



**SAWARD  
DAWSON**

**CLAAZ - Related Parties  
Jeff Tulk**

**September 2024**

# Special Purpose Reporting – For Profit

- AASB 2020-2 – Removes opportunity to prepare SPFS for private entity for profits required to report under legislation (e.g. Corporations Act)
- Impacts large, foreign owned and unlisted public entities that lodge with ASIC
- Periods beginning from **1 July 2021**

# ASIC – Large Pty Ltd

- Thresholds – No change since 1 July 2019

Large	2 of either
Consolidated Revenue	Greater than \$50m
Gross Assets	Greater than \$25m
Number of employees	100 or more

All tests are based on consolidated calculations.

Large Pty Ltd companies must prepare and lodge with ASIC **general purpose** audited financial reports

Grandfathering has also been removed so no exemption exists going forward

# NFP - KMP and Related Parties

General Purpose – must already comply

ACNC Special Purpose – ACNC new requirements

- Medium or Large charities will be required to report and comply with AASB124 in their annual reporting to the ACNC for the financial year ending 30 June 2023 and onwards.

Except for:

- KMP remuneration (exempt if medium OR if large and only one remunerated KMP).
- Comparatives not required

# KMP and Related Parties

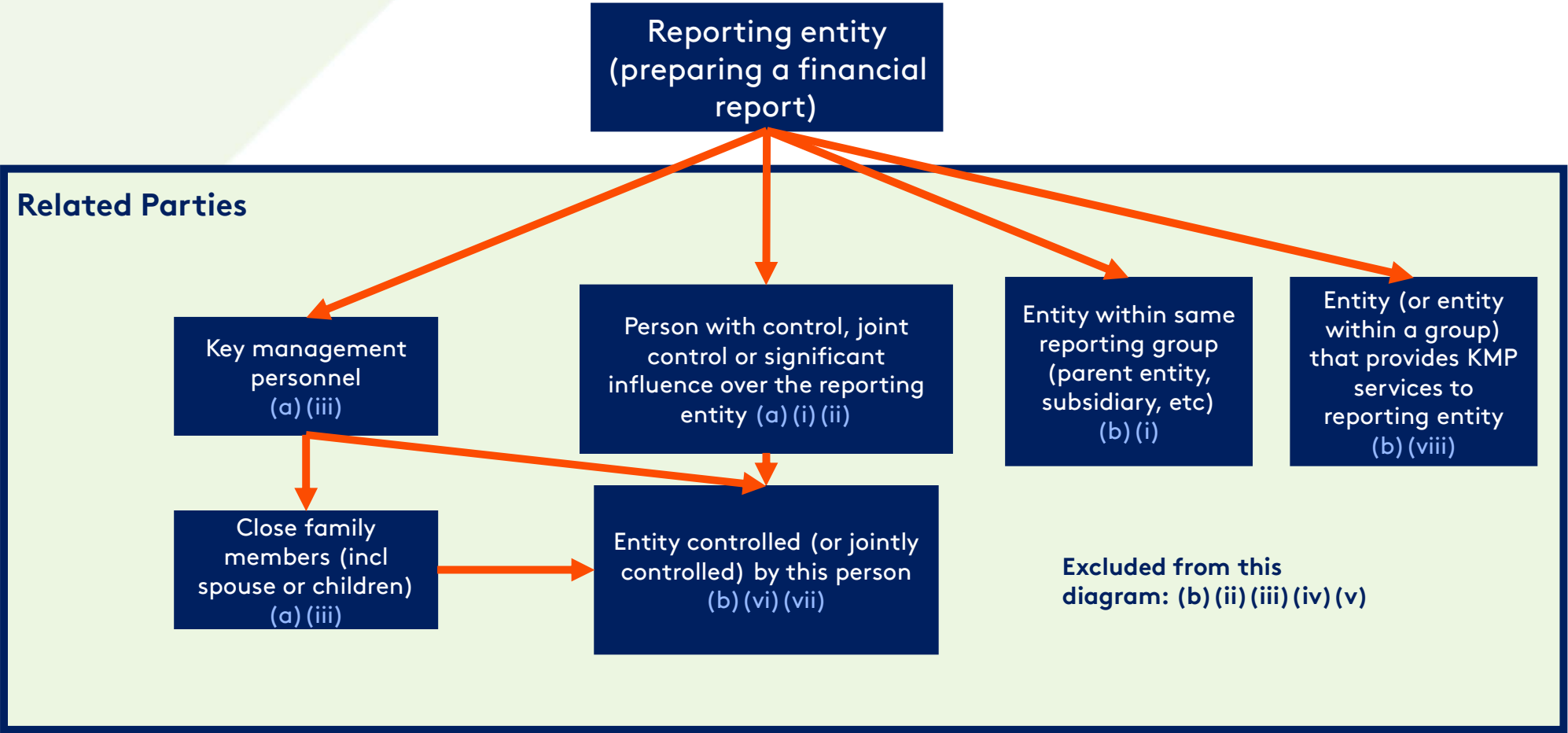
## Small Charities

- Required to report in 2023 AIS.

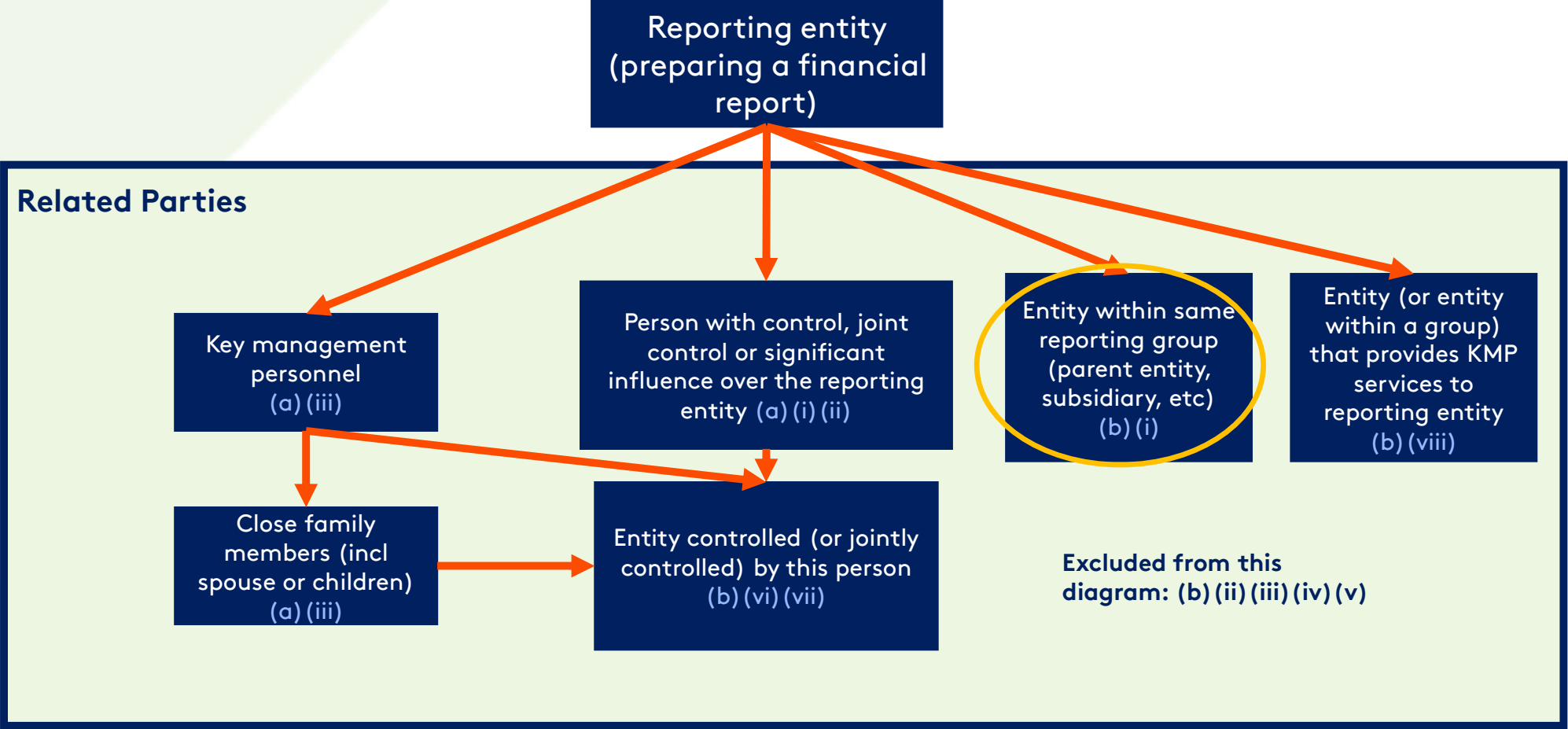
## BRC

- No requirement to report and no financial information in AIS.
- If choose to lodge financial reports required to comply with requirements as listed on previous slide

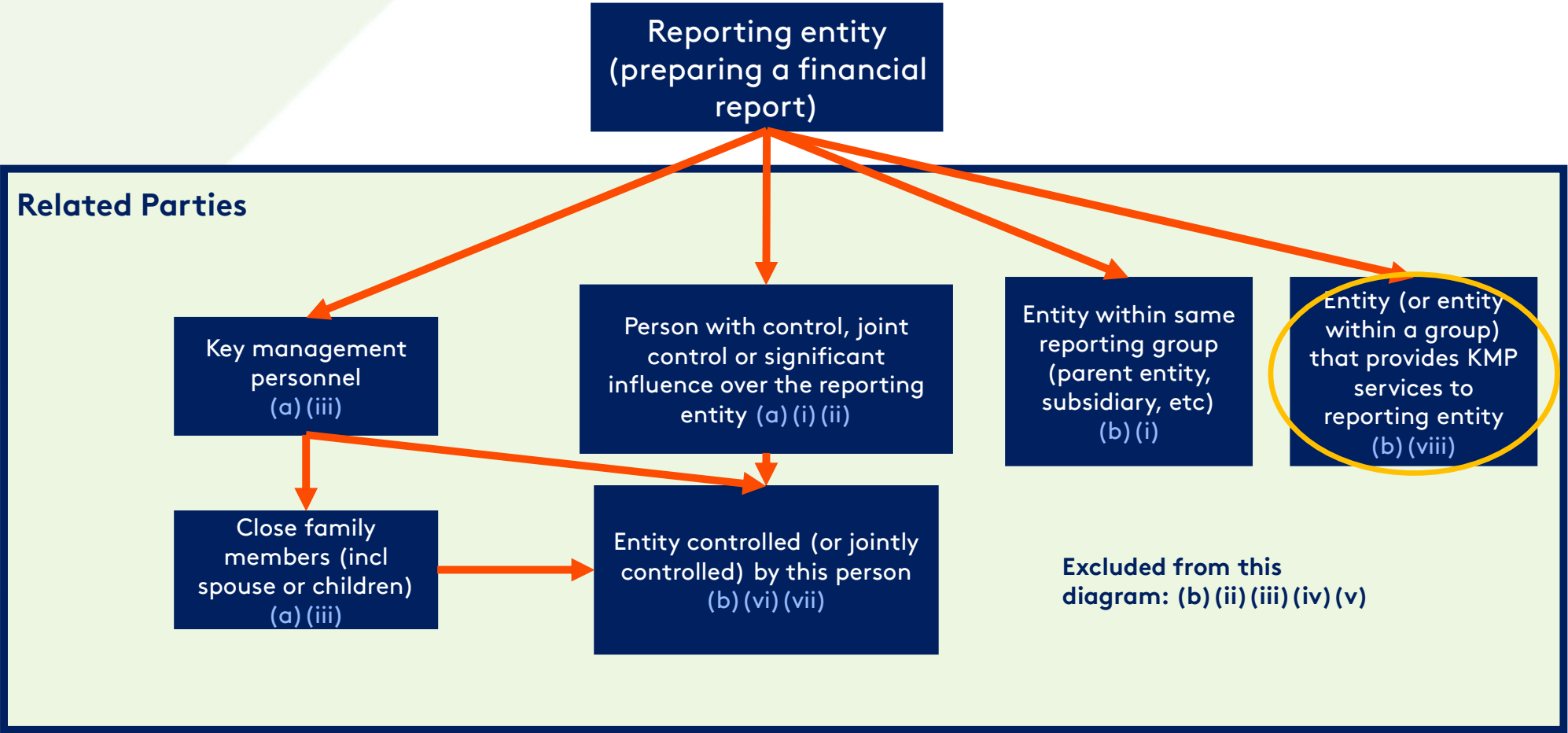
# Related Party – Definition (visual)



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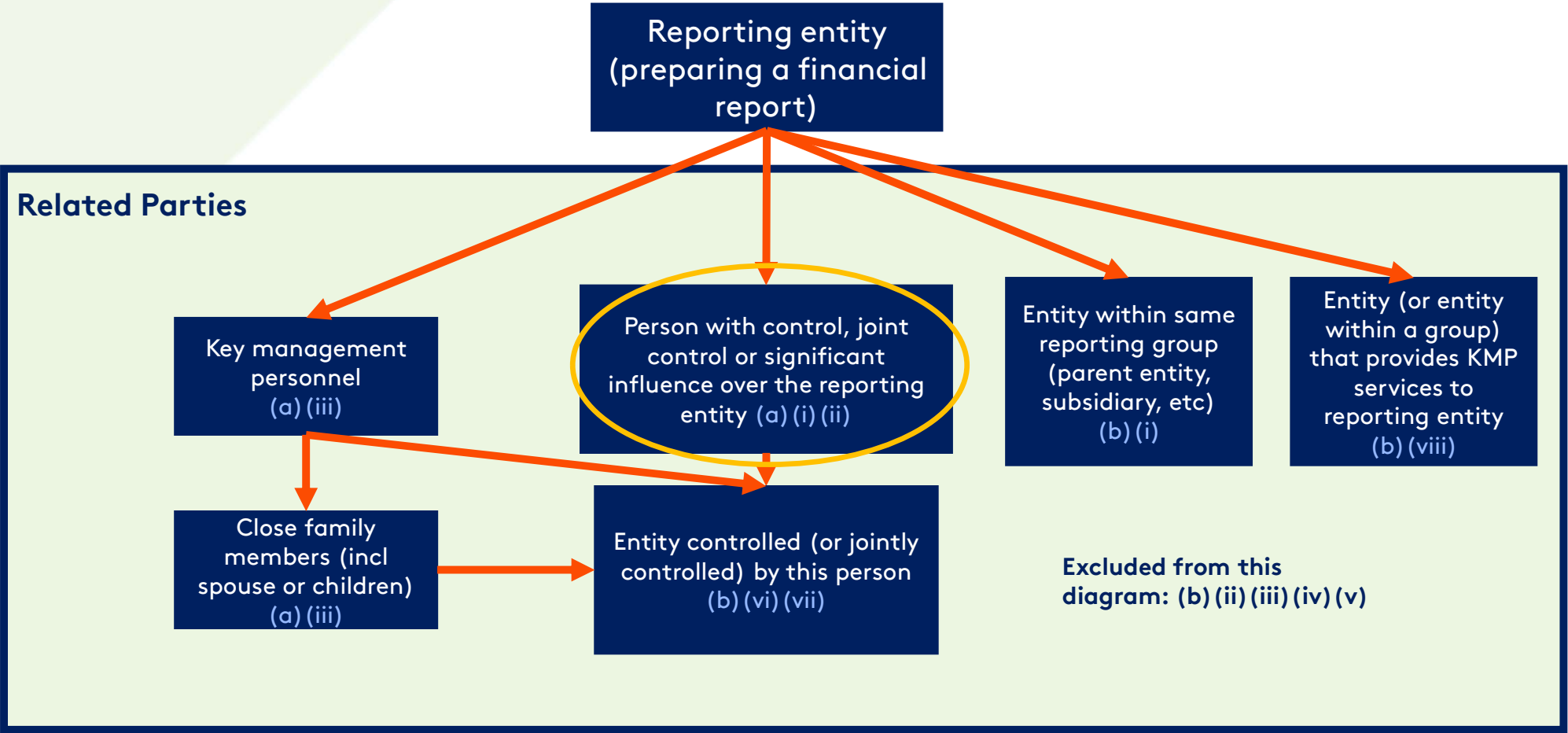


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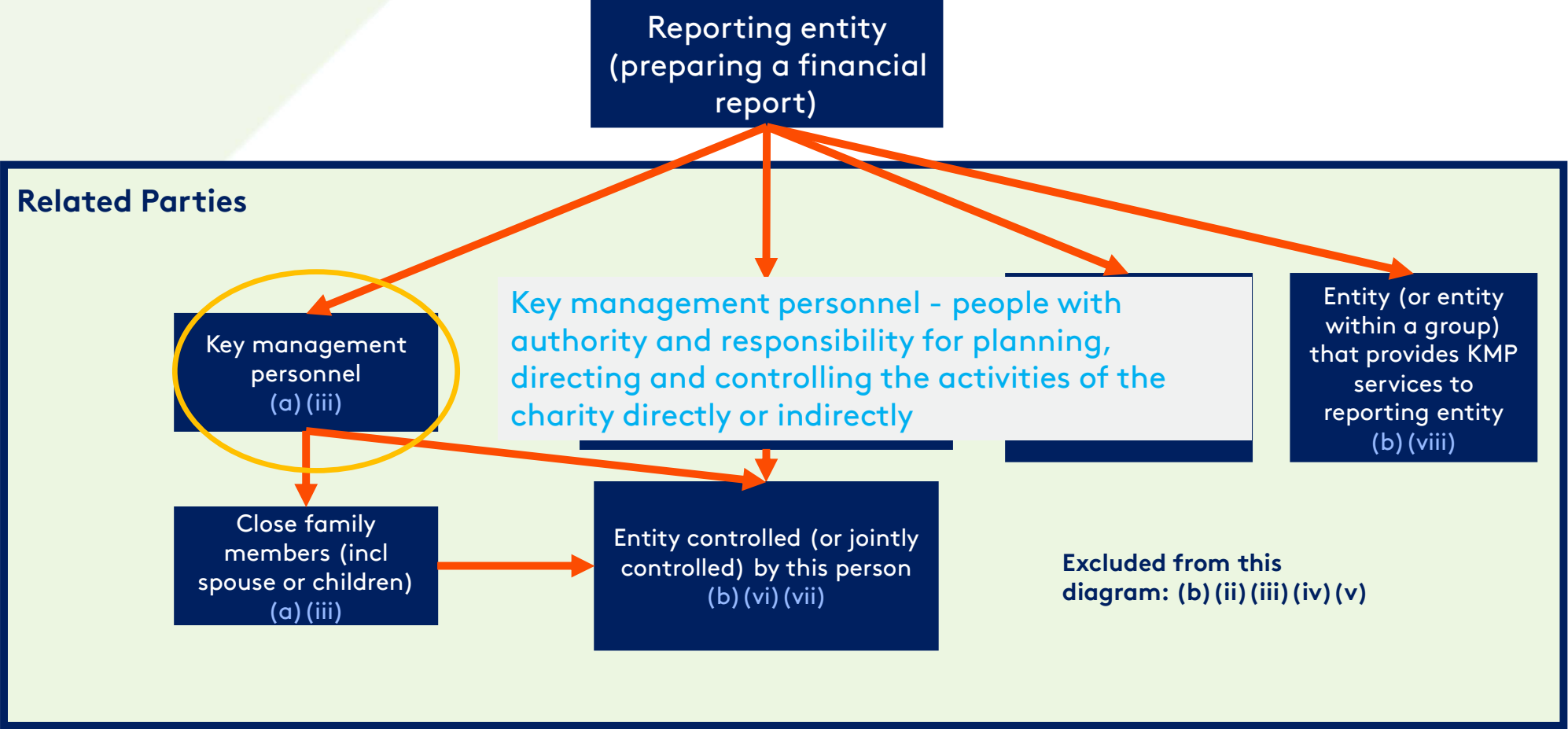




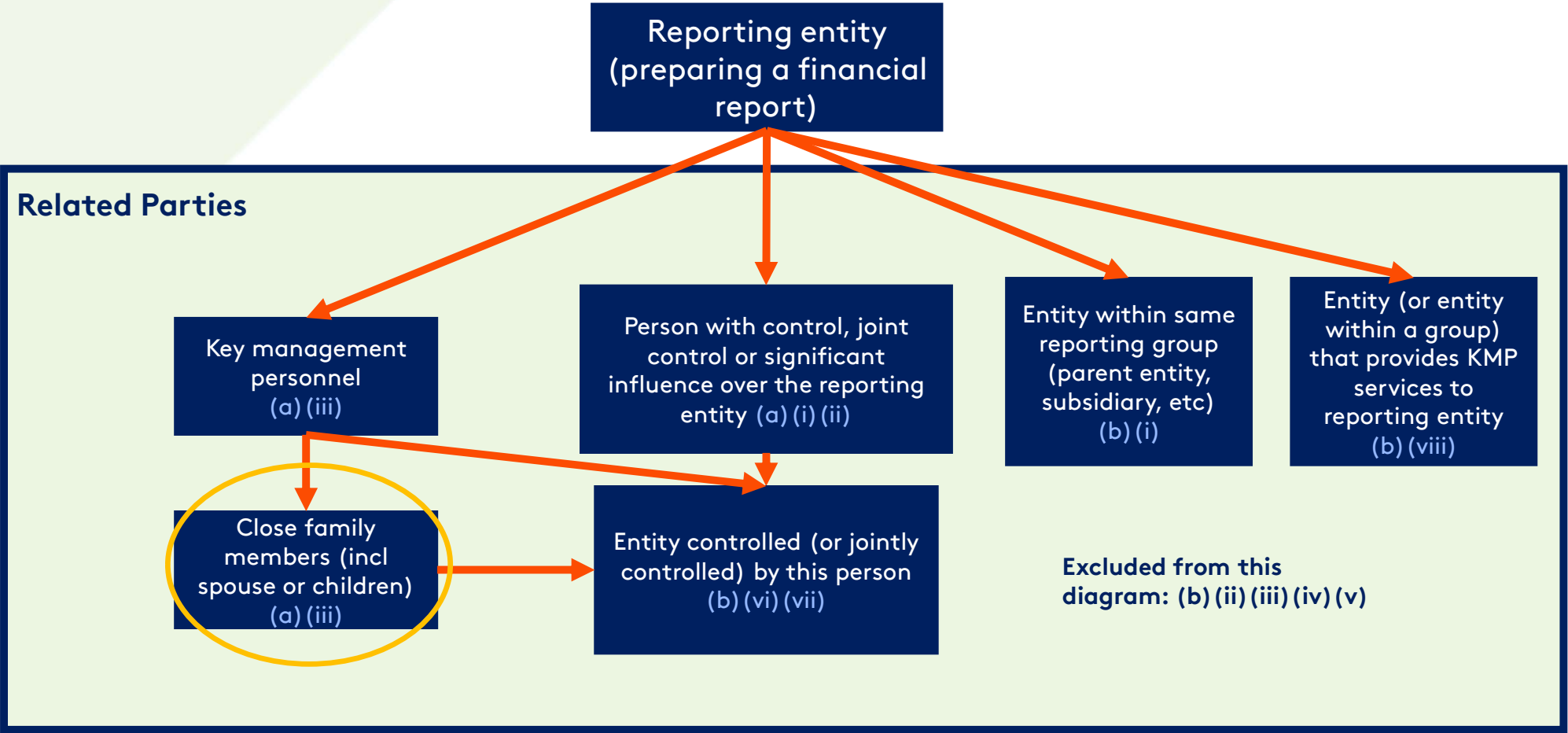
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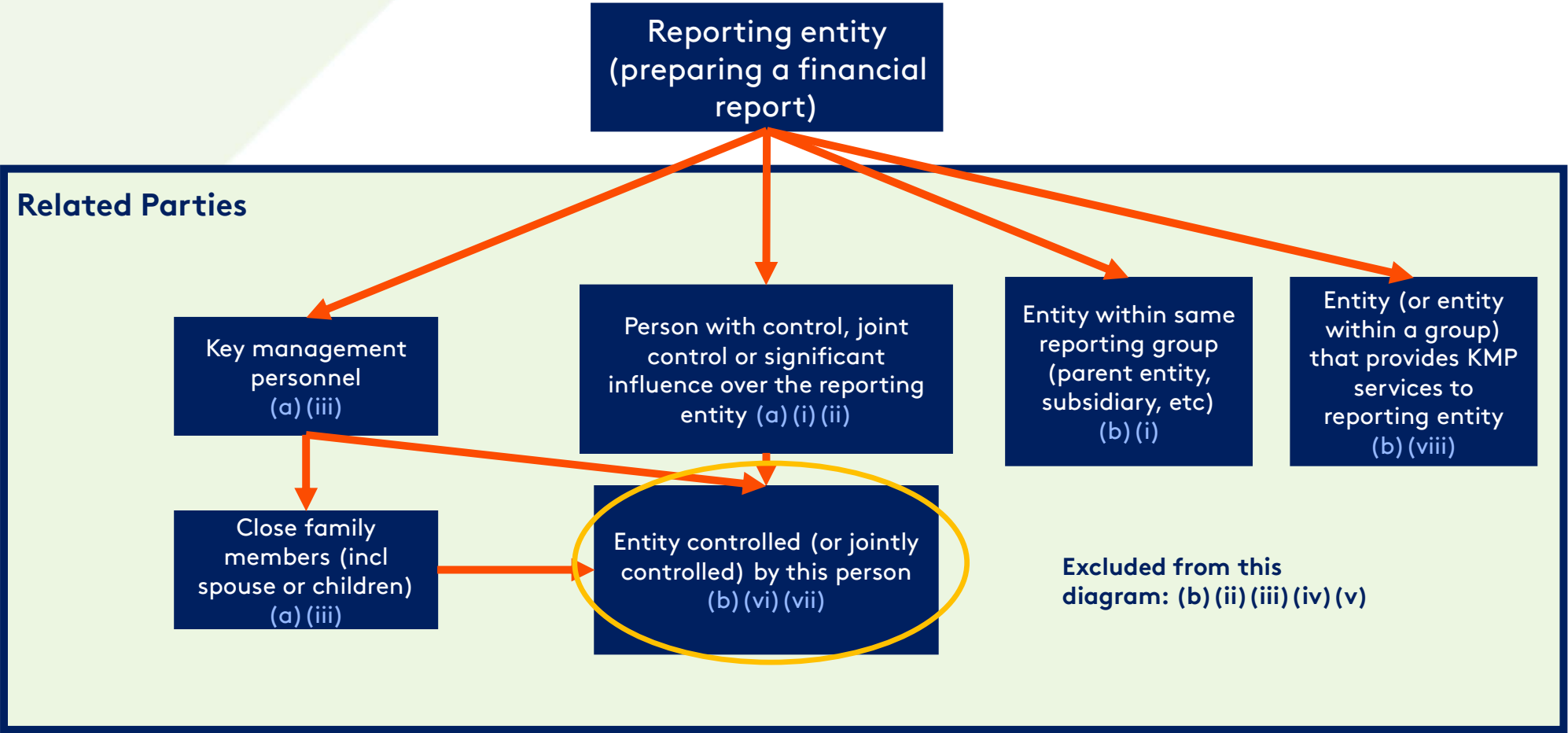
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# Related Party – Definition (visual)



# Who are related parties

In summary, a related party is:

- a person that is connected to the entity, such as a Director, Responsible Person or a close member of their family, that has control or joint control of the charity
- a member of the entity's key management personnel (people with authority and responsibility for planning, directing and controlling the activities of the charity directly or indirectly) or a close member of their family
  - Any entity that is controlled or jointly controlled by anyone identified above
  - An entity that is significantly influenced by or has a member of the KMP for anyone that controls the entity
  - Entity providing KMP services to the entity

# Who are related parties

- an organisation that is connected to the entity and has control or significant influence over the entity, such as a parent entity of the entity
- an organisation that the entity has control or significant influence over, such as a subsidiary entity
- any organisation and the entity that are members of the same group (for example, fellow subsidiaries)
- an associate (an entity over which the entity has significant influence) or joint venturer (an entity that shares control of an arrangement with the entity and has rights to the net assets of the arrangement).

# Types of related party transactions

A related party transaction is a transfer of resources, services, or obligations between related parties. **It does not have to include financial payment.**

A related party transaction can include:

- purchases, sales or **donations**
- receiving goods, services or property
- leases
- transferring property, including intellectual property
- loans
- guarantees
- providing employees or volunteers
- a Director or Responsible Person of an entity providing professional services (for example, accounting or legal services) at a discounted rate **or for free.**

# Key Issues

## Who

Board members and KMP change – can't set and forget

Definitions are difficult in NFP context so need to work way through relationships

What organisations are related? Haven't previously had to formally assess **control and significant influence** if Special Purpose. Control and significant influence are more difficult in an NFP context

**If in doubt include?**

Note – common directors between 2 entities doesn't necessarily mean the entities are related



# Key Issues

## Sensitive Information

Donations and other contributions where no benefit back to contributor. Seeking anonymity.

What is material?

Where a child or spouse or Director / KMP employed results in disclosure of their wage to everyone

Confidentiality and highly sensitive. AASB124 says amount

Discussions with ACNC – they have issued views on materiality.

Smaller the entity the more likely these items are material.

# ACNC Guidance for Disclosures

- The ACNC has issued guidance
- This guidance represents the ACNC's interpretation of AASB 124 (auditor considers interaction with ASA 550)
  - For instance, materiality of related party transactions

## **Related party transactions that are not material**

A related party transaction is not considered material if it:

- does not substantially influence a charity's decisions or activities
- does not affect someone's understanding of the charity or its finances.

A charity does not need to report a related party transaction that is not material.

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# Untangling the cords: Related Party Transactions, Conflicts of Interest and Conflicts of duties

Charity Law Association of Australia & New Zealand webinar

Thursday 19<sup>th</sup> September 2024

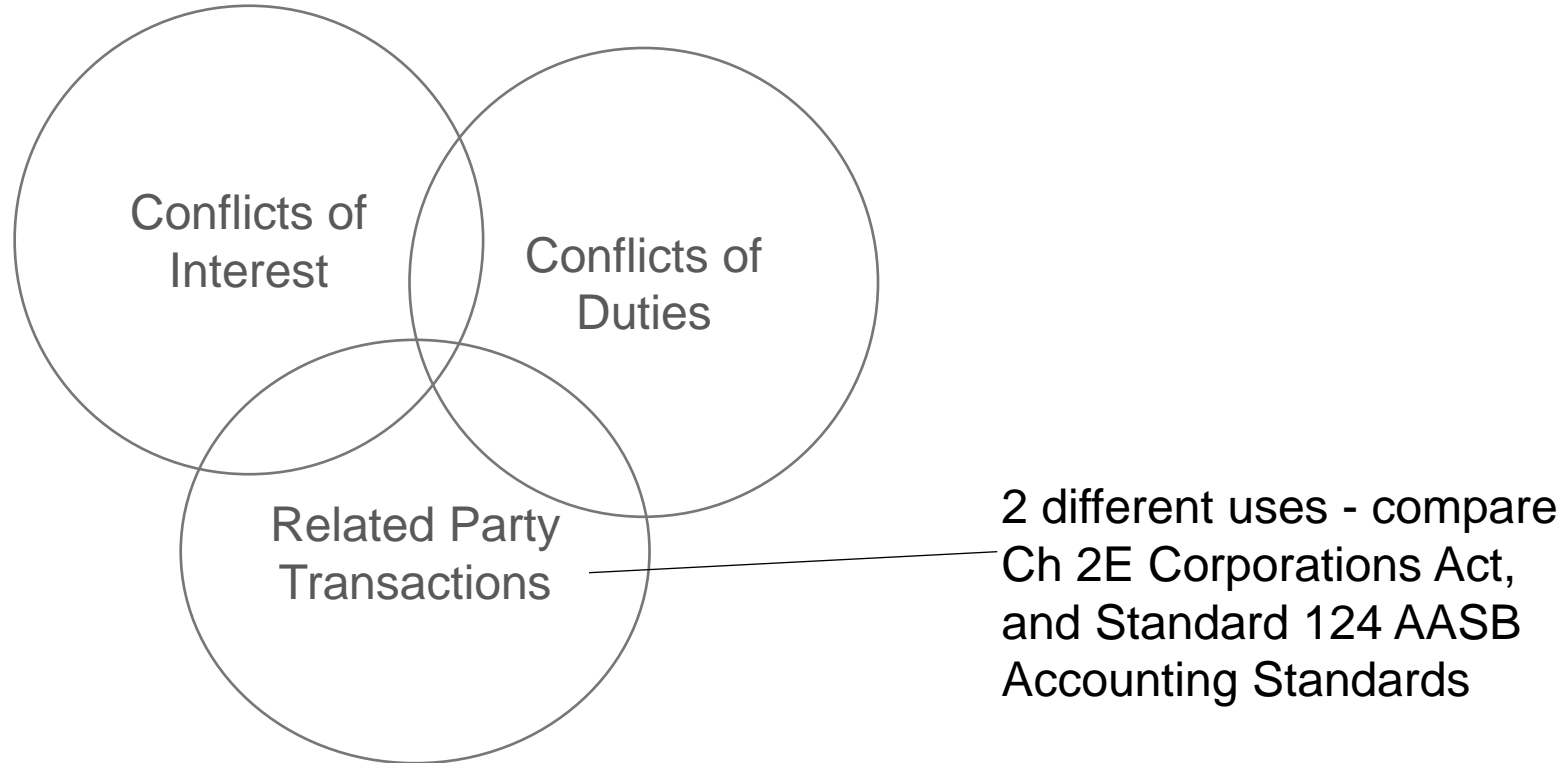
Elizabeth Shalders, Special Counsel

# Untangling the cords



1. Identifying (internal)
2. Declaring (internal)
3. Managing (internal)
4. Recording (internal)
5. Reporting (external)







# Conflicts of interest: Fiduciaries



Trust. Dependence. Vulnerability.  
Undertaking to act on behalf of another.



# Conflicts of interest: Fiduciaries



*“The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that “(n)o man can serve two masters” (112). Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.”*

*Breen v Williams (1996) 186 CLR 71[108].*

The distinguishing obligation of the fiduciary is the obligation of loyalty

1. A fiduciary must not put himself (or herself) into a position where their interest, and that of the beneficiary conflict: **the no-conflict rule**.
2. A fiduciary must not make a profit out of the position: **the no-profit rule**





# Sources of duties

Sources of Duties
Constitution & Policies
Industry-specific regulations
ACNC Governance Standards
<i>Corporations Act 2001 (Cth) (CA)</i> / State or Territory based associations legislation
General law



# Types of interests

Type of interest	Source of duty
A real sensible possibility of conflict	General law
A material personal interest	Corporations Act (but note s 111L)
Perceived or actual material conflicts of interest	ACNC Governance Standard 5
Directly or indirectly interested	Co-operatives
Direct or indirect pecuniary interest in a contract or proposed contract with the association	Some associations legislation





# The test

## General law test:

Whether there is a “real sensible possibility of conflict”.

## Less technical terms:

“Whether the interest has the capacity to **influence the vote** of a [Board member] in a **not insignificant way**”.

## Material personal interest (Corporations Act):

“It is the substance of the interest, its nature and capacity to have an impact upon the ability of the director to discharge his or her fiduciary duty which will be important”:

*McGellin v Mount King Mining NL* (1998) 144 FLR 288

See: “*Conflicts and Coherence in the Charities Sphere: Would a Conflict by any Other Name Proscribe the Same?*” by Rosemary Lanford, (2020) 14(1) *Journal of Equity*, 1-31.



## But note

**The qualification: to read the tests consistently, its necessary for the ACNC to retain its objective bystander approach:**

“Would a reasonable person (properly informed about the nature of your personal interests) believe you might be influenced by your personal interests when making decisions on behalf of the charity?”

*ACNC guidance*

**ACNC governance standards place duties on the charity:**

A registered charity must take reasonable steps to ensure that its board members are subject to, and comply with, the duties

*s. 45-25 Australian Charities and Not-for-profits Commission Regulations 2022*





## Also note

### **There is a difference between general law and ACNC position on third party interests and non-financial interests**

An interest does not need to be financial to produce a conflict of interest; it can be non-financial, it can be direct or indirect, it can be related to a family member or friend or business associate.

*ACNC view*

It still comes back to whether the interest amounts to a real sensible possibility of conflict on the part of the fiduciary

*General law*

See: “Conflicts and Coherence in the Charities Sphere: Would a Conflict by any Other Name Proscribe the Same?” by Rosemary Lanford, (2020) 14(1) Journal of Equity, 1-31.



# Other Duties

- Duty of care and diligence
- Duty to act in good faith, in **best interests**, and for a proper purpose
- Duty **not to improperly use a position or information** obtained from the position

(See sections 180-183 *Corporations Act 2001* (Cth) and ACNC Governance Standard 5)



# Group structures & multiple boards

- Common to have groups
- Often people will sit on multiple boards
  - Prevents mission drift – in group structure
  - Representatives appointed (e.g. alumni association appointment to school board)
  - Can happen in unrelated charities too

# Conflicts of duties

*Bennetts v Board of Fire Commissioners of NSW (1967) 87 W.N. (N.S.W.) 307 (Bennetts case)*



“The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which the parliament has set up the board. ....

His position as a board member is not to be used as a mere opportunity to serve the group which elected him...

Disagreement is to be expected... but it must be disagreement relating to what should **best be done** in the **promotion of the purpose** enshrined in the statute, this being the common interest which all the board members must serve.....”



# Conflicts of duties: best interests' duty

***State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) v Retirement Villages Group Management Pty Ltd***

*[2016] FCA 675 at [42]–[43]*

*“The absolutist position is that a director **must act in the best interests of the company** such that there is no room whatsoever for accommodating the interests of his or her appointer. I do not consider that such an absolute position represents Australian law.*

*A lesser position is that a director can act in the interests of his or her appointer provided that such interests are also **compatible with the best interests of the company** and his or her independent judgment and discretion is not otherwise fettered. But where there is an actual or potential conflict between the appointer's interests and the company's interests, the latter necessarily prevails. It seems to me that this is the present position under Australian law.”*



# Best interests' duty

## Best interests of a corporation

To act in the best interests of a charity that is a corporation, is to act in the best interests of the charitable purposes for which it was established

## Ascertaining purpose

Start with the constitution. It is the first consideration and should be given significant weight.

Then consider:

*“The charitable purpose is not always identical to the charitable objects set out in an incorporated charity’s constitution. In construing an entity’s purpose, the courts typically examine the objects stated in its constitution, its activities and the **circumstances of its formation**. The identity and nature of the entity thus shape its purposes.”*

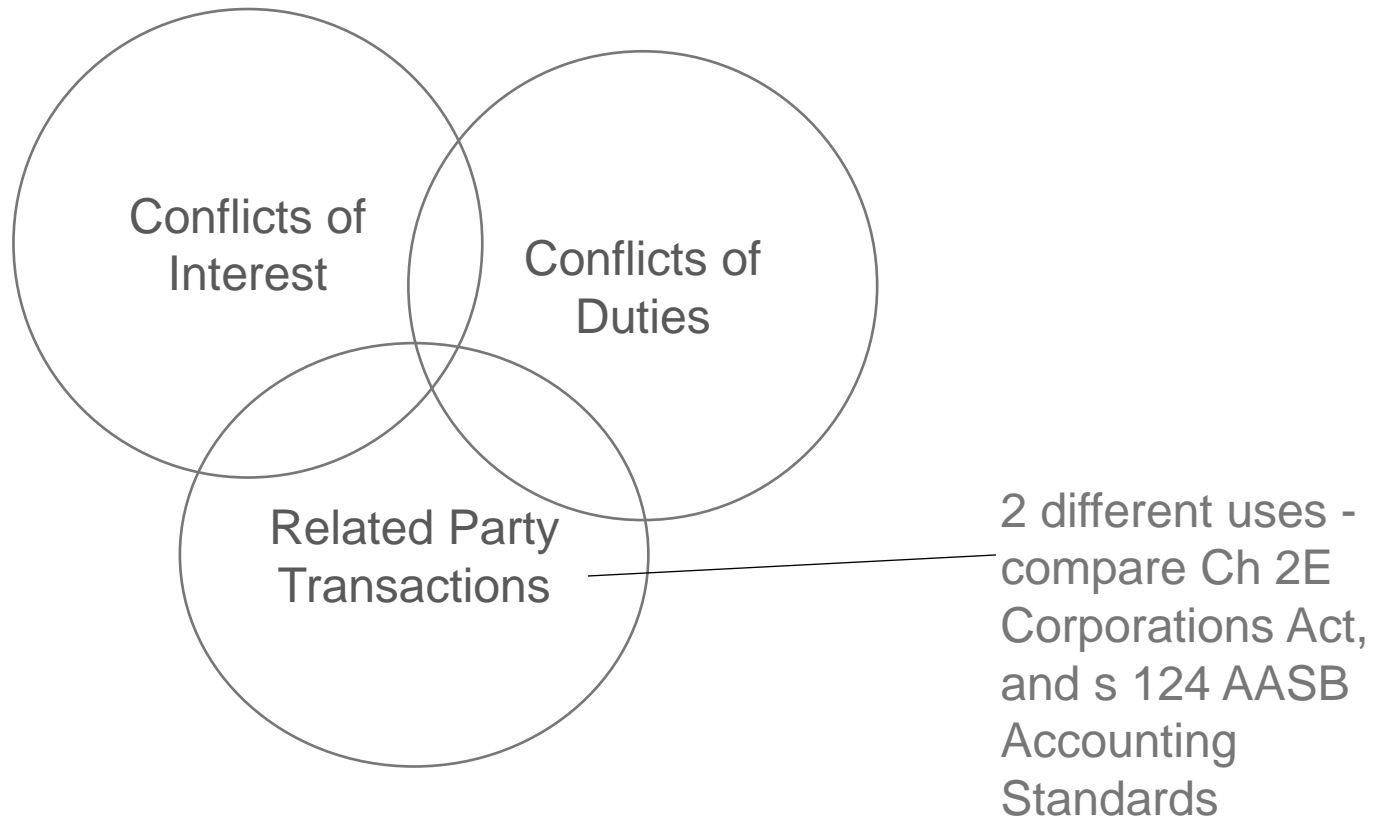
*The Best Interests Duty and Corporate Charities – The Pursuit of Purpose’ by Rosemary Langford and Ian Murray (2021) 15 Journal of Equity 92.*

*See also Word Investments Ltd v Commissioner of Taxation (2008) 236 CLR 204.*



# Practical tips

- Consider the purposes carefully when drafting constitutions, especially in a group structure.
- Consider section 187 *Corporations Act 2001* (Cth) (but mindful of tax and charity status)
- Make sure to work through each layer of laws
  - including check industry specific regulations (e.g. school regulations, housing regulations and so on)
- Be aware of additional considerations for trusts
- Remember: there are several distinct duties, not just “best interests” – such as the care and diligence duty.
- Remember: nature and scope of fiduciary duties can vary according to nature and scope of undertaking



## Key issues:

- **COI:** a matter that has capacity to influence decision – not insignificant
- **COD:** whether a duty is owed to multiple persons or organisations
- **RPT:** technical definitions focused on whether a person or entity has control of another (or where a family member of that person does).

Bearing in mind the layers of duties, regard must be had to the specific definitions in each context, but to help board members comply in practice, it can help to keep front-of-mind the above “key issues”.





# 5 steps

1. Identifying (internal) ✓
2. Declaring (internal) – up next
3. Managing (internal)
4. Recording (internal)
5. Reporting (external)

- Once a conflict of duty, conflict of interest or related party transaction has been identified, the next step is to **declare it**.
- Usually – it should be declared by a board member to the rest of the board.
- Sometimes – it will also need to be disclosed to the members, and/or to a regulator.



- This deals with how a decision is made within the organisation.
- Usually: a board member should not participate in discussion or voting if there is a conflict.
  - Some exceptions. Check each layer of law for the exceptions and limitations.
  - Member ratification cannot excuse statutory breach
  - Easiest if have a structure without completely overlapping boards – consider quorum when drafting constitution in group structures
  - Complications with s 191 switch-off and s 195 interaction – see s 111L Corporations Act
  - Be especially careful with trusts – check deed and laws.
- Consider confidentiality of board papers
- Make sure constitution is workable
- Enabling board members to obtain advice
- Make sure to comply with Chapter 2E (if it applies)
- Make policies clear – help to avoid an accident





# Recording

The next step is to make a written record of the existence and declaration of the conflict of interest, conflict of duty and/or related party transactions, and record how it was managed.

The organisation should:

- A. Record the declaration of the conflict or existence of a related party status in the board/GM minutes. Record the extent of interest. Also record how it was managed – i.e. if board member left the room.
- B. Record the conflict of interest or conflict of duty in the register of interests.
- C. If the Chapter 2E processes were followed, keep records to demonstrate compliance.
- D. Record any related party transactions in the related party transactions register.
- E. Document in writing the related party transactions with clear terms.



## 5 steps

1. Identifying (internal)
2. Declaring (internal)
3. Managing (internal)
4. Recording (internal)
5. Reporting (external) - discussed by Jeff Tulk



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