

# COMPARISON OF ENFORCEMENT POWERS OF THE CHARITY COMMISSION FOR ENGLAND AND WALES AND THE ACNC

Miranda Webster and Rosemary Teele Langford\*

## 1. Introduction

In this report we provide a comparison between the enforcement powers of the Charity Commission for England and Wales ('Charity Commission') and the Australian Charities and Not-for-profits Commission ('ACNC'). The structure of this comparison is as follows. Part 1 outlines the enforcement powers of the Charity Commission. Part 2 provides a summary of the enforcement powers of the ACNC for ease of reference. Part 3 compares the enforcement powers of the Charity Commission with those of the ACNC. It places particular focus on powers relating to misuse and misappropriation of charitable assets given there are arguably gaps in regulatory power in this respect in the Australian context.<sup>1</sup>

It should be noted at the outset that the objects of each regulator differ and that the legal frameworks also differ. The objects of the Charity Commission are as follows:

- to increase public trust and confidence in charities;
- to promote awareness and understanding of the operation of the public benefit requirement;
- to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- to promote the effective use of charitable resources; and
- to enhance the accountability of charities to the donors, beneficiaries and the general public.<sup>2</sup>

By contrast, the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act') has three objects, namely:

- to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.<sup>3</sup>

Enforcement is, of course, just one part of the function of a charities regulator.

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<sup>1</sup> Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45 *University of New South Wales Law Journal* 70.

<sup>2</sup> *Charities Act 2011* (UK) s 14.

<sup>3</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(1).

## 2. Enforcement powers of the Charity Commission

The Charity Commission has five statutory objectives, one of which is the ‘compliance objective’.<sup>4</sup> As noted above, the compliance objective is ‘to promote compliance by the charity trustees with their legal obligations in exercising control and management of the administration of their charities’.<sup>5</sup> In addition to this objective, one of the Commission’s general statutory functions is to identify and investigate ‘apparent misconduct or mismanagement in the administration of charities’ and to take ‘remedial or protective action in connection with misconduct or mismanagement in the administration of charities’.<sup>6</sup> The Commission’s enforcement approach is guided by its general duty to perform its functions under the *Charities Act 2011* (UK) having regard to ‘the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).’<sup>7</sup>

The Commission’s enforcement of ‘exempt charities’<sup>8</sup> is limited — the Commission must consult the charity’s principal regulator before it can exercise any specific power in relation to an exempt charity,<sup>9</sup> and the Commission cannot institute a statutory inquiry in relation to an exempt charity unless there has been a request for it to do so by the charity’s principal regulator.<sup>10</sup> However, the Commission has quite extensive powers which it can use in relation to other charities, but the Commission aims to work with charity trustees to resolve issues through guidance, regulatory advice and supervision without using its statutory powers to intervene in the administration of the charity.<sup>11</sup> Nevertheless, the Commission will use its powers where appropriate and proportionate, and in serious cases of possible misconduct or mismanagement the Commission may initiate a statutory inquiry — some statutory inquiry powers are only used on a temporary basis during the inquiry, whereas other powers extend beyond the end of an inquiry.

### *Enforcement practice by the Charity Commission*

The current enforcement practice of the Charity Commission is driven by its approach outlined in its *Regulatory and Risk Framework*, which was published in 2016 and was updated in April 2020.<sup>12</sup>

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<sup>4</sup> *Charities Act 2011* (UK) s 14.

<sup>5</sup> *Charities Act 2011* (UK) s 14.

<sup>6</sup> *Charities Act 2011* (UK) s 15(1)(3).

<sup>7</sup> *Charities Act 2011* (UK) s 16(4).

<sup>8</sup> An ‘exempt charity’ is any institution within Schedule 3 of the *Charities Act 2011* (UK): *Charities Act 2011* (UK) s 22. It cannot be registered in the Charity Commission’s register of charities: *Charities Act 2011* (UK) ss 22, 30(2)(a), (3).

<sup>9</sup> *Charities Act 2011* (UK) s 28. Any body or Minister of the Crown who is the principal regulator in relation to an exempt charity must do all that the body or Minister reasonably can to meet the compliance objective in relation to the charity: *Charities Act 2011* (UK) s 26(2).

<sup>10</sup> *Charities Act 2011* (UK) s 46(2).

<sup>11</sup> Charity Commission for England and Wales (‘Charity Commission’), *Statutory Inquiries into Charities: Guidance for Charities* (CC46, December 2013) [4.1] <<https://www.gov.uk/government/publications/statutory-inquiries-into-charities-guidance-for-charities-cc46>> (*Statutory Inquiries into Charities*’).

<sup>12</sup> Charity Commission, *Regulatory and Risk Framework* (April 2020) <<https://www.gov.uk/government/publications/risk-framework-charity-commission/regulatory-and-risk-framework>> (*‘Regulatory and Risk Framework*’).

The Framework emphasises that the Commission’s regulatory approach is ‘risk-led’, which means that the Commission aims to be ‘proactive in identifying risks and intervening, where possible, to prevent harm before it occurs’, to address harm effectively where it does occur and to focus its resources effectively on the highest risks.<sup>13</sup> The Commission broadly describes its regulatory approach as follows:

To achieve maximum impact, we are risk-led in calibrating our response to issues that come into us. This approach ensures that no issue or complaint is overlooked, whilst at the same time making sure we are proportionate, prioritise the most serious issues and identify what action is right against identified risks of harm. In cases of severe harm, we will act robustly and quickly, intervene assertively and, if appropriate, communicate our engagement to the wider public to demonstrate how things can and do go wrong.<sup>14</sup>

#### *Statutory enforcement powers without a statutory inquiry*

The Commission has various statutory powers that it may use for investigation or remedial action which are not dependent upon a statutory inquiry being instituted under s 46 of the *Charities Act 2011* (UK). These include the following:

- the power to call for documents (s 52) — the Commission may by order require any person to provide the Commission with any information which is in that person’s possession and which relates to any charity and is relevant to the discharge of the functions of the Commission or of the official custodian;
- official warnings by the Commission (s 75A) — the Commission may issue a warning to a charity trustee or trustee for a charity who it considers has committed a breach of trust or duty or other misconduct or mismanagement in that capacity, or to a charity in connection with which it considers a breach of trust or duty or other misconduct or mismanagement has been committed;<sup>15</sup> and
- the power to direct application of charity property (s 85) — the Commission may by order direct a person or persons to apply charity property in a certain manner where the Commission is satisfied that the person or persons in possession or control of any property held by or on trust for a charity ‘is or are unwilling or unable to apply it properly for the purposes of the charity’ and that it is ‘necessary or desirable’ to make an order to secure a proper application of that property.<sup>16</sup>

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<sup>13</sup> *Regulatory and Risk Framework* (n 12) [1.3].

<sup>14</sup> *Regulatory and Risk Framework* (n 12) [1.3].

<sup>15</sup> Note that this provision was introduced by the *Charities (Protection and Social Investment) Act 2016* (UK). See further, Charity Commission, *Official Warnings to Charities and Trustees: Q and A* (December 2016) <<https://www.gov.uk/government/publications/official-warnings-to-charities-and-trustees-q-and-a>>. Additionally, note that the difference between a ‘charity trustee’ and a ‘trustee for a charity’ is that unincorporated charities may have holding or custodian trustees in whom charity assets are vested (trustees for the charity), but they are not ‘charity trustees’ within the meaning of s 177 of the *Charities Act 2011* (UK), as they are uninvolved in the control and management of the charity’s administration.

<sup>16</sup> *Charities Act 2011* (UK) ss 85(1)–(2). This power also has effect in relation to any body which is entered in the Scottish Charity Register and is managed or controlled wholly or mainly in or from England or Wales: s 87(1).

The Commission also has the power, under s 114, to initiate legal proceedings (with the agreement of the Attorney General on each occasion),<sup>17</sup> and can disqualify a person from being a charity trustee or a trustee for a charity. The Commission may disqualify a person, under s 181A, from being a charity trustee or a trustee for a charity, including where various requirements are satisfied and the person was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and (a) the person was responsible for the misconduct or mismanagement, (b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or (c) the person's conduct contributed to or facilitated the misconduct or mismanagement.

A person cannot appeal an official warning, and a failure to remedy any breach specified in a warning under s 75A may result in a statutory inquiry. Also, the Commission may choose to publish any warning that it issues.<sup>18</sup> However, before the Commission can issue a warning, the Commission must give notice of its intention to do so to the charity and to each charity trustee or trustee for the charity.<sup>19</sup> The notice must specify the following: the grounds for the warning; any action that the Commission considers should be taken (or that the Commission is considering taking) to rectify the misconduct or mismanagement; whether and, if so, how the Commission proposes to publish the warning; and a period within which representations may be made to the Commission about the content of the proposed warning.<sup>20</sup>

An order made by the Commission under s 52 requiring a person to supply information or a document can be appealed; an order made by the Commission under s 85(2) directing a person to apply property in a specified manner can be appealed; and a disqualification order may also be appealed.<sup>21</sup>

### *Statutory inquiries*

The Charity Commission may institute inquiries with regard to charities or a particular charity or a class of charities.<sup>22</sup> The Commission will apply its *Regulatory and Risk Framework* in order to decide whether to open a statutory inquiry under s 46. According to the Commission's guidance on *Statutory Inquiries into Charities: Guidance for Charities* ('*Statutory Inquiries into Charities*'), the purpose of a statutory inquiry is to examine the issues of regulatory concern in greater detail. An inquiry allows the Commission to investigate and establish the facts of a case so that the Commission can determine the extent of any misconduct or mismanagement, and the extent of the risk to the charity, its work, property, beneficiaries, employees or volunteers, and decide what action is needed to resolve the concerns.<sup>23</sup> The Commission is likely to open a statutory inquiry where it has regulatory concerns that there is, has been, or is the potential for, misconduct or

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<sup>17</sup> The Commission may exercise the same powers with respect to the taking of legal proceedings with reference to charities or the property or affairs of charities, or the compromise of claims with a view to avoiding or ending such proceedings, as are exercisable by the Attorney General acting ex officio.

<sup>18</sup> *Charities Act 2011* (UK) s 75A(2).

<sup>19</sup> *Charities Act 2011* (UK) s 75A(3).

<sup>20</sup> *Charities Act 2011* (UK) s 75A(5).

<sup>21</sup> *Charities Act 2011* (UK) sch 6 (Appeals and applications to Tribunal).

<sup>22</sup> *Charities Act 2011* (UK) s 46(1).

<sup>23</sup> *Statutory Inquiries into Charities* (n 11) [1.1]

mismanagement; there is a need to use regulatory powers which are available only if an inquiry is opened; and there is a need to safeguard public trust and confidence in the charity or in charities more generally.<sup>24</sup>

The Commission's decision to institute an inquiry is a 'reviewable matter', which means that it is more difficult to challenge than those decisions or orders that may be subject to a general appeal.<sup>25</sup> The Tribunal must apply principles of judicial review when determining an application for review of a reviewable matter.<sup>26</sup>

The Commission's *Statutory Inquiries into Charities* highlights that the Commission does not need to inform charity trustees about its concerns or give them an opportunity to take action before it opens an inquiry into a charity; however, an inquiry may be an escalation of the Commission's previous engagement with the charity.<sup>27</sup> Once a statutory inquiry has been commenced, the Commission contacts the charity trustees and provides them with an opportunity to respond to allegations.<sup>28</sup> The Commission generally issues a public statement confirming that an inquiry has been opened.<sup>29</sup> And once an inquiry is complete, the Commission will publish a report of its findings on its website, unless exceptional circumstances apply.<sup>30</sup>

Once the Commission has commenced a statutory inquiry, the Commission will commonly require access to the charity's records and will seek other information and documents. Information requests consist of the following: asking trustees for responses to the allegations or complaints made to the Commission; questions requiring factual answers to help the Commission better understand the issues and what has happened; and asking for explanations and evidence from the charity trustees regarding compliance with the policies, procedures or legal duties.<sup>31</sup> The Commission may also use its powers for the protection of charity assets, beneficiaries, employees and volunteers. The institution of a statutory inquiry gives the Commission access to a special set of powers which it can use to investigate the charity and to take temporary or permanent protective action. Most of the Commission's powers to act for the protection of the charity are temporary; they enable the Commission to protect charity property for a limited period while it investigates the charity.<sup>32</sup>

### *Statutory inquiry powers*

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<sup>24</sup> *Statutory Inquiries into Charities* (n 11) [3.2].

<sup>25</sup> *Charities Act 2011* (UK) ss 319, 321, 322(2)(a), sch 6.

<sup>26</sup> *Charities Act 2011* (UK) s 321(4). Where a decision is not a reviewable matter and is subject to appeal, the Tribunal must 'consider afresh' the decision and may take into account evidence which was not available to the Commission: s 319(4).

<sup>27</sup> *Statutory Inquiries into Charities* (n 11) [4.1].

<sup>28</sup> *Statutory Inquiries into Charities* (n 11) [4.1].

<sup>29</sup> *Statutory Inquiries into Charities* (n 11) [4.1].

<sup>30</sup> *Statutory Inquiries into Charities* (n 11) [4.1]. See *Charities Act 2011* (UK) s 50.

<sup>31</sup> *Statutory Inquiries into Charities* (n 11) [4.1].

<sup>32</sup> *Statutory Inquiries into Charities* (n 11) [4.4].

First, the Commission has powers in relation to obtaining evidence for the purposes of the inquiry.<sup>33</sup> For example, the information gathering powers in s 47 allow the Commission to direct *any* person to give the Commission accounts and statements in writing on any matter in question as part of the inquiry, to give the Commission copies of documents in their keeping or under their control, and to attend at a specific time and place to give evidence or produce such documents. (The Commission may also use its powers in s 52 to order a person to provide copies or extracts of documents or original documents.)<sup>34</sup> The Commission’s guidance on *Statutory Inquiries into Charities* notes that the powers under ss 47 and 52 can be useful in relation to accessing information from third parties, such as lawyers, accountants and banks, as the application of these powers extends to any person — and the statutory order or direction overrides any duty of confidence which a person may otherwise have.<sup>35</sup> Section 48 also allows the Commission to obtain a search warrant to search the premises and seize documents; however, this power is not often used.<sup>36</sup>

Second, the Commission has power to take certain actions under s 76 if it is satisfied one of the following two conditions are met:

- that there is or has been a failure to comply with an order or direction of the Commission, a failure to remedy any breach specified in a warning under s 75A, or any other misconduct or mismanagement in the administration of the charity (s 76(1)(a));<sup>37</sup> *or*
- that it is necessary or desirable to act for the purpose of protecting the property of the charity, or for the purpose of securing a proper application for the purposes of the charity of that property or of property coming to the charity (s 76(1)(b)).

Where the ‘misconduct or mismanagement’ or the ‘need to protect property’ element is present, the Commission may of its own motion do one or more of the following things under s 76(3):

- by order suspend any person who is a trustee, charity trustee, officer, agent or employee of the charity from office or employment;

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<sup>33</sup> *Charities Act 2011* (UK) ss 47 (Obtaining evidence etc. for purposes of inquiry), 48 (power to obtain search warrant for purposes of inquiry), 49 (execution of search warrant).

<sup>34</sup> *Statutory Inquiries into Charities* (n 11) [4.3].

<sup>35</sup> *Statutory Inquiries into Charities* (n 11) [4.3].

<sup>36</sup> *Statutory Inquiries into Charities* (n 11) [4.3]. Under s 48, the Commission may obtain a search warrant if a justice of the peace is satisfied that there are reasonable grounds for believing that there is a relevant document or other information on the premises, which the Commission could require to be produced or provided under s 52(1) but, if the Commission were to make such an order, it would not be complied with (or the document or information would be removed, tampered with, concealed or destroyed).

<sup>37</sup> Note that where a power is exercisable in cases where the Commission is satisfied that the s 76(1)(a) ‘misconduct or mismanagement’ element exists, and the Commission is also satisfied (a) that a particular person has been responsible for the misconduct or mismanagement, (b) that a particular person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or (c) that a particular person’s conduct contributed to it or facilitated it, the Commission may take into account certain matters in deciding whether or how to exercise the relevant power. Those matters are the conduct of that person in relation to any other charity, and any other conduct of that person that appears to the Commission to be damaging or likely to be damaging to public trust and confidence in charities generally or particular charities or classes of charity. See *Charities Act 2011* (UK) s 76A.

- by order appoint such number of additional charity trustees as it considers necessary for the proper administration of the charity;
- by order vest any property held by or in trust for the charity in the official custodian, or require the persons in whom any such property is vested to transfer it to the official custodian, or appoint any person to transfer any such property to the official custodian;
- order any person who holds any property on behalf of the charity, or of any trustee for it, not to part with the property without the approval of the Commission;
- order any debtor of the charity not to make any payment in or towards the discharge of liability to the charity without the approval of the Commission;
- by order restrict the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity without the approval of the Commission; and
- by order appoint an interim manager, to act as receiver and manager in respect of the property and affairs of the charity.<sup>38</sup>

Any such order made under s 76(3) may be appealed.<sup>39</sup>

Third, where, at any time after it has instituted an inquiry under s 46 with respect to a charity, the Commission is satisfied that one of the s 76(1) conditions apply (the ‘misconduct or mismanagement’ or the ‘need to protect property’ condition), the Commission has further powers:

- the Commission may of its own motion by order establish a scheme for the administration of the charity (s 79(2));
- the Commission may by order direct the charity trustees (or any trustee for the charity, any officer or employee of the charity, or (if a body corporate) the charity itself), to take any action which the Commission considers to be expedient in the interests of the charity (s 84(2)); and
- the Commission may direct that the charity be wound up and dissolved (and any remaining property transferred to a charity with the same purposes), if ‘expedient in the public interest’ and if it is satisfied that (a) the charity does not operate or (b) its purposes can be promoted more effectively if it ceases to operate (s 84B(1)-(2)).

These orders and directions may also be appealed.<sup>40</sup>

Fourth, at any time after the Commission has instituted an inquiry under s 46 with respect to a charity, the Commission may make an order directing a person not to take certain action or not to continue certain action, if the Commission considers that such action, if taken or continued by such a person, would constitute ‘misconduct or mismanagement in the administration of the charity’.<sup>41</sup> The order may apply in relation to the charity trustees, any trustee for the charity, any officer or

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<sup>38</sup> *Charities Act 2011* (UK) s 76(3).

<sup>39</sup> *Charities Act 2011* (UK) sch 6.

<sup>40</sup> *Charities Act 2011* (UK) sch 6.

<sup>41</sup> *Charities Act 2011* (UK) s 84A(1)-(2).

employee of the charity, or (if a body corporate) the charity itself. This kind of order may also be appealed.<sup>42</sup>

Fifth, where, at any time after it has instituted an inquiry under s 46 with respect to a charity, the Commission is satisfied that both of the s 76(1) conditions apply (the ‘misconduct or mismanagement’ *and* the ‘need to protect property’ conditions), the Commission has certain removal powers under s 79(4). The Commission may of its own motion by order remove any trustee, charity trustee, officer, agent or employee of the charity:

- (a) who has been responsible for the misconduct or mismanagement,
- (b) who knew of the misconduct or mismanagement and failed to take any steps to oppose it,  
or
- (c) whose conduct contributed to it or facilitated it.<sup>43</sup>

Where the Commission makes an order under s 76(3) or 79(4) suspending or removing a person from office or employment and that person is a member of the charity, the Commission may also suspend or terminate that person’s membership of the charity.<sup>44</sup> While orders regarding suspension or removal under ss 76(3) or 79(4) can be appealed, as can an order suspending the person’s membership of the charity for the period for which the person is suspended from office or employment, a person whose membership of a charity has been terminated by the Commission must apply for the Commission’s consent in order to resume membership of the charity.<sup>45</sup>

Note that some of the Commission’s powers in relation to statutory inquiries have effect in relation to any body which is entered in the Scottish Charity Register and is managed or controlled wholly or mainly in or from England or Wales. For example, the general power to institute inquiries, powers regarding obtaining evidence and search warrants for the purposes of inquiry, powers to suspend and remove trustees and to appoint interim managers, and the power to direct specified action to be taken and the power to direct specified action not be taken.<sup>46</sup>

### *Contempt of court*

It is notable that failure to comply with certain directions and orders made by the Commission may mean that a person is in contempt of court — the Commission may apply to the High Court for a person who is guilty of disobedience to certain orders to be dealt with ‘as for disobedience to an order of the High Court’, including those orders made under the s 52(1) power to call for documents, the s 84 power to direct specified action to be taken, the s 85 power to direct application of charity property, and those orders under s 76 and ss 79–81 requiring a transfer of property or payment to be called for or made.<sup>47</sup>

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<sup>42</sup> *Charities Act 2011* (UK) sch 6.

<sup>43</sup> *Charities Act 2011* (UK) s 79(3)-(4).

<sup>44</sup> *Charities Act 2011* (UK) s 83.

<sup>45</sup> *Charities Act 2011* (UK) s 83(4)-(5).

<sup>46</sup> *Charities Act 2011* (UK) ss 46(4), 87(1). However, the Commission cannot establish a scheme for the administration of the body under s 79(2), nor can the Commission suspend or remove a person from membership of the body under s 83.

<sup>47</sup> *Charities Act 2011* (UK) s 336(1).

### *Relief from liability*

Additionally, where a charity trustee (or trustee for a charity) applies to the Commission for its opinion or advice in relation to any matter relating to the performance of any of the trustee's duties or the proper administration of the charity, and the trustee acts in accordance with any such opinion or advice, the trustee is to be taken to have acted in accordance with their trust (so the Commission cannot take action against that person for breach of trust).<sup>48</sup> And, if the Commission considers that a charity trustee or trustee for a charity is or may be personally liable for a breach of trust or a breach of duty committed in their capacity as a charity trustee or trustee for a charity, but the Commission considers that the person acted honestly and reasonably and ought fairly to be excused for the breach of trust or duty, the Commission may make an order relieving that person wholly or partly from any such liability.<sup>49</sup>

### **3. Enforcement powers of the ACNC**

The ACNC regulates charities under the ACNC Act in the following ways: registering charities (and revoking registration);<sup>50</sup> collecting information on charities and maintaining the Charity Register;<sup>51</sup> providing guidance, education and advice to help registered charities comply with their obligations under the Act;<sup>52</sup> and monitoring compliance, investigating non-compliance, and using enforcement powers if necessary.<sup>53</sup> The ACNC Act makes it clear that the primary function of the ACNC Commissioner is 'assisting registered entities in complying with and understanding this Act, by providing them with guidance and education.'<sup>54</sup> The other main function of the Commissioner is to assist the public 'in understanding the work of the not-for-profit sector, in order to improve the transparency and accountability of the sector'.<sup>55</sup>

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<sup>48</sup> *Charities Act 2011* (UK) s 110.

<sup>49</sup> *Charities Act 2011* (UK) s 191(1)-(2). For further information on the Charity Commission and enforcement, see Charity Commission, 'Dealing with Wrongdoing and Harm in Charities' <<https://www.gov.uk/government/collections/tackling-abuse-and-mismanagement-in-charities>>; *Statutory Inquiries into Charities* (n 11); Charity Commission, *Charity Commission policy on restitution and the recovery of charitable funds misappropriated or lost to charity in breach of trust*, Policy paper, (May 2013) <<https://www.gov.uk/government/publications/how-we-ensure-charities-meet-their-legal-requirements/our-policy-on-restitution-and-the-recovery-of-charitable-funds-misappropriated-or-lost-to-charity-in-breach-of-trust>>. For policy papers on enforcement, see Charity Commission, 'How the Charity Commission ensures charities meet their legal requirements' (May 2013) <<https://www.gov.uk/government/publications/how-we-ensure-charities-meet-their-legal-requirements>>.

<sup>50</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ch 2 pt 2-1.

<sup>51</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ch 2 pt 2-2.

<sup>52</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 110-10(1). The obligations of registered charities are set out under chapter 3 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

<sup>53</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ch 4.

<sup>54</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 110-10(1).

<sup>55</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 110-10(2).

Charities can choose whether they register with the ACNC, but only registered charities are entitled to access Commonwealth charitable tax concessions.<sup>56</sup> The ACNC registers entities in accordance with the ACNC Act, applying the definition of charity and charitable purposes in the *Charities Act 2013* (Cth).<sup>57</sup>

### *Obligations of registered charities*

As ‘registered entities’, registered charities have several key obligations under the ACNC Act:<sup>58</sup>

- they must continue to be not-for-profit and pursue their charitable purpose or purposes;<sup>59</sup>
- they must notify the ACNC of changes to the charity’s legal name, address for service, governing documents, and its ‘responsible entities’<sup>60</sup> (e.g. a director, committee member or trustee) where a person commences or finishes their position;<sup>61</sup>
- they must keep financial records that correctly record and explain their transactions, financial position and performance, and they must keep operational records that explain their activities;<sup>62</sup>
- they must submit an annual information statement every year,<sup>63</sup> and medium and large charities (except ‘basic religious charities’<sup>64</sup>) must also submit an annual financial report as part of their annual information statement;<sup>65</sup>
- they must comply with the governance standards that are set out in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) (‘basic religious charities’ are exempt from this requirement);<sup>66</sup>

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<sup>56</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-5(3).

<sup>57</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5.

<sup>58</sup> Australian Charities and Not-for-profits Commission (‘ACNC’), ‘Ongoing obligations to the ACNC’ (Undated) <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc>>.

<sup>59</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5. The Commissioner may revoke the registration of a registered entity if the Commissioner reasonably believes that the charity is no longer entitled to registration: s 35-10(1)(a).

<sup>60</sup> For the definition of a ‘responsible entity’, see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-30.

<sup>61</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 65-5(1). Registered charities must also notify the ACNC of a significant contravention of the ACNC Act or significant non-compliance with the governance standards or external conduct standards: s 65-5(1)(e), (2)-(3).

<sup>62</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 55-5, 55-10.

<sup>63</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 60-5.

<sup>64</sup> For the definition of a ‘basic religious charity’, see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-35.

<sup>65</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 60-10, 60-60.

<sup>66</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 25-5(3)(b), 45-10(1); *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) div 45. Basic religious charities are exempt under *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-10(5). The registration of a regulated entity may be revoked if the Commissioner reasonably believes that the entity has not complied with a governance standard or it is

- registered charities that operate overseas must comply with the external conduct standards, which are set out under *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) and require charities to take reasonable steps to ensure appropriate standards of behaviour, governance and oversight and keep to records when they are undertaking activities or providing resources overseas.<sup>67</sup>

### *ACNC's compliance approach*

The ACNC operates on the assumption that 'most people involved in charities are honest, act in good faith and try to do the right thing': 'If mistakes are made, they are usually honest mistakes, or due to a lack of knowledge, expertise or capacity.'<sup>68</sup> When considering whether to take regulatory action, the ACNC will consider 'whether there was an intention to do the wrong thing and whether any of those responsible for the charity (such as committee members, directors, or trustees) knew about, or participated in, improper conduct'.<sup>69</sup> It will also consider the extent to which the charity is co-operating with the ACNC, and the willingness of those responsible for non-compliance to take action to remedy the problem.<sup>70</sup>

### *Responsive Regulation*

The ACNC's *Regulatory Approach Statement* sets out the ACNC's general approach to regulating charities. The ACNC operates within an evidence and risk-based regulatory framework.<sup>71</sup> The ACNC Act requires that the Commissioner follow principles of 'regulatory necessity', 'reflecting risk' and 'proportionate regulation' when exercising powers and performing his or her functions.<sup>72</sup>

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more likely than not that the registered entity will not comply with such a standard: *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(c)(ii).

<sup>67</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 25-5(3)(b), 50-10(1); *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) div 50, inserted by *Australian Charities and Not-for-profits Commission Amendment (2018 Measures No. 2) Regulations 2018* (Cth) sch 1 cl 2. The registration of a regulated entity may be revoked if the Commissioner reasonably believes that the entity has not complied with an external conduct standard or it is more likely than not that the registered entity will not comply with such a standard: *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(c)(ii).

<sup>68</sup> ACNC, *Regulatory Approach Statement* (Version 4, December 2018) 13 <[https://www.acnc.gov.au/sites/default/files/documents/2021-11/regulatory\\_approach\\_statement\\_-\\_december\\_2018.pdf](https://www.acnc.gov.au/sites/default/files/documents/2021-11/regulatory_approach_statement_-_december_2018.pdf)> ('*Regulatory Approach Statement 2018*').

<sup>69</sup> *Regulatory Approach Statement 2018* (n 68) 13.

<sup>70</sup> *Regulatory Approach Statement 2018* (n 68) 14.

<sup>71</sup> *Regulatory Approach Statement 2018* (n 68) 6.

<sup>72</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 15-10. The manner in which the ACNC is guided by these principles when exercising its compliance and enforcement function is detailed in the ACNC's *Regulatory Approach Statement* and the Commissioner's policy statement on compliance and enforcement: see ACNC, *Commissioner's Policy Statement: Compliance and Enforcement* (CPS 2013/01) (revised 2017) 2-3 [12], [17]-[18], [22] archived at <<https://web.archive.org/web/20200803152917/https://www.acnc.gov.au/file/37885525/download?token=N8PqP0j>> ('*Compliance and Enforcement CPS*'). Note that this pdf version has more detail than the current webpage: <<https://www.acnc.gov.au/about/corporate-information/corporate-policies/commissioners-policy-statement-compliance-and-enforcement>>. See also, *Regulatory Approach Statement 2018* (n 68) 6.

The ACNC has designed a ‘pyramid of support and compliance’ to demonstrate their regulatory approach.<sup>73</sup> The pyramid progresses as follows, with education and support at the base:<sup>74</sup>

- education and support (guidance materials, advice services, education, capacity building, supporting sector initiatives such as forums and excellence awards, reporting reminder letters);
- assisted compliance (letters and phone calls to discuss compliance concerns, regulatory advice, agreed actions to ensure compliance, overdue reporting letters);
- proactive compliance (investigations, use of information gathering and monitoring powers, warnings, overdue statements on the Charity Register);
- graduated and proportionate sanctions (enforceable undertakings, compliance agreements, directions, injunctions, suspension or removal of responsible persons, penalty notices); and
- revocation of the charity’s registration.

The ACNC will generally approach a compliance issue by starting at the lower levels of the regulatory pyramid, preventing problems by providing information, support and guidance to charities.<sup>75</sup> However, in serious cases (such as where vulnerable people or significant charity assets are at risk, or where there is evidence of serious mismanagement or misappropriation), the ACNC may need to commence with regulatory action higher up the pyramid, such as proactive compliance, sanctions or revocation.<sup>76</sup>

#### *The ACNC’s compliance and enforcement powers*

Under the ACNC Act, the ACNC has various regulatory powers, including information gathering and monitoring powers,<sup>77</sup> and enforcement powers.<sup>78</sup> The enforcement powers under Part 4-2 of the Act allow the Commissioner to do the following:

- issue formal warnings;<sup>79</sup>
- give directions;<sup>80</sup>
- accept enforceable undertakings<sup>81</sup> (and to apply to a designated court for the enforcement of an undertaking);<sup>82</sup>

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<sup>73</sup> *Regulatory Approach Statement 2018* (n 68) 7.

<sup>74</sup> *Regulatory Approach Statement 2018* (n 68) 7.

<sup>75</sup> *Regulatory Approach Statement 2018* (n 68) 6.

<sup>76</sup> *Regulatory Approach Statement 2018* (n 68) 6–7.

<sup>77</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) pt 4-1.

<sup>78</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) pt 4-2.

<sup>79</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 80-5.

<sup>80</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 85-5.

<sup>81</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 90-10.

<sup>82</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 90-15.

- apply for injunctions;<sup>83</sup>
- suspend or remove responsible entities (such as a director or committee member);<sup>84</sup> and
- appoint acting responsible entities.<sup>85</sup>

All decisions by the ACNC to use its formal enforcement powers may be reviewed or appealed.<sup>86</sup> Also, the ACNC must publish on the ACNC Charity Register details of any use of its Part 4-2 powers — each warning, direction, enforceable undertaking, injunction and also each suspension or removal of a responsible entity.<sup>87</sup>

The ACNC also has several other compliance powers. It has the power to disqualify a responsible entity who has previously been suspended or removed.<sup>88</sup> The effect of this disqualification from being a responsible entity lasts for up to twelve months.<sup>89</sup> While disqualified, the entity must be listed on the Disqualified Responsible Entities Register.<sup>90</sup> The ACNC has not yet disqualified any responsible persons.<sup>91</sup>

Additionally, if a registered charity makes false or misleading statements or fails to lodge documents on time (such as reports, notices, returns or statements), the ACNC may apply administrative penalties.<sup>92</sup>

The ACNC's most significant enforcement power is its revocation power. It can only be used as a last resort.<sup>93</sup> In exceptional circumstances, the ACNC can revoke the registration of a charity, such

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<sup>83</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 95-15.

<sup>84</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 100-10–100-15.

<sup>85</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 100-30.

<sup>86</sup> *Regulatory Approach Statement 2018* (n 68) 11. See, eg, *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 35-20, 85-25, 100-10(10), 100-15(7); *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.20(6).

<sup>87</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 40-5(1)(f); *Regulatory Approach Statement* (n 68) 12.

<sup>88</sup> *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.20(4).

<sup>89</sup> *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.20(4)

<sup>90</sup> *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) s 45.150.

<sup>91</sup> ACNC, 'Disqualified Persons Register' <<https://www.acnc.gov.au/charity/about-acnc-charity-register/information-charity-register/disqualified-persons-register>>.

<sup>92</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) sub-divs 175-B, 175-C. See further, ACNC, *Commissioner's Policy Statement: Penalties for Failing to lodge documents on time* (CPS 2014/02) (updated June 2017) <<https://www.acnc.gov.au/about/corporate-information/corporate-policies/commissioners-policy-statement-penalties-for-failing-lodge-documents-time>>; ACNC, *Commissioner's Policy Statement: Penalties for False or Misleading Statements* (CPS 2015/02) (Version 3, 2 June 2020) <<https://www.acnc.gov.au/about/corporate-information/corporate-policies/commissioners-policy-statement-penalties-for-false-or-misleading-statements>>.

<sup>93</sup> Revised Explanatory Memorandum, *Australian Charities and Not-for-profits Commission Bill 2012* (Cth), *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012* (Cth) [3.102].

as where the charity has significantly and persistently failed to comply with the governance standards or external conduct standards or its reporting obligations.<sup>94</sup>

#### *The Limitations of the ACNC's Enforcement Powers under Part 4-2*

While the ACNC's powers to revoke a charity's registration or apply administrative penalties apply to all registered charities, the ACNC's enforcement powers under Part 4-2 of the ACNC Act can only be applied to certain registered charities (those that are 'federally regulated entities' or those that operate overseas). The three broad circumstances in which the powers can be applied are as follows:

- the charity is a *federally regulated entity* and the Commissioner reasonably believes that the entity has contravened a provision of the ACNC Act, or that it is more likely than not that the entity will contravene a provision of the ACNC Act;
- the charity is a *federally regulated entity* and the Commissioner reasonably believes that the entity has not complied with a governance standard, or that it is more likely than not that the entity will not comply with a governance standard; or
- the Commissioner reasonably believes that the charity has not complied with an external conduct standard, or that it is more likely than not that the charity will not comply with an external conduct standard.

Under s 205-15 of the ACNC Act, a 'federally regulated entity' is (a) a constitutional corporation;<sup>95</sup> or (b) a trust, all of the trustees of which are constitutional corporations; or (c) a body corporate that is taken to be registered in a Territory under section 119A of the Corporations Act 2001; or (d) a trust, if the proper law of the trust and the law of the trust's administration are the law of a Territory; or (e) an entity, the core or routine activities of which are carried out in or in connection with a Territory.

Additionally, the ACNC's powers are also limited in relation to those charities that are considered to be 'basic religious charities'.<sup>96</sup> Basic religious charities are not required to comply with the governance standards that are set out in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth),<sup>97</sup> so this limits the circumstances in which the ACNC can apply its powers under Part 4-2 of the ACNC Act. Also, the suspension and removal powers do not apply where an individual is a responsible person of a basic religious charity.<sup>98</sup>

Where the ACNC's enforcement powers do not apply because the charity is a federally regulated entity, the ACNC's preferred approach is to work with the charity to bring about compliance, without resorting to the use of the revocation power.<sup>99</sup> However, this depends upon the nature and

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<sup>94</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10. See also, *Regulatory Approach Statement 2018* (n 68) 10.

<sup>95</sup> A 'constitutional corporation' is defined under s 205-20 as (a) a corporation to which paragraph 51(xx) of the Constitution applies; or (b) a body corporate that is incorporated in a Territory.

<sup>96</sup> For the definition of a 'basic religious charity', see *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-35.

<sup>97</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 25-5(3)(b), 45-10(1).

<sup>98</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 100-5(3).

<sup>99</sup> *Compliance and Enforcement CPS* (n 72) 2 [7].

severity of any breach. The ACNC will also adopt a collaborative approach with other government agencies, where possible, in order to address the non-compliance in a proportionate and effective manner.<sup>100</sup>

In response to the limitations of its formal enforcement powers in relation to registered charities that are not federally regulated entities (and also registered charities that are basic religious charities), the ACNC has created an informal enforcement mechanism, known as a ‘Compliance Agreement’.<sup>101</sup> A Compliance Agreement is an action plan, generally involving improvements to a charity’s management practices or governance arrangements; it is drawn up by the ACNC in consultation with the charity and sets out the measures that the charity needs to undertake to ensure it is not in breach of the ACNC Act or ACNC Regulation. A charity’s commitment to such an Agreement is made by way of a voluntary undertaking. Unlike the enforceable undertaking, these cannot be enforced in the courts.

The ACNC’s Compliance and Enforcement Policy Statement highlights that a Compliance Agreement allows the ACNC to ‘have a documented commitment from a Charity to make certain changes or implement governance improvements, particularly, if the charity is not a federally regulated entity and the ACNC cannot use its formal enforcement powers’.<sup>102</sup> Nehme noted that a voluntary undertaking was first used by the ACNC in October 2016.<sup>103</sup> The Commissioner’s Policy Statement on Compliance and Enforcement was revised in 2017 for the sole purpose of including the use of the Compliance Agreement as an informal enforcement power.<sup>104</sup> The charity’s compliance with the agreement is monitored by the ACNC compliance directorate and the need for any further compliance action may lead to the charity having its registration revoked.

#### *The revocation power*

The Commissioner may revoke the registration of a charity under s 35-10(1) of the ACNC Act if the Commissioner reasonably believes that any of the following conditions exist:

- the charity is not entitled to registration;<sup>105</sup>

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<sup>100</sup> *Compliance and Enforcement CPS* (n 72) 2 [7].

<sup>101</sup> *Compliance and Enforcement CPS* (n 72) 7 [57]–[60].

<sup>102</sup> *Compliance and Enforcement CPS* (n 72) 7 [59].

<sup>103</sup> Marina Nehme, ‘Australian Charities and Not-for-profits Commission: Enforcement Tools and Regulatory Approach’ (2017) 45 *Australian Business Law Review* 159, 185. See also, ACNC, ‘Street Swags Takes Action to Address ACNC Concerns’ <<https://www.acnc.gov.au/media/news/street-swags-takes-action-address-acnc-concerns>>.

<sup>104</sup> *Compliance and Enforcement CPS* (n 72) 10.

<sup>105</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(a). A charity maintains its entitlement to registration if it continues to be a charity (meaning it continues its not-for-profit nature, its charitable purpose and continues to be for the public benefit), it continues to meet the description of the subtype of charity that it is registered as, it is complying with the governance standards, it has an Australian Business Number, and it is not involved in terrorist or other criminal activity: see ACNC, *Commissioner’s Policy Statement: Revocation by the ACNC* (CPS 2014/03) (Updated January 2017) [4] <<https://www.acnc.gov.au/about/corporate-information/corporate-policies/commissioners-policy-statement-revocation-acnc>> (‘*Revocation CPS*’); *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 25-5.

- the charity has provided information that was false or misleading in a material particular in its application for registration;<sup>106</sup>
- the charity has contravened the ACNC Act or has not complied with a governance standard or external conduct standard (or is more likely than not to contravene or not comply in the future);<sup>107</sup> or
- the charity has a trustee in bankruptcy, a liquidator, or a person appointed or authorised under Australian law to manage its affairs because it is unable to pay all its debts as and when they become due and payable.<sup>108</sup>

All decisions by the ACNC to revoke the registration of a charity can be reviewed or appealed.<sup>109</sup>

It is important to note that while the Part 4-2 enforcement powers will only be used in serious non-compliance cases, the Commissioner may revoke registration in circumstances where there is not serious misconduct: if entitlement to registration is not maintained (this can be for technical reasons, such as the organisation has had its ABN cancelled) and if it is apparent that a charity is inactive or not operating.<sup>110</sup> The ACNC will also revoke the registration of charities that fail to submit their Annual Information Statements for two or more reporting periods, unless exceptional circumstances apply.<sup>111</sup> The ACNC views the failure to meet reporting obligations for two years or more as serious non-compliance, as the ACNC will seek to contact the charity multiple times before resorting to revocation.<sup>112</sup>

#### **4. A Comparison of the enforcement powers of the Charity Commission and the ACNC**

The Charity Commission’s regulatory powers extend to both registered and unregistered charities — some of its powers can even apply in relation to bodies that are entered on the Scottish Charity Register and are managed or controlled wholly or mainly in or from England and Wales. However, the regulation of exempt charities (which cannot register with the Commission) is essentially delegated to the relevant ‘principal regulator’<sup>113</sup> — the Commission must consult the charity’s

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<sup>106</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(b).

<sup>107</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 35-10(1)(c).

<sup>108</sup> *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(d).

<sup>109</sup> *Regulatory Approach Statement 2018* (n 68) 10.

<sup>110</sup> See further, *Revocation CPS* (n 105) [23], [25] .

<sup>111</sup> *Revocation CPS* (n 105) [17].

<sup>112</sup> *Revocation CPS* (n 105) [15]. For further information on the ACNC, see *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* (March 2020) <<https://treasury.gov.au/sites/default/files/2020-03/p2020-61958-govt-response.pdf>>; *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018* (May 2018) <<https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf>>; ACNC, ‘Commissioner’s Policy Statements’ in ‘Corporate Polices and Procedures’ <<https://www.acnc.gov.au/about/corporate-information/corporate-policies>>.

<sup>113</sup> An exempt charity’s principal regulator is normally the body or authority that is responsible for regulating the charity under another legal framework. For example, most universities are exempt charities and their principal regulator is Office for Students.

principal regulator (if there is one)<sup>114</sup> before it can exercise any statutory power in relation to an exempt charity, and it cannot institute a statutory inquiry in relation to an exempt charity unless there has been a request for it to do so by the charity's principal regulator.<sup>115</sup> This means that if an exempt charity does not have a principal regulator, then the Commission cannot use any of its protective powers that require a statutory inquiry in order to be used – indeed, it is unclear whether the Commission can use any of its statutory powers in relation to such a charity.<sup>116</sup>

By contrast, the ACNC can only exercise its powers in relation to registered charities; once a charity has had its registration revoked by the ACNC, the regulator has no power in relation to that entity. However, both the Charity Commission and the ACNC's powers are less extensive in scope than the Scottish regulator, the OSCR, which has direction powers in relation to a body which is not a charity and is representing itself as a charity, and any person representing that body as a charity.<sup>117</sup> That is, unlike Scotland's Commission, the Charity Commission and the ACNC can take no formal action against an organisation that is not a charity.

There are other limitations placed on the Charity Commission and the ACNC concerning how they may exercise their statutory powers to address compliance failures, misconduct and poor governance. First, many of the Charity Commission's enforcement powers require a statutory inquiry to have been instituted before they can be applied. Indeed, all of the Commission's powers which are set out under the heading 'Powers of Commission to act for protection of charities etc.' under Part 6 of the *Charities Act 2011* (UK) require the institution of a statutory inquiry, with the exception of the use of the official warning power under s 75A and the s 85 power to direct the application of the charity's property.

Secondly, most of the Charity Commission's protective enforcement powers require one of two conditions to be met (or both): (a) that there is or has been a failure to comply with an order or direction of the Commission, a failure to remedy any breach specified in a warning under s 75A, or any other misconduct or mismanagement in the administration of the charity; or (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity, or for the purpose of securing a proper application for the purposes of the charity of that property or of property coming to the charity. For example, when one of these conditions is satisfied (and the Commission has instituted a statutory inquiry), the Commission's powers include: suspending a person from office or employment at the charity, appointing additional charity trustees, appointing an interim manager, restricting charity transactions, restricting a person's ability to part with property which they hold on behalf of the charity, and directing the charity trustees (or any trustee

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<sup>114</sup> Not all exempt charities have a principal regulator (so far): Charity Commission, *Exempt Charities* (CC23) (updated August 2019) <<https://www.gov.uk/government/publications/exempt-charities-cc23/exempt-charities>>.

<sup>115</sup> The Charity Commission has entered into a memorandum of understanding with each of the principal regulators. These explain how the different regulators work together to regulate and share information about exempt charities: see, Charity Commission, 'Memoranda of Understanding (MOU) between the Charity Commission and other organisations' <<https://www.gov.uk/government/collections/memoranda-of-understanding-with-the-charity-commission>>.

<sup>116</sup> The *Charities Act 2011* (UK) provides that 'no such [statutory] inquiry is to extend to any exempt charity except where this has been requested by its principal regulator': s 46(2). Section 28 provides that before exercising 'any specific power exercisable by it in relation to the [exempt] charity, the Commission must consult the charity's principal regulator'.

<sup>117</sup> *Charities and Trustee Investment (Scotland) Act 2005* (UK) s 31(5)(a)–(b).

for the charity, any officer or employee of the charity, or the charity itself) to take any action which the Commission considers to be expedient in the interests of the charity.

By contrast, the Charity Commission's power under s 85 regarding the application of charity property has fewer thresholds. The s 85 power regarding the application of property requires neither a statutory inquiry nor notice to be given to the person who is the subject of the direction — it may therefore be easily applied for the protection of charitable assets — the Commission must simply be satisfied that the person or persons in possession or control of the property held by or on trust for a charity 'is or are unwilling or unable to apply it properly for the purposes of the charity' and that it is 'necessary or desirable' to make an order to secure a proper application of that property.

Thirdly, in comparison, the ACNC can only use its statutory enforcement powers, which are set out under Part 4-2 of the ACNC Act, where the charity is a 'federally regulated entity' or where the compliance issue involves the external conduct standards which apply to charities that operate overseas. Also, the ACNC's use of the enforcement powers is restricted in relation to 'basic religious charities', as these charities are not required to comply with the governance standards and basic religious charities are not subject to the ACNC's power to suspend or remove responsible persons.

Both the Charity Commission and the ACNC are proportionate and risk-based regulators, so the regulators will not use statutory powers if education or informal advice would be sufficient,<sup>118</sup> and they will both adopt the least intrusive regulatory mechanism that is appropriate to the circumstances.

While the Charity Commission may issue a warning to either a charity trustee or trustee for a charity who it considers has committed a breach of trust or duty or other misconduct or mismanagement in that capacity, or to a charity in connection with which it considers a breach of trust or duty or other misconduct or mismanagement has been committed, the ACNC may only give a warning to a registered charity. The ACNC may give a warning where the Commissioner reasonably believes a charity has not complied with an external conduct standard or a federally regulated entity charity has contravened the ACNC Act or has not complied with a governance standard or external conduct standard. Additionally, a key difference between the Charity Commission's and the ACNC's warning powers is that the ACNC's power appears to be more proactive in that the ACNC can issue a warning where the Commissioner believes that it is 'more likely than not' that a federally regulated entity charity will contravene a provision of the ACNC Act or will not comply with a governance standard or external conduct standard, or where the Commissioner reasonably believes that it is 'more likely than not' that a registered charity will not comply with an external conduct standard.

These warning powers require the regulators to give the charity notice before they can issue a warning. The Charity Commission's power also requires it to provide each charity trustee or trustee for the charity with notice of the official warning. The notice provided by the Charity Commission or ACNC informs the charity of the circumstances which relate to the relevant breach, misconduct or mismanagement, or contravention or non-compliance, and will outline any action that the

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<sup>118</sup> The Commission seeks to resolve issues through guidance, regulatory advice and supervision without using its statutory powers to intervene in the administration of the charity; the ACNC will not use its enforcement powers if informal advice or education would suffice. See *Statutory Inquiries into Charities* (n 12) [4.1]; *Compliance and Enforcement CPS* (n 72) 6 [42].

charity (or charity trustees or trustees of the charity) should take to rectify the situation. A warning is not an order or direction, but failure to remedy any breach specified in a warning can be used by the Charity Commission as evidence of misconduct or mismanagement, including when considering whether to exercise other legislative powers, in particular those under s 76 of the *Charities Act 2011* (UK) (which include the power to suspend charity trustees).<sup>119</sup> Similarly, a failure to comply with a warning by the ACNC may result in the ACNC issuing a direction under s 85-5; failure to comply with a direction is a criminal offence.

As well as the power to issue a warning and a direction to a charity, the ACNC also has statutory enforcement powers under Part 4-2 to issue an injunction and to accept an enforceable undertaking. The ACNC Commissioner's power to apply to a court for an injunction is the only power that the ACNC has to bring court proceedings in response to a contravention or possible contravention of the ACNC Act, governance standards or external conduct standards or the ACNC Regulations – although the Commissioner can apply to a court to enforce an enforceable undertaking, if it believes that the charity has breached the undertaking. By contrast, the Charity Commission has broad powers to bring civil proceedings in relation to charity law matters (with the agreement of the Attorney-General) under s 114 of the *Charities Act 2011* (UK).

Both the Charity Commission and the ACNC have powers to suspend, remove and disqualify the persons that are governing the charity – the charity trustees or responsible persons, respectively. However, there are real differences in their ability to do so. In order to suspend or remove a charity trustee for protective purposes, the Charity Commission must have instituted a statutory inquiry. To suspend a charity trustee, the Commission must also be satisfied that (a) there is or has been a failure to comply with an order or direction of the Commission, a failure to remedy any breach specified in a warning under s 75A, or any other misconduct or mismanagement in the administration of the charity, or (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity, or for the purpose of securing a proper application for the purposes of the charity of that property or of property coming to the charity. In order to remove a charity trustee for protective purposes (under s 79), the Commission must be satisfied that both of the aforementioned conditions apply. Additionally, the charity trustee must have either 'been responsible for the misconduct or mismanagement', or 'knew of the misconduct or mismanagement and failed to take any steps to oppose it' or their conduct contributed to or facilitated the misconduct or mismanagement. These protective suspension and removal powers apply not only to charity trustees, but may also be applied in the same circumstances to trustees, officers, agents or employees of the charity.

The Charity Commission may also remove a charity trustee for reasons unrelated to misconduct or mismanagement. These powers do not require a statutory inquiry. The Charity Commission may remove a charity trustee or trustee for a charity if that person is disqualified from being a charity trustee or trustee for a charity (due to s 178 or 181A). The Charity Commission may also remove a charity trustee under s 80 for various reasons such as liquidation, incapacity due to mental disorder, or an absence or failure to act that impedes the proper administration of the charity. All the Charity Commission's removal powers require notice to be given.<sup>120</sup>

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<sup>119</sup> See Charity Commission, *Operational Guidance: Official Warnings by the Commission* (2019) <<http://ogs.charitycommission.gov.uk/g404a001.aspx>>

<sup>120</sup> *Charities Act 2011* (UK) s 82.

By contrast, the ACNC Commissioner may suspend or remove a responsible person where the Commissioner reasonably believes that a charity that is a federally regulated entity has contravened the ACNC Act or has not complied with a governance standard or external conduct standard (or is more likely than not to contravene or not comply in the future), or where a registered charity has not complied with an external conduct standard (or is more likely than not to not comply in the future) — except the suspension and removal powers cannot apply where the charity is a basic religious charity. In contrast to the Charity Commission’s broad disqualification powers, the ACNC Commissioner may only disqualify an individual from being eligible to be a responsible person if that person has previously been suspended or removed under the ACNC Act as a responsible person of a registered charity. The person must be given notice of their disqualification. The effect of this disqualification lasts for up to twelve months. As the ACNC’s suspension and removal powers do not apply to any responsible person of a basic religious charity, and do not apply to responsible persons of charities that do not come within the definition of a ‘federally regulated entity’ unless there is non-compliance (or potential non-compliance) with an external conduct standard, the ACNC’s suspension, removal and disqualification powers may not apply in relation to many responsible persons.

Where the Charity Commission or the ACNC uses their enforcement powers, non-compliance may be a criminal offence or (in the case of the Charity Commission’s powers) contempt of court. For example, failure to comply with orders made by the Charity Commission under the s 52(1) power to call for documents, the s 84 power to direct specified action to be taken, the s 85 power to direct application of charity property or certain orders requiring a transfer of property or payment to be called for or made, may amount to contempt of court if the Commission applies to the High Court for a disobedience order.

#### *Misuse or misappropriation of charitable assets*

There are some important differences in the abilities of the Charity Commission and the ACNC to respond to the misuse or misappropriation of charitable assets. There are a few issues here: What can the regulator do to retrieve misappropriated assets (if possible)? What can the regulator do to prevent further misappropriation or misuse of assets? And what sanctions are available against the persons responsible?

#### *A. Recovering charitable assets*

If assets have been misappropriated and charity no longer has control of those charitable assets, the Charity Commission has more extensive statutory powers that can be used to recover those assets than the ACNC does. The Charity Commission emphasises that it is ‘primarily the responsibility of the trustees to recover the property lost to the charity’.<sup>121</sup> However, the Commission acknowledges that there may be situations in which the trustees are unable or unwilling to do so, such as the following: where trustees may have been involved themselves or may be too involved in the factors that have led to the loss to be able to do this effectively; where trustees may have a conflict of interest or loyalty which means they are unwilling to take steps; or

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<sup>121</sup> Charity Commission, *Charity Commission Policy on Restitution and the Recovery of Charitable Funds Misappropriated or Lost to Charity in Breach of Trust*, Policy Paper (May 2013) <<https://www.gov.uk/government/publications/how-we-ensure-charities-meet-their-legal-requirements/our-policy-on-restitution-and-the-recovery-of-charitable-funds-misappropriated-or-lost-to-charity-in-breach-of-trust>> (*‘Charity Commission Policy on Misappropriated or Lost Charitable Funds’*).

where the charity may have insufficient funds for the trustees themselves to take action or where the charity no longer exists.<sup>122</sup>

Where the trustees are unable or unwilling to recover misappropriated assets, and the amount involved is significant and the breach of trust is sufficiently serious, the Charity Commission will use its powers of intervention and remedy to secure the recovery of lost funds.<sup>123</sup> For example, once the Charity Commission has instituted a statutory inquiry, and it is satisfied that ‘it is necessary or desirable to act for the purpose of protecting the property of the charity’ or ‘for the purpose of securing a proper application for the purposes of the charity of that property’, the Charity Commission may by order (under s 84) direct the charity trustees (or trustees for the charity) or any officer or employee of the charity to take any action which the Commission considers to be expedient in the interests of the charity. This may include directing the trustees to take legal advice to find out ways to recover charity property that has been misappropriated.<sup>124</sup> A failure to comply with an order made by the Charity Commission under s 84 may amount to contempt of court if the Commission applies to the High Court for a disobedience order. Other options to recover charitable assets include suspending trustees who have been involved in the misappropriation or are conflicted, and replacing them with new trustees who are not involved or conflicted and who can consider how to recover the property — or appointing an interim manager to identify the loss and to consider how to recover the property.<sup>125</sup> In exceptional cases, the Commission may bring civil proceedings (with the Attorney-General’s consent) to recover charitable funds lost to a charity.<sup>126</sup>

The ACNC also emphasises that responsible persons have legal duties towards their charity and that they should act in a way that protects the charity’s assets and ensures the charity’s financial affairs are managed in a responsible manner and for its charitable purpose.<sup>127</sup> And significantly, the ACNC does not appear to have any statutory power to directly recover misappropriated charitable funds or other assets. However, if the charity (and its responsible persons) is not willing to work cooperatively with the ACNC, or the misappropriation has resulted from organisational or deliberate non-compliance, the ACNC may use its formal enforcement powers.<sup>128</sup> Like the Charity Commission, the ACNC may suspend (or remove) responsible persons if they are unable or unwilling to take appropriate action. (The misuse or misappropriation of funds or assets may amount to a contravention of governance standard 1, if they are used for a non-charitable purpose such as for the private benefit of its members;<sup>129</sup> it may also amount to a contravention of governance standard 5 — if the charity fails to take action against a responsible person that is

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<sup>122</sup> *Charity Commission Policy on Misappropriated or Lost Charitable Funds* (n 121).

<sup>123</sup> *Charity Commission Policy on Misappropriated or Lost Charitable Funds* (n 121).

<sup>124</sup> *Charity Commission Policy on Misappropriated or Lost Charitable Funds* (n 121).

<sup>125</sup> *Charity Commission Policy on Misappropriated or Lost Charitable Funds* (n 121).

<sup>126</sup> *Charity Commission Policy on Misappropriated or Lost Charitable Funds* (n 121).

<sup>127</sup> ACNC, ‘Protect Your Charity from Fraud’ <<https://www.acnc.gov.au/tools/guides/protect-your-charity-fraud>> (‘Protect Your Charity from Fraud’).

<sup>128</sup> ‘Protect Your Charity from Fraud’ (n 127).

<sup>129</sup> ACNC, ‘Governance Standard 1: Not-for-profit and Working towards Charitable Purpose’ <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/1-not-profit-and-working>>.

responsible for the misuse or misappropriation.) The ACNC can then appoint one or more acting responsible persons to seek to recover the charitable assets. Of course, the ACNC's suspension and removal powers may only be used against a responsible entity of a federally regulated entity (unless non-compliance with an external conduct standard is involved – misuse of charitable resources may breach External Conduct Standard 1); and responsible persons of basic religious charities cannot be suspended or removed by the ACNC. It is important to highlight that the ACNC has never actually used its powers to suspend or remove those persons governing a charity.

### *B. Preventing misuse*

If someone has been misappropriating or misusing charitable assets and may continue to do so, both the Charity Commission and the ACNC have powers to address future misappropriation or misuse — however, the ACNC has no formal power to do anything other than revoke the charity's registration status if the charity concerned is not a 'federally regulated entity' or if the misconduct does not involve non-compliance with the external conduct standards.

Under s 85, the Commission may by order direct a person or persons to apply charity property in a certain manner where the Commission is satisfied that the person or persons in possession or control of any property held by or on trust for a charity 'is or are unwilling or unable to apply it properly for the purposes of the charity' and that it is 'necessary or desirable' to make an order to secure a proper application of that property.

If the Commission has instituted a statutory inquiry, and the Commission determines that it is necessary or desirable to act for the purpose of protecting the property of the charity, or for the purpose of securing a proper application for the purposes of the charity of that property or of property coming to the charity, the Commission may do the following things (under s 76) to protect the charity's assets:

- suspend any person who is a trustee, charity trustee, officer, agent or employee of the charity from office or employment;
- vest any property held by or in trust for the charity in the official custodian;
- order any person who holds any property on behalf of the charity not to part with the property without the approval of the Commission;
- order any debtor of the charity not to make any payment in or towards the discharge of liability to the charity without the approval of the Commission; and
- restrict the transactions which may be entered into in the administration of the charity without the approval of the Commission.

These powers are significant as it is an offence for a person to contravene an order under ss 76(3)(d) (order prohibiting person from parting with property), 76(3)(e) (order prohibiting debtor of charity from discharging liability), or 76(3)(f) (order restricting transactions or payments).<sup>130</sup> Additionally, the imposition of criminal liability does not prevent the Commission from bringing civil proceedings for breach of trust against any charity trustee or trustee for a charity in respect of a contravention of an order under s 76(3)(d) or (f).

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<sup>130</sup> *Charities Act 2011*(UK) s 77.

Also, once the Commission has instituted an inquiry, the Commission may make an order (under s 84A) directing the charity trustees, any trustee for the charity, any officer or employee of the charity, or the charity itself (if a body corporate) not to take certain action or not to continue certain action — if the Commission considers that such action, if taken or continued by such a person, would constitute ‘misconduct or mismanagement in the administration of the charity’. ‘Misconduct’ includes any act (or failure to act) that the person committing it knew (or ought to have known) was criminal, unlawful or improper, and ‘mismanagement’ includes any act (or failure to act) that may cause charitable resources to be misused or the people who benefit from the charity to be put at risk.<sup>131</sup> The Commission could also use its power under s 84 to direct the charity trustees, any trustees for the charity, or any officer or employee of the charity to take any action which the Commission considers to be expedient in the interests of the charity.

Failure to comply with an order under the s 84 power to direct specified action to be taken, the s 84A power to direct specified action not to be taken, and the s 85 power to direct application of charity property may amount to contempt of court if the Commission applies to the High Court for a disobedience order.

If a suspension is thought to be insufficient, the Commission may of its own motion by order (under s 79) remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for any misuse or misappropriation that constitutes ‘misconduct or mismanagement’—or who knew of the misconduct or mismanagement and failed to take any steps to oppose it, or whose conduct contributed to it or facilitated it. To do so, the Commission must be satisfied that ‘it is necessary or desirable to act for the purpose of protecting the property of the charity, or for the purpose of securing a proper application for the purposes of the charity of that property or of property coming to the charity’. A person is automatically disqualified (under s 178) from being a charity trustee or trustee for a charity if they have been removed under s 79(4) from the office of charity trustee or trustee for a charity.

By contrast, the ACNC only has powers to prevent misuse or misappropriation if the charity is a federally regulated entity or if the likely non-compliance involves the provision of charitable resources to third parties outside Australia. If the ACNC can use its Part 4-2 enforcement powers, it may use a direction, injunction, enforceable undertaking or the suspension of responsible persons. Where there is an immediate threat to charitable assets and urgent action is necessary, the useful powers are likely to be a direction,<sup>132</sup> injunction<sup>133</sup> or the replacement of the responsible persons.<sup>134</sup> However, note that while the ACNC ‘could suspend or remove a person who is responsible, in a serious and persistent way, for misdirecting charity funds’, the ACNC’s preference ‘would be to provide evidence of misconduct to enable the charity to suspend or remove that person’. Therefore, the ACNC will ‘generally use this power to remove or suspend a

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<sup>131</sup> Charity Commission, *Official Warnings to Charities and Trustees: Q and A* (December 2016) <<https://www.gov.uk/government/publications/official-warnings-to-charities-and-trustees-q-and-a>>.

<sup>132</sup> See *Compliance and Enforcement CPS* (n 72) 6 [46].

<sup>133</sup> See *Compliance and Enforcement CPS* (n 72) 7 [54].

<sup>134</sup> The Commonwealth Government noted that the power to replace responsible person (by suspension and appointment of acting responsible person) ‘is important as it allows the ACNC Commissioner to act quickly and may prevent the misuse of charitable assets’: *Government response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* (March 2020) <<https://treasury.gov.au/sites/default/files/2020-03/p2020-61958-govt-response.pdf>> 9.

Responsible Person only where other members of the charity’s governing body refuse to act, or are unable to act. In such cases, [the ACNC] may also appoint one or more persons to act in the place of the Responsible Person during the period of suspension, or until the role has been filled.’<sup>135</sup> As noted above, the suspension and removal powers have never been used.

An enforceable undertaking may be useful if the responsible persons who committed the misconduct have left the charity and there are new board members who are willing to change practices.<sup>136</sup> If the ACNC cannot use its statutory powers, it may use a compliance agreement (if there is no immediate threat to charitable assets) whereby the charity makes a voluntary undertaking to make certain changes, such as improving governance practices.

### *C. Action against individuals responsible*

The Charity Commission has some sanctions available to it where there has been a misuse or misappropriation of charitable assets by a charity trustee, trustee for the charity, officer, agent or employee of the charity. In particular, the Commission may disqualify a person, under s 181A, from being a charity trustee or a trustee for a charity, including where various requirements are satisfied and the person was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and (a) the person was responsible for the misconduct or mismanagement, (b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or (c) the person’s conduct contributed to or facilitated the misconduct or mismanagement. Additionally, the s 181A power extends to people working for a corporate trustee of a charity, where ‘that the person was an officer or employee of a body corporate at a time when the body was a trustee or charity trustee for a charity and when there was misconduct or mismanagement by it in the administration of the charity’, and —(a) the person was responsible for the misconduct or mismanagement, (b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or (c) the person’s conduct contributed to or facilitated the misconduct or mismanagement.

The ACNC may also disqualify a person from being eligible to be a responsible person if they were involved in misappropriation or misuse of charitable assets – but only if the individual was suspended or removed under the ACNC Act as a responsible person of a registered charity. If the charity is unwilling to act against its responsible persons and ACNC has no power to do so (as the charity is not a federally regulated entity and there is no external conduct standard issue), the ACNC may resort to revoking the charity’s registration. The ACNC could also refer the matter to the police or another relevant regulator, if appropriate.

## **5. Application of Charity Commission and ACNC statutory powers in practice**

Both charities regulators have a range of legislative powers. Many of the Charity Commission’s enforcement powers require it to institute a ‘statutory inquiry’ — this is the Commission’s most

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<sup>135</sup> *Regulatory Approach Statement 2018* (n 68) 11 [54].

<sup>136</sup> Example of ACNC use of enforceable undertaking in response to misuse of funds: <<https://www.acnc.gov.au/media/news/acnc-takes-compliance-action-against-two-rsl-charities>>. Also, note *Regulatory Approach Statement 2018* (n 68) 11 [54]: ‘For example, if a new or incoming charity board discovers that the charity has previously diverted funds for private benefit, we can reach an agreement where they will take specific action to address the issue.’

serious type of regulatory engagement. However, the Charity Commission can use certain compliance powers outside that regulatory context (such as calling for documents, official warnings and directions regarding charity property). Indeed, most of the Charity Commission's compliance cases are concluded without a statutory inquiry occurring. For example, in 2021–22, the Charity Commission concluded 5,324 regulatory action cases, of which only 45 were statutory inquiries;<sup>137</sup> and in 2020–21, the Charity Commission concluded 4,712 regulatory action cases, of which 64 were statutory inquiries.<sup>138</sup> Furthermore, the Charity Commission has emphasised that it is not always necessary to use compliance powers or sanctions, and that often matters can be addressed by 'providing robust regulatory advice to the trustees, or instructing them to meet an action plan'.<sup>139</sup> By comparison, like the Charity Commission's use of the statutory inquiry powers in only the most serious circumstances, the ACNC only conducts investigations and uses its enforcement powers in the most serious cases. For example, between December 2012 and June 2021, the ACNC used its enforcement powers under Part 4-2 of the ACNC Act only 16 times, but entered into 62 compliance agreements with charities, advised 98 charities to undertake a self-evaluation and provided regulatory advice to 216 charities.

The Charity Commission's use of its statutory compliance and enforcement powers has increased gradually after a sharp increase in the use of legal powers between 2012–13 and 2013–14.<sup>140</sup> In 2013, one of the National Audit Office's key findings in its report on the regulatory effectiveness of the Charity Commission was that the Commission made little use of its statutory enforcement powers — the NAO recommended that the Commission make greater use of its statutory powers in line with its objective of maintaining confidence in the sector.<sup>141</sup> This prompted a significant increase in the use of the Charity Commission's information-gathering powers as well as an increase in its use of enforcement powers.<sup>142</sup> The increased use of enforcement powers was also driven by legislative change in 2016, with the introduction of a power to remove disqualified trustees and to direct specific action not to be taken (from July 2016), a discretionary power to

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<sup>137</sup> Charity Commission, *Charity Commission Annual Report and Accounts 2021–22* (July 2022) 9.

<sup>138</sup> Charity Commission, *Charity Commission Annual Report 2020–21* (July 2021) 9.

<sup>139</sup> Charity Commission, *Tackling Abuse and Mismanagement 2016 to 17* (February 2018) Annex 2, 2 <<https://www.gov.uk/government/publications/tackling-abuse-and-mismanagement-2016-17>>.

<sup>140</sup> The Charity Commission has stated that it used its statutory powers 1,062 times in 2014–15; 1,073 times in 2015–16; 1,099 times in 2016–17; 1,136 times in 2017–18; 1,864 times in 2018–19; 1,962 times in 2019–20; 2,209 times in 2020–21 and on 2,034 occasions in 2021–22: Charity Commission, *Charity Commission Annual Report and Accounts 2015–16* (July 2016) 10; Charity Commission, *Charity Commission Annual Report and Accounts 2016–17* (July 2017) 15; Charity Commission, *Charity Commission Annual Report and Accounts 2017–18* (July 2018) 8; Charity Commission, *Charity Commission Annual Report 2018–19* (July 2019) 17, 19; Charity Commission, *Charity Commission Annual Report 2019–20* (July 2020) 15; Charity Commission, *Charity Commission Annual Report 2020–21* (July 2021) 10; Charity Commission, *Charity Commission Annual Report and Accounts 2021–22* (July 2022) 11. The data published in the annual reports for 2012–13 and 2013–14 was limited to the powers used in relation to statutory inquiries and excluded those powers used in operational compliance case work: Charity Commission, *Charity Commission Annual Report and Accounts 2013–14* (July 2014) 13.

<sup>141</sup> National Audit Office, *The Regulatory Effectiveness of the Charity Commission* (Report, December 2013) 7, 10 <<https://www.nao.org.uk/wp-content/uploads/2013/11/10297-001-Charity-Commission-Book.pdf>>.

<sup>142</sup> National Audit Office, *Charity Commission: Progress Report* (Report, November 2017) 29–30 <<https://www.nao.org.uk/wp-content/uploads/2017/11/Charity-Commission-progress-report.pdf>>.

disqualify individuals who are unfit (from October 2016), and the power to issue official warnings (from November 2016).<sup>143</sup>

The Charity Commission generally uses its statutory powers to help it establish whether wrongdoing has taken place, including powers that allow the Charity Commission to direct charities or third parties to provide documents, accounts or statements.<sup>144</sup> It also, less frequently, uses its powers to issue a charity with an official warning (25 occasions in 2020–21 and 12 in 2021–22) and the power to disqualify a charity trustee (16 times in 2020–21 and 14 times in 2021–22);<sup>145</sup> and in matters involving statutory inquiries, the Commission will also use its powers to freeze charities' bank accounts, suspend or remove trustees, appoint new trustees and appoint an interim manager.<sup>146</sup>

By contrast, the ACNC's use of its statutory enforcement powers has not increased in any significant way. Additionally, it has never used its powers to suspend or remove the responsible persons of a charity, nor has it used its injunction power. However, the ACNC has adopted a more proactive approach to compliance risk in response to an audit by the Australian National Audit Office ('ANAO'). In particular, the ACNC introduced new compliance review and self-audit programs in 2020–21, with the compliance review program being established with funding from the Australian Government to facilitate early intervention where charities are at a high risk of failing to meet the ACNC Governance Standards.

## 6. Conclusion

Both the Charity Commission and the ACNC engage in risk-based, proportionate regulatory activity, and will only use their statutory powers where necessary to do so. They both focus on educating and assisting charities, and they target their compliance and enforcement activities to the highest risks facing the charities sector.

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<sup>143</sup> National Audit Office, *Charity Commission: Progress Report* (Report, November 2017) 27 <<https://www.nao.org.uk/wp-content/uploads/2017/11/Charity-Commission-progress-report.pdf>>.

<sup>144</sup> Charity Commission, *Charity Commission Annual Report 2020–21* (July 2021) 10; Charity Commission, *Charity Commission Annual Report and Accounts 2021–22* (July 2022) 9. For example, the Charity Commission has published a clear breakdown of the Commission's use of its compliance powers in 2017–18 and 2016–17, by the specific sections of the *Charities Act 2011* (UK) in which the powers were located. See, Charity Commission, 'Charity Commission Use of Compliance Powers in 2017-18' in *Dealing with Wrongdoing and Harm 2017-18* (January 2019) <<https://www.gov.uk/government/publications/dealing-with-wrongdoing-and-harm-2017-18>>; Charity Commission, *Tackling Abuse and Mismanagement 2016 to 17* (February 2018) Annex 3 <<https://www.gov.uk/government/publications/tackling-abuse-and-mismanagement-2016-17>>. By contrast, earlier breakdowns are limited to individual orders or directions under the *Charities Act 2011* (or equivalent in 2003 Act) in 'statutory inquiry and operational compliance cases': for 2011–12, 2012–13, 2013–14, 2014–15 and 2015–16, see Charity Commission, *Tackling Abuse and Mismanagement 2015 to 16* (December 2016) Annex 3, 11 <<https://www.gov.uk/government/publications/tackling-abuse-and-mismanagement-2015-16>> 10–11.

<sup>145</sup> Charity Commission, *Charity Commission Annual Report 2020–21* (July 2021) 10; Charity Commission, *Charity Commission Annual Report and Accounts 2021–22* (July 2022) 9.

<sup>146</sup> National Audit Office, *Charity Commission: Progress Report* (Report, November 2017) 30 <<https://www.nao.org.uk/wp-content/uploads/2017/11/Charity-Commission-progress-report.pdf>>; Charity Commission, *Charity Commission Annual Report 2019–20* (July 2020) 15.