CIS 2016/01

Commissioner's Interpretation Statement: Meaning of 'Government Entity'

Commissioner's Interpretation Statements (***CISs***) provide guidance to ACNC staff, charities and the public on how the ACNC understands the law that applies to charities. These statements reflect our current understanding of the law and are binding on ACNC staff.

While we do not have the power to produce binding rulings, consistent with our objects and regulatory approach we will ensure that organisations that rely on the CIS are treated fairly. If the CIS changes, we will apply the new position from the date of the change, not retrospectively in a way that could disadvantage a charity that has relied on the earlier version of the CIS. In most cases, we will also allow a period of time for charities to respond to any change.

The purpose of this CIS is to provide guidance on the meaning of 'government entity' in the *Charities Act 2013* (Cth) (the ***Charities Act***). This CIS relates to the definition of 'charity' set out in s 5 of the Charities Act, which provides that a 'charity' cannot be a 'government entity'. The concept of 'government entity' is also relevant in relation to s 13 of the Charities Act, and while much of the discussion in this CIS will be relevant in that context as well, the CIS does not specifically consider the concept of 'government entity' as it applies in s 13.

This CIS should be read together with **Appendix A**, which sets out the detailed reasoning behind the statement.

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1. Background

1.1. Prior to the introduction of the Charities Act, the courts traditionally distinguished between 'charitable purposes' and 'governmental purposes'. This meant that an entity that was too closely connected to government could not be a charity as it was said to pursue governmental purposes, rather than charitable purposes[1]. Courts referred to this type of entity as a 'governmental body'[2], 'an emanation of government'[3], 'governmental'[4], 'a creature or agent of government'[5] or 'part of the machinery of government'[6].

1.2. This approach is reflected in the Charities Act through the concept of 'government entity'. In particular, under s 5 of the Charities Act, a charity cannot be a 'government entity'.

1.3. However, it should be noted that the new statutory definition does not necessarily reflect the common law in all respects. Consequently, there may be entities that fall within the definition of 'government entity' under the Charities Act, but which are charities under the common law. Conversely, some entities that are not charities under the common law on account of having 'governmental purposes', may fall outside of the definition of 'government entity' in the Charities Act. As the States and Territories apply the common law in relation to determining whether an entity is a charity (with some legislative amendments in certain cases), there may be some discrepancy in the treatment of certain entities by the States or Territories, and the Commonwealth in relation to this issue.

1.4. The purpose of this CIS is to provide some guidance about the way in which the ACNC will interpret the meaning of 'government entity'. Where appropriate, the ACNC will have regard to the common law to inform its interpretation of 'government entity'.

1.5. **Appendix A** sets out the detailed reasoning regarding the ACNC's approach to the second type of 'government entity'[7], namely, a prescribed entity which is established under a law by a State or Territory.

2. 'Government Entity'

2.1. Section 4(1) of the Charities Act defines 'government entity' as:

> (a) a government entity (within the meaning of the *A New Tax System (Australian Business Number) Act 1999*); or

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[1] See for example *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 (***Metropolitan Fire Brigades Board***); *Mines Rescue Board of New South Wales v Commissioner of Taxation* (2000) 101 FCR 91 (***Mines Rescue Board***); *Ambulance Service (NSW) v Deputy Commissioner of Taxation (Cth)* (2003) 130 FCR 477 (***Ambulance Services***); *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 (***Central Bayside***).

[2] *Metropolitan Fire Brigades Board* at 280.

[3] *Metropolitan Fire Brigades Board* at 280.

[4] *Ambulance Services* at [45].

[5] *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* (2005) 60 ATR 151 per Byrne AJA (in dissent) at [34], [40], [56] and [57] and Osborn AJA at [60] and [61].

[6] *Central Bayside* per Kirby J at 210.

[7] Described in s 4(1)(b) of the *Charities Act 2013* (Cth).

(b) an entity:

(i) established under a law by a State or a Territory; and

(ii) of a kind prescribed under subsection (2); or

(c) a foreign government agency (within the meaning of the *Income Tax Assessment Act 1997*).

2.2. Section 3 of the Charities (Definition of Government Entity) Instrument 2013 (Cth) (the ***Legislative Instrument***) prescribes four entities for the purposes of s 4(1)(b)(ii):

(a) a local governing body (within the meaning of the *Income Tax Assessment Act 1997*);

(b) an entity that has all the privileges and immunities of the Crown (in any of its capacities);

(c) an entity, where an individual who occupies a position within that entity holds an office of profit under the Crown (in any of its capacities);

(d) an entity that, in pursuing its objectives, is *not* independent of the Crown (in any of its capacities), having regard to:

(i) the degree of control the Crown can exercise over the entity's governance and operations; and

(ii) whether the entity was established with the objective of fulfilling a function or responsibility of the Crown (in any of its capacities); and

(iii) any other relevant matter.

3. Section 4(1)(a): Government Entity within the meaning of the ABN Act

3.1. The first type of 'government entity' described in s 4 of the Charities Act is 'a government entity (within the meaning of the *A New Tax System (Australian Business Number) Act 1999*)' (the ***ABN Act***).

3.2. Section 41 of the ABN Act defines 'government entity' as including[8]:

(a) a Department of State of the Commonwealth[9]; or

(b) a Department of the Parliament established under the *Parliamentary Service Act 1999*[10]; or

[8] We have not included the fifth type of 'government entity' under the ABN Act. This is because that type relates to organisations that are not entities. In order to be eligible for registration as a charity, an organisation must be an 'entity'. Therefore, that type is not relevant for the purposes of this CIS. However, the fifth type of 'government entity' under the ABN Act may be relevant for the purposes of s 13 of the Charities Act (for example, where a charity has a purpose to provide money to a division of a government department that would be a charity were it not a government entity).

[9] See http://www.apsc.gov.au/publications-and-media/current-publications/australian-public-service-agencies for a list of Commonwealth government departments.

[10] See http://www.aph.gov.au/About_Parliament/Parliamentary_Departments for a list of Parliamentary Departments.

(c) an Executive Agency, or Statutory Agency, within the meaning of the *Public Service Act 1999*[11]; or

(d) a Department of State of a State or Territory.

4. Section 4(1)(b): Prescribed entities that are established under a law by a State or Territory

4.1. The second type of 'government entity' described in s 4 of the Charities Act is an entity which is established under a law by a State or Territory and which is also a prescribed entity.

Established

4.2. An entity does not need to be initially set up by a State or Territory in order to satisfy s 4(1)(b)(i) (ie, to be 'established under a law by a State or Territory').

4.3. The ACNC will interpret 'established under a law by a State or Territory' as meaning 'established under a law by a State or Territory *as the relevant prescribed entity*'. In other words, the type of entity that must be established by a State or Territory is to be understood with reference to the relevant type of prescribed entity. For example, a State or Territory may enact legislation that declares that an existing entity is a public hospital. Assume that under legislation, a public hospital is subject to significant control by the Crown. Although the entity already existed prior to its designation as a public hospital, by declaring that body to be a *public hospital*, the State or Territory has now established that entity as *a body which is not independent of the Crown*. In that way, that entity has been established by the State or Territory in the relevant sense.

4.4. The ACNC considers that this is the correct and preferable interpretation for the following reasons:

- Interpreting 'established' as meaning initial formation would not achieve the purpose of the Charities Act given that it would lead to entities which are, say, sufficiently controlled by a State or Territory being eligible to be registered as charities merely because of the way in which they were initially set up. This would produce inconsistent results in that two entities, which are substantially the same, could be treated differently under the Charities Act merely because of their historical formation. Further, there is case authority which supports the view that 'established' can be understood as referring to the current status of an entity, rather than with reference only to its initial formation[12].

- If 'established' does not mean 'initial formation', it is difficult to precisely formulate the test that is to be applied. The concept of 'established' cannot easily be understood as a standalone concept. Rather, there needs to be some articulation of what must be established.

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[11] See http://www.apsc.gov.au/publications-and-media/current-publications/australian-public-service-agencies for a list of Statutory and Executive Agencies.

[12] See for example *Western Australian Turf Club v The Commissioner of Taxation of the Commonwealth of Australia* (1978) 139 CLR 288; *Bray v FCT* (1978) 140 CLR 560; *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 625.

- Taking a broad approach could lead to finding that an entity which obtained any characteristic through State or Territory involvement could satisfy the test. For example, any incorporated association could be said to be established by the State or Territory (as a corporate body). However, a vast majority of these entities would not fall within the definition of 'prescribed entity', meaning that it will generally be the second part of the test that is relevant in determining the divide between charity and government.
- A broad approach would also lead to uncertainty, as there is no clear articulation of the type of entity that the State or Territory must establish or the level of Crown involvement required. For example, it may be possible to argue that the mere licencing of an entity is sufficient to establish that entity in its current state.

4.5. Therefore, the ACNC considers that the preferable approach is to narrow the type of entity that must be established by the State or Territory for the purposes of s 4(1)(b)(i), by reference to s 4(1)(b)(ii). In other words, in the legislative context, 'established' should be understood in the context of the type of 'prescribed body' that the entity is established as. In coming to this view, the ACNC has had regard to case law which takes a similar approach (albeit in a different legislative context)[13].

4.6. This approach:

- creates certainty as the type of entity that must be created,
- directs a focus on the connection to government which is ultimately the disqualifying feature (and the purpose of the definition of 'government entity'), and
- retains the requirement of State or Territory involvement (as opposed to Commonwealth involvement) in establishing an entity with a particular connection to government.

4.7. As such, the approach clearly achieves the purpose of the legislation, which is to exclude certain entities that have a particular connection to a State or Territory from being charities.

4.8. Consequently, the relevant tests are:

(a) Is the entity established under a law by a State or Territory *as a local governing body*?

(b) Is the entity established under a law by a State or Territory *as an entity that has all the privileges and immunities of the Crown*?

(c) Is the entity established under a law by a State or Territory *as an entity which has within it an office of profit*?

(d) Is the entity established under a law by a State or Territory *as an entity which is not independent of the Crown having regard to the specified considerations*?

[13] See *Renmark Hotel Incorporated v Federal Commissioner of Taxation* (1949) 79 CLR 10; *Western Australian Turf Club v The Commissioner of Taxation of the Commonwealth of Australia* (1978) 139 CLR 288.

4.9. It should be noted that it may be the interaction of a number of laws and factors that indicates that a State or Territory has established an entity as a particular prescribed body.

Under a law

4.10. Section 4 does not limit the definition to only including entities which are established under a *State or Territory* law. It includes entities established under a *Commonwealth law* by a State or Territory. For example, a State may establish a company under the *Corporations Act 2001* (Cth) (the ***Corporations Act***) and include provisions in the constitution that make it clear that the entity is not independent of the State (for example, by including a clause that the directors must comply with directions from a Minister).

4.11. The ACNC interprets the phrase 'under a law' to mean 'under an Act', and does not extend to common law or equity. More analysis can be found in **Appendix A** from paragraph 2.43.

By a State or Territory

4.12. In order for an entity to be a 'government entity' under s 4(1)(b), it must be established under a law *by a State or Territory*. It will generally be clear that an entity has been established by a State or Territory where it is established by the body politic that is the State or Territory itself.

4.13. However, there is authority for the view that an entity that has a sufficient connection with a State or Territory may itself be classified as 'the State' or 'the Territory'. Consequently, an entity (***Entity A***) that is established by another entity (for example, a 'government entity') (***Entity B***) may itself be a 'government entity'. This will occur where the connection between Entity B and the State or Territory is such that Entity B can be said to be discharging governmental functions for the State or Territory, or put another way, that the State or Territory is carrying out its functions through Entity B. In such a case, Entity B will be regarded as the State or Territory.[14]

4.14. Various factors are relevant to whether a particular entity can be considered to be 'the State' or 'the Territory'. Many of these factors would also be relevant to determine whether that entity is a 'government entity'. However, the question of whether a particular entity can be considered to be 'the State' or 'the Territory' is not a question that relates only to charity law. The ACNC will determine this issue in accordance with the principles developed by the High Court concerning the meaning of 'the Commonwealth' or 'a State' in s 114 of the Australian Constitution. The principles are equally relevant for considering whether an entity is a 'Territory':

(a) Every feature of the entity which bears upon its relationship with the State must be considered.[15]

(b) The membership and management of the entity, and the purposes that it is required to pursue will most often reveal the relationship the entity has with the State. If, on examining these features, it is found that the entity is wholly

[14] See *SGH Limited v Commissioner of* Taxation (2002) 210 CLR 51 (***SGH***) at [16].
[15] See the joint judgment in SGH at [22].

owned and controlled by the State, and must act solely in the interests of the State, the conclusion that the entity *is* the State will readily follow.[16]

(c) Conversely, if the State does not control the conduct of the affairs of the entity, it cannot be said to be carrying on activities of government through the entity, even though the entity may have been established in accordance with government policy.

(d) If the entity is required to pursue the interests of the State, or if its policies are determined by government, that would indicate that it is the State.[17]

(e) Conversely, if the entity can (or must) take into account the interests of external parties, that is a contrary indicator. For example, if the objects of the entity involve advancing the interests of a particular group of citizens, and the entity cannot act outside of these objects, that would indicate that it is not the State.[18]

(f) The fact that an entity's functions are traditionally accepted governmental functions may assist in forming the view that the entity is the State.[19]

(g) The ability of the State to make or direct significant decisions for the entity (for example, by issuing directions to the board, or overriding board decisions) is an indication that the entity is the State.[20]

(h) Conversely the absence of State control would point away from the entity being the State.

(i) The ability of the State to appoint and remove directors may provide support for the view that the entity is the State, as does the ability of the State to fix the remuneration of the directors[21]. However, without more, this will not likely be sufficient.

(j) The financial arrangements of the entity will also be relevant. For example, the level of government oversight or control.[22]

(k) A regulatory role, such as the ability to make by-laws may indicate that the entity is the State.[23]

4.15. As noted above, many of these factors are also relevant to whether the entity is a 'government entity'. However, just because an entity falls within the definition of 'government entity' does not mean that it has the close relationship with a State or Territory to justify the finding that it is acting as 'the State' or 'the Territory'.

5. Prescribed Entity A: Local Governing Body

5.1. The first prescribed entity is a 'local governing body' as defined in the *Income Tax Assessment Act 1997* (Cth) (the ***ITAA***).

5.2. The ITAA defines 'local governing body' as a local governing body established by or under a State law or Territory law.

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[16] See the joint judgment in SGH at [22].
[17] See the joint judgment in SGH at [31] and Callinan J at [131].
[18] See the joint judgment in SGH at [28] and [32].
[19] *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 337.
[20] See the joint judgment in SGH at [22] and Callinan J at [131].
[21] See SGH per Callinan J at [131] and Kitto J (with whom Windeyer J agreed) In Ingles at 340.
[22] See *Bank of NSW v Commonwealth Savings Bank* (1986) 161 CLR 639 at 646-647.
[23] See *Bank of NSW v Commonwealth Savings Bank* (1986) 161 CLR 639 at 647-648.

5.3. As this is a concept set out in the ITAA, the ACNC will be guided by views expressed by the Australian Taxation Office (***ATO***) in relation to this concept. The ATO considers that the definition requires that the entity be established by or under a law of a State or Territory *for the purpose of being* a local governing body[24].

5.4. 'Local governing body' refers to a body that is established by the State or Territory to govern over a particular defined area. The State or Territory law that establishes an entity as a local governing body will usually define the geographical areas that the body is responsible for and define the powers and duties of that body. For example, these could include collecting rates and duties, managing waste collection, public recreation facilities, vehicle parking and town planning.

5.5. The naming conventions for a local governing body vary across the jurisdictions, but may be called cities, shires, towns, councils or municipalities. Local governing bodies derive their functions and powers from the State or Territory laws under which they operate.

6. Prescribed Entity B: Privileges and Immunities of the Crown

6.1. The second prescribed entity is one which has all of the privileges and immunities of the Crown (in any of its capacities). In this context, the States and Territories are all considered to be the 'Crown'.

6.2. This category refers to special privileges and immunities that are enjoyed by the Crown. For example, the Crown is generally not subject to legislation or to a claim for adverse possession of Crown land.

6.3. It will ordinarily be clear whether an entity has been established by a State or Territory to have all of the privileges and immunities of the Crown. For example, the State legislation that incorporates an entity may specify that the entity has all of the privileges and immunities of the Crown. Alternatively, State legislation may provide that an entity with a particular status or designation (such as 'a body that represents the Crown') has all of the privileges and immunities of the Crown. An entity that is given that particular status or designation (for example, in the legislation that incorporates the entity), will therefore have all of the privileges and immunities of the Crown.

6.4. In such cases, the State has established the entity with all of the privileges and immunities of the Crown. That entity would therefore be a 'government entity'.

6.5. It is also possible that, absent express legislative words, an entity may be found to have all of the privileges and immunities of the Crown (for example, where an entity is so closely connected with the Crown that it can be said to be a mere agent or emanation of the Crown)[25]. However, for the reasons set out in **Appendix A**, the ACNC will generally only consider the second category of prescribed entity where there are express statutory

[24] See ATO Interpretative Decision (ATO ID) 2004/757.

[25] For the reasons set out in **Appendix A**, the ACNC does not consider that the mere fact that an entity *is described* as an agent, instrumentality or representative of the Crown *necessarily* means that it enjoys all of the privileges and immunities of the Crown.

words that the relevant entity has all of the privileges and immunities of the Crown (such as in the circumstances outlined in paragraph 6.3).

6.6. Importantly, the express words must provide that the entity enjoys (*all* of) the privileges and immunities of the Crown. If the express words only provide that an entity enjoys one particular privilege, that will not be sufficient to establish that the entity is a prescribed entity under this category.

Examples

6.7. Section 6 of the *TAFE Queensland Act 2013* (Qld) states that 'TAFE Queensland has the status, privileges and immunities of the State'. Therefore, TAFE Queensland is a 'government entity' under the Charities Act.

6.8. Section 13A of the *Interpretation Act 1987* (NSW) says that where an Act states that a body is a 'statutory body representing the Crown', that body 'has the status, privileges and immunities of the Crown'. Therefore, if a NSW Act designates an entity to be a 'statutory body representing the Crown', then by virtue of s 13A, that entity will be a 'government entity' under the Charities Act.

6.9. Section 46A of the *Interpretation of Legislation Act 1984* (Vic) states that if an Act or subordinate instrument provides that an entity 'represents the Crown', then that entity has 'for all purposes, the status, privileges and immunities of the Crown, unless the contrary intention appears'. The Act further provides that if the entity is said *not* to represent the Crown, then the entity does not have the status, privileges and immunities of the Crown.

6.10. Consequently, if a Victorian Act or subordinate instrument states that an entity represents the Crown, then that entity will be a 'government entity' under the Charities Act (subject to any contrary intention). Conversely, if a Victorian Act or subordinate instrument states that the entity does not represent the Crown, then the entity will not be a prescribed entity under the second category. However, it may still be a prescribed entity under another category.

6.11. Section 20 of the *Acts Interpretation Act 1915* (SA) states that where an Act does not bind the Crown, the Crown's immunity extends (unless the contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agent's obligations. Further, an 'agent of the Crown' extends to an 'instrumentality of the Crown'. This section does not provide for the provision of *all of* the Crown's privileges and immunities, but only deals Crown immunity from legislation. Consequently, it does not follow that an entity described as an 'agent' or 'instrumentality' in South Australia necessarily has *all* of the privileges and immunities of the Crown.

7. Prescribed Entity C: Office of Profit under the Crown

7.1. The Legislative Instrument describes this type of entity as an entity, where an individual who occupies a position within that entity holds an office of profit under the Crown. As with the second category of prescribed entity,

Crown in this case includes a State or Territory[26]. The concept of 'office of profit' is found in s 44(iv) of the Australian Constitution.

7.2. The ACNC considers that the relevant question is whether the State or Territory has established the entity with an office of profit within it. If the answer to that question is 'yes', the entity will only be a prescribed entity if a person actually occupies that position.

7.3. Importantly, the relevant office of profit must be one *within* the entity in order for it to fall within this category of prescribed entity. In other words, the fact that a person works as a public servant and also works in a charity will not make the charity a prescribed entity. This is because the office of profit (being the position of a public servant) exists outside of the charity. In fact, as explained below, even where a person is required to occupy an external office of profit in order to gain a position within the charity (for example, an *ex officio* board member), that will not necessarily make the position within the charity an office of profit.

7.4. Section 44(iv) of the Constitution has only directly been the subject of High Court consideration on one occasion. This occurred in the case of *Sykes v Cleary (No 2)* (1992) 109 ALR 577. In their joint judgment, Mason CJ, Toohey and McHugh JJ noted that the meaning of 'office of profit under the Crown' is obscure. While their Honours did not attempt an exhaustive definition of the term, they state that it at least encompasses permanent public servants[27].

7.5. Consequently, if an entity has within it public servant positions, that entity will have an office of profit. For example, if the legislation which establishes an entity provides that its employees will be governed by the relevant public service legislation, those positions would be offices of profit. The ACNC does not consider that the position within the entity needs to be a position of responsibility or management, but could extend to any position within the entity, including the position of employee.

7.6. It is clear that the concept of 'office of profit' is not limited to public servants. However, given the lack of Australian case authority and the recognised uncertainty about the scope of the term 'office of profit', the ACNC will not take an overly restrictive approach. As explained in **Appendix A**, in determining whether a position within an entity is an office of profit, the ACNC will consider the level of control that the Crown exercises over the position.

7.7. In that respect, if the Crown has the power to appoint and dismiss, there will be a *presumption* that the Crown controls the position and therefore, that it is an office under the Crown.

7.8. However, if there are no additional features of control over the position, it may not be difficult to rebut the presumption. For example, where the Crown is the sole member of a corporation incorporated under the Corporations Act and has the power to appoint and remove directors, unless there are special features, the ACNC will generally consider that the directors do not occupy offices of profit. This is because a director's general responsibility to act in accordance with the constitution (and in particular, in accordance with the charitable purposes of the charity) and

[26] The reference to the Crown would also include references to entities which are emanations of the Crown (for example, certain statutory authorities).
[27] See *Sykes v Cleary (No 2)* (1992) 176 CLR 77 at 95.

not under the direction of the company's members, will be sufficient to rebut the presumption that the position is controlled by the Crown.

7.9. Additional features that would strengthen the presumption that the Crown controls the position could include a provision in the constitution that the director is subject to the direction of the Crown, or bound to act first in the interests of the Crown shareholder. In such a case, it would be likely that the position would be an office of profit under the Crown.

7.10. The presumption of Crown control may also be rebutted if the duties of the position are not duties associated with or connected to the public service.

7.11. It is important to note though that in the absence of case law, the legal position is not certain. A court may determine that where the Crown has the power of appointment and dismissal, the position is an office under the Crown. In order to ensure that a position would not be found to be an office *of profit* under the Crown (where the Crown has power of appointment and dismissal), an entity may decide that no remuneration attaches to the position. Assuming that no remuneration for the position is provided by another source, it would be clear that the particular office is not an office *of profit* under the Crown.

An office of profit that is connected to the position within an entity

7.12. The fact that a position within an entity must be occupied by a person who holds an office of profit outside of the entity, does not necessarily mean that the position itself is an office of profit. This situation could occur where an entity has an *ex officio* member of the board who becomes a board member by virtue of holding a particular office of profit under the Crown. Similarly, sometimes the holding of an office of profit is a necessary criterion for becoming a board member (for example, requiring one board member of a parents and citizens association for a public school to be a teacher of the public school).

7.13. In both of these cases, as long as the board member retains the ability to act independently of the Crown, and in the interests of the charity, then the board position will not generally be considered to be an office of profit. It should be noted that it is arguable that in these cases, the person is specifically appointed to represent the interests of the Crown (since they are appointed by virtue of their position as a servant of the Crown). However, absent any special features (such as an express provision allowing the board member to act in the interests of the Crown), the ACNC will generally take the view that the relevant office of profit provides that board member with particular expertise and insight that will benefit the charity, and it is for that reason that the office of profit attaches to the position.

Profit

7.14. The fact that the person who occupies the office is not getting paid (for example, because they are on unpaid leave[28], or because they decline the fee[29]), does not mean that the office itself is not one of profit. What is relevant is that there *is a right* to a salary or another form of emolument. However, the ACNC does not consider that the payment of reasonable

[28] See *Sykes v Cleary* (No 2) (1992) 109 ALR 577.
[29] *Warrego Election Petition, In re (Bowman v Hood)* (1899) 9 QLJ 249.

expenses[30] or a reasonable allowance for expenses makes the office one of profit.

7.15. It also appears that the profit may not need to be provided by the Crown itself. For example, in *Clydesdale v Hughes* (1933) 36 WALR 73[31], the Court determined that a member of the Lotteries Commission who was entitled to the remuneration out of the gross profits of subscriptions to Commission-conducted lotteries, held 'an office of profit'[32]. The Court specifically acknowledged that the profit did not come out of the moneys of the Crown, but did not consider this relevant to whether the position was an office of profit under the Crown. What was relevant was that the office was one which was under the Crown, and that profit attached to that office.

8. Prescribed Entity D: Not Independent of the Crown

8.1. The final category of prescribed entity relates to an entity that is established by a State or Territory as an entity that, in pursuing its objects, is not independent of the Crown.

8.2. This fourth category is intended to restate the principle derived from the common law that an entity which is 'too governmental' cannot be a charity[33]. This category goes to the heart of the charity/government divide in that it recognises that where a sufficient connection exists between an entity and government, the government is essentially acting through that entity to perform the government's functions. In such a case, the entity exists to perform government functions, rather than to pursue charitable purposes.

8.3. To determine whether an entity is not independent of the Crown in pursuing its objects, the Legislative Instrument requires consideration of two specified factors, which are consistent with the matters that the courts previously took into account when considering this issue.

Control

8.4. The first factor to consider is the degree of control that the Crown can exercise over the entity's governance and operations. Importantly, what is relevant is the *ability* to exercise control, not the actual exercise of control[34].

8.5. The ACNC considers that 'governance' focuses attention on the way in which the Crown can control the exercise of authority within the entity. This specifically relates to Crown control over the decision making body of the entity, or any other key decision makers. 'Operations' focuses attention on the work that the entity does (for example, its activities), including the way in which that work is undertaken.

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[30] *Warrego Election Petition, In re (Bowman v Hood)* (1899) 9 QLJ 249.

[31] Note that this decision was ultimately reversed by the High Court in *Clydesdale v Hughes* (1934) 51 CLR 518 on a different point. The High Court did not need to consider whether the relevant position was an 'office of profit' under the Crown.

[32] This case considered the term 'office of profit *from* the Crown' and may be distinguishable on that ground.

[33] The ACNC will have regard to judicial guidance in applying this category. In particular, the ACNC will consider *Metropolitan Fire Brigades Board*; *Mines Rescue Board*; *Northern Land Council v Commissioner of Taxes* (2002) 12 NTLR 86; *Ambulance Service*; *Central Bayside*.

[34] *Mines Rescue Board* at 99.

8.6. There are various factors that the ACNC will consider in determining the degree of control that the Crown can exercise over the governance and operations of an entity. Some factors may point towards government control, while other factors may point away from it. The assessment will necessarily involve a weighing of the relevant factors in their context. Importantly, not all of the factors will have equal weight. Some factors will simply operate to confirm a conclusion.

8.7. While it is not possible to set out an exhaustive list, the following are some factors that may be relevant:

- What control does the Crown have over the decision making body, or any other key decision maker in the entity? For example:
  - Can the Crown issue directions to decision makers? If so, what do these directions relate to and do they have any limitations?
  - Can the Crown appoint and remove decision makers (including a veto power)?
  - Is there any requirement that decisions are approved by the Crown (for example, in dealing with assets)?
  - Do decision makers have to make decisions in accordance with any government policy?
  - Where decision makers have a duty to act for the purposes of the entity, is there anything that limits this duty?
- What control does the Crown have over the operations of the entity?
  - Does the Crown have the ability to change or set the functions or purposes of the entity?
  - Can the Crown control the hiring and dismissal of staff?
  - Can the Crown control budgeting and spending (for example, where Crown approval is required for setting budgets)?
  - Does the Crown have the ability to direct what activities are carried out by the entity or how those activities are carried out?
  - Does the Crown control the funding of the entity?

8.8. After the ACNC has identified any factors which point towards Crown control, the ACNC will consider whether these factors go to the independence of the entity, or whether they can be explained on another basis (for example, in the context of the particular regulatory environment or contractual conditions).

Ability to issue directions

8.9. The ability for the Crown to issue directions to an entity, through for example, a Minister, is a strong indicator of Crown control. It will of course be necessary to consider the type of directions that may be given, and how these relate to the governance and operations of the entity.

8.10. There may be circumstances where the particular regulatory environment that applies to a type of entity may look like ‘control’, but should not be considered to be control for the purposes of establishing that an entity is not independent of the Crown.

8.11. Where the ability to issue directions to the entity can be explained by reference to the particular regulatory environment in which the entity operates, the entity may be found to be independent of the Crown despite the Crown's ability to issue directions. For example, legislation which regulates the conduct of hospitals may provide that the Minister for Health may issue directions to hospitals (including private hospitals) in certain circumstances. Given that hospitals deal with life threatening situations, the level of regulatory control can be explained by reference to the severe consequences that may result if Government did not provide sufficient oversight.

Power to appoint and remove members of the entity's board or management

8.12. The ACNC does not consider that the power to appoint or remove members of the entity's board or management will be a strong indicator of control. This is because, in the charitable context in particular, members of boards must act in the interests of the entity and for its charitable purposes. Therefore, while the Crown may be able to control the identity of the decision makers, it will not control the actual decisions. Similarly, where the Crown can appoint managers, it does not control the decisions or actions of those managers, who are ultimately accountable to the board.

Funding and Conditions attached to funding

8.13. The source of funding is unlikely to be a strong factor, either for or against government control. However, government funding may be a factor weighing in favour of government control where the entity is required to seek government funding and cannot seek funding in any other way.

8.14. Generally, contractual conditions attached to funding will not indicate control, particularly where the entity has voluntarily entered into the control[35].

Legal obligation to comply with requirements or obtain government approval

8.15. Entities may have to comply with certain legislative requirements, for example, because of the legal structure of the entity. An incorporated association will have certain obligations under its incorporating legislation, as well as prescribed matters which go to the governance of the entity (for example, rules around meetings of members). Entities established under specific legislation will also have similar requirements.

8.16. The ACNC does not consider that such legislative requirements are likely to indicate that the Crown has control over the governance of the entity. Rather, these requirements simply ensure that the entity operates within a particular governance structure, but would not likely indicate Crown control over the actual decision making of the entity.

8.17. Similarly some entities may have to comply with legislative requirements, or seek government approval in certain circumstances because of the activities that they undertake. In such cases, entities may have to go through various processes and meet a range of conditions to demonstrate they will act in ways considered appropriate by the regulators. As with the discussion above, this is likely reflective of the particular regulatory environment in which the entity operates as opposed to being an indication of government control in the relevant sense. However, this will again

[35] See *Central Bayside.*

depend on the context, and in some cases, a requirement that an entity seeks approval from the government before it can implement a decision of the board, may be properly categorised as Crown control over the governance or operations of the entity.

Government function

8.18. The second factor to consider is whether the entity was established with the objective of fulfilling a function or responsibility of the Crown.

8.19. This factor is about ascertaining the character of the entity in order to determine the ultimate purpose for its existence. Essentially the question is whether the entity was established to pursue charitable purposes, or whether it was established to implement government policy. Consideration must be given to what the entity is currently established to do (ie, why it currently exists), rather than only considering the matter from an historical perspective.

8.20. The ACNC does not consider that this question can be answered merely by looking at the activities of the entity and asking if those activities are traditionally regarded as the responsibility or function of government. Rather, the relevant inquiry will relate to the reason that the entity performs that work. In this regard, the reason that a governmental entity exists is in order to fulfil the functions and responsibilities of government. Consequently, the relevant inquiry is whether there are any factors which indicate that the entity is governmental in nature.

8.21. Any such factors will point towards a conclusion that the entity was established to fulfil a function or responsibility of the Crown rather than to pursue charitable purposes.

8.22. While government control is an important factor in the characterisation of an entity as governmental, other factors are also relevant. Those other factors (some of which are discussed below) will be considered in this part of the test.

How the entity was formed

8.23. The fact that an entity has been established by statute (statutory body) may point towards the entity being governmental[36]. However, this may be rebutted where it is clear that the government's role was merely facilitative (for example, as is the case with church land trustee corporations).

Functions specified by Government

8.24. It is not unusual for the functions of a charity to be specified by the government. For example, the legislation which establishes a corporate body to hold land for a religious association would specify the objects or functions of the body in the legislation.

8.25. Similarly, parents and citizens associations for government schools may have their objects and functions set out in legislation, or have a provision in legislation requiring them to include certain objects and functions in their constitutions.

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[36] For example, the fact that the relevant entity was established by statute was one relevant factor in *Metropolitan Fire Brigades Board* at 280, *Mines Rescue Board* at 101 and *Ambulance Service* at 493.

8.26. This does not necessarily mean that the entity will be established to carry out a government function. While the government may be said to have formulated the entity's objects or functions, the entity may still carry out those objects or functions in order to pursue its own independent charitable purpose.

Special powers – eg to make by laws or to impose penalties

8.27. If the government has established the entity with certain powers of control or regulation that could indicate that the entity was created as a tool of government to carry out the functions and responsibilities of government[37].

Funding

8.28. The fact that an entity is funded entirely by government does not mean that it is carrying out the functions of government. While the government could be said to be funding the entity in order to discharge its own functions and responsibilities, that is not inconsistent with the fact that the entity is using the funding in order to carry out its charitable purposes[38].

Representatives, Agents or Instrumentalities of the Crown

8.29. The fact that an entity is described as representing the Crown, or as an instrumentality or agent of the Crown (or similar descriptions), may point towards the governmental nature of the entity.

8.30. Similarly, the fact that the entity is subject to certain requirements that other government agencies are subject to (eg Access to Information laws that apply to State government agencies) may indicate that it is governmental in nature.

Any other relevant matter

8.31. Finally, in determining whether, in pursuing its objectives, an entity is independent of the Crown, the ACNC can have regard to any other relevant matter.

8.32. The Explanatory Statement to the Legislative Instrument notes that another relevant matter may the fact that a State or Territory has included a particular entity in its definition of 'government entity'.

9. Section 4(1)(c): Foreign Government Agency

9.1. The third type of 'government entity' described is s 4 of the Charities Act is 'a foreign government agency (within the meaning of the *Income Tax Assessment Act 1997*)'.

9.2. Section 995.1 of the ITAA defines 'foreign government agency' as:

(a) the government of a foreign country or of part of a foreign country,

(b) an authority of the government of a foreign country; or

(c) an authority of the government of part of a foreign country.

[37] See for example *Mines Rescue Board; Metropolitan Fire Brigades Board.*

[38] See *Central Bayside; Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 94 LGERA 330.

Appendix A – Reasoning behind Commissioner's Interpretation Statement: Definition of 'Government Entity' in s 4(1)(b) of the Charities Act

1. 'Government Entity'

1.1. Section 4(1) of the *Charities Act 2013* (Cth) (the ***Charities Act***) defines 'government entity' as:

> (a) a government entity (within the meaning of the *A New Tax System (Australian Business Number) Act 1999*); or
>
> (b) an entity:
>
> > (i) established under a law by a State or a Territory; and
> >
> > (ii) of a kind prescribed under subsection (2); or
>
> (c) a foreign government agency (within the meaning of the *Income Tax Assessment Act 1997*).

1.2. Section 3 of the Charities (Definition of Government Entity) Instrument 2013 (Cth) (the ***Legislative Instrument***) prescribes four entities for the purposes of s 4(1)(b)(ii):

> (a) a local governing body (within the meaning of the *Income Tax Assessment Act 1997*);
>
> (b) an entity that has all the privileges and immunities of the Crown (in any of its capacities);
>
> (c) an entity, where an individual who occupies a position within that entity holds an office of profit under the Crown (in any of its capacities);
>
> (d) an entity that, in pursuing its objectives, is *not* independent of the Crown (in any of its capacities), having regard to:
>
> > (i) the degree of control the Crown can exercise over the entity's governance and operations; and
> >
> > (ii) whether the entity was established with the objective of fulfilling a function or responsibility of the Crown (in any of its capacities); and
> >
> > (iii) any other relevant matter.

2. Prescribed entities that are established by a State or Territory

2.1. The detailed reasoning will focus on the second type of 'government entity' described in s 4(1) of the Charities Act, namely, an entity which is

established under a law by a State or Territory and which is a prescribed entity.

2.2. The ACNC will interpret 'established under a law by a State or Territory' as meaning 'established under a law by a State or Territory *as the relevant prescribed entity*'. In other words, the type of entity that must be established by a State or Territory is to be understood with reference to the relevant type of prescribed entity. Although this interpretation does not necessarily accord with a plain reading of the legislation, and may have the effect of conflating two tests into one, the ACNC considers that it is the correct and preferable interpretation. The detailed reasons for adopting this approach are set out below.

Meaning of 'established'

2.3. In considering the test for an entity *established* by a State or Territory, it is useful to have regard to case law which considers similar concepts. There is case law which considers the meaning of the word 'constitute', which, in the ACNC's view, is analogous or even synonymous to the word 'establish'[39].

2.4. The ordinary meaning of the word 'establish' according to the Macquarie Dictionary includes 'to set up on a firm or permanent basis; institute; found'[40]. The ordinary meaning of the word 'constitute' according to the Macquarie Dictionary includes 'to set up or found (an institution, etc.)'[41].

2.5. The ordinary meaning of the words appears to relate to the initial formation of an entity. However, there is authority to support the view that these words refer to the current state of the entity.

2.6. The *Western Australian Turf Club v The Commissioner of Taxation of the Commonwealth of Australia* (1978) 139 CLR 288 (***WA Turf Club***) involved an unincorporated racing club which had been given the function of granting licences for holding race meetings. The High Court had to determine whether the club was a 'public authority constituted under a …State Act'.

2.7. When the club was initially formed, there was no suggestion that it was a public authority constituted under a State Act. Nevertheless, Stephen J stated at 293:

> It is clear from these cases that an entity need not from its origin have possessed those qualities which at the relevant date make it a public authority; it may acquire the necessary attributes subsequently and if it does so as a result of legislation it will thereupon have become a public authority.

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[39] There is judicial support for the view that the terms can be synonymous. For example, in *Bryce v Curtis* (1983) 51 ALR 73, Burt CJ stated that '(t)he primary meaning of the word "to constitute" is to establish '. In *Re Brennan and The Law Society of the Australian Capital Territory* (1984) 6 ALD 428, the AAT referred to the statement by Burt CJ and said '(t)he decision in Bryce, far from supporting any distinction between the words "constitute" and "establish", supports the view that these words are synonymous – a view that accords with my own understanding and with the dictionary definitions to which I have referred…'. See also *In re East and West India Dock Co* (1888) 38 Ch D 576.

[40] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2015) 'establish'.

[41] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 5 November 2015) 'constitute'.

2.8. The Court therefore did not consider that the word 'constitute' was limited to the initial formation of the entity.

2.9. Similar principles have been applied in relation to the word 'established'. In *Bray v FCT* (1978) 140 CLR 560, the High Court had to consider whether a fund was 'a public fund established and maintained under an instrument of trust'. Barwick J held that there were no public elements in the establishment or maintenance of the fund and therefore, it was not a public fund. However, his Honour stated at 566 that this conclusion did not 'rule out the possibility that the fund could yet become a public fund by the participation of the public in it to a substantial degree. Whether it does so or not must remain a question to be decided in the circumstances which then exist'. Implicit in this obiter statement is the fact that the use of the word 'established' did not mean that the fund could only be a public fund if it was initially formed as one. Rather, what is relevant is how it is currently established.

2.10. In *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82, the Court considered whether 'the appellant is a society, association or club established for the encouragement or promotion of rugby league football'. Lockhart J noted at 87 to 88 that:

> Counsel for each party also submitted that, notwithstanding the use of the word 'established' and the context in which it appears in the subparagraph, the relevant time to determine whether the appellant was established for the encouragement or promotion of rugby league football was during the relevant years of income, not at the time the appellant was incorporated, although the memorandum of association of the appellant and the history of its activities since its incorporation were all relevant considerations.

2.11. At 89, his Honour endorsed this approach stating that:

> The syntax of the subparagraph and the choice of the word "established" are less happy; but it is, I think, reasonably clear that the subparagraph looks to the year of income to determine whether each of its elements is satisfied.

2.12. More recently, in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 625, the Victorian Court of Appeal had to consider whether an entity was 'a body established for religious purposes'. Maxwell P stated at 663:

> The one question of construction identified in the applicants' outline concerned the temporal connotation of the word "established". According to the outline, the question whether the body satisfied the statutory description had to be answered by reference to "the objects or purposes for which the body was established in the past". Hence, it was contended, her Honour had erred by examining CYC's current activities.
>
> In oral argument, however, those submissions were abandoned. Senior counsel for the applicants accepted — correctly, in my view — that the word "established" had an ambulatory meaning. The question to be addressed was whether, at the time of the alleged conduct, the body answered the statutory description of "established for religious purposes". Moreover, it was expressly conceded — once again, correctly, in my view — that the court would therefore need to examine the character and purpose of the activities of CYC at that time.
>
> This last point needs to be emphasised, as it highlights the nature of the examination which s 75(2) requires. Senior counsel for Cobaw drew attention to what the High Court majority said in Word Investments (a decision on which the applicants relied) (at [17]):

> [I]t is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question.
>
> Counsel for the applicants acknowledged in argument that a body originally established for religious purposes, but which now operated for entirely commercial purposes, would no longer qualify as "a body established for religious purposes".
>
> [citations omitted]

2.13. In terms of the legislative context of the definition of 'government entity', it is clear that interpreting 'established' as limited to initial formation would defeat the purpose of the provision. The concept of 'government entity' is intended to ensure that certain types of entities that have a sufficient connection to government cannot be charities.

2.14. Further, the Explanatory Statement to the Legislative Instrument (the ***ES***) makes clear that, particularly in relation to an entity that is not independent of the Crown[42], there should not be a significant departure between the status of an entity under the common law and under the Legislative Instrument (at page 4):

> Consideration of the degree of government control and the functions 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.**
>
> **[emphasis added]**

2.15. The interpretation of 'established' as only relating to the 'initial formation' of the entity could result in entities that are wholly controlled by government being eligible to be charities, merely because they were initially set up by a voluntary group of people. This could lead to two entities, which are substantially the same, being treated differently under the Charities Act merely because of their historical formation. This result would be wholly inconsistent with the common law position which would look at the current circumstances of an entity to determine whether a sufficient connection to government exists.

2.16. The ACNC therefore considers that the word 'established' relates to the current status of the entity. This interpretation ensures that the purpose of the definition of 'government entity' is not frustrated and is in line with case law which considered similar issues.

Established as what?

2.17. However, if 'established' does not mean 'initial formation', it is difficult to clearly identify how an entity can be 'established' so as to satisfy the first part of s 4(1)(b). The word 'established' when used to mean something beyond the 'initial formation' necessarily requires an identification of what the entity has been established as.

2.18. For example, if a hospital was originally formed by a voluntary group of people, but then at some later stage was brought within a public health system and designated as a 'public hospital' by State legislation, has that hospital been 'established' by the State? By changing the character of

[42] The fourth type of prescribed entity.

that entity and establishing it as a *public hospital*, can the State be said to have established that entity for the purposes of the Charities Act?

2.19. If so, the phrase 'established under a law by a State or Territory' could potentially have broad application. For example, it could be read as encompassing any incorporated association given that the State, through its legislation, has bestowed the corporate character upon the entity, and established it as an incorporated association.

2.20. Similarly, the mere licencing or accreditation of an entity could arguably bring the entity within the definition, given that the State or Territory could be said to have established the entity in its current form, namely as a licenced or accredited entity.

2.21. Such an approach would lead to uncertainty, as there is no clear articulation of what level of State or Territory involvement is required in order for the State or Territory to have established the entity. Further, a vast majority of these entities would not fall within the definition of 'prescribed entity', meaning that it will generally be the second part of the test that is relevant in determining the divide between charity and government.

2.22. In addition, it does not necessarily accord with the plain meaning of the legislation to interpret any incorporated association or licenced entity as having been 'established' by the State or Territory by virtue of that incorporation or licencing. Indeed, albeit in a different statutory context, Rich J did not consider that an entity incorporated under an Act or licenced under an Act was necessarily *constituted* under those Acts[43] (see paragraph 2.25 below).

2.23. The question then, is whether, in the particular statutory context, there can be a clear articulation of the type of entity that must be established by the State or Territory, in a way that achieves the purpose of the legislation and reduces uncertainty. Some assistance may be gained from cases which have considered a similar question.

2.24. In that regard, courts have previously had to consider the meaning of 'constituted' in the phrase 'a public authority constituted under any Act or State Act' which appeared in s 23(d) of the *Income Tax Assessment Act 1936* (Cth). Once it was accepted that 'constituted' did not mean 'initially formed', there needed to be an articulation of exactly what the entity was required to be constituted as.

2.25. In *Renmark Hotel Incorporated v Federal Commissioner of Taxation* (1949) 79 CLR 10 (***Renmark***), Rich J at first instance stated at 19:

> In the case of the appellant, its corporate being is obtained from the certificate granted under the *Associations Incorporation Act*, but it is not easy to say that it is constituted under that Act. The associations which obtain a certificate under the Act are treated as being in existence independently of their corporate character. Their corporate character is conferred upon them for specific and limited purposes. The appellant can hardly be regarded as constituted under the *Licensing Act*. The *Licensing Act* has been used as a means of placing conditions and limitations upon its functions and the manner of their exercise. The word "constituted" is not the same as "incorporated." For the purposes of s.23(d) it is conceivable that an unincorporated body might be constituted under a State Act so as to satisfy the exemption. On the other hand, mere incorporation under an Act does not

[43] *Renmark Hotel Incorporated v Federal Commissioner of Taxation* (1949) 79 CLR 10 (***Renmark***).

> constitute the body. The word "constituted" immediately follows "public authority." **It means constituted as a public authority**.
>
> **[emphasis added]**

2.26. Although the Full Court of the High Court did not decide the meaning of 'constituted' upon appeal[44], the comments above were later referred to in *WA Turf Club*.

2.27. Barwick CJ appeared to endorse the analysis of Rich J, stating at 291 that 'the question is whether the possession and exercise by the appellant of the statutory power of licencing the holdings of race meetings "constituted" the appellant a public authority under the Racing Restrictions Act…'.

2.28. Stephen J stated at 293 that:

> Rich J. understood "constituted under" to mean "constituted as a public authority" by State legislation and thought it conceivable that a body, while remaining unincorporated, might yet be constituted under a State Act so as to satisfy the exemption. Latham C.J. distinguished "constituted under" from "constituted by" and recognized that it might be by the interaction of a variety of legislation that a body came to be a public authority. This accords with the views expressed by English courts in *In re East and West India Dock Co*. and, on appeal, and in *Swain v. Southern Railway Co*.
>
> It is clear from these cases that an entity need not from its origin have possessed those qualities which at the relevant date make it a public authority; it may acquire the necessary attributes subsequently and if it does so as a result of legislation it will thereupon have become a public authority.
>
> [citations omitted]

2.29. Implicit in this statement is that Stephen J also accepts the reasoning of Rich J, that 'constituted' must be understood as 'constituted as a public authority'.

2.30. Murphy J, before referring to the relevant statement by Rich J, stated explicitly at 305 that '(t)o come within s.23(d), it is not enough for the Club to be a public authority; it must be constituted **as such** under a (State) Act'. **[emphasis added]**

2.31. It therefore appears that there is support for Rich J's view that the phrase 'constituted under any Act' could not be understood as a standalone test, but rather, must be understood *with reference to the type of body* which was relevant in the context. In other words, part of the test was not simply whether the body was constituted under an Act, but whether it is constituted under an Act *as a public authority*.

2.32. It is clear that the wording in the Charities Act is different to s 23(d). In particular, the Charities Act appears to include two distinct tests; first, that the entity be established by a State or Territory under a law (s 4(1)(b)(i)), and secondly, that the entity be prescribed (s 4(1)(b)(ii)). The fact that there is an 'and' connector between s 4(1)(b)(i) and s 4(1)(b)(ii) supports the view that these are two distinct tests.

2.33. Nevertheless, in interpreting legislation, it is necessary to take into account its context and purpose. Indeed, s 15AA of the *Acts Interpretation Act* 1901 (Cth) states that '(i)n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act

[44] Their Honours decided the matter on the basis that the relevant entity was not a 'public authority'.

(whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation'.

2.34. As explained by McHugh J *in Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 (when still a judge of the Supreme Court of New South Wales) at 423:

> A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.

2.35. In considering the purpose for the definition of 'government entity', it is useful to have regard to the Explanatory Memorandum to the Charities Bill 2013 (Cth):

> 1.52 The purposes of government in carrying out its functions and responsibilities are not charitable and a government entity cannot be a charity. However, the definition of a government entity and, in particular, its boundaries, has remained uncertain in the common law, with various factors, particularly government control, being considered as determining factors.
>
> 1.53 To give greater certainty about what is a government entity, the Bill provides that the term has the same meaning as 'government entity' within the meaning of the A New Tax System (Australian Business Number) Act 1999 (ABN Act). [Paragraph 4(1)(a)]
>
> 1.54 As state and territory laws describe 'government entity' in various ways, the Bill enables the Minister to prescribe additional classes of government entities to allow the Government to list the state and territory equivalents to Commonwealth concepts already incorporated into the ABN Act definition and to allow those terms to be more easily kept up to date. The Bill gives an example of those entities likely to be prescribed, such as the state and territory equivalents of Commonwealth executive and statutory agencies. [Paragraph 4(1)(b) and subsection 4(2)]

2.36. Accordingly, in providing a statutory definition of charity, the purpose of the Charities Act was to retain (and to clarify) the distinction from the common law between governmental purposes and charitable purposes. The concept of 'government entity' is meant to encompass entities that have a particular type of connection to government, such that their purpose, rather than being charitable, is to carry out the functions and responsibilities of the Crown.

2.37. Importantly, in relation to the States and Territories, this connection is found where an entity falls within the definition of a prescribed entity (ie, the second part of the test). That is, all four of the prescribed entities have a clear connection to government. The purpose of the first part of the test is to distinguish between entities that have the connection to a State or Territory rather than a connection to the Commonwealth. This is presumably because, where an entity has such a connection to the Commonwealth, it will fall within the definition of 'government entity' under the ABN Act.

2.38. In light of the discussion above, the ACNC considers that the correct and preferable approach is to define the type of entity that must be established by the State or Territory for the purposes of the first part of the test, by reference to the second part of the test. In other words, just as some of the cases discussed above considered that in the legislative context, the

phrase ‘a public authority constituted under an Act’, meant ‘constituted *as a public authority* under an Act’, so too must the phrase ‘established under a law’ be understood in the context of the type of ‘prescribed body’ that the entity is established as.

2.39. This approach creates certainty as the type of entity that must be created, it directs a focus on the connection to government which is ultimately the disqualifying feature (and the purpose of the definition of ‘government entity’), and it retains the requirement of State or Territory involvement (as opposed to Commonwealth) in establishing an entity with a particular connection to government. As such, it clearly achieves the purpose of the legislation, which is to exclude certain entities that have a particular connection to a State or Territory.

2.40. Therefore, the ACNC considers that ‘established under a law by a State or Territory’ means ‘established under a law by a State or Territory under a law *as the relevant prescribed entity*’.

2.41. Consequently, the relevant tests are:

(a) Is the entity established under a law by a State or Territory *as a local governing body*?

(b) Is the entity established under a law by a State or Territory *as an entity that has all the privileges and immunities of the Crown*?

(c) Is the entity established under a law by a State or Territory *as an entity which has within it an office of profit*?

(d) Is the entity established under a law by a State or Territory *as an entity which is not independent of the Crown having regard to the specified considerations*?

2.42. It should be noted that it may be the interaction of a number of laws and factors that indicates that a State or Territory has established an entity as a particular prescribed body.

Established under a law

2.43. Section 4 does not limit the definition to only including entities which are established under a *State or Territory law*. It includes entities established under a *Commonwealth law* by a State. For example, a State may establish a company under the *Corporations Act 2001* (Cth) (the ***Corporations Act***) and include provisions in the constitution that make it clear that the entity is not independent of the State (for example, by including a clause that the directors must comply with directions from a Minister).

2.44. Importantly though, the entity must in some way be said to be established *under a law*.

2.45. The case of *Tasmania Wilderness Society Inc v Fraser* (1982) 153 CLR 270 provides an example of a body that may have been established by the Commonwealth, but was not established by the Commonwealth under a law. In that case the Court had to determine whether the Australian Loan Council (ALC) was a body established by or appointed under the laws of the Commonwealth. The ALC was a body established under the Financial Agreement which was an agreement between the Commonwealth and the States. Section 105A of the Australian Constitution provides for the making of such an agreement and confers legislative power for the validation of, and for the carrying out of, such an agreement.

2.46. The Court noted that a previous decision had found that the Financial Agreement was not a law of the Commonwealth, even though it was authorised under the Australian Constitution, and approved by a Commonwealth Act. Rather, it was a contract. Mason J stated at 276:

> The agreement remains a contract, yet it is a contract entrenched by the Constitution, subject only to its being varied and rescinded by the parties (see s. 105A(4)).
>
> I do not accept the argument that because the Agreement is approved and validated by Commonwealth statutes the ALC is in some way established by those statutes.

By a State or Territory

2.47. In order for an entity to be a 'government entity' under s 4(1)(b), it must be established under a law by *a State or Territory*. It will generally be clear that an entity has been established by a State or Territory where it is established by the body politic that is the State or Territory itself. However, a question arises as to the status of an entity which is established by another entity which is connected to the State or Territory, but is not the body politic that is the State or Territory.

2.48. For example, if a local governing body establishes a company which it wholly owns and controls, is that company excluded from being a charity? It could be argued that since it was not the 'State' or the 'Territory' that established that company as an entity which is not independent of the Crown, there is no basis to argue that the company is itself a government entity, given the wording of s 4(1)(b).

2.49. However, there is authority for the view that an entity that has a sufficient connection to a State or Territory may itself be classified as 'the State' or 'the Territory'. In other words, the concept of the 'State' or 'Territory' can be understood as wider than the relevant body politic that is the State or Territory itself. Consequently, an entity (***Entity A***) that is established by another entity (for example, a 'government entity') (***Entity B***) may itself be a 'government entity'. This will occur where the connection between Entity B and the State or Territory is such that Entity B can be said to be discharging governmental functions for the State or Territory, or put another way, that the State or Territory is carrying out its functions through Entity B. In such a case, Entity B will be regarded as the State or Territory.[45]

2.50. The court has previously considered this issue in relation to whether particular corporations could be considered to be the 'Commonwealth' or the 'State' for the purposes of s 114 of the Australian Constitution. Kitto J in *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 (***Inglis***) phrased the test as follows at 338:

> The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth [or the State/Territory] shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth [or the State/Territory], that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth [or State/Territory] activity cannot realistically be applied to what the corporation does?

[45] See *SGH Limited v Commissioner of* Taxation (2002) 210 CLR 51 (***SGH***) at [16].

2.51. Therefore, in determining whether Entity A described above in paragraph 2.49 could be a 'government entity', it would first be necessary to determine whether Entity B can be considered to be 'the State'. If the answer to that question is yes, then the question would be whether Entity A was established by Entity B (ie, the State) as a particular prescribed entity.

2.52. Various factors are relevant to whether a particular entity can be considered to be 'the State' or 'the Territory'. Many of these factors would also be relevant to determine whether that entity is a 'government entity'. However, the question of whether a particular entity can be considered to be 'the State' or 'the Territory' is not a question that relates only to charity law. The ACNC will determine this issue in accordance with the principles developed by the High Court concerning the meaning of 'the Commonwealth' or 'a State' in s 114 of the Australian Constitution. The principles are equally relevant for considering whether an entity is a 'Territory':

a) Every feature of the entity which bears upon its relationship with the State must be considered.[46]

b) The membership and management of the entity, and the purposes that it is required to pursue will most often reveal the relationship the entity has with the State. If, on examining these features, it is found that the entity is wholly owned and controlled by the State, and must act solely in the interests of the State, the conclusion that the entity *is* the State will readily follow.[47]

c) Conversely, if the State does not control the conduct of the affairs of the entity, it cannot be said to be carrying on activities of government through the entity, even though the entity may have been established in accordance with government policy.

d) If the entity is required to pursue the interests of the State, or if its policies are determined by government, that would indicate that it is the State.[48]

e) Conversely, if the entity can (or must) take into account the interests of external parties, that is a contrary indicator. For example, if the objects of the entity involve advancing the interests of a particular group of citizens, and the entity cannot act outside of these objects, that would indicate that it is not the State.[49]

f) The fact that an entity's functions are traditionally accepted governmental functions may assist in forming the view that the entity is the State.[50]

g) The ability of the State to make or direct significant decisions for the entity (for example, by issuing directions to the board, or overriding board decisions) is an indication that the entity is the State.[51]

h) Conversely the absence of State control would point away from the entity being the State.

i) The ability of the State to appoint and remove directors may provide support for the view that the entity is the State, as does the ability of the State to fix the remuneration of the directors[52]. However, without more, this will not likely be sufficient.

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[46] See the joint judgment in SGH at [22].
[47] See the joint judgment in SGH at [22].
[48] See the joint judgment in SGH at [31] and Callinan J at [131].
[49] See the joint judgment in SGH at [28] and [32].
[50] *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 337.
[51] See the joint judgment in SGH at [22] and Callinan J at [131].
[52] See SGH per Callinan J at [131] and Kitto J (with whom Windeyer J agreed) In Ingles at 340.

j) The financial arrangements of the entity will also be relevant. For example, the level of government oversight or control.[53]

k) A regulatory role, such as the ability to make by-laws may indicate that the entity is the State.[54]

If an entity is found to be a 'government entity' is it also 'the State'?

2.53. As noted above, many of these factors would be relevant to determining whether an entity is a 'government entity'. However, just because an entity falls within the definition of 'government entity' does not mean that it has the close relationship with a State or Territory to justify the finding that it is acting as 'the State' or 'the Territory'.

2.54. For example, the High Court *in Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 230 expressly rejected the argument that an entity that had the privileges and immunities of the Crown was necessarily also 'the State' for the purposes of s 114 of the Constitution.

3. Prescribed Entity A: Local Governing Body

3.1. The first prescribed entity is a 'local governing body' as defined in the *Income Tax Assessment Act 1997* (Cth) (the ***ITAA***).

3.2. The ITAA defines 'local governing body' as a local governing body established by or under a State law or Territory law. A State law means a law of a State and a Territory law means a law of a Territory.

3.3. As this is a concept set out in the ITAA, the ACNC will be guided by views expressed by the Australian Taxation Office (***ATO***) in relation to this concept.

3.4. In ATO Interpretative Decision (***ATO ID***) 2004/757, the ATO provides some guidance on the meaning of 'local governing body'. The ATO ID states:

> 'Local governing body' is defined in section 74A of the ITAA 1936 as 'a local governing body established by or under a law of a State or Territory'. The company must be established by or under a law of a State or Territory **for the purpose of being** a local governing body.

3.5. Importantly, the ATO's interpretation is consistent with the ACNC's interpretation of the meaning of 'established by a State or Territory'. That is, the phrase 'established under a law by a State or Territory' cannot be understood in isolation, but must be understood in the context to mean 'established by a State or Territory under a law *as, or for the purpose of being, a local governing body*'.

3.6. However, the definition of 'local governing body' restricts the test of government entity to an entity established by a State under a law of that State (rather than under any law).

3.7. 'Local governing body' refers to a body that is established by the State or Territory to govern over a particular defined area. The State or Territory law that establishes an entity as a local governing body will usually define the geographical areas that the body is responsible for and define the powers and duties of that body. For example, these could include

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[53] See *Bank of NSW v Commonwealth Savings Bank* (1986) 161 CLR 639 at 646-647.
[54] See *Bank of NSW v Commonwealth Savings Bank* (1986) 161 CLR 639 at 647-648.

collecting rates and duties, managing waste collection, public recreation facilities, vehicle parking and town planning.

3.8. The naming conventions for local governing bodies vary across the jurisdictions, but may be called cities, shires, towns, councils or municipalities. Local governing bodies derive their functions and powers from the State or Territory under which they operate.

Example

3.9. A particular area of a State did not have a local council. In order to obtain funding that is provided to local governments, the community established an incorporated association. All members of the community were eligible to be members of the association. The committee was made up of four local elected members and three State government representatives.

3.10. The association undertakes projects for the benefit of the local community, including representing community needs to government authorities. For example, the association campaigned for the redevelopment of local roads and bridges and oversaw the project. The association provides grants to various community bodies. For example, it provided additional medical equipment to the local health service. The association also purchases buildings of historical significance to the local community in order to restore them so that they can be opened to the public.

3.11. In light of the role that the association plays within the community, and given that there is no local council, the relevant Minister arranges for the association to be declared a 'local governing body' for the purpose of the *Local Government (Financial Assistance) Act 1995* (Cth). This Act provides financial assistance for local government purposes.

3.12. That Act defines 'local governing body' as:

- A local governing body established by or under a law of a State…
- A body declared by the Minister, on the advice of the relevant State Minister…to be a local governing body for the purposes of this Act.

3.13. Although the association is declared to be a local governing body for the purposes of receiving financial assistance under the Act, it does not appear that it is a 'government entity' for the purposes of the Charities Act. This is because, although it may perform many functions which are ordinarily performed by a local governing body, it has not been established by the State as a local governing body. It does not derive any authority from the State, nor has it been given any powers or functions by the State (for example, the power to made by-laws). Further, the fact that the association does not fall within the first definition of 'local governing body' but had to be specifically declared as such, supports the view that it is not a local governing body as defined in the ITAA. The mere fact that the State Minister had some involvement in deeming the body to be a 'local governing body' for the purpose of receiving government grants is not sufficient to show that the State established the body as a local governing body, or indeed, that the body is in fact, a local governing body.

3.14. As such, the association would not be a 'local governing body' under the Legislative Instrument.

4. Prescribed Entity B: Privileges and Immunities of the Crown

4.1. The second prescribed entity is one which has all of the privileges and immunities of the Crown (in any of its capacities). In this context, the States and Territories are all considered to be the 'Crown'.

4.2. This category refers to special privileges and immunities that are enjoyed by the Crown. For example, the Crown is generally not subject to legislation or to a claim for adverse possession of Crown land.

4.3. It will ordinarily be clear whether an entity has been established by a State or Territory to have all of the privileges and immunities of the Crown. The State legislation that incorporates an entity may specifically express this to be the case. For example, s 6 of the *TAFE Queensland Act 2013* (Qld) states that 'TAFE Queensland has the status, privileges and immunities of the State'.

4.4. Alternatively, State legislation may provide that an entity with a particular status or designation (such as 'a body that represents the Crown') has all of the privileges and immunities of the Crown. An entity that is given that particular status or designation (for example, in the legislation that incorporates the entity), will therefore have all of the privileges and immunities of the Crown. [55]

4.5. In such cases, it would be clear that the State has established the entity with all of the privileges and immunities of the Crown. That entity would therefore be a 'government entity'.

4.6. For the reasons described below, the ACNC will generally only consider whether an entity falls within this category of prescribed entity if there are express statutory words that the relevant entity has the privileges and immunities of the Crown. Where the legislation that provides this is State or Territory legislation, the entity will be a 'government entity' on the basis that the State or Territory has established the entity to have the privileges and immunities of the Crown.

4.7. As explained in more detail below, in the absence of express words, the inquiry as to whether an entity has all of the privileges and immunities of the Crown involves very similar considerations to the question of whether an entity is independent of the Crown (ie the fourth kind of prescribed entity). As a result, it would be very unusual for an entity to have all of the privileges and immunities of the Crown (absent any express wording), but yet not also fall within the fourth category of prescribed entity. Consequently, absent any express words, the ACNC will generally not consider this category of prescribed entity further. Rather, the ACNC will consider whether the entity falls within one of the other categories of prescribed entity. If the entity does fall within the fourth category, then there would be no need to also establish that it enjoys the privileges and immunities of the Crown (since it would be a government entity in any event). If the entity does not fall within the fourth category, it is highly unlikely that it could be said to enjoy all of the privileges and immunities of the Crown (absent express words).

[55] Some examples are given in paragraphs 2.20 to 2.26.

When does an entity have all of the privileges and immunities of the Crown?

4.8. An entity will have the privileges and immunities of the Crown where the Crown has bestowed those privileges and immunities upon the entity. Generally, this is demonstrated by express words. However, in the absence of express words, it may be possible to reveal an intention on the part of the Crown to bestow these privileges and immunities through necessary implication[56]. However, as explained below, this should not be readily determined.

4.9. In *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 (***Townsville***), Gibbs J stated at 291:

> All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention.

4.10. Where there are no express words, the relevant statute that constitutes the entity (and any other relevant statute), must be examined to determine whether the entity has, by necessary implication, been given those privileges and immunities. It is clear from the authorities that this is a matter of statutory interpretation, and will depend on all of the circumstances, including the functions of the entity and the level of control that the Crown can exercise over the entity.

4.11. In *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 (***McNamara***) McHugh, Gummow and Heydon JJ stated (at 665) that in the absence of an express provision:

> …the decision whether a statutory corporation is entitled to the privileges and immunities of the Crown requires…close attention to the functions of that body and the degree of control exercisable over it by the executive government.

4.12. In relation to the question of 'functions', Gibbs J (with whom Murphy, Wilson and Brennan JJ agreed) stated in *Townsville* at 288:

> It has been said that in deciding the question whether a person or body is entitled to the privileges and immunities of the Crown it is necessary to consider all the circumstances of the case and that "[t]he fact that function has been a traditional function of government and that no intention of 'aliening' it appears is sufficient to answer the question in many cases"…There have been cases in which the fact that the objects which the statutory body was set up to achieve were peculiarly within the province of the Government was regarded as decisive…However, many functions formerly regarded as matters of private concern are now carried out by instrumentalities of government and the question whether the functions in question are traditionally or peculiarly governmental is likely to be increasingly unhelpful in deciding whether the body formed to carry out those functions enjoys the privileges and immunities of the Crown.
>
> [citations omitted]

[56] As explained above, the ACNC will generally not undertake this analysis.

4.13. Relevantly, Latham J in *South Australia v Commonwealth* (1942) 65 CLR 373 at 425 noted that a 'government function' is simply a function which is carried on by, or on behalf of the government.

4.14. Consequently, it may be that the more relevant consideration is the level of control exercised by the Crown.

4.15. For example, in *Superannuation Fund Investment Trust v Cmr of Stamps (SA)* (1979) 145 CLR 330, Stephen J, while noting that the task is one of statutory interpretation, rather than the mechanical application of a particular test, stated at 348:

> The importance of the presence or absence of control by the executive government in ascertaining whether or not a statutory corporation possesses a particular immunity or privilege of the Crown is a consequence of the very nature of that inquiry, concerned as it is with the nexus between the corporation and the executive. If a corporation is no more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its acts be viewed as those of its master and that it be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed. If, on the contrary, a statutory corporation is essentially autonomous, its acts being in no sense the outcome of directions by the executive but truly its own, there will be little reason to clothe it with any of those immunities or privileges. In saying this I do not intend to suggest the need for any examination of the actual extent to which particular actions are or are not the result of the exercise of control by the executive: it is the existence of the statutory ability to control, or its absence, that is to be looked at.

4.16. In *Roads Corporation v Pearce* [2012] VSC 527 Bell J considered whether a particular corporation was entitled to the privileges and immunities of the Crown and provided a useful summary of the relevant enquiry at [7] to [8]:

> …the starting point is that all persons are equal before the law and therefore statutory corporations are prima facie treated as being distinct from the Crown. The central consideration in determining whether that presumption has been displaced such that the corporation is to be regarded as the Crown for the purpose of an immunity is "the intention to be derived from the statute under which the body in question is constituted".
>
> In ascertaining that intention, it is relevant to take into account the functions which the corporation performs and whether they are governmental in character, while noting that many functions are now carried out on behalf of the government which were not previously considered to be governmental. **It is especially relevant** to take into account whether the Crown is able to control, directly or indirectly, the activities of the corporation. However, these considerations are no more than guides in resolving the central question of statutory interpretation by reference to which the intention of Parliament is to be ascertained.
>
> [citations omitted, **emphasis added**]

4.17. Given the above (in particular, the passage set out in paragraph 4.15), it is difficult to conceive of a situation where an entity would have the privileges and immunities of the Crown (absent express words), but would not also be a prescribed entity under the fourth category. This is because the very nature of the test for determining whether the entity enjoys the privileges and immunities of the Crown (absent express words) relates to the nexus (generally evidenced by Crown control) between the Crown and the entity (taking into account any relevant statutory features). That is precisely the question which the fourth category of prescribed entity is concerned with.

4.18. Consequently, the ACNC will generally take the approach that where there are no express words that the entity has the privileges and immunities of the Crown, the ACNC will not consider this category of prescribed entity further, but instead, focus on assessing whether the entity has been established as another type of prescribed entity (most relevantly, under the fourth category).

4.19. Nevertheless, for completeness, we provide some further comments below regarding matters that may imply that an entity has the privileges and immunities of the Crown.

Representative of the Crown

4.20. There may be times where an entity has been given a particular status or designation, for example, as a 'representative' of the Crown. It could be argued that such a status or designation implies that the Crown intended the entity to enjoy the privileges and immunities of the Crown. An entity may in fact be given this designation in circumstances where the Crown does not control the entity in any meaningful way. If certain designations imply that the entity has the privileges and immunities of the Crown, even where there is no control, then this would call into question the approach set out in paragraph 4.17.

4.21. Nevertheless, the ACNC does not consider that the fact that an entity is given a particular status or designation necessarily implies that it has all of the privileges and immunities of the Crown. This has been confirmed by the court, at least in relation to entities described as 'representatives' of the Crown.

4.22. In *McNamara*, McHugh, Gummow and Heydon JJ stated at 659 and 662:

> The distinction which Jordan CJ drew in Skinner assumed that the question of whether the privileges and immunities of the Crown may extend to a given statutory body could be fully stated by asking whether that body "represents" the Crown. However, for the reasons given by Kitto J in his dissenting judgment in *Wynyard Investments* and accepted by McHugh and Gummow JJ in *State Authorities Superannuation Board v Cmr of State Taxation (WA)*, that assumption cannot hold true.
>
> …
>
> …there is no automatic congruence between the phrase, "representing the Crown", and entitlement to its privileges and immunities.

4.23. On the other hand, if an entity is given the status of a 'representative of the Crown', and another statute states that a 'representative of the Crown' enjoys all of the privileges and immunities of the Crown, then the designation leads to the express intention that the entity is a prescribed entity under the second category.

Agent or instrumentality of the Crown

4.24. Where an entity is subject to the control of the Crown and performs functions on behalf of the Crown, it is often described as an agent or instrumentality of the Crown (and therefore, entitled to Crown immunity).

4.25. For example, in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 184 ALR 641, Finkelstein JJ stated at 696 'that a municipal corporation in Victoria is a "mere instrumentality of the State" is evident from the statute pursuant to which it is established'. His Honour then listed the governmental functions carried out by the

council and the significant control exercisable over the council by the executive government, concluding that the council was 'an agent of the state'. The issue to then be determined was whether in the circumstances, an immunity of the Crown had been interfered with.

4.26. In *New South Wales v Commonwealth Bank of Australia* [2001] NSWSC 1067, Young CJ stated at [83] that:

> The term Crown agent does not usually denote someone with authority from the crown to do something [ie, as 'agent' is understood in the private law context], **but merely that that person has Crown immunity and Crown indemnity**.
>
> **[emphasis added]**

4.27. In *Bank of NSW v Commonwealth* (1948) 76 CLR 1, Dixon J stated:

> … a matter depending upon the characterization of the Commonwealth Bank as an agency of the Crown **enjoying, as such, the Crown's privileges and immunities**.
>
> **[emphasis added]**

4.28. In *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107, Mason and Jacobs JJ took the view that if an entity could be characterised as an instrumentality, agent or authority of the Crown, then it would attract the privileges and immunities of the Crown. This is apparent from the way their Honours framed the questions to be answered:

> Is the Commissioner for Railways an instrumentality or agent or authority of the Crown in right of the State of Queensland?
>
> If so, is it the legislative intention that the Trade Practices Act should bind the Crown in right of the State of Queensland [ie, is there an intention that a particular Crown immunity does not apply in this case].

4.29. In *Repatriation Commission v Kirkland* (1923) 32 CLR 1 at 13, Higgins J explained:

> The Commission is a corporation, and is charged with the general administration of the Act; but the administration is **subject to the control of the Minister**. The Minister is a member of the Executive Council which advises the Governor-General in the Government of the Commonwealth, in exercising the executive power of the Commonwealth…The Minister is one of the advisers of the Governor-General; the Commission is under the control of, is subordinate to, the Minister…**The links of the chain, therefore, seem to be complete; the Commission is an agent or instrument of the executive power in administering the Act**; and whatever hinders the Commission in the exercise of its legitimate functions hinders the Crown.
>
> **[emphasis added]**

4.30. In *Unley City Corporation v South Australia* (1997) 68 SASR 511, the Supreme Court of South Australia had to decide whether a particular entity was 'an agency or instrumentality of the Crown'. In concluding that the relevant entity was an instrumentality of the Crown, Matheson J stated at 525 that in considering the relevant legislation and the constitution of the entity:

> …my conclusion is that the Centre is carrying out a government purpose or activity. Moreover, although the control of the Minister and the Commission is not as comprehensive as that existing in some of the authorities, it is nevertheless significant.

4.31. The above cases illustrate that where there is sufficient government control and where the functions undertaken by the entity are governmental, courts have concluded that the entity is a mere instrumentality or agent of the Crown. This characterisation in turn leads to the conclusion that the entity enjoys the privileges and immunity of the Crown.

4.32. A question arises for the ACNC as to whether an entity which has been designated the status of an 'instrumentality' or 'agent' of the Crown by legislation, is therefore by necessary implication entitled to the privileges and immunities of the Crown.

4.33. Relevantly, the ES indicates that the fact that an entity is declared to be an instrumentality of the Crown *means* that it has the privileges and immunities of the Crown (at page 4):

> In determining whether an entity has the privileges and immunities of the Crown under paragraph 3(b) of the instrument, consideration may be given to the establishing statute, its governing rules or the character and functions of the entity.
>
> The ten bodies politic in Australia that enjoy the 'privileges and immunities of the Crown' are the Commonwealth, the six States, the Northern Territory, the Australian Capital Territory and Territory of Norfolk Island. 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 Crown also extends 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.**
>
> **[emphasis added]**

4.34. Section 6 of the *Public Corporations Act 1993* (SA) states that a public corporation:

> a) is an instrumentality of the Crown and holds its property on behalf of the Crown; and
>
> b) is subject to control and direction by its Minister.

4.35. Consequently, it is arguable that the reference in the ES which implies that a public corporation enjoys the privileges and immunities of the Crown, is not merely based on the fact that the entity is *described* as an 'instrumentality' of the Crown, but also on the fact that it is subject to the control and direction of the Crown, meaning that it in fact *operates* as an instrumentality of the Crown.

4.36. However, it may be argued that there is authority which suggests that the fact that an entity is merely *described* in legislation as an agent or an instrumentality of the Crown, is sufficient to conclude that the privileges and immunities of the Crown attach to that entity.

4.37. In *Water Corporation v Hughes* [2009] WASC 152 (Water Corporation), the relevant provision stated that the Water Authority was 'charged, **as the agent of the Crown** in right of the State, with the duty of administering the rights and interests of the Crown in and in relation to water in the State' **[emphasis added]**.

4.38. Martin CJ noted that in *Wynyard Investments Pty Ltd v Cmr for Railways (NSW)* (1955) 93 CLR 376 (***Wynyard***), the majority held that 'legislation describing a Commissioner for Railways as a "statutory body representing the Crown" was decisive to show that the Commissioner was entitled to the immunities of the Crown'. On this basis, his Honour concluded that the authority was 'an emanation of the Crown in right of the State, **to serve the purposes of the State** and to enjoy the various privileges and immunities of the Crown in right of the State' **[emphasis added]**.

4.39. However, despite the reliance on Wynyard, it is arguable that it was not the mere fact that the entity was described as an agent of the Crown that led to the conclusion that it had the privileges and immunities of the Crown. Rather, its functions were clearly relevant in establishing that it did *in fact operate* to carry out the responsibilities and functions of the Crown, and could therefore be characterised as an emanation of the Crown. This is evident from the wording of the legislation that described the Water Authority as having 'the duty of administering the rights and interests of the Crown', as well as Martin CJ's conclusion that the Water Authority was 'to serve the purposes of the State'.

4.40. As noted above, Martin CJ relied upon *Wynyard* where the description of the entity as a 'statutory body representing the Crown' was decisive to show it had the privileges and immunities of the Crown. In *Wynyard*, the majority stated that:

> The only way a statutory body could represent the Crown would be to act as the agent or servant of the Crown and this must be the meaning of the word "represent" in this special provision.

4.41. In other words, the majority took the view that the fact that a body was said to be a representative of the Crown necessarily meant that it was an agent of the Crown (***representative point***). The majority concluded that because the body was an agent of the Crown, it was subject to the privileges and immunities of the Crown (***agent/instrumentality point***).

4.42. While the representative point appears to have been rejected in *McNamara* (as discussed above in paragraph 4.22), the Court impliedly endorsed the agent/instrumentality point (at [43]-[44]) per McHugh, Gummow and Heydon JJ:

> In *Wynyard Investments*, Kitto J proposed, and a majority of this court accepted in *NT Power Generation*, that asking whether a statutory body is representative of the Crown does not correspond to asking whether it is entitled to the privileges and immunities of the Sovereign. The cogency of this should not be gainsaid. There then seems little reason to accept that a statutory provision stating that such a body is so representative should be sufficient to render available to it a statutory immunity expressed to be conferred upon the Crown.
>
> This conclusion finds reinforcement in the circumstance that a body may be deemed to be a "statutory body representing the Crown" for a purpose other than direct engagement of some statutory immunity **enjoyed by the instrumentalities of the executive government**.
>
> **[emphasis added]**

4.43. The ACNC considers that where the above cases have described an entity as an agent or instrumentality of the Crown (and therefore entitled to the immunities of the Crown) that description is intended to convey that the entity *in fact* carries out the functions of the Crown and is *actually* controlled by the Crown, meaning that it is an emanation of the Crown.

4.44. However, the ACNC does not consider that the mere fact that an entity is *described* in legislation as an 'agent' or 'instrumentality' is sufficient to conclude that it is entitled to all of the privileges and immunities of the Crown. Rather, the entity must *in fact* operate as an agent or instrumentality, with regard to its functions and the level of control exercisable over it by the State or Territory, such that it is an emanation, or alter-ego of the Crown.

4.45. As explained above in paragraph 4.35, the statement in the ES may be understood in this context. Under the *Public Corporations Act 1993* (SA), an instrumentality of the Crown is said to be subject to the control and direction of the Crown. It may be upon this basis (ie that the entity is subject to Crown control and *operates* as an instrumentality of the Crown) that establishes the legislative intent of endowing the entity with the privileges and immunities of the Crown.

Examples

4.46. As explained above, the mere fact that an entity has been given a specific designation (eg, that it represents the Crown) will not in itself be sufficient to mean that the entity has all of the privileges and immunities of the Crown. However, as indicated at paragraph 4.23, there may be other legislation that states that bodies with that designation have the privileges and immunities of the Crown. In such a case, the designation leads to the express words which establish that the entity is a prescribed entity under the second category.

New South Wales

4.47. For example, s 13A of the *Interpretation Act 1987* (NSW) states that where an Act provides that an entity is a 'statutory body representing the Crown', that body 'has the status, privileges and immunities of the Crown'.

4.48. Therefore, if a NSW Act has designated an entity to be a statutory body representing the Crown, then by virtue of s 13A, that entity will be a 'government entity' under the Charities Act.

Victoria

4.49. Section 46A of the *Interpretation of Legislation Act 1984* (Vic) states that if an Act or subordinate instrument provides that an entity 'represents the Crown', then that entity has 'for all purposes, the status, privileges and immunities of the Crown, unless the contrary intention appears'. Further, if the entity is said not to represent the Crown, then the entity does not have the status, privileges and immunities of the Crown.

4.50. Consequently, if a Victorian Act or subordinate instrument states that an entity represents the Crown, then that entity will be a 'government entity' under the Charities Act (subject to any contrary intention). Conversely, if a Victorian Act or subordinate instrument states that the entity does not represent the Crown, then the entity will not be a prescribed entity under the second category[57].

South Australia

4.51. Section 20 of the *Acts Interpretation Act 1915* (SA) states that where an Act does not bind the Crown, the Crown's immunity extends (unless the

[57] However, it may still be a prescribed entity under another category.

contrary intention is expressed) to an agent of the Crown in respect of an act within the scope of the agent's obligations. Further, an 'agent of the Crown' extends to an 'instrumentality of the Crown'. This section does not provide for the provision of all of the Crown's privileges and immunities but only deals with Crown immunity from being subject to legislation. Consequently, it does not follow that an entity described as an 'agent' or 'instrumentality' in South Australia is necessarily also a prescribed entity under the second category.

ACT

4.52. Section 7 of the *Interpretation Act 1967 (*ACT) states that to the extent that an Act does not bind the Crown, that immunity extends to an 'agent of the Crown'. An 'agent' includes an 'instrumentality'.

4.53. Similarly s 121(4) of the *Legislation Act 2001 (*ACT) states that '[t]o the extent that an Act does not bind a government, the same degree of immunity extends to a government entity in relation to an authorised act or omission of the entity'.

4.54. As with the South Australian legislation, this does not establish that an entity described as an 'agent', 'instrumentality' or 'government entity' has *all* of the privileges and immunities of the Crown.

4.55. Section 8 of the *Territory-owned Corporations Act 1990* (ACT) states that a territory-owned corporation or subsidiary is not, only because of its status as a territory-owned corporation or subsidiary, entitled to any immunity or privilege of the Territory.

4.56. A 'territory authority' which is prescribed by the financial management guidelines for Part 8 of the *Financial Management Act 1996* (ACT) may have the privileges and immunities of the Crown. This is by virtue of s 73 of that Act which provides that a 'relevant territory authority' has the same status, privileges and immunities as the Territory so far as it represents the Territory'. Under s 72, a 'territory authority' prescribed for Part 8 will not be a 'relevant territory authority' if the establishing Act for the authority provides otherwise.

5. Prescribed Entity C: Office of Profit under the Crown

5.1. The Legislative Instrument describes this type of entity as an entity, where an individual who occupies a position within that entity holds an office of profit under the Crown. As with the second category of prescribed entity, Crown in this case includes a State or Territory[58].

5.2. A literal reading of the provision could suggest that where a person holds a position within an entity, and that person also holds an unconnected office of profit under the Crown (for example, because they are a public servant), the entity will be a prescribed entity.

5.3. This reading is inconsistent with the interpretation of 'established under a law by a State or Territory' described above in paragraph 2.38. That interpretation is that the entity must be established by the relevant State or Territory as the type of entity prescribed. The State or Territory would

[58] The reference to the Crown would include references to entities which are emanations of the Crown (for example, certain statutory authorities).

have no ability to establish an entity which has within it a position that is occupied by a person who holds an office of profit under the Crown, unless that office of profit under the Crown was *within* that entity.

5.4. Consequently, the entity must be established by the State or Territory with an office of profit *within that entity*.

5.5. That interpretation is also in line with the purpose of the definition of 'government entity'. As set out above in paragraph 2.35 and 2.36 the concept of 'government entity' is meant to encompass entities that have a particular type of connection to government, such that their purpose, rather than being charitable, is to carry out the functions and responsibilities of the Crown.

5.6. In the case where the State has established an entity with an office of profit in that entity, that connection to government can more readily be seen to exist. However, that connection could not be said to exist merely because a public servant (for example) also holds a position within that particular entity. Such an interpretation would be inconsistent with the legislative intent.

5.7. Consequently, the relevant question is whether the State or Territory has established that entity with an office of profit within it. If the answer to that question is 'yes', the entity will only be a prescribed entity if a person actually occupies that position.

5.8. It is clear that a public servant position is an office of profit[59], but the concept of 'office of profit' is not limited to public servants. However, given the lack of Australian case authority and the recognised uncertainty about the scope of the term 'office of profit', the ACNC will not take an overly restrictive approach.

5.9. In determining whether a position is an office of profit under the Crown, the essential questions to be considered relate to the level of control that the Crown can exercise over the position and the nature of the duties attached to the position.

5.10. In that respect, if the Crown has the power to appoint and dismiss, there will be a presumption that the Crown controls the position and therefore, that it is an office of profit.

5.11. However, if there are no additional features of control over the position, it may not be difficult to rebut the presumption. For example, where the Crown is the sole member of a corporation incorporated under the Corporations Act and has the power to appoint and remove directors, unless there are special features, the ACNC will generally consider that the directors do not occupy offices of profit. This is because a director's general responsibility to act in accordance with the constitution (and in particular, in accordance with the charitable purposes of the charity) and not under the direction of members, will be sufficient to rebut the presumption that the position is controlled by the Crown.

5.12. Additional features of control that would strengthen the presumption that the Crown controls the position could include a provision in the constitution that the director is subject to the direction of the Crown, or bound to act first in the interests of the Crown shareholder. In such a case, it would be likely that the position would be an office of profit under the Crown.

[59] See *Sykes v Cleary (No 2)* (1992) 176 CLR 77 (***Sykes***) at 95.

5.13. The presumption of Crown control may also be rebutted if the duties of the position are not duties associated with or connected to the public service.

What is an Office of Profit under the Crown?

5.14. The ES states that:

> The concept of an 'office of profit under the Crown' in the instrument is a concept embedded within the Constitution which encompasses both a consideration of powers of appointment, control and dismissal and the nature of the duties.
>
> If the Crown itself has the power of appointment and dismissal, this would indicate Crown control, and that the office is one under the Crown. If, although the Crown appoints, the duties are not duties connected with the public service, the office may not be an office of profit under the Crown

5.15. As noted in the ES, the concept of 'office of profit under the Crown' is referred to in s 44(iv) of the Australian Constitution which prohibits a person who 'holds any office of profit under the Crown' from serving as a senator or member of the House of Representatives.

5.16. While it is clear that a public servant holds an office of profit[60], there is considerable uncertainty about the scope of the term 'office of profit'.

5.17. For example, the House of Representatives Standing Committee on Legal and Constitutional Affairs[61] stated at pages 56, 65 and 66:

> Subsection 44(iv) has long been considered to be something of a minefield because of its scope and uncertainty…
>
> …
>
> … to what extent does it apply to employees and members of the governing bodies of statutory authorities? Does it apply to employees of authorities that are established under the Corporations Law but wholly owned by the Commonwealth? Is the position different if the Commonwealth is partial owner of such a corporation?
>
> …
>
> The reach of subsection 44(iv) remains something of a mystery that can only be fully elucidated by further judicial consideration.

5.18. Similarly, the Senate Standing Committee on Constitutional and Legal Affairs[62] (***Senate Paper***) stated:

> The uncertainty lies at the margins of government employment. Thus, in the area of public authorities and other offices of a semi-government nature…there is often considerable doubt as to whether a particular office is one of profit under the Crown.

Australian Authority

5.19. Section 44(iv) of the Constitution has only directly been the subject of High Court consideration on one occasion. This occurred in the case of *Sykes v Cleary (No 2)* (1992) 176 CLR 77 (***Sykes***). In their joint judgment, Mason CJ, Toohey and McHugh JJ noted that the meaning of 'office of profit under the Crown' is obscure. While their Honours did not attempt an

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[60] *Sykes* at 95.

[61] Report on Aspects of section 44 of the Australian constitution: Subsections 44(i) and (iv), 1996.

[62] Senate Standing Committee on Constitutional and Legal Affairs, *Report*, *The Constitutional Qualifications of Members of Parliament*, 1981, p.39-40.

exhaustive definition of the term, they state that it at least encompasses permanent public servants[63].

5.20. Consequently, if an entity has within it public servant positions, that entity will have an office of profit within it. For example, if an entity has a position within it which is governed by the relevant public service legislation, that position would be an office of profit.

5.21. In relation to the word 'office', their Honours rejected the argument that it was restricted to a position of authority (such as a director). They stated at 96-97:

> …the meaning of "office" turns largely on the context in which it is found and, in the light of the principal mischief which s44(iv) and its predecessors were directed at eliminating or reducing, namely, Crown or executive influence over the House, such a restricted meaning cannot be given to "office" in s44(iv).

5.22. Given that the third prescribed entity is directed at eliminating or reducing Crown or Executive influence over a charity, it would appear that the same reasoning is relevant, such that a restricted meaning cannot be given to 'office'. For example, if, although all of the directors and managers of an entity do not hold offices of profit, the entire workforce consists of public servants, there would appear to be a level of Crown influence, despite the fact that the people in authority do not occupy the offices of profit.

5.23. Another case which may be helpful in understanding the term 'office of profit under the Crown' is *Williams v Commonwealth of Australia* (2012) 248 CLR 156. In that case, one of the arguments related to a different provision in the Australian Constitution which refers to an 'office… under the Commonwealth'. The question was whether school chaplains could be said to hold an office under the Commonwealth. All of the judges agreed that the chaplains did not hold such an office.

5.24. Gummow and Bell (Kiefel, Crennan J, Hayne and French agreeing in relation to this issue[64]) stated at [109] – [110]:

> The chaplains engaged by SUQ [Scripture Union Queensland] hold no office under the Commonwealth. The chaplain at the Darling Heights State Primary School is engaged by SUQ to provide services under the control and direction of the school principal. The chaplain does not enter into any contractual or other arrangement with the Commonwealth. That the Commonwealth is a source of funding to SUQ is insufficient to render a chaplain engaged by SUQ the holder of an office under the Commonwealth.
>
> It has been said in this Court that the meaning of "office" turns largely on the context in which it is found, and it may be accepted that, given the significance of the place of s 116 in the Constitution, the term should not be given a restricted meaning when used in that provision. Nevertheless, the phrase "office ... under the Commonwealth" must be read as a whole. If this be done, the force of the term "under" indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case.
>
> [citations omitted]

[63] At 95.
[64] See [9], [168], [476] and [597].

5.25. Heydon J (in dissent on a different issue) discussed the difference between the terms ‘office of profit under the Crown’ and ‘office under the Commonwealth’ at [444]:

> The absence of the words "of profit" from s 116 indicates only that s 116 is wider than s 44(iv). Section 116 applies to offices which are not "of profit" as well as those which are. An "office" is a position under constituted authority to which duties are attached. That suggests that an "officer" is a person who holds an office which is in direct relationship with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued. The word "under" in s 116 has no significance. It does not suggest the wider meaning which the plaintiff advocated. It simply repeats the relevant part of Art VI of the United States Constitution: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."
>
> The Commonwealth has no legal relationship with the "chaplains". It cannot appoint, select, approve or dismiss them. It cannot direct them. The services they provide in a particular school are determined by those who run that school. The provision of those services is overseen by school principals.

5.26. Consequently, it appears that an ‘office of profit’ under the Crown is a position that has a particular connection with the Crown. Factors such as powers of appointment, approval, dismissal, direction and oversight may be relevant in determining whether the necessary connection exists. This is supported by the discussion from the United Kingdom outlined below.

United Kingdom Guidance

5.27. An often quoted passage about the meaning of the ‘office of profit’ comes from an analysis by a former Attorney General of the United Kingdom in 1941[65]. In the course of providing advice he wrote:

> In considering whether an office is under the Crown one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. If, although the Crown appoints, the duties are not duties connected with the public service, the office would not, I think, be an office under the Crown within the Act…If the duties are duties under and controlled by the Government then the office is, prima facie, at any rate, an office under the Crown, and the appointment would normally be made by a Minister or by someone who clearly held an office under the Crown. The office of a Governor of the British Broadcasting Corporation is, I think an office under the Crown. The Crown has the power of appointment and dismissal; the Postmaster General has certain powers of control and the functions of the Corporation are of interest and importance to all citizens.

5.28. Another example is provided where the Chairmen of the War Agricultural Committee are appointed and can be dismissed by the Minister and ‘carry out very important functions on his behalf’. In such a case, the Attorney General considered that if those positions were paid positions, they would likely be Offices of Profit.

Australian Guidance

5.29. The Department of the Parliamentary Library produced a paper in 1993 entitled ‘Office of Profit under the Crown’ and Membership of the

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[65] Report from the Select Committee on Offices or Places of Profit Under the Crown, House of Commons, 1941, p 136.

Commonwealth Parliament' (the ***DPL Paper***). In discussing the concept of 'office of profit', the DPL paper refers to (and impliedly endorses) the analysis by the UK Attorney General set out above.

5.30. Some case studies which are discussed in the DPL Paper are considered in the next section.

ACNC's approach

5.31. Given the lack of Australian case authority and the recognised uncertainty about the scope of this term (see paragraphs 5.17 and 5.18), the ACNC will not take an overly restrictive approach and will have regard to the analysis by the UK Attorney General.

Powers of Appointment and Dismissal

5.32. The fact that the Crown has the power of appointment and dismissal (for example, because an Act grants this power, or because the Crown is the sole member of a corporate body), may indicate that the Crown controls the position. However, the ACNC will consider the nature/function of the position as well as control factors (such as level of oversight and ability to issue directions) to determine whether the position is an office of profit.

5.33. Consequently, where the Crown is the sole member of a corporation incorporated under the Corporations Act, unless there are special features, the ACNC will generally consider that the directors do not occupy an office of profit under the Crown. This is because a director's responsibility to act in accordance with the constitution (and in particular, in accordance with the charitable purposes of the charity) and not under the direction of members, will be sufficient to rebut the presumption that the position is controlled by the Crown.

5.34. Similarly, there may be situations in which the Crown is not the sole member, but has the power to appoint one director. Again, the ACNC considers that there would usually need to be some level of particular Crown control upon the Crown appointee over and above the power of appointment and dismissal to conclude that the position is an office of profit under the Crown. Otherwise, the duties of a director to act in accordance with the constitution and for the purposes of the company would rebut any presumption of Crown control over the position. However, if the Crown appointee is subject to the direction of the Crown, or bound to act first in the interests of the Crown shareholder, it would be likely that the position would be an office of profit under the Crown.

5.35. It is important to note though that in the absence of case law, the position is not certain. It may be that a court would determine that where the Crown has the power of appointment and dismissal, the position is an office under the Crown. Certainly a more restrictive approach appears to be suggested in the DPL Paper.

5.36. For example, in considering the position of certain persons appointed to the War Memorial's Council, the DPL Paper states at 12:

> Those persons are to be appointed by the Governor-General (subsection 10(2) [of the *Australian War Memorial Act* 1980]) and their terms of office, are fixed by him or her up to a period of three years (paragraph 10(3)(b)). Section 14 sets out the circumstances in which the Governor-General may terminate their appointments, while section 15 provides that appointed members' resignations should be directed to the Governor-General. Section 13 provides for the remuneration of appointed members. **The**

characteristics of appointment, resignation or dismissal of Council members, together with the provision for remuneration, suggest that such positions would constitute 'offices of profit under the Crown'.

[emphasis added]

5.37. In relation to the Australian and Overseas Telecommunications Corporation, the DPL Paper states at 12 that 'the Commonwealth retains ownership of all shares and therefore controls the appointment of all directors'. While no conclusion is provided, the suggestion appears to be that this fact means that the position of director is an office of profit in this case.

5.38. This is supported by the next situation considered by the DPL Paper, namely in relation to entities that are partly privatised but where the government retains a power to appoint a director. In such a case, the DPL Paper states:

> Arguably, the paid directors of such corporations who are appointed by the Commonwealth would hold 'offices of profit under the Crown', while those appointed by other shareholders would not hold such 'offices of profit under the Crown'.

5.39. The position taken by the DPL Paper appears to be that if the Crown has the power of appointment and dismissal, the position will be an Office of Profit. However, this position may be justified on the basis that the appointment and dismissal raises a presumption of control, and in the particular cases mentioned, there are no features to rebut this presumption. The case of a company that operates for charitable purposes may be distinguished on the basis that the directors of the company are bound to act for the purposes of the company, and not in accordance with the purposes of the Crown. While the Crown may dismiss a director for not acting in accordance with its wishes, the next director appointed would still be required to act for the charitable purposes, and not for the purposes of the Crown.

5.40. Nevertheless, the above illustrates that there is significant uncertainty about this issue. While the ACNC will take the less restrictive approach[66] referred to above, in order to ensure that a position would not be found to be an office of profit under the Crown (where the Crown has power of appointment and dismissal), an entity may decide that no remuneration attaches to the position. Assuming that no remuneration is provided by another source in relation to the position, it would be clear that the particular office is not an office *of profit* under the Crown.

Ex Officio members

5.41. An *ex officio* member of a board is a person who, by virtue of another office or position becomes a member of the board of the entity in question, rather than because they are personally appointed. For example, the committee of the Parents and Citizens (P&C) Association for a State School may include the Principal of the School as an *ex officio* member. Clearly, the principal occupies an office of profit at the school (as a public servant). However, this does not mean that the committee member position that the Principal occupies within the P&C Association is itself an office of profit.

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[66] In the sense that the power of appointment and removal will not act as a strong presumption of control and can be readily rebutted.

5.42. Similarly, sometimes the holding of an office of profit is a necessary criterion for becoming a board member. For example, in a P&C Association, one position on the committee may be required to be filled by a teacher of a public school. That in itself does not make the office within the P&C Association an office of profit. It only means that holding another office of profit is a necessary qualification for obtaining the position within the P&C Association.

5.43. In both cases described above, as long as the board member retains the ability to act independently of the Crown, and in the interests of the P&C Association, then the board position will not be considered to be an office of profit. It should be noted that it is arguable that in these cases, the person is specifically appointed to represent the interests of the Crown (since they are appointed by virtue of their position as a servant of the Crown). However, absent any special features (such as an express provision allowing the board member to act in the interests of the Crown), the ACNC will generally take the view that the relevant office of profit provides that board member with particular expertise and insight which are of value to the governance of the entity, and it is for that reason that the office of profit attaches to the position.

What kind of profit?

5.44. The Senate Paper states at page 39:

> The meaning of 'profit' is a little more elusive and best explained negatively: It appears than an office is not one of profit if it has never had attached to it anything in the nature of a salary or fee, and no holder of the office could claim payment of such emolument under any circumstances. Payment of reasonable expenses incurred in carrying out an office does not make it one of profit. However, the fact that the holder of an office is not paid any emolument which otherwise attaches to the office does not affect his position as the holder of an office of profit.

5.45. In other words, *the office* itself must be a paid position. The fact that the person who occupies the office is not getting paid (for example, because they are on unpaid leave[67], or because they decline the fee[68]), does not mean that the office itself is not one of profit. However, the payment of reasonable expenses does not make the office one of profit.

5.46. It also appears that the profit does not need to be provided by the Crown itself. For example, in *Clydesdale v Hughes* (1933) 36 WALR 73[69], the Court determined that a member of the Lotteries Commission who was entitled to the remuneration out of the gross profits of subscriptions to Commission-conducted lotteries, held 'an office of profit'.

5.47. It is not clear whether the payment of an allowance constitutes a 'profit' for the purpose of the definition of 'office of profit'. The definition of 'allowance' in the Macquarie Dictionary[70] includes 'a definite sum of money allotted or granted to meet expenses or requirements'. Essentially, an allowance is a definite predetermined amount which is intended to cover an estimated expense, and will be paid whether or not the recipient

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[67] See *Sykes*.

[68] *Warrego Election Petition, In re (Bowman v Hood)* (1899) 9 QLJ 249.

[69] Note that this decision was ultimately reversed by the High Court in *Clydesdale v Hughes* (1934) 51 CLR 518 on a different point. The High Court did not need to consider whether the relevant position was an 'office of profit' under the Crown.

[70] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 6 November 2015) 'allowance'.

actually incurs the expected expense. Where an allowance exceeds the actual expense, the recipient has in a sense made a 'profit'.

5.48. However, the intention of paying an allowance is not to provide a profit, but rather, to provide compensation for expenses to be incurred. Consequently, where a reimbursement is a reasonable estimation of expenses, the ACNC will not consider this to be a 'profit'.

6. Prescribed Entity D: Not Independent of the Crown

6.1. The final category of prescribed entity relates to an entity that is established under a law by a State or Territory as an entity that, in pursuing its objects, is not independent of the Crown.

6.2. In relation to this category, the ES states at 4:

> Where an entity is not clearly a government entity under paragraphs 3(a), (b) or (c) of the instrument, then consideration should be given to paragraph 3(d) 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 functions 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.

6.3. As noted in the ES, this fourth category is intended to restate the principle derived from the common law that an entity which is 'too governmental' cannot be a charity[71].

6.4. One important reason for the distinction between government and charity relates to the purpose of the entity. While a government school and a private school undertake the same educational activities, the purpose behind those activities is different. On the one hand, the private school undertakes the activities in order to advance education, a recognised charitable purpose. On the other hand, a government school undertakes the activities for the overarching purpose of carrying out the functions and responsibilities of government, and of giving effect to government policy. As explained by Kirby J in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 (***Central Bayside***) (at [123] and [125]):

> The disqualification of organisations from description as "charitable bodies", on account of their connection with government, is linked to the characterisation of their "purposes". If the "purposes" fall within the *Pemsel* criteria, the body will be classified as "charitable". If, however, the "purposes" are no more than to implement governmental, including legislative, objectives, those features will colour the character of the body. It will then be

[71] The ACNC will have regard to judicial guidance in applying this category. In particular, the ACNC will consider *Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 (***Metropolitan Fire Brigades Board***); *Mines Rescue Board of New South Wales v Commissioner of Taxation* (2000) 101 FCR 91 (***Mines Rescue Board***); *Ambulance Service (NSW) v Deputy Commissioner of Taxation (Cth)* (2003) 130 FCR 477 (***Ambulance Services***); *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 (***Central Bayside***).

> designated as one to implement governmental policies, whether charitable or non-charitable. It will not qualify as a "body" whose purposes are identifiably "charitable".

6.5. This category therefore goes to the heart of the charity/government divide in that it recognises that where a sufficient connection exists between an entity and government, the government is essentially acting through that entity to perform the government's functions. In such a case, the entity exists to perform government functions, rather than to pursue charitable purposes.

6.6. To determine whether an entity is not independent of the Crown in pursuing its objects, the Legislative Instrument requires consideration of two specified factors, which are consistent with the matters that the courts previously took into account when considering this issue.

Control

6.7. The first factor to consider is the degree of control that the Crown can exercise over the entity's governance and operations. Importantly, what is relevant is *the ability* to exercise control, not the actual exercise of control[72].

6.8. The Macquarie Dictionary's[73] definition of 'control' includes 'to exercise restraint or direction over; dominate; command'.

6.9. Control can be both the positive aspect of directing and the negative aspect of restraining.

6.10. The Macquarie Dictionary[74] defines 'governance' as:

- government; exercise of authority; control.
- method or system of government or management.

6.11. The Macquarie Dictionary's[75] definition of 'operation' includes:

- the act, process, or manner of operating.
- a course of productive or industrial activity.

6.12. Taking into account these definitions, the ACNC considers that 'governance' focuses attention on the way in which the Crown can control the exercise of authority within the entity. This specifically relates to the Crown control over the decision making body of the entity, or any other key decision makers. 'Operations' focuses attention on the work that the entity does (for example, its activities), including the way in which that work is undertaken.

6.13. In relation to control, the ES states at page 4-5:

> 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 3(d) of the instrument, if the function of a charity in independently carrying out its own purposes has the effect of helping to

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[72] *Mines Rescue Board* at 99.
[73] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 6 November 2015) 'control'.
[74] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 6 November 2015) 'governance'.
[75] Susan Butler (ed), *Macquarie Dictionary* (online ed, at 6 November 2015) 'operation'.

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.

6.14. There are a number of factors that the ACNC will consider in determining the degree of control that the Crown can exercise over the governance and operations of an entity. Some factors may point towards government control, while other factors may point away from it. The assessment will necessarily involve a weighing of the relevant factors in their context.

6.15. Importantly, not all of the factors will have equal weight. Some factors will simply operate to confirm a conclusion. For example, the fact that the government can appoint and remove directors, where those directors still retain the ability to act independently of the wishes of the government (and indeed, are required to act for the purposes of the entity), will not of itself be enough to establish that the entity is not independent of the Crown. On the other hand, where other control factors exist, the fact that the Crown also has the power of appointment and removal may support the conclusion that the entity is not independent of the Crown.

6.16. While it is not possible to set out an exhaustive list, the following are some factors that may be relevant:

- What control does the Crown have over the decision making body, or any other key decision maker in the entity? For example:
  - Can the Crown issue directions to decision makers? If so, what do these directions relate to and do they have any limitations?
  - Can the Crown appoint and remove decision makers (including a veto power)?
  - Is there any requirement that decisions are approved by the Crown (for example, in dealing with assets)?

- Do decision makers have to make decisions in accordance with any government policy?
- Where decision makers have a duty to act for the purposes of the entity, is there anything that limits this duty?

- What control does the Crown have over the operations of the entity?
  - Does the Crown have the ability to change or set the functions or purposes of the entity?
  - Can the Crown control the hiring and dismissal of staff?
  - Can the Crown control budgeting and spending (for example, where Crown approval is required for setting budgets)?
  - Does the Crown have the ability to direct what activities are carried out by the entity or how those activities are carried out?
  - Does the Crown control the funding of the entity?

6.17. After the ACNC has identified any factors which point towards Crown control, the ACNC will consider whether these factors go to the independence of the entity, or whether they can be explained on another basis (for example, in the context of the particular regulatory environment or contractual conditions).

6.18. Some of the considerations are explained in more detail below.

Ability to issue directions

6.19. The ability of the Crown to issue directions to an entity, for example, through a Minister, is a strong indicator of Crown control. It will of course be necessary to consider the type of directions that may be given, and how these relate to the governance and operations of the entity.

6.20. As noted in the ES, there may be circumstances where the particular regulatory environment that applies to a type of entity may look like 'control', but should not be considered to be control for the purposes of establishing whether or not that entity is independent of the Crown.

6.21. Where the ability to issue directions to the entity can be explained by reference to the particular regulatory environment in which the entity operates, the entity may be found to be independent of the Crown despite the Crown's ability to issue directions. For example, the State legislation which regulates hospitals may include a power for the Minister of Health to issue directions in certain circumstances. This may appear on the surface to be an ability to exercise a high degree of control on the governance or operations of the entity. However, in the context of providing health care to members of the public, strong regulatory controls are required to ensure that public health concerns are addressed and that people are properly cared for. Given that hospitals deal with life threatening situations, the level of regulatory control can be explained by reference to the severe consequences that may result if Government did not provide sufficient oversight. In such circumstances, there will likely be other factors which indicate whether or not the entity is independent of the Crown.

Power to appoint and remove members of the entity's board or its managers

6.22. The ACNC is aware that there may be views that the power to appoint and remove directors is a strong indicator of control. For example, in *Re News*

Corporation (1987) 15 FCR 227, the Court had to consider whether The News Corporation Limited (TNCL) was 'in a position to exercise control' over another company (NTHL). Bowen CJ (with whom Lockhart J agreed) stated at 244:

> Strictly speaking, the issue of the directors' adherence to their fiduciary duties is irrelevant to this question. It is TNCL's power to appoint directors, not its control of what they do, which is determinative of whether it is thereby in a position to exercise control of NTHL. But were any assumptions needed to be made as to the conduct of the appointed directors, I would think it realistic to assume that they would act generally in the interests of the company which appointed them. Such behaviour would not, of itself, constitute a breach of duty "unless it can also be inferred that the directors, so nominated, would so act even if they were of the view that their acts were not in the best interests of the company": *Re Broadcasting Station 2GB Pty Ltd* [1964-65] NSWR 1648 at 1663 per Jacobs J. As was pointed out in the 2GB case, it would make the position of a nominee or representative director an impossibility to require that he approach each company problem with a completely open mind. It is both realistic and not improper to expect that such directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole.

6.23. The Court held that the power to appoint or remove directors was sufficient to establish that TNCL was in a position to exercise control of NTHL.

6.24. This case does provide some support for the view that the Crown's power to appoint and remove a director can amount to control. However, in the context of the Charities Act, the ACNC does not consider that these powers will be determinative. In the Charities Act, regard must be had to degree of control that the Crown can exercise over the *entity's governance and operations*. As noted above, the ACNC considers that 'governance' in this context relates to control over the actual decision-making of the entity. In the context of a charitable company, the ACNC considers that the directors have a particular duty to pursue the charitable purposes of the company. In the ACNC's view, the Crown's power to appoint and remove directors, while perhaps sufficient to establish 'control' in some contexts, does not, of itself, appear sufficient to conclude that the Crown controls the governance or decision-making of the entity. While realistically speaking, as pointed out in the above judgment, the directors may consider the interests of the Crown, those interests can only be pursued to the extent that they align with the charity's purposes[76]. While the Crown clearly controls who the decision-makers in the entity are, it does not have any control over the decision-making of those directors. In this way, the Crown cannot be said to control the governance and operations of the entity merely because it can appoint the board. Similarly, where the Crown can appoint managers, it does not control the decisions or actions of those managers, where they are ultimately accountable to the board.

6.25. It should also be noted that there will be situations where the Crown has power of appointment or removal, but in a manner which is merely facilitative. This is unlikely to point towards control or even operate to support a finding of control. For example, there may be statutory corporations set up to act as trustees for land held for religious

[76] This may not be the case if there is a special provision in the constitution of the company or any relevant legislation which allow the directors to act otherwise than in accordance with the purposes of the company.

congregations. The legislation establishing these trustees may require a Minister to appoint the members of the corporate trustee upon recommendation by a church council. That power to appoint the board is merely facilitative and does not point towards Crown control.

Funding and conditions attached to funding

6.26. The source of funding is unlikely to be a strong factor, either for or against government control.

6.27. For example, an entity that is controlled by government may nevertheless not receive government funding. For example, in *Mines Rescue Board of New South Wales v Commissioner of Taxation* (2000) 101 FCR 91 (***Mines Rescue Board***), the Board was treated as governmental even though it did not obtain any funds from government.

6.28. On the other hand, in *Central Bayside*, an entity that received significant government funding was found to be a charity. In that case, the charity had entered into a funding agreement with the government which imposed a number of conditions and controls. It appeared that if the charity did not enter into the agreement to seek the funding, it would likely have ceased to exist. Although the activities of the charity had to be based on the national framework (set by the government) in order to receive funding, Gleeson CJ, Heydon and Crennan JJ considered that the charity 'plays an active role in itself selecting the particular projects which it undertakes for the benefit of the community' (at 182). Their Honours also noted at 183 that there was no legal compulsion to seek funding and that even if the charity had no capacity to negotiate (i.e. it was a standard contract) and not entering into the agreement would impair or destroy its capacity to function:

> it does not necessarily follow that the fact of entry by the appellant into an OBF Agreement of itself establishes that the appellant is under the control of the government. However, its terms might create that control…

6.29. In considering the particular terms in the OBF Agreement, their Honours noted at 183:

> *Ongoing contractual management and control*. The Commissioner relied on two aspects of the OBF Agreement. One was that it compelled the appellant to conform with the Strategic Plan and the Business Plans. The second was that the Agreement provided for periodic reporting by the appellant (cl 7.1 and Sched 3), provided for liaison by the appellant with the Department as required (cl 8.1), provided for the Department to have access to the appellant's premises and records (cl 19), prohibited subcontracting without the Department's consent (cl 22), gave the Department power to procure the replacement of personnel undertaking work in relation to Programs of Activity (cl 23) and gave the Department power at any time to terminate the Agreement or reduce the scope of the Programs of Activity (cl 24.1).
>
> It is common for the donors of funds for charitable purposes to attach conditions to the gift or to stipulate mechanisms pursuant to which the funds are to be expended. These conditions or stipulations do not affect the charitable character of gifts. In addition, the Department is obliged by s 44 of the *Financial Management and Accountability Act 1997* (Cth) to manage its affairs in a way that promotes the efficient, effective and ethical use of its resources. Recital C of the OBF Agreement refers to this obligation:
>
> > "The Department is required by law to ensure the accountability of Program Funds and accordingly, the Division is required to be accountable for all Department Funds received."

> The expression "Program Funds" means funding supplied by the Department under Sched 4 for the programmes of activity to be carried out by the appellant pursuant to Scheds 1 and 2. The clauses which make the appellant accountable are not properly characterised as forms of control by the Department, but simply as methods of ensuring that the Department itself complies with the law.

6.30. Therefore, the Crown may appear to have a high degree of control over an entity's operations (in terms of how it uses its resources) by virtue of conditions attached to funding agreements. However, as explained in *Central Bayside*, this should not necessarily be characterised as 'control' in the relevant sense. Rather, it can be explained by reference to the government's interest that the funds it provides are properly managed. Nevertheless, as noted in the excerpt at in 6.28 above though, the terms in a contract might create that control.

6.31. In addition, in *Central Bayside*, it was relevant that there was no legal compulsion to seek government funding. Therefore, government funding may be a factor weighing in favour of government control in circumstances where the entity is required to seek government funding and cannot seek funding in any other way.

Legal obligation to comply with requirements or obtain government approval

6.32. Entities may have to comply with certain legislative requirements, for example, because of the legal structure of the entity. An incorporated association will have certain obligations under its incorporating legislation, as well as prescribed matters which go to the governance of the entity (for example, rules around meetings of members). Entities established under specific legislation will also have similar requirements.

6.33. The ACNC does not consider that such legislative requirements indicate that the Crown has control over the governance of the entity. Rather, these requirements simply ensure that the entity operates within a particular governance structure, but would not likely indicate Crown control over the actual decision making of the entity.

6.34. Similarly some entities may have to comply with legislative requirements, or seek government approval in certain circumstances because of the activities that they undertake. In such cases, entities may have to go through various processes and meet a range of conditions to demonstrate they will act in ways considered appropriate by the regulators. As with the discussion above, this is likely reflective of the particular regulatory environment in which the entity operates as opposed to being an indication of government control in the relevant sense. However, this will again depend on the context, and in some cases, a requirement that an entity seeks approval from the government before it can implement a decision of the board, may be properly categorised as Crown control over the governance or operations of the entity.

Example 1

6.35. A religious organisation decides to set up a childcare facility. They have to comply with a range of conditions in order to obtain the necessary accreditation for a childcare facility, including appropriate conditions attached to staffing. They are accredited for 2 classes with no more than 10 children in each. The Board decides to expand the operations to 3 classes. Before it can do so, it must seek approval from the relevant government department. This requirement for approval does not amount

to Crown control in the relevant sense. Rather, it can be understood in light of the regulatory environment under which all childcare facilities operate.

Example 2

6.36. The parents of children attending a local government school decide to set up a P&C Association. Under the relevant State legislation, a P&C for a government school must obtain approval from the Minister before it can pursue any legal proceedings. This requirement provides the Crown with control over certain decisions of the committee, and appears to affect the autonomy of the entity. It does not appear to be explicable in terms of any regulatory context. Consequently, this factor provides support for the view that the entity is not independent of the Crown.

Government function

6.37. The second factor to consider is whether the entity was established with the objective of fulfilling a function or responsibility of the Crown.

6.38. This factor is about ascertaining the character of the entity in order to determine the ultimate purpose for its existence. Essentially the question is whether the entity was established to pursue charitable purposes, or whether it was established to implement government policy. As explained above, consideration must be given to what the entity is currently established to do (ie, why it currently exists), rather than only considering the matter from an historical perspective.

6.39. The ACNC does not consider that this question can be answered merely by looking at the activities of the entity and asking if those activities are traditionally regarded as the responsibility or function of government. This is for two reasons.

6.40. First, the courts have recognised that it is increasingly difficult to determine what matters are the responsibility of government and what are not. For example the Court stated in *Mines Rescue Board* (at 97) that '[t]he notion that certain activities are the responsibility of government is not one which could comfortably be made by a court today except in very limited circumstances'.

6.41. In *Ambulance Service of NSW v FCT* (2003) 130 FCR 477, the Court referred to *Mines Rescue Board and Metropolitan Fire Brigades Board v Federal Commissioner of Taxation* (1990) 27 FCR 279 (***Metropolitan Fire Brigades Board***) and noted that the issue arising from those cases 'is not whether the activities are the responsibility of government per se, but whether government has in fact assumed control or substantial control thereof'.

6.42. Secondly, in *Central Bayside*, Gleeson CJ, Heydon and Crennan JJ accepted that charities implement government policy in the sense that their goals are the same as those of the government[77]. But the mere fact that a charity's goals align with the government's goals does not establish that the *purpose* of a charity is to give effect to government policy. Rather, the charity simply pursues its own charitable purpose. In that case, Gleeson CJ, Heydon and Crennan JJ said at 186:

[77] See *Central Bayside* at 185.

> Even if, by fulfilling its own [charitable] purpose, the appellant performed, "the work or function of government", that did not prevent it from being a charitable body.

6.43. Kirby J stated at 214:

> At all times, as a "body", the appellant was a private corporation, constituted independently of government. It was only tied to the governmental purposes so long as those purposes coincided with benefits to the public, the patients and the members, as perceived and accepted by the constituent body of the appellant. The appellant was fulfilling its own objectives and purposes, which were conceded to be beneficial to the public. The appellant was not simply carrying out the objects of government.

6.44. Consequently, rather than looking at whether or not the entity actually performs the work or function associated with government, the relevant inquiry will relate to the reason that the entity performs that work. As explained in paragraph 6.4 above, a governmental entity exists in order to fulfil the functions and responsibilities of government. On the other hand, a charity exists in order to fulfil its charitable purposes. This explains why courts have referred to an entity that exists to carry out government functions as a 'governmental body'[78], 'an emanation of government'[79], 'governmental'[80], 'a creature or agent of government'[81], or 'part of the machinery of government'[82].

6.45. Therefore, factors which indicate that the entity is governmental in nature will point towards a conclusion that the entity was established to undertake government functions rather than to pursue charitable purposes.

6.46. While government control is an important factor in the characterisation of an entity as governmental, other factors are also relevant. Those other factors (some of which are discussed below) will be considered in this part of the test.

How the entity was formed

6.47. The fact that an entity has been established by statute (statutory body) may point towards the entity being governmental[83]. However, this may be rebutted where it is clear that the government's role was merely facilitative (for example, as is the case with church land trustee corporations).

Functions specified by Government

6.48. It is not unusual for the functions of a charitable entity to be specified by the government. For example, the legislation which establishes a corporate body to hold land for a religious association would specify the objects or functions of the body in the legislation.

6.49. Similarly, P&C Associations for government schools may have their objects and functions set out in legislation, or have a provision in

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[78] *Metropolitan Fire Brigades Board* at 280.
[79] *Metropolitan Fire Brigades Board* at 280.
[80] *Ambulance Services* at [45].
[81] *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* (2005) 60 ATR 151 per Byrne AJA (in dissent) at [34], [40], [56] and [57] and Osborn AJA at [60] and [61].
[82] *Central Bayside* per Kirby J at 210.
[83] For example, the fact that the relevant entity was established by statute was one relevant factor in *Metropolitan Fire Brigades Board* at 280, *Mines Rescue Board* at 101 and *Ambulance Service* at 493.

legislation requiring them to include certain objects and functions in their constitutions.

6.50. This does not necessarily mean that the entity will be established to carry out a government function. While the government may be said to have formulated the entity's objects or functions, the entity may still carry out those objects or functions in order to pursue its own independent purpose.

Special powers

6.51. In *Mines Rescue Board*, the Court considered a case which discussed the meaning of 'authority of the state' noting that the principles would be the same in relation to the characterisation of the activities of a body as a responsibility of government. The Court referred to *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577, where Gibbs J said that 'authority of a state':

> Refers to a body which exercises power derived from or delegated by State. It's a body given by the State the power to direct or control the affairs of others on behalf of the State, that is, for the purposes of and in the interests of the community or some section of it.

6.52. In other words, if the government has established the body with certain powers of control or regulation that could indicate that the body was created as a tool of government to carry out the functions and responsibilities of government.

6.53. In *Metropolitan Fire Brigades Board*, although there were control factors which were relevant, the Court noted at 280 that '[a]nother reflection of the Board's status as an emanation of government was that it was given power to make bylaws and impose penalties for breaches of the bylaws it made…'.

Funding

6.54. The fact that an entity is funded entirely by government does not mean that it is carrying out the functions of government. While the government could be said to be funding the entity in order to discharge its own functions and responsibilities, that is not inconsistent with the fact that the entity is using the funding in order to carry out its charitable purposes.

6.55. This conclusion is supported by *Central Bayside*. Additionally, in *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 94 LGERA 330, Mildren J stated at 348 that '[t]he mere fact that the associations are indirectly government funded does not deprive them of the character of being charities'.

Representatives, Agents or Instrumentalities of the Crown

6.56. The fact that an entity is described as representing the Crown, or as an instrumentality or agent of the Crown (or similar descriptions), may point towards the governmental nature of the entity.

6.57. Similarly, the fact that the entity is subject to certain requirements that other government agencies are subject to (eg Access to Information laws that apply to State government agencies) may indicate that it is governmental in nature.

Any other relevant matter

6.58. Finally, in determining whether, in pursuing its objectives, an entity is independent of the Crown, the ACNC can have regard to any other relevant matter.

6.59. The ES notes that another relevant matter may the fact that a State or Territory has included a particular entity in its definition of ‘government entity’.