REGULATING THE INVESTMENT ACTIVITIES OF AUSTRALIAN CHARITIES

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I Introduction

Charities play an important role in civil society in Australia. Over 3.4 million people volunteer their time to charities, and the sector receives donations of upwards of AUD$12.7 billion annually.[1] Charities harness the energies and imaginations of their volunteers and employees, and the financial resources gleaned from donations and other sources, to address a wide range of societal needs. Importantly, although they enjoy government support (most particularly through bespoke tax and regulatory concessions), they are quintessentially private in nature. For the most part, they are formed by private individuals to promote an objective or remedy a concern that is perceived to be inadequately addressed either by the State or market.[2] 'Third sector' institutions such as charities can emerge because they require neither the majoritarian consensus that motivates the State nor the prospect of an economic reward that motivates private market participants.

Private motivations provide much of the impetus for charities, but those motivations can also create governance challenges.[3] The sense of purpose[4] that energises a charity may also blinker its board to governance deficiencies, including the possibility of outright fraud,[5] the presence of conflicts of interest,[6] an anti-expert bias, an over-concentration on cost minimisation and 'group-think'. It can also promote a conservatism that stultifies innovation[7] and justify looseness in accountability. Nor is it necessarily the case, as Hansmann has suggested,[8] that the absence of distributable profits removes the incentive for individuals to act in their own self-interest. It may just be that the rewards are expressed otherwise than in the distribution of profits from the enterprise.[9]

State-based regulation is a common response to perceptions of governance deficiencies in non-state organisations. However, as noted elsewhere in this volume, governments are typically minded to regulate the operations of charities very carefully. They do not want to suppress the eleemosynary spirit both because of its value to civil society[10] and, more pragmatically, for electoral reasons. On the other hand, the considerable economic and social footprint of charities overall, and in vulnerable sectors specifically, is felt to justify some level of regulatory oversight, particularly in light of the privileges

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1 ACNC, *Australian Charities Report* (Report No 8, 7 June 2022) 3 ('*Australian Charities Report 2022*').

2 Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) xxix.

3 Jeff Cheverton, 'Holding Our Own: Value and Performance in Nonprofit Organisations' (2007) 42(3) *Australian Journal of Social Issues* 427; Steven Dellaportas, Jonathan Langton and Brian West, 'Governance and Accountability in Australian Charitable Organisations: Perceptions from CFOs' (2012) 20(3) *International Journal of Accounting & Information Management* 238.

4 Brody provocatively describes this as a 'halo': Evelyn Brody, 'The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice' (2007) 76(2) *Fordham Law Review* 521, 528.

5 Erica Harris, Christine Petrovits and Michelle Yetman, 'Why Bad Things Happen to Good Organizations: The Link Between Governance and Asset Diversions in Public Charities' (2017) 146(1) *Journal of Business Ethics* 149.

6 Ibid.

7 Cheverton (n 3) 431; Kristina Jaskyte, 'Transformational Leadership, Organizational Culture, and Innovativeness in Nonprofit Organizations' (2004) 15(2) *Nonprofit Management and Leadership* 153.

8 Henry Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89(5) *Yale Law Journal* 835.

9 Andreas Ortmann, 'Modern Economic Theory and the Study of Nonprofit Organizations: Why the Twain Shall Meet' (1996) 25(4) *Nonprofit and Voluntary Sector Quarterly* 470, 471–2.

10 Industry Commission (Cth), *Charitable Organisations in Australia* (Report No 45, 1995) xvi.

accorded to the sector.[11] A balance is required between oversight, guidance, prescription and proscription on the one hand, and facilitation on the other.

This overall justification applies also to charities' investment activities. Much of charitable giving is intended to be applied directly to funding either the expenses or the distributions of the charity, but charities can and do build up investment portfolios either by retaining some of their revenue or as a consequence of the terms of the bequests they receive. Those amounts are typically held on trust and, as such, are subject to the general law and to relevant statutory rules. Intricate and arcane in places, these rules can frustrate and, on occasion, ensnare unwitting trustees. Moreover, supervision by the State and Territory Attorneys-General is a regulatory mechanism not well-suited to oversight of the investment activities of charitable trustees. It is generally reactionary rather than proactive and also it is profoundly under-resourced, in comparison, for instance, to the resources committed by the Australian Securities and Investment Commission ('ASIC') and Australian Prudential Regulation Authority ('APRA') to analogous tasks in the funds management and superannuation sectors (which are themselves sometimes criticised for being under-resourced).[12] The challenge is to ensure that the relevant constraints on investment are given the salience they require so that trustees can pursue their charitable objectives confident of not falling foul of the relevant legal constraints.

This chapter proceeds as follows. Part II briefly describes the charities sector in Australia, including the legal forms charities can take. Part III then describes the layers of regulation applied to charities, with an emphasis on the regulation of the governance processes involved in charities' investment activities. Part IV then assesses how those regulatory requirements engage with key contemporary investment themes: climate change, impact investing and crypto-assets. Part V then argues that the lack of guidance and effective regulatory oversight in relation to charities' investment activities is undesirable and requires attention. It does so recognising the charities sector's unique circumstances and the opportunity to learn from developments in the United Kingdom.

II Charities in Australia

The charities sector in Australia is vibrant and diverse. Australia's 49,000 charities reported assets in total of AUD$384 billion and revenue of $176 billion in the 2020 reporting period.[13] Approximately 32.5% of charities' revenue was from sales of good and services, 50.4% from government grants and 7.2% from donations and bequests.[14] Revenue from investments amounted to around AUD$4.984 billion in the 2020 reporting period.[15] Charities distributed just over AUD$9 billion in grants and donations to Australian and overseas recipients in the 2020 reporting period.[16]

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11 Jenny Onyx, Liz Cham and Bronwen Dalton, 'Current Trends in Australian Nonprofit Policy' (2016) 7(2) *Nonprofit Policy Forum* 171, 173.

12 Australia has adopted a 'Twin Peaks' model for the regulation of its financial system, by which responsibility is shared between two equal and independent bodies by reference to supervisory objectives. One body is responsible for the enforcement of prudential regulation while the other is responsible for market conduct and consumer protection. In Australia, those bodies are APRA and ASIC respectively. See Andrew Godwin, Ian Ramsay and Andrew, 'Twin Peaks in Australia' in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge, 2021) 71.

13 *Australian Charities Report 2022* (n 1) 15.

14 Ibid 20.

15 Ibid 20. This figure is approximate because disclosure of investment income is optional for charities classified as 'extra small' or 'small'.

16 Ibid 22.

Australia's charities sector is not highly concentrated. There are around 200 charities with annual revenue of more than AUD$100 million, but more than 50% of charities have annual revenue less than $250,000.[17] Approximately 75% of the assets in the sector are administered in charities classified as 'very large' or 'extra large' by the ACNC.[18] There is also diversity in the 'charitable' activities undertaken, with religion (22%), education (17%) and human services (16%) being the main sub-sectors.[19]

Charities can adopt any one of a small number of legal forms under Australian law. In addition to charitable trusts, charities can take the form of Private Ancillary Funds and Public Ancillary Funds, bespoke forms of trust provided for by Commonwealth statute, or unincorporated associations or incorporated entities. In the latter two cases, although the charity is not itself a trust, the assets of the charity are held on trust.[20] The law of trusts is therefore important for each of the forms a charity mighty take.

Although the charities sector has traditionally been a matter for private autonomy, in recent decades there has been a trend towards government regulation. Indeed, there were four major government enquiries into the charitable sector between 1995 and 2010. [21] That activity led, amongst other things, to the establishment in 2012 of the ACNC, amongst whose primary functions are registration and disclosure regimes for entities in the charities sector. Those regimes are designed to address a perceived lack of coordinated oversight and reporting requirements, and a lack of transparency on the part of charitable entities, which in turn undermined public trust and understanding of the sector.[22] The establishment of the ACNC also removed the decision to recognise the charitable status of an entity from the Australian Taxation Office, whose taxation revenue responsibilities might be thought to create conflicting objectives.[23]

The early years of the ACNC were controversial, but a Bill to disband the ACNC was shelved in 2016 after opposition in the Senate.[24] Then, in 2018, a Treasury report concluded that:

> There is strong support for the Australian Charities and Not-for-profits Commission (ACNC) and its accomplishments in the first five years, with the sector acknowledging the collaborative and educative approach taken by the ACNC. The Panel considers this approach should continue …[25]

The report did however go on to note that:

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17 Ibid 7.

18 Ibid 16. 'Very large' charities have annual revenue between AUD$10 million and $100 million. 'Extra large' have annual revenue greater than $100 million.

19 Ibid 9.

20 The variety of ways in which this can be arranged in respect of unincorporated associations is outlined by Dal Pont: Gino Dal Pont, *Law of Charity* (LexisNexis, 2nd ed, 2017) [17.51]ff.

21 In chronological order; Industry Commission (n 10) (1995); The Treasury (Cth), Charities Definition Inquiry Committee, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Report, June 2001); Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (Report, 4 December 2008); Productivity Commission (n 2) (2010).

22 John Vaughan-Williams, 'The Future of Charity Regulation in Australia: Complexities of Change' (2016) 37(1) *Adelaide Law Review* 219, 220.

23 Productivity Commission (n 2) 144–5.

24 Ibid 222.

25 The Treasury (Cth), *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (Final Report, 22 August 2018), 8.

> … there is an opportunity to broaden the use of incentives to encourage good behaviour and use powers available to enforce the law in matters of misconduct.[26]

There was no consideration of the investment activities undertaken by charities in the report.

III Statutory and General Law Regulation

Charities in Australia are subject to multiple layers of legal and regulatory oversight.[27] Although the particular circumstances of each charity will determine which layers apply, the most pertinent and commonly applicable layers are:[28]

- The registration and reporting regime administered by the ACNC;
- The law of trusts, as augmented by statute, which applies in many cases even when the charity is not specifically a charitable trust;
- Regimes targeting specific regulatory objectives, such as the anti-money-laundering and counter-terrorism-funding ('AML/CTF') and modern slavery regimes;
- Corporations law, either because the charity is itself an incorporated entity (usually a company limited by guarantee)[29] or because there is a corporate form present somewhere in the structure (often as the trustee of the assets of the charity); and
- Taxation, given the preferential treatment accorded to charities under Commonwealth, State and Territory revenue laws.

The first three are outlined below as a foundation for the analysis in Part IV.

A *The ACNC*

The ACNC was established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*'). Section 15-5 of that Act provides that the objects of the ACNC regime are to:

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

The Commissioner (and by extension the ACNC) is required by section 15-10 of the *ACNC Act* to have regard for the need for transparency and accountability; the benefits of public disclosure; the effectiveness and sustainability of the sector; the regulatory principles of necessity, risk and proportionality; the benefits of guidance and education; and the 'unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia'.

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26 Ibid.

27 Ian Murray, 'Regulating Charity in a Federated State: The Australian Perspective' (2018) 9(4) *Nonprofit Policy Forum* 20180034.

28 Other important regimes that do not engage directly with charities' investment activities include the Australian Consumer Law and the criminal law in each State.

29 Note, the legislation in each State specifically governing incorporated associations does not engage directly with the investment activities of the entity.

The ACNC monitors how registered charities comply with their obligations under the *ACNC Act* and its Regulations (which together govern registration and ongoing disclosure) and the *Charities Act 2013* (Cth). The ACNC does not have authority to pursue actions under other legislation or the general law.

The ACNC's registration process does provide a measure of protection for donors,[30] particularly when married to the enhanced disclosure regime which permits a donor or potential donor to view each charity's Annual Information Statement and (for larger charities) recent Financial Statements. This clearly is designed to nurture public confidence in the sector as a whole, and in individual charities as appropriate. Moreover, consistent with Judge Brandeis' aphorism that 'sunlight is said to be the best of disinfectants, electric light the most efficient policeman',[31] the existence of even a relatively light-touch disclosure regime can be expected to influence those managing the affairs of the charity.[32]

Crucially, also, the ACNC is empowered to determine and impose Governance Standards. It can monitor compliance with those standards[33] and take enforcement action if required.[34] The Standards address the charity's commitment to its charitable object (Standard 1), its compliance with Australian laws (Standard 3), the suitability of its people (Standard 4) and the charity's commitment to involvement (if required) in the National Redress Scheme for Institutional Child Sexual Abuse (Standard 6). Registered charities must also take reasonable steps to ensure that their people act with reasonable care and diligence, and honestly and fairly in the best interests of the charity and for its charitable purposes, do not misuse their position or information they gain in their role with the charity, disclose conflicts of interest, ensure that the financial affairs of the charity are managed responsibly, and do not to allow the charity to operate while it is insolvent (Standard 5). These requirements to some extent displace the familiar *Corporations Act 2001* (Cth) obligations on directors.[35] Charities are also expected to be open and accountable to their members (Standard 2), although not all charities have 'members' per se, since that will depend on the specific legal form adopted. In any event, members are typically only one class of a charity's stakeholders.

Finally, it is worth noting that the ACNC espouses a graduated approach to its regulatory task derived from the Ayres and Braithwaite's Enforcement Pyramid, under which the set of regulatory measures available to a regulator are arrayed from the generic and non-interventionist up to the highly targeted and interventionist measures reserved for when escalation has been deemed necessary.[36] Crucially, the foundational layer of the ACNC's pyramid is dedicated to 'education and support'. This is tacit recognition that providing guidance and assisting in capacity building across the sector is a cost-

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30 Vaughan-Williams (n 22) 236–7.

31 Louis D Brandeis, 'What Publicity Can Do' (*Harper's Weekly*, 20 December 1913, Vol 58, No 2974) 10, 10.

32 Evelyn Brody, 'Sunshine and Shadows on Charity Governance: Public disclosure as a Regulatory Tool' (2012) 12(4) *Florida Tax Review* 183.

33 *ACNC Act* pt 4-1.

34 *ACNC Act* pt 4-2 empowers the ACNC with a suite of sanctions and measures that it can use to promote compliance with the Standards, including Warnings (div 80), Directions (div 85), Enforceable Undertakings (div 90), Injunctions (div 95) and Suspension and Removal (div 100).

35 ACNC Governance Standard 5 displaces *Corporations Act 2001* (Cth) pt 2D.1 div 1 (the civil penalty provisions) and ss 111L, 191–194 but not ss 184, 195 or 588G. See generally, Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45(2) *Australian Business Law Review* 127; and in relation specifically to the conflicts aspect of the standard, Rosemary Teele Langford 'Conflicts and coherence in the charities sphere: Would a conflict by any other name proscribe the same?' (2020) 14(1) *Journal of Equity* 1.

36 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35.

effective and respectful way to influence conduct amongst compliance-minded participants in the sector.

It is notable that the ACNC has not been prescriptive in respect of the investment activities of charities. Its website notes that '[p]rudent investments can diversify a charity's income stream and form part of good financial management practice' and that '[i]t is common for charities to make investments.'[37] However the website offers little concrete guidance beyond suggesting that charities consider how the investments will ultimately further their charitable purposes, that they seek appropriate advice and that the investment strategy ought to be part of a financial plan that includes risk management policies and procedures.[38] There is one specific item of advice, which is that 'high risk investments are generally not appropriate for charities'. While it is true that charities would generally struggle to justify an investment portfolio with a high overall risk level, that advice does not adequately recognise the beneficial effect of diversification in a portfolio. In any event, its utility is limited where there is no definition of a 'high risk' investment. Unlike its guidance in relation to other governance matters, no links to other materials or to other sources of information is provided, nor is there any reference to the need for charities to consider the powers and constraints that may be present in their constitutive documents. As suggested below, there is an opportunity for the ACNC to provide more detailed guidance in this area, consistent with its stated desire to assist charities to 'stay on track'.[39] That said, the ACNC has recently released guidance on crypto-asset donations and investments.[40] That guidance is considered in more detail below, but so far as general investment principles are referred to, the ACNC again cautions against high risk investments without engaging with the aforementioned issues.

B *The Law of Trusts*

It is common for discussions about the investment activities of charities to emphasise the role played by the law of trusts, despite the fact that trusts are only one of the legal forms a charity in Australia can take. The reason is that both unincorporated associations and incorporated charities (often companies limited by guarantee) typically hold money or property donated to them, as well as any property purchased by them from such donations, on trust.[41]

Before turning to the duties that apply to investment by charitable trustees, it is necessary to recall a distinction first articulated by Nicholls V-C in *Harries v Church Commissioners*[42] ('*Harries*') between property held for functional purposes and property held for investment purposes. The Vice-Chancellor in that case clarified that property is held for functional purposes where it is directly employed to advance the aims of the charity and for investment purposes where the intention is to generate money, whether by way of income or capital growth. Where property is held for investment purposes, the charitable trustee best serves the purposes of the trust by seeking to maximise investment returns,

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37 ACNC, 'Charity Money Myths: The Facts About Operating as a Not-For-Profit' (Web Page, accessed 4 April 2022) <https://www.acnc.gov.au/for-public/understanding-charities/charity-money-myths-facts-about-operating-not-profit>.

38 Ibid.

39 ACNC, 'Commissioner's Policy Statement: Compliance and Enforcement' (Web Page, 14 September 2021) [19] <https://www.acnc.gov.au/about/corporate-information/corporate-policies/commissioners-policy-statement-compliance-and-enforcement>.

40 ACNC, 'Charities and Crypto-Assets' (Web Page, accessed 16 January 2022) <https://www.acnc.gov.au/tools/guides/charities-and-crypto-assets>. See also the accompanying media release.

41 See *Harmony — The Dombroski Foundation Ltd v A-G (NSW)* [2020] NSWSC 1276, [66] (Ward CJ in Eq).

42 [1992] 1 WLR 1241 ('*Harries*').

consistent with commercial prudence.[43] For as Nicholls V-C put it, '[m]ost charities need money; and the more that is available, the more the trustees can seek to accomplish'.[44] Accordingly, trustees typically act in the best interests of the charity by selecting investments 'solely on the basis of well-established investment criteria', taking expert advice where appropriate and with due regard to diversification, income needs, and the balance between risk and return.[45]

Nicholls V-C identified three exceptions to this general rule. The first was that trustees could eschew investments that conflicted directly with the charity's purposes, 'even if it would likely result in significant financial detriment'.[46] The Vice-Chancellor provided the example of cancer charities not investing in tobacco or temperance societies not investing in alcohol.[47] The second, so-called 'indirect conflicts'[48] arose where the investment could alienate supporters, donors or recipients of aid. In those circumstances, trustees must balance such consequences against the potential financial detriment should the investments be excluded.[49] The third exception involved 'other cases where trustees are justified in departing from what would otherwise be their starting point'.[50] While the Vice-Chancellor did not elaborate on what those cases might be, he cautioned against using the investment power as a means for making moral statements at the expense of the charity.[51]

Nicholls V-C's formulation of the general rule (or 'starting point') and the exceptions to it, despite technically being only *obiter dicta*, escaped curial reconsideration until *Butler-Sloss v The Charity Commission for England and Wales* ('*Butler-Sloss*')[52] in 2022. The environmental charities in *Butler-Sloss* sought to adopt an investment policy that excluded investments which were incompatible with the Paris Climate Agreement; a restriction which would substantially reduce the charity's investable universe.[53] Justice Green adopted the position in *Harries* that the charitable trustee's exercise of its investment power is informed by the trustee's overarching duty to further the purposes of the trust and that normally trustees satisfy that requirement by maximising financial returns.[54] However his Honour moved away from the categories of exceptions in *Harries* and towards a more generalised approach to managing conflicts, whether they be direct or indirect.[55] His Honour rejected the argument put to him by counsel that Nicholls V-C's first exception amounted to an 'absolute prohibition', holding instead that trustees have a discretion to exclude investments where they potentially conflict with the charitable purposes.[56] In exercising that discretion trustees must balance all relevant factors, including the likelihood and seriousness of both the potential conflict and the potential financial detriment associated with the exclusion.[57] Trustees who properly complete this balancing exercise will have complied with their legal duties, regardless of whether the court or other trustees might have arrived at a different conclusion.[58] His Honour also found that social investments or impact investments are not acquired

43 Ibid 1246.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid 1247.
49 Ibid.
50 Ibid.
51 Ibid.
52 [2022] EWHC 974 (Ch) ('*Butler-Sloss*').
53 Ibid [27].
54 Ibid [78(3)]
55 See ibid [71].
56 Ibid [78(6)].
57 Ibid [78(6)]–[78(7)].
58 Ibid [78(10)].

under a 'pure power of investment' but are rather to be made under separate powers.[59] While only *obiter dicta*,[60] that conclusion is likely jurisdictionally limited given that the English charities are subject to a statutory regime for social investments.[61] However, it does signify a potential need for clarification in Australia.

The State and Territory *Trustee Acts* give statutory expression to a number of these general law duties, including a duty of care, diligence and skill and a duty to exercise the power in accordance with the trust deed.[62] These are expressed to be subordinate to the terms of the trust instrument.[63] They also preserve other duties that exist at general law including the best interests duty; a duty to avoid speculative or hazardous investments; a duty to act impartially; and a duty to take advice.[64] In addition to those duties, the State and Territory *Trustee Acts* provide for specific matters trustees are to have regard to, so far as they are appropriate to the circumstances of the trust.[65]

The duty of care is particularly relevant here and requires trustees to exercise the same care as an ordinary prudent business person in the exercise of the investment power,[66] unless the trust deed (or legislation) provides otherwise.[67] The duty has been long recognised in the case law, and it can be seen to underpin other more specific expectations of trustees, such as the requirement to make adequate enquiries, to insure an asset, and to secure an independent valuation.[68] It should be noted that the descriptor 'prudent' does not require trustees to exercise prudence per se. The term instead operates 'as a benchmark (the level of care of a prudent person) against which the trustee(s) actions will be compared'.[69] While the conduct of the trustee in making the investment and the investment itself can found separate bases for criticism,[70] courts are generally more concerned with whether an investment is one that a prudent business person might make.[71] This inquiry is complex and must be made in light of all the trust's circumstances including its purpose, financial constraints, and existing investments.[72] Usually investments are impugned on the basis that they are too risky, but trustees have also been chastised for being too conservative.[73] Accordingly, trustees should not allow investment strategies to stagnate nor ignore nascent investment opportunities. Crypto-assets are potentially one such opportunity and are discussed in more detail in Part IV.

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59 Ibid [78(4)].

60 Ibid [48]–[52].

61 See *Charities Act 2011* (UK) pt 14A. Section 292A defines a 'social investment' as an 'act carried out with a view to both (a) directly furthering the charity's purposes; and (b) achieving a financial return for the charity'. Section 292B confers a power to make social investments with some qualifications, including an exclusion for investments involving a permanent endowment (sub-s (2)) and a clarification that the power is subject to the terms of the trust (sub-s (3)).

62 See, eg, *Trustee Act 1925* (NSW) s 14A.

63 Ibid s 14A(1).

64 Ibid s 14B(2).

65 Ibid s 14C.

66 Ibid s 14A(2); *ASIC v Drake (No 2)* (2016) 118 ACSR 189, 240 [264]. However, a higher standard will apply where a trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons: see ibid s 14(2)(a).

67 *Armitage v Nurse* [1997] 2 All ER 705; *ASIC v Drake (No 2)* (2016) 118 ACSR 189, 244 [281]–[285].

68 M Scott Donald, 'Modern Challenges to the Prudence Expected of Pension Fund Trustees' (2022) 33(1) *King's Law Journal* 92.

69 M Scott Donald, 'Prudence Under Pressure' (2010) 4(1) *Journal of Equity* 44, 46.

70 Ibid 46–7.

71 Ibid 51.

72 Ibid.

73 See, eg, *Nestle v Westminster Bank Plc* [1993] 1 WLR 1260, 1276–7; *Re Mulligan* [1998] 1 NZLR 481.

C *AML/CTF and Modern Slavery*

Although both AUSTRAC and the ACNC identify that the charities sector poses a medium risk in respect of both money laundering and terrorism financing,[74] Australia's AML/CTF regime does not currently apply directly to the charities sector. This is because the fundraising and disbursement activities of charities largely occur through the banking system, which is encompassed within the AMLC/CTF regime. However, the purchase by trustees of interests in investment vehicles domiciled in high risk jurisdictions does represent a potential risk. That said, ACNC External Conduct Standard 3, which applies to charities with operations outside of Australia, requires charities to take reasonable steps to minimise any risk of corruption, fraud, bribery or other financial impropriety in their conduct outside Australia.

Australia's modern slavery regime has also enjoyed heightened attention in recent years.[75] The ethical foundation of many charities give those charities an even more intense interest in the subject. Formally, however, the *Modern Slavery Act 2018* (Cth) only imposes reporting requirements on entities with an annual consolidated revenue of at least $100m, a threshold coinciding with the ACNC's 'extra large' designation, although other entities can elect to submit to the regime if they choose. Entities subject to those reporting requirements must provide to the Minister for Home Affairs a modern slavery statement annually, but there is currently no legal requirement for them to take positive steps to address instances of modern slavery that they identify.[76] This relieves portfolio investors, including large charities, from doing more than collecting and disclosing information relating to the companies and governments whose securities they hold.

IV Investment Themes, Opportunities and Risks

A wide range of investment themes clamour for attention in investment markets at any point in time. Three themes in particular are currently prominent: Climate and environmental concerns, impact investing and investing in crypto-assets.

A *Climate and Environmental Concerns*

The impact of climate change on communities, markets and economies worldwide has received considerable attention over the past decade. Environmental concerns, many of which are allied under the climate change banner, have long been a focus of specific charities,[77] but there is arguably a broader affinity between environmental concerns and many of the social causes championed by Australian charities more generally. Many charities are therefore attracted to what has come to be known as 'ESG'

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74 Commonwealth of Australia, *Australia's Non-profit Organisation Sector: National Risk Assessment* (Report, 2017) 9. See also Samantha Bricknell et al, 'Money Laundering and Terrorism Financing Risks to Australian Non-Profit Organisations' (Research and Public Policy Series Report No 114, Australian Institute of Criminology, 2011).

75 Justine Nolan and Nana Frishling, 'Australia's *Modern Slavery Act*: Towards Meaningful Compliance' (2019) 37(2) *Company and Securities Law Journal* 104.

76 Ibid 111, 114. See further Margaret Cusenza and Vivienne Brand, 'A Tiger Without Teeth? The Forthcoming Review of the *Modern Slavery Act 2018* (Cth) and the Place of Traditional Penalties' (2021) 38(3) *Company and Securities Law Journal* 152.

77 Approximately 2.5% of registered Australian charities are classified as 'Environment' under the 'CLASSIE' system: *Australian Charities Report 2022* (n 1) 9, Table 5.

(for Environmental, Social and Governance) investing. Addressing climate change has emerged in recent years as the most prominent of the range of causes pursued under the ESG banner.[78]

The main obstacle to charities adopting ESG approaches has been the two-part perception that, first, the law of trusts requires a single-minded pursuit of the financial interests of the charity and that, second, ESG investing necessarily requires that the pursuit of investment returns be compromised. It turns out that the restrictions posed by both perceptions are commonly over-estimated.

The first of these perceptions was addressed above. As was discussed there, charities can justify certain constraints on their investment activities if those activities would be repugnant to the charity's objectives. So charities established to pursue environmental goals would, all other things being equal, be entitled to screen out such investments, even in the absence of specific express authority to do so in the governing instruments of the charity. This line of argument is not however open to charities whose objects are not so directly aligned with ESG investing. They will need to rely on challenging the second misperception.

Whether ESG investing necessarily compromises the pursuit of investment returns has been the subject of considerable academic debate, spanning more than fifteen years.[79] It is first necessary to recognise that the term 'ESG' encompasses a wide range of approaches and strategies and, to be fair, a wide and not always reconcilable set of potential objectives. So care needs to be taken in accepting or rejecting propositions advanced in relation to the whole field. Beyond that caveat, however, it seems appropriate to conclude that the most robust conclusion is that over certain timeframes and in certain markets some ESG strategies and approaches will prosper and some will struggle for the reason that over time the market rewards and penalises different types of economic exposure, but that there is no permanent return premium from ESG investing.[80] In that (limited) sense, climate change is little different from other investment risks to which the trustee must have regard when formulating an investment strategy for the trust. The challenge for the trustee will be to ensure that it can demonstrate that it has engaged carefully, skilfully and diligently in the task of crafting an investment strategy, including consideration of the risks of climate change, that is appropriate for the unique needs of the trust it administers.

The requirement for care, skill and diligence is underscored by the advent of 'greenwashing.'[81] The possibility that investments which claim ESG credentials do not in fact possess those credentials means that charities need to ensure that they conduct appropriate research to ensure that the strategies and investment products in their portfolio do genuinely possess the characteristics on which the charity is relying. If the charity does not have either the resources or expertise to conduct that research, it will need to retain expert advice.[82] It will not be enough to point to the conduct of other charities, even assuming that evidence of similar practices was available in the notoriously opaque charities sector. Although the contemporary practices of a peer group can be relevant to the court's assessment of the prudence of an investment approach,[83] the trustee will still need to be able to demonstrate an appropriate

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78 Pedro Matos, *ESG and Responsible Institutional Investing Around the World: A Critical Review* (CFA Research Institute, 2020).

79 See Alessio Venturini, 'Climate Change, Risk Factors and Stock Returns: A Review of the Literature' (2022) 79(3) *International Review of Financial Analysis* 79.

80 Ibid.

81 Rajna Gibson et al, 'Do Responsible Investors Invest Responsibly?' (2022) 26(6) *Review of Finance* 1389.

82 *Trustee Act 1925* (NSW) s 14A and equivalent provisions in other States and Territories.

83 Donald, 'Prudence Under Pressure' (n 69) 67.

dedication of time and energy into the decision, and that the unique needs and circumstances of the charity drove the decision ultimately taken.

B *Impact Investing*

Although still primarily identified as an Anglo-American phenomenon, the impact investment marketplace has grown over the past decade, with estimates of the size of the global impact investment marketplace ranging from USD$715 billion[84] to more than $2 trillion[85] in 2020. An 'impact' investment is one in which pursuit of a social goal, such as interventions in relation to homelessness, literacy, child welfare or criminal recidivism, provides some of the financial case for the investment.[86] Social impact bonds, where some or all of the return is contingent on the achievement of some social goal[87] and is, as such, underwritten by a party (principally a State government, in the Australian experience)[88] dedicated to achievement of that goal,[89] are perhaps the most familiar examples, but impact investments can equally take the form of equity investments, trust investments, partnerships or any of the myriad types of fixed income and hybrid investment forms found in mainstream financial markets.[90]

The attraction of impact investment to charities is self-evident. Being able to use not just the grant programmes, but also the investment portfolio, for 'good' is very attractive to many charities. This is true whether or not the social objective driving the investment performance of the impact investment is the same as the objective of the charity.

The main challenge for charities is the private market nature of almost all impact investments. Because impact investments are not typically listed for trading on public markets, foundational governance matters such as valuation and information disclosure have to be established specifically for each impact investment. This can place demands on already stretched decision-making resources at the charity. The bespoke nature of the documentation governing the operation of each impact investment will require careful and expert due diligence prior to any decision by a charity to invest, and the absence of a regulated disclosure regime complicates monitoring.

Concerns have also been raised about the investment returns that impact investing is capable of delivering to investors.[91] With respect, this is something of a red herring. The analysis above makes it clear that the charity would be well advised to formulate and then document carefully an investment strategy that is tailored to the needs of the trust. That strategy then provides the criteria against which the prospects of any impact investment ought to be assessed, and against which actual performance can

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84 Global Impact Investing Network, *2020 Annual Impact Investor Survey* (Survey Report, June 2020) <https://thegiin.org/research/publication/impinv-survey-2020>.

85 International Finance Corporation, *Growing Impact: New Insights into the Practice of Impact Investing* (Report, June 2020) <https://www.ifc.org/wps/wcm/connect/8b8a0e92-6a8d-4df5-9db4-c888888b464e/2020-Growing-Impact.pdf?MOD=AJPERES&CVID=naZESt9>.

86 Stewart Jones, Helena de Anstiss and Carmen Garcia, *Social Impact Investing. An Australian Perspective* (Routledge, 2021).

87 Mildred E Warner, 'Private Finance for Public Goods: Social Impact Bonds' (2013) 16(4) *Journal of Economic Policy Reform* 303.

88 Jacob Broom, 'Social Impact Bonds and Fast Policy: Analysing the Australian Experience' (2021) 53(1) *Environment and Planning A: Economy and Space* 113.

89 Ian Ramsay and Corinne Tan, 'Social Impact Bonds in Australia' (2018) 29(3) *Journal of Banking and Finance Law and Practice* 248.

90 Jarrod Ormiston et al, 'Overcoming the Challenges of Impact Investing: Insights from Leading Investors' (2015) 6(3) *Journal of Social Entrepreneurship* 352, 353.

91 See for instance Brad M Barber, Adair Morse and Ayako Yasuda, 'Impact investing' (2021) 139(1) *Journal of Financial Economics* 162.

be judged. Whether an impact investment performed better or worse than a mainstream investment is, from that perspective, arguably less important than whether it performed the role expected of it in the charity's investment portfolio.

C *Crypto-assets*

Sometimes denounced as a scam, crypto-assets are increasingly being considered as a potential investment class.[92] However, any prospective crypto-asset investor will quickly be confronted by a complex universe of choices which differ in purpose, design and return.[93] The common feature linking crypto-assets is distributed ledger technology, which essentially describes a ledger that is maintained by several different entities rather than a central administrator.[94] Beyond that, crypto-assets can vary significantly, with some serving a specific use-case in a crypto-asset ecosystem and others functioning like a currency or financial security.[95]

There are two preliminary questions for charitable trustees considering investment in crypto-assets. The first is whether crypto-assets are even property capable of being held on trust. The weight of authority in New Zealand,[96] Singapore[97] and the United Kingdom[98] suggests they are, although there is some ambiguity as to their precise legal classification. The second question is whether the charitable trustee's investment power extends to crypto-asset investments. Most jurisdictions have done away with a prescribed investment list and have left in its place a largely unconstrained power of investment.[99] Accordingly, so long as the crypto-asset in question has the potential for a return by way of income or capital appreciation, it likely falls within the scope of the investment power – subject to the terms of the trust instrument.[100] But the fact that charitable trustees likely can invest in crypto-assets does not mean that they should.

In order to comply with their duties and requirements, charitable trustees considering an investment in a crypto-asset must recognise that the task involves two levels. The first level requires consideration of the financial prudence of the particular crypto-asset investment. In this sense, a crypto-asset is to be assessed just as a more orthodox investment would be, albeit selecting the appropriate valuation method may involve more complexity.[101] A particular challenge for the inclusion of many crypto-assets will be their extreme price volatility, which is especially problematic when variance of returns is used as a proxy for risk. This may, for instance, enliven the prohibition in all State and Territory Trustee Acts on trustees investing in 'speculative' investments.[102] Trustees must also bear in mind the risk that such

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92 Ashton Cook, 'Prudent or Perilous: Can Trustees of Charitable Trusts Invest in Crypto-Assets?' (2022) 30(2) *Australian Property Law Journal* 154, 154.

93 For example, as at January 2023 there are over 22,000 different crypto-assets in existence: 'Today's Cryptocurrency Prices by Market Cap', *CoinMarketCap* (Web Page) <https://coinmarketcap.com/>.

94 Cook (n 92) 155–7.

95 More formally referred to as 'utility tokens', 'currency tokens', and 'security tokens' respectively: ibid 159–63.

96 *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809, 815–7 [21] (Gendall J).

97 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20, 67 [143] (Sundaresh Menon CJ for Robert French IJ, Andrew Phang Boon Leong and Andrew Phang Boon Prakash JJA). For recognition of non-fungible tokens, see *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264.

98 *AA v Persons Unknown* [2020] 4 WLR 35, [56]–[61] (Bryan J); *Robertson v Persons Unknown* (High Court of England, Moulder J, 15 July 2019); *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch); *Copytrack Pte Ltd v Wall* [2018] BCSC 1709.

99 See, eg, *Trustee Act 1925* (NSW) s 14; *Trustee Act 2000* (UK) s 3.

100 Cook (n 92) 169–70.

101 Ibid 181.

102 *Trustee Act 1925* (NSW) s 14B, and cognate provisions in other States and Territories.

volatility could prejudice the charity's investment income requirements. Accordingly, trustees cannot be mesmerized by the allure of new and exciting technology and instead must be able to articulate a positive financial reason for the inclusion of the crypto-asset in their portfolio. Diversification across uncorrelated asset classes may be one such reason, as modern portfolio theory advocates,[103] although making good that proposition may be difficult where value drivers are not always clear and where price histories are relatively limited.

The second level requires trustees to consider the technological characteristics and risks associated with the relevant crypto-asset. While distributed ledger technology is praised for its transparency and immutability, it creates new problems in transactions and storage. Crypto-assets are solely controlled by two parameters: a public and private key.[104] The former functions like a bank account number and the latter like a password, although a new one is generated after each transaction. If a crypto-asset owner loses their public-private key pair, the owner effectively and irretrievably loses the crypto-asset. A crypto-asset may be similarly lost if it is accidentally transferred to the wrong recipient. Even trustees who effectively mitigate those risks through well designed internal controls and storage practices may still fall victim to hazards inherent in a crypto-assets code. The collapse of 'The DAO',[105] a decentralised investment fund, and the more recent failure of the 'Terra'[106] crypto-asset both illustrate that risk. Beyond those risks, crypto-assets (such as Bitcoin) which rely on the energy intensive 'proof-of-stake' consensus protocol may not be reconcilable with charitable trusts which have environmental aims.[107] Other ethical or moral conflicts may also arise where a crypto-asset is designed in a way that could facilitate the avoidance of AML/CTF regimes, thereby supporting the criminal ends those regimes seek to prevent.[108]

As noted above, the ACNC has recently released a brief guidance note on crypto-asset investments and donations.[109] The ACNC recognises that accepting crypto-asset donations may allow a charity to increase its pool of donors and notes that crypto-asset investments are legal. However, the ACNC generally recommends against crypto-asset investments because of their 'high risk' and 'significant volatility'. Importantly, the ACNC also recognises that the safe management of crypto-assets requires expertise and resources which may be beyond a charity's capabilities. To that end, the ACNC notes that financial advice may be appropriate and refers to third parties which can assist charities in managing and transacting crypto-assets. The ACNC suggests that charities considering the receipt or use of crypto-assets should prepare documentation recording the decision-making process, risk mitigation and the procedure for transacting crypto-assets. However, the ACNC mandates that charities which 'engage' with crypto-assets must develop a 'comprehensive implementation plan and due diligence process' and

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103 Cook (n 92)181ff. Cf Kelvin Low, 'Trusts of Cryptoassets' (2021) 34(4) *Trust Law International* 191; Gilead Cooper, 'Virtual Property: Trusts of Cryptocurrencies and Other Digital Assets' (2021) 27(7) *Trusts and Trustees* 622; Tang Hang Wu, 'Trustees' Investment Duties and Cryptoassets' (2020) 26(2) *Trusts and Trustees* 183.

104 Cook (n 92) 158–9. See also Low (n 103) 200.

105 See Kyung Taeck Minn, 'Towards Enhanced Oversight of "Self-Governing" Decentralized Autonomous Organizations: Case Study of the DAO and its Shortcomings' (2019) 9(1) *New York University Journal of Intellectual Property and Entertainment Law* 139.

106 See Zeke Faux and Muyao Shen, 'An $85b Crypto Collapse Reveals a New Kind of Bank Run', *The Australian Financial Review* (online, 25 May 2022).

107 Cook (n 92) 187. For example, Bitcoin is estimated to consume as much energy as some countries: 'Bitcoin Energy Consumption Index', *Digiconomist* (Web Page) <https://digiconomist.net/bitcoin-energy-consumption/>.

108 For example, the 'Monero' crypto-asset is designed to be a fully anonymous and untraceable currency: Hannah Murphy, 'Monero Emerges as Crypto of Choice for Cybercriminals', *Financial Times* (online, 22 June 2021).

109 ACNC, ' Charities and Crypto-Assets' (n 40).

briefly outlines their elements. While the guidance note raises some of the significant issues and risk associated with crypto-asset investments, its utility is limited by its brevity and charities should view it as a starting point. It does not, for example, recognise the heterogeneity of crypto-assets, the proper use of risk in a diversified investment portfolio, or the potential ethical issues that some crypto-assets may trigger.

V Issues and Challenges

Australian charities are not uniquely vulnerable to inefficiency or fraud. However, in other contexts where the institutions involved are public-facing and the repository of significant financial resources, such as the superannuation and managed investment sectors, the State has responded by imposing bespoke regulatory regimes and mandating dedicated supervisory agencies to oversee and regulate the sector. The establishment of the ACNC represents an evolution towards greater State involvement in the charities sector, but with respect, more needs to be done.

As described above, one of the early priorities for the ACNC has been to promote the development of governance norms reflective of the responsibilities borne by participants in the sector. There has been relatively less attention to the governance of charities' investment decision-making. This is undesirable because there are a number of features of the sector that may undermine investment decision-making in the sector.

The first is that the sector is animated by volunteers and employees who are often reputed to be inspired to participate at least partly by what might be termed 'intrinsic' motivations.[110] It is also possible that an operating ethos can emerge in charities that is more forgiving of inexpert contributions than might be the case in a purely commercial environment because allegiance to a charitable purpose is privileged over more instrumental qualities.[111] Group think and institutional insularity can also develop in purpose-driven contexts. Ideological pursuit of a purpose other than profit maximisation might also lead to a myopic preference for cost containment that results in an under-investment in external expertise, especially given the proliferation of small charities which may believe they lack the scale to warrant dedicated expert assistance. These posited departures from an economically 'rational' mode of decision-making, can undermine investment decision-making by charities.

Weak accountability mechanisms are also an issue. Many charities solicit money from the public. However, unlike the members of registered managed investment schemes ('MIS') and public offer super funds, donors to charities typically have only limited incentive to spend time and resources to monitor how their financial contributions are applied.[112] Moreover, donors have limited rights to information about the use of their funds and would ordinarily not have standing to hold a charity accountable for its use of those funds. The Attorney-General of the relevant jurisdiction does have standing but, unlike ASIC and APRA who together supervise the administration of MIS and superannuation funds, the Attorney-General does not have an infrastructure in place to monitor the administration of the charitable trusts in its jurisdiction. Attorneys-General are also more attuned to

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110 Laura Leete, 'Wage Equity and Employee Motivation in Non-Profit and For-Profit Organizations' (2000) 43(4) *Journal of Economic Behaviour and Organisation* 423. But see Matthias Benz, 'Not for the Profit, but for the Satisfaction? – Evidence on Worker Well-Being in Non-Profit Firms' (2005) 58(2) *Kyklos* 144.

111 Brody (n 4) 528.

112 Mark Steven LeClair, 'Malfeasance in the Charitable Sector: Determinants of "Soft" Corruption at Non-profit Organizations' (2019) 21(1) *Public Integrity* 54, 55.

investigating issues such as common law fraud and misappropriation than the governance deficiencies of the type with which ASIC and APRA have had to engage.

Even the ACNC, newcomer to the scene, has limited ambitions. It describes itself as a 'digital first, data driven' regulator, relying on the pro forma Annual Information Statements it receives each year from each registered charity and on concerns received from the community and other government agencies. This is quite likely a pragmatic stance as much as a philosophical one. All public agencies operate under a strict budget constraint. As the ACNC itself concedes:

> The ACNC is not resourced to investigate every regulatory concern that is brought to its attention. The ACNC targets its resources in those areas that present the greatest risk to public trust and confidence.[113]

Even with its light-touch approach, the challenge for the ACNC will be to ensure that it demonstrates the value of the costs and constraints it imposes on the sector. Requiring charities to compile and submit data merely for the purpose of producing an annual survey report will quickly attract resistance from the sector. The annual survey is a valuable exercise but the ACNC will have to demonstrate that the data is used for other purposes, such as entity supervision and policy deliberation, or that the public uses the data in some constructive way. It may, for instance, be possible for the data to be used by the charities themselves for the purpose of peer group comparison, benchmarking and 'best practice' emulation. That does however require the data to be accurate, timely and relevant. Without the demonstration of additional utility, the inevitable appeals by the sector for less costly and invasive forms of 'supervision' will gain credence. The ACNC will therefore need to demonstrate how the data inspires, informs and conditions decisive activity at all levels of the enforcement pyramid.

It is clear that the ACNC has prioritised certain aspects of charity administration ahead of the investment activities of the charities it supervises. With respect, it may be time for the ACNC to turn its attention to those investment activities. The discussion of investment themes in Part IV highlights the challenges faced by charities in engaging effectively with the opportunities and threats currently present in investment markets. The recommendation here is not, however, that government ought to legislate or issue regulations to prescribe or proscribe specific types of investment strategy or process for charities. However, the ACNC could provide greater guidance to charities on how their existing legal obligations are enlivened by such themes. Bringing greater salience to the existing duties and demonstrating the application of those duties to contemporary investment themes, will not discourage the 'Bad Man' of Holmesian formulation. But it is reasonable to expect that it would promote the development of norms and shared frames of reference across the widely dispersed decision-makers in the charities sector. If reinforced by the publication of more detailed data on the investment practices of charities, and perhaps even a training requirement, it is reasonable to expect that investment practices across the sector would improve.

Recent initiatives in the United Kingdom provide a practical exemplar of how this could be achieved. In August 2016 the Charity Commission for England and Wales updated its guidance on charity investment, *Charities and Investment Matters: A Guide for Trustees* ('CC14').[114] CC14 is available publicly online and addresses a wide range of issues associated with a charity's investment activities, from the setting of investment objectives, deciding the investible universe and the relevance of tax

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113 ACNC, 'Regulatory Approach Statement' (Web Page, July 2020) [63] < https://www.acnc.gov.au/raise-concern/regulating-charities/acnc-regulatory-approach-statement>.

114 The Charity Commission announced an intention to revise CC14 in respect of social investment decisions in April 2021. Although consultation on the revisions closed in August 2021, CC14 has yet to be formally updated.

considerations to the roles, responsibilities and potential liabilities of different potential parties. Along the way (and amongst a much longer list) it addresses specifically 'investment' questions such as:

- What risks should a charity consider when making investments?
- What are the benefits [of pooled funds] for charity investors?

It also addresses issues of a more 'governance' nature, such as:

- What should an investment policy cover?
- What advice must trustees take?
- Should a charity manage investments itself or use the services of an investment adviser or manager?
- What must the trustees do to assess the performance of their charity's investments?
- Can a charity make a financial investment in companies in which the charity trustees, or people connected with them, have private interests?

Perhaps the most striking feature of CC14 is its pragmatic but principled tone. There is little overt finance theory and little jargon. However, a reader with a technical background can discern clearly the foundations on which the guidance rests. It is also well structured, providing short summaries before more comprehensive explanations in each section. Moreover, and importantly, although it is expressed throughout in plain language, CC14 identifies expressly which recommendations respond to formal legal requirements. In so doing, it signals to the reader the existence of a legal framework within which charity trustees must operate, which can be important in and of itself.

The result is that reading CC14 can prepare individual charity trustees to perform the investment aspects of their role, without dictating what they are to decide in the circumstances of the charity they serve. Moreover, beyond that guidance role, although CC14 will not provide the Charity Commission with grounds for prosecuting an aberrant charity trustee, it is likely to mark the minimum level of knowledge that a court would regard as setting a benchmark for contemporary expectations of the trustee role, so it has more than a purely educative role. As such, it represents a very effective example of 'soft' regulation which the ACNC could well emulate.

VI Conclusions and Recommendations

It is inevitable that much of a charity's energies and imagination will be directed towards its fundraising and grant-making activities. It is also important that the regulatory regime applied to charities not be too heavy-handed because overly prescriptive regulation is likely to discourage private citizens from making financial contributions to the sector. That said, there is a need to ensure that any assets held on trust by a charity are deployed efficiently and lawfully. The need arises both from purely economic considerations, given the taxation and other dispensations enjoyed by charities, and the trend towards greater transparency in the governance of public-facing institutions. It is also important for the integrity of the financial markets in which charities invest their capital.

This chapter has examined three contemporary investment themes to illustrate the challenges faced by charity trustees in designing a strategy for their investment portfolio: climate change and ESG; impact investing; and crypto-assets. It did so not to promote or discourage charity engagement with any of the themes but rather to highlight the complexities and risks charities face in respect of each; complexities

and risks that the law, through the law of trusts and some more targeted regimes such as the AML/CTF regimes, addresses but on which the guidance provided by the ACNC is currently almost silent.

The analysis in this chapter suggests therefore that adjustments in the regulatory regime are required to safeguard the balance between the desire to promote charitable activity by protecting the autonomy of participants in the sectors and the need to ensure that the capital held by charities is invested appropriately. In particular, it suggests three ways by which the ACNC ought to increase the salience of the already existing legal requirements relating to the investment of charitable assets. First, by specifically crafting a Governance Principle that more directly addresses investment issues. Secondly, by providing more detailed guidance on its website about what the law requires of charities in respect of their investment activities. Thirdly, by requiring greater disclosure of the investment activities of charities to the regulator and perhaps even, in the case of the largest public-facing charities, the public. Although dedicated legislative interventions, such as that seen in the superannuation context, might also be considered, the analysis above suggests that such a step would be undesirable at this stage because it would be inconsistent with the ACNC's stated and revealed preference for a light-touch approach to regulating charity governance. The approach taken by the Charity Commission for England and Wales in its investment guidance for charity trustees would therefore seem to be one that the ACNC ought to consider closely.