Queensland Law Society

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Office of the President

21 December 2023

Our ref: [LP:MC]

Trusts Act Review
Department of Justice and Attorney-General

By email: [redacted]

Dear Review Team

Trusts Bill 2024 Consultation

Thank you for the opportunity to provide feedback on the consultation draft of the Trusts Bill 2024 (**draft Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been complied by the QLS Not for Profit Law Committee and Succession Law Committee, whose members have substantial expertise in this area.

Due to the size and significance of the draft Bill and the limited time for consultation, QLS has limited its comments to those aspects outlined in this letter. The absence of comment on a particular matter should not be considered an endorsement by QLS.

Part 1 – Preliminary

Clause 3 Application of Act

QLS notes the double negative in the drafting of clause 3(2), which may cause confusion.

In clause 3(3), QLS recommends replacing the words "additional to or greater than" with "different to". This will remove any uncertainty about whether a particular power is actually additional to or greater than those conferred by the draft Bill.

Clauses 4 - 9

Acceptable.

Clause 11 meaning of *charitable*

See comments below in relation to Part 12 of the draft Bill.

Clause 12 References to security when lending or investing trust funds

Acceptable.

Part 2 – Restrictions on appointment of trustees and related matters

Clause 13 Persons who can not be appointed as trustees

QLS supports defining 'bankrupt' consistently with the Commonwealth legislation as proposed.

Additionally, QLS is comfortable with prohibiting minors being appointed as a trustee.

Clause 14 Limit on number of trustees of particular trusts

Acceptable, subject to our comments in relation to clause 15 below.

QLS supports the approach taken in the draft Bill to limit the number of trustees to four, while making provision for situations where more than four trustees have been named. Except for charitable trusts and SMSF trusts, our Committee members are not aware of any circumstances where trusts are commonly created with more than four named trustees.

Clause 15 Court approval of more than 4 trustees for particular trusts

In our 5 April 2018 submission, QLS recommended that the power to appoint additional trustees should vest in the Attorney-General, rather than the Supreme Court, in order to save costs:

> "The power to appoint additional trustees should vest in the Attorney-General to save costs. This avoids the necessity of an application to court which will attract additional costs in facilitating the application to court and resources of the court to hear such applications. The Interim Report made reference to Professor Lee's consideration of situations where it may be desirable to have more than four trustees and Professor Lee was of the view that "the power to approve the appointment of additional trustees should also be given to the court, as there is no reason to restrict the power to the Minister" [emphasis added] (paragraph 3.47 of Interim Report, page 24). It is possible that Professor Lee's suggestions could be read to be inclusive of an approval process through the court to determine such applications, rather than replace the approval of the Minister.
>
> It is worthy of consideration that the power does not necessarily have to be restricted to just the Minster, but instead have the Minister empowered to determine such applications and reserve the right to submit to the court for more complex matters. QLS recommends that there be some impetus to avoid the situation where there was only one trustee - when a sole trustee had an interest which on termination, left other trusts to be administered. For example, in the case of a sole life tenant.
>
> Identifying the type of trust by employing separate definitions may assist, including, for example, 'inter vivos trust', 'testamentary trust'. We also favour separate definitions for officeholders. In that way, any provision of the Act can limit its application to one or the other types of trustees by simply using those terms individually or collectively."

While we identified the costs issue in our 5 April 2018 submission, we recognise there may be advantages for some parties to make an application to the Court rather than to the Attorney-General. Therefore, in the limited circumstances where more than four trustees are to be appointed, we suggest implementing a concurrent jurisdictional power to appoint additional

trustees granted to both the Attorney-General and the Supreme Court. Similar to the mechanism in clause 207 of the draft Bill, an applicant could choose whether it wishes to apply to the Attorney-General or the Supreme Court.

We have not had sufficient time to consider whether conferring such power on the Attorney-General might give rise to potential judicial review applications under the *Judicial Review Act 1991* (Qld). We therefore recommend you consider any judicial review implications.

Clause 16 Local government trustees may act in administration of trusts

Acceptable.

Part 3 – Appointment, discharge and removal of trustees and devolution of trusts

Clause 17 Application of part

QLS welcomes the inclusion of the words "a part of the estate", which recognises that a personal representative may be acting as trustee for an estate in some respects but is still administering the estate in other respects.

Clause 18 When appointors are not *able and willing to act*

QLS welcomes the revised draft of this clause which includes a reference to "*within a reasonable period*".

However, the term "not able and willing to act" in clause 18 only refers to situations where more than one appointer is not willing and able to act (i.e., use of the plural "appointors" in clause 18(b)). We suggest clause 18(b) should also refer to a single appointor who is not able and willing to act.

Clause 19 Application of division

Acceptable.

Cause 20 Appointment of trustees—replacement of trustee in particular circumstances

QLS agrees with bankruptcy nullifying an existing appointment. However, we suggest that bankruptcy is a prohibition only for the duration of the bankruptcy. We also suggest including a subclause (c) in clause 20(3) to allow a bankrupt sole trustee to appoint a new trustee, but to exercise no other power, where there is no appointor for the trust.

In relation to clause 20(4), QLS is comfortable with permitting the appointor of a trust to appoint themselves as trustee, subject to a contrary intention in the trust instrument. In our Committee members' experience there are situations when it's necessary for an appointor to appoint themselves. We do not consider it necessary for an 'express' contrary intention in the trust instrument; reference to a contrary intention will suffice.

In our view, the draft Bill should permit a contrary intention in a trust instrument to prevail, as this allows the issue to be dealt with in the trust instrument.

Clause 21 Appointment of trustees—replacement of last continuing trustee who is dead

QLS supports allowing a contrary intention under the trust instrument to prevail, as a trust instrument may contain a mechanism for replacing the last continuing trustee upon death. We suggest amending clause 21(1)(b) to include the words "or no other mechanism under the trust

instrument to appoint a trustee" to ensure the clause is not applied where there is a mechanism in the trust instrument to deal with this situation.

QLS is comfortable with permitting a personal representative of the last continuing trustee to appoint themselves as trustee under clause 21(5), subject to a contrary intention in the trust instrument. We do not consider it necessary for an 'express' contrary intention in the trust instrument; reference to a contrary intention will suffice.

Clause 22 Appointment of trustees—replacement of last continuing trustee with impaired capacity

QLS supports including clause 22 in the draft Bill. A legislative mechanism to replace the last continuing trustee with impaired capacity is preferable to requiring an application to the court.

In clause 22(1)(c), we suggest removing the word "all" from "all financial matters for the trustee" This is because some of a trustee's financial responsibilities may be split between different financial attorneys.

Further, we suggest clause 22(1)(c) apply provided the administrator or attorney is not prohibited from or restricted in dealing with trust responsibilities in the instrument or order appointing them.

QLS does not support making the clause subject to the agreement of the beneficiaries. This is likely to be impractical as it can be difficult to identify all the beneficiaries, particularly where there is a discretionary trust with a large number of potential beneficiaries.

QLS considers it appropriate for administrators and attorneys to act jointly under this clause, subject to the terms of the appointing instrument or order. Similarly, any exercise of the power of appointment should be subject to the terms of the instrument or order. In this respect, the power of an attorney or administrator of the last continuing trustee to appoint themselves as trustee may be prevented by a contrary intention under the instrument appointing them as attorney or administrator.

In our view, clause 22 should not be limited to trust deeds created after commencement, as this would be inconsistent with clause 3(1) of the draft Bill.

Clause 23 Appointment of trustees—additional trustees

QLS is comfortable with an appointor being authorised to appoint themselves as trustee, subject to a contrary intention in the trust instrument.

QLS welcomes the amendment to clause 23(3) to clarify that it relates to any Act, which would include this Act.

In our view, clause 23 should not be limited to trust deeds created after commencement, as this would be inconsistent with clause 3(1) of the draft Bill.

Clause 24 Appointment of trustees—separate set of trustees for separate trust property

Acceptable but for the following comment:

QLS suggests that the wording "If a new trustee may be appointed..." be amended to "Where a new trustee may be appointed... ".

Clause 25 Powers etc. of trustees appointed under division

Acceptable.

Clause 26 Meaning of minimum trustee requirements

QLS suggests the 'minimum trustee' requirement should be amended to one trustee who is an individual, rather than two individuals, unless otherwise required by the instrument.

In our Committee members' experience, many difficulties can arise when one of two individuals pass away or in cases of family trusts where two married trustees subsequently divorce and one of them wishes to resign as trustee. If a minimum of two individual trustees is required, the resigning trustee will not be discharged from the trust until a replacement trustee is appointed. Whereas, if a minimum of one trustee is required, the trustee who resigns can be immediately discharged from the trust and the remaining trustee can continue to act on their own.

The requirement for two individual trustees can also be difficult for individuals who are not married or in a long-term relationship but wish to set up a family trust for their own personal affairs. In these cases, it would be artificial to require the individual to appoint a second trustee.

We also note the requirement for two individual trustees is inconsistent with the *Corporations Act 2001* (Cth), which permits a sole individual to establish a corporation and take the benefit of the 'corporate veil'.

Clause 27 Discharge of trustee on appointment of new trustee

If the minimum trustee requirement for individual trustees is reduced to one individual trustee as we have suggested in relation to clause 26 of the draft Bill, then clause 27 is acceptable.

Clauses 28 – 42

Acceptable.

Division 8 – Vesting of trust property and devolution of trusts—last continuing trustee with impaired capacity for particular matters

QLS supports including a protective mechanism of vesting trust property in the Public Trustee until a new trustee is appointed in circumstances when the last continuing trustee has impaired capacity.

Clause 48 Disclaimer of testamentary trust on renunciation of probate

We suggest clause 48 be amended to clarify that the clause applies where the person is appointed as trustee because of their appointment as executor. This could be achieved by amending clause 48(1) to state: "This section applies if a person who is appointed by will as both executor of the will and, because of their appointment as executor, trustee—"

The phrasing of clause 48(1)(a) is problematic as it could lead to the automatic consequence of all testamentary trusts being disclaimed, whereas those trusts that are not intended to be disclaimed should be excluded. To address this, we suggest replacing the words "renounces probate of the will" in clause 48(1)(a) with "renounces trusteeship of the testamentary trust".

We also recommend amending clause 48(1) to include situations where there is a court order removing the executor, but it is silent about any outcome in relation to the trusts. Clause 48(2) should also be amended to include a reference to a court order.

Clause 49 When grantee under letters of administration is taken to be trustee of testamentary trust

We suggest clause 49 also reference a court order.

Part 4 – Custodian trustees

Acceptable. We make the following comments for the Department's consideration:

QLS does not have a strong view about whether the Act should continue to make provision for custodian trustees, or whether the current provision ought to be omitted.

Clauses 52 – 56 and 58

We do not agree with requiring an 'express' contrary intention in the trust instrument; reference to a contrary intention will suffice. We recommend keeping the phrasing consistent with other parts of the draft Bill and other Acts, which only require a 'contrary intention'.

Part 5 – Trustee's duties

Clauses 68 and 69

Acceptable, but for the following comments:

QLS welcomes the statutory identification of the common law requirement to keep accounts. However, an opportunity has been missed to provide an expansive requirement for accounts with specificity of items that should be included. This would give greater clarity to the rights and responsibilities of the parties.

There will remain a litigation risk for disputes concerning the shape, form and contents of accounts.

We also suggest the drafting of these clauses makes it clear that they do not create any new rights for beneficiaries, other than as provided for in an Act or at law, to otherwise obtain information from the trustee.

It is important to ensure that any changes do not alter the common law, so that beneficiaries do not seek to misuse the legislation to obtain more information than the information to which they are currently entitled. Beneficiaries should be required to pursue their rights under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) for any additional information.

Part 7 – General powers of trustees

Clauses 91 – 97

Acceptable but for the following comments:

QLS notes that these provisions effectively replace the appropriation power in existing sections 33(1)(l), 33(2) and 33(4). QLS welcomes the change to procedure which means that a beneficiary must consent to the appropriation.

QLS welcomes the addition of clauses 93 and 94(3)(c), which allow an interested person, having notice, to waive the time period. This is particularly important where there is an amicable appropriation, to ensure the appropriation is not delayed by the two-month period.

To avoid any doubt, we suggest clarifying in clause 93(1)(b) that the waiver includes an abridgement of the two-month time period.

QLs welcomes the clarification in clause 94(4) that the value of the trust property will be fixed as at the day the appropriation is made.

Clause 121 Valuations

In clause 121(2), we recommend adding a benchmark to remove the unlimited discretion conferred on the trustee.

Part 8 – Maintenance, education and advancement

Clause 132 Application of trust capital for beneficiary's maintenance etc

The clause should include provision for a contrary intention in the trust instrument, similar to the drafting in clause 129(7) of the draft Bill.

Clause 134 Prescribed amount for application of trust capital

QLS welcomes the inclusion of a mechanism to increase the prescribed amount by reference to the CPI to avoid the need for legislative amendment as values change and increase.

Part 9 – Indemnities and protection of trustees and other persons

Clause 139 Giving notice of intention to distribute

QLS supports the amendments to this clause to be consistent with the advertising process required when obtaining a grant. However, we suggest that clause 139(3)(b)(ii) require notice to be published via a practice direction, which would be consistent with how other notices are published under the UCPR.

Part 11 – Court powers

Clause 194 Court's power to make orders in relation to property or claim of child

We suggest extending this clause to anyone who lacks capacity rather than just children.

Part 12 – Charitable trusts

Opportunity to progress a harmonised legislative definition of *charity*

The current *Trusts Act 1973* (Qld) (**Trusts Act**) affirms the common law definition of '*charity*' in section 103(1) of the Trusts Act.

Section 103(2) of the Trusts Act provides that:

> '[n]otwithstanding any rule of law to the contrary, it shall be deemed always to have been charitable to provide, or to assist in the provision of, facilities for recreation or other leisuretime occupation, if the facilities are provided in the interests of social welfare.'

In this context, '*social welfare*' is defined at section 103(3) of the Trusts Act, inter alia, as facilities provided '*with the object of improving the conditions of life*'.

As illustrated by the list in **Schedule 1**, there are significant other legislative provisions that also define '*charity*' or '*charitable*' (or related concepts) in similar, but often slightly different terms. For Queensland-based organisations that operate across state jurisdictions, there can be

significant challenges dealing with the different definitions in those jurisdictions, including at the federal level.

A number of public inquiries have recommended that a consistent base definition of '*charity*' would ensure better decision-making practices by government agencies, reduce paperwork and compliance costs of the non-profit sector and provide clarity to the general public.[1]

Such an approach would not preclude individual jurisdictions from extending or limiting the organisations subject to a particular legislative provision (particularly revenue provisions) but would provide a basic harmonised definition of '*charity*'.

QLS considers it makes sense for this basic definitional starting point to be the Commonwealth statutory definition of '*charity*' set out in section 5 of the *Charities Act 2013* (Cth), with the accompanying 12 purposes under the definition of 'charitable purpose' in section 12 of the *Charities Act 2013* (Cth).

This definition is also used by the Commonwealth regulatory body, the Australian Charities and Not-for-profits Commission to register charities in its public database recording their details and financial materials.

When compared with the four heads of charity at common law,[2] the Commonwealth definition may seem much more extensive than that under common law. However, the purposes set out in the *Charities Act 2013* (Cth) may fall within one or more of the four heads of charity, e.g. the purpose of advancing health may fall within the first, second and/or fourth heads of charity under the common law definition.

There are some differences between the Commonwealth definition of charity and the common law definitions.

For example, the Commonwealth definition has been extended to include childcare services and rebuilding, repairing or securing assets after a disaster (independently of the relief of individual distress). Further, entities that provide benefits to Indigenous Australians (including in respect of native title) do not fail the public benefit test solely because the beneficiaries are related, and that test does not apply in respect of open and non-discriminatory self-help groups and closed or contemplative religious orders.

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[1] The Australian Government the Treasury, Report of the Inquiry into the Definition of Charities and Related Organisations (2001) 18 ('CDI Report'); Standing Committee on Economics, Parliament of Australia, Disclosure regimes for charities and not-for-profit organisations (2008) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/charities_08/index; Productivity Commission, Contribution of the Not-for-Profit Sector (2010) ('Productivity Commission Report'); The Australian Government the Treasury, Australia's Future Tax System – Final Report: part 2 – Detailed Analysis – Volume 1 (2010) 205 ; Senate Economics Legislation Committee (2010) Tax Laws Amendment (Public Benefit Test) Bill 2010, 35; Deloitte Access Economics, Australian Charities and Not-for-Profits Commission – Cutting Red Tape: Options to align state, territory and Commonwealth charity regulation (2016) 35 ('Cutting Red Tape Report');

[2] "The common law definition is largely based on the Preamble to the Statute of Charitable Uses (known as the Statute of Elizabeth), enacted by the English Parliament in 1601 and Commissioners for Special Purposes of Income Tax v Pemsel [1891 1894] All ER Rep 28 (Pemsel's case) which classified the categories of charitable under four heads; and subsequent court cases." The four categories are the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community not falling under any of the preceding heads. (see discussion in The Commonwealth of Australia - The Treasury, Consultation Paper: A definition of charity (2011), https://treasury.gov.au/sites/default/files/2019-03/definition_v6.rtf#:~:text=A%20public%20benefit%20requirement%20is,advancement%20of%20education%20or%20religion (page 3)).

QLS believes the incremental expansion and clarification of the common law definition of *'charity'* has been beneficial and has caused few unintended consequences.

It is recommended that the Commonwealth definition of *'charity'* be adopted in Queensland as the base definition of *'charity'* and other Queensland acts and legislative instruments then operate with definitions that either adopt this definition or modify it.

This harmonised approach would have positive benefits for government agencies and non-profit organisations.

Cy-près applications and changing a charitable trust's purpose

Draft Bill – Charitable corporations and proposed definition of charity in Schedule 1 – Dictionary

The Schedule contains the definition:

> ***charity*** means an institution, whether or not incorporated, that is established for charitable purposes.

This definition mirrors the definition in section 106(5) of the current Trusts Act.

However, there is growing concern by practitioners (mirrored in several recent cases) about whether a charitable corporation is amenable to the court's supervisory jurisdiction exercised in respect of charities.

The critical issue is whether the charitable corporation holds its assets beneficially or as trustee.

The preferred method of conducting charitable activities has been for some time through a corporate vehicle being a company limited by guarantee or incorporated association.

As such organisations age, their original stated purposes may no longer be fit for today's purposes, as demonstrated by the recent cases of *Northern NSW Helicopter Rescue Service Limited v Attorney General of New South Wales* [2023] NSWSC 515 and *Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 3)* [2023] NSWSC 238.[3]

These organisations have been the beneficiary of extensive support through state and federal taxation concession, direct government funding and public donations, often for decades.

In our view, it is not in the public interest for corporate controllers, often being the same as the members of the corporation or a small number of members, to be able to privately benefit from altering the purposes of the corporation without the supervision of the Attorney-General who will bring the lens of the public interest to the alteration of the purpose.

In the English jurisdiction, the recognition of charitable corporations is contained in the *Charities Act 1960* (now repealed), and the successor legislation, the *Charities Act 2011* (UK).

Part 10 of the *Charities Act 2011* provides for their meaning, public disclosure of their status, restrictions on alteration of their objects, and other acts requiring the consent of the Charity Commission for England and Wales (**Charity Commission**).

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[3] See also earlier decisions regarding Grain Technology Australia Ltd: *Rosewood Research Pty Limited* [2014] NSWSC 449; *Re Rosewood Research Pty Ltd (No.2)* [2014] NSWSC 1226; *Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 2)* [2019] NSWSC 1744; *Grain Technology Australia Limited & Ors v Rosewood Research Pty Ltd & Ors* [2019] NSWSC 1111; and *Grain Growers Limited v Chief Commissioner of State Revenue* [2015] NSWSC 925.

It is now the case in the United Kingdom that charitable companies and charitable trusts, following a vote and with Charity Commission consent, can alter their trust where they consider it expedient in the interests of the charity to do so.[4]

The following recent cases also illustrate this point:

- *Harmony – The Dombroski Foundation Ltd v Attorney General in and for The State of New South Wales* [2020] NSWSC 1276
- *Soka Gakkai International of Hong Kong Ltd v. Lam Kin Chung* [2022] HKCA 480

Clause 204 – Circumstances in which purposes of charitable trust may be changed under sdiv 2 or 3

QLS understands that the phrase "an area that was, but has since ceased to be, a unit for some other purpose" has not been interpreted in any common law. In the time available, we have not formed a view on whether this concept should be amended or removed for Queensland.

We also note that clause 204 has been adopted from the *Charities Act 1960* (UK). However, the United Kingdom legislative provisions relating to cy-près have been significantly reformed since the 1960 legislation to reflect changing circumstances and modern regulatory practice.

Lord Hodgson, an architect of past charities legislation,[5] prominently called for the reform of areas of charity law akin to barnacles that slow down a ship.[6] The English Law Commission produced its report *Technical Issues in Charity Law in 2017*.[7] The endpoint of the process is the *Charities Act 2022* (UK), which amends the *Charities Act 2011* (UK). It has received Royal Assent, and the legislation is entering into force in stages, finishing in early 2024.

The amended provisions of the *Charities Act 2011* (UK) provide a more contemporary approach to cy-près that we consider is far more appropriate to contemporary society with its fast-changing social circumstances. The updated approach also minimises regulatory costs for the Court, Government and the charity sector. An example of this is that appeal donors of £120 or less now have no right to a refund of their gifts, unless they made a written statement at the point of donation.

We note the drafting in clause 204 of the draft Bill quite closely reflects the wording in section 62(1) of the *Charities Act 2011* (UK) (as amended by the *Charities Act 2022* (UK)) and we support this approach.

We particularly welcome the inclusion of the definition of *"relevant considerations"* in clause 204(2) of the draft Bill which introduces the element of consideration of the "social and economic conditions prevailing at the time of the proposed change to the purposes of the trust."

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[4] See for example section 280 of the *Charities Act 2011* (UK), as inserted by the *Charities Act 2022* (UK).

[5] See Lord Hodgson of Astley Abbots, Trusted and Independent, Giving Charity Back to Charities (London: The Stationery Office, July 2012).

[6] Trusts (Capital and Income) Bill [HL],Report of the Special Public Bill Committee HL Paper 42 (2012) 50.

[7] Technical Issues in Charity Law Com No 375 (2017). See also Technical Issues in Charity Law: A Consultation Paper Law Com Consultation Paper No 220 (2015); Technical Issues in Charity Law: Supplementary Consultation Law Com Consultation Paper (2016).

We query whether there are other elements of sections 62(4)-(6) and section 63A of the *Charities Act 2011* (UK) which may also be worth considering for the Queensland context. We recommend the Department reconsider adding these accompanying provisions.

If the Department does not support including additional provisions of this nature, we request the Department explain the reasoning in any further consultation undertaken on these changes.

We also note that the Canadian province of Alberta has also recently updated its *Trustee Act 2022*,[8] based on the Uniform Law Conference of Canada's Uniform Trustee Act. The new legislation:

- codifies the common law cy-près doctrine;
- provides the courts with some additional powers for varying charitable purpose trusts, including the power to vary the purposes of a charitable purpose trust if such a variation would facilitate the carrying out of the charitable intent, whether general or specific, of the settlor.[9] We understand this broadens the previous power of the court and now permits the court to change the purposes of a charitable purpose trust even if the original purpose has not failed;
- provides the court's powers to vary a charitable purpose trust prevail over any contrary provisions in the trust instrument;[10]
- specifically allows for the recognition and creation of non-charitable purpose trusts, which are purpose trusts with purposes that fall outside the legal definition of charity. The legislation includes categories of trusts which can be recognised as non-charitable purpose trusts[11] and provides the court may vary a non-charitable purpose trust in a way similar to charitable trusts.[12] Commentary suggests that these new provisions might ultimately enable valid non-charitable trusts for the preservation and maintenance of public parks and buildings or the support of community-based activities.[13]

We raise these of the Alberta legislation for the Department's consideration.

We also note that Canadian courts have in the past recognised non-charitable purpose trusts for limited purposes.[14]

Recommendation:

Having reviewed the draft Bill, we would suggest that the grounds for cy-près could be liberalised further to be fit for more rapidly changing social conditions, based on the English

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[8] Trustee Act, SA 2022, c T-8.1, <https://canlii.ca/t/55x78> retrieved 13 June 2023; commenced 1 Feb 2023.
[9] Section 74(1) *Trustee Act* SA 2022, c T-8.1 (Alberta, Canada)
[10] Section 74(5) *Trustee Act* SA 2022, c T-8.1 (Alberta, Canada)
[11] Section 77 *Trustee Act* SA 2022, c T-8.1 (Alberta, Canada)
[12] Section 78 *Trustee Act* SA 2022, c T-8.1 (Alberta, Canada)
[13] Roberts, K, "Alberta's revised Trustee Act: Implications for charities and non-profits" (31 May 2023), Miller Thomson LLP, accessed at https://www.lexology.com/library/detail.aspx?g=87d20724-e468-4e6d-bbc6-f2b911f90066#:~:text=The%20Act%20states%20that%20the,a%20matter%20specified%20by%20regulation on 13 June 2023
[14] Fletcher's Fields Limited v. The Ontario Rugger Union, 2023 ONSC 373 concerned Court approval for the distribution of a special purpose sport trust. Title to several playing fields was transferred to a company in trust for itself and the clubs for the purpose of playing rugby. The Court found a specific, non-charitable purpose trust for the purpose of promoting the game of rugby.

model and the legislation in Alberta. References to the Charity Commission for England and Wales could be replaced by the Attorney-General.

Given that this is a once-in-a-generation reform of Queensland trust law, we recommend a more progressive view of cy-près should be taken to serve the best interests of Queensland.

Clauses 209 - 210

It is common for the Attorney-General to take a slightly different view from the trustees in such matters and this is usually to the benefit of the public interest.

We are satisfied with the approach in the draft Bill that, before approving a scheme with a variation, the Attorney-General must notify the trustees of the proposed variation and give them the opportunity to make submissions. It might also be appropriate to give the Attorney General discretion to notify those members of the public that may have provided material in relation to the matter.

We would also suggest that clauses 211(2) and 213(1) be amended to clarify that these clauses also apply to the decision of the Attorney-General to approve the scheme with a variation, so that such a decision can be contested. To avoid doubt, clause 212(1) should also be amended to apply to an approval with a variation.

Part 13 – Gifts by particular trustees for philanthropic purposes

Ancillary funds

Currently, Part 9 of the Trusts Act addresses reforms made in the *Income Tax Assessment Act 1997* (Cth) dealing with ancillary funds. New Part 13 of the draft Bill has been drafted with reference to the *Charitable Trusts Act 2022* (WA).

QLS welcomes the inclusion of this amended Part 13, which the Consultation Paper indicates has been "redrafted to reflect changes to federal tax legislation in 2013 where certain ancillary funds are deemed charitable. This part now provides a trustee with relevant power to make gifts for philanthropic purposes to these ancillary funds that are deemed charitable, even if the trust instrument does not include the power expressly. These changes align with recent amendments to the *Charitable Trusts Act 2022* (WA)."

QLS particularly welcomes the amended definition of "*eligible recipient*" in clause 217 of the draft Bill.

We take the opportunity to **attach** a paper by Alice Macdougall and Marla Cowen of Herbert Smith Freehills (**Macdougall and Cowen Paper**) which was prepared as part of a submission on reforms to the Western Australia *Charitable Trusts Act 1962* (WA). The paper makes it clear that there have been a number of changes made in Commonwealth laws, both from a taxation perspective and also a charity law perspective, since the provisions in Part 9 of the current Queensland Trusts Act were introduced.

The paper highlights areas of confusion across the various States and notes the opportunity for simplification and harmonisation that can be introduced now across State boundaries. The provisions relate to an issue created by Commonwealth tax law and the QLS takes the view that there is no good reason to adopt different provisions in that respect across State jurisdictions.

For that reason, QLS endorses the approach proposed by Alice Macdougall and Marla Cowen and welcomes the updated Part 13 of the draft Bill which addresses some of the potential confusion arising with the current provisions.

However, QLS also supports the recommendation in the Macdougall and Cowen Paper that amendments of this nature be retrospective. Retrospective effect is required to address any breaches which might have inadvertently occurred since the introduction of the *Charities Act 2013* (Cth). Retrospective effect will also mean ancillary funds and charitable trusts do not need to take any additional administrative steps to enjoy the benefit of these new provisions (as discussed in paragraph 4.3 of the Macdougall and Cowen Paper).

QLS recommends the draft Bill drafting clearly state that these amendments will have retrospective effect, using the approach taken in section 42 of the *Charitable Trusts Act 2022* (WA).

QLS also suggests a modification to the proposed provisions to include the following additional provision at the start to make it clear that the added power is not in fact an added purpose giving trustees license to divert assets from the original purpose to the deemed purpose of distributing funds to a government entity deductible gift recipient:

> "*1A Sub-section (1) applies to the extent that the charitable purpose of a charitable trust would include the purpose of providing money, property or benefits to an eligible recipient or for the establishment of an eligible recipient if the eligible recipient would be a charity were it not for its connection with government or it being a government entity.*"

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted]

Yours faithfully

[redacted]

Chloé Kopilović
President

Schedule 1

Queensland legislation defining *charity*, *charitable purpose* or similar:

Legislative provision	Relevant definition or use of term
Acquisition of Land Act 1967 Schedule 1, Part 13	"non-profit or not-for-profit organisations, including a charity, charitable institution, public benevolent institution, charitable fund and income tax exempt fund"
Anti-Discrimination Act 1991 Section 110	**Charities** – A person may include a discriminatory provision in a document that provides exclusively for charitable benefits, and may do an act that is required to give effect to such a provision.
Building and Construction Industry (Portable Long Service Leave) Act 1991 Section 79	Section 79(1)(b) - charitable purpose
Charitable and NonProfit Gaming Act 1999 Section 10	(5) ***charitable purpose*** means...
Charitable Funds Act 1958 Section 2	***charitable purpose*** means...
Civil Liability Act 2003 Section 38	charitable
Collections Act 1966 Schedule 2 (Dictionary)	*charitable purpose* *charity*
Duties Act 2001 Schedule 6	***charitable institution*** means an institution registered under the Administration Act, part 11A.
Gaming Machine Act 1991 Section 305	charitable
Introduction Agents Act 2001 Section 12	non-profit activities
Land Act 1994 Schedule 1B	charitable
Land Tax Act 2010 Division 2, Sections 46 and 47	46 - charitable purpose 47 - charitable institution

Local Government Act 2009 Section 93(3)	charitable purposes
Motor Accident Insurance Act 1994 Section 96	***registered charity*** means [for the purposes of section 96]
Payroll Tax Act 1971 Section 14	(9) ***charitable institution*** means an institution registered under the Administration Act, part 11A, other than a university or university college.
Property Law Act 1974 Section 214	(b) charity
Residential Tenancies and Rooming Accommodation Act 2008 Section 393	(5) charity
Retirement Villages Act 1999 Section 116	(5)(a)(i) charitable purpose
Second-hand Dealers and Pawnbrokers Act 2003 Section 6	(2)(e) and (f) – charity
Trading (Allowable Hours) Act 1990 Section 19	(2)(a) charitable purpose
Transport Operations (Passenger Transport) Act 1994 Sch 3	charity
Trusts Act 1973 Part 8, section 103	charity
Taxation Administration Act 2001 Part 11A	charitable institutions

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).

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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.

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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.