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# Charitable Companies and Related Party Transactions

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**Abstract:** *In response to a recommendation by the Panel reviewing the Australian Charities and Not-for-profits legislation, the Federal Government has announced that charities will be required to disclose related party transactions. The problem of related party transactions is a common theme in the ACNC's compliance reports. This article critically analyses the issue of related party transactions within the Australian charities sphere, as well as potential reforms. It concludes that reporting of such transactions is the most sensible first step but that further attention should be given to the contours of such reporting.*

## 1. Introduction

In 1993 DeMott wrote that 'it is foolish to import for-profit norms respecting self-dealing generally into the nonprofit context.'<sup>1</sup> Around the same time McGregor Lowndes commented:

The societal perception of charitable organisations being 'good', 'worthy', 'moral', 'altruistic', 'philanthropic', 'compassionate', 'loving', 'caring' and 'beyond reproach' creates an 'aura' or 'halo' which tend to give them saintly qualities. Such widely held perceptions have significant implications for those who seek to regulate such organisations.<sup>2</sup>

It is against this background that this article undertakes critical analysis of the regulation of related party transactions by Australian charities. It is opportune given the Review of the Australian Charities and Not-for-profits Commission (ACNC) in 2018<sup>3</sup> and publication of the Government's Response to that Review in March 2020.<sup>4</sup> Both the Review and the Response recommended changes to regulation of related party transactions.

In contrast to the corporate sphere, the Australian charities sector has not been subject to detailed regulation of related party transactions. A common theme in the compliance reports of the ACNC is, however, the provision of private benefits by charities to individuals, particularly those controlling the charity or their

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<sup>1</sup> See DA DeMott, 'Self Dealing Transactions in Nonprofit Corporations' (1993) 59 *Brooklyn Law Review* 131, 146.

<sup>2</sup> Myles McGregor-Lowndes, 'Nonprofit Corporations – Reflections on Australia's Largest Nonprofit Insolvency' (1995) 5 *Australian Journal of Corporate Law* 417, 428.

<sup>3</sup> See Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018– Report and Recommendations* (2018) ('ACNC Review').

<sup>4</sup> See Commonwealth of Australia, *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* (6 March 2020) ('Government Response').

associates.<sup>5</sup> Related party transactions were a specific focus of the 2019 ACNC Compliance Report and also came to the fore in the Bergin Report,<sup>6</sup> which identified endemic conflicts and benefits to related parties in entities connected with the Returned and Services League.<sup>7</sup> As noted by the ACNC, misuse of charitable funds diminishes public trust and confidence in the charities sector, particularly due to the fact that many charities receive tax concessions, public funding and donations.<sup>8</sup> Inappropriate related party transactions constitute a specific type of such misuse of charitable funds for private benefit.

The particular focus of this article is charitable companies and, more particularly, charitable companies that are permitted to omit the word 'Limited' from their name. The reason for this focus is that such companies are exempted from the related party regime in ch 2E of the *Corporations Act 2001* (Cth), unlike other public companies (including charitable companies). This disapplication (and the resultant disparity between regulation of related party transactions in different types of public company) highlights the policy issues surrounding related party transactions in the charities sphere and the different approaches adopted by the ACNC governance regime and the *Corporations Act 2001* (Cth).

The structure of this article is as follows. Section 2 provides an overview of corporate law regulation of related party transactions under ch 2E of the *Corporations Act 2001* (Cth). Section 3 examines the licence granted to certain companies limited by guarantee to remove the word 'Limited' from their name, which also results in the inapplicability of ch 2E to such companies. Section 4 outlines current regulation of related party transactions by charitable entities. Section 5 presents the recommendations of the ACNC Review in relation to related party transactions and the Government's response to those recommendations. Section 6 critically evaluates how related party transactions by charities should be regulated. It is concluded in Section 7 that charities should be required to disclose related party transactions but that consideration be given to developing financial reporting standards that are fit-for-purpose for the charitable sector.

## **2. Regulation of Related Party Transactions in the Corporate Sphere**

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<sup>5</sup> See ACNC, *Charity Compliance Report December 2012 – December 2014 and Beyond* (Compliance Report, March 2015) 9, 17, 18 ('ACNC 2014'); ACNC, *Charity Compliance Report 2015 and 2016* (Compliance Report, March 2017) 17 ('ACNC 2016'); ACNC, *Charity Compliance Report 2017* (Compliance Report, March 2018) 2 ('ACNC 2017'); ACNC, *Charity Compliance Report 2018* (Compliance Report, March 2019) 28 ('ACNC 2018').

<sup>6</sup> The Hon PA Bergin SC, *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 and RSL LifeCare Limited* (January 2018).

<sup>7</sup> The Australian charities sector has also recently been impacted by alleged kick-back payments to a high-profile foreign aid charity – see Luke Michael, 'World Vision Clouded by Corruption Scandal', *Probono News* (11 March 2020), available at [probonoaustralia.com.au](http://probonoaustralia.com.au).

<sup>8</sup> ACNC 2018 (n 5) 2. As noted by Saj and Cheong, in 2013 the Commonwealth Government forwent \$1.1bn in revenue because of allowable tax deductions for donors to charities that were accorded gift deductibility status – see Phil Saj and Chee Chong, 'The Application of the Reporting Entity Concept by Australian Charities' [2020] *Australian Accounting Review* (forthcoming).

Related party transactions are transactions through which an entity provides a financial benefit to a 'related party' such as a director, certain relatives of a director, or entities connected with a director. Regulation of related party transactions is a common feature of for-profit regulatory regimes. A number of Commonwealth jurisdictions impose specific statutory requirements for shareholder approval in situations where directors are conflicted and where corporate history has shown that a requirement of board approval has been inadequate to counter inherent conflicts.<sup>9</sup> In Australia ch 2E of the *Corporations Act 2001 (Cth)* regulates the conferral of benefits on directors and director-related parties in the context of public companies.<sup>10</sup> The purpose of ch 2E is stated to be 'to protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests.'<sup>11</sup>

The central provision is s 208(1) which provides that, unless an exception applies, in order for a public company or an entity that the public company controls to give a financial benefit to a related party of the public company, the public company must obtain the approval of its members (in a specified way that involves the Australian Securities and Investments Commission (ASIC)<sup>12</sup>) and give the benefit within 15 months after the approval. The term 'related party' is defined broadly and includes controlling entities; directors (of the company and of controlling entities) and their spouses and de facto spouses; parents and children of such directors; entities controlled by other related parties; an entity that was a related party in the past six months; an entity that has reasonable grounds to believe that it will become a related party in the future; and an entity acting in concert with a related party.<sup>13</sup>

The Corporations Act defines the concept of 'control' broadly so that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.<sup>14</sup> The concept of 'financial benefit' is also defined widely.<sup>15</sup> Exemptions relate to arm's length transactions;<sup>16</sup> reasonable remuneration or reimbursement;<sup>17</sup> reasonable indemnities, exemptions, insurance premiums and payments of legal costs;<sup>18</sup> small advances;<sup>19</sup> financial benefits to, or by, a closely held subsidiary;<sup>20</sup>

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<sup>9</sup> See, eg, *Companies Act 2006* (UK) Chapter 4 Part 10; *Companies Ordinance* (Hong Kong) cap 622, part 11.

<sup>10</sup> See Ian Ramsay and Robert Austin, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, July 2020) [9.480] ('Ford, Austin and Ramsay') for discussion of inclusion of some propriety companies.

<sup>11</sup> For commentary see Robert Austin and Justice Black, LexisNexis, *Austin and Black's Annotations to the Corporations Act* (LexisNexis) [2E.207].

<sup>12</sup> See *Corporations Act 2001* (Cth) ss 217-227.

<sup>13</sup> See *ibid* s 228.

<sup>14</sup> See *ibid* s 50AA(1).

<sup>15</sup> See *ibid* ss 229(1)-(3); see also *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1.

<sup>16</sup> See *Corporations Act 2001* (Cth) s 210.

<sup>17</sup> See *ibid* s 211.

<sup>18</sup> See *ibid* s 212.

<sup>19</sup> See *ibid* s 213.

<sup>20</sup> See *ibid* s 214.

non-discriminatory benefits to members in their capacity as members;<sup>21</sup> and benefits given under order of a court.<sup>22</sup>

Thus where the spouse or parent of a public company director enters into a transaction on favourable terms with the public company, shareholder approval would be required in order to avoid a breach of s 208 unless an exemption is made out. Such breach does not affect the validity of the transaction or render the company guilty of an offence.<sup>23</sup> Persons involved in a contravention may be liable for civil penalty consequences<sup>24</sup> and dishonest involvement constitutes an offence.<sup>25</sup> Civil penalty consequences consist of a declaration of contravention;<sup>26</sup> disqualification;<sup>27</sup> pecuniary penalty and relinquishment orders;<sup>28</sup> and/or compensation.<sup>29</sup> Directors should also remember their other duties, which continue to apply in the context of related party transactions.<sup>30</sup> These include statutory and general law duties relating to conflicts and profits,<sup>31</sup> acting in good faith in the interests of the company and for proper purposes<sup>32</sup> and acting with care and diligence.<sup>33</sup> Although the related party provisions emanate from core proscriptions on conflicts and profits,<sup>34</sup> they are a separate regime to which directors should pay particular attention. Directors of public companies should therefore be mindful of a number of duties when considering transactions between the company and related parties.

The sections in ch 2E have their origins in English provisions that prohibited loans to directors but were widened to prohibit loans to families of directors and to companies in which the director had an interest, in order to prevent circumvention of the prohibitions.<sup>35</sup> The Australian provisions were broadened in 1992 in response to evidence that some corporate controllers had misused their

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<sup>21</sup> See *ibid* s 215.

<sup>22</sup> See *ibid* s 216.

<sup>23</sup> See *ibid* s 209(1).

<sup>24</sup> See *ibid* s 209(2). Section 79 provides that a person is involved in a contravention if, and only if, the person: '(a) has aided, abetted, counseled or procured the contravention; or (b) has induced, whether by threats or promises or otherwise, the contravention; or (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) has conspired with others to effect the contravention.'

<sup>25</sup> See *ibid* s 209(3).

<sup>26</sup> See *ibid* s 1317J.

<sup>27</sup> See *ibid* s 206C.

<sup>28</sup> See *ibid* ss 1317G, 1317GAB.

<sup>29</sup> See *ibid* s 1317J(3).

<sup>30</sup> See *ibid* s 230.

<sup>31</sup> In terms of relevant statutory duties see *ibid* ss 182, 183, 191, 195.

<sup>32</sup> The relevant statutory duties are contained in *ibid* s 181.

<sup>33</sup> See *ibid* s 180 for the relevant statutory duty. Note also the duty to prevent insolvent trading in *ibid* s 588G.

<sup>34</sup> ASIC Regulatory Guide 76 states: 'Almost by definition, related party transactions involve conflicts of interest because related parties are often in a position to influence the decision of whether the benefit is provided to them, and the terms of its provision' – see Australian Securities and Investments Commission, *Related Party Transactions* (Regulatory Guide 76, March 2011) [76.1] ('ASIC RG 76').

<sup>35</sup> See Ford, Austin and Ramsay (n 10) [9.470].

positions by shifting assets away from companies and corporate groups into their own hands via remuneration payments, asset transfers and loan arrangements.<sup>36</sup>

### **3. Companies Limited by Guarantee**

Australian company law enables incorporation of a number of different types of company, including companies limited by shares, companies limited by guarantee, no liability companies and unlimited companies. The focus of this Section is on companies limited by guarantee because this is a legal structure adopted by some charities. Section 9 of the *Corporations Act 2001* (Cth) defines a company limited by guarantee as a company formed on the principle of having the liability of its members limited to the amounts that the members undertake to contribute to the property of the company if it is wound up. Companies limited by guarantee do not have power to issue shares<sup>37</sup> and are prohibited from paying dividends to members.<sup>38</sup> Such companies are public companies.

#### **3.1 Regulation of Charitable Companies Limited by Guarantee**

A company limited by guarantee that is a charity may register with the Australian Charities and Not-for-profits Commission (ACNC). The ACNC has primary regulation of the day-to-day activities of registered charities.<sup>39</sup> In fact, s 111L of the *Corporations Act 2001* (Cth) provides that certain sections of the Corporations Act are 'turned off' for charitable companies. These include the core governance duties of company directors such as the duty of care and diligence (in s 180), the duties to act in good faith in the interests of the company and for proper purposes (s 181), the duties to avoid improper use of position and of information from position (ss 182 and 183), and the duty to disclose material personal interests (s 191). The equivalent general law duties continue to apply.

Provisions that are not turned off include s 184 (which imposes criminal liability for breach of the core statutory directors' duties), s 588G (which imposes liability for insolvent trading) and ch 2E (which, as outlined above, regulates related party transactions concerning public companies). This means that ASIC retains regulatory authority over the application of ch 2E to charitable companies limited by guarantee. It is also significant due to the complex and stringent nature of the related party provisions in ch 2E.

#### **3.2 Section 150 Companies**

However, closer inspection reveals that some charitable companies limited by guarantee will not in fact be subject to the related party provisions in ch 2E due to

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<sup>36</sup> See *ibid*; Companies and Securities Advisory Committee, *Report on the Reform of the Law Governing Corporate Financial Transactions* (Report, July 1991) 1.

<sup>37</sup> See *Corporations Act 2001* (Cth) s 124.

<sup>38</sup> *Ibid* s 254SA.

<sup>39</sup> See Explanatory Memorandum, *Australian Charities and Not-for-Profits Commission Bill 2012* (Cth), cl 15.74 ('Explanatory Memorandum 2012'). Clause 15.78 explains that ASIC retains power with respect to external administration processes.

a combination of s 150 of the Corporations Act and the definition of 'public company' in s 9 of the Corporations Act. The author's consultation with charity law experts indicates that this exemption from ch 2E may not be widely known.

Section 150 of the *Corporations Act 2001* (Cth) allows certain companies to omit the word 'Limited' from their name. It provides:

- (1) A company is not required to have the word 'Limited' at the end of its name if:
  - a. the company is registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the type of entity mentioned in column 1 of item 1 of the table in subsection 25-5(5) of that Act (charity); and
  - b. the company's constitution:
    - i. prohibits the company paying fees to its directors; and
    - ii. requires the directors to approve all other payments the company makes to directors ....<sup>40</sup>

Section 150(2) provides that the company must notify ASIC if it ceases to be registered with the ACNC or there is non-compliance with para s 150(1)(b) or the company's constitution is modified to remove any of those prohibitions or requirements.<sup>41</sup> Companies that obtain a licence pursuant to s 150 will be referred to as 's 150 companies' in this article.<sup>42</sup>

Section 9 of the *Corporations Act 2001* (Cth) provides that 'public company means a company other than a proprietary company and: ... (c) in Chapter 2E ... does not include a company that does not have "Limited" in its name because of section 150 or 151.'<sup>43</sup> As a result of these provisions, s 150 companies are not subject to the related parties regime in ch 2E.

Before assessing the significance of this exemption and the way in which related party transactions by s 150 companies and other charitable entities are regulated, it is instructive to probe the history of, and rationales for, this exemption.

### 3.2.1 History of Section 150

Levy and McGregor-Lowndes provide fascinating insights into the history of the s 150 exemption.<sup>44</sup> Significant points from their detailed analysis are as follows. First, the exemption was originally more significant in that such companies were

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<sup>40</sup> Column 1 of Item 1 of the table in s 25-5(5) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) specifies charities. The current version of s 150 was introduced by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) Schedule 2 Item 136.

<sup>41</sup> Section 150(3) provides that an offence based on s 150(2) is an offence of strict liability.

<sup>42</sup> For exceptions in relation to payments to directors see Australian Securities and Investments Commission, *Omission of 'Limited' from Company Names* (Regulatory Guide 50, 29 March 1993) [50.13] ('RG 50').

<sup>43</sup> Section 151 provides an exception to the requirement for using 'Limited' in a company's name where a company has a pre-existing licence.

<sup>44</sup> See Kerrie J Levy, 'Should Section 383 of the Corporations Act Still Exist in 2001?' (Paper presented at National Corporate Law Teachers Conference, 1994); McGregor-Lowndes, 'Nonprofit Corporations' (n 2); Kerry J Levy, 'The Australian Football League: Is It Time for the Siren to Blow?' in Myles McGregor-Lowndes, Keith Fletcher and A S Sievers (eds), *Legal Issues for Non-profit Associations* (LBC Information Services, 1996) ch 5, 107-11.

formerly automatically exempted from lodging annual returns; lodging returns of particulars of directors, managers and secretaries; and the publication of accounts.<sup>45</sup> These privileges were ended after reviews and reforms were instituted following the collapse of the National Safety Council Victoria Division.<sup>46</sup> The reason for allowing the omission of the word 'Limited' was to avoid the connotation of commercialism which would otherwise be inherent in a company's registered name.<sup>47</sup>

Second, the exemption applied to a broader category of companies. Section 66(1) of the *Companies Act 1981* (Cth) and Companies Codes<sup>48</sup> provided:

[Proposed company] Where it is proved to the satisfaction of the Local Authority that a proposed limited company –

- (a) is being formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion, charity, patriotism, pension or superannuation schemes or any other object useful to the community;
- (b) will apply its profits (if any) or other income in promoting its objects; and
- (c) will prohibit the payment of any dividend to its members,

the Local Authority may (after requiring, if it thinks fit, the proposal to be advertised in such manner as it directs either generally or in a particular case), by licence, authorise the proposed company to be registered as a company with limited liability without the addition of the word 'Limited' to its name, and the company may be registered accordingly.

However, after the collapse of the National Safety Council, the view of the Australian Securities Commission (ASC) was that, where the commercial activities of a company which held a licence or which applied for a licence were significant, the right of the public to know that the company was an entity with limited liability assumed a greater importance than the public good which was served by encouraging the incorporation of these organisations under the Law.<sup>49</sup> The ASC could therefore deny a licence where it thought that the level of commercial activity was or would be significant.<sup>50</sup> The exemption became less significant once the requirement to state an ACN was introduced.

Third, in order to obtain an exemption, a licence had to be obtained from the regulator. By contrast, s 150 no longer requires approval to be sought. Fourth, both McGregor-Lowndes and Levy detail how the s 150 exemption was copied from the UK 'with little question, discussion or debate'.<sup>51</sup> McGregor-Lowndes describes this as 'cloning':

This state of affairs came about directly through cloning of the statute without due regard for the circumstances in England and continued in Australia through statutory rigor mortis. The company

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<sup>45</sup> McGregor-Lowndes, 'Nonprofit Corporations' (n 2) 422.

<sup>46</sup> Ibid 421.

<sup>47</sup> See ibid 427.

<sup>48</sup> See, eg, *Companies (New South Wales) Code 1982* (NSW); see also *Corporations Law 1989* (Cth) s 383.

<sup>49</sup> See Australian Securities Commission, *Omission of 'Limited' in Company Names* (Policy Statement 29, 27 July 1992) [9], [13] ('PS 29'); see now RG 50 (n 42).

<sup>50</sup> See, eg, PS 29 (n 49) [9]-[12]; Australian Securities Commission, *Authorisation under Section 383 to Omit 'Limited' from a Company's Name* (ASC Policy Statement 50, 18 March 1993) [17]-[20].

<sup>51</sup> Levy, 'Should Section 383 of the Corporations Act Still Exist in 2001?' (n 44) 14; see also McGregor-Lowndes, 'Nonprofit Corporations' (n 2) 438-9.

limited by guarantee was an English corporate form established by the first English code of company law. This legislation was almost copied word for word in its entirety by each of the states of Australia ...<sup>52</sup>

McGregor-Lowndes points out a significant flaw in this unthinking adoption, namely the failure to appreciate that other English bodies (such as the English Charity Commission) supervised English charities, whereas no such bodies existed in Australia.<sup>53</sup>

In addition to the points made by McGregor-Lowndes and Levy, it can also be noted that English companies limited by guarantee can be private or public. It is only private companies that can obtain the exemption equivalent to s 150 in the UK.<sup>54</sup>

### 3.2.2 Section 150 Companies and Chapter 2E

As mentioned in Section 3.2 above, s 9 of the Corporations Act exempts s 150 companies from the related party provisions in ch 2E. A question arises as to why such companies are exempt. There appears to be no clear answer to this question. The related party provisions were introduced by the *Corporate Law Reform Act 1992* (Cth). The definition of public company in s 9 of the Corporations Act was changed by s 22 of the *Corporate Law Reform Act 1992* (Cth) to exclude s 150 companies (previously s 383 companies) from the related party provisions. Despite searches of the explanatory memorandum, the supplementary explanatory memorandum, the exposure draft and the parliamentary debates there is no reason provided for this change to s 9. The provisions stem from a series of reports by the Companies and Securities Law Review Committee and the Companies and Markets Advisory Committee<sup>55</sup> but there is nothing in those reports that explains the changed definition in s 9.

The following reasons can be speculated. The first is that Part 3.2A was originally drafted by the Companies and Securities Advisory Committee to apply to all companies, subject to exceptions. The exemptions included exempt proprietary companies and companies with less than 15 members. The ASC could also provide exemptions where, inter alia, the transaction or class of transactions did not involve the public.<sup>56</sup> When the Act was passed in 1992 it just applied to public companies. Perhaps charitable companies were seen as different to other public

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<sup>52</sup> See McGregor-Lowndes, 'Nonprofit Corporations' (n 2) 438-9.

<sup>53</sup> Ibid 439.

<sup>54</sup> *Companies Act 2006* (UK) s 60.

<sup>55</sup> See, eg, John Kløver and Jillian Segal, *Discussion of and Proposals on Reform in Principle of Australian Law Relating to Loans to Directors, Loans to Related and Connected Companies and Executive and Intra-group Remuneration* (1989); Companies and Securities Advisory Committee, *Report on Reform of the Law Governing Corporate Financial Transactions* (1991); see also Companies and Securities Law Review Committee, *Director's Statutory Duty to Disclose Interest (Companies Act s 228) and Loans to Directors (Companies Act s 230)* (Discussion Paper No 8, 1988); Companies and Securities Law Review Committee, *Director's Statutory Duty to Disclose Interest (Companies Act s 228) and Loans to Directors (Companies Act s 230)* (Report No9, 1989).

<sup>56</sup> See also Ian Ramsay, 'Corporate Disclosure of Loans to Directors: Report of an Empirical Study' (1991) 9 *Company and Securities Law Journal* 80.

companies. In addition, the Parliamentary Debates reflect concern that the related party provisions were 'very wide'.<sup>57</sup> These points also align with queries that have been raised as to the appropriateness of for-profit norms in the not-for-profit sphere, as highlighted in the comments of McGregor-Lowndes and DeMott referred to in Section 1 above.

A second possible explanation is that the extra requirements imposed by ch 2E are not required in the context of s 150 companies because, in order to qualify as a s 150 company, the company must have provisions in the constitution that explicitly prohibit the payment of directors in their capacity as directors. In this sense s 150 companies already have some checks and balances in relation to transactions with directors (but not with other related parties).

A third possible reason is that documents connected with the introduction of ch 2E reflect concerns (in the context of corporate collapses of the 1980s) in relation to the impact of self-dealing on investors and creditors, as well as Australian financial markets and the national economy. Thus the Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth) stated that the related parties provisions were

intended to protect shareholders of public companies against the possibility that the value of their investment will be eroded by a related party arranging for the company to enter into a transaction which gives a benefit to a related party.<sup>58</sup>

The Companies and Securities Advisory Committee stated:

Following the corporate collapses of the 1980s, it has become evident that some corporate controllers abused their positions of trust by arranging for the shifting of assets around and away from companies and corporate groups, and into their own hands ... This was made easier by the lack of any general statutory requirement that shareholders either consent to, or be informed of, these transactions. These abuses generally involved significant losses of corporate funds, with adverse effects on investor and creditor returns and confidence. They also brought into question the integrity of Australian financial markets, with detrimental consequences for the national economy.<sup>59</sup>

Members of charitable companies do not hold shares and do not therefore have a proportional right to the income and property of a company.<sup>60</sup>

Finally, as mentioned above, the s 150 exemption was originally copied from the UK companies legislation. In the UK companies limited by guarantee can be public or private but only private companies can omit the word 'Limited' from their name.

#### **4. Regulation of Related Party Transactions by Charities**

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<sup>57</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 20 November 1992, 3029 (Mr Costello).

<sup>58</sup> Explanatory Memorandum, *Corporate Law Reform Bill 1992 (Cth)* [206], [210].

<sup>59</sup> Companies and Securities Advisory Committee, *Report on Reform of the Law Governing Corporate Financial Transactions* (1991) 1.

<sup>60</sup> See DeMott (n 1) 132.

The fact that ch 2E does not apply to s 150 companies raises the question of how related party transactions engaged in by such companies are regulated. This is part of a broader question as to the extent and sufficiency of regulation of related party transactions by charitable entities generally. Charities take a number of forms, including trusts, incorporated and unincorporated associations, co-operatives and companies. This issue came to the fore in light of the recent review of the ACNC.<sup>61</sup>

The fact that related party transactions are an issue in the charities sector is also reflected in the 2018 ACNC Compliance Report, which draws attention to the following common related party transactions:

- Charities receiving goods or services from for-profit organisations that are owned or operated by relatives of the charity's responsible persons – its board or committee members. This is done without conflicts of interest being considered and managed, and in the absence of any formal arrangement such as a contract or service agreement.
- Goods and services are provided at inflated prices beyond what would be a reasonable market rate. No due diligence was conducted by the charity to determine that the price was appropriate
- Board members awarding contracts or projects to their own companies without managing conflicts of interest or considering any alternative providers.<sup>62</sup>

#### 4.1 ACNC Governance Standard 5

The system of governance duties that applies to those who govern charities (known as 'responsible persons') is complex. This is partly because the ACNC has limited jurisdiction in relation to individuals for constitutional reasons.<sup>63</sup> ACNC Governance Standard 5<sup>64</sup> lays down core duties for responsible persons. However, responsible persons are only indirectly subject to ACNC Governance Standard 5 in that registered charitable entities are required to take reasonable steps to make sure that responsible persons comply with the duties set out in that Standard.<sup>65</sup> Any sanctions are generally imposed on the entity rather than the individual.<sup>66</sup>

Governance Standard 5, contained in reg 45.25(2) of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth), provides:

A registered entity must take reasonable steps to ensure that its responsible entities are subject to, and comply with, the following duties:

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<sup>61</sup> See n 3 above.

<sup>62</sup> ACNC 2018 (n 5) 28.

<sup>63</sup> See Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45(2) *Australian Business Law Review* 127; Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446.

<sup>64</sup> See *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.25(2); *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ch 3.

<sup>65</sup> Reasonable steps could include having the duties set out in a contract of employment or letter of appointment; as part of a board charter; a code of conduct based on the duties; or specifying the duties of the responsible entities in the registered entity's governing rules (although there is no prescribed or mandatory form): see Explanatory Statement, *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No 1)* (Cth) 11–12.

<sup>66</sup> For critical analysis see Ramsay and Webster (n 63) 147–50.

- (a) to exercise the responsible entity's powers and discharge the responsible entity's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible entity of the registered entity;
- (b) to act in good faith in the registered entity's best interests, and to further the purposes of the registered entity;
- (c) not to misuse the responsible entity's position;
- (d) not to misuse information obtained in the performance of the responsible entity's duties as a responsible entity of the registered entity;
- (e) to disclose perceived or actual material conflicts of interest of the responsible entity;  
Note: A perceived or actual material conflict of interest that must be disclosed includes a related party transaction.
- (f) to ensure that the registered entity's financial affairs are managed in a responsible manner;
- (g) not to allow the registered entity to operate while insolvent.<sup>67</sup>

#### 4.1.1 Related Party Transactions

Governance Standard 5 does not include a specific duty in relation to related party transactions. However, a note to Governance Standard 5 specifies that related party transactions constitute a perceived or actual material conflict of interest. What this means is that registered charities must take reasonable steps to make sure that responsible persons disclose related party transactions.

A question arises as to what a related party transaction is for the purposes of Governance Standard 5. The ACNC factsheet on related party transactions notes that related parties are not defined in the ACNC legislation and refers to the definition in the Australian Accounting Standards Board's *AASB Standard: Related Party Disclosures* ('AASB 124').<sup>68</sup> The ACNC provides the following summary as to which persons and entities are related persons for the purposes of AASB 124:

- a person that is connected to the charity, such as a Responsible Person or a close member of their family that has control or joint control of the charity
- an organisation that is connected to the charity and has control or significant influence over the charity, such as a parent entity of the charity
- an organisation that the charity has control or significant influence over, such as a subsidiary entity
- any organisation and the charity that are members of the same group (for example, fellow subsidiaries)
- a member, or close member of their family, of the key management personnel of the charity (the people with authority and responsibility for planning, directing and controlling the activities of the charity directly or indirectly)

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<sup>67</sup> These requirements apply also to charitable entities that are not companies such as trusts, associations and co-operatives. Section 205-30 of the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) defines responsible entities to include directors, trustees and other persons involved in a charity's governing body.

<sup>68</sup> Australian Charities and Not-for-profits Commission, 'Related Party Transactions', *Australian Charities and Not-for-profits Commission* (Website) <<https://www.acnc.gov.au/for-charities/manage/related-party-transactions>> ('Related Party Factsheet'); Australian Government, Australian Accounting Standards Board, *AASB Standard: Related Party Disclosures* (July 2015) ('AASB 124').

- an associate (an entity over which the charity has significant influence) or joint venture (a joint arrangement whereby the charity with another entity or entities have joint control of the arrangements and have rights to the net assets of the arrangement).<sup>69</sup>

The text of AASB 124 is, in fact, difficult to follow and it is necessary to turn to other accounting standards for definitions of terms such as ‘parent’, ‘subsidiary’ and ‘associate’.

#### **4.1.2 Differences between AASB 124 and Chapter 2E**

It can be seen from this summary that this definition of the term ‘related parties’ differs from that in s 228 (outlined in Section 2 above). For example, ch 2E applies to directors and related parties of directors, whereas AASB 124 extends further to include key management personnel and close family members of such personnel. The term ‘key management personnel’ is defined in AASB 124 as the people with authority and responsibility for planning, directing and controlling the activities of the charity directly or indirectly.<sup>70</sup> Although the Governance Standards do not apply to officers below board level, AASB 124 requires disclosure of related party transactions involving key management personnel.

Section 228 of the Corporations Act is specific as to which family members are included, whereas AASB 124 refers to ‘close family members’. AASB 124 defines the term ‘close members of the family of a person’ as

those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity and include:

- that person’s children and spouse or domestic partner;
- children of that person’s spouse or domestic partner; and
- dependants of that person or that person’s spouse or domestic partner.<sup>71</sup>

For some of the categories of related parties specified in AASB 124 it must be shown that that person or organisation has control or significant influence over the charity. However, family members of key management personnel of the charity are included without this nexus.

A further point to note is that related party transactions are required to be disclosed but there is no requirement for member approval. By contrast, ch 2E of the Corporations Act requires a specific form of shareholder approval to be given for related party transactions and for ASIC to be involved. Charitable companies that are subject to ch 2E must therefore, in the absence of an applicable exemption, obtain member approval for related party transactions (as defined in ch 2E) in addition to requiring responsible persons to make disclosure of related party transactions (as defined in AASB 124) in accordance with Governance Standard 5.

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<sup>69</sup> The ACNC Related Party Factsheet adopts the AASB 124 definition of related party transactions, namely ‘a transfer of resources, services, obligations between a charity and a related party regardless of whether a price is charged.’ – Related Party Factsheet (n 68). This includes purchases, sales, donations; receipt of goods, services or property; leases; transfers of property including intellectual property; loans; guarantees; provision of employees on a paid or complementary basis.

<sup>70</sup> AASB 124 (n 68) [9].

<sup>71</sup> Ibid.

The decision to adopt the definitions in AASB 124 for the purposes of disclosure under para (e) of Governance Standard 5 is interesting in light of the intentions expressed at the time that the ACNC Act and Regulations were considered and enacted. For example, the Explanatory Statement to the Australian Charities and Not-for-profits Amendment Regulation 2013 (No1) (Cth) states that the duties in Governance Standard 5

have been derived from the common law and the *Corporations Act* and they have well established meanings. Consequently, it is intended that the meaning of these duties will be interpreted with reference to the existing common law and relevant legislation.<sup>72</sup>

Treasury stated that the duties in Governance Standard 5 were intended to 'be substantially the same as the duties of directors under the *Corporations Act*.'<sup>73</sup> This would suggest application of the definitions from the related parties regime in ch 2E of the *Corporations Act*. It also appears from s 111M of the *Corporations Act* that further regulations were intended concerning related party transactions and the interaction between ch 2E and the ACNC Governance Standards. On the other hand, the application of the definitions in AASB 124 is consonant with the fact that certain charitable entities are required to prepare financial reports in accordance with the accounting standards.<sup>74</sup> This is also supported by the fact that related party transactions just need to be disclosed (rather than approved) in order to comply with Governance Standard 5.

In terms of practical application and compliance, the differences between AASB 124 and ch 2E may not be significant for charitable companies that are subject to both given that many for-profit corporations are subject to both.<sup>75</sup>

#### 4.1.3 Details of Disclosure

Pursuant to the terms of paragraph (e) of Governance Standard 5, if a responsible person has a perceived or actual material conflict of interest (which includes a related party transaction), they must disclose that conflict. Regulation 45.25(3) provides details of the person/s to whom disclosure should be made. For example, reg 45.25(3)(a) provides that if the responsible person is a director of the registered entity then disclosure should be made to the other directors (if any). The ACNC Guide on Conflicts provides that it is then up to those directors to

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<sup>72</sup> Explanatory Statement, *Australian Charities and Not-for-profits Commission Amendment Regulation 2013 (No1)* (Cth) 11.

<sup>73</sup> See Australian Government, The Treasury, *Governance Standards for the Not-for-Profit Sector* (Consultation Paper, December 2012) 22.

<sup>74</sup> See *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 60.10; *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 300-5; Section 4.4 below. Note, however, that many for-profit corporations are subject to the different regimes in AASB 124 and ch 2E (see *Corporations Act 2001* (Cth) Pt 2M.3, ASIC RG 76 (n 34) 36), meaning that it would not be incongruous for the definitions in AASB 124 to apply to reporting but for those in ch 2E to apply for the purposes of disclosure under Governance Standard 5.

<sup>75</sup> See *Corporations Act 2001* (Cth) Pt 2M.3; ASIC RG 76 (n 34) 36.

determine how the conflict should be managed.<sup>76</sup> Depending on the nature and extent of the conflict, this may mean that the responsible person is able to be present, participate in the relevant decision and vote on the matter, or that the responsible person must abstain from participation and/or being present and/or voting.<sup>77</sup> Conflicts need to be recorded, ideally in a register of interests.<sup>78</sup>

One criticism of Governance Standard 5 is that the requirement to *disclose* perceived and actual material conflicts is inadequate in that the requirement should be to *manage* the conflict. This was raised in some submissions to the ACNC Review.<sup>79</sup> Interestingly the ACNC factsheet on related party transactions states that '[i]t is important for charities to carefully manage these transactions', although this is followed by the words 'and ensure that they [are] transparent and the details of them are recorded appropriately.'<sup>80</sup> The factsheet gives the following example:

A charity is planning to launch a new website. One of the companies being considered to create the website is managed by the daughter of a director of the charity. This service has been identified as a potential related party transaction and a conflict of interest. To manage this, the charity follows its procedures for conflicts of interest and related party transactions. Following the steps outlined in the policies and procedures means that:

- all board members will be aware of the relationship between the board member and the web design company
- the related party transaction will be recorded in the charity's register of interests and register of related party transactions
- the board member with the potential conflict will not be involved in the charity's decision to award the contract for the web design work
- the board will obtain quotes from a few companies before making its decision as a way of assessing that the cost is of fair market value.

## 4.2 Other Governance Duties

It is important that responsible persons disclosing related party transactions and those to whom disclosure is made (and who make the decision as to how the conflict is managed) remember their own duties (imposed at general law, under statute and indirectly under Governance Standard 5). These include duties to act in good faith in the interests of the entity and for proper purposes, to avoid unauthorised conflicts and profits<sup>81</sup> and to exercise care and diligence. This means that they should, inter alia, undertake care and diligence to investigate and be

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<sup>76</sup> Australian Charities and Not-for-profits Commission, *Managing Conflicts of Interest: A Guide for Charity Board Members* (2015) 18 ('ACNC Conflicts Guidance Note').

<sup>77</sup> See *ibid* 15-17.

<sup>78</sup> *Ibid*.

<sup>79</sup> See, eg, Australian Charities and Not-for-profits Commission, *Submission to the Treasury: Review of Australian Charities and Not-for-profits Commission (ACNC) Legislation* (undated); Beyond PMSA, *Submission to the Treasury: Review of Australian Charities and Not-for-profits Commission (ACNC) Legislation* (28 February 2018); Illawarra Legal Centre, *Submission to the Treasury: Review of Australian Charities and Not-for-profits Commission (ACNC) Legislation* (February 2018); Queensland Law Society, *Submission to the Treasury: Review of Australian Charities and Not-for-profits Commission (ACNC) Legislation* (28 February 2018).

<sup>80</sup> Related Party Factsheet (n 68).

<sup>81</sup> For analysis see also Rosemary Teele Langford, 'Conflicts Coherence in the Charities Sphere: Would a Conflict by Any Other Name Proscribe the Same?' (2020) 14 *Journal of Equity* 1.

satisfied that the relevant transaction is in the best interests of the entity and in furtherance of its purposes and that it does not jeopardise its solvency.

The duties to act in good faith in the interests of the entity and for proper purposes, in particular, extend to transactions that confer benefits on third parties.<sup>82</sup> Responsible persons should also be very wary of related party transactions that constitute misuse of position or misuse of information. Such misuse is proscribed by paras (c) and (d) of Governance Standard 5, and may result in breach of statutory duties or the fiduciary duty to avoid profits from position.<sup>83</sup>

### **4.3 Section 150 Companies**

Where the charitable company is a s 150 company (and therefore exempt from ch 2E) the charitable company's constitution must prohibit the company paying fees to its directors and must require directors to approve all other payments that the company makes to directors. This means that any payments to directors must not only be disclosed; they must also be approved. However, approval is by the other directors rather than the members. There is no requirement for disclosure or approval of payments to, or transactions with, parties connected with directors such as directors' spouses, family members or associated entities.

### **4.4 Reporting Entities**

Charities that are 'reporting entities' are required to submit financial statements that comply with applicable Australian accounting standards, including AASB 124.<sup>84</sup> The ACNC Annual Information Statement now asks charities for information on any related party transactions, and also whether the charity has any documented policies or procedures which cover related party transactions.<sup>85</sup>

## **5. ACNC Review and Government Response**

In 2018 a review of the ACNC was conducted to meet the Commonwealth Government's statutory obligation to undertake a review of the legislation establishing the ACNC after the first five years of operation of that legislation.<sup>86</sup>

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<sup>82</sup> For analysis of the myriad conflicts duties applicable in the charities context see Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) 299-300 [10.21]-[10.23], 304 [10.36].

<sup>83</sup> As mentioned above, the core statutory duties in ss 180-183 and 191-194 of the Corporations Act have been turned off for directors of charitable companies. General law duties continue to apply, however.

<sup>84</sup> See Australian Charities and Not-for-profits Commission, 'Annual Financial Report: General and Special Purpose Statements' [acnc.gov.au](http://acnc.gov.au)

<sup>85</sup> See ACNC Review (n 3) 60.

<sup>86</sup> See *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) s 16.

As part of this review the Panel received and extracted submissions calling for all charities to disclose related party transactions.<sup>87</sup> The main concerns were the misuse of funds for private benefit, which can have the effect of reducing public trust and confidence in the charities sector. Thus CAANZ submitted that [i]nappropriate transactions with related parties are a key risk in relation to charities misusing funds for private benefit.’<sup>88</sup> The Australian Institute of Company Directors asserted that ‘... public trust and confidence in the sector can be eroded by the application of charitable resources for private benefit. One of the common ways through which private benefit occurs is through improper related party transactions ...’<sup>89</sup>

The ACNC Review recommended that registered entities should be required to disclose related party transactions as part of their financial disclosures.<sup>90</sup> This recommendation was intended to increase transparency of transactions that pose a higher risk to charitable assets being used for private benefit.<sup>91</sup> The Government responded to this recommendation by stating that it supports all registered entities being required to disclose related party transactions.<sup>92</sup> However, to minimise the compliance burden on small charities, the Government will require small charities to make a simplified disclosure involving a brief description of the related party transaction.<sup>93</sup> This will be implemented by changes to the regulations and the start date for this requirement will be aligned with any change made to the revenue thresholds for financial reporting requirements.<sup>94</sup>

The ACNC Review also recommended that large registered entities be required to disclose the remuneration paid to responsible persons and senior executives on an aggregated basis. This was supported by the Government.<sup>95</sup>

## **6. Appraisal: How Should Related Party Transactions by Charitable Entities Be Regulated?**

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<sup>87</sup> See, eg, Chartered Accountants Australia and New Zealand, *Submission to the Treasury: Review of the Australian Charities and Not-for-profits Commission (ACNC) Legislation* (27 February 2018) 2.

<sup>88</sup> *Ibid.*

<sup>89</sup> See Australian Institute of Company Directors, *Submission to the Treasury: Review of the Australian Charities and Not-for-profits Commission (ACNC) Legislation* (28 February 2018) 7.

<sup>90</sup> ACNC Review (n 3) 60-63.

<sup>91</sup> *Ibid* 10. The ACNC Review Panel also commented on uncertainty relating to the interaction between the ACNC Act and the Corporations Act, commenting that this was ‘[o]ne of the more vexed issues that was raised with the Panel ...’ – see *ibid* 118, 125.

<sup>92</sup> Government Response (n 4) 14.

<sup>93</sup> *Ibid.*

<sup>94</sup> See *ibid.* Despite supporting these recommendations, the Government has stated that the exemptions for basic religious charities will not be reviewed, contrary to a recommendation by the ACNC Review – see *ibid* 15.

<sup>95</sup> See *ibid* 14. The Government stated that this disclosure will only be required from entities with two or more key management personnel to accommodate privacy concerns and that the start date will align with any change to the revenue thresholds for minimum reporting requirements – *ibid* 14.

Against the background description of the ACNC regime and the changes to be introduced in response to the ACNC Review, this Section of the article critically analyses how related party transactions by charitable entities should be regulated. There have been arguments in favour of specific regulation of related party transactions. For example, in 2004 Woodward and Marshall argued that payments to responsible persons or related parties should be publicly disclosed and that '[c]onsideration should be given to the application of Chapter 2E ..., or possibly new conflict of interest-type provisions, to all NFP companies.'<sup>96</sup> This would include removing the exemption for s 150 companies. In addition they argued that an effective way of ensuring that not-for-profit organisations disclose remuneration of directors and officers be found.<sup>97</sup>

By contrast, Prolegis Lawyers expressed the following in its submission to the ACNC Review:

Arguably the protections that chapter 2E affords to members are not appropriate nor necessary for charities, which are subject to constitutional constraints, specifically, that the income and revenue of a charity may only be applied in furtherance of its charitable objects. These constitutional constraints protect against the diminution of the assets of a charity, and the members as a whole do not have an interest in those assets, except to ensure compliance with the constitution.<sup>98</sup>

## 6.1 Key Considerations

The following key considerations arise.

### 6.1.1 Private Benefit and the Non-Distribution Constraint

One justification for appropriate regulation of related party transactions is to enforce the constraints to which charities are subject in relation to private benefit. A core feature of charitable entities (and not-for-profit entities generally) is the non-distribution constraint. This is a constitutional provision that bars a not-for-profit organisation from distributing its surplus income to any controller, office holder, employee or member.<sup>99</sup> However, the effectiveness of the non-distribution constraint is arguably dependent on the existence of an effective regulatory environment.<sup>100</sup> Hansmann has argued that limited policing of the non-

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<sup>96</sup> See Susan Woodward and Shelley Marshall, *A Better Framework – Not-for-Profit Regulation 2004* (Centre for Corporate Law and Securities Regulation, The University of Melbourne) 7.

<sup>97</sup> Ibid. Concerns as to transparency and reporting in the not-for-profit sector have been expressed for a number of years, although the ACNC regime has introduced some reforms in these respects – see Senate Standing Committee on Economics, *Disclosure Regimes for Charities and Not-for-profit Organisations* (December 2008) ch 10 ('Senate Disclosure Report').

<sup>98</sup> Prolegis Lawyers, *Submission to the Treasury: Review of the Australian Charities and Not-for-profits Commission (ACNC) Legislation 2018* (28 February 2018) ('Prolegis Submission').

<sup>99</sup> Any surplus must be used solely to finance the ongoing attainment of the objects for which the organisation was formed. See Myles McGregor-Lowndes, 'An Overview of the Not-for-Profit Sector' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) ch 5. See also Andrew J Lind, 'The Non-Distribution Constraint and Social Enterprise: Can Share Capital Fund Non-profit Organisations?' (2019) 25 *Third Sector Review* 233; Prolegis Submission, *ibid.*

<sup>100</sup> See Henry Hansmann, 'Reforming Nonprofit Corporation Law' (1981) 129 *University of Pennsylvania Law Review* 497; see also Richard Steinberg and Bradford H Gray, 'The Role of

distribution constraint has resulted in managers of not-for-profit entities evading the constraint and enriching themselves via mechanisms such as excessive salaries, favourable loans and excessively generous contracts between the entity and related parties.<sup>101</sup> As highlighted by Garton, private contracts and charitable trusts are unlikely to be effective in achieving an effective non-distribution constraint, thus making regulation desirable.<sup>102</sup> The non-discoverability of infringement of the non-distribution constraint is also noted as a key concern.<sup>103</sup>

These points are borne out by the ACNC Compliance Reports. For example, the 2012 and 2018 Reports note that one of the most common concerns raised by the public and investigated by the ACNC is charities providing individuals with private benefit.<sup>104</sup> As highlighted in the Bergin report, people contributing money or time or both to charities are entitled to expect that the contributions flow to the intended beneficiaries.<sup>105</sup> The report stated:

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.<sup>106</sup>

In addition to requirements concerning conflicts of interest,<sup>107</sup> it is submitted that ensuring the existence and enforcement of adequate safeguards in relation to related party transactions is an important part of monitoring and enforcing the non-distribution constraint. Furthermore, particularly where the corporate form is a chosen vehicle (with attendant privileges such as separate legal personality and limited liability) additional requirements and duties are arguably appropriate. The 'halo' perception of charities should arguably not outweigh the need for appropriate controls and safeguards.<sup>108</sup>

For these reasons, at a minimum, related party transactions should arguably be disclosed.

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Nonprofit Enterprise in 1993: Hansmann Revisited' (1993) 22 *Nonprofit and Voluntary Sector Quarterly* 297.

<sup>101</sup> See Henry B Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 *Yale Law Journal* 835, 873-5. For further evaluation of the non-distribution constraint see Evelyn Brody, 'Agents without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms' (1996) 40 *New York Law School Law Review* 457.

<sup>102</sup> Jonathan Garton, 'Principles of Regulation of Not-for-Profits' in Matthew Harding (ed), *Research Handbook on Not-For-Profit Law* (Edward Elgar, 2018) ch 22, 515.

<sup>103</sup> See also Brody (n 101); Hansmann, 'The Role of Nonprofit Enterprise' (n 101).

<sup>104</sup> ACNC 2014 (n 5) 9; ACNC 2018 (n 5) 6-7.

<sup>105</sup> See Bergin (n 6) [1.30].

<sup>106</sup> See *ibid* [8.4.46]. As stated by the UK charities commissions, 'The disclosure of certain transactions is important for stewardship purposes to provide assurance that the charity is operating for the public benefit and that its trustees are acting in the interests of their charity and not for private benefit' – see The Charity Commission for Northern Ireland, Charity Commission for England and Wales and Office of the Scottish Charities Regulator, *Accounting and Reporting by Charities: Statement of Recommended Practice Applicable to Charities Preparing Their Accounts in Accordance with the Financial Reporting Standard Applicable in the UK and Republic of Ireland (FRS 102)* (2<sup>nd</sup> ed, 2019) [9.2] ('SORP').

<sup>107</sup> McGregor-Lowndes in Harding (n 99) ch 5, 134.

<sup>108</sup> As to the halo perception see McGregor-Lowndes, 'Nonprofit Corporations' (n 2) 428, extracted in Section 1 above.

### 6.1.2 For-Profit Norms

In assessing the necessity and form of regulation of related party transactions, an important consideration is whether for-profit norms are appropriate in the not-for-profit sphere. As highlighted in Section 1 above, commentators such as DeMott and McGregor-Lowndes have pointed to issues concerning the transferability of corporate standards to not-for-profit entities. However, DeMott also drew attention to the fact that instances of self-dealing by responsible persons of well-known not-for-profits had affected donors' trust in these entities and also more broadly in similar not-for-profits.<sup>109</sup> McGregor-Lowndes pointed out that taking away for-profit regulation mechanisms can leave holes in the regulation of charitable companies which can lead to regulatory default.<sup>110</sup>

These observations arguably raise the need for any regulation of related party transactions to be attuned to the charitable (or wider not-for-profit) sphere. It will be argued below that a financial reporting regime more tailored to the charities (or wider not-for-profit) sphere should be developed.

### 6.1.3 Member Approval

A third set of considerations relates to the appropriateness of member approval, which is an important feature of the for-profit regulatory regime in ch 2E.<sup>111</sup> It has been argued that member approval may be less meaningful in the charitable context given that, as pointed out by DeMott, members do not have proprietary interests in the entity.<sup>112</sup> On the other hand, it is notable that members of charities may well have an increased interest in ensuring that the relevant charity's funds are not misappropriated because of their commitment to the purpose of the relevant charity. In addition, ACNC Governance Standard 2 requires charities that have members to take reasonable steps to be accountable to their members and to allow their members adequate opportunities to raise concerns about how the charity is run.<sup>113</sup> In fact the United Kingdom Supreme Court recently held that members of charitable companies owe fiduciary duties in limited

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<sup>109</sup> DeMott (n 1) 134.

<sup>110</sup> McGregor-Lowndes, 'Nonprofit Corporations' (n 2) 428.

<sup>111</sup> For differences between corporate shareholders and not-for-profit members see Vivienne Brand, Jeff Fitzpatrick and Sulette Lombard, 'Governance and Not-for-Profits: Regulatory Reform' (2013) 15 *Flinders Law Journal* 381.

<sup>112</sup> In this respect the issue of to whom responsible persons of charitable entities are accountable is complex - see Brody (n 101); Matthew Harding, 'Independence and Accountability in the Charity Sector' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart, 2020) ch 2; 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; Tracey M Coule, 'Nonprofit Governance and Accountability: Broadening the Theoretical Perspective' (2015) 44(1) *Nonprofit and Voluntary Sector Quarterly* 75.

<sup>113</sup> See *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.10.

circumstances,<sup>114</sup> although the potential application of this precedent in Australia has been queried.<sup>115</sup>

Member approval in the charities context may not, however, always be practical. For example, some charities (such as trusts) do not have members; in some charities the responsible persons are the members and in others the membership may be wide and dispersed. In smaller charities member approval is likely to be more practical than in larger charities, where meetings may be costly. There are, therefore, a number of factors that complicate the appropriateness and efficacy of requiring member approval in the charities context.

#### 6.1.4 Compliance Costs

A fourth, and very important, set of considerations concerns the compliance burden already faced by charities and the difficulties they face in recruiting board members.<sup>116</sup> Any regulation of responsible persons needs to strike a careful balance between preventing private benefit, on the one hand, and making it too hard for charities that are trying to do the right thing, on the other. In this respect it must also be remembered that many responsible persons are volunteers and anecdotal evidence suggests many are short of time – care must be given to not unnecessarily increasing the complexity and compliance costs for such responsible persons. For these reasons an important consideration in determining appropriate regulation of related party transactions is avoiding excessive compliance burden.<sup>117</sup>

#### 6.2 Options

There are a number of ways in which appropriate regulation of related party transactions by charities could be developed. The first option is for related party transactions to be disclosed as part of the charity's financial disclosures, as recommended by the ACNC Review and accepted by the Government. However, additional measures should also be canvassed. These measures are supported by the fact that, although disclosure and consent are widely adopted as a means of managing conflicts, the efficacy of disclosure has recently been questioned.<sup>118</sup>

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<sup>114</sup> *Lehtimäki v Cooper* [2020] UKSC 33.

<sup>115</sup> See Myles McGregor-Lowndes and Frances Hannah (eds), *Lehtimäki and others v Cooper*; *ACPNS Legal Case Note Series: 2020-94*.

<sup>116</sup> See, eg, Noel Hyndman and Paul McDonnell, 'Governance and Charities: An Exploration of Key Themes and the Development of a Research Agenda' (2009) 25(1) *Financial Accountability & Management* 5; John Chelliah, Martijn Boersema 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.

<sup>117</sup> See also Oonagh B Breen, 'The Disclosure Panacea: A Comparative Perspective on Charity Financial Reporting' (2013) 24 *Voluntas* 852. Note that the Government Response proposes simplified reporting of related party transactions for small charities – see Government Response (n 4) 14.

<sup>118</sup> See, eg, Australian Securities and Investments Commission and The Dutch Authority for the Financial Markets, *Disclosure: Why It Shouldn't Be the Default* (REP 632, October 2019).

The second option is approval by members, as discussed above. Any responsible persons connected with the relevant transaction who are also members should not be able to vote. A requirement for member approval of related party transactions could be subject to exceptions such as transactions on arm's length terms.<sup>119</sup>

A third option would be a requirement for ACNC approval in certain cases perhaps where transactions exceed a monetary amount and/or where member approval is impractical, again subject to exceptions. The interaction between such approval and relevant general law and statutory duties (such as duties to avoid conflicts and profits and to act in good faith in the interests of the entity) would need to be considered and determined.<sup>120</sup>

A fourth option would be to require disclosure of all related party transactions and to also require that related party transactions worth over \$5000 (or some other sum) be approved by either the members or the ACNC unless it can be proved that the transaction is at arm's length. This would need to be substantiated, such as by independent valuation.<sup>121</sup>

Other options include requiring related party transactions to be subject to approval of the other responsible persons (noting that these other persons would be subject to duties to act in good faith in the interests of the entity, to further its purposes and to act with care and diligence) or a requirement that the responsible person demonstrate the fairness of the transaction.<sup>122</sup>

Hansmann has suggested stronger measures due to the fact that donors and customers of not-for-profits are less able to look out for themselves than shareholders of for-profit companies (who have the benefit of voting power, extensive disclosure requirements and the option of taking a derivative action).<sup>123</sup> He advocates a 'flat prohibition' against all self-dealing transactions involving controlling persons in not-for-profit organisations or any other organisation in which such a person has a financial interest.<sup>124</sup> This would be subject to exceptions in relation to (for example) reasonable salaries and expenses and the purchase of services on arm's length terms or if there was prior consent from a

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<sup>119</sup> Guidance on what constitutes arm's length terms could be sourced in the *Corporations Act 2001* (Cth) and in SORP (n 106). For example, s 210 of the *Corporations Act* provides an exemption if the financial benefit is given on terms that would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm's length or are less favourable to the related party than such terms. For further guidance as to arm's length terms see ASIC RG 76 (n 34); *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No2)* (2005) 53 ACSR 305, 381.

<sup>120</sup> In England and Wales conflicted trustees may seek authority of the Charity Commission for England and Wales in certain circumstances – see Charity Commission for England and Wales, *Conflicts of Interest: A Guide for Charity Trustees* (May 2014) (CC29) [2.2].

<sup>121</sup> This suggestion is based on a similar proposal in Helen Anderson, Ian Ramsay, Michelle Welsh and Jasper Hedges, *Phoenix Activity – Recommendations on Detection, Disruption and Enforcement* (Melbourne Law School and Monash Business School Research Paper, February 2017).

<sup>122</sup> See DeMott (n 1) 143.

<sup>123</sup> Hansmann, 'Reforming Nonprofit Corporation Law' (n 100).

<sup>124</sup> *Ibid* 569.

court of equity.<sup>125</sup> Hansmann has also suggested that donors, and in some cases customers, be given standing to sue related parties.<sup>126</sup>

### **6.3 Evaluation – How Should Related Party Transactions Be Regulated?**

Given that charities take a number of legal forms, it is important that any change to the regulation of related party transactions be suitable for all charities. An alternative is for different requirements to be imposed for different types of charity. This could be achieved by implementing a baseline standard with exceptions for smaller or unincorporated charities and/or additional requirements for larger or incorporated charities. As mentioned, given that charities are cost-sensitive it is important that any changes not be overly burdensome. There is also a clear need for coherence and clarity in any changes to regulation.<sup>127</sup>

#### **6.3.1 Reporting**

It is submitted that related party transactions should at the very least be disclosed, as recommended by the ACNC Review and accepted by the Government Response. In this respect reporting of related party transactions is a middle point between for-profit norms in ch 2E and the current nebulous inclusion of related party transactions as conflicts of interest that need to be disclosed in Governance Standard 5. In line with the sentiment that ‘sunlight [is] the best disinfectant’,<sup>128</sup> disclosure of such transactions ensures that there can be scrutiny, thus in turn deterring inappropriate related party transactions.<sup>129</sup> In addition, it focuses the minds of relevant responsible persons on the purposes and interests of the charitable entity. Reporting is important so that the ACNC and potential donors can see details of related party transactions. As stated by the UK charities regulators:

A decision by a charity to enter into any transaction must be made in the charity’s own interests and for the benefit of its beneficiaries. The disclosure of related party transactions is an important element of transparency in financial reporting because:

- related parties may enter into transactions that unrelated parties would not
- transactions between related parties may not be made at the same amounts or on the same terms as those between unrelated parties; and

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<sup>125</sup> Ibid.

<sup>126</sup> Hansmann, *The Role of Nonprofit Enterprise* (n 101) 841 defines patrons as those persons who constitute the ultimate source of the not-for-profit’s income (such as donors and, in some cases, customers); see also Hansmann, *Reforming Nonprofit Corporation Law* (n 100) 609; cf Brody (n 101).

<sup>127</sup> See ACNC Review (n 3) 47. As noted in Section 5 above, the Government Response to the ACNC Review proposes that small charities are to make a simplified disclosure involving a brief description of the related party transaction – see Government Response (n 4) 14.

<sup>128</sup> LD Brandeis, *Other People’s Money and How the Bankers Use It* (Frederick A Stokes, 1914) 92. For evaluation in the charities context see Susan D Phillips, ‘Shining Light on Charities or Looking in the Wrong Place? Regulation-by-Transparency in Canada’ (2013) 24 *Voluntas* 881.

<sup>129</sup> In this respect the objective of AASB 124 is ‘to ensure that an entity’s financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances, including commitments, with such parties’ – AASB 124 (n 68).

- the existence of the relationship may be sufficient to affect the transactions of the charity with other parties.<sup>130</sup>

This article therefore supports proposals to require reporting of related party transactions as a first step.

### 6.3.2 Reporting Framework

It is, however, recommended that a financial reporting regime that is more appropriate for the charitable (or wider not-for-profit) sector be developed. In 2017 an AASB discussion paper found that: 'It is clear that the current financial reporting framework is not "fit for purpose" for charities.'<sup>131</sup> In an extensive empirical survey, Saj and Cheong demonstrate inconsistencies and problems with reporting by Australian charities, arguing for sector-specific reporting requirements for charities.<sup>132</sup>

Attention should first be given to developing an accounting standard that is suitable for the charitable (or broader not-for-profit) sphere, whether by way of a common conceptual framework with modifications for charities (and other not-for-profits) or a separate framework specific to the charitable (or wider not-for-profit) sector.<sup>133</sup> Detailed consultation with the charities sector should be conducted as to the appropriate contours of financial reporting requirements.<sup>134</sup>

### 6.3.3 Unsuitability of AASB 124

As noted in Section 4.4 above, AASB 124 currently applies to charities that are 'reporting entities' and also forms the basis for disclosure under ACNC Governance Standard 5. The appropriateness of this standard in the charitable context has, however, been doubted. The questionable suitability of AASB 124 in the context of charitable entities can be seen by the use of commercial terminology<sup>135</sup> and by the fact that key concepts such as 'parent', 'subsidiary', 'control' and 'joint venture' may not capture relevant relationships within the charitable sector. By way of contrast, the Explanatory Memorandum to the Australian Charities and Not-for-profits Commission Bill 2012 (Cth) refers to related parties in terms of 'a trustee, member, director, employee, agent or officer

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<sup>130</sup> See SORP (n 106) [9.13]. It also notes at [9.2]: 'The disclosure of certain transactions is important for stewardship purposes to provide assurance that the charity is operating for the public benefit and that its trustees are acting in the interest of their charity and not for private benefit.'

<sup>131</sup> Australian Government, Australian Accounting Standards Board, *Improving Financial Reporting for Australian Charities* (Discussion Paper, December 2017).

<sup>132</sup> See Saj and Cheong (n 8). See also Ralph Kober, Janet Lee and Julianna Ng, 'Australian Not-for-profit Sector Views on the Conceptual Framework, Accounting Standards and Accounting Information' [2020] *Accounting & Finance* 1; Phillips (n 128); DJ Gilchrist, *Issues Paper: Better Financial Reporting for Australia's NFPs, A Report Prepared for Anglicare Australia, Canberra* (Report, 2017); see also Senate Disclosure Report (n 97) ch 10; Woodward and Marshall, n 96, 6.

<sup>133</sup> For some suggestions see Kober, Lee and Ng (n 132) 29.

<sup>134</sup> For results of some initial consultation see Kober, Lee and Ng (n 132).

<sup>135</sup> For example, AASB 124 (n 68) [5] states: 'Related parties are a normal feature of commerce and business'.

of a trustee, donor, founder or ... associate of any of those entities'.<sup>136</sup> There are a number of other reasons for questioning the appropriateness of AASB 124 for charitable entities. For example, AASB 124 is complex and reference must be had to other accounting standards for definition of some terms.

In addition to the fact that a number of different types of entity exist in the charities sector, relationships within the charities sphere are not necessarily viewed in corporate terms. Complex relationships and structures exist in the charitable sphere.<sup>137</sup> For example, Woodward notes that

many of the larger welfare organisations are church-sponsored and have no clearly defined identity of their own. They receive their legal status by Acts of Parliament that allow their sponsoring denomination to hold property. In order to determine the exact legal nature of each organisation within a church's umbrella, it is often necessary to work through a complex (and largely confidential) combination of legislation, trusts, incorporated associations and companies.<sup>138</sup>

Moreover, the relationship between entities (and therefore the extent of control) may fluctuate in terms of whether there is 'control', particularly where this depends on the number of nominees on the board of the related organisation. In addition, in the context of religious charities a central incorporated property-holding body may have two capacities, namely as trustee of the denomination's property and as an entity in its own right. This means that concepts utilised in AASB 124 do not necessarily capture relationships and interactions between charitable entities, particularly in religious contexts. Approximately one third of registered charities identify the advancement of religion as their charitable purpose.<sup>139</sup>

A financial reporting regime developed with close attention to the charitable sector could also aid in achieving the delicate balance needed between catching related party transactions associated with private benefit without over-complicating arrangements within larger charitable groups with purposes that

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<sup>136</sup> Explanatory Memorandum 2012 (n 39) [3.34].

<sup>137</sup> For examples of structures, transactions and interactions occurring in religious charitable contexts see, eg, *His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand v Lambe Mitreski* [2018] NSWSC 13; *Presbyterian Church of Victoria Trusts Corporation v Anstee (No1)* 2016] VSC 297; *Presbyterian Church of Victoria Trusts Corporation v Attorney-General* (unreported, Pape J, Supreme Court of Victoria, 29 February 1972); *Malek Fahd Islamic School Ltd v The Australian Federation of Islamic Councils Inc* [2017] NSWSC 1712; *Anglican Development Fund Diocese of Bathurst (receivers and managers appointed) v Palmer* (2015) 336 ALR 372; *Re Salvation Army (Victoria) Property Trust* [2017] VSC 553.

<sup>138</sup> Susan Woodward, 'Not-for-Profit Motivation in a "For-Profit" Company Law Regime – National Baseline Data' (2003) 21 *Company and Securities Law Journal* 102, 103, referring to Industry Commission, *Charitable Organisations in Australia Report No 45* (AGPC, 1995) Appendix C, 10-13, 16-17. See also Chris Cornforth, 'Nonprofit Governance Research: Limits of the Focus on Boards and Suggestions for New Directions' (2012) 41 *Nonprofit and Voluntary Sector Quarterly* 1116 for discussion of structures and arrangements.

<sup>139</sup> See Penny Knight and David Gilchrist, *Australia's Faith-based Charities 2013: A Study Supplementing the Australian Charities 2013 Report* (Report, Curtin Not-for-Profit Institute, 2015) 3. Knight and Gilchrist note that this likely understates the number of charities that are religious – see *ibid* 1. For discussion, and further evidence of the connection between many charities and religion see Aroney and Turnour (n 63) 455-6.

are aligned (or where the charitable purpose of a recipient entity is also within the charitable purposes of the disposing entity). In this respect consideration could also be given to whether any exceptions should be granted. One potential exception could be where the transaction or arrangement is with another not-for-profit entity that has charitable purposes within the purposes of the first entity and where the transaction or arrangement furthers the purposes of the first entity.<sup>140</sup> Such transactions and arrangements may be necessary in some charitable settings in order for the individual entities to fulfill their purposes, particularly where one body holds the majority of the property and other assets. Another option would be for such arrangements to be disclosed to, and approved by, the ACNC. As the author's knowledge of the potential problems caused for religious charities by mandatory reporting of related party transactions is anecdotal, it is recommended that sector-wide consultation on this issue be undertaken.

### 6.3.4 Examples from Other Jurisdictions

A number of sources could be consulted in developing more appropriate reporting and regulation of related party transactions as part of a revised financial reporting framework. For example instructive guidance can be gained from the standards adopted in the UK, namely *Charities SORP (FRS 102)*.<sup>141</sup> This standard is specifically adapted for the charitable sector.<sup>142</sup> Although SORP is similar to AASB 124 in a number of respects, it is more tailored to the charitable sector in other respects. For example, the definition of related parties includes donors and there are a number of exceptions.<sup>143</sup> These include:

- Donations to the reporting charity from a trustee or a related party provided the donor has not attached conditions which would, or might, require the charity to alter significantly the nature of its existing activities if it were to accept the donation.
- Services provided on a voluntary basis to a charity as an unpaid general volunteer by a trustee or other related party.
- The purchase from the charity by a trustee, or other related party, of minor articles which are offered for sale on the same terms as they are offered to the general public, for example a small purchase made from a charity shop.
- The provision of services to a trustee or other related party where the services are received on the same terms as they are received by other beneficiaries of the charity.

In addition, it specifically draws attention to the stewardship role of responsible persons (referred to in the UK as 'charity trustees')<sup>144</sup> and the need for users of the accounts 'to be able to assess whether the relationship between the charity

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<sup>140</sup> For a definition of 'not-for-profit' see Explanatory Memorandum 2012 (n 39) [3.33]-[3.35]. My thanks to Andrew Lind for this suggestion.

<sup>141</sup> See SORP (n 106). Note also that Parts 7 and 9 of the *Charities Act 2011* (UK) regulate connected transactions and that there are also tax implications for donations to related parties (introduced by Parts 1 to 3 of Schedule 3 of *Finance Act 2011*). For comparative analysis of three jurisdictions see Breen (n 117).

<sup>142</sup> See SORP (n 106) [1.1], [9.2].

<sup>143</sup> *Ibid* [9.18].

<sup>144</sup> *Ibid* [9.2].

and the other party or parties to a transaction may have been influenced by interests other than those of the charity...'<sup>145</sup> A further noticeable feature of SORP is that it contains a specific section for charities established under company law.<sup>146</sup> This is an option that should be considered in any Australian standard.

### 6.3.5 Guidance

A number of other reforms should be considered in addition to reporting of related party transactions. The first is clearer and stronger guidance from the ACNC on benefits to responsible persons and their associates, including related party transactions and management of conflicts of interest. The Charity Commission of England and Wales guidance is instructive in these respects.<sup>147</sup> This guidance is much clearer and more definite in relation to the need for authorisation of, and procedures for dealing with, benefits to charity trustees and their connected persons.<sup>148</sup> It also lists examples of trustee benefits.<sup>149</sup> In addition, the Charity Commission guidance is much more definite on what is required of conflicted trustees.<sup>150</sup>

As concerns related party transactions, revised ACNC guidance could suggest that charities should consider implementing a related party transactions policy. Charities could, for example, be encouraged to determine and specify what is recommended procedure in relation to related party transactions (which could involve disclosure, approval and justification where the transaction is not arm's length) as well as considering different providers for the requisite product or service.<sup>151</sup> As concerns conflicts of interest, ACNC guidance should be clearer that the default position for conflicted responsible persons is to absent themselves from discussion and from voting. In its submission to the ACNC Review, the ACNC in fact suggested 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.'<sup>152</sup>

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<sup>145</sup> Ibid [9.14].

<sup>146</sup> Ibid [15].

<sup>147</sup> See, eg, Charity Commission for England and Wales, *Guidance – Conflicts of Interest: A Guide for Charity Trustees* (February 2017) (CC29).

<sup>148</sup> Ibid [2.1], Annex 1.

<sup>149</sup> See, ibid [3.2].

<sup>150</sup> See ibid sections 2-4.

<sup>151</sup> A particularly clear form of guidance, which could be altered if necessary, is Recommendation 11 of the Swiss Foundation Code: 'Important business transactions between the foundation and members of its executive bodies or related persons are to be conducted under the same conditions as for third parties ('at arm's length'). Such transactions are to be disclosed and accounted for in the annual report' – see Thomas Sprecher, Philipp Egger and Georg von Schnurbein, *Swiss Foundation Code 2015 – Principles and Recommendation for the Establishment and Management of Grant-making Foundations* (Foundation Governance Vol 13, Helbing Lichtenhahn, 2016).

<sup>152</sup> Australian Charities and Not-for-profits Commission, *Submission to the Treasury: Review of Australian Charities and Not-for-profits Commission (ACNC) Legislation* (undated) 45 (Recommendation 17).

In framing guidance on related party transactions, regard could also be had to the guidance provided by the New Zealand Charities Commission.<sup>153</sup> This guidance provides simple explanations combined with examples. The examples given by the ACNC in its 2018 Compliance Report (extracted in Section 4 above) could also be drawn upon.

### 6.3.6 Application of Chapter 2E

There is currently no proposal to disapply ch 2E to charitable companies (although, as noted, s 150 companies are exempt). The advantage of ch 2E is that individuals who have been involved in related party transactions can be held accountable. By contrast the ACNC has limited jurisdiction in relation to individuals. On the other hand, it is unclear how much involvement ASIC has in relation to the application of ch 2E to charitable companies. On balance, until a fit-for-purpose financial reporting regime is introduced, charitable companies that do not enjoy the s 150 exemption should be subject to both ch 2E and the new reporting requirements advocated by the ACNC Review and accepted by the Government.

This would be consistent with the recommendation made by the ACNC Review that the duties in ss 180-183 and 191-194 of the Corporations Act be turned back on for charitable companies,<sup>154</sup> which this author supports. Reintroducing these duties would have a number of benefits. These include subjecting officers (as defined in s 9) to duties; switching on the business judgment rule (both for the purposes of s 180(1) and for the equivalent common law and equitable duties); making civil penalty consequences available; and enabling a regulator to take enforcement action against individuals in more serious instances of breach of duty (such as, for example, misappropriation of charitable assets).

Prolegis has, however, submitted that, if ch 2E is retained, its drafting and application should be reviewed. Prolegis raises specific points concerning the validity of transactions, the definition of the concept of 'nominee' and identification of the appropriate regulator.<sup>155</sup> These issues, and the question of whether ch 2E should continue to apply, should be subject to consultation as part of the consultation conducted in relation to a more suitable financial reporting regime, as advocated in Section 6.3.2 above.

### 6.3.7 Summary

In summary therefore this article supports the recommendation of the ACNC Review, accepted by the Government, that reporting of related party transactions by charitable entities be required. However, there is a clear need for greater

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<sup>153</sup> Charities Services, 'Charitable Purpose and Your Rules', *Charities Services* (Web page, undated) <<https://www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose-and-your-rules/>>

<sup>154</sup> See ACNC Review (n 3) 50 (Recommendation 11).

<sup>155</sup> Prolegis Submission (n 98) 9.

scrutiny of, and consultation with the charitable sector concerning, the finer details of that reporting.

A number of other options have been canvassed. Over the next five years the incidence of related party transactions should continue to be monitored as part of ACNC compliance and enforcement actions to determine whether the occurrence of problematic related party transactions decreases. If not, further requirements could be considered. Any such additional measures would, however, need to maintain an appropriate balance between preventing private benefit, on the one hand, and making it too hard for volunteers who are trying to do the right thing, on the other.

## **7. Conclusion**

Related party transactions constitute a form of self-dealing that has been viewed by Australian regulators as sufficiently pernicious to warrant detailed statutory provisions in the Corporations Act. Some charitable companies are, however, exempt. This raises a question as to how related party transactions by charitable companies and charities generally should be regulated.

This article recommends that charities should be required to disclose related party transactions, as propounded by the ACNC Review and accepted by the Government. This will ensure increased transparency of related party transactions which is important in light of the non-distribution constraint and the receipt by charities of public donations and concessions. This article has, however, recommended that close attention be given to developing and instituting a financial reporting regime that is more suitable to the charities sphere. This will allow for relationships and interactions within the charities sphere to be appropriately captured and enable a distinction to be drawn between transactions that involve private benefit and transactions in furtherance of charitable purpose. The models adopted by overseas jurisdictions are instructive in this respect. In order for the most appropriate and effective regime to be developed and implemented, detailed consultation with the charitable sector (and wider not-for-profit sector) should be undertaken.