8-e62f-ed11-9460-005056be13b5/Attachment%20B%20%20Why%20is%20defining%20Public%20Benevolent%20Institutions%20so%20fraught%20and%20possible%20policy%20solutions.pdf>.

Recommendation 1.4: Enable community foundations to be Item 1 DGRs

13. If DGR endorsement is not extended to all charities, the Committee strongly supports enabling community foundations to have the status of Item 1 DGRs, as this is a significant potential area for increasing community philanthropy.[8] This recommendation builds on the Committee's Recommendations 3.2 and 3.3 below.

Recommendation 1.5: Enable entities to be endorsed under more than one DGR category

14. If DGR endorsement is not extended to all charities, the Committee recommends that a single entity, which meets the requirements for more than one DGR category, should be able to be endorsed as a DGR under all of those DGR categories. At present, a separate entity must be established for each DGR category.

15. The Committee understands that many philanthropists seek to establish charities which address various areas of need. They do this by creating programs and activities, investing for social impact and funding other charities through one entity, which enables a co-ordinated, multidisciplinary response to complex social issues through one entity. There is no one DGR category which enables this.

16. The Committee similarly notes that supporting charities and community organisations relating to rural, regional and remote areas and Aboriginal and Torres Strait Islander Australians is challenging under the current DGR categories. Further, additional administration and expenses are required to establish each entity, creating unnecessary burdens and red tape. The Committee is of the strong view that this existing constraint limits the efficient administration of philanthropy.

17. The Committee observes that some multiple purpose entities, established by philanthropists, have obtained specific listing under the *Income Tax Assessment Act 1997* (Cth) (**Tax Assessment Act**). This recommendation would enhance consistency and fairness in this respect, particularly given that many entities are not sufficiently resourced, or may not have the relevant political leverage, to seek specific listing through the Tax Assessment Act.

Recommendation 2: Clarify and broaden charitable purposes

The below comments relate to information requests 5, 6 and 8.

Recommendation 2.1: Explicitly recognise charitable purposes in addition to those set out in the Charities Act list which have been preserved

18. The Charities Act lists 12 charitable purposes, including paragraph 12(1)(k):

> *any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j).*

[8] This was a welcomed measure of the previous government in its 2022-23 Federal Budget. See the Hon Michael Sukkar MP, Morrison Government backs Community Foundations with DGR status reforms (Media Release, 1 April 2022) <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/morrison-government-backs-community-foundations-dgr>.

19. In addition, Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) (**Charities Consequential Act**) preserves every purpose that was deemed a charitable purpose prior to the commencement of the Charities Act, and to which the other paragraphs of the definition do not apply, expressly recognising that those purposes fall under paragraph 12(1)(k).

20. In the experience of members of the Committee, philanthropists will often assume that charitable purposes are limited to the recognised purposes in subsection 12(1) and will overlook paragraph (k), especially in respect of the Charities Consequential Act. In addition, the guidance on the ACNC's website only lists the 12 'recognised charitable purposes'.[9] This approach is incorrectly confining and does not encourage broader innovative approaches to philanthropy beyond the purposes explicitly provided in the Charities Act. For example, the Committee is aware that philanthropists often wish to support the development of certain industries and economies.

21. The Committee submits that, in addition to the 12 charitable purposes set out in subsection 12(1) of Charities Act, the other charitable purposes which were in existence prior to the commencement of the Charities Act (and therefore fall under paragraph 12(1)(k)) should be more prominently specified in the legislation. Further, the ACNC should sufficiently recognise these other charitable purposes and provide guidance on what constitutes them.

Recommendation 2.2: Include 'advancing amateur sport' as a charitable purpose

22. The Committee recommends that the categories of charitable purposes in the Charities Act be extended to include 'advancing amateur sport'.

23. The Committee endorses the submission made in December 2021 on this matter by the Australian Sports Foundation to the former Treasurer and several relevant Ministers,[10] noting that this change would significantly increase philanthropic giving to amateur sport from its current levels to a level equivalent to philanthropy in the arts and cultural sector, which will to help meet funding demands and ease the funding pressures on Government.

Recommendation 3: Simplify structure and governance requirements and consider new legal forms

The below comments relate to information requests 6 and 8.

Recommendation 3.1: Remove the references to 'fund' and 'institution' and replace with 'entity'

24. The Committee considers that it is unnecessary and confusing for some DGR categories to be 'funds', while others are 'institutions'. This language should be replaced by the catch-all term 'entity'.

[9] ACNC, Charitable Purpose (Web Page, 2023) <https://www.acnc.gov.au/for-charities/start-charity/you-start-charity/charitable-purpose>.
[10] This submission is not available publicly. The Committee suggests that the Productivity Commission obtain a copy from the Australian Sports Foundation if it has not already received it.

25. Currently, Commonwealth and State tax legislation have different rules for 'funds' and for 'institutions' in numerous areas. However, it is increasingly difficult to identify when an entity is a 'fund' or an 'institution'. While this has always been the case, the distinction is very artificial, particularly following the 2008 case of *Word Investments*,[11] which gave rise to the interpretation that active fundraising would make the entity an institution, even if it fulfilled its charitable purpose by passive grant making.

26. The Committee is of the view that there is no clear policy rationale for denying charities which are 'funds' certain tax concessions which are available to charities which are 'institutions' or requiring some DGR categories to be 'funds' and others to be 'institutions'. There are also differences in how the cases relating to the distinctions are applied.

27. Further, for philanthropic foundations, the detrimental impacts of the artificial and blurred distinction between 'fund' and 'institution' include:

    - the inability to access the fringe benefit tax (**FBT**) rebate, which is only available to charitable institutions;
    - the inability to direct philanthropic funding for benevolent purposes or prevention and control of diseases to charities that are not endorsed as DGRs;
    - restrictions on gifts of property under some State laws; and
    - unnecessary complication and confusion.

Recommendation 3.2: Enable philanthropic structures to be companies

28. Similar to the problematic 'distinction' between funds and institutions, the Committee considers that there is no satisfactory policy reason to require ancillary funds to be trusts, rather than companies, as is the case currently. The disadvantages of requiring ancillary funds to be trusts include that:

    - additional costs are borne, as two entities are required (the company as trustee and the trust itself);
    - trusts are not as well understood as companies, resulting in increased expenses in obtaining advice or errors being made; and
    - trustees are subject to greater restrictions on investments and powers.

29. It is not clear to the Committee why the DGR philanthropic foundations must have this structure, whereas charitable entities do not. The Committee therefore recommends that this requirement be abolished as it unnecessarily adds costs and restraints that do not apply to other charitable structures.

Recommendation 3.3: Simplify structures and rules for community foundations

30. At Recommendation 1.4 above, the Committee recommends the endorsement of all community foundations as Item 1 DGRs. Additionally, to remove unnecessary complications and burdens, the Committee recommends that community foundations should be structured as companies, limited by guarantee, with the ability to carry out charitable activities and make grants to local charities.

[11] 236 CLR 204.

31. Transitional laws should be passed to enable existing community foundations to simplify their structures.

Recommendation 3.4: Simplify and streamline governance requirements for Aboriginal and Torres Strait Islander Australian organisations

32. The Committee notes that while companies which are registered charities have enjoyed the switching-off of certain provisions of the *Corporations Act 2001* (Cth) since the introduction of the ACNC regime, the same exercise has not been undertaken for organisations established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).[12]

33. The Committee therefore recommends that the governance requirements for Aboriginal and Torres Strait Islander Australian organisations be simplified and streamlined.

Recommendation 3.5: Consider new and optimal legal forms

34. The Committee notes that the question of optimal legal forms for social enterprises has been under consideration for many years. The Australian Law Reform Commission's (**ALRC**) publications on this topic are relevant and the Committee refers the Productivity Commission to these.[13]

35. Most recently, there has been consideration of decentralised autonomous organisations (**DAOs**). In the Law Council's 2022 submission to Treasury Board of Taxation (**Board**) in response to its Review of the Tax Treatment of Digital Assets and Transactions in Australia,[14] the Committee recommended that the Board should also consider the principles of taxation for new legal forms associated with DAOs that are formed for altruistic purposes, akin to what are known as 'giving circles' (i.e., groups of individuals who donate money and/or time, and have a say in the distribution of these resources).

[12] The Committee refers to the presentation on 'First Nations and Charity Law' at the 2022 Annual Conference of the Charity Law Association of Australia and New Zealand for an explanation of the key issues. In particular, the presentation of Bridgid Cowling (Arnold Bloch Leibler) at 28:38, 'After 10 years of the ACNC, the CATSI Act has some catching up to do'. Recording available at <https://claanz.org.au/events_2022claanz conference-1>.

[13] See ALRC and University of Melbourne, Legal Structures for Social Enterprises – a nationwide conversation on law reform (Webinar, 31 August 2020) <https://www.alrc.gov.au/news/legal-structures-for-social-enterprises-a-nationwide-conversation-on-law-reform/>; ALRC, Legislative Framework for Corporations and Financial Services Regulation: New Business Models, Technologies, and Practices (Background Paper, October 2022) <https://www.alrc.gov.au/wp-content/uploads/2022/10/FSL7-New-Business-Models-Technologies-and-Practices.pdf>.

[14] Law Council of Australia, Review of the Tax Treatment of Digital Assets and Transactions in Australia (Submission, 26 October 2022) <https://www.lawcouncil.asn.au/publicassets/61b9461e-065f-ed11-9475-005056be13b5/2022%2010%2026%20-%20S%20%20Review%20of%20the%20Tax%20Treatment%20of%20Digital%20Assets%20and%20Transactions%20in%20Australia.pdf> 4-5 [16].

Recommendation 4: Amend the 'in Australia' special conditions

The below comments relate to information request 6.

36. The Committee considers that while philanthropy increasingly seeks to tackle global issues, Australia has one of the strictest regimes for the tax treatment of cross-border donations.[15] At present, entities with the most tax concessions—DGRs—can provide benefits outside Australia, but charities without DGR status, that seek to retain income tax exemptions, are restricted to operating and incurring their expenditure principally in Australia.

37. The Committee is of the view that this is a nonsensical situation from a policy perspective, as it restricts charitable philanthropic entities from participating in global causes such as medical research, environmental issues, education, think tanks and the like.

38. Any charity 'operating' (which includes sending funds) outside Australia must comply with the ACNC's External Conduct Standards,[16] so there appears to be no clear rationale for having a different requirement for non-DGR charities. The Committee therefore recommends that the 'in Australia' requirement that currently applies to DGRs be applied to all charities, whether DGR or not.

Recommendation 5: Address issues arising from federated regulation

The below comments relate to information requests 6 and 8.

39. The Committee considers that there are currently numerous challenges as a result of the current federated regulation of charities, including:

    - confusion as a result of the inconsistent definitions of 'charity';
        - In addition to the common law definitions, the terms 'charity', 'charitable purpose' and 'charitable status' occur in 172 pieces of Commonwealth, State and Territory legislation.[17]
    - confusion as to varying treatment of taxes, including in relation to payroll tax, stamp duty and land tax.
        - This creates significant complexity for charities operating in multiple jurisdictions. It also creates barriers to gifting land, in particular, due to different rules for stamp duty, and also for philanthropists providing buildings for charitable purposes if the charity is not in occupation, as this triggers taxes in many States.

[15] See Natalie Silver, 'When Charity No Longer Begins and Ends at Home: The Australian Government's Regulatory Response to Charities Operating Overseas', *Adelaide Law Review* (2019, 40(3)) 755-782, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548343>; Natalie Silver and Renate Buijze, 'Tax Incentives for Cross-Border Giving in an Era of Philanthropic Globalization: A Comparative Perspective', *Canadian Journal of Comparative and Contemporary Law* (2020, 6(1)) 109-150, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765102>.

[16] ACNC, External Conduct Standards (Web Page, 2023) <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards>.

[17] See ACNC, A Common Charity Definition? (Presentation to The Tax Institute, 27 July 2016), <https://www.acnc.gov.au/sites/default/files/documents/2021-07/Download%20%20-%20A%20common%20charity%20definition%20%5BPDF1.0MB%5D.pdf>.

- difficulties with fundraising; and
    - The Committee commends the steps taken already towards a consistent and simplified approach to charitable fundraising through the introduction of National Fundraising Principles in early 2023.[18]
- a very technical issue, directly affecting philanthropic trusts, relates to what is generally referred to as the 'opt in' provisions in some State statutes applying to charitable trusts, permitting the trusts to 'opt in' to a power to give to non-charitable DGRs and remain charitable at law.
    - A paper by Herbert Smith Freehills is at **Appendix A** is which includes drafting for the States to adopt. The Committee notes that only Western Australia has adopted this wording to date.

40. The Committee is of the view that the above issues could ideally be addressed by the States transferring their powers with respect to charities, including charitable trusts, to the Commonwealth. Failing this, then a harmonisation of the regulation of charities should be pursued.

41. In addition, the Committee commends the proposals outlined by The Tax Institute to the Board in 2020 for a generally accepted definition of 'charity' for federal and state taxation purposes.[19]

42. The above views concerning State referrals and harmonised laws represent the views of the Committee. The views of the Law Council's constituent bodies, which are responsible for state and territory matters, have not been sought in reaching these positions. The Law Council would, however, be happy to consult its constituent bodies on these matters should it assist the Productivity Commission.

Recommendation 6: Review provision of housing by charities

The below comments relate to information requests 5 and 6.

43. In September 2020, the Committee provided a submission to the ACNC regarding the Commissioner's Interpretation Statement on the provision of housing by registered charities.[20] A key issue the Committee raised in its submission was:

> *The Committee perceives that the ACNC tends to regard provision of housing by home ownership as necessarily providing unacceptable private benefit [by the registered charity]. The Committee submits that provision of home ownership is not incompatible with charitable purposes. Indeed, there will be circumstances where enabling ownership may be more efficient, effective and economic than commitment to long term rental subsidy.*[21]

[18] The Hon Dr Andrew Leigh MP, Agreement reached on reform of charitable fundraising laws (Media Release, 16 February 2023) <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/agreement-reached-reform-charitable-fundraising-laws>.
[19] The Tax Institute, Proposal for a Generally Accepted Definition of 'Charity' for Federal and State Taxation Purposes (Submission, 14 August 2020) <https://resources.taxinstitute.com.au/tisubmission/tax-institute-submission-proposal-for-a-generally-accepted-definition-of-charity-for-federal-and-state-taxation-purposes>.
[20] Law Council of Australia Legal Practice Section, Revision of Commissioner's Interpretation Statement CIS2014/02 Provision of Housing by Charities (Submission, 10 September 2020) <https://www.lawcouncil.asn.au/publicassets/9b72f591-f601-eb11-9434-005056be13b5/3880%20%20Revision%20of%20Commissioners%20Interpretation%20Statement%20-%20Housing.pdf>.
[21] Ibid 2 [9].

44. Further, in its submission, the Committee commended the position taken in the United Kingdom on the provision of housing,[22] and compared 'private benefit' to 'public benefit' in the context of provision of housing.[23]

45. The ACNC Commissioner's revised Interpretation Statement only partly addressed the matters raised in the Committee's submission. The Committee accordingly recommends law reform in this area as a step towards addressing the ongoing issue of housing affordability in Australia. Moreover, the Charities Act should be reviewed and, where necessary, amended to address the remaining matters.

Recommendation 7: Clarify incentives for giving

The below comments relate to information requests 6 and 8.

46. The Committee considers that philanthropy can be increased by assisting charities to provide incentives for giving, while avoiding providing private benefits by clarifying materiality. For instance, this may consist of deleting the deductible contributions provisions in the Tax Assessment Act as these are confusing and rarely—if ever—used.

47. The Committee recommends a review to consider how to encourage more giving through events and sales of tickets, goods and services. It also refers to Recommendation 11 of the NFP Working Group's Report, relating to modernising the anti-avoidance rules for gifts.[24]

Recommendation 8: Consider law reform necessary to encourage philanthropy in CALD and Aboriginal and Torres Strait Islander communities

The below comments relate to information requests 1, 8 and 8.

48. As Australia continues to diversify, understanding is evolving within Australian society regarding the meaning of 'inclusion'. As such, how existing laws could be improved to encourage philanthropy in CALD and Aboriginal and Torres Strait Islander communities is an area that warrants further research and examination.

49. At Recommendation 3.4 above, the Committee identified one topic of necessary law reform for Aboriginal and Torres Strait Islander Australian organisations. Beyond this, the Committee recommends further identification and consideration of the law reforms necessary to enact the suggestions set out in the Cultural and Indigenous Research Centre Australia's 2016 Report, '*Giving and volunteering in culturally and linguistically diverse and Indigenous communities*.'[25]

[22] Ibid 3 [12].
[23] Ibid 3-7 [13-29].
[24] NFP Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector (Final Report, May 2023) <https://treasury.gov.au/sites/default/files/2019-03/NFP-Sector-WG-Final-Report.pdf> 33.
[25] Cultural and Indigenous Research Centre Australia, Giving and volunteering in culturally and linguistically diverse and Indigenous communities (Final Report, June 2016) <https://volunteeringhub.org.au/wp-content/uploads/2021/02/Giving%20and%20Volunteering%20in%20Cultural%20and%20Linguistically%20Diverse%20and%20Indigenous%20Communities.pdf>.

Recommendation 9: Review, streamline and update the current process for the valuation of tax deductable gifts

The below comments relate to information requests 6 and 8.

50. The Committee notes that there are currently a range of complex requirements and restrictions on the deductibility of different types of assets and how they are valued.[26] For example, donations of listed shares are only deductible if the market value of the shares are between $2 and $5,000 and acquired more than 12 months prior to the donation. Different requirements apply if:

    - the shares are not listed shares;
    - the market value is over $5,000 according to ATO's valuation; or
    - the shares were acquired less than 12 months prior to the donation.

51. Further, a valuation needs to be obtained from the Australian Taxation Office (**ATO**) for certain types of properties which are gifted. The Committee understands that obtaining this valuation is rarely a quick exercise and can only be undertaken after the gift has been made and the ATO does not provide much information about how it establishes value. Consequently, the uncertainty and delay in ascertaining the availability and amount of any deduction discourages philanthropy.

52. The Committee recommends that these arrangements be reviewed and streamlined. It would be ideal if the ATO could provide valuation and confirmation prospectively, so that philanthropists can have confidence about whether their proposed gift is tax deductible and have certainty regarding the amount of the deduction that is available to them. The Committee refers to Recommendation 7 of the NFP Working Group's Report in this respect.[27]

53. There is also the issue of new types of assets, principally, digital assets. The Committee has previously made submissions on this issue to the Board in response to its Review of the Tax Treatment of Digital Assets and Transactions in Australia.[28]

Recommendation 10: Address other unfinished law reform and improvements and emerging issues

The below comments relate to information requests 4, 5, 6 and 8.

54. Most of the Committee's recommendations in this submission are in the nature of unfinished law reform, or further improvements that should be made, to enable philanthropists to engage in philanthropy and operate their charities (once established) more easily.

[26] See, e.g., Australian Taxation Office, Valuing contributions and minor benefits (Web Page, 2017) <https://www.ato.gov.au/Non-profit/Gifts-and-fundraising/Valuing-contributions-and-minor-benefits/>.
[27] NFP Working Group, Fairer, simpler and more effective tax concessions for the not-for-profit sector (Final Report, May 2023) <https://treasury.gov.au/sites/default/files/2019-03/NFP-Sector-WG-Final-Report.pdf> 30.
[28] Law Council of Australia, Review of the Tax Treatment of Digital Assets and Transactions in Australia (Submission, 26 October 2022) <https://www.lawcouncil.asn.au/publicassets/61b9461e-065f-ed11-9475-005056be13b5/2022%2010%2026%20-%20S%20%20Review%20of%20the%20Tax%20Treatment%20of%20Digital%20Assets%20and%20Transactions%20in%20Australia.pdf>.

55. In 2021, Professor Ann O'Connell detailed the structure and failings of the current design and implementation of the taxation regime for philanthropy in Australia in the Law Council's John Emerson Oration,[29] and in early 2023, Emeritus Professor Myles McGregor-Lowndes published a paper outlining a significant number of unfinished law reform measures and improvements that remain necessary.[30] The Committee recommends a thorough examination of their views to continue the reforms commenced when the ACNC was established and legislation such as the Charities Act was enacted, and further enhance on the existing legal framework for charitable tax concessions.

56. Finally, the Committee notes there are also emerging issues which should be identified and addressed. For example, in relation to digital assets, in the Law Council's 2022 submission to the Board,[31] the Committee suggests that the Ministerial Guidelines for Private Ancillary Funds and Public Ancillary Funds should be altered to include provisions about digital assets in relation to investment strategy or investment limitations and distributions in digital assets.

[29] Ann O'Connell, Is the tax regime for charities and not-for-profit entities 'fit for purpose'? (Paper delivered at the John Emerson Oration, 30 November 2021) <https://www.lawcouncil.asn.au/media/news/2021-john-emerson-oration>.
[30] Myles McGregor-Lowndes, Are any more Recommendations worth implementing from nearly 30 years of Commonwealth Nonprofit Reform Reports? (QUT Paper, February 2023) <https://eprints.qut.edu.au/237821/33/Are_there_any_more_recommendations_worth_implementing.pdf>.
[31] Law Council of Australia, Review of the Tax Treatment of Digital Assets and Transactions in Australia (Submission, 26 October 2022) <https://www.lawcouncil.asn.au/publicassets/61b9461e-065f-ed11-9475-005056be13b5/2022%2010%2026%20-%20S%20%20Review%20of%20the%20Tax%20Treatment%20of%20Digital%20Assets%20and%20Transactions%20in%20Australia.pdf> 4.

1 Overview of the issue

The complex and inconsistent laws create barriers for State government DGRs (such as hospitals, galleries, museums) to raise necessary funds from philanthropic foundations.

Since the creation of the ACNC, charities and philanthropic foundations are more aware of the ACNC requirements and the *Charities Act 2013 (Cth)* and are not aware of State requirements or that these may be inconsistent.

The *Charities Act 2013 (Cth)* automatically accepts that trusts which make grants to government entities which would be charitable if they were not a government entity, are charitable for Commonwealth purposes. However, under the various State legislation, in order to make grants to government entities, philanthropic funds need to take action (in the form of a declaration or selecting specific wording when drafting the trust deed).

Trustees currently make distributions not authorised under State laws (other than WA), in mistaken reliance on the *Charities Act 2013 (Cth)*, and also then can make distributions which threaten the trust's charitable status under Commonwealth law, in mistaken reliance on the State laws.

2 Overview of the solution

All State and Territory Acts regulating charitable trusts be harmonised to adopt the recent amendments in Part 6 *Charitable Trusts Act 2022 (WA)*:

(a) Provide an *automatic* power for trustees of any charitable trust[1] to distribute to government entity Item 1 DGRs[2], so no action is required by the trustees to enable the trust to make these grants.

(b) The power needs to have retrospective effect to cover any breaches which have been occurring, particularly since the introduction of the Commonwealth *Charities Act 2013*.

(c) The provision must:

  (1) ensure that the trust remains charitable under the relevant State and Territory law.

  (2) be drafted consistently with the *Charities Act 2013* so these trusts remain charitable under Commonwealth law and income tax exempt.

This would significantly reduce red tape and compliance risks for ancillary funds and other charitable trusts and simplify access to philanthropic funds by government DGRs.

[1] While this issue is particularly relevant for ancillary funds, all charitable trusts would benefit from a clear, consistent approach across the Commonwealth, States and Territories.

[2] These are DGRs listed in item 1 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (Cth).

HERBERT SMITH FREEHILLS

3 The detailed explanation

3.1 What is an ancillary fund?

An ancillary fund is a trust which is a type of deductible gift recipient (**DGR**) under item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**).

Item 2 specifies that an ancillary fund can only provide money, property or benefits to Item 1 DGRs[3].

3.2 Charitable status of trusts

In order to be a valid charitable trust, a trust must meet the requirements of being charitable under its relevant State or Territory laws.

In order to be income tax exempt as a charity, a trust must meet the requirements of being charitable under the Commonwealth laws.

This is where the confusion and complication arises which we submit should now be simplified.

3.3 Position before 2006

(a) Charitable under State and Territory laws

To be a valid charitable trust under State and Territory laws, an ancillary fund could only make distributions to Item 1 DGRs which were themselves 'charitable at law'. That is, as a charitable trust, an ancillary fund could only give to other charities.

(b) Income tax exempt status under Commonwealth laws

In order to be income tax exempt under Commonwealth laws, an ancillary fund also had to meet the legal meaning of charity and was therefore restricted to only making grants to charitable Item 1 DGRs.

(c) Definitions the same

As the meaning of 'charitable' at Commonwealth and State and Territory laws was the same, there was no confusion and all trust deeds for charitable ancillary funds prior to and including 2006 would be restricted to giving only to charitable item 1 DGRs.

3.4 Government entities

Relevantly, some Item 1 DGRs are not charities due to their connection with government. For example, government controlled hospitals, libraries, museums and art galleries. Most of these rely to some extent on philanthropic support for their operations, for example, medical research at hospitals.

[3] The requirements of an ancillary fund are otherwise substantially set out in the Private Ancillary Fund Guidelines and the Public Ancillary Fund Guidelines.

If ancillary funds and other charitable trusts could only give to charities, these government DGRs could not receive grants from the growing number of philanthropic funds.

3.5 2006 to 2013

(a) Charitable under State and Territory laws

In order to ensure that these types of DGRs could benefit from the philanthropy provided by ancillary funds, the State governments in Victoria, New South Wales, Western Australia, South Australia and Queensland all inserted amendments into their respective legislation which allowed ancillary funds to remain charitable at law while distributing to non-charitable Item 1 DGRs[4]. But required specific action by the trustees to come within these amendments.

The legislation in Victoria, New South Wales and Western Australia, provided protection for trusts which may have made grants to non-charitable DGRs prior to the date of the amending Act (but not for trusts which make grants to non-charitable DGRs after the date of the relevant amending Act and before they take the specific action to come within these amendments).

In addition, the laws in the different jurisdictions are not consistent, and involve different requirements.

Generally, a separate declaration made as a deed by the trustee of the ancillary fund is required to 'opt in' to the power to give to non-charitable Item 1 DGRs or specific wording is required in the drafting of the trust deed.

(b) Income tax exempt status under Commonwealth laws

The State law amendments enabled ancillary funds to remain charitable under the relevant governing law of the ancillary fund. However, the State laws could not make the ancillary funds charitable under Commonwealth law for tax purposes.

Therefore, in order for the ancillary funds which did 'opt in' to the relevant State legislation to remain income tax exempt, the ITAA97 was amended to create a new category for income tax exemption referred to as an income tax exempt fund (**ITEF**).

The forms for the declaration in the State laws recognise the change in tax status by requiring the trustee to have regard to the liability of the trustee to income tax.

During this period the trustee had to apply to the ATO to change the tax status to an ITEF from an income tax exempt charity (**ITEC**).

It was easy to identify those ancillary funds which had 'opted in' as the ABR identified the trust as either an ITEC or an ITEF.

[4] The laws differ as to whether grants can be made to any Item 1 DGR or only Item 1 DGRs which are charitable, or which would be charitable but for their connection to government – see table annexed.

3.6 After 2013

(a) Income tax exempt status under Commonwealth laws

After the introduction of the *Charities Act 2013* (Cth) (**Commonwealth Charities Act**), ancillary funds are effectively deemed charitable under Commonwealth law, if they can make grants to government entities which are Item 1 DGRs and which would be charities if they were not 'government entities' (referred to as **government entity Item 1 DGRs**).

As a result of these changes, the ITEF provision in the ITAA97 was no longer required and was repealed as these ancillary funds became charitable under Commonwealth law and could access income tax exemption on that basis.

The ABR then removed all references (even in the historical data) to ITEF endorsement.

Due to the wider provisions in New South Wales, Western Australia and Queensland, transitional laws[5] were required to 'grandfather' those ancillary funds which had 'opted in' to the wider powers available prior to the Commonwealth Charities Act. Since 1 January 2014, ancillary funds established in these jurisdictions, which can give to *any* DGR (not only DGRs that are charitable or would be charitable if they were not a government entity) can no longer access income tax exemption.

(b) Charitable under State and Territory laws

Only Western Australia has recently made changes to recognise this change to Commonwealth law – no other States or Territories have adopted this as yet which is causing confusion and lack of compliance with State and Territory laws.

4 The problems

4.1 The differences between State and Commonwealth legislation create uncertainty and confusion[6]

Every ancillary fund or other charitable trust that wishes to be a valid charitable trust and obtain income tax exemption needs to ensure that it is charitable under both the State law, and the Commonwealth law. In the context of an ancillary fund that wishes to make grants to a government entity Item 1 DGR, there is inconsistency between how the State law and the Commonwealth law operates, which results in unnecessary confusion and red-tape.

For example, section 13 of the Commonwealth Charities Act appears to operate automatically while the State laws might require a separate action to be taken by the

[5] *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth).

[6] The differences between the jurisdictions is set out in the table in Annexure A.

trustees (in the form of making a declaration and selecting specific wording when drafting the trust deed).

Section 13 may be viewed as allowing a charitable trust to make distributions to a government entity Item 1 DGR, without appreciating that section 13 only operates for Commonwealth charity law purposes, not State charity law purposes. As a result, a trustee might make a distribution which threatens the trust's charitable status under State law (albeit, that the distribution is authorised under Commonwealth law). On the other hand, the legislation in New South Wales, Queensland and Western Australia enables ancillary funds to make distributions any DGRs, and still remain charitable. This is broader than what section 13 allows, which means that a trustee might make a distribution which threatens the trust's charitable status under Commonwealth law (albeit, that the distribution is authorised under State law).

In other words, the discrepancy between State and Commonwealth laws in this area creates a situation where mistakes will likely be made.

In addition, the concepts used to describe 'government entity Item 1 DGR' for State purposes and for Commonwealth purposes are different. Trustees must therefore go through a two step-process, such as the following (for South Australian ancillary funds):

1) Would the entity be a charity within the meaning of the *Charities Act 2013* (Cth) if it were not a 'government entity' as defined in that Act?

2) Would the entity be a charity as set out in section 69D of the *Trustee Act 1936* (SA), but for its connection to government?

These concepts likely overlap in a significant if not complete way. Nevertheless, the fact that two slightly different tests exist creates unnecessary red tape and burden on philanthropy.

There is also inconsistency between the States, with Victoria always requiring a declaration, South Australia requiring a power in the trust deed and New South Wales, Queensland and Western Australia allowing a declaration in the absence of a power in the trust deed. In the other jurisdictions, the absence of legislation means that ancillary funds can only make distributions to charities.

Given the above, money that could be used for grant making, is instead spent on legal advice and compliance, due to the complex legal framework in which ancillary funds operate. It is in the interests of both the philanthropic community, and State governments (which benefit from the significant donations to public institutions), to ensure that the law facilitates philanthropy and is as clear and easy to apply as possible.

4.2 It can be difficult to identify which ancillary funds have 'opted-in'

As mentioned above, State law (other than WA) does not apply automatically to all ancillary funds. In Victoria, in order to make distributions to government entity Item 1 DGRs, trustees are required to 'opt-in' by signing a particular declaration. This is also required in New South Wales and Queensland unless the trust deed already allows for this type of distribution.

Previously, ancillary funds that had opted in, or which were otherwise able to make grants to government entity Item 1 DGRs were identifiable by reference to their tax status as an

income tax exempt fund (or ITEF). However, this income tax exempt category no longer exists, and instead, these ancillary funds obtain income tax exemption as charities.

As there is no longer a way of identifying ancillary funds that have 'opted in' by reference to their tax status, many trusts do not know if they have opted in or not. Declarations may have been entered into but not kept with the trust deed. There is confusion in the ancillary fund sector as to how they work out if they have, at some stage in the past 15 or so years, made this declaration. This situation will only get worse as time goes on.

4.3 Risks from inadvertent lack of compliance

Due to the complexity of these laws, there are a number of ancillary funds unaware that they may be operating in a manner which is not charitable at State and Territory law.

In practice, if and when this is identified, a declaration to 'opt in' can be made in those States permitting this, but, even then, it cannot operate retrospectively under the various State laws. Whereas the ATO can decide that it will not take any action in respect to a breach of the trust deed, there is no equivalent power at State law, so the position of these trusts, and the liability of the trustees remains unclear.

5 Opportunity to simplify

The introduction of the Commonwealth Charities Act provides an opportunity for the States and Territories to reduce uncertainty and facilitate philanthropy by harmonising the various laws and by providing automatic powers to trustees of charitable trusts to distribute to government entity Item 1 DGRs.

All State and Territory laws regulating charitable trusts should be amended to:

1) Provide an automatic power for trustees of any charitable trust[7] to distribute to government entity Item 1 DGRs with retrospective effect, so no action is required by the trustees to enable the trust to make grants to government entity Item 1 DGRs.

2) Ensure the drafting is consistent with the operation of section 13 of the *Charities Act 2013* so these trusts remain charitable under Commonwealth law and income tax exempt.

WA has done this and we urge all States and Territories to adopt the wording in Part 6 of the *Charitable Trusts Act 2022 (WA)* – extracted in Annexure B.

[7] While this issue is particularly relevant for ancillary funds, all charitable trusts would benefit from a clear, consistent approach across the Commonwealth and States.

Annexure A: Comparison of State and Commonwealth Laws

INCOME TAX EXEMPTION - COMMONWEALTH		
Legislation	The provisions apply to:	How the provision operates
Income Tax Assessment Act 1997 (Cth): section 50-1 and item 1.1 in the table in section 50-5	Registered charities	Subject to certain conditions, charities that are registered with the ACNC are eligible to be endorsed as exempt from income tax.
Income Tax Assessment Act 1997 (Cth): section 50-1 and item 1.4 in the table in the former section 50-20	Ancillary funds which were: • established and maintained solely for the purpose of providing money, property or benefits to, or for the establishment of, an item 1 DGR • not eligible to be endorsed as a charitable trust These funds were referred to as income tax exempt funds (or ITEFs).	Subject to certain conditions, these types of funds were eligible to be endorsed as exempt from income tax.

INCOME TAX EXEMPTION - COMMONWEALTH		
Legislation	The provisions apply to:	How the provision operates
Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth): Item 4, Part 2, Division 2, Schedule 2	A fund that was endorsed as an ITEF[8] on 31 December 2012	A fund that was endorsed as an ITEF on 31 December 2012 was automatically registered as a charity with the ACNC and endorsed to access income tax exemption as a charity with the ATO on 1 January 2013. Its purposes are treated as charitable purposes.

[8] Under Subdivision 50-B of the *Income Tax Assessment Act 1997* (Cth) because of being covered by the item 4.1 of the table in the former section 50-20 of that Act.

	CHARITABLE STATUS				
Jurisdiction	Legislation	Year that the provisions came into effect	The provisions apply to:	Who can grants be made to:	How the provision operates
Commonwealth	*Charities Act 2013* (Cth): section 13	2014	This provision applies to any 'fund'. While it may extend to all charities, it certainly applies to all charitable trusts.	A 'government entity' that would be a charity were it not a government entity. 'Government entity' is defined in section 4.	The government entity is treated as a charity when determining whether the fund has a charitable purpose. As such, any grants made by the fund to a government entity Item 1 DGR will be deemed to be made to a charity and therefore, the fund will continue to have a charitable purpose.

	CHARITABLE STATUS				
Jurisdiction	Legislation	Year that the provisions came into effect	The provisions apply to:	Who can grants be made to:	How the provision operates
Victoria	*Charities Act 1978* (Vic): section 7K Came into effect in 2006	2006	Charitable trusts	DGRs which would be charities but for their connection to government.	Trustees can make a declaration in the form provided in the Schedule of the Act. The declaration gives them the power to make distributions to, or for the establishment of, a DGR that would be a charity but for its connection to government. The trust remains charitable under Victorian law despite these distributions to non-charitable DGRs. This applies despite anything contrary in the trust deed.

	CHARITABLE STATUS				
Jurisdiction	Legislation	Year that the provisions came into effect	The provisions apply to:	Who can grants be made to:	How the provision operates
South Australia	*Trustee Act 1936* (SA): section 69D	2010	Charitable trusts	Any entity that would be a charity but for its connection to government.	Any trust that provides money, property or benefits to, or for the establishment of, an entity that would be a charity but for its connection to government, remains charitable. This provision operates automatically, without requiring any special action by the trustee. However, the trust deed will need to include the power or a purpose to make these distributions.

Queensland New South Wales	*Trusts Act 1973* (Qld): Part 9 *Charitable Trusts Act 1993* (NSW): Part 4A	**Queensland** 2009 **New South Wales** 2006	**Queensland** Ancillary funds and certain prescribed entities. There are currently no prescribed entities. **New South Wales** Ancillary funds and prescribed entities. Currently trusts which are endorsed as registered charities have been prescribed in the Regulations.	Any DGR	The trustee is empowered to make grants to, or for the establishment of, a non-charitable DGR, and the trust remains charitable if either: 1. its trust deed allows for these distributions to be made; or 2. the trustee makes a declaration in the approved form. Where a declaration is made, the power given to the trustee under Part 9 applies despite anything to the contrary in the trust deed, except where the trust deed expressly prohibits a distribution to a particular recipient or class of recipients. The declaration can be limited only include certain recipients or classes of recipients.
Tasmania, NT and the ACT	No legislation addressing this issue	NA	NA	NA	Ancillary funds set up in these jurisdictions can only make grants Item 1 DGRs that are charitable at law.

Annexure B - Charitable Trusts Act 2022 (WA)

Part 6 — Gifts by certain trusts for philanthropic purposes

48. Terms used

In this Part —

eligible recipient means a deductible gift recipient —

(a) listed in item 1 of the Table to the *Income Tax Assessment Act 1997* (Commonwealth) section 30-15; and

(b) that is not a charity due to its connection with government or by being a government entity but would be a charity if it did not have the connection with government or it was not a government entity;

former commencement day means the day on which the *Charitable Trusts Amendment Act 2011* came into operation;

former prescribed power means a prescribed power as defined in the *Charitable Trusts Act 1962* section 22D(1);

government entity has the meaning given in the *Charities Act 2013* (Commonwealth) section 4;

prescribed power, for a prescribed trust, means a power referred to in section 49 or 50;

prescribed trust means —

(a) a fund referred to in item 2 of the Table to the *Income Tax Assessment Act 1997* (Commonwealth) section 30-15, whether created before, on or after former commencement day; or

(b) a trust that is established and maintained for charitable or philanthropic purposes and is of a class prescribed by the regulations, whether created before, on or after former commencement day;

trust instrument, in relation to a prescribed trust, means the will or instrument of trust establishing the prescribed trust, as modified by all validly executed amendments.

49. Prescribed trust: trust instrument containing express power to give to eligible recipients

The trust instrument of a prescribed trust may include an express power for the trustees to provide property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

50. Prescribed trust: trust instrument not containing express power to give to eligible recipients

(1) The powers of the trustees of a prescribed trust, whose trust instrument does not contain an express power to do so, include a power to provide property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

(2) Subsection (1) —

(a) applies despite any provision to the contrary in the trust instrument; but

(b) does not apply in relation to a particular eligible recipient or a particular class of eligible recipients to the extent that there is an express prohibition in the trust instrument against the provision by the trustees of property or benefits —

(i) to or for that eligible recipient or class of eligible recipients; or

(ii) for the establishment of that eligible recipient or class of eligible recipients.

51. Ancillary provisions

(1) This Act applies to a prescribed power as if it were a power exercisable for a charitable purpose.

(2) Without limiting subsection (1) —

(a) neither the existence nor the exercise of the prescribed power affects the validity or status of a charitable trust as a charitable trust; and

(b) a prescribed trust is to be construed and given effect to as if —

(i) the prescribed power were a power exercisable for a charitable purpose; and

(ii) any application of property held by the trust in the way allowed by the power were to or for a charitable purpose;

and

(c) the existence or exercise of the prescribed power does not affect the control of a prescribed trust by the Court in the exercise of the Court's general jurisdiction in relation to charitable trusts; and

(d) the jurisdiction mentioned in paragraph (c) extends to the prescribed power as if the power were exercisable for a charitable purpose.

52. Validation provisions for period preceding former commencement day

(1) In this section —

former eligible recipient means an eligible recipient as defined in the *Charitable Trusts Act 1962* section 22A.

(2) The provision, before former commencement day, by the trustees of a prescribed trust of property or benefits to or for a former eligible recipient or for the establishment of a former eligible recipient —

(a) is taken to be, and always to have been, a provision for an authorised and valid purpose of the prescribed trust; and

(b) does not affect, and is taken never to have affected, the status of the prescribed trust as a charitable trust.

(3) Subsection (2) applies despite a failure by the trustees of a prescribed trust to do any of the following —

(a) make a declaration under the *Charitable Trusts Act 1962* section 22C(3);

(b) adhere to a limitation applicable in relation to the prescribed trust under the *Charitable Trusts Act 1962* section 22C(4) and (5);

(c) comply with the *Charitable Trusts Act 1962* section 22C(6).

(4) The inclusion of a former prescribed power in the trust instrument of a prescribed trust before former commencement day is taken to be, and always to have been, valid.

53. Validation and transitional provisions for period preceding commencement of this Part

(1) In this section —

new commencement day means the day on which this Part comes into operation.

(2) The inclusion of a former prescribed power for a prescribed trust on and after former commencement day but before new commencement day is taken to be, and always to have been, valid.

(3) The exercise of a former prescribed power on and after former commencement day but before new commencement day is taken to be, and always to have been, valid despite a failure by the trustees of a prescribed trust to do any of the following —

(a) make a declaration under the *Charitable Trusts Act 1962* section 22C(3);

(b) adhere to a limitation applicable in relation to the prescribed trust under the *Charitable Trusts Act 1962* section 22C(4) and (5);

(c) comply with the *Charitable Trusts Act 1962* section 22C(6).

(4) The former prescribed power is, on and after new commencement day, taken to be a prescribed power for the purposes of section 51.