Charities and the Fiduciary Paradigm

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I Introduction

The recent decision of the UK Supreme Court in *Lehtimäki v Cooper*[1] has caused a stir in a number of common law jurisdictions due to the finding that members of a charitable company limited by guarantee owe fiduciary duties. The decision is not, however, necessarily applicable in Australia due to unique features of the regulatory framework in England and Wales. The first part of this article explores the appropriateness of imposing fiduciary duties on members of charitable companies (and other charitable entities), particularly in Australia given the different statutory and regulatory schemes. This provides an opportune basis for assessing the application of the fiduciary paradigm to charitable entities in Australia.

The second part of this article probes the proposition that a charitable company holds its assets analogous to a trustee, which played an important part in the judgment of Lady Arden in the case, and indicates the special nature of charitable companies. This results in obligations and restrictions being imposed on the company. These obligations and restrictions — and the special nature of charitable companies — have flow-on effects for those who participate in the management and decision-making of such companies (in the same way as the nature and obligations of trustee companies have a flow-on effect for the duties of directors of such companies). Directors of charitable companies and others who govern charitable entities (known in Australia as 'responsible persons') thus owe fiduciary duties. There are, in addition, a number of other reasons why the relationship between responsible persons and charitable entities is of a fiduciary nature. However, the imposition of fiduciary duties (as opposed to restrictions) on members is undesirable. Members are instead subject to restrictions arising from the rule in *Barnes v Addy.*[2]

II The decision in *Lehtimäki v Cooper*

The decision in *Lehtimäki v Cooper* revolved around whether a member of a charitable company limited by guarantee was a fiduciary in relation to the power to approve

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[1] [2020] UKSC 33. Reported as *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155 (*Lehtimäki v Cooper*).

[2] (1874) LR 9 Ch App 244 (CA).

payments to directors for loss of office and whether the court could intervene to direct the member, as a fiduciary, to vote in favour of a payment.

A Facts

The facts of the case are as follows. The Children's Investment Fund Foundation (UK) (CIFF), which helps children in developing countries, is a charitable company limited by guarantee with more than $4b in assets. The company was founded by Sir Christopher Hohn and Ms Jamie Cooper in 2002 but difficulties arose when their marriage broke down. Sir Christopher and Ms Cooper therefore agreed that Ms Cooper would resign as a member and trustee of CIFF in return for a grant of $360m being made over five years to a charity founded by Ms Cooper, Big Win Philanthropy (BWP). Sir Christopher and Ms Cooper were directors of CIFF and were also members. The third member of CIFF was Dr Lehtimäki. The requirements applicable to the making of the grant derived from the terms of the grant agreement, the provisions of the Companies Act 2006 (UK) and the Charities Act 2011 (UK) and general law requirements relating to charities, trustees, directors and members.[3]

Because the making of the grant constituted a payment for loss of office to a person connected to a director (in that BWP was connected with Ms Cooper), s 217 of the Companies Act 2006 required CIFF to pass a resolution in general meeting approving the grant. Section 201 of the Charities Act 2011 also required the consent of the Charity Commission. Given that Sir Christopher and Ms Cooper were conflicted, Dr Lehtimäki was the sole member voting on the decision.

The trustees surrendered their discretion as to whether to approve the payment to the court. The High Court held that the grant was in the best interests of CIFF. Dr Lehtimäki, however, did not surrender his discretion and wished to be free to exercise his own judgment as to how to vote.[4] Chancellor Vos in the High Court found that Dr Lehtimäki was a fiduciary as concerns to power to approve the payment and directed Dr Lehtimäki to vote in favour of the resolution.[5] Dr Lehtimäki appealed to the Court of Appeal, which held that he was a fiduciary in regard to the power but that he was not acting (or proposing to act) in breach of duty. In the absence of an actual or threatened breach of duty, the Court of Appeal felt there was no jurisdiction to direct Dr Lehtimäki to approve the payment.[6] Ms Cooper appealed to the Supreme Court, which agreed that Dr Lehtimäki was a fiduciary in relation to the power to approve the payment and restored the direction of the Chancellor that Dr Lehtimäki vote in favour of the payment. However, the members of the Supreme Court provided different justifications for the court's ability to give the direction.

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[3] *Lehtimäki v Cooper* (n 1) [6] (Lady Arden). The grant agreement was also conditional on either the Charity Commission having approved (or making no objection to) the payment or the approval of the court: see [7].

[4] See ibid [2] (Lady Arden).

[5] See *Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371.

[6] See *Lehtimäki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605.

B Decision

The focus of this article is the judgment of Lady Arden. Lady Arden held that members of a charitable company limited by guarantee are fiduciaries particularly for the purposes of the power to approve payments to directors for loss of office and potentially in other circumstances (although these were not identified) — but not 'in every instance where a member has a power to act'.[7] Key factors in Lady Arden's decision included the fact that constitutions of charitable companies prohibit application of property other than for the charity's purposes and the decision in *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* that the court would treat a charitable company as a trustee of its funds and thus exercise jurisdiction over the assets of the company in a liquidation context.[8] The duty of principal relevance in this case was the fiduciary duty to act in good faith in the interests of the company (the 'best interests rule').

Although in the minority, it is Lady Arden's reasoning that has attracted the most attention. The majority judges adopted a different approach, although they agreed that Dr Lehtimäki was a fiduciary at least as concerns the power to approve the grant.[9] Lord Briggs (with whom Lords Kitchin and Wilson agreed) took a more straightforward route in finding that 'once the court has ruled upon the underlying question whether the proposed transaction is in the best interests of the charity … the ordinary subjective duty of the fiduciary … has to give way [so that] [t]he duty of the fiduciary is to use his powers so as to give effect to the court's decision about the company's best interests.'[10]

The Court's finding that members of charitable companies limited by guarantee owe fiduciary duties is concerning and has potentially wide-ranging and unfortunate consequences for charities. Its applicability in Australia is, however, less clear. This is because a key reason for Lady Arden's finding that members of charitable companies are subject to fiduciary duties is Charity Commission of England and Wales (CCEW) guidance to that effect.[11] In Australia the Australian Charities and Not-for-profits Commission (ACNC) does not expound similar guidance as concerns members. The statutory framework (or 'mosaic'[12]) applicable to charities in the UK also differs in significant respects from the equivalent Australian framework. There are, in addition, strong policy reasons why the imposition of fiduciary duties on members is undesirable.

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[7] *Lehtimäki v Cooper* (n 1) [200].

[8] [1981] Ch 193 (*Liverpool and District Hospital)*.

[9] See *Lehtimäki v Cooper* (n 1) [200], [215].

[10] ibid [218]. This passage was cited in *Boyd v Talbot* [2021] QSC 99 [34] in which Bond J stated: '[O]nce the Court has, in the exercise of its jurisdiction over a charitable trust, formed and acted on a view of what is expedient in relation to the administration of the trust, it becomes the duty of all the trustees and those charged with fiduciary duties in relation to the trust to act in accordance with the Court's decision, regardless of whether they agree with the Court about the merits of the matter'. On this point, Bond J referred to *Lehtimäki v Cooper* (n 1) [208] (Lord Briggs JSC, with whom Lord Wilson and Lord Kitchin JSC agreed).

[11] See *Lehtimäki v Cooper* (n 1) [48]–[49], [94].

[12] See ibid [66].

It should be noted that the circumstances that arose in this case were exceptional and were described by the judge at first instance as 'unique' and 'extremely unusual'.[13] The decision could, in fact, be confined to circumstances in which the trustees surrender their discretion to the court. In addition, the decision was focused on the particular power at issue on the facts of the case, namely the power to approve the grant to BWP. Nevertheless, the decision has attracted significant attention and concern, and is likely to be highly persuasive in relation to whether members of charitable companies limited by guarantee and members of other charitable entities owe fiduciary duties.

C Judgment of Lady Arden

Lady Arden identified three key issues to be decided in the appeal. The first was whether 'Dr Lehtimäki in his capacity as a member of CIFF [was] a fiduciary in relation to the objects of the charity …'[14] The second was whether (if Dr Lehtimäki was a fiduciary) the court could exercise jurisdiction over him.[15] The third was whether s 217 of the Companies Act 2006 allowed the court to direct a member how to exercise their discretion.[16] The focus of this article is on the first issue. The significance of the first issue was that (subject to the second and third issues) the court would be able to direct Dr Lehtimäki how to vote.[17]

Despite the unusual circumstances of this case,[18] Lady Arden held that her finding that there was a 'fiduciary relationship between the charitable objects of CIFF and Dr Lehtimäki in his capacity *qua* member of CIFF'[19] applies to other companies limited by guarantee which contain restrictions preventing members receiving profits from the company. Dr Lehtimäki was subject to a fiduciary duty to act in good faith in the interests of the company in exercising the power in question. Lady Arden felt that '[t]he fiduciary's duty is subjective, namely to do that which he considers to be in the best interests of the objects of the charity'.[20]

The following Part outlines key aspects of Lady Arden's reasoning.

1 Single-minded loyalty and self-abnegation

[13] See first instance judgment, *The Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (Ch), [2018] Ch 371 [128] (Sir Geoffrey Vos C); see also *Lehtimäki v Cooper* (n 1) [19] (Lady Arden).
[14] *Lehtimäki v Cooper* (n 1) [35].
[15] ibid [36].
[16] ibid [39].
[17] ibid [42].
[18] See ibid [137], [143].
[19] ibid [78].
[20] ibid [180].

In terms of the first issue, namely whether Dr Lehtimäki was a fiduciary as concerns the power to vote in relation to the grant, Lady Arden identified the key principle in defining a fiduciary as that 'a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, meaning that he cannot exercise any power so as to benefit himself'.[21] Lady Arden also referred to the test laid down in *Grimaldi v Chameleon Mining NL (No 2)*[22] which in her view 'introduces the additional concept of reasonable expectation of abnegation of self-interest'.[23] In this respect, Lady Arden noted that a Charity Commission publication, *RS7-Membership Charities,* makes it clear that the Commission is of the opinion that members of a charitable company have an obligation to use their rights and exercise their vote in the best interests of the charity of which they are a member,[24] and that the 'rights that exist in relation the administration of a charitable institution are fiduciary'.[25] Her Ladyship also drew an analogy with the duty imposed on members of a charitable incorporated association (CIO) by s 220 of the Charities Act 2011 (UK).[26] Despite the fact that leading works on charities doubt the characterisation of members as fiduciaries or consider it an open question, Lady Arden felt that the Charity Commission guidance had more weight in terms of finding whether there is a reasonable expectation in the public at large.[27] Her Ladyship also felt that the fiduciary duty she found to exist 'exactly matches what Dr Lehtimäki considers is required for him' and 'is also surely what both a potential beneficiary and member of the public would expect him to do'.[28] Lady Arden clarified that any fiduciary duty is not owed to the company but rather to the charitable purposes or objects of the charity.[29]

2 Scope and constitution

A key factor in Lady Arden's reasoning was the company's constitution, which constituted an agreement between the members and the company.[30] Lady Arden noted

[21] ibid [44]. Lady Arden also said that 'the "distinguishing obligation" of a fiduciary is that he must act only for the benefit of another in matters covered by his fiduciary duty. That means that he cannot at the same time act for himself': at [45].

[22] [2012] FCAFC 6, (2012) 200 FCR 296 [177]: '[A] person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …'

[23] *Lehtimäki v Cooper* (n 1) [48].

[24] Charity Commission for England and Wales, *RS7 — Membership Charities* (March 2004) (RS7) 18, outlined in *Lehtimäki v Cooper* (n 1) [48] (Lady Arden).

[25] RS7 (n 24) 33, outlined in *Lehtimäki v Cooper* (n 1) [48] (Lady Arden).

[26] *Lehtimäki v Cooper* (n 1) [48]; see also [30]. Section 220 provides: 'Each member of a CIO must exercise the powers that the member has in that capacity in the way the member decides, in good faith, would be most likely to further the purposes of the CIO.' There is no equivalent in Australia.

[27] *Lehtimäki v Cooper* (n 1) [49].

[28] ibid [91].

[29] ibid [50].

[30] As to the scope of the fiduciary relationship, Lady Arden noted that a person can be a fiduciary in relation to a person with whom he or she has a contract in respect of some only of those contractual obligations: at ibid [51]. This highlights the importance of ascertaining the scope of the fiduciary

that members are affected by the fact that a company is charitable because memoranda provide that assets of charitable companies should only be applied towards the company's charitable objects and impose other restrictions.[31] According to s 33(1) of the Companies Act 2006 the memorandum and articles of the company 'bind the company and its members to the same extent as if there were covenants on the part of the company and each member to observe those provisions'.[32]

In CIFF's case the memorandum of association contained exceptions to the conflicts and profits principles (such as reasonable and proper remuneration for goods or services supplied to CIFF).[33] Lady Arden found that it was 'clear that the original corporators of CIFF took the view that the no-conflict and no-profit principles applied to members as well as trustees'[34] and that the assets of the company should be applied for the objects of the charity.[35] Lady Arden stated:

> The provisions of the memorandum of association are a further indication that members should be treated as fiduciaries. It represents the understanding of CIFF and all its members that the members are fiduciaries and they have agreed to represent that position to the entire world. So, it would require good reason not to conclude that members are fiduciaries.[36]

In summary, Lady Arden stated: 'It is essentially a contract-and-statute-based model of fiduciary duty. The structure comprises both the statutory provisions in the Companies Acts and the agreement of the members and CIFF … The 2011 Act (in addition to the general law) provides additional restrictions …'[37] As outlined in Part III below, the Australian statutory and general law framework is quite different, meaning that the decision is not necessarily applicable in Australia.

3 Signposts

Lady Arden then identified other 'signposts' as to why members are fiduciaries.[38] The first is that the courts' approach is to 'uphold charitable gifts wherever possible'.[39] The second is 'the recognition of charitable companies in statute law and the conclusions to

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relationship and which fiduciary obligations are appropriate, a matter that has been emphasised in a number of cases. In this respect the provisions of a charity's constitution will be important. As noted by Lady Arden at [80]: 'The general principle is that, as a result of the agreement which is made when a person becomes a member of a company, the rights of a member against the company and his liabilities to it stem from the memorandum and articles and the obligations imposed by the Companies Acts and the general law'; see also at [81].

[31] ibid [73].

[32] ibid.

[33] See ibid [84].

[34] See ibid [85].

[35] ibid.

[36] ibid.

[37] ibid [92]. In this respect it is well established as a matter of Australian law that a company's constitution operates as a statutory contract: see *Corporations Act 2001* (Cth) s 140.

[38] *Lehtimäki v Cooper* (n 1) [52].

[39] ibid [53].

be drawn from this statutory scheme'.[40] This includes s 198 of the Charities Act 2011 (UK) which requires Charity Commission consent to certain alterations of charitable company constitutions. There are notable differences in this respect between the applicable Australian and UK statutory frameworks, as drawn out in Part III below. The third is the case of *Liverpool and District Hospital for Diseases of the Heart v Attorney-General*,[41] in which, as outlined in more detail in Part VII below, Slade J found that, although the charitable company in question was not a trustee in the strict sense, its relationship to its assets was analogous to that of a trustee.

4 Practical difficulties

Importantly, Lady Arden articulated the practical difficulties that could arise from members of charitable companies being held to be fiduciaries (as argued by counsel for CIFF).[42] Lady Arden did not find these difficulties convincing:

(i) Whether there ought to be declarations of interest before meetings of members;
(ii) Whether a member with a conflict of interest can vote (which was particularly emphasised by Dr Lehtimäki on the grounds of the difficulties that this would cause where a member was a member of more than one charity in the same field);
(iii) Whether a member has a duty to attend and vote at meetings;
(iv) Whether a member can appoint a general proxy as permitted by section 324(1) of the 2006 Act;
(v) Whether a member can receive a benefit from the company;
(vi) Whether a member can fetter his discretion by making a voting agreement;
(vii) Whether a member would have to investigate a matter before he could vote on it;
(viii) What information a member could require from the company;
(ix) Whether a member is entitled to be indemnified for the cost of attending a meeting of the company or for the cost of legal advice;
(x) Whether a member would be liable to compensate the company if he exercised his right to vote in breach of duty.

Further on in the judgment[43] Lady Arden considered an argument that holding that members are fiduciaries would likely disincentivise people from becoming members 'when it is often desirable to give those who support a particular charity a stake in its affairs'. Lady Arden countered this with the fact that the Charity Commission has already provided guidance and that 65% of new charities registered with the Commission in 2018 were CIOs (which suggests that the fact that members of CIOs are subject to a duty is not a disincentive). As mentioned above, the Australian context is quite different.

[40] ibid [56].
[41] See ibid [67].
[42] ibid [75].
[43] ibid [94].

With respect, it is submitted that the decision in *Lehtimäki* does in fact give rise to some serious practical difficulties. These are outlined in further detail in Part III below.[44]

5 Dr Lehtimäki's objections and access to information

The decision is arguably extraordinary in light of what Dr Lehtimäki said in evidence:

> The analyses that I have carried out above make me think that it is very difficult — on the currently available evidence — to decide whether the Grant is in the best interests of CIFF's beneficiaries. On the one hand there is a clear benefit in resolving the historic governance problems and achieving finality. On the other hand transferring $360m to BWP comes at a cost. How big a cost is unknown, particularly given the lack of available information in relation to BWP and its very limited track record. It may be large, and that is my biggest concern … I would very much like CIFF to be able to draw a line under its difficulties, and move forward, with no further risk of litigation. However, I remain concerned about the cost of achieving that end ….[45]

This statement arguably shows that Dr Lehtimäki complied with the best interests rule based on the mixed subjective/objective standard currently applied to company directors.[46] Most importantly, it is evident that he considered whether making the grant was in the best interests of CIFF and thus arguably complied with the requirements of the rule.

Despite the imposition of fiduciary duties, however, Lady Arden found that Dr Lehtimäki was not entitled to any further information than what members would normally be entitled to.[47] This also has potential to create unfair disparities between members in that a member who is also a charity trustee will potentially have additional information to that which other non-charity trustee members have. It may also be that members find if difficult to get the information they need or to raise the questions they need answered due to a dominating charity trustee.

6 Convenience

With respect, it appears that fiduciary duties were imposed due to convenience. Lady Arden stated: 'If Dr Lehtimäki is a fiduciary then a well-known set of rules and remedies come into play. It will be easier for the court to exercise its inherent jurisdiction over charities, and the law of charities will be more internally coherent.'[48]

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[44] For other difficulties see John Picton, '*Lehtimäki v Cooper:* Duty and Jurisdiction in Charity Law' (2021) 84 Modern Law Review 383.

[45] ibid [106].

[46] For discussion of the different tests see Rosemary Teele Langford and Ian M Ramsay, 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective?' [2015] (2) Journal of Business Law 173.

[47] *Lehtimäki v Cooper* (n 1) [92], [200].

[48] ibid [93]. This approach of relying on fiduciary status to determine equitable controls has been questioned by Jessica Hudson, 'Justifying Equity's Control of Power: Fiduciary Status and Beyond' in

III Factors that distinguish the regulatory regimes applicable to charitable companies in Australia and in England and Wales

A key question that arises is whether this decision will be applied in Australia to charitable companies limited by guarantee and whether it will be applied to other charitable entities such as incorporated and unincorporated associations and co-operatives. The decision will arguably not necessarily apply based on precedent due to a number of differences between the statutory and regulatory frameworks. The imposition of fiduciary duties on members may, however, apply as a matter of principle.

As mentioned above, there are a number of factors which mean that the decision is not necessarily applicable in Australia. First, and importantly, in contrast to the Charity Commission of England and Wales, the ACNC does not state that members are fiduciaries. Lady Arden placed significant weight on the Charity Commission's guidance in this respect. A second key difference is the analogy made with the duty imposed on members of CIOs under s 220 of the Charities Act, which requires each member of a CIO to exercise their powers in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO.[49] Australia does not have the charitable incorporated organisation structure or equivalent duties applicable to members of any charitable entity. However, Lady Arden did distinguish the duty in s 220 on the basis that it applies in all circumstances and 'leaves open the full scope of a company member's duties because s 220 does not state that this is an exhaustive statement of the duties of a member of a CIO'.[50] Nevertheless it does provide a precedent for imposing duties on members.

A third key difference is the regime established under the Charities Act 2011 (UK) under which assets of a charitable company can only be used for charitable purposes and members cannot use assets for non-charitable purposes.[51] This is where the Australian statutory framework differs from the UK framework. For example, as noted by Lady Arden, there is considered interaction between the UK Companies Act and the UK Charities Act.[52] By contrast, the interaction between the Australian ACNC legislation and the Corporations Act 2001(Cth) is fraught. In addition, the UK statutory

Paul Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume II* (Oxford University Press 2022).

[49] See *Lehtimäki v Cooper* (n 1) [48], [30], [101].

[50] ibid [95].

[51] Noted by Sir Geoffrey Vos C at first instance: *The Children's Investment Fund Foundation (UK) v Attorney General*) [2017] EWHC 1279(Ch), [2018] Ch 371 [144]. Note also s 172(2) of the Companies Act 2006 (UK), which provides that, '[w]here or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members', the duty in s 172(1) (which is the statutory version of the best interests rule) requires directors to act in the way that they consider, in good faith, would be most likely to achieve those purposes. Note also s 178, discussed below.

[52] *Lehtimäki v Cooper* (n 1) [58].

framework requires Charity Commission approval of certain actions by charitable companies, such as alterations to their constitutions.[53] This is not the case in Australia.

An issue that arises in Australia is who would enforce such duties. If the duties are owed to the charity then responsible persons could take action to enforce the duties. If, however, the duties are owed to the charitable purposes (as held by Lady Arden) then it becomes more complex. In the UK s 115 of the Charities Act 2011 allows interested persons (including the charity) to bring charity proceedings (subject to CCEW consent). Equivalent mechanisms in Australia are more restrictive.[54]

Moreover, although the view that the duties are owed to the purposes is attractive and consistent with recent theories of purpose-based governance,[55] the problem with this in the Australian context is that ACNC Governance Standard 2 requires accountability to members. This does not mean that duties are necessarily owed to members but it does, on one view, stand in the way of members being fiduciaries. On another view, however, the requirement of accountability to members could be seen as consistent with duties being owed to purpose because it would import an accountability mechanism in the sense of members ensuring that responsible persons stay true to the charity's purpose.

A further difference is the fact that the fiduciary classification of the best interests rule in Australia is contested, whereas the fiduciary nature of that rule is still accepted in the UK in the company law context at least.[56] Indeed Lady Arden points out that s 178(2) of the Companies Act 2006 (UK) expressly makes the best interests rule a fiduciary duty in the case of company directors.[57] However, in this respect, it is notable that Australia does not have an equivalent statutory provision and that s 178(2) applies to directors (who are status-based fiduciaries) but not to members. Moreover, directors' duties in the UK are fully codified (but remedies are left to general law), further distinguishing the applicability of this reasoning in the Australian context.

If Lady Arden's reasoning is adopted in Australia then a question arises as to whether it would result in a fiduciary best interests rule applying to members. On one view, given that the only duties universally accepted as fiduciary in Australia are the conflicts and profits rules, the decision would just result in these duties applying to members. However, there was no issue of conflict or profit in relation to Dr Lehtimäki's voting on the grant. On another view, the decision could result in a fiduciary best interests rule being applied to members given that the best interests rule as applied to directors in

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[53] See, eg, Charities Act 2011 (UK) s 198, extracted at ibid [58].

[54] See *Trustee Act 1925* (ACT) s 94A(1), (3); *Charitable Trusts Act 1993* (NSW) s 5; *Trusts Act 1973* (Qld) s 106(2)(c); *Trustee Act 1936* (SA) s 60(2)(g); *Charitable Trusts Act 1962* (WA) s 21(1).

[55] See Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43 University of New South Wales Law Journal 954.

[56] See Companies Act 2006, s 178(2); *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (*Mothew*); see also *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 [1], [11], [71], [73], [77], [205], [242], [252], [363], [412]. For discussion see Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (OUP, 2019) ch 2.

[57] *Lehtimäki v Cooper* (n 1) [46]. Lady Arden then opines that it is not necessary to consider whether these duties (ie, conflicts, profits, best interests) are fiduciary duties in all cases.

Australia is still classified as fiduciary.[58] A third view is that the relationship between member and charitable company could be classified as fiduciary, with the fiduciary conflicts and profits rules applying but an equitable (rather than fiduciary) best interests rule applying.[59] Regardless of whether the best interests rule is a fiduciary duty in Australia, as noted by Nolan and Conaglen, it makes no sense for there to be a fiduciary relationship without a duty of good faith[60] and therefore at the very least an equitable duty of good faith will apply.

A question also arises as to whether a duty of care would apply to members. It is generally now accepted that the duty of care, although arising in equity, is not fiduciary in nature,[61] although some scholars and judges disagree with this view.[62] At one point in time the classification of a person as a fiduciary could import the imposition of a duty of care.[63] This is, however, less likely to be the case now due to shifts in equity theory. However, it should be noted that there is significant overlap between the requirements of the best interests rule and the duty of care, although the former only operates in connection with the exercise of power.[64]

Notably also the best interests rule as applied to directors has required extended disclosure and even positive action to prevent a transaction from going ahead.[65] These aspects would be problematic if the rule were applied to members in the same way as it is applied to directors. The best interests rule as applied to directors requires consideration and investigation.[66] Query, again, whether this is desirable given the

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[58] See, eg, *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 44 WAR 1 (*Bell Group (No 3)*); *BCI Finances Pty Limited (in liq) v Binetter* [2018] FCAFC 189, (2018) 132 ACSR 1 [596]–[598].

[59] Conaglen, for example, has argued that the best interests rule is equitable rather than fiduciary - see Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010).

[60] See Richard Nolan and Matthew Conaglen, 'Good Faith: What Does It Mean for Fiduciaries and What Does It Tell Us about Them?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press 2010) 321, 330.

[61] See *Mothew* (n 56) 16; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237–38; William M Heath, 'The Director's "Fiduciary" Duty of Care and Skill: A Misnomer' (2007) 25 Company and Securities Law Journal 370.

[62] See, eg, *Bell Group (No 3)* (2012) 44 WAR 1 [845] (Lee AJA); Geraint W Thomas, *Thomas on Powers* (2nd edn, Oxford University Press 2012) 26 [1.49]; Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 251; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th edn, LexisNexis Butterworths 2015) 200–210 [5-325]–[5-375].

[63] See Conaglen (n 59) 37.

[64] For discussion see Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press, 2014) 159 [9.7.3].

[65] In the UK it has even required disclosure of wrongdoing – see, eg, *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 [41].

[66] In this respect, note the subjective interpretation given to the statutory duty of members of CIOs (in Charities Act 2011 (UK) s 220) in *Re The Ethiopian Tewahedo Church St Mary of Bebre Tsion, London*. [2020] EWHC 1493 (Ch) [52]-[53]. The duty would not, however, necessarily be applied in the same way to members of Australian charities. In this respect note Lady Arden's comments in *Lehtimäki v Cooper* (n 1) [95], [100] and the differences noted in footnote 67 below. In addition, the rule as outlined by Lady Arden appears not to be wholly subjective – see *Lehtimäki v Cooper* (n 1) [100], [120]-[121].

disincentives to taking up membership and attending meetings. The best interests rule could also include a requirement to consider (and in some circumstances protect) the interests of creditors.[67] A question arises as to the liability of members who vote to approve a course of action that prejudices creditors.

For these reasons Lady Arden's finding of a fiduciary relationship is arguably distinguishable in the Australian context and arguably undesirable for policy reasons.

IV Application to other charitable forms

Given that the judgment was concerned solely with the obligations of members of charitable companies limited by guarantee and placed significant emphasis on the fact that company members are bound by the company's memorandum and articles,[68] its application to other types of charitable entity is less clear. It is, however, quite possible that the principle in *Lehtimäki*, if upheld, could extend to members of other types of charitable structure depending on the provisions of a charity's constitution and statutory provisions on the effect of the constitution.[69] The extension to these types of charity would, however, be concerning, particularly in the case of smaller community-based organisations run by volunteers. For example, if a person becomes a member of an incorporated association that runs a kindergarten upon enrolment of their child at that kindergarten would it be desirable to subject them to fiduciary duties? Some of the practical difficulties are outlined below.

V Appraisal of reasoning

The following Part probes aspects of Lady Arden's reasoning.

A Self-abnegation and application of fiduciary principles

It is instructive to pause here and probe Lady Arden's finding of expectation of abnegation of self-interest further. It is undeniable that there are strict restraints on self-benefit that apply to charitable entities — these stem from the non-distribution constraint, which prevents a not-for-profit organisation from distributing its surplus

[67] Note also that in the UK directors have the benefit of the '*Charterbridge* test', which is more favourable but which does not apply in Australia. Under that test, where a director has not actually considered the interests of the company, courts consider whether an intelligent and honest person in the position of the director would have believed that the relevant decision was for the benefit of the company – in which case there is no breach of duty: see *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.

[68] See *Lehtimäki v Cooper* (n 1) [67], [73], [78], [81], [85].

[69] For example, Dawson and Alder write that courts will 'easily construe a contract or trust' as concerns gifts to unincorporated associations – see Ian Dawson and John Alder, 'The Nature of the Proprietary Interest of a Charitable Company or a Community Interest Company in its Property' (2007) 21 Trust Law International 3, 7.

income to any controller, office holder, employee or member.[70] In addition, private benefit may jeopardise a charity's charitable status. However, a question arises as to whether this is the sort of self-abnegation that constitutes a fiduciary. For example, although members of charitable companies or charitable entities generally cannot receive distributions of profits or surplus, they are entitled to receive incidental benefits. By contrast, a fiduciary would be expected to obtain authorisation for incidental benefits (unless not material).[71] In addition, as pointed out by Picton:

> [I]f the reasoning in *Lehtimäki* was ever stretched to cover mass membership organisations, it would find itself in need of considerable clarification. As a general proposition, the larger the charity, the less selfless the membership, and in turn, the less appropriate it is to start with a prima facie duty of loyalty to the purposes. For example, while members of the National Trust are undoubtedly committed to the organisation, it is also the case they are motivated by the provision of discounts and special deals. It is only reasonable and realistic, that they should vote with those arrangements in mind.[72]

With respect, Lady Arden's view of reasonable expectation of abnegation of self-interest by members is open to question. Arguably a better analogy could be made with Criddle's concept of stakeholder fiduciaries.[73] These are fiduciaries (such as partners) who are not expected to abjure self-interest when they exercise fiduciary power. Instead of requiring complete self-abnegation of self-interest, the duty of loyalty requires that these fiduciaries practice solidarity with other beneficiaries.[74] Criddle states that 'when stakeholder fiduciaries exercise voting rights in collective governance, they are free to vote solely on their own interests as long as they do not misuse their voting power to undermine the purposes of the fiduciary relationship or dominate other beneficiaries'.[75] If members of charitable companies are indeed fiduciaries then perhaps a similar 'stakeholder fiduciary' model could apply to them — they should be free to vote in their own self-interest as long as it is consistent with the charitable purposes and does not undermine those purposes. An expectation of self-abnegation is not, of course, the decisive determinant of the appropriateness of fiduciary duties.

B Problematic aspects

[70] For detail see Myles McGregor-Lowndes, 'An Overview of the Not-for-Profit Sector' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar 2018) ch 5; Henry Hansmann, 'Reforming Nonprofit Corporation Law' (1981) 129 University of Pennsylvania Law Review 497.

[71] See also Ryan James Turner, 'The "Fiduciary" Member of the Charitable Company' (2018) 24 Trusts & Trustees 869.

[72] Picton (n 44) 90 (citations omitted).

[73] Evan J Criddle, 'Stakeholder Fiduciaries' in Matthew Harding and Paul B Miller (eds), *Fiduciaries and Trust: Ethics, Politics, Economics, and Law* (Cambridge University Press, 2020) ch 6, 106.

[74] ibid.

[75] ibid.

The other unfortunate aspects of the case are as follows. First, a member of a company limited by guarantee may be called on to contribute to the debts of the company if the company becomes insolvent. Directing a member to vote in favour of such a large disposition could, in some circumstances, have personal financial consequences for that member. As mentioned, the outcome is extraordinary in light of Dr Lehtimäki's evidence of his concern as to the cost of the grant which 'may be large'[76] and the fact that he was denied further information.[77]

Second, Lady Arden was unclear on when members would be subject to fiduciary duties and when not, deciding that: 'The precise circumstances in which the member of a charitable company has fiduciary duties in relation to the charitable purposes and the content of those duties will have to be worked out when they arise'.[78] This introduces too much uncertainty and potentially discourages volunteers from taking up membership of charitable entities. As outlined above, Lady Arden stated that a fiduciary duty does not apply in all circumstances but she did not identify in which circumstances such a duty would apply.[79]

The third is the potential discouragement of charitable membership, which was arguably not sufficiently answered by any of the judges. This is expanded on in the next Part. This raises a separate issue (beyond the scope of this article) as to why people become members of charities — this may be to access a service (eg, to enrol a child at an educational institution), to support a cause, for social reasons or for reasons associated with identity. A member's motivations for joining a charity or retaining membership may affect how much of a disincentive these practical problems pose.

Imposing fiduciary duties on members is an attractive option in terms of discouraging a change of a charity's purposes from charitable to non-charitable. However, there are other ways of dealing with this. The most effective in terms of charitable companies would be to turn back on the statutory directors' duties in the Corporations Act 2001 (Cth), in which case directors in such circumstances may breach ss 181 or 182 and shareholders could also be liable for being involved in the breach.[80]

VI Practical difficulties

The decision in *Lehtimäki* could give rise to practical problems in relation to conflicts of interest such as the following. First, do members need to declare conflicts of interest (and absent themselves) at the start of members' meetings? Second, to whom do members disclose such conflicts and from whom do they obtain authorisation to

[76] See *Lehtimäki v Cooper* (n 1) [106].

[77] See ibid [92], [106], [200].

[78] See ibid [100]; see also [90], [101], [200].

[79] The Court found that the duty applies when members exercise a power to approve payments to directors for loss of office or to approve or disapprove the making of a grant such as the one in this case. Other powers to which it could apply might be other dispositions of assets. In contrast, an example of where a power would not attract fiduciary duties (identified by Lady Arden) is a member's resolution relating to the provision of benefits: ibid [101].

[80] See ss 181(2), 182(2), 79. See also footnote 108 below.

participate? Moreover, what happens if all members are conflicted? In England and Wales the Charity Commission can provide authorisation in relation to conflicts of charity trustees but the ACNC does not have equivalent power in Australia. This issue was raised indirectly by Lady Arden in considering the hypothetical situation were Dr Lehtimäki to have a conflict of interest in voting on the resolution. Lady Arden noted that 'there is neither any organ of the company which has the express function of receiving any disclosure of details of a conflict of interest nor any means of obtaining fully informed consent'.[81] However, in her view, 'certainly, he would not be able to vote as a member on any resolution concerning the benefit'.

A question arises, however, as to situations where all or a majority of members have a conflict and therefore cannot vote. In Australia there would appear to be no means of disclosure and consent (unlike where responsible persons have a conflict). Lady Arden's mooted solution was that the constitution could be amended to 'permit a member to have this interest', noting also the involvement of the Charity Commission either under s 198(2)(c) or s 15(2) of the Charities Act 2011 (UK). [82] Equivalent statutory sections do not apply in Australia and amendments to the constitution to allow members to benefit may in some circumstances infringe the non-distribution constraint (and therefore threaten charitable status).[83] Such amendments are also unwieldy given that they require approval of a 75% majority of members. In addition, although Lady Arden noted that charitable constitutions could modify conflicts and profits duties, it is very difficult to reduce the best interests rule (which was the duty that was applied to Dr Lehtimäki in this case), as highlighted in Lady Arden's comments about not reducing the irreducible core of obligations.[84]

Questions also arise as to whether members can favour their own interests when appointing or removing responsible persons (in the sense of voting for themselves or voting against their own removal). It is also not uncommon for responsible persons to also be members (and in some charities the members and the responsible persons are the same). It is therefore quite possible that a person who is both a member and a responsible person could face a conflict of duties. These difficulties also arguably militate against there being a reasonable expectation of self-abnegation and thus against a finding that members are fiduciaries.[85] There is also a question as to whether charities can indemnify members.

As pointed out by Turner, if members are fiduciaries they are not entitled to appoint themselves as directors of the charitable company. It is, however, common for members

[81] *Lehtimäki v Cooper* (n 1) [96].

[82] ibid [97].

[83] According to Lady Arden, such amendments would also not necessarily absolve members from a requirement of disclosure or entitle them to vote – see *Lehtimäki v Cooper* (n 1) [86].

[84] ibid [82]. Lady Arden noted that it is possible to reduce fiduciary duties as long as the duties of a fiduciary nature are not reduced below the 'irreducible core' of obligations identified by Millett LJ in *Armitage v Nurse* [1998] Ch 241, 253-4.

[85] It is also difficult to find the necessary voluntary undertaking on the part of members: see James Edelman, 'Four Fiduciary Puzzles' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010); James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 Law Quarterly Review 302.

to do so: 'More generally, the risk of conflicts of interest for members in closely held charitable companies is acute; a member who also acts as a director or employee of a charitable company may constantly find themself unable to vote (subject to the possible authorization of voting while conflicted in the articles).'[86]

There is also an element of unfairness in imposing fiduciary duties on members due to the power imbalance between directors (or other responsible persons) and members in meetings and in the running of charitable companies. For example, although a member may seek to raise questions or challenge decisions at a meeting, the member may be ignored or overruled. A question arises as to what practical options a member has in such situations. For example, in such situations does the member need to resign if they are concerned about their liability?[87]

A question also arises as to whether members must attend meetings if they are now fiduciaries. The best interests rule itself would not necessarily require attendance because it attaches to the exercise of powers. If fiduciary obligations only apply when members attend meetings (or when they exercise powers at meetings) then there is arguably a disincentive to attend meetings (or to attend those meetings at which voting might be controversial or potentially risk breach of fiduciary duty), which is also undesirable.

A further question arises as to remedies for breach. The consequences of breach of fiduciary duty by a member were not explored. At general law breach of the best interests rule by directors can give rise to remedies such as rescission and compensation. Certain decisions may be voidable or even void. A member could potentially be liable to compensate the charity for loss or to disgorge gains. This is another disincentive.

In summary, there are a number of potential implications and practical difficulties arising from the decision in *Lehtimäki* which militate against its application in Australia. [88]

It may well be appropriate to impose duties relating to conflicts and profits on members in some specific circumstances (based on factors such as, eg, the terms of the entity's constitution, the nature and extent of the relevant member's power and discretion and/or the nature of the particular vote or decision) where is it appropriate to expect the member or members to act exclusively in the interests (or for the purposes) of the charity. [89] However, the imposition of a best interests rule is arguably inappropriate. This, however, militates against finding the existence of a fiduciary relationship given that, at the very least, an equitable (if not fiduciary) duty of good faith applies to fiduciaries.[90]

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[86] Turner (n 71) 873.

[87] Lord Briggs did mention resigning: *Lehtimäki v Cooper* (n 1) [218].

[88] Leading academics have also previously opposed the imposition of fiduciary duties on members – see, eg, Jean Warburton, 'Charity Members: Duties and Responsibilities' [2006] *Conveyancer and Property Lawyer* 330, 337–38, 351.

[89] See MW Bryan, VJ Vann and S Barkehall Thomas, *Equity & Trusts in Australia* (2nd ed, Cambridge, 2017) [10.3], [10.9].

[90] See Nolan and Conaglen (n 60) 321, 330; Bryan, Vann and Thomas (n 89) [10.36].

VII The unique (or trust-like) nature of charitable companies

A key aspect of Lady Arden's decision in *Lehtimäki* was the judgment of Slade J in the key case of *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* that, although there was no trust in the strict sense, the assets of a charitable incorporated body were held subject to a legally binding obligation to apply the assets for exclusively charitable purposes — the body therefore held a position in relation to the assets analogous to that of a trustee for charitable purposes.[91]

This Part of the article probes this key part of Lady Arden's reasoning and the implications.

A Is there a charitable trust inherent in charitable companies?

A question that has occupied commentators, and been considered in a number of cases, is whether there is a charitable trust inherent in incorporated charities.[92] A popular approach is to find that charitable companies hold their assets analogous to a trustee. As mentioned, this was a key aspect of Lady Arden's decision in *Lehtimäki*.

As noted by Warburton, this approach gives the court discretion to determine the duties and powers of the company in relation to its assets. The company is not necessarily subject to all the limitations imposed on trustees.[93] Dal Pont, by contrast, considers that the 'flexibility' of this approach[94] leads to uncertainty in a number of respects. Dal Pont distinguishes between three categories of situation.[95] The first category is where a company is constituted as trustee of a charitable trust. In such situations there is clearly a trust. The second category enunciated by DalPont is where money and/or property is given to a charitable body for a specified purpose. According to DalPont, '[m]oney or property given to a (charitable or non-charitable) incorporated body for a specified charitable purpose is treated as trust property'.[96] The third category

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[91] *Liverpool and District Hospital* (n 8) 214 (Slade J). Lady Arden also outlined cases on which Slade J relied in reaching this decision: see *Construction Industry Training Board v Attorney General* [1973] Ch 173; *Von Ernst & Cie SA v Inland Revenue Comrs* [1980] 1 WLR 468, 479–80. In some cases support has been found for the proposition that a company incorporated exclusively for charitable purposes is in the position of a trustee: see *Von Ernst & Cie SA v Inland Revenue Comrs* [1980] 1 WLR 468, 479–80 and the cases cited there by Buckley LJ, as extracted in *Lehtimäki v Cooper* (n 1) [71] (Lady Arden).

[92] For discussion of a number of authorities and argument that there is an actual trust see Dawson and Alder (n 69); see also Ian Murray and Rosemary Teele Langford, 'The Best Interests Duty and Corporate Charities: The Pursuit of Purpose' (2021) 15 Journal of Equity 92, 99.

[93] Jean Warburton, 'Charitable Companies' [1984] Conveyancer & Property Lawyer 112, 116.

[94] See GE Dal Pont, *Law of Charity* (2nd edn, LexisNexis Butterworths 2017) 455 [17.70].

[95] ibid 452–57 [17.65]–[17.74].

[96] Dal Pont cites the following cases: *Re Vernon's Will Trusts (Note)* [1972] Ch 300, 303 (Buckley J); *Re Attorney-General v Corporation of the Lesser Chapter of the Cathedral Church of Brisbane* (1977) 136 CLR 353, 371 (Jacobs J); *Eurella Community Services Inc v Attorney General* [2010] NSWSC 566

is where money and/or property is given to a corporate body for its general purposes. Dal Pont shows that case law has taken different approaches to this situation, holding alternatively that (1) no trust arises; (2) a trust or trust-like obligations apply in some cases that are within the discretion of the court; (3) a trust always arises; or (4) the assets are held on constructive trust.

There are Australian authorities that support the view that a charitable corporation acts as trustee when it receives and manages property. For example, Kitto J in *Sydney Homeopathic Hospital v Turner*[97] stated (in dicta) that 'a gift [to a body with objects limited to altruistic purposes] which would be invalid unless it operates to create a charitable trust may be upheld because, when the objects of the body which is the donee are taken into consideration, an inference arises that the gift is upon trust for charitable purposes …' This view was endorsed by Kearney J in *Sir Moses Montefiore Jewish Home v Howell (No 7)*:

> In my view a disposition to a charitable corporation is to be treated as having presumptively the necessary elements creating a trust, so that the disposition to such a charitable corporation takes effect as a trust for the purposes of the corporation rather than as a gift to it as it sees fit …[98]

Recent Australian authority also supports the proposition that a charitable company holds property on trust when properties are donated for the purposes of the charitable objects. In *Harmony — The Dombroski Foundation Ltd v Attorney General (NSW)*[99] Ward CJ in Eq held that a foundation (in the form of a company limited by guarantee) held its property subject to a valid charitable trust for the purposes of the New South Wales cy-près legislation. The properties had been donated to the foundation for the objects of the foundation set out in its constitution.[100] Ward CJ in Eq referred to Kearney J's statement in *Sir Moses Montefiore Homes v Howell & Co (No 7)*[101] and stated:

> It follows from the conclusion that the Foundation is a charitable organisation, and on the material referred to above that [the donated property and gifts] are to be treated as having

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[55]–[62] (Slattery J). Dal Pont also notes that the same principles would apply in respect of gifts to unincorporated bodies.

[97] (1959) 102 CLR 188, 221. In *Re Padbury* (1908) 7 CLR 680, 695, O'Connor J said: 'A person or body of persons who undertakes to administer in the interests of a charity moneys received by them for that purpose are answerable to a Court of Equity for any diversion of the charitable fund from its purposes on the ground that they occupy in relation to the donors and the beneficiaries the position of trustees'; see also *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83, 97 (Jordan CJ); *Smith v West Australian Trustee Executors and Agency Co Ltd* (1950) 81 CLR 320, 325 (Fullagar J).

[98] [1984] 2 NSWR 406, 416 (*Howell (No 7)*).

[99] [2020] NSWSC 1276 (*Harmony*).

[100] ibid [24].

[101] ibid [66] (Ward CJ in Eq). Ward CJ also noted that Kearney J's approach in *Howell (No 7)* was cited with approval by Kourakis J in *Australian Executor Trustees Ltd v Attorney-General (SA)* [2010] SASC 348 [49] and McMillan J in *Re Coulson* [2014] VSC 353 [39].

> been held by the Foundation on a charitable trust for the purposes set out in cll 2(a)-(h) of the Constitution … [A]ny income received and any other property derived by the Foundation during the course of using such gifts (in furtherance of its objects) is trust property (ie it is impressed with the same charitable trust) …[102]

It is notable that the properties in this case were donated for the purposes of the charitable objects.[103] The judgment could be read more broadly as authority for the proposition that a charitable corporation is the embodiment of the charitable trust so that where property is given to a company with solely charitable objects and the donor does not specify a purpose, then that property can only be used by the company for its charitable purposes. On another view it could be argued that the NSW cy-près legislation was interpreted in a pragmatic manner in order to reach a sensible result.

There are, however, difficult issues that would arise in recognising such a trust. The first is the need to take form seriously in that if parties do not choose a trust as the vehicle for a charitable entity there is a prima facie case against there being a trust. In support of this argument it is notable that intention is judged objectively[104] (and taking into account the form chosen by the parties) and that there are a number of different types of charitable vehicle and reasons for choosing different types.[105] Persons setting up a charity do have the option of choosing a trust as a vehicle. Where they do not then this should arguably be taken into account.

Second, where a trust is chosen this will be a charitable purpose trust (which would usually not have members or direct beneficiaries), meaning that governance is determined by what will further the particular purpose/s of the trust. Where a trust is imposed or found in the context of another charitable vehicle (such as a charitable corporation) that does have members practical issues and tensions can arise (such as those identified in Part III above).

The third is the need to assess what the implications of such a trust would be. I argue below that one implication is that responsible persons of charitable entities should owe fiduciary duties if there is indeed a trust inherent in charitable structures. However, other potential implications are less clear. The 'trust' question, as it applies to property, is of practical significance if the corporation is wound up. If property received by the corporation is trust property, the property could then be applied cy-près (assuming other requirements are met) for related charitable purposes, instead of being dealt with in accordance with corporate law provisions dealing with winding-up.[106] A more difficult question is whether the corporation is a trustee for other, non-property related purposes

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[102] *Harmony* (n 99) [67]. Ward CJ in Eq noted that the parties cited *Attorney General (Qld) (Ex rel Nye) v Cathedral Church of Brisbane* (1977) 136 CLR 353, 371–72 (Jacobs J, with whom Stephen, Mason and Murphy JJ agreed) and *University of New South Wales International House Ltd v University of New South Wales* [2016] NSWSC 1709 [64], [130]–[136] (McDougall J).

[103] See *Harmony* (n 99) [24].

[104] See *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253.

[105] These include the advantages of incorporated form (counterbalanced by the lack of formalities); advantages and disadvantages of having members; and advantages and disadvantages of being able to operate in more than one state or territory.

[106] In this respect see *Liverpool and District Hospital* (n 8) 215.

(for example, whether it is entitled to invoke the powers of a trustee under trusts legislation). A question also arises as to whether the corporation is a trustee for the purpose of being subject to non-fiduciary trustee duties, or of being able to exercise rights and powers that are vested in trustees.[107]

One other upshot of there being a trust inherent in a charitable company is that it would mean that members presumably could not convert the company into a non-charitable company or divert the assets of the company to non-charitable purposes or perhaps even change the company into a company with different types of charitable objects. That is an appealing upshot. However, there are other ways of dealing with this problem.[108]

Significantly for the purposes of the analysis in this article, if there is a trust inherent in charitable companies then it is the charitable company that is trustee and owes fiduciary duties. Whilst the imposition of such a trust and the duties therefore imposed on the company as trustee have consequential effects on the duties of the directors (and potentially members) of the company, it is the company that is primarily impacted by the imposition of a trust. The nature of a charitable entity (whether it be incorporated or unincorporated), as compared to an equivalent non-charitable entity, impacts and shapes the duties of those governing the entity.

This can be seen in jurisprudence concerning directors of trustee companies. It is well established that the duties of directors of trustee companies are affected by the fact that the company is a trustee — a higher standard of care has been imposed on directors of trustee companies due to the 'flow-on' effect of the duties of the trustee company to those of its directors.[109] For example, in *Australian Securities Commission v AS Nominees Ltd*[110] Finn J said:

> Where the trustee is itself a company the requirements of care and caution are in no way diminished. And here, unlike with companies in general, these requirements have a flow-on effect into the duties and liabilities of the directors of such a company … It was established early – largely it would seem from case law on charitable and municipal corporations – that at least when, and to the extent that, directors of a trustee company are themselves 'concerned in' the breaches of trust of their company, they are liable to the company according to the same standard of care and caution as is expected of the company itself … To affirm such a limited coalescence in the standard of care of directors and trustees in the case of directors of trustee companies is not to reignite the arid debate on whether directors are trustees … It is merely to say that in this context the duties of trusteeship of the company

[107] For other difficulties see GE Dal Pont, *Law of Charity* (2nd edn, LexisNexis Butterworths 2017) 455-6 [17.70].

[108] A notable option is the oppression action. See, eg, Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43 University of New South Wales Law Journal 977; Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45(1) University of New South Wales Law Journal 70; Murray and Langford (n 92).

[109] See *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452, (2015) 33 ALR 185 [209]; *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 517 (*AS Nominees*).

[110] *AS Nominees* (n 109) 517.

can give form and direction to the common law and statutory duties of care and diligence imposed on directors, where the directors themselves have caused their company's breach of trust.

B Implications of charitable trustees holding assets analogous to trustees

In light of these factors and considerations, it cannot be said with certainty that there is a trust inherent in charitable companies or in other charity structures. There are, in addition, a number of issues arising in relation to such recognition. The finding by Slade J in *Liverpool and District Hospital* (and followed by Lady Arden in *Lehtimäki*) that a charitable company is in a position analogous to that of a trustee as concerns its property is therefore sensible. An important question is what are the implications of finding that a charitable body holds assets analogous to a trustee?

1 First implication

The first implication is arguably that the responsible persons of the entity owe fiduciary duties as a result of the incorporated body holding its assets in this way. This should apply whether the entity is a company, incorporated association or co-operative.[111] This does not mean, however, that responsible persons are trustees per se (thus owing all the duties owed by trustees).[112] Rather, it is the entity that is in a trustee-like position and subject to trust-like duties or fiduciary duties.[113] The duties of the responsible persons are, however, coloured or shaped by the fact that the body is in a trustee-like position in relation to its assets and funds.[114] Just as the duties of directors of trustee companies are heightened due to the fact that the company is a trustee, so are the duties of responsible persons of an incorporated body that holds assets analogous to a trustee in situations such as that in *Liverpool and District Hospital*. For example, in *Re The French Protestant Hospital*[115] (which concerned a charitable corporation incorporated by Royal Charter) Dankwerts J held that the directors of the corporation, although not technically trustees, were as much in a fiduciary position as trustees in regard to acts done (due to the fact that the corporation was the trustee of the property and that the

[111] Note that *Liverpool and District Hospital* (n 8) was distinguished in the context of an incorporated association in *Islamic Assn of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) (No 2)* [2009] WASC 404.

[112] cf Warburton and Dal Pont. Warburton has suggested that the duties of directors of a charitable company may be 'more onerous and analogous to those of a trustee': see Jean Warburton, 'Charitable Companies' [1984] (March/April) Conveyancer & Property Lawyer 112, 120. Dal Pont, *Law of Charity* (n 107) 456–57 [17.72] discusses whether the directors are actually trustees.

[113] Incidentally Conaglen shows how fiduciary duties were initially imposed based on an analogy with trustees: see Conaglen (n 59).

[114] In a similar vein, Warburton argues that officers of incorporated charitable bodies owe a higher (more stringent) duty of care than is owed by ordinary directors of a commercial company: see Jean Warburton, 'Charity Corporations: The Framework for the Future?' [1990] (March/April) Conveyancer & Property Lawyer 95, 98.

[115] [1951] Ch 567, 570.

directors (with the governor and deputy governor) controlled the corporation) and were therefore bound by rules that affect trustees and fiduciaries.

There are a number of other reasons why responsible persons of charitable entities should be classified as fiduciaries. First, a fiduciary relationship can be established on the facts,[116] based on tests established by Mason J in *Hospital Products Ltd v United States Surgical Corporation*[117] and the High Court in *John Alexander's Clubs Pty Limited v White City Tennis Club Limited*[118] — responsible persons of all charities undertake or agree to act for or on behalf of or in the interests of the entity in the exercise of a power or discretion which will in turn affect the interests of the entity. Responsible persons such as directors of charitable companies, directors of trustee companies and trustees are, of course, status-based fiduciaries. For those responsible persons who are not status-based fiduciaries (such as management committee members of charitable incorporated and unincorporated associations and directors of cooperatives and statutory corporations) there is a strong argument that indicia of fiduciary relationship are present in the same way that they are present in the relationship between director and company. This is because such responsible persons undertake to act for or on behalf of or in the interests of the charitable entity[119] and because the exercise of such responsible persons' power or discretion has the ability to adversely affect the interests of the charitable entity.

Second, although responsible persons of non-charitable entities do not necessarily owe fiduciary duties, responsible persons of charitable entities do owe fiduciary duties due to the unique nature of charitable entities. This has consequential effects for the duties of such responsible persons. This uniqueness stems from the altruistic[120] and

[116] The criteria by reference to which such a relationship is established are not settled. Some judges have pointed to particular features such as a relation of confidence, inequality of bargaining power, an undertaking by one party to perform a task or fulfil a duty in the interests of the other party, the unilateral exercise of a discretion or power by one party which may affect the interests of the other, or dependency or vulnerability which causes reliance on the other: see, eg, *Breen v Williams* (1996) 186 CLR 71, 106–7 (Gaudron and McHugh JJ); *Hospital Products Ltd v United States Surgical Corp* (1956) 156 CLR 41, 141–42 (Deane J) (*Hospital Products*). There is, in addition, boundless academic literature on this issue. Key pieces include PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989); PD Finn, 'Fiduciary Reflections' (2014) 88 Australian Law Journal 127; Conaglen (n 59); Edelman, 'When Do Fiduciary Duties Arise?' (n 85); James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7 Journal of Equity 128. For a helpful list of academic literature see Justice Ashley Black, 'Modern Indicia of Fiduciary Relationships in a Commercial Setting and the Interaction of Equity and Contract' (Supreme Court Corporate and Commercial Law Conference, 15 November 2017) n 8.

[117] *Hospital Products* (n 116) 96–7.

[118] [2010] HCA 19, (2010) 241 CLR 1 [87].

[119] As to what the interests of a charitable entity are see Langford, 'Purpose Based Governance' (n 55); Murray and Langford (n 92).

[120] Harding articulates the norm of altruism that underlies both charity law and fiduciary law: see Matthew Harding, 'Independence and Accountability in the Charity Sector' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart Publishing 2020) ch 2.

other-regarding[121] nature of charities and from the fact that charities steward public funds and assets for public purposes (despite being subject to private decision-making processes).[122] The other-regarding and altruistic values that inhere in charitable entities are reflected in other-regarding and altruistic governance duties of responsible persons. In addition, members of charities have less incentive and ability to monitor responsible persons than members of for-profit entities[123] (and, in fact, some charitable entities such as trusts do not have members), highlighting the vulnerability and dependence of charitable entities. This is further heightened by the governance and regulatory framework of the Australian charities sector in that the charities regulator has limited power in relation to individuals.[124]

Third, imposition of fiduciary duties on those who govern charities is also justified due to the expressive and educative function of fiduciary law and its role in influencing social norms.[125] As outlined by Harding, fiduciary duties facilitate 'fiduciary loyalty not only by guaranteeing that fiduciaries will act in certain ways, but also by helping fiduciaries to grasp what is required if they are true to their commitments'.[126]

Fourth, commentators have opined that responsible persons of charitable incorporated associations,[127] co-operatives[128] and statutory corporations[129] owe

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[121] See Ian Murray, Submission to the Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018).

[122] See also Michael D Connelly, 'The Sea Change in Nonprofit Governance: A New Universe of Opportunities and Responsibilities' (2004) 4(1) *Inquiry* 6, 7–8.

[123] For discussion see Vivienne Brand, Jeff Fitzpatrick and Sulette Lombard, 'Governance and Not-for-Profits: Regulatory Reform' (2013) 15 Flinders Law Journal 381; Susan Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-Profit Regulation* (Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2004) 186; James J Fishman, 'Improving Charitable Accountability' (2003) 62 Maryland Law Review 218; Hansmann (n 70); Harding, 'Independence and Accountability' (n 120) 13.

[124] See Langford and Webster (n 108).

[125] See, eg, Irit Samet, 'Fiduciary Loyalty as Kantian Virtue' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 130; Matthew Harding, 'Disgorgement of Profit and Fiduciary Loyalty' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing 2017); Fishman (n 123).

[126] Harding, 'Disgorgement of Profit' (n 125).

[127] AS Sievers, 'What is the Future for Honorary Directors and Committee Members? Their Duties and Liabilities' in Myles McGregor-Lowndes, Keith Fletcher and AS Sievers (eds), *Legal Issues for Non-profit Associations* (LBC Information Services 1996) 30; Charles Parkinson, 'Duties of Committee Members under the Associations Incorporation Acts' (2004) 30 Monash University Law Review 75, 79. After citing Sievers and Parkinson, Cowley and Knight 'identify a stream of judicial authority that supports the tenor of these observations': see Bruce Cowley and Stephen Knight, *Duties of Board and Committee Members* (Lawbook Co 2018) 464 [13.130], citing *Bonnyrigg Turkish Islamic Cultural Association v Abdullah* [2002] NSWSC 100; *Vannini Campbelltown City Soccer & Social Club Inc* [2003] SASC 113; *Pine Rivers, Caboolture and Redcliffee Group Training Scheme Inc v Group Training Association Queensland & Northern Territory Inc* [2015] Qd R 542 [38].

[128] Cowley and Knight (n 127) 423 [11.600]; as to enforcement see 423–24 [11.610].

[129] See Marco Bini, 'Foss v Harbottle: Alive and Well in the Public Sector?' (2014) 88 Australian Law Journal 406, 411, citing *Bennetts v Board of Fire Commissioner of New South Wales* (1967) 87 WN (pt1) (NSW) 307, 313. See also *Hughes v Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 237 (Finn J); *Molomby v Whitehead* (1985) 7 FCR 541, 550 (Beaumont J).

fiduciary duties on the basis of an analogy with directors. As to statutory corporations, there is arguably no valid reason to distinguish directors of such corporations (and particularly corporations of a charitable nature) from other corporations. Directors of statutory corporations should be treated as status-based fiduciaries.[130] Commentators also argue that members of committees of management of unincorporated associations owe fiduciary duties, [131] particularly where the unincorporated association is charitable.[132]

Fifth, the object of the indirect duties imposed on responsible persons by the ACNC is expressed to be: 'to ensure that the responsible [persons] of a registered entity conduct themselves in the manner that would be necessary if: (i) The relationship between them and the entity were a fiduciary relationship; and (ii) They were obliged to satisfy minimum standards of behaviour consistent with that relationship …'[133]

These traditional methods of determining fiduciary status — and the relevance of fiduciary status itself — have more recently been challenged.[134] Hudson argues that what is determinative of equity's control of power is whether a power is held on terms, and if so, what terms.[135] Fiduciary loyalty applies when there are particular terms, being terms requiring a power to be held for or on behalf of another.[136] In this respect it is clear that this is the case for responsible persons of charities, who hold powers for charitable purposes. In addition, notwithstanding the problems associated with an approach based on fiduciary status, the fiduciary principle has an important normative, expressive and organisational role. This would assist in bringing certainty and coherence to governance and regulatory frameworks currently applicable to the Australian charities sector, which are complex, confusing and at times incoherent. A core set of fiduciary duties applicable to responsible persons of all charities would be

[130] Ultimately the provisions of the relevant statute establishing the corporation will be important in determining the appropriateness of fiduciary duties. However, as argued above, where a statutory corporation is charitable this affects and shapes the nature of the duties owed by directors of the corporation. An analogy with directors of non-statutory corporations (eg, corporations incorporated under the *Corporations Act 2001* (Cth)) is persuasive and such directors clearly owe fiduciary duties.

[131] See, eg, GE Dal Pont, *Law of Associations* (LexisNexis Butterworths 2018) 208; AS Sievers, *Associations and Clubs Law in Australia and New Zealand* (Federation Press 2010) 17. For relevant case law see *Harrison v Hearn* (1972) 1 NSWLR 428, 435; *Clark v University of Melbourne* [1978] VR 457, 469 (Kaye J).

[132] See, eg, Jean Warburton, 'Charity Members: Duties and Responsibilities' [2006] (July/August) Conveyancer and Property Lawyer 330.

[133] Australian Charities and No-for-profits Regulation 2013 (Cth) reg 45.25(1)(d), promulgating the object of ACNC Governance Standard 5, which requires charitable entities to take reasonable steps to ensure that their responsible persons are subject to certain duties. In addition, these duties include duties relating to conflicts and profits: see Australian Charities and Not-for-profits Commission Regulation 2013 (Cth) reg 45.25(2).

[134] See Hudson (48).

[135] ibid 10.

[136] ibid 15.

immensely beneficial in terms of identifying core standards and forming the basis around which other statutory duties could be organised and explained.[137]

The fiduciary relationship in the charities sphere, unlike many other contexts, is purpose-based in that purpose is central to the governance duties and fiduciary model applicable to responsible persons of charities. Charitable entities are established to pursue certain articulated charitable purposes (rather than to act in the interests of people or entities) and the fiduciary (and other) duties of responsible persons emanate from, and support, the furtherance of the entity's purpose. [138]

2 Second implication

The second implication of the special nature of charitable entities (and, in particular, the view that such entities hold their assets analogous to trustees) is that restrictions are placed on the rights and powers of members of such bodies — their powers and rights are affected by the fact that the company (or entity) holds property as if it were a trustee. Any action sanctioned or initiated by the members that constitutes a breach of trust (or breach of fiduciary duty) by the charity may result in accessory liability for the members based on the rule in *Barnes v Addy*.[139] Any misappropriation of trust property (which would occur where trust property is applied other than for the charitable purposes) could result in personal liability for the members.

The rule in *Barnes v Addy* imposes liability on third parties where they knowingly receive property in breach of trust or other fiduciary duty (first limb) or assist with knowledge in a dishonest and fraudulent design on the part of a trustee or fiduciary (second limb).[140] Application of both limbs of the rule depends on proof of a requisite degree of knowledge.[141] Application of the second limb in Australia requires that the breach by the fiduciary be dishonest.[142]

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[137] In this respect see Rosemary Teele Langford, 'Conflicts and Coherence in the Charities Sphere: Would A Conflict by Any Other Name Proscribe the Same?' (2020) 14 Journal of Equity 1.

[138] See Langford, 'Purpose Based Governance' (n 55). For discussion of purpose-based fiduciary models see Evan Fox-Decent, 'The Nature of State Legal Authority' (2005) 31 Queen's Law Journal 259, 268; Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015) 57 William & Mary Law Review 513; see also Andrew S Gold and Paul B Miller, 'Fiduciary Duties in Social Enterprise' in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press 2018) ch 8.

[139] (1874) LR 9 Ch App 244 (CA) 251-2. Note also the potential application of an oppression remedy in relation to members – see footnote 108 above.

[140] *Barnes v Addy* (1874) LR 9 Ch App 244 (CA) 251-2. See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, 140-1 [111]-[113]. Originally the rule applied only to breach of trust but was later extended to include other breaches of fiduciary duty – see, eg, *Grimaldi* (n 22) 44.

[141] See Bryan, Vann and Thomas (n 89) 176-8 [11.8]-[11.12], 181-2 [11.18]-[11.19]; Langford, *Company Directors' Duties* (n 56) 399-400 [12.55]-[12.59].

[142] See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, 164 [179]. The second limb also requires that the accessory participate 'in a significant way in the commission of the breach of fiduciary duty' – see ibid 164 [180]. For discussion of the requirement of dishonest breach and for other potential limitations see Jamie Glister, 'Knowing Receipt, Knowing Assistance, and Torrens Land' (2022) 96 ALJ 388. Note also that there are differences in the application of the rule in

In circumstances where members are involved in a breach of trust or breach of fiduciary duty by the charitable entity (or by its directors or responsible persons) those members could potentially be liable as having knowingly assisted in the breach under the second limb of *Barnes v Addy* (unless, eg, the members are involved in converting the entity to a for-profit entity and taking the assets, in which case the first limb would also potentially be applicable). This can be illustrated by a practical example. If the directors of a charitable company caused the company's resources or assets to be distributed for purposes (or to beneficiaries) outside of the purposes (or beneficiaries) identified in the charity's objects or caused the charity's resources to be distributed to persons connected with the directors or members and the members voted in favour of such distribution then those members could in certain circumstances be seen to have knowingly assisted in the breach. Just as directors of a trustee company can be liable under the rule in *Barnes v Addy* where they assist in a breach of duty by the trustee company, so can members of charitable entities.[143]

A question arises as to the difference between this approach and the approach taken in *Lehtimäki*, in which (positive) fiduciary duties were said to be applicable to a member of a charitable company limited by guarantee in some circumstances. The differences are as follows. First, under the approach enunciated in this Part, members are subject to restrictions rather than duties. However, these restrictions apply at all times. By contrast, the UK Supreme Court in *Lehtimäki* declined to enunciate when fiduciary duties would apply to members. Second, there is overlap between the fiduciary duties to avoid conflicts and profits (which have been described as disabilities or proscriptions) and the restrictions that apply under the rule in *Barnes v Addy.* However, the latter restrictions are broader in that misapplication of property to third parties would constitute a breach of trust and therefore potentially give rise to liability under *Barnes v Addy* but such misapplication does not always constitute breach of the conflicts and profits rules — it is more clearly a breach of the best interests and/or proper purposes rules.[144] This is significant given that, as outlined above, it is not clear whether these rules are fiduciary in Australia. Even if they are, they are arguably not necessarily applicable to members who are in a different situation to responsible persons (who are more analogous to directors). [145]

It is acknowledged that liability under *Barnes v Addy* requires proof of sufficient knowledge on the part of the third party (in this context the members) and, in the case of the second limb, a dishonest breach by the relevant trustee of fiduciary (in this

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the UK and Australia – for detail see Langford, *Company Directors' Duties* (n 56) 392-400 [12.35]-[12.59].

[143] See, eg, *AS Nominees* (n 109) 522. Finn J said, 'this form of liability is one of no little significance to the directors of a trust company for the very reason that, often enough, it will be their own conduct in exercising the powers of the board which causes their company to commit a breach of trust': at 523.

[144] See Langford, *Company Directors' Duties* (n 56) 299–300 [10.21]–[10.23], 304 [10.36].

[145] In addition, Turner has argued that members should only owe duties where they act collectively rather than individually (Turner (n 71)). By contrast, the restrictions imposed under the rule in *Barnes v Addy* would apply to members whether they acted collectively or not so that members who instituted or sanctioned a misapplication of the entity's property without the collective approval of all members could be liable.

context the charitable company). These additional requirements, and resultant circumscription of liability of members, are arguably more appropriate than the application of duties due to the practical difficulties identified above.

The imposition of restraints on members voting on decisions is well known in Australian law. For example, members of both charitable and for-profit companies must (when they act collectively) use their powers in good faith and for proper purposes. In *Ngurli v McCann*[146] the Court (Willams ACJ, Fullagar and Kitto JJ) observed as follows:

> But the powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purposes. 'The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power' … Voting powers conferred on shareholders … must be used bona fide for the benefit of the company as a whole.

However, these are restrictions on the exercise of shareholders' voting power rather than positive duties. As commented by Worthington:

> One common misconception needs to be laid to rest at the outset. This form of equitable restriction on exercise of power by the general meeting does not impose fiduciary obligations on shareholders. Shareholders are not required to put the interests of the company or other shareholders *ahead* of their own, as a fiduciary would. They may vote in their own interests in every case *except* where to do so would be to use their voting power to achieve ends (personal or otherwise) outside the scope of the power granted to them. This is the essence of the restriction. It is a 'fraud on the power' to exercise the power for purposes 'outside of the scope of the social contract.' The limitation does not demand altruism. It simply denies any efficacy to this form of equitable fraud.[147]

Imposition of restrictions on members by way of the rule in *Barnes v Addy* (or the doctrine of fraud on a power) is arguably more appropriate than direct duties.

VIII Conclusion

This article has argued that the unique nature of charitable entities has flow-on effects for those who govern such entities. Responsible persons of such entities owe fiduciary duties. Although charitable entities are not the same as trustee companies, analogies

[146] (1953) 90 CLR 425, 438 (citations omitted). In addition, restrictions apply in relation to ratification of breach of directors' duties (see, eg, *Edwards v Halliwell* [1950] 2 All ER 1064 (HL) 1067; *Miller v Miller* (1995) 16 ACSR 73, 89) and in relation to altering the constitution (see *Gambotto v WCP Ltd* (1995) 182 CLR 432).

[147] Sarah Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches' (2000) 116 Law Quarterly Review 638, 648 (emphasis in original).

with jurisprudence on trustee companies are instructive. Members are subject to restrictions as a result of the fact that charitable entities hold their assets analogous to trustees. There is significant scope for the fiduciary paradigm to play an important role in articulating central duties applicable to responsible persons (around which the myriad of statutory duties and regulatory guidance requirements to which they are subject could be organised) and restraints on members.

The article also critically analysed the alternative view, adopted in *Lehtimäki*, that members are subject to fiduciary duties and argued that such duties are undesirable and are also inapplicable in Australia due to the different statutory and regulatory framework. The judgment could, in fact, be confined to circumstances in which charity trustees surrender their jurisdiction to the court.