

CHARITABLE TRUSTS BILL 2022

EXPLANATORY MEMORANDUM

Overview

The Charitable Trusts Bill 2022 repeals and replaces the *Charitable Trusts Act 1962* with a modern new Act.

The Charitable Trusts Bill 2022 makes provision for 5 key matters. First, charitable recreational facilities. Second, schemes for property held for charitable purposes. Third, the investigation of charitable trusts by the Attorney General and a newly established Western Australian Charitable Trusts Commission constituted by the Ombudsman. Fourth, proceedings in the Supreme Court in relation to charitable trusts. Fifth, gifts by certain trusts for philanthropic purposes.

Part 1 - Preliminary

Clause 1. Short title

This clause provides that the short title of the Act is the *Charitable Trusts Act 2022*.

Clause 2. Commencement

This clause provides for the commencement of the Act.

Part 1 commences on the day on which the Act receives the Royal Assent.

The rest of the Act commences on a day fixed by proclamation, with the ability to fix different days for the proclamation of different provisions, if needed.

Clause 3. Act binds Crown

This clause provides for the Act to bind the Crown.

Clause 4. Terms used

This clause contains the definitions of terms used in the Act.

The definition of 'charitable purpose' now expressly includes a charitable purpose as defined in the *Charities Act 2013* (Commonwealth) section 12, to confirm that any such purpose is charitable for the purposes of the Act. The common law definition of charitable purpose is also retained, so that a purpose is 'charitable' if either definition is met.

Part 2 - Charitable recreational facilities

The object of Part 2 is to continue to recognise the circumstances in which recreational facilities are taken to be provided for a charitable purpose.

Clause 5. Recreational facilities for charitable purposes

This clause provides for the circumstances in which recreational facilities, such as a sporting field or community centre, are taken to be provided for a charitable purpose.

It replaces section 5 in the *Charitable Trusts Act 1962* (**Current Act**).

Clause 6. General savings of law relating to charitable trusts

This clause replaces sections 5(4) and 6(1) of the Current Act.

It provides that nothing in Part 2:

- (a) detracts from the principle that a purpose must be for the public benefit in order to be charitable.
- (b) restricts the purposes that are to be regarded as charitable independently of Part 2. The common law recognises four classes of charitable trusts: trusts for the relief of poverty; trusts for the advancement of education; trust for the advancement of religion; and trusts for other purposes beneficial to the community.

Clause 7. Savings for *Charitable Trusts Act 1962*

This clause replaces section 7 of the Current Act. It contains savings provisions in respect of matters arising under the Current Act.

Part 3 - Schemes for property held for charitable purposes

The object of Part 3 is to enable the Attorney General and the Supreme Court to continue to approve schemes for property held for charitable purposes.

Clause 8. Terms used

This clause contains the definitions of terms used in Part 3.

Clause 9. Application of Part 3

This clause clarifies that a trust can be the subject of an approved scheme under Part 3 (i.e. under clause 10, 11, 12 or 16) whether or not the charitable purpose is defined by an approved scheme.

Clause 10. Property disposed of for other charitable purposes

This clause applies to property held for a charitable purpose (**original purpose**) if any of the following circumstances arise:

- (a) it is impossible, impracticable or inexpedient to carry out the original purpose;
- (b) the amount available is inadequate to carry out the original purpose;
- (c) the original purpose has already been effected; or
- (d) the original purpose is unlawful or uncertain;
- (e) the value of the property is greater than what is necessary for the original purpose.

This clause provides that, in accordance with an approved scheme, the property (or surplus property) must be applied for some other charitable purpose (**an alternative charitable purpose**) that is as close as possible to the original purpose. This reflects existing case law requirements. Subclause (3) may be applied so as to restore, with or without modification, the original purpose if this becomes possible.

In any of the circumstances referred to in subclause (1)(a) to (e), the persons in whom the property is vested must, as soon as reasonably practical after becoming aware of the circumstances, submit a scheme for the application of the property for an alternative purpose to the Attorney General for approval. A failure to do so constitutes a ground for removal under clause 45(1)(b). This is to avoid trustees unnecessarily delaying applying for a scheme, which could result in the trust funds not being applied for charitable purposes for a substantial period of time, and the value of the trust fund being eroded over that time.

Clause 10 replaces the existing regime in section 7 of the Current Act, but does not include the restriction found in section 7(3) of the Current Act. In broad terms, section 7(3) excluded a scheme under section 7 if both:

- (a) the intended gift would otherwise lapse by reason of a rule of law; and
- (b) the property would not be applicable for any charitable purpose.

There were differences in opinion as to how section 7(3) was intended to operate. This caused confusion and complications and therefore increased legal costs. However, the provision did not change the outcome of any proposed schemes under the Current Act. For those reasons, that section has been removed.

The Current Act permits property of low value (generally less than \$15,000) held for a charitable purpose, where certain conditions apply, to be the subject of a scheme to dispose of the property, to distribute the proceeds to that charitable purpose or another charitable purpose, as approved by the Attorney General, and to terminate any trust that exists (section 7A, read with sections 9(1)(b) and 10A of the Current Act). This existing provision has not been expressly replicated in this Bill as similar objectives can be achieved by the operation of clauses 10(1)(b) and 12 of the Bill.

Clause 11. Combining property held for same or similar purpose

This clause replaces section 7B of the Current Act. It applies to property held for a charitable purpose (original property) if the charitable purpose (original purpose) could be more effectively carried out by combining the property with other property held for a charitable purpose (other property) and the other property is held for a charitable purpose that is the same as, or similar to, the original purpose.

This clause provides that, in accordance with an approved scheme, the original property may be combined, and jointly administered and applied, with the other property.

Clause 12. Extension or variation or powers or specification or variation of mode of administration

This clause replaces section 8 of the Current Act. It applies to property held for a charitable purpose if the administration of the property could be facilitated either by

extending or varying the powers of the persons in whom the property is vested or by specifying or varying the mode of administering the property.

This clause provides that, in accordance with an approved scheme, the powers of the persons in whom the property is vested may be extended or varied, and the mode of administering the property may be specified or varied, if the extension, variation or specification is consistent with the charitable purpose for which the property is to be applied.

This clause confirms existing case law that the previous equivalent provision applies to accumulation clauses that are invalid or will become invalid at the conclusion of the perpetuity period.

If an action referred to subclause (1)(a) or (b) becomes necessary for the administration of the property, the persons in whom the property is vested must, as soon as reasonably practical thereafter, submit a scheme that effects the action to the Attorney General for approval. A failure to do so constitutes a ground for removal under clause 45(1)(b). As for clause 10, this is to avoid trustees unnecessarily delaying applying for a scheme, which could result in the trust funds not being applied for charitable purposes for a substantial period of time, and the value of the trust fund being eroded over that time.

Like section 7 of the Current Act (and its New Zealand equivalent section 32 of the *Charitable Trusts Act 1957* (NZ)), clause 10 is directed to changes to the purposes of a charitable trust. In contrast, clause 12 (and section 8 of the Current Act and its New Zealand equivalent section 33 of the *Charitable Trusts Act 1957* (NZ)) relates to amending administrative provisions of a trust; a scheme under this provision deals with powers of the trustees, rather than purposes of the trust. Clause 12 would not allow for a scheme that would fundamentally alter the trust as originally intended, as opposed to amplifying or expanding upon it. This is consistent with the *cy-près* jurisdiction of the Court that was replaced by the Current Act, which was intended to, as nearly as possible, give effect to the donor's original purpose.

Clause 13. Schemes for approval

This clause replaces section 9 of the Current Act. It provides that persons in whom property held for a charitable purpose is vested must prepare, and submit to the Attorney General, a scheme if they want the property to be dealt with in accordance with an approved scheme. In particular:

- (a) if clause 10 applies, then the scheme must relate to the application of the property for an alternative charitable purpose;
- (b) if clause 11 applies, then the scheme must relate to the combination and joint administration of the property (and the persons in whom the property to be combined is vested must jointly prepare, and submit the scheme); and
- (c) if clause 12 applies, then the scheme must relate to the extension or variation of the powers of the persons in whom the property is vested or the specification of variation of the mode of administering the property.

This clause also provides that if the consideration by the Supreme Court or the Attorney General of 2 or more schemes will involve consideration of substantially

similar issues, then the persons in whom the property is vested may jointly prepare, and seek approval for, the schemes.

Clause 14. Submitting schemes to the Attorney General

This clause replaces section 10 of the Current Act. It sets out the information and documents which must accompany a scheme submitted to the Attorney General.

This clause provides that the Attorney General may remit a scheme to the persons in whom the property is vested for consideration of any amendments suggested by the Attorney General.

This clause sets out the circumstances in which the Attorney General is required to prepare a scheme report and give it to the persons in whom the property is vested. The scheme report must address the matters referred to in clause 25(1).

The Attorney General must also make the scheme and scheme report available to the public free of charge (clause 14(6)).

Clause 15. Attorney General's fees for considering schemes and preparing scheme reports

This clause replaces sections 10(1a) and 10A(11) of the Current Act. It provides that the Attorney General may charge persons submitting a scheme under clause 14, reasonable fees for the costs and expenses (including legal costs) incurred by the Attorney General in considering the scheme and preparing a scheme report.

The Attorney General's legal costs may be charged in accordance with a legal costs determination: either a determination made for the purposes of this clause under the *Legal Profession Uniform Law Application Act 2022*, section 133(5), or if no such determination exists, applying the determination in respect of contentious business before the Supreme Court made under the *Legal Profession Uniform Law Application Act 2022*, section 133(1)(b)(i).

Subclause 15(3) extends the cost recovery to costs charged by any person providing legal services to the Attorney General, such as the State Solicitor's Office.

Clause 16. Applications for approval of schemes by Attorney General

This clause replaces part of section 10A of the Current Act. It sets out the circumstances in which persons in whom property is vested may apply to the Attorney General, instead of the Supreme Court, to approve a scheme under Part 3. The Attorney General may approve a scheme in two circumstances:

- (a) if the value of the property to which the scheme applies is less than \$100,000, or any greater amount that is prescribed; or
- (b) if income in the previous financial year from the property to which the scheme applies was less than \$20,000 or any greater amount that is prescribed.

These monetary thresholds are the same as those currently prescribed in the *Charitable Trusts Regulations 2015*.

This clause provides that the value of the property for the purposes of subclause (1) is to be determined without regard to any limits on use imposed by a charitable purpose to which the property is to be applied. For example, land that is subject to a trust for recreational purposes should be valued as if it were not subject to that restriction. This is particularly important if the trustees propose a scheme to enable them to sell the land (or part of it) free from the recreational use limitation.

This clause also provides that the Attorney General may approve the scheme or refuse to approve the scheme. Further, before making a decision about the scheme, this clause provides that the Attorney General may require the persons in whom the property is vested to give public notice of the scheme and have regard to any representations made to the Attorney General by any person considered by the Attorney General to have an interest in the matter.

Clause 17. Approval of scheme by Attorney General

This clause provides that if the Attorney General approves a scheme, then the Attorney General must give an approval notice to the persons in whom the property is vested and, if a scheme report has been prepared by the Attorney General, provide them with a copy of the scheme report. The persons in whom the property is vested must ensure the approval notice is published in the *Gazette* within 28 days of receipt of that notice. The approval of the scheme takes effect at the time it is granted or such later time as is specified in the approval notice.

This clause provides that the Attorney General may approve a scheme despite non-compliance with the procedural requirements of Part 3.

This clause also provides that if the Attorney General refuses to approve the scheme, the Attorney General must set out the reasons for that decision in a scheme report and the persons in whom the property is vested may apply to the Supreme Court for approval of the scheme.

This clause replaces sections 10A(6), (7) and (8) of the Current Act. However it differs from the Current Act in the following respects:

- (a) the obligation to arrange publication of the approval notice is placed on the persons in whom the property is vested, rather than on the Attorney General; and
- (b) a failure to comply with the above obligation constitutes a ground for removal of the person in whom the property is vested, under clause 45(1)(b).

Clause 18. Approval of schemes by Court

This clause provides that the persons in whom the property is vested may, at any time after receipt of a scheme report from the Attorney General, apply to the Supreme Court for approval of the scheme. The application to the Supreme Court must be accompanied by a copy of the scheme and the scheme report.

The Supreme Court must make the application, scheme and scheme report available for inspection by the public free of charge.

Clause 18(4) provides that the persons in whom the property is vested must ensure that notice of the Supreme Court's approval or refusal to approve the scheme is

published in the *Gazette* within 28 days after approval or refusal. Clause 18(5) provides that a failure to publish that notice constitutes a ground for removal under clause 45(1)(b).

The notice published in the *Gazette* must be in a form approved by the Principal Registrar.

This clause replaces sections 10(2), 10(3) and 16 of the Current Act. However it differs from the Current Act in the following key respects:

- (a) the obligation to arrange publication of the notice that the Court's approval or refusal of a scheme is placed on the persons in whom the property is vested, rather than on the Principal Registrar of the Supreme Court (refer to clause 18(4)); and
- (b) a failure to comply with the above obligation constitutes a ground for removal of the person in whom the property is vested, under clause 45(1)(b) (refer to clause 18(5)).

Clause 19. Scheme to be advertised

This clause replaces section 11 of the Current Act. It provides that the Supreme Court cannot consider an application for approval of a scheme until the persons in whom the property is vested give notice of the application for a scheme approval to the public or a person or class of persons having an interest in the application of the property as directed by the Court and in a manner approved by the Court.

This clause also sets out what information must be contained in the notice advertising the scheme. The notice must be given between 1 and 3 months prior to the date proposed for the hearing of the application.

The obligation to advertise the Court's approval or refusal also exists in section 11 of the Current Act but it differs from clause 19 by prescribing the method of advertising required (i.e. by publication in the *Gazette* and once in a daily newspaper circulating the State). Clause 19 leaves the Court to decide the appropriate method of advertising in each case. Advertising a scheme in the Government Gazette and The West Australian is expensive and may not be the most effective way of notifying members of the public about the existence of a scheme. Advertising contemplated by this clause might include more flexible and modern methods that may be more likely to reach persons with an interest in the matter. For example, notification via a community website, social media page, community newsletter, email group or local newspaper may be appropriate.

Clause 20. Opposition to application for scheme

This clause replaces section 12 of the Current Act. It provides that a person wanting to oppose an application to the Supreme Court for approval of a scheme must give notice of their intention to oppose the application to the Principal Registrar, the persons in whom the property is vested and the Attorney General.

This clause also provides that the notice must be in writing and given at least 7 days before the proposed hearing of the application.

Clause 21. Jurisdiction of Court in respect of schemes

This clause replaces section 15 of the Current Act. It provides that if an application is made to the Supreme Court for approval of a scheme, then the Court may decide which persons are to be heard before it in support of, or in opposition to, the scheme.

This clause also provides that the Supreme Court has jurisdiction and authority to hear all matters relating to the scheme and may, as it thinks fit, make an order approving the scheme, with or without modification, or make an order refusing to approve the scheme.

Further, where a scheme is approved and the persons in whom the property is vested make a further application for the Supreme Court to approve variations to the scheme, the Court may make any order it thinks fit.

Clause 22. Power to make an order despite non-compliance with procedural requirements

This clause provides that the Supreme Court may make an order under Part 3 despite non-compliance with the procedural requirements of Part 3 in relation to the scheme. This clause replaces section 17 of the Current Act.

Clause 23. Administration of property through schemes

This clause replaces section 13 of the Current Act. It provides that an approved scheme may provide that the purposes of the scheme may, in whole or in part, be carried out, and that any property to which the scheme relates may be administered, by the trustees of an existing charitable trust, a health service provider, the Public Trustee or any trustees who could be appointed under the *Trustees Act 1962*. This clause is expressly stated not to limit a scheme in making other any provision for carrying out the purpose of the scheme or for administering any property to which the scheme relates.

Clause 24. Expenses of scheme

This clause replaces section 14 of the Current Act. It provides that a scheme prepared and approved under Part 3 may provide that the expenses of the scheme must be paid out of, and be a charge on, the property to which the scheme relates.

Clause 25. Restrictions on approval of schemes

This clause replaces section 18 of the Current Act. It sets out requirements for the approval of a scheme by the Supreme Court or the Attorney General, namely that:

- (a) the scheme is appropriate to carry out each proposed purpose and is not contrary to the law of Western Australia or generally accepted standards of decency;
- (b) the scheme can be approved under Part 3;
- (c) each proposed purpose under the scheme is a charitable purpose that can be carried out; and
- (d) the requirements of Part 3 have been complied with, except as provided under sections 17(5) and 22 where the Attorney General and the Supreme Court may

make an order despite non-compliance with the procedural requirements in Part 3.

This clause also makes it clear that a refusal to approve a scheme under Part 3 does not prevent fresh steps from being taken under Part 3 to obtain the approval of any other scheme in respect of the same property.

Clause 26. Holder of property to transfer it in accordance with scheme

This clause replaces section 19 of the Current Act. It applies where a scheme approved by the Supreme Court or the Attorney General under Part 3 designates a person or body to hold or receive property under the scheme.

This clause provides that the persons in whom that property is vested must transfer that property to that person or body. Once the property is transferred, then the persons in whom the property was previously vested are no longer liable in respect of any express or implied trust upon which they held the property except in respect of any default or misappropriation of the property.

Clause 27. Savings for *Charitable Trusts Act 1962*

This clause provides that a scheme approved under Part III of the Current Act is taken to be an approved scheme under Part 3 of this Bill.

Part 4 - Investigation of charitable trusts

Part 4 of the Bill overhauls the investigation powers currently residing with the Attorney General with respect to the administration and management of charitable trusts under section 20 of the Current Act. A number of the changes have been made to implement recommendations of the Report on the Njamal People's Trust, dated November 2018, commissioned by the Attorney General of Western Australia under section 20 of the Current Act (**Njamal Inquiry Report**).

Clause 28. Terms used

This clause contains the definitions of terms used in Part 4.

Clause 29. Western Australian Charitable Trusts Commission established

This clause provides for the establishment of the Western Australian Charitable Trusts Commission (**WACTC**). The WACTC is constituted by the Parliamentary Commissioner, the Deputy Commissioner (but only in the circumstances referred to in section 6A(2) of the *Parliamentary Commissioner Act 1971*) or the Acting Commissioner (but only in the circumstances referred to in section 7(2) of the *Parliamentary Commissioner Act 1971*).

This clause applies sections 9, 10, 11 and 20(1) of the *Parliamentary Commissioner Act 1971* to the WACTC. This will, among other matters:

- (a) permit the WACTC to appoint such officers as the WACTC considers necessary and use the Parliamentary Commissioner's personnel to enable the WACTC to carry out its functions (section 9);

- (b) where the Commissioner of the WACTC is a public service officer, preserve the Commissioner's continuity of service (section 10);
- (c) permit the Parliamentary Commissioner to delegate the performance of certain functions (section 11); and
- (d) provide the WACTC with all the powers, rights and privileges of a Royal Commission in investigating any matter under Part 4 (section 20(1)). Clause 33 of the Bill expands on these powers (refer to explanation of clause 33 below).

This clause gives effect to recommendation 53 of the Njamal Inquiry Report and implements recommendation 54 in a different form (by creating the WACTC to exercise these powers instead of conferring powers on the Auditor General or a delegate appointed by the Attorney General).

Clause 30. Functions of the WACTC

This clause sets out the functions of the WACTC. The WACTC has 3 functions. First, to conduct investigations, including audits of the accounts of charitable trusts under investigation. Second, to make an investigator's report on each investigation. Third, to make recommendations to the trustees of charitable trusts in respect of matters arising out of investigations.

Clause 31. Complaints relating to charitable trusts or classes of charitable trusts

This clause provides that a complainant may make a complaint to the Attorney General or the WACTC about a charitable trust or a class of charitable trust. The complaint must be made in any approved manner.

This clause extends to trusts created, and acts done and omissions made in relation to those trusts, before the commencement of the Act.

Clause 32. Investigation of charitable trusts

This clause sets out the investigators who may carry out investigations of a charitable trust or a class of charitable trust.

There are two types of investigators:

- (a) an authorised person acting at the direction of the Attorney General on a complaint to the Attorney General or on the Attorney General's own initiative; and
- (b) the WACTC on a complaint to the WACTC or on referral by the Attorney General.

This clause provides that an investigator may, in the performance of a function under the Act, give a written notice (a requirement) to a person. A requirement may require the person to provide a document or other information relating to a charitable trust or concerning any person involved in the administration of a charitable trust. A requirement may also require the person to provide any other assistance that is reasonably necessary.

This clause also sets out the circumstances in which an investigator may refuse to investigate a complaint or refuse to continue the investigation. For example, where the complaint is frivolous, unnecessary or unjustifiable or where another person or body (such as the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC) or the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC), established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)) has investigated, is investigating or is about to investigate the charitable trust or a trustee of the charitable trust to which the complaint relates. If an investigator refuses to investigate a complaint or refuses to continue an investigation then the investigator must, by written notice, inform the complainant of their decision and may provide reasons for the decision.

As noted above, the WACTC also has the powers of a Royal Commission under the *Royal Commissions Act 1968* as applied by clause 33 of the Bill.

This clause gives effect to recommendations 48 and 49 of the Njamal Inquiry Report. This clause also implements the first part of recommendation 54 in a different form.

Clause 33. Powers under *Royal Commissions Act 1968*

This clause provides that an investigator has the powers, rights and privileges of a Royal Commission under the *Royal Commissions Act 1968*. In particular, this means that the investigator will have the power to summons witnesses and documents (which power is conferred by section 9 of the *Royal Commissions Act 1968*).

This clause also gives effect to recommendations 49, 50 and 53 of the Njamal Inquiry Report.

Clause 34. WACTC's power to carry out audits of charitable trust accounts

This clause provides that the WACTC may, as part of an investigation, carry out an audit of the accounts of a charitable trust under investigation.

There are two ways in which an audit may occur. First, the WACTC may appoint an appropriately qualified auditor, to carry out all or a part of the audit. Second, the WACTC may direct the trustees of a charitable trust to arrange an appropriately qualified auditor to carry out all or a part of the audit.

The auditor must report on completion of the audit to the WACTC.

This clause gives effect to the second and third parts of recommendation 54 of the Njamal Inquiry Report.

Clause 35. Power to enter premises

This clause provides that, for the purposes of conducting an investigation, an investigator may, at any reasonable time, enter any premises occupied or used by a person to whom a requirement has been given and inspect those premises or anything on those premises.

A requirement may be given by way of written notice to a person by an investigator under clause 32(2).

Clause 36. Consequences of disclosure of privileged documents or information

This clause provides that if a provider discloses to an investigator a document or information subject to privilege against self-incrimination or legal professional privilege, then:

- (a) in the case of legal professional privilege, the privilege relating to a trustee is abrogated only to the extent that the privileged document or information relates to the administration of the trust and the disclosure does not otherwise constitute a waiver of legal professional privilege; and
- (b) the privilege is not abrogated in relation to the disclosure of the privileged document or information to a person other than the investigator except if:
 - (i) the investigator is the WACTC or an authorised person, and the disclosure is made to the Attorney General;
 - (ii) the disclosure is made with the consent of the person who benefits from the privilege;
 - (iii) the disclosure is for the purposes of proceedings for an offence under clause 39 or 40(2); or
 - (iv) the disclosure is for the purposes of civil proceedings for directions in respect of the charitable trust to remove the trustee or otherwise in respect of a breach of trust.

This clause also provides that a privileged document or information provided in compliance with a requirement is not admissible in evidence against the person in proceedings other than proceedings referred to in clause 36(4)(c) or (d).

This clause gives effect to the second part of recommendation 55 of the Njamal Inquiry Report.

Clause 37. Confidentiality

This clause makes it clear that, other than as is necessary for the administration of the Act, nothing in Part 4 authorises access to, or the disclosure of, a document or information provided to an investigator by a provider.

This clause imposes a duty of confidentiality on:

- (c) people who are or were engaged or employed to perform a function under Part 4;
- (d) any other people to whom a document or information is disclosed under Part 4; or
- (e) any other people who gain access to a document or information obtained under Part 4.

This clause provides that a person subject to the duty of confidentiality must not record, disclose or make use of a document or information provided by a provider except:

- (a) with the consent of the provider; or
- (b) for the purpose of enabling or assisting the WACTC or the Attorney General to perform or exercise any functions or powers under the Act or another law relating to charitable trusts, including disclosing it to a trustee, or a person with an advisory role in relation to, a relevant charitable trust, or to a person or

- class of persons, intended to benefit from the application of trust funds from the relevant charitable trust; or
- (c) for the purpose of obtaining or providing legal advice; or
 - (d) for the purpose of legal proceedings relating to the relevant charitable trust instituted by the Attorney General or to which the Attorney General is or may become a party including for representation in legal proceedings and to a witness or potential witness in the proceedings; or
 - (e) in accordance with an order of the Court on application by the Attorney General; or
 - (f) as permitted or required under the Act or another written law; or
 - (g) for the purposes of notifying, or referring a matter to the Commissioner of Police, the Advisory Committee established under the *Charitable Collections Act 1946*, the Australian Securities and Investments Commission (ASIC), the Commissioner of the ACNC, ORIC, the Commissioner of Taxation and the Commissioner of State Revenue; or
 - (h) if disclosing it to a person or class or persons prescribed in the regulations.

A breach of the duty of confidentiality is an offence. The maximum penalty for the offence is a fine of \$50,000.

This clause gives effect to recommendation 58 of the Njamal Inquiry Report.

Clause 38. Protection from liability for complainants and providers

This clause confers various protections on two classes of persons. First, a person who, in good faith, makes a complaint about a charitable trust under the Act. Second, a person who, in good faith, provides a document, information or assistance to an investigator in relation to a charitable trust or class of charitable trusts, whether in response to a requirement or voluntarily.

There are 7 protections conferred by this clause. First, the person does not incur any civil or criminal liability. Second, the person is not to be regarded as having breached any duty of confidentiality or secrecy imposed by law. Third, the person is not to be regarded as having breached any professional ethics or standards or any principles of conduct applicable to the person's employment. Fourth, the person is not to be regarded as having engaged in unprofessional conduct. Fifth, the person is not liable to any disciplinary action under a written law. Sixth, the person is not liable to be dismissed from office or to have their employment terminated. Seventh, the person is not liable to have the person's services dispensed with or otherwise terminated.

This clause gives effect to recommendation 57 of the Njamal Inquiry Report.

Clause 39. False or misleading information

This clause makes it an offence for a provider to provide to an investigator a document or information that the provider knows to be false or misleading in a material particular. The maximum penalty for the offence is a fine of \$50,000.

This clause gives effect to recommendation 52 of the Njamal Inquiry Report.

Clause 40. Failure to comply with requirement

This clause provides that a person who is given a requirement must comply with the requirement within 14 days or any other period specified by the investigator in the requirement or otherwise in writing. A person who fails to comply with a requirement commits an offence. The maximum penalty for the offence is a fine of \$50,000 (a ten-fold increase on the maximum penalty in section 20(4) of the Current Act).

This clause provides that it is a defence to a charge under clause 40(2) to prove that the person had a reasonable excuse for not complying with the requirement and the person objected to the requirement in accordance with subclause (4).

A person who is given a requirement may, within the specified period after the requirement is given, object to complying with the requirement by lodging with the investigator a notice in writing specifying a reasonable excuse for not complying with the requirement.

It is not a reasonable excuse to assert the privilege against self-incrimination or, if the person is a trustee of the relevant charitable trust, legal professional privilege.

This clause gives effect to recommendations 48, 50, 51 and 55 of the Njamal Inquiry Report.

Clause 41. Investigator's report

This clause:

- (a) requires an investigator to prepare a report and provide a copy to the Attorney General; and
- (b) permits an investigator to issue a written notice (directed to the relevant trustee) to accompany the investigator's report, and in that case, give a copy of that notice to the relevant trustee.

This clause also provides that if a relevant trustee fails to comply with a notice from the investigator:

- (a) the investigator must prepare an amended or further investigator's report; and
- (b) the trustee's failure to comply with the notice constitutes a ground for removal of the trustee under section 45(1)(b)(i).

Clause 42. Investigator's report may be published, tabled and provided to certain persons by Attorney General

This clause gives the Attorney General the discretion to, if the Attorney General considers the investigator's report to be final, do any of the following:

- (a) cause a copy of the report, in whole or in part, to be laid before each House of Parliament; and
- (b) provide a copy of the report, in whole or in part, to a complainant, a trustee, the Commissioner of Police, ASIC, the Advisory Committee under the *Charitable Collections Act 1946*, the ACNC, ORIC, the Commissioner of Taxation, the Commissioner of State Revenue or any other persons or class of persons prescribed by regulation.

This clause gives effect to recommendation 59 of the Njamal Inquiry Report.

The clause does not compel the Attorney General to publish any investigator's report received.

Clause 43. Recovery of costs and expenses of investigation of charitable trust

This clause permits the Attorney General to apply to the Supreme Court to recover the costs and expenses of an investigation, including any audit of the accounts of a charitable trust under investigation.

This clause provides that the Supreme Court may make orders for the payment of the whole or part of the costs or expenses of the investigation out of the property of the relevant charitable trust, by a trustee of the relevant charitable trust or, if the investigation was the result of a complaint and the Court finds that the complaint was frivolous or vexatious or was not made in good faith, the complainant.

This clause gives effect to recommendation 56 of the Njamal Inquiry Report.

Part 5 - Proceedings in relation to charitable trusts

The object of Part 5 of the Bill is to increase the powers currently available to the Supreme Court to make orders with respect to charitable trusts or the persons involved in their administration.

Clause 44. Proceedings to enforce or vary charitable trusts

This clause replaces section 21 of the Current Act. It applies in relation to property held by a charitable trust whether or not a scheme in respect of the property has been approved under Part 3.

This clause provides that a person may apply to the Supreme Court for 1 or more of the following orders:

- (a) an order requiring a trustee of a charitable trust to carry out the trusts on which the property is held, and to comply with the provisions of an approved scheme (if any) relating to the property;
- (b) an order requiring a trustee of a charitable trust to meet the trustee's liability for any breach of trust affecting the property, as the Court may direct;
- (c) an order requiring a trustee of a charitable trust to provide a document or information to a person or class of persons, or a person or body representing a person or class of persons, intended to benefit from the application of trust funds from the charitable trust;
- (d) an order giving directions in respect of: the administration of a charitable trust; any investigation in relation to a charitable trust; or any assistance required of a person under clause 32(2)(b);
- (e) an order requiring an audit or the accounts of a charitable trust;
- (f) an order directing that on and after the date of the order, or any subsequent date specified in the order, the property must not be applied except in accordance with an approved scheme;
- (g) an order directing that a person holding the property must not dispose of it without the approval of the Court, the Attorney General or some other person;
- (h) an order restricting the transactions that may be entered into or the nature or amount of the payments that may be made, in the administration of a

- charitable trust, without the approval of the Court, the Attorney General or some other person; and
- (i) any other order that is necessary or convenient to be made for giving effect to an order referred to above.

This clause also provides that copies of the application must be served on the trustees of the charitable trust to which the application relates. Clause 47 provides that the application is also to be served on the Attorney General.

Like section 21 of the Current Act, this provision allows any person to apply to the Supreme Court for these orders. Such applicants might include, for example, a representative of the persons or objects intended to benefit from the trust, or a regulatory body such as the ACNC.

Clause 45. Proceedings relating to persons involved in administration of charitable trusts

Although the Attorney General currently has power to apply to the Supreme Court for the removal and appointment of a trustee in the exercise of the court's inherent jurisdiction, the Attorney General currently has no express power to apply to the Supreme Court for an order to prevent other persons who may wield influence over the trust to its detriment, from being employed, engaged or otherwise involved in the administration or management of a charitable trust.

This clause is a new provision that expands the range of orders the Attorney General may seek from the Supreme Court. It provides that the Attorney General, or a person authorised by the Attorney General, may apply to the Supreme Court for 1 or more of the following orders:

- (a) an order precluding the involvement of a person in the administration of a charitable trust;
- (b) an order removing all or any trustees of a charitable trust or any other person involved in the administration of a charitable trust; and
- (c) an order appointing a person as a trustee of a charitable trust; and
- (d) any other order that is necessary or convenient to be made for giving effect to an order referred to in the above paragraphs.

The grounds on which an application may be made to the Supreme Court are:

- (e) that there has been misconduct or mismanagement in relation to the administration of a charitable trust;
- (f) that it is necessary or desirable to act for the purpose of protecting existing or future property held by a charitable trust;
- (g) that a person is not a fit and proper person to be involved in the administration of a charitable trust;
- (h) that, in the case of an order seeking removal, a person has failed to comply with a provision of the Act and that failure is specified by this Act to constitute a ground for removal.

The Supreme Court may make any order under clause 45(1) as it thinks fit.

This clause also makes it an offence for a person to contravene an order made by the Supreme Court. The maximum penalty for a contravention of an order is imprisonment for 1 year and a fine of \$50,000.

This clause gives effect to the parts of recommendation 60 of the Njamal Inquiry Report.

Clause 46. Certain persons unfit to be involved in administration of charitable trusts

This clause prohibits the following persons from being involved in the administration of a charitable trust:

- (a) a person who is an insolvent under administration;
- (b) a person who is the director of a corporation that is insolvent or under administration;
- (c) a person who was the director of a corporation at the time it became insolvent or went into administration;
- (d) a person who is disqualified by or under a written law or law of another State, a Territory or the Commonwealth from being employed, engaged or otherwise involved in the management of a body corporate or other entity registered under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*;
- (e) a person who is precluded from being involved in a charitable trust by court order under clause 45(1)(a), or a person removed by court order under clause 45(1)(b) from being a trustee of a charitable trust or being involved in the administration of a charitable trust, or a person otherwise removed as a trustee of a charitable trust by order of the Supreme Court;
- (f) a person who has been convicted of an offence involving fraud or dishonesty;
- (g) a body corporate of which an individual referred to above is a director unless the Supreme Court gives leave for the person to be involved in the administration of a charitable trust.

This clause is directed at ensuring that only persons of honesty and integrity are in a position to manage and administer the charitable trust and protect the trust property. If persons are not fit and proper persons to manage and administer the trust then they should not be in a position where they could misappropriate the property of the charitable trust or otherwise improperly or detrimentally affect the trust.

This clause also provides that a person who is prohibited by clause 45(1) from being involved in the administration of a charitable trust may apply to the Supreme Court for leave to be involved in the administration of a charitable trust. The Supreme Court may, subject to any conditions the Court considers appropriate, grant leave if it considers there are exceptional circumstances warranting the granting of leave. The Attorney General is to be a party to any application for leave to be involved in the administration of a charitable trust.

A contravention of the prohibition in clause 46(1) is an offence. The maximum penalty for the offence is imprisonment for 1 year and a fine of \$50,000.

This clause gives effect to parts of recommendation 60 of the Njamal Inquiry Report.

Clause 47. Conduct of proceedings related to charitable trusts

This clause 47 is a new provision that applies to proceedings in the Supreme Court under the law relating to charitable trusts, other than proceedings for an offence under the Act.

This clause provides that an originating process lodged with the Supreme Court by a person other than the Attorney General must be served on the Attorney General.

This clause also provides that the Supreme Court is not bound by the rules of evidence when hearing the proceedings and may be informed and conduct the proceedings in any manner the Court thinks fit. In many cases where the Attorney General needs to take action in relation to a charitable trust, the Attorney General is acting on hearsay information. In some cases, the Attorney General may rely on information provided anonymously. It may also be difficult for the Attorney General to find a person with direct knowledge of facts who is willing to make an affidavit for use in Supreme Court proceedings. Further, the Attorney General and any other person bringing an application in the Supreme Court may wish to rely on decisions, findings and reports of other regulatory bodies, for example, ASIC's findings in deciding to disqualify a person from managing corporations or a report of a special administrator appointed by ORIC.

This clause gives effect to recommendation 61 of the Njamal Inquiry Report.

Part 6 - Gifts by certain trusts for philanthropic purposes

Part VA of the Current Act was inserted in 2011 to deal with a change in Commonwealth taxation legislation made in 2006. There has been a further change to Commonwealth laws as a result of the passing of the *Charities Act 2013* (Cth).

There is now an inconsistency in how the Current Act and Commonwealth laws (i.e. the *Charities Act 2013* and the *Income Tax Assessment Act 1997*) operate in relation to certain trusts known as private ancillary funds or ancillary funds, which are vehicles used for philanthropic purposes.

For ancillary funds to be a valid charitable trust under State law as well as obtain an income tax exemption, they need to be charitable under both State and Commonwealth laws.

Under the *Charities Act 2013* (Cth) ancillary funds which make distributions to a government entity Item 1 deductible gift recipient (**DGR**) will be charitable and a grant can be made. However, the *Charities Act 2013* (Cth) only operates for Commonwealth law purposes.

At present in order to make a distribution to a DGR and remain charitable under the Current Act (a State Act), the trustee must take separate action, in the form of making a declaration, or including specific wording in the trust deed. The trustees may need to obtain legal advice to determine the scope of the power and may also have no record of a previous declaration made under the State law.

The object of Part 6 of the Bill is to continue to enable the trustees of certain kinds of trusts to make tax deductible gifts to eligible recipients following the introduction of the *Charities Act 2013* (Cth).

Clause 48. Terms used

This clause replaces section 22A of the Current Act. It contains the defined terms used in Part 6.

The key differences are the amendment of the definition of '*eligible recipient*' to align it with the categories of recipient permitted by the *Charities Act 2013*. The defined term '*government entity*' is also added to achieve this objective; it is used only in the defined term '*eligible recipient*'.

The other added terms are '*former commencement day*' and '*former prescribed power*' which are both used in the validation provisions at clauses 52 and 53.

The term '*prescribed power*' is also transferred to clause 48; it exists in a corresponding form in section 22D(1) of the Current Act.

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

This clause replaces section 22B of the Current Act, although the only word change is a drafting improvement, to remove the word 'money' from the expression 'money, property or benefits' as money is included in the definition of 'property' in clause 4.

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

As the term 'eligible recipient' has been restricted by clause 48, to align with the categories of recipient permitted by the *Charities Act 2013* (Cth), the effect of this clause is that a will or trust instrument can expressly provide that gifts can be made to a deductible gift recipient as that term is defined in the *Income Tax Assessment Act 1997* (Cth).

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

This clause replaces section 22C of the Current Act. It provides that if the trust instrument of a prescribed trust does not include an express power to do so, the power to provide property or benefits to an eligible recipient is conferred by this clause 50.

This conferral of power applies even if a provision in the trust instrument provides to the contrary except that, where the trust instrument contains an express prohibition against providing property or benefits to a particular eligible recipient or particular class of eligible recipient, then that express prohibition overrides this conferred power in clause 50.

The requirement for trustees of prescribed trusts to make a declaration before being able to use the conferred power, as required by section 22C of the Current Act, is removed.

Clause 51. Ancillary provisions

This clause replaces subsections 22D(1), (2) and (3) of the Current Act. It provides that the Act applies to a prescribed trust as if the prescribed power were a power exercisable for a charitable purpose.

This clause also confirms that the existence or exercise of the prescribed power (i.e. for a prescribed trust to make gifts to eligible recipients) does not affect the validity of the charitable trust as a charitable trust or the application of property of the trust as allowed by the prescribed power.

Clause 52. Validation provisions for period preceding former commencement day

This clause replaces subsections 22D(4), (5) and (6) of the Current Act but preserves the validation provided by those subsections to certain acts of the trustees of a prescribed trust and the inclusion of a prescribed power in the trust instrument of a prescribed trust before the commencement of Part VA of the Current Act (i.e. the *former commencement day*, being 2 May 2011, the day on which the Charitable Trusts Amendment Act 2011 came in to operation).

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

This is a new clause.

Subclause (1) inserts a definition of '*new commencement day*' to mean the day on which Part 6 comes into operation.

Subclauses (2) and (3) validate the:

- (a) inclusion of a former prescribed power for a prescribed trust; and
- (b) exercise of that power,

at any time on and after 2 May 2011 (*former commencement day*) but before the *new commencement day*.

The validation is expressed to apply despite a failure by the trustees of a prescribed trust to make a declaration, adhere to a limitation or retain a copy of the declaration for the trust records, as required by Part VA of the Current Act.

Subclause 53(4) clarifies that a former prescribed power is, on and after the *new commencement day* (i.e. when this new Part 6 comes into operation), taken to be a prescribed power for the purposes of section 51.

Part 7 - Miscellaneous

Clause 54. Protection from liability for persons performing functions under Act

This clause is a new provision not present in the Current Act. It confers various protections on persons for an act or omission done in good faith in the performance or purported performance of a function under the Act or any other law relating to charitable trusts.

There are three protections conferred by this clause. First, the person does not incur any civil or criminal liability. Second, the person is not to be liable to any disciplinary action under a written law. Third, the person is not to be dismissed from office, have their employment terminated or their services dispensed with, or otherwise terminated.

This clause gives effect to recommendation 57 of the Njamal Inquiry Report.

Clause 55. Regulations

This clause replaces section 22 of the Current Act. It confers on the Governor a discretionary power to make regulations prescribing all matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of the Act.

Part 8 - Repeal, savings, transitional and consequential amendment

Clause 56. *Charitable Trusts Act 1962* repealed

This clause provides that the *Charitable Trusts Act 1962* is repealed.

Clause 57. Savings and transitional provisions for *Charitable Trusts Act 1962*

This clause provides for how certain matters commenced under the Current Act are to be dealt with. First, a scheme application pending immediately before commencement day is to be determined under the Current Act as if it had not been repealed. Second, an examination or inquiry commenced under section 20 of the Current Act but not concluded immediately before commencement day may, in the Attorney General's discretion, be continued under the Current Act as if it had not been repealed or under Part 4 of the Act as if it had commenced as an investigation. Third, an application for orders made under section 21 of the Current Act but not determined immediately before commencement day, is to be determined under the Current Act as if it had not been repealed. Fourth, a declaration under section 22C of the Current Act continues in operation on and after commencement day as if the Current Act had not been repealed.

Clause 58. *Freedom of Information Act 1992* amended

This clause provides for the amendment of the *Freedom of Information Act 1992* by amending Schedule 2 of that Act to add a reference to the WACTC.

Under the *Freedom of Information Act 1992*, a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with that Act.

The effect of the amendment is that the WACTC will be an exempt agency under the *Freedom of Information Act 1992*. This means that a person will not be able to access the WACTC's documents under that Act. The Parliamentary Commissioner is currently an exempt agency under the *Freedom of Information Act* and this clause is consistent with that position.