

MISUSE OF POWER IN THE AUSTRALIAN CHARITIES SECTOR

ROSEMARY TEELE LANGFORD AND MIRANDA WEBSTER*

Charities are an essential part of Australian civil society and make fundamental contributions to social cohesion and well-being, as well as to the Australian economy. Public trust and confidence in the sector has, however, been damaged by high profile governance failures, despite the advent of a new national regime overseen by the Australian Charities and Not-for-profits Commission. This article draws attention to gaps in the regulatory frameworks applicable to Australian charities in relation to misuse of charitable assets and makes reform suggestions. Strengthening the charities sector by deterring and sanctioning such misuse more effectively is important in order for the law to hold those who govern and control charities to account and to ensure that such power is not misused.

I INTRODUCTION

A person who leads an organisation entrusted with the privilege to raise funds from the public must be vigilant to ensure that those funds are protected from misuse and are used only for the purpose for which they were donated.¹

As highlighted in this special issue of the *University of New South Wales Law Journal*, '[o]ne of the primary responsibilities of the law is to hold those in power to account, and to ensure that such power is not misused'.² There is a real issue as to whether the law is sufficiently fulfilling these imperative functions in the charities sphere. In particular, there are insufficient controls on abuse of power that takes the form of misuse of charitable assets (including charitable funds and property), especially in the case of charitable companies.

* Professor and Research Fellow, Melbourne Law School, University of Melbourne respectively. This research was funded by the Australian Government through the Australian Research Council. Our thanks to the charity law experts we consulted and to the anonymous reviewers for helpful comments.

1 New South Wales Government, *Report of the Inquiry under the Charitable Fundraising Act 1991 into the Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution, RSL LifeCare Limited* (Report, January 2018) 274 [8.4.46] ('*Bergin Report*'); see also at 358 [9.3.4].

2 Karie Mayman, 'Call for Submissions to the University of New South Wales Law Journal Issue 45(1)', *University of New South Wales Law Journal* (Web Page, 21 April 2021) <

The gap in relation to the protection of assets would be of concern in any regulatory regime. It is of even greater concern in the charitable context, given that charities steward money and other assets, donated by the public, for charitable purposes³ – and given that members (as well as donors and beneficiaries) of charitable entities may have less incentive and ability to monitor the use of the entity's assets than if the entity was for-profit.⁴ Charities straddle the public–private divide in that they exist to provide public benefit but the decision-making model is private in nature.⁵ Charities face ‘multiple and complex accountability foci’⁶ and multiple stakeholders, with pursuit of charitable purpose being the underlying and grounding accountability focus.⁷

The conferral of charitable status gives rise to a number of benefits such as tax concessions, donations and reputational advantages. The privileges accorded to charities, and the licence granted to charities by the state to operate as charities, in turn justify regulatory measures to require and enforce accountability. In particular, it is important that sufficient controls exist to prevent and sanction misuse of charitable assets, given charities' core responsibility of stewarding resources for charitable purposes. When misuse of charitable assets occurs, it undermines public trust and confidence in the charities sector, which are vital for attracting donations and volunteers.⁸ Sufficiently encompassing governance duties, backed up by appropriate enforcement action by regulators and members, are essential in this regard.⁹ At the same time, it is important to balance the need for protection of charitable assets and accountability for misconduct (with the associated obligations,

3 As to the nature of charities, see *Charities Act 2013* (Cth) s 5; Ann O'Connell, *Taxation of Charities and Not-for-profits* (LexisNexis, 2020) 46; Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 7.

4 See, eg, Susan Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-Profit Regulation* (Research Report, 2004) 186; Matthew Harding, ‘Independence and Accountability in the Charity Sector’ in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart, 2020) 13 (‘Independence and Accountability’); Vivienne Brand, Jeff Fitzpatrick and Sulette Lombard, ‘Governance and Not-for-Profits: Regulatory Reform’ (2013) 15(2) *Flinders Law Journal* 381; Henry B Hansmann, ‘Reforming Nonprofit Corporation Law’ (1981) 129(3) *University of Pennsylvania Law Review* 497.

5 See also Michael D Connelly, ‘The Sea Change in Nonprofit Governance: A New Universe of Opportunities and Responsibilities’ (2004) 4(1) *Inquiry* 6, 7–8; Jonathan Garton, ‘Principles of Regulation of Not-for-Profits’ in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 507, 517; Noel Hyndman and Danielle McConville, ‘Trust and Accountability in UK Charities: Exploring the Virtuous Circle’ (2018) 50(2) *British Accounting Review* 227.

6 Woodward and Marshall (n 4) 16; see also Harding, ‘Independence and Accountability’ (n 4); Richard Tacon, Geoff Walters and Chris Cornforth, ‘Accountability in Nonprofit Governance: A Process-Based Study’ (2017) 46(4) *Nonprofit and Voluntary Sector Quarterly* 685; Stijn Van Puyvelde et al, ‘The Governance of Nonprofit Organisations: Integrating Agency Theory with Stakeholder and Stewardship Theories’ (2012) 41(3) *Nonprofit and Voluntary Sector Quarterly* 431.

7 See Rosemary Teele Langford, ‘Purpose-Based Governance: A New Paradigm’ (2020) 43(3) *University of New South Wales Law Journal* 954 (‘Purpose-Based Governance’).

8 See, eg, *Director of Public Prosecutions v Cirianni* [2018] VCC 2288, [17] (‘DPP v Cirianni’).

9 In addition, Harris, Petrovits and Yetman have found that overall stronger governance reduces the likelihood of asset diversions: see Erica Harris, Christine Petrovits and Michelle H Yetman, ‘Why Bad Things Happen to Good Organisations: The Link between Governance and Asset Diversions in Public Charities’ (2017) 146(1) *Journal of Business Ethics* 149, 150.

compliance costs and liability), on the one hand, with the need to attract and retain board members and volunteers, on the other.¹⁰

Furthermore, there is evidence that misuse of charitable assets is occurring. In the past decade, a number of cases of misappropriation by individuals holding senior positions in charities have been reported in the media. These have involved use of charitable funds and charity credit cards for personal and family expenses, purchase of assets at an inflated price, and payments for consulting and out-of-pocket expenses. Indeed, in 2019–20, the Australian Charities and Not-for-profits Commission ('ACNC') received 2,102 concerns about charities (generally from the public or members of a charity), and the most common concerns were about perceived mismanagement of funds or individuals obtaining a 'private benefit' from a charity.¹¹ Examples of charitable assets being used for private benefit include a person misusing their position in a charity to conduct unauthorised transfers of charity funds to themselves or another, or the unauthorised (or inappropriate) use of charity credit cards; and individuals using charity-owned assets, such as vehicles or properties, for personal purposes.

In this article, we first outline examples of the misuse of charitable assets. Second, we set out the regulatory framework of the ACNC and how this applies to cases of misuse. We draw attention to the ACNC's very limited enforcement powers against individuals and the constitutional uncertainty surrounding the ACNC's powers, which has further constrained the regulatory response. Third, we consider how other regulatory frameworks can protect charitable resources and be used to sanction the offending individuals. Particular focus is on incorporated charities and, in particular, on the ability of regulators to take action in circumstances of misuse of charitable assets. Fourth, we consider the main problems that arise from these regulatory frameworks and, finally, we set out some recommendations for law reform. Our core concern is the gap that exists in relation to misuse of power by directors and officers of companies incorporated under the *Corporations Act 2001* (Cth) ('*Corporations Act*') or its predecessors and registered with the ACNC ('charitable companies')¹² – for all other incorporated charities a regulator can take

10 See, eg, *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 198; *Official Receiver v Batmanghelidjh* [2021] EWHC 175 (Ch) [848]. There is evidence that recruitment of directors is difficult and that boards struggle with lack of time: see, eg, John Chelliah, Martijn Boersma and Alice Klettner, 'Governance Challenges for Not-for-Profit Organisations: Empirical Evidence in Support of a Contingency Approach' (2016) 12(1) *Contemporary Management Research* 3; Domini Stuart, 'Fighting Back' (2015) 31(5) *Company Director* 36.

11 Australian Charities and Not-for-profits Commission, *Annual Report 2019–20* (Report, 16 October 2020) 24. The Australian Charities and Not-for-profits Commission ('ACNC') states that 'private benefit' is 'where the resources of the charity are used for the benefit of those close to or related to the charity, rather than for the charity's beneficiaries, and for its charitable purpose': 'Private Benefit', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/topic-guides/private-benefit>>.

12 We use the term 'charitable company' to refer to a company or corporation that is incorporated under the *Corporations Act 2001* (Cth) or its predecessors (as opposed to, eg, a corporation incorporated under or governed by sections 279-1, 279-5 and 279-15 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('*CATSI Act*') or incorporated under a separate Act of Parliament) and registered with the ACNC.

action for breach of duty by individuals. For charitable companies, this ability was reduced with the introduction of the ACNC regime. Although state referral of power to enable a comprehensive national charities regime has been suggested,¹³ such referral is unlikely in practical terms and may not in fact be the optimal solution. The priority is to reinstate regulatory power in relation to individual directors and officers of charitable companies.

Our key recommendations are as follows. The first is to turn back on the statutory duties in the *Corporations Act* in relation to charitable companies, thus giving a regulator (or regulators) jurisdiction over individual directors and officers of charitable companies who misappropriate charitable assets (or commit other breaches of statutory duty). The second is to develop a core set of governance duties for committee members of incorporated associations that are charities. The third is that consideration be given to expanded standing in relation to charities, including investigation of, and potential reform in relation to, the exercise of the protective jurisdiction by state Attorneys-General.

We are not arguing that the ACNC should increase its compliance or enforcement activities or intensify its regulatory approach. In fact, anecdotal evidence suggests that the ACNC's changed focus in recent years is imposing significant costs on charities. The additional red tape and layers of compliance add to the regulatory and compliance burdens borne by charities.¹⁴ Rather, our argument is that enabling regulators to take action against those who govern charities (and, in particular, against directors of charitable companies) in sufficiently serious cases of misuse or misapplication of charity funds or assets would fill gaps in the regulatory regime and thus deter such misuse and misapplication in a potentially more effective way than is the case under the current regulatory framework.

II THE MISUSE ISSUE

In 2012, a new charities regime was introduced into Australia, with the creation of the ACNC. The new regime, outlined in Part III below, has been welcomed and has enjoyed strong support from the charities sector, although there has been increasing concern as to the additional compliance and regulatory burdens. Closer inspection of the regime also reveals a void in the power of the ACNC and other regulators to prevent and sanction the misuse of charitable assets. A review of the ACNC regime ('*ACNC Review*') was undertaken after its first five years of operation, with a report published in 2018.¹⁵ The *ACNC Review*'s findings, as well

13 By referral of power we mean the referral of powers by the states to the Commonwealth under s 51(xxxvii) of the *Constitution*.

14 See Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446, 457. See also Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (Final Report, 31 May 2018) 47 ('*ACNC Review*').

15 *ACNC Review* (n 14). This review was conducted to meet the Commonwealth Government's statutory obligation to undertake a review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*') and the *Australian Charities and Not-for-profits Commission (Consequential and*

as the government response and submissions to the *Review*, will be referred to throughout this article.

The ACNC regime has three key weaknesses: limited enforcement powers against individuals; limited enforcement powers against registered charities that are not federally regulated entities (as defined in the *ACNC Act*);¹⁶ and no enforcement powers against charities that have been deregistered. The ACNC regime has also reduced accountability of directors and officers under the *Corporations Act 2001* (Cth). For example, as part of the ACNC regime, charities are required to ensure that their ‘responsible persons’¹⁷ comply with a set of governance duties; as a consequence of this, the statutory duties that would normally apply to directors and officers of charitable companies are no longer applied – to avoid duplication of regulation and to shift the regulatory responsibility for charities registered under the *Corporations Act* from the Australian Securities and Investments Commission (‘ASIC’) to the ACNC.

This article focuses on the misuse of charity assets by an individual or individuals for their own benefit or for the benefit of a third party. Misuse (or ‘misappropriation’) of charitable funds or assets may occur in a number of ways. We use the term to refer to situations that range from inappropriate or unauthorised use to criminal misconduct amounting to fraud. In the *Charity Compliance Report 2018*, the ACNC outlined the following common scenarios, which involve the use of charitable assets for private benefit:

- (a) related party transactions (namely when the charity engages in a business transaction with another party that has a relationship with the charity);¹⁸
- (b) gifts, honorariums and other payments;¹⁹
- (c) financial fraud (an intentional act of deception involving the charity’s finances or assets for the purpose of a private gain),²⁰ and
- (d) ‘Founder syndrome’ (whereby ‘the person or people that established the charity do not adequately separate their own interests and finances from the charity’s interests and finances’).²¹

Transitional) Act 2012 (Cth) after their first five years of operation: see *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) sch 1 item 16 (‘*ACNC (CT) Act*’).

16 *ACNC Act 2012* (Cth) s 205-15.

17 *Ibid* s 205-30.

18 Australian Charities and Not-for-profits Commission, *Charity Compliance Report 2018* (Report, March 2019) 28 (‘*ACNC Charity Compliance Report 2018*’). Examples include charities receiving goods or services from organisations that are owned or operated by relatives of the charity’s responsible persons; goods or services being provided at inflated prices beyond what would be a reasonable market rate; and board members awarding contracts or projects to their own companies.

19 For detail, see *ibid* 29. For example, the Returned & Services League of Australia (Queensland Branch) (‘RSL Queensland’) had a long-established practice of making monthly payments to its directors to cover ‘out of pocket’ expenses with no policy in place to govern these payments – discussed below.

20 *Ibid* 30. See, eg, Commonwealth Director of Public Prosecutions, *Annual Report 2017–18* (Report, 19 October 2018) 65.

21 *ACNC Charity Compliance Report 2018* (n 18) 31. See, eg, Josh Bavas, ‘Horses for Harmony Charity Sold Raffle Tickets for Corvette but Never Drew a Winner’, *ABC News* (online, 3 November 2020) <<https://www.abc.net.au/news/2020-11-03/horses-for-harmony-charity-ran-corvette-raffle-with-no-winner/12839488>>.

There have been recent prominent examples of financial fraud. For example, in 2018 a former senior manager of Guide Dogs Victoria pleaded guilty to three charges of dishonestly obtaining financial advantage by deception (under section 82 of the *Crimes Act 1958* (Vic)), having dishonestly obtained amounts totalling \$178,413.89 to cover personal expenses incurred for renovations and improvements on his own home, in addition to using his corporate credit card and fuel cards for unauthorised purchases.²² Another example is the case of a former State President of the Returned and Services League of Australia (New South Wales Branch) ('RSL NSW') who was found guilty of two counts of dishonestly obtaining financial advantage by deception (under section 192E of the *Crimes Act 1900* (NSW)) in February 2020 for using an RSL NSW credit card to pay family members' phone bills and for a hotel room for his daughter.²³

The ACNC's *Charity Compliance Report 2018* provides practical steps that charities can take to avoid these types of misuse of charitable funds and assets.²⁴ However, our focus in this article is on the relevant legal frameworks that can be used to prevent this kind of misconduct, sanction those responsible for misuse of assets, and recover charitable funds (by stopping transactions or seeking compensation in the courts). We are particularly interested in the gaps that exist in those frameworks and what can be done to improve regulatory coverage so that power over charitable assets is less likely to be misused, and so that those who govern and control charities can be held to account.

III THE APPLICATION OF THE ACNC REGULATORY FRAMEWORK TO MISUSE OF CHARITABLE ASSETS

The ACNC regulates charities under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*' or '*the Act*') by registering charities (and revoking registration),²⁵ collecting information on charities and maintaining the Charity Register,²⁶ providing guidance, education and advice to help registered charities comply with their obligations under the *Act*,²⁷ and monitoring compliance, investigating non-compliance, and using enforcement

22 For details, see *DPP v Cirianni* [2018] VCC 2288; *ACNC Charity Compliance Report 2018* (n 18) 3.

Guide Dogs Victoria responded to the fraud by taking this opportunity 'to set up additional controls to reduce the risk of this type of fraud occurring again': *ACNC Charity Compliance Report 2018* (n 18) 3.

23 For details, see Alison Xiao, 'Former NSW RSL President Don Rowe Found Guilty of Misappropriating Funds', *ABC News* (online, 28 February 2020) <<https://www.abc.net.au/news/2020-02-28/magistrate-finds-former-rsl-president-don-rowe-guilty/12010870>>; Jamie McKinnell, 'Former RSL President Don Rowe Fined \$2,000 but Avoids Jail over Credit Card Fraud', *ABC News* (online, 17 April 2020) <<https://www.abc.net.au/news/2020-04-17/nsw-rsl-president-don-rowe-sentenced-for-fraud-offences/12156880>>; Jamelle Wells, 'Former NSW RSL President Don Rowe Wins Appeal against Fraud Convictions', *ABC News* (online, 25 August 2020) <<https://www.abc.net.au/news/2020-08-25/former-nsw-rsl-president-wins-appeal-in-fraud-conviction/12594228>>.

24 *ACNC Charity Compliance Report 2018* (n 18) 28–31.

25 *ACNC Act 2012* (Cth) ch 2 pt 2-1.

26 *Ibid* ch 2 pt 2-2.

27 *Ibid* s 110-10(1). The obligations of registered charities are set out under ch 3.

powers if necessary.²⁸ Registered charities (referred to in the *ACNC Act* as ‘registered entities’) have several key obligations under the *ACNC Act*,²⁹ which include the following: keeping financial records that correctly record and explain their transactions, financial position and performance,³⁰ and complying with a set of governance standards and external conduct standards.³¹

In particular, registered charities (with the exception of ‘basic religious charities’)³² must ensure that they comply with six governance standards in order to maintain their status as a ‘registered entity’. These standards relate to the purposes and not-for-profit nature of a registered charity (Governance Standard 1), accountability to members (Governance Standard 2), compliance with Australian laws (Governance Standard 3), the suitability of the charity’s ‘responsible persons’ (Governance Standard 4), the duties of the charity’s responsible persons (Governance Standard 5) and accountability for the charity’s past conduct relating to institutional child sexual abuse (Governance Standard 6). A ‘responsible person’ is the term used by the ACNC to refer to a ‘responsible entity’ as defined under section 205-30 of the *ACNC Act* – it refers to an individual who is responsible for governing a registered charity, such as a director, management committee member or trustee of a charity.³³ Although Governance Standard 5 concerns the duties of a charity’s ‘responsible persons’, the burden of ensuring compliance with all the governance standards rests on the charity.³⁴

If a registered charity is operating outside Australia or working with third parties that are operating outside Australia, it will also be subject to four external conduct standards.³⁵ The standards cover activities and control of resources (Standard 1), annual review of overseas activities and recordkeeping (Standard 2), anti-fraud and anti-corruption (Standard 3), and protection of vulnerable individuals (Standard 4).

A Relevant Governance Standards

The following governance standards are particularly relevant to misuse of charitable assets by responsible persons. Governance Standard 1 (purposes and

28 Ibid ch 4.

29 ‘Ongoing Obligations to the ACNC’, *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc>>.

30 *ACNC Act 2012* (Cth) s 55-5(1).

31 Ibid ss 25-5(3)(b), 45-10(1), 50-10(1); *Australian Charities and Notforprofits Commission Regulation 2013* (Cth) divs 45, 50 (‘*ACNC Regulation*’).

32 For the definition of a ‘basic religious charity’, see *ACNC Act 2012* (Cth) s 205-35. Basic religious charities are exempt from the governance standards under section 45-10(5).

33 For example, where a registered charity is a company, a director of the company is a ‘responsible person’; where a registered charity is a trust, a trustee of the registered charity is a ‘responsible person’ (unless the trustee of the registered charity is a body corporate, then a director of the trustee is a responsible person). See also Ian Ramsay and Miranda Webster, ‘Registered Charities and Governance Standard 5: An Evaluation’ (2017) 45(2) *Australian Business Law Review* 127, 130; ‘Responsible Persons’, *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/topic-guides/responsible-persons>>, archived at <<https://web.archive.org/web/20210422151123/https://www.acnc.gov.au/tools/topic-guides/responsible-persons>>.

34 Ramsay and Webster (n 33) 129.

35 *ACNC Regulation 2013* (Cth) ss 50.20(2), 50.25(2), 50.30(2), 50.35(2).

not-for-profit nature of a registered entity) includes a requirement that a registered charity must ‘comply with its purposes and its character as a not-for-profit entity’.³⁶ In this respect, the ACNC highlights that a not-for-profit entity is ‘an organisation that does not operate for the profit, personal gain or other benefit of particular people’, including the charity’s members, its responsible persons or their friends or relatives.³⁷ In certain circumstances, misuse of charitable assets may amount to the charity contravening Governance Standard 1.³⁸

Governance Standard 5 (duties of responsible entities) provides that a charity must ‘take reasonable steps’ to ensure that its responsible persons are ‘subject to, and comply with’ certain duties:³⁹

- (a) to exercise the responsible person’s powers and discharge the responsible person’s duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible person of the registered charity;
- (b) to act in good faith in the registered charity’s best interests, and to further the purposes of the registered charity;
- (c) not to misuse the responsible person’s position;
- (d) not to misuse information obtained in the performance of the responsible person’s duties as a responsible person of the registered charity;
- (e) to disclose perceived or actual material conflicts of interest of the responsible person;
- (f) to ensure that the registered charity’s financial affairs are managed in a responsible manner; and
- (g) not to allow the registered charity to operate while insolvent.⁴⁰

A number of these duties are relevant to situations involving the misuse of charitable assets. First, by considering and complying with their duty to act in good faith in the charity’s best interests and to further the charity’s purposes (in paragraph (b)), their duties not to misuse their position or information from their position (in paragraphs (c) and (d)) and their duty to disclose perceived or actual material conflicts of interest (in paragraph (e)), responsible persons are likely to prevent themselves from entering into inappropriate transactions on behalf of the charity or from misusing other property.⁴¹ For example, the ACNC notes that a

36 ACNC Regulation 2013 (Cth) s 45.5(2)(c).

37 ‘Governance Standard 1: Not-for-profit and Working towards Charitable Purpose’, *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/1-not-profit-and-working>>.

38 Ibid.

39 ACNC Regulation 2013 (Cth) s 45.25(2).

40 Note that there are some ‘Protections’ that apply to the duties in Governance Standard 5: see ACNC Regulation 2013 (Cth) sub-div 45-C.

41 In fact, a prevalent interpretation of the duty to act in good faith in the interests of the company, in the corporate context, requires that directors must not misuse or abuse their powers, must avoid conflict between their personal interests and those of the company, should not take advantage of their position to make secret profits and should not misappropriate the company’s assets for themselves: see *Chew v The Queen* (1991) 4 WAR 21, 49 (Malcolm CJ). This judgment is referred to in a number of cases – for a detailed outline, see Rosemary Teele Langford, *Company Directors’ Duties and Conflicts of Interest*

responsible person's duty to act in good faith in the charity's best interests and to further the purposes of the charity 'is breached if a responsible person uses the charity's property to benefit another organisation, where there was no real benefit to the charity or it didn't further its charitable purposes'.⁴² Additionally, an example of misusing a responsible person's position 'is where a responsible person is involved in paying another company owned or controlled by a friend or relative (when it is not reasonable payment for the goods or services provided)'.⁴³ Both of these examples of breaches of duties are likely to arise due to a conflict of interest. To avoid conflicts of interest impacting decision-making, responsible persons should disclose actual, potential or perceived conflicts between their duty to act in the interests of the charity and a personal interest – and they may need to refrain from participating in any discussion on the matter, remove themselves from the room during such discussion and abstain from voting.⁴⁴

Second, to act in accordance with their duty of care and diligence (in paragraph (a)), and the duty to ensure that the charity's financial affairs are managed in a responsible manner (in paragraph (f)), responsible persons must ensure that they have an understanding of the charity's financial position and that there are appropriate policies, procedures and other effective financial controls in place to protect the charity's assets. By taking these duties seriously, responsible persons may be able to prevent themselves and others from engaging in unintentional, careless or even deliberate misconduct. The type of financial controls that will be appropriate will depend upon the complexity and size of the charity's resources.⁴⁵

(Oxford University Press, 2019) 294–5 [10.08]–[10.11]. See also *Southern Real Estate Pty Ltd v Dellow* (2003) 87 SASR 1, 7–8 [23]–[25] (Debelle J, Nyland J agreeing at 15 [60], Lander J agreeing at 16 [61]); *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504, 618 [539] (Giles JA, Mason P agreeing at 511 [1], Beazley JA agreeing at 511 [2]).

42 'Duties of Responsible Persons', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage/governance-standards/governance-standard-5-duties-responsible-persons/what-are>>, archived at <<https://web.archive.org/web/20210702023620/https://www.acnc.gov.au/for-charities/manage/governance-standards/governance-standard-5-duties-responsible-persons/what-are>>.

43 Ibid.

44 Ibid; 'Managing Conflicts of Interest Guide', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/guides/managing-conflicts-interest-guide>>; 'Related Party Transactions', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage/related-party-transactions>>.

45 'Managing Charity Money: A Guide for Board Members on Managing Finances and Meeting ACNC Duties', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/guides/managing-charity-money-guide-board-members-managing-finances-and-meeting-acnc-duties>>, archived at <<https://web.archive.org/web/20210324092527/https://www.acnc.gov.au/tools/guides/managing-charity-money-guide-board-members-managing-finances-and-meeting-acnc-duties>>. For example, an important control is requiring multiple signatures on payments and receipts, so that more than one person is involved in authorising and completing any transaction. Another important control involves establishing clear financial delegations – where an officer of a charity (such as a Chief Executive Officer or other senior member of management) is authorised to approve purchases and other transactions, there should be policies and procedures that clearly establish how much that person is permitted to spend without seeking approval from others.

In addition, section 55-5 of the *ACNC Act* requires each registered charity to keep written financial records that correctly record and explain its transactions and financial position and performance, and enable true and fair financial statements to be prepared and to be audited.⁴⁶ It must also keep written records that correctly record its operations.⁴⁷ Maintenance of such records guards against charity assets being misused for personal purposes.

B Relevant External Conduct Standards

The external conduct standards impose certain requirements on registered charities that are operating outside Australia or working with third parties that are operating outside Australia.⁴⁸ Particularly relevant in the context of misuse is External Conduct Standard 1, which provides that charities must take certain steps, including the following: maintaining reasonable internal control procedures to ensure that resources (including funds) are used outside Australia in a way that is consistent with the charity's purpose and its character as a not-for-profit entity; and also taking reasonable steps to ensure that the resources given to third parties outside Australia – or within Australia for use outside Australia – are applied (i) in accordance with the charity's purpose and character as a not-for-profit entity, and (ii) with reasonable controls and risk management processes in place.⁴⁹ These requirements are intended to ensure that a registered charity has procedures in place to manage the risks associated with its own operations and activities, and that resources given to third parties are also subject to reasonable controls.⁵⁰

C Overview of the ACNC's Compliance and Enforcement Powers

The ACNC operates within an evidence and risk-based regulatory framework;⁵¹ the Commissioner's Policy Statement on compliance and enforcement emphasises that the ACNC will take the minimum action required by the circumstances.⁵² However, in serious cases – such as where significant charity assets are at risk, or where there is evidence of serious mismanagement or misappropriation – the ACNC may commence with regulatory action higher up in its pyramid of

46 *ACNC Act 2012* (Cth) s 55-5(1).

47 *Ibid* s 55-5(2).

48 *ACNC Regulation 2013* (Cth) ss 50.20(2), 50.25(2), 50.30(2), 50.35(2).

49 *Ibid* s 50.20(3). See also, 'External Conduct Standard 1: Activities and Control of Resources', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards/external-conduct>>.

50 *ACNC Regulation 2013* (Cth) s 50.20(3) (Note).

51 'ACNC Regulatory Approach Statement', *Australian Charities and Not-for-profits Commission* (Web Page, July 2020) [60] <<https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>>, archived at <<https://web.archive.org/web/20211108093302/https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>>.

52 Australian Charities and Not-for-profits Commission, *Commissioner's Policy Statement: Compliance and Enforcement* (CPS 2013/01, 12 October 2017) 3 [22] <<https://www.acnc.gov.au/about/corporate-information/corporate-policies/compliance-and-enforcement>>, archived at <<https://web.archive.org/web/20200803152917/https://www.acnc.gov.au/file/37885525/download?token=N8PqP0ja>> ('*ACNC CPS 2013/01*').

enforcement options, such as by using proactive compliance, sanctions or (as a last resort) by revoking the charity's registration.⁵³

Under the *ACNC Act*, the ACNC's regulatory powers include information gathering and monitoring powers,⁵⁴ and enforcement powers.⁵⁵ The enforcement powers under part 4-2 of the *Act* allow the Commissioner to do the following: issue formal warnings;⁵⁶ give directions;⁵⁷ accept enforceable undertakings ('EUs')⁵⁸ (and to apply to a court for the enforcement of an undertaking);⁵⁹ apply for injunctions;⁶⁰ suspend or remove responsible persons;⁶¹ and appoint acting responsible persons.⁶²

However, the ACNC's enforcement powers under part 4-2 of the *ACNC Act* are subject to limitations and have not been used frequently. The part 4-2 powers can only be applied to certain registered charities – those that are 'federally regulated entities'⁶³ or those that are operating in circumstances in which the external conduct standards apply. The ACNC's powers are also limited in relation to those charities that are considered to be 'basic religious charities'.⁶⁴

D The ACNC's Response to the Misuse of Assets

As outlined above, misuse of a charity's assets by the charity's responsible persons, officers or employees may amount to (or may have been facilitated by) a contravention by the charity of Governance Standard 1, Governance Standard 5 or External Conduct Standard 1. If assets are being (or have been) misused, the ACNC's first step will be to work with the charity to help it to take action against the person or persons engaging in misconduct and to help the charity to recover any lost assets where possible. The ACNC emphasises that the charity's responsible persons have legal duties towards their charity and that they should act in a way

53 'ACNC Regulatory Approach Statement', *Australian Charities and Not-for-profits Commission* (Web Page, July 2020) [25], [65] <<https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>>, archived at <<https://web.archive.org/web/20211108093302/https://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement>>.

54 *ACNC Act 2012* (Cth) pt 4-1.

55 *Ibid* pt 4-2.

56 *Ibid* s 80-5.

57 *Ibid* s 85-5.

58 *Ibid* s 90-10.

59 *Ibid* s 90-15.

60 *Ibid* s 95-15.

61 *Ibid* ss 100-10–100-15.

62 *Ibid* s 100-30.

63 Under section 205-15 of the *ACNC Act 2012* (Cth), a 'federally regulated entity' is defined as any of the following: (a) a constitutional corporation; or (b) a trust, all of the trustees of which are constitutional corporations; or (c) a body corporate that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001* (Cth); or (d) a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.

64 For the definition of a 'basic religious charity', see *ACNC Act 2012* (Cth) s 205-35. As noted above, basic religious charities are not required to comply with the governance standards: see *ACNC Act 2012* (Cth) ss 25-5(3)(b), 45-10(1). Additionally, even if the charity is a federally regulated entity or subject to the external conduct standards, the ACNC's suspension and removal powers do not apply where an individual is a responsible person of a basic religious charity: see *ACNC Act 2012* (Cth) s 100-5(3).

that protects the charity's assets;⁶⁵ indeed, the ACNC does not have any statutory power to directly recover misappropriated charitable funds or other assets.

However, if the charity is not willing to work cooperatively with the ACNC – or the misuse has resulted from 'organisational or deliberate non-compliance' – the ACNC may use its formal enforcement powers.⁶⁶ Where there is an immediate threat to charitable assets and urgent action is necessary, the useful powers are likely to be a direction, injunction or the replacement of the charity's responsible persons.⁶⁷ The Revised Explanatory Memorandum for the ACNC legislation suggested that the ACNC Commissioner's power to direct a registered charity to not enter into a specified commercial transaction, financial transaction or other transaction provides the Commissioner with 'an instrument to move rapidly in cases of fraud and misappropriation'.⁶⁸ The federal government has also emphasised that the power to remove and replace a responsible person 'is important as it allows the ACNC Commissioner to act quickly and may prevent the misuse of charitable assets'.⁶⁹ The ACNC also has the power to disqualify a responsible person who has previously been suspended or removed.⁷⁰

While the ACNC may have the power to 'suspend or remove a person who is responsible, in a serious and persistent way, for misdirecting charity funds', the ACNC's preference is 'to provide evidence of misconduct to enable *the charity to suspend or remove that person*'.⁷¹ For example, the charity should ask any person who is believed to have engaged in misconduct to take leave from their position at the charity until the situation is resolved – or resign – and to repay any misappropriated funds. The ACNC has stated that it would only use its power to remove or suspend a responsible person where the members of the charity's governing body (its responsible persons) 'refuse to act, or are unable to act'.⁷² In these types of cases, the ACNC could also appoint someone to act in the place of the responsible person during the period of suspension, or until a removed person's role has been filled.⁷³ The ACNC has never used those powers.

65 'Protect Your Charity from Fraud', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/guides/protect-your-charity-fraud>>.

66 Ibid.

67 See *ACNC CPS 2013/01* (n 52) 6 [46], 7 [54]; Revised Explanatory Memorandum, Australian Charities and Not-for-profits Commission Bill 2012 (Cth), Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012 (Cth) 136 ('ACNC Bill Explanatory Memorandum'); Australian Government, *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* (Report, 6 March 2020) 9 ('Government Response').

68 ACNC Bill Explanatory Memorandum (n 67) 136.

69 *Government Response* (n 67) 9.

70 See *ACNC Regulation 2013* (Cth) s 45.20(4).

71 Australian Charities and Not-for-profits Commission, 'Regulatory Approach Statement' (Statement, December 2018) 11 [54] ('*ACNC Regulatory Approach Statement 2018*') (emphasis added).

72 Ibid.

73 Ibid. Note criticism of this in the *ACNC Review*: see *ACNC Review* (n 14) 9, 37; see also Law Institute of Victoria, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (16 March 2018) 13, 14 ('*LIV Submission*'); Law Council of Australia, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 11 ('*LCA Submission*').

Unfortunately, the ACNC may not become aware of financial misconduct until after it has occurred. However, where a lack of financial controls or other serious governance failures have provided the opportunity for an individual or individuals to engage in misuse of charitable assets, the ACNC may attempt to remedy these structural problems and prevent future misconduct by entering into an EU or compliance agreement with the charity or by issuing a direction to the charity – and the ACNC may also refer the prosecution of an offending individual to another agency.⁷⁴

1 EUs and Compliance Agreements

Where the person or people who have committed the misconduct have left the charity, and the current responsible persons and other officers in management roles are willing to change the charity's practices, an EU between the charity and the ACNC may be useful.⁷⁵

For example, during the ACNC's investigation into RSL NSW, the ACNC identified misuse of charity funds by the former State President and also found that the former State Council (RSL NSW's governing body) had failed to properly investigate the misuse of those funds and had failed to report the allegations to police.⁷⁶ RSL NSW acknowledged that its State Councillors (the charity's responsible persons) had been ignorant of their directors' duties and it had asked those State Councillors who had served during the consideration of the State President's conduct to resign.⁷⁷ The ACNC accepted an EU from RSL NSW, which covered a three-year period and set out 15 actions that RSL NSW was required to implement to help RSL NSW comply with Governance Standard 1, the operational recordkeeping obligation under section 55-5(2) of the *ACNC Act*, and Governance Standard 5.⁷⁸

If the ACNC cannot use its power under section 90-10 of the *ACNC Act* to accept an EU (given by a registered charity that is a federally regulated entity), it may use a compliance agreement whereby the charity makes a voluntary undertaking to make certain changes, such as improving the charity's management

74 Note that poor financial management or poor governance make charities vulnerable to abuse: see 'Monitoring Concerns about Charities', *Australian Charities and Not-for-profits Commission* (Web Page, 21 February 2017) <<https://www.acnc.gov.au/tools/webinars/monitoring-concerns-about-charities>>. On strong financial controls, see 'Setting Up Strong Financial Controls', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/factsheets/setting-strong-financial-controls>>.

75 *ACNC Regulatory Approach Statement 2018* (n 71) 11 [54].

76 Australian Charities and Not-for-profits Commission, 'Undertaking Summary: Enforceable Undertaking Accepted by the Australian Charities and Not-for-profits Commission from the Returned and Services League of Australia (New South Wales Branch)' (Press Release, 15 May 2018) ('*ACNC RSL Undertaking*'); 'ACNC Takes Compliance Action against Two RSL Charities', *Australian Charities and Not-for-profits Commission* (Web Page, 15 May 2018) <<https://www.acnc.gov.au/media/news/acnc-takes-compliance-action-against-two-rsl-charities>>.

77 *ACNC RSL Undertaking* (n 76).

78 For example, the State Councillors needed to complete a course with the Australian Institute of Company Directors; the charity was required to maintain policies and procedures that regulated the use of the charity's credit cards and the reimbursement of expenses incurred by State Councillors and employees.

practices or governance arrangements.⁷⁹ A compliance agreement is an action plan drawn up by the ACNC in consultation with the charity and sets out the measures that the charity needs to undertake to ensure that it is not in breach of the *ACNC Act* or *ACNC Regulation*.⁸⁰ Compliance agreements have been used more frequently by the ACNC than EUs. This is likely due to the constitutional uncertainty of the *ACNC Act*.⁸¹

2 Directions

The ACNC may also issue a direction to a charity to address the misuse of charitable assets, where the misuse was facilitated by governance failures. For example, the ACNC Commissioner issued a direction to Returned & Services League of Australia Limited (also known as RSL National) to take specific action to address breaches of Governance Standard 1 and Governance Standard 5 in relation to the giving of excessive gifts (totalling over \$30,000 in value) to the charity's outgoing National President.⁸² The direction required the charity to engage a governance expert to conduct a review of their board and governance practices, and to then prepare a report outlining an action plan for the charity to implement.

The ACNC also issued a direction to the Returned & Services League of Australia (Queensland Branch) ('RSL Queensland'), in response to breaches of Governance Standard 5 and the obligations under section 55-5 of the *ACNC Act*, including making monthly payments to directors for 'out of pocket' expenses and failing to retain records of the directors' operational use of RSL Queensland vehicles.⁸³ The ACNC's direction included requiring the charity to submit to the ACNC a 'Board Resources Policy' clearly explaining the scope and limitations of the directors' entitlements and resources, and also requiring the charity to engage a 'suitably qualified independent governance expert'⁸⁴ to conduct an evaluation of the board's performance and effectiveness, so that RSL Queensland could determine what training was required for the board.

79 *ACNC CPS 2013/01* (n 52) 7 [57]–[60].

80 Only one compliance agreement has been published on the ACNC Charity Compliance Decisions website: 'ACNC Charity Compliance Decisions', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/raise-concern/regulating-charities/action-taken-against-charities>>. This is because the ACNC cannot publish a Compliance Agreement without consent from the charity: *ACNC Charity Compliance Report 2018* (n 18) 24. For example, in 2018, the ACNC entered into 24 compliance agreements: at 7.

81 For detail, see, eg, Aroney and Turnour (n 14).

82 Australian Charities and Not-for-profits Commission, 'Direction Issued by the Australian Charities and Not-for-profits Commission to the Returned & Services League of Australia Limited' (Direction, 14 February 2018).

83 Australian Charities and Not-for-profits Commission, 'Direction Summary: Summary of a Direction Issued by the Australian Charities and Not-for-profits Commission to the Returned & Services League of Australia (Queensland Branch)' (Press Release, 29 March 2018).

84 *Ibid.*

3 Revocation

If the charity is unwilling to cooperate with the ACNC, and the ACNC cannot use its enforcement powers (as the charity may not be a federally regulated entity or there is no relevant external conduct standard breach), the ACNC may resort to revoking the charity's registration. The Commissioner may revoke the registration of a charity if the Commissioner reasonably believes that the charity has contravened a provision of the *ACNC Act* (or it is more likely than not that it will contravene a provision of the Act), or if the Commissioner reasonably believes that the charity has not complied with a governance standard or external conduct standard (or it is more likely than not that the charity will not comply with such a standard).⁸⁵ The ACNC has used its revocation power as a final resort in compliance cases; however, it is unclear from the ACNC's published reports whether any of these cases have concerned misuse of charitable assets.⁸⁶

E The Significant Gaps in the ACNC Regulatory Framework

There are three main problems with the ACNC regulatory framework. First, a key weakness of the ACNC framework is that it provides very limited possibilities for pursuing individuals. Governance Standard 5 does not place duties directly on the charity's responsible persons; rather, it places an obligation on the charity to take reasonable steps to ensure that its responsible persons are subject to, and comply with, certain duties. Additionally, the main enforcement power that the ACNC can apply in relation to individuals is the power to suspend or remove responsible persons – and it has never been used. This power can only be used where the individual is a responsible person of a charity that is a federally regulated entity. It cannot be used in relation to senior officers of the charity who are not responsible persons. The ACNC is therefore likely to refer an individual who has engaged in misconduct (and possibly a criminal offence) to another relevant government agency.

There are some very narrow circumstances under which individuals could be subject to criminal responsibility under the *ACNC Act*. For example, certain responsible persons (of unincorporated associations or trusts) may be deemed to have committed an offence where the registered charity has committed an offence against the *ACNC Act*.⁸⁷ These provisions could be used to impose criminal

85 *ACNC Act 2012* (Cth) ss 35-10(1)(c)(i)–(ii).

86 Between its establishment and June 2020, the ACNC revoked the registration of 95 charities following compliance investigations: one in 2013–14, 10 in both 2014–15 and 2015–16, 22 in both 2016–17 and 2017–18, 12 in 2018–19 and 18 in 2019–20: Australian Charities and Not-for-profits Commission, *ACNC Annual Report 2013–14* (Report, October 2014) 47; Australian Charities and Not-for-profits Commission, *ACNC Annual Report 2014–15* (Report, October 2015) 51; Australian Charities and Not-for-profits Commission, *ACNC Annual Report 2015–16* (Report, October 2016) 66; Australian Charities and Not-for-profits Commission, *ACNC Annual Report 2016–17* (Report, September 2017) 3, 58; Australian Charities and Not-for-profits Commission, *Annual Report 2017–18* (Report, October 2018) 49; Australian Charities and Not-for-profits Commission, *Annual Report 2018–19* (Report, September 2019) 51; Australian Charities and Not-for-profits Commission, *Annual Report 2019–20* (Report, August 2020) 25. The ACNC's resort to its revocation power is, again, likely to be influenced by the constitutional uncertainty of the ACNC legislation.

87 *ACNC Act 2012* (Cth) ss 180-10, 180-15, 180-25. See also Ramsay and Webster (n 33) 150.

liability on an individual where misuse has occurred in the context of a breach of the recordkeeping obligations under section 55-5 of the *ACNC Act*.⁸⁸

Second, the ACNC has limited use of its enforcement powers under part 4-2 of the *ACNC Act* if the charity is not a federally regulated entity – the ACNC could only use these powers to enforce the external conduct standards. In addition, the ACNC currently has no legislative power to require the charity to provide the information that may be needed to make an assessment as to whether the charity is a ‘trading or financial corporation’ and therefore a ‘constitutional corporation’ (a type of federally regulated entity).⁸⁹ The Australian National Audit Office has also noted that there is a ‘time and cost impact’ for the ACNC in determining whether a charity is a federally regulated entity, and ‘a determination typically requires internal legal advice and in more complex cases external legal advice (through the Attorney-General’s Department)’.⁹⁰

This means that if the ACNC believes that a charity does not (or may not) fall within the definition of a federally regulated entity, the ACNC may resort to the use of its revocation power, where it cannot work with the charity to address compliance issues (for example, by entering into a compliance agreement). Revocation is arguably an unsuitable deterrent to deliberate misuse of charitable assets given that it operates against the charity rather than against the individual(s) involved. The constitutional uncertainty that surrounds the ACNC’s enforcement powers therefore limit their use.⁹¹

Third, the ACNC has no power to protect a charity’s assets once the charity has been deregistered – whether revocation has occurred at the charity’s request or because the ACNC Commissioner believes on reasonable grounds that the charity is no longer entitled to registration.⁹² This is because the ACNC’s jurisdiction only covers registered charities – not those that have not been registered or have had

88 A registered charity commits an offence if it does not comply with the requirements of section 55-5. If such an offence is committed by a charitable trust, no trustee of which is a body corporate, any individual who was a trustee at the time of the offence would be deemed to have committed the offence. Management committee members of an unincorporated association that commits such an offence could also be criminally responsible (subject to the applicability of defences). See *ACNC Act 2012* (Cth) ss 55-5(6), 180-25, 180-10, 180-15.

89 Australian Charities and Not-for-profits Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (19 January 2018) 59 (*‘ACNC Submission’*).

90 Australian National Audit Office, *Regulation of Charities by the Australian Charities and Not-for-profits Commission* (Auditor-General Report No 29 2019–20, 31 March 2020) 52–3. In addition, guidance provided to government agencies may lead such agencies to stay away from administrative decisions that raise potential constitutional issues and find means to deal with presenting regulatory issues squarely within the relevant statutory scheme and constitutional powers. See, eg, Australian Government Attorney-General’s Department, Office of Legal Services Coordination, ‘Principles of Constitutional Litigation Involving Commonwealth Entities’ (Guidance Note 5, June 2018) <<https://www.ag.gov.au/sites/default/files/2020-03/Guidance-note-5-principles-of-constitutional-litigation-involving-corporate-commonwealth-entities.pdf>>.

91 For a discussion of the constitutional issues, see Aroney and Turnour (n 14).

92 *ACNC Act 2012* (Cth) s 35-10; see also *LCA Submission* (n 73) 11 [25].

their registration revoked. A number of submissions to the *ACNC Review* expressed concern about this gap in regulatory power.⁹³

The constitutional limitations underlying the ACNC legislation and the resultant narrow regulatory framework therefore constrain the ACNC's regulatory actions. In Part IV, we consider the extent to which other legislative frameworks can protect charitable assets and sanction individuals involved in misuse. Then in Part V, we outline recommendations to address the gaps in the legislative frameworks.

IV OTHER LEGISLATIVE FRAMEWORKS RELEVANT TO MISUSE

When the ACNC is investigating a compliance matter, the ACNC will consider whether another regulator is more appropriately placed to take action and will refer a case where appropriate. In cases involving misuse of assets that may constitute criminal conduct, the ACNC tends to encourage charities to take the case to the relevant state police force.⁹⁴ This may be because prosecuting matters relating to non-profit organisations is not a regulatory priority for some regulators. In particular, ASIC and the state and territory Attorneys-General appear to be reluctant to take action in relation to charities.⁹⁵ However, the South Australian Consumer and Business Services, New South Wales Fair Trading and the Queensland Office of Fair Trading have prosecuted some cases; and the Office of the Registrar of Indigenous Corporations ('ORIC') is very proactive in cases of misuse of charitable assets.

First, we will cover frameworks that apply to various types of charitable entities (namely, crimes legislation and charitable fundraising legislation). Then we will consider law that is entity-specific – charities take a number of forms including companies, incorporated associations, co-operatives, unincorporated

93 See, eg, Australian Community Philanthropy, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 3, 10; Australian Taxation Office, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (30 April 2018) 6; Community Council for Australia, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018) 9; World Vision, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 4–5; CPA Australia, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 5–6 ('CPA Submission'); LIV Submission (n 73) 11; Prolegis Lawyers, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 2, 5 ('Prolegis Submission'); Philanthropy Australia, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 6–7 ('Philanthropy Australia Submission'); Lock the Gate, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 1–2.

94 See, eg, 'ACNC Reveals Charity Fraud', *Pro Bono Australia* (online, 28 January 2014) <<https://probonoaustralia.com.au/news/2014/01/acnc-reveals-charity-fraud/>>.

95 See, eg, Ian Murray, 'Regulating Charity in a Federated State: The Australian Perspective' (2019) 9(4) *Nonprofit Policy Forum* 20180034:1–17, 4; Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 122; Stephen Judd, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that Made the Difference* (Hammond Press, 2012) 261–2.

associations, and charitable trusts. Our focus is on the standing and ability of other regulators to take action in cases of misuse of charity assets, with particular focus on incorporated charities.

A State and Territory Crimes and Fundraising Legislation

First, all of the states and territories have fraud offences – most jurisdictions have offences in relation to both dishonestly obtaining a financial advantage by deception and dishonestly obtaining property by deception.⁹⁶ However, the wording and structure of the offences differs between jurisdictions. Some jurisdictions have more than one fraud offence (such as the crime of ‘obtaining financial advantage by deception’ and the crime of ‘obtaining property by deception’);⁹⁷ others have one crime that covers a broader range of misconduct (generally described as the crime of ‘fraud’).⁹⁸ The wording of the offences has an impact on the scope of the conduct to which they apply. This may mean that some instances of misuse of charitable assets may constitute a criminal offence in some jurisdictions, but not others.

Most of the fraud offences involve an element of ‘deception’ or ‘intent to defraud, by deceit or any fraudulent means’ as well as dishonesty;⁹⁹ some simply require dishonesty but no deception;¹⁰⁰ others require deception but do not require dishonesty.¹⁰¹ Some fraud offences relating to obtaining property by deception require an ‘intention of permanently depriving’ a person of their property;¹⁰² others are not restricted in this manner.¹⁰³ Some offences concern obtaining a ‘financial advantage’,¹⁰⁴ while others extend to ‘a benefit’¹⁰⁵ or ‘a benefit or advantage, pecuniary or otherwise’.¹⁰⁶

96 South Australia (‘SA’) does not have an offence for obtaining property by deception. The SA offence of deception provides that a person who deceives another and by doing so (a) dishonestly benefits him/herself or a third person or (b) dishonestly causes a detriment to the person subjected to the deception or a third person, is guilty of an offence: *Criminal Law Consolidation Act 1935* (SA) s 139.

97 *Criminal Code 2002* (ACT) ss 326, 332; *Criminal Code Act 1924* (Tas) ss 252A, 253A; *Crimes Act 1958* (Vic) ss 81, 82.

98 *Crimes Act 1900* (NSW) s 192E; *Criminal Code Act 1983* (NT) s 227; *Criminal Code Act 1899* (Qld) s 408C; *Criminal Law Consolidation Act 1935* (SA) s 139; *Criminal Code Act Compilation Act 1913* (WA) s 409.

99 *Criminal Code 2002* (ACT) ss 326, 332; *Crimes Act 1900* (NSW) s 192E(1); *Criminal Law Consolidation Act 1935* (SA) s 139; *Criminal Code Act 1924* (Tas) ss 252A(1), 253A; *Crimes Act 1958* (Vic) ss 81(1), 82(1); *Criminal Code Act Compilation Act 1913* (WA) s 409(1).

100 *Criminal Code Act 1899* (Qld) s 408C(1).

101 *Criminal Code Act 1983* (NT) s 227(1).

102 *Criminal Code 2002* (ACT) s 326; *Crimes Act 1958* (Vic) s 81(1).

103 *Crimes Act 1900* (NSW) s 192E(1); *Criminal Code Act 1983* (NT) s 227(1); *Criminal Code Act 1899* (Qld) s 408C(1)(b); *Criminal Code Act 1924* (Tas) s 253A; *Criminal Code Act Compilation Act 1913* (WA) s 409(1). Note that under the Queensland legislation, if the offender is an employee of the victim (eg, the charity) or if the offender is a director or officer of a victim corporation (eg, the charity is a charitable corporation), that offender will be subject to a higher penalty than if they had not committed the fraud against their employer, or if they were an officer or director of another type of entity (maximum penalty of 14 years imprisonment compared to 5): *Criminal Code Act 1899* (Qld) ss 408C(2)(a)–(b).

104 *Criminal Code 2002* (ACT) s 332; *Crimes Act 1900* (NSW) s 192E(1); *Criminal Code Act 1924* (Tas) s 252A(1); *Crimes Act 1958* (Vic) s 82(1).

105 *Criminal Code Act 1983* (NT) s 227(1); *Criminal Law Consolidation Act 1935* (SA) s 139.

106 *Criminal Code Act 1899* (Qld) s 408C(1)(d); *Criminal Code Act Compilation Act 1913* (WA) s 409(1).

There are a few examples of state police investigating and referring for prosecution cases involving fraud committed against charities – such as the Victorian Director of Public Prosecutions case against the former senior manager of Guide Dogs Victoria under section 82 of the *Crimes Act 1982* (Vic) (who was convicted of obtaining financial advantage by deception and placed on a three-year Community Correction Order)¹⁰⁷ and the New South Wales Police case against the former State President of RSL NSW (who was found guilty and convicted of dishonestly obtaining financial advantage by deception under section 192E of the *Crimes Act 1900* (NSW) and was placed on a two-year Community Corrections Order),¹⁰⁸ both outlined in Part II above. Further examples include action taken by Tasmania Police against the former Chief Executive Officer (‘CEO’) of the Meals on Wheels Association of Tasmania (who pleaded guilty to dishonestly acquiring a financial advantage under section 252A of the *Criminal Code Act 1924* (Tas) and was sentenced to an 18-month home detention order)¹⁰⁹ and action taken by New South Wales Police against a former Surf Life Saving New South Wales general manager (who was charged with multiple offences under the former section 178BA (obtaining money by deception) and under section 192E (dishonestly obtaining a financial advantage by deception) of the *Crimes Act 1900* (NSW) in relation to the alleged misappropriation of approximately \$2.7 million over a 10-year period).¹¹⁰

Attempts to misappropriate charitable assets may also be dealt with in some jurisdictions by offences concerning falsifying documents or records.¹¹¹ For example, in the Northern Territory and Victoria, any person who, with a view to gain for himself/herself or another, falsifies any account or any record or document made or required for any accounting purpose is guilty of an offence.¹¹² Additionally, where a person is a trustee, specific offences may be used, such as those under the *Criminal Code Act 1983* (NT) and the *Criminal Code Act 1924* (Tas), which provide that any trustee of any property who, ‘with intent to defraud’, converts the property to any use not authorised by the trust is guilty of an offence.¹¹³

Second, through the regulation of charitable fundraising, the states and territories have some power in relation to the misuse of money and other goods that have been donated. For example, under section 20 of the *Charitable Fundraising Act 1991* (NSW), any money or benefit received in the course of a fundraising appeal is to be applied according to the objects or purposes represented by or on behalf of the persons conducting the appeal as the purposes or objects of the

107 *DPP v Cirianni* [2018] VCC 2288.

108 For detail, see Xiao (n 23); McKinnell (n 23); Wells (n 23).

109 *Tasmania v Burk* (Supreme Court of Tasmania, Brett J, 5 August 2020).

110 Jamie McKinnell and Selby Stewart, ‘Former Surf Life Saving NSW Boss Charged over “Brazen” \$2.7m Charity Fraud’, *ABC News* (online, 21 August 2019) <<https://www.abc.net.au/news/2019-08-21/surf-life-saving-nsw--boss-arrested-over-fraud/11435038>>. This matter is still before the courts: ‘Saving the Surf Life Savers’, *Australian Institute of Company Directors* (Web Page, 1 March 2020) <<https://aicd.companydirectors.com.au/membership/company-director-magazine/2020-back-editions/march/saving-the-surf-life-savers>>.

111 *Criminal Code Act 1983* (NT) s 233; *Criminal Law Consolidation Act 1935* (SA) s 140; *Criminal Code Act 1924* (Tas) s 261; *Crimes Act 1958* (Vic) s 83; *Criminal Code Act Compilation Act 1913* (WA) s 419.

112 *Criminal Code Act 1983* (NT) s 233; *Crimes Act 1958* (Vic) s 83.

113 *Criminal Code Act 1983* (NT) s 232; *Criminal Code Act 1924* (Tas) s 260(1).

appeal;¹¹⁴ a person is guilty of an offence if they are conducting a fundraising appeal for the charity (or are a member of the charity's governing body), and are 'in any way directly or indirectly concerned in', or they aid, abet, counsel or procure, a contravention.¹¹⁵ A person convicted of an offence under section 20 is also liable to the charity for the loss incurred as a result of the offence.¹¹⁶ In Queensland and Victoria, certain individuals may also commit an offence by misusing 'any money or articles' obtained by a fundraising appeal (Queensland) or 'the net proceeds' of an appeal (Victoria).¹¹⁷

By contrast, some jurisdictions do not impose liability in relation to the misuse of charitable assets that are received through fundraising or 'collections', but misuse is grounds for the licence that enables that collection for charitable purposes to be revoked,¹¹⁸ other jurisdictions only impose liability on the charity, rather than on an individual, for the misapplication of the proceeds of a fundraising appeal.¹¹⁹ For example, under the Tasmanian legislation, an organisation must not permit any donation given for any charitable purpose to be used for any purpose other than the purpose for which it was obtained, except for reasonable expenses incurred in relation to the administration of the organisation.¹²⁰ There is no legislation regulating charitable fundraising in the Northern Territory.¹²¹

There are also other controls in place in some jurisdictions. For example, under section 13(1) of the *Collections for Charities Act 2001* (Tas), an organisation may receive a fine if it permits an agent, contractor, officer or employee of that organisation to receive any benefit which is manifestly excessive, if that benefit in whole or in part is derived from funds obtained by donation.

However, Myles McGregor-Lowndes observed in his evidence to the Senate Select Committee on Charity Fundraising in the 21st Century that state and territory charity regulators 'don't go to their fundraising or collections acts; they go to the criminal law for bogus flood or bushfire collections or other frauds'.¹²² Indeed, there only appears to be one case that has been reported in the media in which a state regulator used their fundraising legislation to take action against an individual who misappropriated charitable donated funds.¹²³

114 *Charitable Fundraising Act 1991* (NSW) s 20(1).

115 *Ibid* s 20(7).

116 *Ibid* s 20(8).

117 *Collections Act 1966* (Qld) s 39; *Fundraising Act 1998* (Vic) s 26(1).

118 See, eg, *Collections for Charitable Purposes Act 1939* (SA) s 12(4)(a); *Charitable Collections Act 1946* (WA) s 13(2)(a).

119 *Charitable Collections Act 2003* (ACT) s 44; *Collections for Charities Act 2001* (Tas) s 14. Note that, since 1 July 2017, charities registered with the ACNC no longer need to hold an Australian Capital Territory ('ACT') charitable collections licence: *Charitable Collections Act 2003* (ACT) s 14(2). Accordingly, the section 44 offences do not apply to registered charities.

120 *Collections for Charities Act 2001* (Tas) s 14.

121 However, raffle and gaming activities are governed by the *Gaming Control Act 1993* (NT) and the *Gaming Control (Community Gaming) Regulations 2006* (NT), and administered by Licensing Northern Territory.

122 Evidence to Senate Select Committee on Charity Fundraising in the 21st Century, Parliament of Australia, Brisbane, 31 January 2019, 11 (Myles McGregor-Lowndes).

123 In June 2018, the Acting President of Furkids Animal Rescue Inc ('Furkids') was fined \$7000 after being found guilty of two counts of breaching the *Collections Act 1966* (Qld) by transferring money from the

B The Regulation of Charitable Corporations

Third, individuals working for charities that are corporations may be subject to both legislative duties (under the *Corporations Act* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('CATSI Act')) and general law duties. Under the general law, directors of companies have various duties, including duties of reasonable care, skill and diligence, duties of good faith and of proper purpose, and duties regarding conflict of interest and profits from position.¹²⁴ Senior executive officers of companies also owe these general law duties to their companies, the content of which is likely to be affected by the terms of their contract of service¹²⁵ and whether they are sufficiently senior to be classified as fiduciaries in accordance with equity jurisprudence.

1 *Corporations Act*

However, the *Corporations Act* remedies available in relation to misconduct by directors, officers and employees of registered charities are limited due to the shift in oversight from ASIC to the ACNC.¹²⁶ Section 111L of the *Corporations Act* is generally seen to have 'turned off' certain statutory provisions in relation to registered charities on the establishment of the ACNC and on the commencement of the governance standards in 2013.¹²⁷ In particular, since 2013, the duties under sections 180–3 (the duties to act with reasonable care and diligence, to act in good faith in the best interests of the company and for a proper purpose, and to not improperly use position or information from position) are no longer applicable to directors or officers of registered charities.¹²⁸ However, as the offences in section

Furkids bank account to pay two personal electricity bills: see Darryl Swindells, 'Fraud and NOCLAR' (2018) 14 *For Impact: News for the Not-for-Profit Sector* 1, 14.

124 For detail, see Ramsay and Webster (n 33) 138–9; RP Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Australia, online edition, 2020) [9.020].

125 Austin and Ramsay (n 124) [8.045], [9.040].

126 See Ramsay and Webster (n 33) 131–3.

127 *ACNC (CT) Act 2012* (Cth) sch 3 pt 3 divs 1–2. This is reflected in submissions made by both the Australian Securities and Investments Commission ('ASIC') and the ACNC to the *ACNC Review* and by Recommendation 11 of the *ACNC Review*, which was to turn on these provisions of the *Corporations Act*: see *ACNC Submission* (n 89) 42 [7.3]; Australian Securities and Investments Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (8 March 2018) 2–3 ('*ASIC Submission*'); *ACNC Review* (n 14) 45, 48–9. The *Bergin Report* (n 1) at [8.6.48] notes that sections 180–3 of the *Corporations Act* became inapplicable to the Returned and Services League of Australia (New South Wales Branch) ('RSL NSW') once it became registered under the *ACNC Act 2012* (Cth) after 1 July 2013. An alternative view is that the effect of section 111L is to turn off the provisions just for charitable companies but not for individual directors and officers. Whilst this view is certainly open, the practical reality is that both key regulators view the duties as having been turned off and the ACNC has taken the view that it is appropriate to deal with directors' duties as a matter for the charity in line with Governance Standard 5. At the very least, authoritative clarification as to whether the statutory duties apply to directors and officers of charitable companies is needed. The ACNC Review Panel commented that the 'uncertainty in the application of section 111L compounds the confusion' for directors of charitable companies and therefore stated: 'Director's duties and other provisions "turned off" under section 111L of the *Corporations Act 2001* (Cth) should be "turned on" to resolve ambiguity in relation to the application of the *Corporations Act 2001* (Cth) provisions to companies registered under the *ACNC Act* and their directors and officers': see *ACNC Review* (n 14) 45, 49.

128 *ACNC (CT) Act 2012* (Cth) sch 3 s 25, amending *Corporations Act 2001* (Cth) s 111L(1).

184 of the *Corporations Act* have not been turned off for registered charities, it is still possible for directors and other officers to be prosecuted for failure to exercise their powers and discharge their duties in good faith in the best interests of the charity or for a proper purpose, where they are reckless or dishonest.¹²⁹ Directors, other officers and employees may also commit an offence if they use their position dishonestly with the intention of directly or indirectly gaining an advantage for themselves or someone else (or are reckless as to whether the use of position may result in such an advantage).¹³⁰ However, as section 184 is a criminal offence, it will be difficult to meet the standard of proof required.

Additionally, section 191, which requires directors to disclose a material personal interest in a matter that relates to the affairs of the company, is also viewed as having been turned off.¹³¹ Section 195 (on voting restrictions for directors of public companies) has not been specifically switched off for registered charities; however, the interlinking with section 191 means that section 195 is unlikely to have any practical application for those companies.¹³²

In the context of misuse of charitable assets, it should also be noted that the Chapter 2E provisions, which require member approval for giving financial benefits to related parties, have not been turned off and apply to charitable companies that are public companies unless those companies have omitted 'Limited' from their name in accordance with section 150 of the *Corporations Act*.¹³³ Contravention of section 208 could give rise to civil penalty or criminal proceedings against a person involved in the contravention.¹³⁴

There are a number of problems with the inapplicability of the *Corporations Act* duties. First, the corporate regulator, ASIC, no longer has standing in relation to directors or officers of charitable companies who misuse charitable assets in breach of the statutory duties in sections 180–3 of the *Corporations Act*. Additionally, although the charity can take action based on breach of general law directors' duties, the cost of legal action may be a significant deterrent.¹³⁵ Also, penalties for breach of these general law duties do not include civil penalty consequences such as pecuniary penalty, relinquishment, compensation or disqualification.¹³⁶

129 *Corporations Act 2001* (Cth) s 184(1).

130 *Ibid* s 184(2). Section 588G of the *Corporations Act 2001* (Cth), which imposes a duty in relation to insolvent trading, has also not been turned off.

131 *ACNC (CT) Act 2012* (Cth) sch 3 s 26, amending *Corporations Act 2001* (Cth) s 111L(1).

132 Under section 195(1) of the *Corporations Act 2001* (Cth), a director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not be present while the matter is being considered or vote – but section 195(1A) provides that section 195(1) does not apply if the interest does not need to be disclosed under section 191. The ACNC noted that it was 'unclear' how section 195 applies to charitable companies: *ACNC Submission* (n 89) 45. See also, *ASIC Submission* (n 127) 3–4.

133 For discussion, see Rosemary Teele Langford, 'Charitable Companies and Related Party Transactions' (2021) 38(2) *Company and Securities Law Journal* 91 ('Related Parties').

134 *Corporations Act 2001* (Cth) ss 209(2)–(3).

135 Woodward and Marshall note that '[i]t is more likely that an action in the name of the company will only be taken when matters have deteriorated to the point where a liquidator or administrator is appointed': Woodward and Marshall (n 4) 185.

136 See *Corporations Act 2001* (Cth) ss 1317G, 1317H, 1317GAB, 206C. By contrast, proof of breach of the general law duties potentially results in equitable remedies such as injunction, declaration, rescission,

Disqualification from managing corporations is a particularly important sanction for the purposes of deterrence¹³⁷ and protection of the public.¹³⁸

This position can be contrasted with the activeness of ORIC in relation to directors and officers of Aboriginal and Torres Strait Islander corporations registered under the *CATSI Act*.¹³⁹ Not only has the Registrar initiated proceedings in instances where serious dishonest misuse of charitable assets has occurred, the Registrar has also taken action in cases where misconduct by officers of Aboriginal and Torres Strait Islander corporations may not have been undertaken for a ‘personal financial gain’,¹⁴⁰ but rather may have been due to a misguided belief that what was being done was in the best interests of the charity.¹⁴¹

The following problems arise from the disapplication of these duties to charitable companies. First, the statutory duties in sections 180–3 apply not only to directors but also to officers.¹⁴² Disabling these duties means that officers of charitable companies are not subject to statutory duties. The indirect duties in Governance Standard 5 apply only to responsible persons and therefore apply only in relation to directors of charitable companies but not to officers. In addition, sections 182 and 183 of the *Corporations Act* (which proscribe misuse of position and misuse of information from position) apply to employees as well as to directors and officers. Turning off the duties in sections 182 and 183 therefore results in employees of charitable companies not being subject to these duties, in contrast to employees of non-charitable corporations. There is arguably no justification for this distinction.

Second, the fact that the statutory duties are turned off means that the business judgment rule in section 180(2) is also turned off as concerns the equivalent duties of care and diligence that arise in equity and at common law. This was arguably unintentional. Section 180(2) provides that a director or officer of a corporation

compensation, account of profits and/or constructive trust. Proof of breach of the duty of care may also result in common law damages: Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) ch 12.

137 See, eg, Economics References Committee, ‘*Lifting the Fear and Suppressing the Greed*’: *Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (Report, March 2017) 66–8 [5.10]–[5.18].

138 Note that if a person is disqualified from managing a corporation under the *Corporations Act*, they cannot be a responsible person of a registered charity: see *ACNC Regulation 2013* (Cth) s 45.20(3)(a).

139 The Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) noted, at 27 [1.35], as follows: ‘Including a civil penalty scheme in the Bill is appropriate considering that civil penalties have traditionally been directed against corporate wrongdoing if imprisonment is either not available or is inappropriate. The civil penalty scheme will also provide a strong financial disincentive against corporate wrongdoing and is an appropriate non-criminal alternative in the context of regulating Indigenous corporations’. See also *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412, 419 [29] (Jacobson J).

140 *Registrar of Aboriginal and Torres Strait Islander Corporations v Ponto* (2012) 208 FCR 346, 362 [79] (Reeves J).

141 See, eg, *Registrar of Aboriginal and Torres Strait Islander Corporations v Berto* [2014] FCA 100, [1], [17], [35] (Mansfield J).

142 ‘Section 9 of the Corporations Act 2001 (Cth) defines an ‘officer’ to include a person ‘who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation’ or ‘who has the capacity to affect significantly the corporation’s financial standing’.

who makes a business judgment is taken to meet the requirements of the duty of care and diligence in section 180(1) ‘and their equivalent duties at common law and in equity’ if they satisfy certain requirements in relation to the judgment.¹⁴³

Third, it is accepted that members of companies can in many circumstances authorise or ratify breach of directors’ general law duties, although there are limits to such authorisation and ratification. By contrast, Australian courts have held that members cannot authorise or ratify breach of statutory duty.¹⁴⁴ The fact that the statutory duties in the *Corporations Act* do not apply to directors (and officers) of charitable companies leads to the anomalous result that members of charitable companies can absolve directors of most breaches of duty whereas members of non-charitable corporations cannot. This is arguably an unintended consequence of the turning off of the duties in the *Corporations Act*.¹⁴⁵

It should be noted that, despite the turning off of the duties in sections 180–3, members of registered charities do have rights where directors of charitable companies breach their general law duties. These include bringing a statutory derivative action or an oppression action.¹⁴⁶ The first option is unlikely to be attractive particularly due to costs (and there are leave requirements to be satisfied). The oppression action is, however, attractive and arguably underappreciated. There are many examples of the oppression remedy being successfully argued in situations involving breach of directors’ duties and the remedy could also prove useful where charitable companies depart from their purposes.¹⁴⁷ The disapplication of the duties in sections 180–3 does not therefore necessarily reduce the ability of members to bring an action (although reapplication of these duties would give members extra bases in cases of breach of duty).¹⁴⁸ Additional measures to empower members should nevertheless be considered.

143 There is an equivalent protection in Protection 2 to Governance Standard 5: see *ACNC Regulation 2013* (Cth) s 45.110. However, it is difficult to see how this would operate to protect an individual director or officer.

144 For discussion, see Rosemary Teele Langford, ‘Statutory Duties and Ratification: Untangling the Maze’ (2021) 15(1) *Journal of Equity* 126.

145 As noted in *LCA Submission* (n 73) 9, another (potentially unintended) consequence of turning off sections 182 and 183 is that the prohibition on obtaining insurance for improper use of position/information (in section 199B) appears no longer to apply.

146 An oppression action may be brought in relation to oppressive, unfairly prejudicial or unfairly discriminatory conduct or conduct that is contrary to the interests of the members as a whole under part 2F.1 of the *Corporations Act 2001* (Cth).

147 See, eg, *Szencorp Pty Ltd v Clean Energy Council Ltd* (2009) 69 ACSR 365, 379 [59] (Goldberg J); Rosemary Teele Langford, ‘Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law’ (2020) 43(3) *University of New South Wales Law Journal* 977, 1002–4. Note also that the oppression action has been used in a number of cases in relation to companies limited by guarantee (see, eg, *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 6)* (2013) 300 ALR 492), co-operatives (see, eg, *Shears v Chisolm* [1994] 2 VR 535; *Bundaberg Sugar Ltd v ISIS Central Sugar Mill Co Ltd* [2007] 2 Qd R 214) and incorporated associations (see, eg, *Popovic v Tanasijevic* (2000) 34 ACSR 1).

148 As to *Corporations Act 2001* (Cth) s 1324, see Part V(A) below.

2 *CATSI Act*

Some registered charities are Aboriginal and Torres Strait Islander corporations registered under the *CATSI Act*. Sections 265-1, 265-5, 265-10 and 265-15 of the *CATSI Act* are the equivalents of sections 180–3 of the *Corporations Act* and section 265-25 mirrors section 184; additionally, sections 268-1, 268-10 and 268-15 mirror sections 191–3 of the *Corporations Act* and section 268-20 mirrors section 195. Sections 284-1 and 284-5 mirror sections 208–9 of the *Corporations Act* on the need for member approval for financial benefit. The provisions in the *CATSI Act* regarding disqualification from managing corporations also mirror those in the *Corporations Act*.¹⁴⁹ None of the *CATSI Act* provisions were turned off for registered charities. The ACNC and ORIC work together to reduce regulatory overlap – there has been no transfer of power from ORIC to the ACNC.

There have been a number of cases in which ORIC has taken action against individuals working for registered charities that are Aboriginal and Torres Strait Islander corporations. ORIC's list of criminal prosecutions and civil proceedings is extensive,¹⁵⁰ and many of these appear to involve instances of misuse of charitable assets. These include a CEO who had arranged bonus payments to himself totalling \$202,312, charged expenses of a personal nature to his corporate credit card, and approved personal payments to a related party of the corporation;¹⁵¹ a CEO who facilitated the unauthorised transfer of more than \$700,000 to himself (by way of unauthorised bonuses payments, time in lieu payments, excess superannuation contributions, unauthorised recreation leave payments, other unauthorised non-salary payments and unauthorised credit card payments);¹⁵² and a chair who was found to have contravened the *CATSI Act* by allowing unauthorised payments to herself, as well as causing the corporation to sell a property to her for below market value and forgiving rental arrears of tenants (including herself) at a time when the corporation was unable to pay its debts.¹⁵³ Each of these cases resulted in declarations of contravention of the sections 265-1 (care and diligence), 265-5 (good faith) and 265-10 (improper use of position) provisions, disqualification from managing Aboriginal and Torres Strait Islander corporations for a specified

149 See *Corporations Act 2001* (Cth) ss 206A, 206B, 206C; *CATSI Act 2006* (Cth) ss 279-1, 279-5, 279-15.

150 'Prosecution Outcomes', *Office of the Registrar of Indigenous Corporations* (Web Page) <<https://www.oric.gov.au/prosecution-outcomes>>.

151 See Office of the Registrar of Indigenous Corporations, 'Landmark Decision against Former CEO of Kempsey Medical Service' (Media Release MR1213-16, 31 October 2012); Office of the Registrar of Indigenous Corporations, 'Registrar Obtains Interim Freezing Orders against Former CEO of Medical Service' (Media Release MR1112-16, 16 December 2011).

152 See Office of the Registrar of Indigenous Corporations, 'Registrar Obtains Freezing Orders against CEO of NSW Aboriginal Medical Service' (Media Release MR1112-19, 25 January 2012); *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham* (2013) 216 FCR 393, 397 (Jacobson J); *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412, 415 (Jacobson J).

153 See *Registrar of Aboriginal and Torres Strait Islander Corporations v Kerkhoffs* [2013] FCA 1445; *Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66.

period and the imposition of a pecuniary penalty.¹⁵⁴ In the second and third cases, the defaulting directors were also required to pay compensation to the charity.¹⁵⁵

ORIC has also used the criminal offences under the *CATSI Act* to address misuse of charitable assets. For example, in 2013, a former CEO pleaded guilty to three charges under the *CATSI Act* for misusing her position (section 265-25(3) of the *CATSI Act*) for a personal gain of \$11,746.23 in cash and \$30,000 towards the purchase of a new four-wheel drive.¹⁵⁶ Additionally, in 2013, a former director and manager of another Aboriginal and Torres Strait Islander corporation, was convicted under section 284-5(3) of the *CATSI Act* for making 80 unauthorised payments to herself from the corporation's funds.¹⁵⁷ At the same time, Nehme has criticised the duties in the *CATSI Act* and ORIC's approach, arguing that more needs to be done to ensure that the duties are culturally appropriate and that building capacity should become one of ORIC's key functions.¹⁵⁸

3 Entities Incorporated by Statute

The duties of those who govern statutory corporations that are charities will depend on the relevant incorporation statute and requirements of any sector regulator.¹⁵⁹

C Co-operatives

Fourth, duties are imposed on directors and officers of co-operatives under state and territory legislation and regulations applying the *Co-operatives National Law* (or 'National Law'),¹⁶⁰ as regulated by various state and territory based

154 In a fourth example, an executive officer and finance officer made loans to themselves using the charity's funds, without seeking approval from the charity's directors in contravention of sections 265-1, 265-5 and 265-10 of the *CATSI Act 2006* (Cth), resulting in orders for disqualification, pecuniary penalties and compensation: see *Registrar of Aboriginal and Torres Strait Islander Corporations v Taylor* [2018] FCA 900; *Registrar of Aboriginal and Torres Strait Islander Corporations v Taylor (No 2)* [2018] FCA 1234.

155 In the third case, there was a declaration regarding failure to cause the company to keep adequate books and records (under section 363-1 of the *CATSI Act 2006* (Cth)), in addition to the contraventions of the key directors' duties: see *Registrar of Aboriginal and Torres Strait Islander Corporations v Kerkhoffs* [2013] FCA 1445.

156 See Office of the Registrar of Indigenous Corporations, 'Former CEO of Yuendumu Women's Centre Jailed' (Media Release MR1213-34, 4 June 2013).

157 See Office of the Registrar of Indigenous Corporations, 'Former Orana Manager Jailed for Fraud' (Media Release MR1314-12, 8 November 2013); Office of the Registrar of Indigenous Corporations, 'Former Director of Orana Appears on Fraud Charges' (Media Release MR1213-21, 5 December 2021).

158 See Marina Nehme, 'Indigenous Corporations and Accountability: The Evolution of the Directors' Duties' (2021) 36(3) *Australian Journal of Corporate Law* 240.

159 For example, for discussion of university statutes, see Bruce Cowley and Stephen Knight, *Duties of Board and Committee Members: A Guide for Corporations, Associations and Statutory Bodies* (Lawbook Co, 2018) ch 10. There is also a lack of clarity as to whether such corporations are included in or excluded from being a 'corporation' for the purposes of the *Corporations Act 2001* (Cth) – for discussion in relation to universities, see John Orr, 'Australian Corporate Universities and the *Corporations Act*' (2012) 17(2) *International Journal of Law and Education* 123.

160 For example, the Co-operatives National Law (Victoria) is located in the appendix to the *Co-operatives National Law Application Act 2013* (Vic) and applied under section 4(1) of the *Co-operatives National Law Application Act 2013* (Vic). In other states and territories, see *Co-operatives National Law (ACT) Act 2017* (ACT); *Co-operatives (Adoption of National Law) Act 2012* (NSW); *Co-operatives National Law*

regulators.¹⁶¹ The *National Law* imposes duties to act in good faith in the best interests of the co-operative and for proper purposes¹⁶² and to act with reasonable care and diligence;¹⁶³ a duty not to misuse information from position;¹⁶⁴ a duty not to misuse position;¹⁶⁵ and duties to disclose certain interests¹⁶⁶ and to abstain from participation.¹⁶⁷ A number of these duties are the same as those in the *Corporations Act* (with the exception of those concerning disclosure of conflicts).

Offences against the *National Law* can be prosecuted by the Registrar of the relevant jurisdiction or a person authorised in writing by the Registrar.¹⁶⁸ The Registrar can apply for a declaration of contravention, a pecuniary penalty or compensation order. Co-operatives may also apply for a compensation order.¹⁶⁹ A wider range of persons can apply for orders against a person on the basis that the person is guilty of fraud, negligence, default, breach of trust or breach of duty where the co-operative has suffered damage as a result.¹⁷⁰

D Incorporated Associations

Fifth, many registered charities are incorporated associations and most of the states and territories have legislation that imposes duties on the members of the management committee of an incorporated association ('committee members') and other 'officers' or 'office holders'. However, New South Wales ('NSW') only has duties that apply to an association's committee members,¹⁷¹ and Tasmania has no broad duties that apply to officers or committee members.¹⁷² It has been

Act 2020 (Qld); Co-operatives National Law (South Australia) Act 2013 (SA); Co-operatives National Law (Tasmania) Act 2015 (Tas) (together, '*Co-operatives National Law*'). Western Australia ('WA') has a slightly different structure, but the substance of the provisions is very similar: see *Co-operatives Act 2009* (WA). There are also regulations in each state and territory.

- 161 These are Consumer Affairs Victoria; New South Wales Fair Trading; Queensland Office of Fair Trading; Department of Mines, Industry Regulation and Safety (WA); South Australia Consumer and Business Services; Licencing Northern Territory; Access Canberra; and Consumer, Building and Occupational Services (Tasmania).
- 162 See *Co-operatives National Law* s 193, for which civil penalties apply (section 554), as well as criminal liability in cases of reckless or intentionally dishonest breaches (see section 196).
- 163 *Ibid* s 192(1), for which civil penalties apply (section 554).
- 164 *Ibid* s 195, for which civil penalties apply (section 554), as well as criminal liability in cases of intentional or reckless breach (section 196).
- 165 *Ibid* s 194, for which civil penalties apply (section 554), as well as criminal liability under section 196 for reckless or intentional breach.
- 166 See, eg, *ibid* s 208 (which is penalised by a fine or imprisonment or both). For detail, see Rosemary Teele Langford, 'Conflicts and Coherence in the Charities Sphere: Would a Conflict by Any Other Name Proscribe the Same?' (2020) 14(1) *Journal of Equity* 1.
- 167 *Co-operatives National Law* s 208. For a case in which action was taken against a director of a co-operative under previous state-based co-operatives legislation, see *Commissioner for Fair Trading v Taukeiano* [2005] NSWSC 722.
- 168 See *Co-operatives National Law* s 552.
- 169 *Ibid* s 558.
- 170 *Ibid* s 541; Cowley and Knight (n 159) 419 [11.430]. As to members' rights in relation to oppression and bringing proceedings, see *Co-operatives National Law* pt 2.5 div 4; *Co-operatives Act 2009* (WA) pt 4 div 5; and *Co-operatives National Law* pt 7.4; *Co-operatives Act 2009* (WA) pt 4 div 6.
- 171 *Associations Incorporation Act 2009* (NSW) ss 30A, 31–3.
- 172 *Associations Incorporation Act 1964* (Tas).

assumed that committee members owe the same common law and equitable duties to associations that directors owe to companies, and that senior officers of associations owe duties in the same manner as senior officers of companies.¹⁷³ In this Part, we focus on the legislative duties given our focus on regulatory standing in cases of misuse of assets.

The definitions of ‘officer’¹⁷⁴ and ‘office holder’¹⁷⁵ are broad and are similar throughout the different jurisdictions.¹⁷⁶ Accordingly, in each jurisdiction that has officers’ or office holders’ duties, the definitions of an ‘officer’ or ‘office holder’ of an association cover the key individuals in charitable organisations; those people who are most likely to commit misuse of charitable assets or misappropriation. There has only been one reported case of court proceedings in relation to the misuse of an incorporated association’s charitable funds, and this involved the former president of that charity.¹⁷⁷

The Australian Capital Territory (‘ACT’), Queensland, South Australia (‘SA’), Victoria and Western Australia (‘WA’) impose a duty of care and diligence on officers or office holders;¹⁷⁸ in NSW, the duty only applies to committee members.¹⁷⁹

173 See the discussion in Ramsay and Webster (n 33) 142–3.

174 *Associations Incorporation Act 1991* (ACT) Dictionary (definition of ‘officer’); *Associations Act 2003* (NT) s 4 (definition of ‘officer’); *Associations Incorporation Act 1981* (Qld) sch 2 (definition of ‘officer’); *Associations Incorporation Act 1985* (SA) s 3 (definition of ‘officer’); *Associations Incorporation Act 2015* (WA) s 3 (definition of ‘officer’).

175 *Associations Incorporation Reform Act 2012* (Vic) s 82.

176 The definitions are based upon the definition of ‘officer’ in section 9 of the *Corporations Act 2001* (Cth) (definition of ‘officer’); see also *CATSI Act 2006* (Cth) s 683-1 (Meaning of director and officer). All definitions of an ‘officer’ or ‘office holder’ include a committee member of the association; most definitions also include an association’s secretary. The definitions, with the exception of Queensland’s definition of ‘officer’, either cover a person ‘who is concerned in or takes part in the management of the association’s affairs’ or they include both of the following: ‘a person, including an employee of the association, who makes, or participates in making, decisions that affect the whole, or a substantial part, of the operations of the association’ and ‘a person who has the capacity to significantly affect the association’s financial standing’. In comparison, Queensland’s ‘officer’ definition includes ‘a manager appointed by the management committee for the association’: see *Associations Incorporation Act 1981* (Qld) sch 2 (definition of ‘officer’). Most definitions also include a person in accordance with whose directions or instructions the committee of the association is accustomed to act.

177 See *Kong v Commissioner for Corporate Affairs* (2014) 121 SASR 244 in which the president of an incorporated association pleaded guilty to six counts of making improper use of a position in an incorporated association, under section 39A(3) of the *Associations Incorporation Act 1985* (SA) and was convicted and sentenced to 20 months’ imprisonment with a non-parole period of six months. On appeal, his sentence was suspended and he was placed on a good behaviour bond. See also ‘CBS Prosecution Sees Association Chief Jailed’, *Consumer and Business Services (SA)* (Web Page, 27 June 2014) <<https://www.cbs.sa.gov.au/news/cbs-prosecution-sees-association-chief-jailed>>; Loukas Founten, ‘Cambodian Association Official Appeals against Jailing for Theft of \$159K’, *ABC News* (online, 11 September 2014) <<https://www.abc.net.au/news/2014-09-11/cambodian-association-theft-appeal-against-jail-sentence/5736940>>.

178 *Associations Incorporation Act 1991* (ACT) s 66A; *Associations Incorporation Act 1981* (Qld) s 70E, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31; *Associations Incorporation Act 1985* (SA) s 39A(4); *Associations Incorporation Reform Act 2012* (Vic) s 84; *Associations Incorporation Act 2015* (WA) s 44. The SA duty only applies to an officer of a ‘prescribed association’, which is an incorporated association that had gross receipts in that association’s previous financial year in excess of \$500,000: *Associations Incorporation Act 1985* (SA) s 3(1) (definition of ‘prescribed association’); *Associations Incorporation Regulations 2008* (SA) reg 4.

179 *Associations Incorporation Act 2009* (NSW) s 30A.

The ACT, Queensland, Victoria and WA have a duty of good faith and proper purpose for officers or office holders.¹⁸⁰ Officers and employees in SA and the Northern Territory ('NT') have duties to not make improper use of position or information obtained from that position; and these type of duties apply to officers or office holders in the ACT, Queensland, Victoria and WA, and to committee members in NSW.¹⁸¹ Management committee members in the ACT, NSW, the NT, Queensland, SA, Victoria and WA also have duties to disclose certain interests (and have associated restrictions on deliberation and voting).¹⁸² Queensland's newly revised Act provides that an incorporated association's management committee members must ensure that they present to the association's annual general meeting the prescribed details of any remuneration paid or other benefits given to any management committee member, senior staff member or relative of such persons.¹⁸³

There are also some other duties and offences that may apply in the context of misuse of charitable assets. Both the NT and SA impose, on an officer of an incorporated association, a duty to not commit an act 'with intent to deceive or defraud the association' or for any fraudulent purpose – in the exercise of his or her powers or the discharge of the duties of his or her office.¹⁸⁴ Queensland has a special fraud offence, which applies to any 'person' who 'obtains possession by false representation or imposition of any property of an incorporated association' or who 'withholds or misapplies' any property of an incorporated association in their possession, or 'wilfully applies' any part of the property to purposes other than those authorised by the Act or by the association's rules.¹⁸⁵ Queensland, the NT and SA also

180 *Associations Incorporation Act 1991* (ACT) s 66B; *Associations Incorporation Act 1981* (Qld) s 70F, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31; *Associations Incorporation Reform Act 2012* (Vic) s 85; *Associations Incorporation Act 2015* (WA) s 45.

181 *Associations Incorporation Act 1991* (ACT) ss 66C–66D; *Associations Incorporation Act 2009* (NSW) ss 32–3; *Associations Act 2003* (NT) ss 33(2)–(3); *Associations Incorporation Act 1981* (Qld) ss 70G–70H, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31; *Associations Incorporation Act 1985* (SA) ss 39A(2)–(3); *Associations Incorporation Reform Act 2012* (Vic) ss 83(1)–(4); *Associations Incorporation Act 2015* (WA) ss 46–7.

182 *Associations Incorporation Act 1991* (ACT) ss 65, 65A; *Associations Incorporation Act 2009* (NSW) s 31; *Associations Act 2003* (NT) ss 31, 32; *Associations Incorporation Act 1981* (Qld) ss 70B, 70C, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31; *Associations Incorporation Act 1985* (SA) ss 31, 32; *Associations Incorporation Reform Act 2012* (Vic) ss 80, 81; *Associations Incorporation Act 2015* (WA) ss 42, 43.

183 *Associations Incorporation Act 1981* (Qld) s 70D, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31.

184 *Associations Act 2003* (NT) s 33(1); *Associations Incorporation Act 1985* (SA) s 39A(1). Additionally, both the Northern Territory ('NT') and SA statutes also contain specific offences regarding misappropriation, which only apply in certain circumstances such as where the association is being wound up or under administration: *Associations Act 2003* (NT) ss 87, 92; *Associations Incorporation Act 1985* (SA) ss 49AA, 49AF. For example, an officer of an incorporated association must not (by false pretences, or by means of another fraud) induce a person to give credit to the association; and an officer must not, with intent to defraud the association, make or purport to make a gift or transfer of, or charge on, property of the association: *Associations Act 2003* (NT) ss 92(1)(a)–(b); *Associations Incorporation Act 1985* (SA) ss 49AF(1)(a)–(b).

185 *Associations Incorporation Act 1981* (Qld) s 122(1).

have offences in relation to the falsification of books¹⁸⁶ – this kind of misconduct may occur when a person is trying to hide the misuse of charitable funds.

The mechanisms available to enforce the duties of officers and committee members differ between jurisdictions. However, the duties concerning disclosure of conflicts of interest and the restrictions on deliberation and voting are all offence provisions¹⁸⁷ – with the exception of NSW’s provision on deliberation and voting (this provision does not appear to be enforceable).¹⁸⁸ Additionally, in WA and Queensland, the officers’ duties are all criminal offences.¹⁸⁹ The relevant regulator in each jurisdiction has power to prosecute offences against the incorporated associations legislation,¹⁹⁰ and in the NT, SA, and WA, others may prosecute the offence with the authorisation of the Minister or Commissioner, the Minister’s permission, or the Commissioner’s authorisation (respectively).¹⁹¹ Most jurisdictions impose a time limit in regards to initiating criminal proceedings.¹⁹²

By contrast, in Victoria, the duties of care and diligence and of good faith and proper purpose, which apply to office holders, are civil penalty provisions;¹⁹³ a person who contravenes a civil penalty provision may be ordered to pay a pecuniary penalty of up to \$20,000.¹⁹⁴ The Victorian office holders’ duties concerning

186 Ibid s 124; *Associations Act 2003* (NT) s 107; *Associations Incorporation Act 1985* (SA) s 58.

187 *Associations Incorporation Act 1991* (ACT) ss 65, 65A; *Associations Incorporation Act 2009* (NSW) s 31(1); *Associations Act 2003* (NT) ss 31, 32; *Associations Incorporation Act 1981* (Qld) ss 70B, 70C, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31; *Associations Incorporation Act 1985* (SA) ss 31, 32; *Associations Incorporation Reform Act 2012* (Vic) ss 80, 81; *Associations Incorporation Act 2015* (WA) ss 42, 43.

188 *Associations Incorporation Act 2009* (NSW) s 31(5).

189 *Associations Incorporation Act 2015* (WA) ss 44–7; *Associations Incorporation Act 1981* (Qld) ss 70E–H, as inserted by *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) s 31.

190 *Associations Incorporation Act 1991* (ACT) s 106(1); *Associations Act 2003* (NT) s 112(1); *Associations Incorporation Act 1985* (SA) s 62E(6); *Associations Incorporation Act 2015* (WA) s 181. In New South Wales (‘NSW’) and Victoria, there are no provisions specifying who has authority to commence proceedings for offences.

191 In the NT, ‘a person authorised by the Minister or Commissioner’ may also prosecute an offence against the Act, as may a ‘person authorised in writing by the Commissioner’ in WA: *Associations Act 2003* (NT) s 112(1); *Associations Incorporation Act 2015* (WA) s 181. In SA, ‘any other person’ may prosecute an offence with the Minister’s consent: *Associations Incorporation Act 1985* (SA) s 62E(6).

192 For example, in SA, Victoria and WA, the regulator (Corporate Affairs Commission, Consumer Affairs Victoria, Commissioner for Consumer Protection) can commence a prosecution of an offence within three years of the day on which the offence is alleged to have been committed: *Associations Incorporation Act 1985* (SA) s 62E(6); *Associations Incorporation Reform Act 2012* (Vic) s 210; *Associations Incorporation Act 2015* (WA) s 180. The ACT legislation provides that proceedings must be commenced within a period of five years after the offence was committed: *Associations Incorporation Act 1991* (ACT) s 106. In both the ACT and SA, the time limit may be extended by the relevant Minister, in a particular case: *Associations Incorporation Act 1991* (ACT) s 106; *Associations Incorporation Act 1985* (SA) s 62E(6). In NSW, only proceedings for certain offences are subject to a three-year time limit. New South Wales Fair Trading may commence criminal proceedings under sections 31(1) (disclosure of interests), 32 (dishonest use of information), 33 (dishonest use of position), 40(1) (association not to provide pecuniary gain for its members), 68(1) or 69 no later than three years from when the offence was alleged to have been committed: *Associations Incorporation Act 2009* (NSW) s 94(2). The NT has no time limit in regards to the prosecution of an offence against the *Associations Act 2003* (NT): *Associations Act 2003* (NT) s 112.

193 *Associations Incorporation Reform Act 2012* (Vic) ss 84(1), 85(1), 146(1).

194 Ibid s 146(2)(c). It should also be possible for a compensation order to be made, as section 1317H of the *Corporations Act 2001* (Cth) appears to be applied without modification: s 146(2).

improper use of information or position may give rise to civil penalty or criminal consequences (but not both).¹⁹⁵ If a person is found guilty of an offence of improper use, the court may order the person to pay compensation to the incorporated association in addition to imposing a criminal penalty.¹⁹⁶

In the NT and SA, the officers' duties may give rise to both criminal and civil liability. Contravention of a duty is a criminal offence,¹⁹⁷ and a person who contravenes one of these provisions is liable also to the association for all profit made by him or her and for all damage suffered by the association as a result of the contravention.¹⁹⁸ Additionally, in the NT and SA, if, on application by the Commissioner of Consumer Affairs or Corporate Affairs Commission (respectively) or a prescribed person (such as a liquidator), the Supreme Court is satisfied that a person is guilty of 'fraud, negligence, default, breach of trust or breach of duty in relation to an incorporated association' and the association has suffered, or is likely to suffer loss or damage, as a result, then the Court may make orders as it considers appropriate (including directing the person to pay money or transfer property to the association), even if the person may have committed an offence in relation to the matter to which the order relates.¹⁹⁹

By contrast, in the ACT, the duties of care and diligence, good faith and proper purpose, and to not misuse an officer's position and information are not civil or criminal liability provisions.²⁰⁰ Similarly, in NSW, there appears to be no enforcement mechanism for committee members' duty of care and diligence, or for the restrictions on voting and deliberation (as noted above).²⁰¹ However, in NSW, there are situations in which committee members may be indirectly liable for misuse of charitable assets. For example, under section 40(1) of the *Associations Incorporation Act 2009* (NSW) ('*NSW Act*'), it is an offence for an association to conduct its affairs so as to provide pecuniary gain for its members.²⁰² If an association contravenes, whether by act or omission, any provision of the *NSW Act*, each committee member is also taken to have contravened that provision if

195 Sections 83(1)–(2) of the *Associations Incorporation Reform Act 2012* (Vic) are civil penalty provisions and sections 83(3)–(4) are offences. Under section 1317M of the *Corporations Act 2001* (Cth), which is applied by section 146 of the *Associations Incorporation Reform Act 2012* (Vic), civil proceedings under part 9.4B of the *Corporations Act 2001* (Cth) may not be instituted against a person in respect of conduct for which the person has been convicted of an offence.

196 *Associations Incorporation Reform Act 2012* (Vic) s 83(5).

197 *Associations Act 2003* (NT) ss 33(1)–(3); *Associations Incorporation Act 1985* (SA) ss 39A(1)–(4).

198 *Associations Act 2003* (NT) s 33(4); *Associations Incorporation Act 1985* (SA) s 39A(5).

199 *Associations Act 2003* (NT) ss 100(2), (4); *Associations Incorporation Act 1985* (SA) ss 62A(2), (4).

200 *Associations Incorporation Act 1991* (ACT) ss 66A–66D. If the person is, or has been, the public officer or a committee member of an incorporated association and the Registrar-General is satisfied that the person has failed to comply with the Act, the Registrar-General could apply to the ACT Civil and Administrative Tribunal for an order disqualifying them from being the public officer or a committee member of an incorporated association for a specified period: at s 63A. However, if an officer is not the public officer or a committee member – but is the secretary, treasurer or an executive officer of the association, or the holder of any other office of the association or is 'concerned in or takes part in the management of the association's affairs' – there seems to be no way to enforce the duties: at s 2, Dictionary (definition of 'officer').

201 *Associations Incorporation Act 2009* (NSW) ss 30A, 31(5).

202 *Ibid* s 40(1).

he or she knowingly authorised or permitted the contravention; and a committee member may be proceeded against and convicted, whether or not any action has been taken against the association under that provision.²⁰³

Where a person is convicted of an offence under the incorporated associations legislation, in certain jurisdictions this may lead to a person being disqualified from their position or being unable to accept an appointment.²⁰⁴ One of the weaknesses of the Victorian regime is that breach of a duty imposed by the *Associations Incorporation Reform Act 2012* (Vic) does not lead to disqualification.²⁰⁵

The standing of state and territory regulators, and their ability to take action, in relation to misuse of charitable assets under incorporated associations legislation thus varies.

E Unincorporated Associations

Sixth, management committee members of an unincorporated association have no general legislative obligations towards the association, as unincorporated associations are not specifically regulated by state or territory legislation.²⁰⁶ Given that an unincorporated association is ‘no more than the aggregate of its members’ and has no separate legal status,²⁰⁷ management committee members owe no general law obligations towards the association. Committee members may, on one view, owe general law duties and contractual duties to members, in some circumstances, although the authorities are inconsistent.²⁰⁸ The introduction of Governance Standard 5 for charitable unincorporated associations has therefore brought a measure of accountability.

F Charitable Trusts

Seventh, there is very limited regulation in relation to non-corporate trustees of charitable trusts. The trustee legislation in the states and territories does not set out any statutory duties relevant to misuse of charitable assets. However, under general law, trustees have various duties including to ‘act with the care which an ordinary prudent man of business would take’²⁰⁹ and to ‘act in good faith, responsibly and

203 Ibid ss 91(1)–(2).

204 See, eg, *Associations Act 2003* (NT) s 30(2)(d); *Associations Incorporation Act 1985* (SA) s 30(2)(d)(i); *Associations Incorporation Act 2015* (WA) ss 39(1)(b)(iii), (2).

205 *Associations Incorporation Reform Act 2012* (Vic) s 78.

206 Note, however, that certain unincorporated organisations may have rules that have been given statutory recognition: see, eg, the rules of the Anglican Church as set out under the *Anglican Church in Australia Constitution Act 1961* (NSW), as considered in *Scandrett v Dowling* (1992) 27 NSWLR 483.

207 GE Dal Pont, *Law of Associations* (LexisNexis Butterworths, 2018) 117; see *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611, 619 (Viscount Simonds for the Privy Council).

208 See, eg, *Cameron v Hogan* (1934) 51 CLR 358, 371 (Rich, Dixon, Evatt and McTierman JJ); *Stevens v Keogh* (1946) 72 CLR 1, 11–12 (Latham CJ), 34 (Williams J) (this case involved misuse of an association’s assets); *Harrison v Hearn* [1972] 1 NSWLR 428, 435, 438–40 (Helsham J) (this case concerned improper use of funds); *Scandrett v Dowling* (1992) 27 NSWLR 483, 491 (Mahoney JA); Jean Warburton, ‘Charities, Members, Accountability and Control’ [1997] *Conveyancer and Property Lawyer* 106, 109–12.

209 *Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, 661 (French CJ, Gummow, Hayne and Crennan JJ).

reasonably'.²¹⁰ They are also subject to fiduciary duties that prohibit them from making an unauthorised profit from their position and from acting in a position where their own interests may conflict with their duty as a trustee.²¹¹

A breach of trust must be enforced in accordance with any relevant state and territory provisions.²¹² Traditionally, in Australia, the state Attorneys-General representing the Crown as *parens patriae*, have been responsible for the regulation and enforcement of charitable trusts.²¹³ The trustee Acts of states and territories generally give enforcement powers to the relevant Attorney-General,²¹⁴ but the Attorneys-General have not actively enforced breaches of the trusts legislation.²¹⁵ Those jurisdictions that provide statutory enforcement mechanisms for the relevant Attorney-General in relation to a charitable trust (the ACT, NSW, Queensland, SA and WA), also provide standing to other 'relevant' or 'interested' persons in addition to the Attorney-General.²¹⁶ Most of those jurisdictions specify that a 'trustee' of the trust may apply to the court for an order;²¹⁷ WA does not.²¹⁸ Queensland also specifies that 'the charity' may apply to the Court for an order in respect of a charitable trust.²¹⁹ It is assumed that in jurisdictions in which the charity itself, or a trustee, is not specified, they could sue as 'any other person'²²⁰ or any person with an 'interest in'²²¹ the trust. In NSW, proceedings in the Supreme Court with respect to any breach of a charitable trust must be authorised by the Attorney-General or leave must be obtained from the Court.²²² In the other jurisdictions, charitable

210 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717 (Walker J).

211 Ramsay and Webster (n 33) 144.

212 The *Trustee Act 1893* (NT), *Trustee Act 1898* (Tas) and *Trustee Act 1958* (Vic) have no provisions on standing for trust proceedings.

213 See, eg, *Strickland v Weldon* (1885) 28 Ch D 426, 430 (Pearson J); *Ku-ring-gai Municipal Council v Attorney-General* (1954) 55 SR (NSW) 65, 69–70.

214 See *Trustee Act 1925* (ACT) s 94A(3)(a); *Charitable Trusts Act 1993* (NSW) s 6; *Trusts Act 1973* (Qld) s 106(2)(a); *Trustee Act 1936* (SA) s 60(2)(a); *Charitable Trusts Act 1962* (WA) s 21(1). The *Trustee Act 1893* (NT), *Trustee Act 1898* (Tas) and *Trustee Act 1958* (Vic) have no provisions on standing for trust proceedings.

215 See above n 95 but note *Borman & Hunter* [2019] FamCA 1003.

216 See, eg, *Re Hampton Fuel Allotment Charity* [1989] Ch 484, 494 (Nicholls LJ). See *Trustee Act 1925* (ACT) s 94A(1), (3) ('relevant person'); *Charitable Trusts Act 1993* (NSW) s 5 ('any other person'); *Trusts Act 1973* (Qld) s 106(2)(c) ('any person interested in the due administration of the trust'); *Trustee Act 1936* (SA) s 60(2)(g) ('any other person who ... has a proper interest in the trust'); *Charitable Trusts Act 1962* (WA) s 21(1) ('any other person'). Case law sees a person to be 'interested' in the due administration of a charitable trust if the person's interest is 'materially greater than or different from that possessed by ordinary members of the public': see, eg, *Re Hampton Fuel Allotment Charity* [1989] Ch 484, 494 (Nicholls LJ). Under the *Charitable Trusts Act 1993* (NSW) s 6, charitable trust proceedings must be authorised by the Attorney-General or by leave from the Court.

217 *Trustee Act 1925* (ACT) s 94A(3)(b); *Charitable Trusts Act 1993* (NSW) s 5(1); *Trusts Act 1973* (Qld) s 106(2)(b); *Trustee Act 1936* (SA) s 60(2)(b).

218 *Charitable Trusts Act 1962* (WA) s 21(1).

219 *Trusts Act 1973* (Qld) s 106(2)(b).

220 *Charitable Trusts Act 1993* (NSW) s 5(1); *Charitable Trusts Act 1962* (WA) s 21(1).

221 *Trustee Act 1925* (ACT) s 94A(3)(g); *Trustee Act 1936* (SA) s 60(2)(g).

222 *Charitable Trusts Act 1993* (NSW) s 6(1). The Court cannot give such leave unless satisfied that the Attorney-General has been given an opportunity to consider whether to authorise the proceedings or that the referral of the matter to the Attorney-General is not appropriate because of the urgency of the matter: at s 6(2).

trust proceedings do not appear to require Attorney-General authorisation, but the Attorney-General (or Minister) would be notified of the application.²²³

The remedies available are very broad, with the *Trustee Act 1925* (ACT) clarifying that the Court may make any order ‘that it considers just’.²²⁴ The *Charitable Trusts Act 1993* (NSW) specifies some of the powers of the Court to protect charitable property (without limiting any other powers of the Court), which include making an order removing any or all trustees of the charitable trust, an order appointing a person as a trustee of the charitable trust, and an order precluding the employment or engagement of a person in the affairs of the charitable trust.²²⁵

In contrast to directors of charitable companies, directors (or committee members) of corporate trustees are subject to statutory and general law duties, according to the type of their body corporate – most corporate trustees are incorporated under the *Corporations Act*, but some are incorporated associations.²²⁶ No directors’ duties have been turned off for the directors of corporate trustees of charitable trusts, so they will be subject to the directors’ duties under part 2D.1 of the *Corporations Act* such as a duty of care and diligence (section 180), a duty to act in good faith in the interests of the company and for proper purposes (in section 181) and duties to avoid improper use of position and of information from position (in sections 182 and 183). Additionally, officers of licensed trustee companies are subject to specific duties under the *Corporations Act*, such as a duty to act honestly, to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position, and to not make improper use of their position as an officer for the purpose (or for purposes including the purpose) of gaining an advantage for the officer or for any other person.²²⁷ Contravention of these duties may give rise to either civil penalty or criminal consequences.²²⁸

There has, however, been significant discontent around the administration of charitable trusts run by licensed trustee companies, leading to a report by the Corporations and Markets Advisory Committee (‘CAMAC’).²²⁹ Amongst other recommendations, CAMAC proposed a ‘fair and reasonable’ requirement for all fees and costs charged against a charitable trust²³⁰ and an enhanced judicial procedure for the consideration of disputes over alleged excessive fees charged by

223 Queensland, SA and WA require the Attorney-General to be notified: *Trusts Act 1973* (Qld) s 106(3); *Trustee Act 1936* (SA) s 64; *Charitable Trusts Act 1962* (WA) s 21(2). The ACT requires the Minister to be served notice of an application for relief in relation to the administration of a trust for charitable purposes: *Trustee Act 1925* (ACT) s 94C(1). Although some of these provisions are expansive, it is arguably unlikely that they would enable the ACNC to bring proceedings as a party (as opposed to, eg, appearing as *amicus curiae*) without specific legislative intervention and the ACNC has never sought to do so. The narrow scope of the ACNC’s objects, functions and powers are particular limitations.

224 *Trustee Act 1925* (ACT) s 94B. As to orders in other jurisdictions, see *Charitable Trusts Act 1993* (NSW) ss 7(1)–(2); *Trusts Act 1973* (Qld) ss 106(1), (4); *Trustee Act 1936* (SA) s 67; *Charitable Trusts Act 1962* (WA) s 21(1).

225 *Charitable Trusts Act 1993* (NSW) s 7(2).

226 Ramsay and Webster (n 33) 146 n 136.

227 *Corporations Act 2001* (Cth) s 601UAA(1).

228 *Ibid* ss 601UAA(1)–(2).

229 Corporations and Markets Advisory Committee, Australian Government, *Administration of Charitable Trusts* (Report, May 2013) (‘CAMAC’).

230 *Ibid* 2, 10, 12, 21, 28, 34–5.

licensed trustee companies.²³¹ Although these measures have not been introduced, directors of licensed trustee companies should be cognisant of the duties outlined above, as well as of section 912A of the *Corporations Act*, breach of which can give rise to civil penalties.²³²

The general law duties of directors of trustee companies are substantially the same as those applying to directors of other companies, but the trust duties of the corporate trustee may give ‘form and direction’ to those duties.²³³ Additionally, under section 197 of the *Corporations Act*, a person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability in certain circumstances, such as a breach of trust by the corporation.²³⁴

G Standing under the Legislative Frameworks

The offences under the crimes legislation relevant to misappropriation are indictable offences and will be prosecuted by the relevant Office of Public Prosecutions; the state charities regulators will prosecute offences against individuals under the charitable fundraising or collections legislation; ASIC may enforce duties under the *Corporations Act*; ORIC will enforce duties under the *CATSI Act*; the state and territory registrars will enforce duties under the respective co-operatives legislation; the state and territory regulators of incorporated associations will enforce duties under the incorporated associations legislation; and the Attorneys-General (and sometimes other relevant persons) have the power to take action against trustees.

Some state and territory legislation does provide charities with the opportunity to take legal action against an individual. For example, under section 20 of the *Charitable Fundraising Act 1991* (NSW) a person is guilty of an offence if they are conducting a fundraising appeal for the charity or are a member of the charity’s governing body, and are ‘in any way directly or indirectly concerned in’ or they aid, abet, counsel or procure the misapplication of any money or benefit received in the course of a fundraising appeal,²³⁵ and a person convicted of such an offence is also liable to the charity for the loss incurred as a result of the offence.²³⁶ However, it is more beneficial if the charity has access to a legislative enforcement mechanism that is not dependent upon criminal liability. For example, as noted above, under the NT and SA incorporated associations legislation, the officers’ duties may give rise to both criminal and civil liability. Contravention of a duty is a criminal offence,²³⁷ and a person who contravenes one of these provisions is liable also to

231 Ibid 10–11, 24–5.

232 Section 912A(1) includes obligations in relation to conflicts of interest and provision of financial services efficiently, honestly and fairly. Note also *Corporations Act 2001* (Cth) s 601UAA.

233 Ramsay and Webster (n 33) 146.

234 *Corporations Act 2001* (Cth) s 197(1). There is an equivalent provision under the *CATSI Act 2006* (Cth) s 271-1 (directors liable for debts and other obligations incurred by corporation as trustee).

235 *Charitable Fundraising Act 1991* (NSW) s 20(7).

236 Ibid ss 20(8)–(9).

237 *Associations Act 2003* (NT) ss 33(1)–(3); *Associations Incorporation Act 1985* (SA) ss 39A(1)–(4).

the association for all profit made by him or her and for all damage suffered by the association as a result of the contravention.²³⁸

V THE PROBLEMS WITH THE LEGAL FRAMEWORKS REGULATING CHARITABLE ASSETS AND RECOMMENDATIONS

The above overview of the ACNC legal framework and the other legal frameworks that can be applied to protect charitable assets – and to take action against individuals who have been involved in misconduct – highlights some serious gaps in the standing of regulators as well as the lack of available sanctions against individuals. In this respect the laws governing charities are not fulfilling their responsibilities to hold those in power to account and to ensure that such power is not misused. In this Part we summarise the key problems and provide recommendations as to what can be done to improve regulatory coverage and enforcement options.

The first, and most significant, issue is the lack of standing of regulators to take action against individuals who misuse charitable assets, particularly when the charity takes the form of a company. The most important reform is therefore to turn back on the duties in sections 180–3 and 191–3 of the *Corporations Act* for charitable companies, as recommended by the ACNC Review Panel.²³⁹ The federal government has noted the Review Panel’s recommendation and has stated that it will release a consultation paper to seek the views of the charities sector.²⁴⁰ The most comprehensive and effective way of solving the gaps in regulatory power is for the states to consider engaging in a co-operative arrangement with the Commonwealth so that the ACNC can apply its enforcement powers to all registered charities, as well as to the responsible persons and other officers of such charities. We appraise these potential reforms in Parts V(A) and (B) below, before considering other suggestions such as measures in relation to Attorneys-General and the importance of reporting, conflicts procedures and red tape reduction.

A Turning on the Duties in the Corporations Act

Our first recommendation is that the statutory duties in sections 180–3 and 191–3 of the *Corporations Act* should be turned back on for charitable companies. There are a number of reasons for this proposal and a number of benefits would arguably flow from it.

238 *Associations Act 2003* (NT) ss 33(4); *Associations Incorporation Act 1985* (SA) s 39A(5). For example, in *Kong v Commissioner for Corporate Affairs* (2014) 121 SASR 244 (discussed in n 177 above) prior to the commencement of criminal proceedings by the Commissioner of Corporate Affairs, the charity had successfully brought a civil action against the defendant to recover the money that he had taken from the association but had not yet repaid: at 247 (Sulan J). Although the basis of the charity’s action was unclear from the reporting of the case, the charity may have relied upon section 39A(5) of the *Associations Incorporation Act 1985* (SA).

239 ACNC Review (n 14) 48, 50.

240 *Government Response* (n 67) 12.

The first is the ability of a regulator to take action against directors and officers of charitable companies in sufficiently serious cases of breach of duty. A number of benefits (such as limited liability) attend the corporate form and with such benefits come requirements in the form of directors' and officers' duties. Weak controls in this respect could serve to attract those wishing to misuse the corporate form to the charities sector. Second, the duties in sections 180–3 of the *Corporations Act* are civil penalty provisions and the civil penalty regime has a strong public interest focus.²⁴¹ The policy reasons behind the civil penalty regime apply equally to charitable companies and it is important to have appropriate mechanisms available to protect the public in relation to wrongdoing by directors and officers of charitable companies. At present, there is significant disparity in terms of legal responsibility and liability between directors, officers and employees of charitable companies and those of non-charitable corporations, and between directors of corporate trustees of charitable trusts and directors of charitable companies.

Another advantage arises in relation to situations in which directors of a charitable company cause the company to change its objects from charitable to non-charitable and (directly or indirectly) take the benefit of the charity's funds and assets. In some such circumstances an action for breach of section 182 of the *Corporations Act* against the directors would be open (where there is evidence of impropriety and purposefulness).²⁴² At present, there is uncertainty as to what action can be taken in such circumstances, although an oppression action is a clear possibility.²⁴³ Although such circumstances might also constitute misuse of position under paragraph (c) of Governance Standard 5, this would not result in a breach of duty by the individual director(s). Moreover, as outlined in Part III above, the ACNC's key sanction of revocation will not be a significant deterrent in circumstances where directors are deliberately seeking to change the company into a for-profit company. In addition, sections 182 and 183 apply to former directors, officers and employees of companies, and would therefore also apply after deregistration by the ACNC of a charitable company (even if deregistration occurred in conjunction with deregistration of the charitable company as a company).

Turning on the duties in the *Corporations Act* would not mean that ASIC would need to become the primary regulator of charitable companies. Rather, the ACNC and ASIC could co-regulate charitable companies, with the ACNC referring

241 See Part IV(B)(1) above.

242 See, eg, *R v Byrnes* (1995) 183 CLR 501, 514–17 (Brennan, Deane, Toohey and Gaudron JJ); *Chew v the Queen* (1992) 173 CLR 626, 633–4 (Mason CJ, Brennan, Gaudron and McHugh JJ). In addition, members who authorise such change may be liable under section 182(2): see Rosemary Teele Langford, 'Solving the Riddle of Ratification of Misappropriation of Company Property: A New Analogy' (2021) 15(3) *Journal of Equity* 233.

243 See above n 146. Cf in England and Wales charitable companies and Charitable Incorporated Organisations need to obtain permission from the Charity Commission for England and Wales before changing their purposes (and charitable companies must register the change with Companies House): see Charity Commission for England and Wales, 'Guidance: How to Make Changes to Your Charity's Governing Document', *Gov.UK* (Web Page, 15 December 2014) <<https://www.gov.uk/guidance/how-to-make-changes-to-your-charitys-governing-document>>. Prolegis submitted that charities should be required to get ACNC consent before changing objects: *Prolegis Submission* (n 93) 6.

appropriate cases to ASIC²⁴⁴ – just as the ACNC currently coregulates other charitable entities (such as Aboriginal and Torres Strait Islander corporations, co-operatives, incorporated associations and trustee companies) with other regulators. Referral of cases involving serious breach of the statutory directors' duties by the ACNC to ASIC would arguably be a more nuanced and effective approach than overreliance on revocation. In addition, ASIC's mandate, regulatory priorities and resources mean that action will only be taken in sufficiently serious cases.²⁴⁵ This means that turning on the duties in the *Corporations Act* would not overburden charity directors or necessarily dissuade people from taking up roles as volunteer directors of charitable companies. Moreover, the application of the duties in sections 180–3 (and, in particular, sections 180 and 181) takes into account the nature of the company, as well as its interests and purposes.²⁴⁶ The duties would therefore be applied differently to directors and officers of charitable companies than to directors and officers of for-profit (or other not-for-profit) companies in these respects.²⁴⁷ In this regard, a key feature that distinguishes charitable companies from other companies is pursuit of purpose, with purpose at the centre of governance.²⁴⁸

As has been suggested previously by Woodward and Marshall, a specialist unit could be established within ASIC to deal with charitable and other not-for-profit companies.²⁴⁹ In addition, it is possible that section 1324 of the *Corporations Act* may enable other parties (such as the ACNC, members and, on a wide view, beneficiaries and donors) to bring actions against directors of charitable companies for breach of the duties in sections 180–3 of the *Corporations Act*.²⁵⁰ That section allows a person whose interests have been affected by a breach of the *Corporations Act* to bring action.²⁵¹

244 As outlined by Ramsay and Webster (n 33) n 169, the ACNC and ASIC have entered into a memorandum of understanding which provides for referral of a matter where it 'more appropriately falls within the jurisdiction of the other agency'.

245 See Australian Securities and Investments Commission, 'ASIC's Approach to Enforcement' (Information Sheet 151, September 2013) <https://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf>.

246 See Langford, 'Purpose-Based Governance' (n 7).

247 In this respect, it is notable that the two most well-known cases involving ASIC taking action against not-for-profit companies involved companies that were not charities: see *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; *Australian Securities and Investments Commission v Mitchell* (No 2) (2020) 382 ALR 425.

248 See Langford, 'Purpose-Based Governance' (n 7).

249 Woodward and Marshall (n 4) 3. The Law Council of Australia submitted that it could be clarified that this is not intended to transfer regulation of charities back to ASIC: *LCA Submission* (n 73) 10 [19]. See also Justice Connect, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018) 25 ('Justice Connect Submission').

250 See Ian Murray and Murray Wesson, 'Outsourcing to Not-for-Profits: Can Judicial Enforcement of Charity Law Provide Accountability for the Performance of "Public" Functions?' (2020) 43(4) *University of New South Wales Law Journal* 1309.

251 Note, however, that the remedies are limited and that the section has been interpreted restrictively to date: see, eg, *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128 (but cf *Airpeak Pty Ltd v Jetsream Aircraft Ltd* (1997) 73 FCR 161); *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303; *Macks v Viscariello* (2017) 130 SASR 1; *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27; *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233.

Following the introduction of the ACNC governance standards, the only governance requirements that were disapplied in relation to registered charities were those imposed under the *Corporations Act*. Duties of responsible persons of other incorporated charities (such as Aboriginal and Torres Strait Islander corporations, co-operatives and incorporated associations) were not turned off. Indeed, the statutory duties in sections 180–3 of the *Corporations Act* are adopted in the *Co-operatives National Law* and the *CATSI Act*, and continue to apply to directors of charitable co-operatives and charitable Aboriginal and Torres Strait Islander corporations. There is arguably therefore no justification for turning off the duties of directors of charitable companies in the *Corporations Act* on which these provisions are modelled.

B Central Governance Duties – Incorporated Associations

As highlighted above, some state and territory incorporated associations legislation imposes comprehensive statutory duties on members of management committees. However, in some states there are gaps in the statutory duties. To ensure that appropriate mechanisms are in place to hold individuals who are working for incorporated associations accountable, a core set of legislative governance duties should ideally be imposed in each state and territory on committee members of incorporated associations that are charities. This would also reduce the complexity for charitable incorporated associations that operate in multiple states and territories. This could be achieved either via harmonisation of state and territory incorporated associations acts or via a model similar to the *Co-operatives National Law*.²⁵²

C Referral of Power

As highlighted in Part III above, there are two key weaknesses in the ACNC's powers: its enforcement powers generally only apply in relation to federally regulated entities and it only has jurisdiction in relation to charities that are registered.²⁵³ The ACNC Review Panel concluded that 'the only long-term solution to comprehensively protect charitable and other assets is a national scheme, commencing with states, territories and government agencies responsible for aspects of asset protection conferring their powers on the Commissioner.'²⁵⁴ In this respect it would not be

252 There have been multiple calls for a national regime for incorporated associations, but this has never eventuated: see, eg, Productivity Commission, Australian Government, *Contribution of the Not-for-Profit Sector* (Report, January 2010) xliv, 120, 126; Myles McGregor-Lowndes and Frances Hannah, 'Unincorporated Associations as Entities: A Matter of Balance between Regulation and Facilitation?' (2010) 28(3) *Company and Securities Law Journal* 197, 218–21. The proposal in this article is more modest in that it relates to charitable incorporated associations only and just in relation to the duties of committee members of such incorporated associations. The Queensland Law Society also submitted that another area that needs to be considered is the interaction and harmonisation between the duties of officeholders under state-based incorporated legislation and ACNC governance standards: see Queensland Law Society, Submission to Treasury, *Review of the Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 4 ('*QLS Submission*').

253 See also *ACNC Submission* (n 89) 16; *LCA Submission* (n 73) 11 [26].

254 *ACNC Review* (n 14) 37, see also at 2, 102, 113; *LCA Submission* (n 73) 11 [26]; *Prolegis Submission* (n 93) 5 [4.6]; ACNC Advisory Board, Submission to Treasury, *Review of the Australian Charities and Not-*

necessary for the states and territories to engage in a subject matter referral of power in relation to registered charities or not-for-profit entities generally. The referral could be a restricted text-based reference similar to those references used to support the *Corporations Act* and *Australian Securities and Investment Commission Act 2001* (Cth), and the prevention of terrorism laws under part 5.3 of the *Criminal Code 1995* (Cth) – the reference could be limited in time and subject to termination by proclamation.²⁵⁵ A referral of power could also allow for the amendment of the *ACNC Act* so that the ACNC's powers extend to the protection of a charity's assets after the ACNC has revoked the charity's registration or the charity has voluntarily become unregistered. If a referral were obtained, the federal government could look to the Scottish model of charities regulation for inspiration in regards to the protection of the charitable assets of unregistered charities such as asset locks and ongoing reporting requirements.²⁵⁶ Tax legislation is also a possibility for protecting charitable assets post deregistration of a charity.²⁵⁷

An alternative proposal is for a referral of power in relation to registration and reporting responsibilities along with some enforcement powers 'but potentially with continued state/territory enforcement and with some state ability to set divergent governance duties, to be enhanced by a presumption of compliance with the ACNC governance standards arising from the application of state duties'.²⁵⁸ We agree that this type of 'fragmented, federalist, approach to regulation'²⁵⁹ is preferable. In particular, there is a question as to whether one set of governance duties and/or one type of regulatory model is in fact appropriate for all types of charitable entity. It is submitted that there are legitimate differences between different types of charity structure that in turn affect the appropriate nature and intensity of the applicable governance duties. For example, where charities choose an incorporated form (particularly a company) and benefit from the privileges and

for-profits Commission Legislation (29 January 2018) 3.

- 255 See, eg, regarding text-based referrals of power by the states to the Commonwealth, Robert French, 'Horizontal Arrangements: Competition Law and Cooperative Federalism' (2008) 15(3) *Competition and Consumer Law Journal* 255, 262–5; Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32 *Sydney Law Review* 365.
- 256 For detail, see Oonagh B Breen, Patrick Ford and Gareth G Morgan, 'Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland' (2009) 11(3) *International Journal of Not-for-Profit Law* 5, 15; Office of the Scottish Charity Regulator, *Monitoring of Former Charities* (Report, August 2010) 1 <<https://www.oscr.org.uk/media/1263/guidance-on-oscr-monitoring-under-section-19.pdf>>. The Office of the Scottish Charity Regulator has highlighted that its statutory power to monitor the use of charitable assets held by bodies removed from the Register allows it 'to protect those assets held within the Scottish charity sector and to ensure that the public continue to have confidence in charitable giving': see Office of the Scottish Charity Regulator, *OSCR Monitoring under Section 19: Reporting on Work to Date* (Report, August 2010) 5 <<https://www.oscr.org.uk/media/1264/oscr-monitoring-under-section-19-report-on-work-to-date.pdf>>.
- 257 *Philanthropy Australia Submission* (n 93) 6; *Justice Connect Submission* (n 249) 25.
- 258 Ian Murray et al, 'Regulation and the Contemporary Not-for-profit: Based on the Proceedings of a Summit Held at the University of Western Australia on 26 November 2018' (Report, Not-for-profits University of Western Australia Research Group, 4 April 2019) 11. The reason for this proposal is concern that 'a national approach to the enforcement of duties and protection of charity assets ... has the potential to impinge to a greater extent on state sovereignty and on approaches tailored to local circumstances': at 11.
- 259 *Ibid.* See also Ian Murray, Submission to Treasury, *Review of the Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 4.

benefits that flow from that form (such as limited liability and the ability to operate nationwide) then extra duties and regulatory burdens are arguably appropriate.

In its response to the *ACNC Review*, the Commonwealth Government noted that '[a]ny referral of powers would require agreement of the states' and, in light of this 'hurdle', the Government was continuing to focus on working with the states and territories to 'streamline and harmonise charities regulation'.²⁶⁰ Given current discontent with the change in regulatory approach by the ACNC in recent years and the likely disinclination of states to cede their powers to the Commonwealth, a referral of power is unlikely to be a realistic solution in current circumstances.

D Other Standing Issues

A number of submissions to the *ACNC Review* drew attention to the reluctance of the state and territory Attorneys-General to take action in relation to misappropriation of charitable assets, and in relation to charities generally. The Law Council of Australia recommended that the ACNC be 'conferred with the ability to bring an action in Court seeking any appropriate equitable remedy, if sanctioned by the Attorney General of a state, or in the case of a charity being in a Territory, of its own motion'.²⁶¹ A second option would be to consider expanding standing in relation to charitable trusts and charities generally.²⁶² In addition, CAMAC proposed the enactment of enabling legislation to give courts an enhanced role in the resolution of disputes involving charitable trusts administered by licensed trustee companies and that 'a uniform and consistent approach to the role and powers of the court in dispute resolution should apply to all segments of the charities sector'.²⁶³ This included a proposal that a regulator such as the ACNC be granted power to make a preliminary assessment of whether a person should be classified as someone with a sufficient interest to apply for a judicial hearing.²⁶⁴ These submissions and recommendations warrant renewed consideration.

E Other Measures

Reporting and accounts are important in terms of protecting charitable assets and resources. As recommended by the *ACNC Review* and accepted by the federal government, such reporting should include related party transactions, in order 'to increase transparency of transactions that pose a higher risk to charitable assets being used for private benefit'.²⁶⁵ Close attention should arguably be given to developing and instituting a financial reporting regime that is fit-for-purpose

260 *Government Response* (n 67) 21.

261 *LCA Submission* (n 73) 11 [26]. See also *LIV Submission* (n 73) 11. The Queensland Law Society submitted that Attorneys-General must play their part in the regulatory scheme or reform should be made to give the ACNC remit to intervene: see *QLS Submission* (n 252) 7.

262 This could be done by expanding the current standing provisions for trust proceedings. See *Trustee Act 1925* (ACT) s 94A(3); *Charitable Trusts Act 1993* (NSW) s 5(1); *Trusts Act 1973* (Qld) s 106(2); *Trustee Act 1936* (SA) s 60(2); *Charitable Trusts Act 1962* (WA) s 21(1); see also *Charities Act 2011* (UK) s 115; Murray and Wesson (n 250).

263 *CAMAC* (n 229) 50.

264 *Ibid* 50–2.

265 *Government Response* (n 67) 13. See also *ACNC Review* (n 14) 60–3.

for the charities sector.²⁶⁶ Clearer guidance could also be provided to responsible persons in relation to related party transactions and private benefit.

Submissions to the *ACNC Review* also advocated stronger measures in relation to conflicts of interest. One suggestion was that section 195 of the *Corporations Act* be turned off and that Governance Standard 5 be amended ‘to restrict participation in decision making with respect to the governance or management of a registered charity by a responsible person with a material conflict of interest’.²⁶⁷ Although we do not advocate turning off section 195, we agree with the suggestion that those with a conflict should be restricted from participating. In this respect, the ACNC Guide on Managing Conflicts should be amended to specify abstention as the baseline standard.²⁶⁸

Protection of charitable assets could also arguably be enhanced by reducing the complexity and red tape that burden the charities sphere, freeing responsible persons up to focus on pursuing charitable purpose and on understanding, and complying with, core governance duties. Measures to reduce red tape and overlapping compliance burdens in relation to reporting, fundraising and grants administration are therefore essential. We also recommend that a special purpose incorporated legal structure for charities be introduced.

VI CONCLUSION

As argued by Harding, one function of conferring charitable status is ‘ensuring that those who manage resources for charitable purposes are subjected to appropriate legal duties’.²⁶⁹ As outlined in this article, there are in fact gaps in the legal duties imposed on responsible persons and gaps in regulatory power to enforce compliance with those duties. These aspects of Australian charity law need to be strengthened. Although a referral of power is the most logical solution, such referral is unlikely in practical terms and a fragmented system has appeal. Our core recommendation is therefore that the duties in sections 180–3 and 191–3 of the *Corporations Act 2001* (Cth) be turned back on for directors and officers of charitable companies. Consideration could also be given to introducing a central set of governance duties for members of management committees of incorporated associations and to addressing gaps in standing and enforcement, particularly as concerns the protective role of the state Attorneys-General. Other measures include

266 See also Langford, ‘Related Parties’ (n 133).

267 *ACNC Submission* (n 89) 6, 45. See also *QLS Submission* (n 252) 10; *Justice Connect Submission* (n 249) 25.

268 Australian Charities and Not-for-profits Commission, *Managing Conflicts of Interest: A Guide for Charity Board Members* (Guide, November 2015). Submissions by Justice Connect and Illawarra Legal Centre as to further specificity in relation to dealing with conflicts should also be considered: see *Justice Connect Submission* (n 249) 25; Illawarra Legal Centre, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018) 5. For other noteworthy suggestions see *Prolegis Submission* (n 93) 7 (in relation to emphasis of other duties) and *ACNC Submission* (n 89) 34–5 (in relation to suitability conditions for responsible persons).

269 Harding, *Charity Law and the Liberal State* (n 3) 41. See also Garton (n 5) 524.

strengthening of reporting (particularly in relation to related party transactions) and management of conflicts of interest. The charitable sector is an essential part of Australia's social fabric and economy. Tighter controls on misuse of charitable resources and assets will strengthen and maximise the sector's capacity to contribute to social and economic life, protecting stakeholders and bolstering public trust and confidence.