

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Charities Act 2013

Charities (State or Territory Government Entity) Instrument 2023

Section 4(2) of the *Charities Act 2013* (the Act) provides that the Minister may, by legislative instrument, prescribe a kind of government entity for the purposes of paragraph (b) of the definition of ‘government entity’ in subsection 4(1) of the Act.

Under subsection 34AAB(1) of the *Acts Interpretation Act 1901*, the Minister for Social Services authorised the Assistant Minister for Competition, Charities and Treasury to make a legislative instrument for the purposes of subsection 4(2) of the Act.

The purpose of this legislative instrument is to prescribe kinds of entities established under a law by a State or Territory as government entities, which by virtue of their status as government entities, will be excluded from the definition of charity for purposes of all Commonwealth law. The instrument will replace the *Charities (Definition of Government Entity) Instrument 2013* which was to sunset on 1 April 2024.

The Act defines charity and charitable purpose for the purposes of all Commonwealth laws. A core element of the definition of charity is that a government entity cannot be a charity.

The definition of “government entity” in the Act utilises an existing definition in Commonwealth law, the meaning of ‘government entity’ in *A New Tax System (Australian Business Number) Act 1999* (ABN Act). The meaning covers Departments of State of the Commonwealth or of a State or Territory, Commonwealth executive or statutory agencies within the meaning of the *Public Service Act 1999*, and non-entity organisations established by the Commonwealth, State or Territory with certain characteristics.

The Act also provides for the responsible Minister to prescribe kinds of entities, established under a law by a State or Territory, as government entities for the purposes of the Act.

As State and Territory laws describe “government entity” in various different ways, the Act allows the Minister to prescribe concepts that are equivalent to the concepts of the definition in the Act for the purpose of defining a government entity established under a law by a State or Territory.

This instrument reflects the concepts underlying the Act’s definition of Commonwealth entities, by providing that an entity established under a law by a State or Territory is a government entity if:

- it is a local governing body;
- it has all the privileges and immunities of the Crown (in any of its capacities); or

- in pursuing its objectives, the entity is not independent of the Crown, having regards to the degree of control by government and the functions and responsibilities that it was set up to carry out.

The Act does not specify any conditions that need to be met before the power to make the legislative instrument can be exercised.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*, and is subject to disallowance and sunseting.

The instrument commences on the day after it is registered.

Details of the instrument are set out in Attachment A.

A Statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA23-05737) and agreed that an Impact Analysis is not required. The measure has no impact on compliance costs.

EXPOSURE DRAFT

Details of the Charities (State or Territory Government Entity) Instrument 2023

Part 1 - Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Charities (State or Territory Government Entity) Instrument 2023*.

Section 2 – Commencement

The instrument commences on the day after it is registered.

Section 3 – Authority

The instrument is made under subsection 4(2) of the *Charities Act 2013* (the Act).

Section 4 – Schedule

The instrument amends or repeals other instruments as set out in the applicable items in a Schedule.

Section 5 – Definitions

The instrument includes definitions for the purposes of the instrument, but otherwise adopts terms already defined in the Act.

Part 2 – State and territory government entities

Section 6 – Prescribed types of entity

The instrument prescribes the following kinds of entity to be a government entity for the purposes of paragraph 4(1)(b) of the Act:

- a local governing body (within the meaning of the *Income Tax Assessment Act 1997*);
- an entity that has all the privileges and immunities of the Crown (in any of its capacities); or
- an entity that, in pursuing its objectives, is not independent of the Crown (in any of its capacities), having regard to:
 - the degree of control the Crown can exercise over the entity’s governance and operations;
 - whether the entity was established with the objective of fulfilling a function or responsibility of the Crown (in any of its capacities); and
 - any other relevant matter.

The prescribed kinds of entity above are already prescribed under the *Charities (Definition of Government Entity) Instrument 2013* which was to sunset in early 2024 and has been replaced by this instrument.

Local governing body

Paragraph 6(a) of the instrument provides that an entity that is a local governing body established under a State or Territory law will be prescribed as a government entity. This would include local governments and local government entities in accordance with the relevant law of a State or Territory.

The instrument prescribes local governing bodies expressly in order to provide certainty as to their status as a government entity.

An entity that has all the privileges and immunities of the Crown

In determining whether an entity has the privileges and immunities of the Crown under paragraph 6(b) of the instrument, consideration may be given to the establishing statute, its governing rules or the character and functions of the entity.

The nine bodies politic in Australia that enjoy the ‘privileges and immunities of the Crown’ are the Commonwealth, the six States, the Northern Territory and the Australian Capital Territory. As the Government of Australia takes the form of a Constitutional Monarchy, these bodies politic are often referred to as ‘the Crown’.

In each jurisdiction the privileges and immunities of the Crown extend to Cabinet, the Ministry and the public service. The privileges and immunities of the Crown also extend to some statutory bodies. In many cases the legislation establishing a statutory body will state whether it enjoys the privileges and immunities of the Crown. Further, some State and Territory legislation determines whether particular types of statutory bodies enjoy the privileges and immunities of the Crown. For example, the *Public Corporations Act 1993* (SA) provides that public corporations are an instrumentality of the Crown.

Bodies that enjoy the privileges and immunities of the Crown are government entities and are not eligible to be charities.

Non-independent in pursuing objectives

Where an entity is not clearly a government entity under paragraphs 6(a) or 6(b) of the instrument, then consideration should be given to paragraph 6(c) which prescribes kinds of entities that, in pursuing their objectives are not independent of the Crown, having regard to the elements of government control and function.

Consideration of the degree of government control and the function of the entity is consistent with the current factors that must be considered in determining whether an entity is a government entity (and therefore not a charity) under the common law. It is intended that the status of entities under the legislative instrument will generally be consistent with the status of entities as they have been determined under the common law.

Control may be expressed under statute, in the entity’s governing rules (such as constituent documents), through membership or at board level, or through the ability of a Minister to control activities, finances or operations.

In applying paragraph 6(c) of the instrument, if the function of a charity in independently carrying out its own purposes has the effect of helping to achieve government policy this is, in itself, unlikely to constitute government control.

An entity substantially funded by government may still be independent if its governance, its objectives, and its activities and functions undertaken in carrying out its purposes are discharged independent of government. However, if an institution is fully or mostly funded by government, in order to give effect to government policy, and the entity carries out its functions in order to discharge a responsibility of government (rather than to pursue a charitable purpose), it will not likely be considered independent of government.

Many charities undertake activities or deliver services on behalf of the government under a contract or grant arrangement. The factors that might indicate control of the entity should be distinguished from any accountabilities that may be part of the contract or grant, which may require an entity to report periodically to the government for general governance purposes. Neither periodical reporting requirements, nor the fact that an entity's purpose is shared by the government, mean that the entity is carrying out its activities to purely achieve a government policy for or on behalf of the government. As long as delivering services for a government is a voluntary activity of the entity and is not its only function or the reason for its establishment, accountabilities embedded in contracts will generally not constitute controls that indicate it is a government entity.

Some management accountabilities and 'controls' may also arise from the need for an entity to meet external regulations or standards relevant to broad types of entities, for example, public corporations, childcare providers or hospitals. These requirements are to be distinguished from government control of the entity for the purposes of this instrument.

Subparagraph 6(c)(iii) of the instrument allows for consideration of any other relevant matter, which are those other minor matters considered by the courts over the years. This may include circumstances where state or territory laws may provide that certain positions within the entity are reserved to public officials or governed by the operation of legislation relating to public officials. This could also include consideration of the definitions of government entities within other state and territory laws where these are not inconsistent with paragraphs 6(a) and 6(b) of the instrument.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Charities (State or Territory Government Entity) Instrument 2023

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of this legislative instrument is to prescribe kinds of entities established under a law by a State or Territory as government entities, which by virtue of their status as government entities, will be excluded from the definition of charity for purposes of all Commonwealth law..

The legislative instrument prescribes that an entity established under a State or Territory law is a government entity if:

- it is a local governing body;
- it has all the privileges and immunities of the Crown (in any of its capacities); or
- in pursuing its objectives, the entity is not independent of the Crown, having regards to the degree of control by government and the functions and responsibilities that it was set up to carry out.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.