

Empowering and Enabling Charity Governors: Loyalty to Purpose

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1. Introduction

The increasing globalisation of charity law is undoubted, making comparative charity legal analysis particularly valuable.¹ Many jurisdictions face similar challenges in determining the optimal governance and regulatory models for their charitable sector. Indeed, the question of coherence in governance duties confronts a number of jurisdictions and the challenge of regulating conflicts of interest is universal. Complexity in governance requirements poses particular difficulties for volunteer charity governors² without relevant training or qualifications. Empirical research indicates that those in particular need are younger charity governors and those from smaller and religious charities.³

In addition, new social, economic and health challenges face charities in multiple jurisdictions.⁴ A particular challenge faced by charities in a number of jurisdictions is the increase in regulation. A number of jurisdictions have established charity regulators in the last two decades and charity law reviews have occurred in New Zealand, Germany, Northern Ireland, and Australia to name a few. This has been accompanied by an increase in the level of statutory

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¹ See, eg, Anne-Marie Piper, *Charity Law – A Global Guide from Practical Law* (Thomson Reuters, 2016) v.

² The term ‘charity governors’ is used in this paper to describe those persons who are ultimately responsible for leading a charity and deciding how it is run.

³ For details see Rosemary Teele Langford, ‘Restoring Public Trust in Charities: Empirical Findings and Recommendations’ (2023) 46 *University of New South Wales Law Journal* (forthcoming, July); Rosemary Teele Langford and Malcolm Anderson, ‘Passing the Baton: Emerging Leadership Values, Governance and Responsibility in Australian Charities’ (forthcoming, 2023); Rosemary Teele Langford and Malcolm Anderson, ‘Religious Charities in Australia: Implications for Governance under Traditional Values and Outlooks’ (forthcoming, 2023).

⁴ As commented by Harding, ‘Trends in the social, economic and political lives of many communities, and in geopolitics, have created new opportunities – or, viewed from another perspective, new burdens – for the not-for-profit sector, which in turn have demanded new legal and regulatory responses’ – see Matthew Harding, Introduction to the *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 1, 1.

regulation of the charity sphere.⁵ Indeed, Barker has commented that charities legislation and its administration have become increasingly restrictive (rather than enabling), reflecting increasing authoritarianism around the world such that civil society is operating in an increasingly hostile environment.⁶ Particular issues are faced in federations such as Australia, Germany, the United States and Canada.

Although there are differences between charity regulators in different jurisdictions, there are common goals of charitable regulation.⁷ Charities in many jurisdictions are subject to a number of accountability metrics⁸ and accountable to a number of stakeholders in a number of different ways.⁹ This causes difficulties due to the need to balance the interests of a number of stakeholders.¹⁰ In addition, the distinctive defining characteristic of charities (namely, purpose

⁵ See Oonagh Breen, 'Redefining the Measure of Success: A Historical and Comparative Look at Charity Regulation' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 549, 549-50.

⁶ Sue Barker, 'Designing an Optimal Charities Framework' in Rosemary Teele Langford (ed), *Governance and Regulation of Charities: International and Comparative Perspectives* (Edward Elgar, forthcoming, 2023) ch 4.

⁷ As also remarked by Breen, '[u]nderstanding the nature of the problems faced is the first step towards crafting a regulatory solution ... In situations of generic charity regulation "problems", drawing on the wisdom and experience of both ancestral and peer regulators should provide us with richer possibilities to learn from previous successes and failures ...' – see Breen (n 5) 550.

⁸ See Joseph Mead and Michael Pollack, 'Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector' (2016) 77(3) *University of Pittsburgh Law Review* 281.

⁹ A number of commentators have critically analysed different forms of accountability to different stakeholders – see, eg, Richard Tacon, Geoff Walters and Chris Cornforth, 'Accountability in Nonprofit Governance: A Process-Based Study' (2017) 46(4) *Nonprofit and Voluntary Sector Quarterly* 685; Kathleen M Boozang, 'Does an Independent Board Improve Nonprofit Corporate Governance?' (2007) 75(1) *Tennessee Law Review* 83; Noel Hyndman and Danielle McConnville, 'Trust and Accountability in UK Charities: Exploring the Virtuous Circle' (2018) 50(2) *The British Academy Review* 227; Helmut K Anheier, Annelie Beller and Rabea Hass, 'Accountability und Transparenz des Dritten Sektors in Deutschland: Ein Paradox' (2011) 24 *Forschungsjournal Soziale Bewegungen* 96; Debra Morris, 'An Examination of Charity Accountability: To Whom, and How Can We Make It Better?' in Rosemary Teele Langford (ed), *Governance and Regulation of Charities: International and Comparative Perspectives* (Edward Elgar, forthcoming, 2023) ch 1.

¹⁰ As commented by the NCVO, 'For almost all voluntary organisations, there is a need to be accountable to many parties. Many will need to account to statutory enablers, funders, donors, users, volunteers, staff, members and regulators etc. Many will have multiple funders or donors, occasionally with conflicting expectations. Voluntary organisations must therefore recognise and cope with multiple accountability. Those with whom voluntary organisations work must recognise that this requirement of accountability is due to others as well as

(combined with public benefit))¹¹ is common to multiple jurisdictions. And so is the need, in carefully calibrating charity regulatory regimes, to both ensure accountability,¹² on the one hand, and to avoid complexity, on the other.¹³ Excessive compliance burdens (combined with complex regulatory requirements) may discourage volunteers and divert charitable entities from pursuit of charitable purposes. In this respect guidance propounded by charity law commissions plays a core role. For this reason, getting such guidance right is imperative. At the same time, it is challenging given the very diverse nature of charities and of the people who govern charities.

Drawing on insights from a number of jurisdictions (but, in particular, from Australia and England and Wales) this paper presents two key proposals to bring coherence to complex governance frameworks. The first is enunciation of central principles around which other governance duties can be organised. In Commonwealth jurisdictions (but also in jurisdictions with civil law elements such as Scotland, Korea and perhaps also Japan) these correspond to the duties that apply to fiduciaries centred in a purpose-based model of governance. The second is development of appropriate guidance by charity regulators. This paper compares the guidance on conflicts of interest from a number of jurisdictions (namely Australia, England & Wales, Germany, Irish Republic, New Zealand, Scotland, Switzerland and Northern Ireland), outlining the advantages and disadvantages of each. It suggests that detailed guidance combined with so-called ‘Five-Minute Guides’ (as provided in England & Wales) with the

themselves’ – see National Council of Voluntary Organisations, ‘Meeting the Challenge of Change: Voluntary Action into the 21st Century - The Report of the Commission on the Future of the Voluntary Sector’ (1996) 108 [4.5.6]. See also John Chelliah, Martin Boersma and Alice Klettner, ‘Governance Challenges for Not-for-Profit Organisations: Empirical Evidence in Support of a Contingency Approach’ (2016) 12(1) *Contemporary Management Research* 31; Boozang (n 9).

¹¹ As to the relationship between purpose and public benefit see Mary Synge, ‘A No-Benefit Benefit Test: When, if Ever, Should Benefit Be Presumed or Assumed in Charity Law?’ in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 159; Sue Barker, ‘Issues and Problems with the Application of the Public Benefit Test in New Zealand Law’ in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 261; Rosemary Teele Langford, ‘Comment: Purpose and Public Benefit’ in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 279.

¹² In this respect see Department for Communities (Northern Ireland), *Independent Review of Charity Regulation in NI* (Report, January 2022) 89.

¹³ See, eg, Boozang (n 9) 86.

addition of worked examples (such as those provided by the Northern Irish charities regulator) may be a good combination.

These arguments are backed up by empirical research conducted in Australia and in England and Wales. This research is outlined in Appendix 1 and key features are presented throughout the paper.

These are, of course, just two elements of charity frameworks and there is a clear need for other measures such as reduction of unnecessary duplication of regulatory requirements (particularly as concerns reporting), appropriate accounting standards, transparent and clear communication by regulators, the availability of appropriate charity legal structures, and, potentially, provision of a charity governance code.

Some of the ideas presented in this paper have been published in academic journals. Others have not, including the detailed reconciliation of general law and statutory governance duties under five core governance standards and the detailed analysis of guidance on conflicts of interest.

2. Central Principles

As highlighted above, there is increasing complexity in the regulation of charities in a number of jurisdictions. A key way to combat the increasingly complex nature of regulatory frameworks in relation to governance of charities in common law jurisdictions would be for the myriad of governance duties to be reconciled and connected under four to five standards or principles. This would be of particular benefit in the Australian context due to problems of complexity and incoherence. It can be shown that the governance duties and requirements of charity governors can be condensed into five core principles. These principles in turn correspond largely to the central duties of fiduciaries, based in a purpose-based governance model.

Purpose-based governance is a model of governance based on fidelity to purpose. Purpose is at the core of charitable entities – for example it determines charitable status and registration, as well as tax exemptions. The centrality and importance of purpose in the charities sphere cannot be overstated. In particular, purpose plays a fundamental role in the governance of charities. In previous work I have propounded a model of purpose-based governance, which

sees an entity's purposes as central to the governance duties of charity governors – purpose is the guiding requirement, with other requirements supporting this.¹⁴ This model is consistent with, and draws on, the fiduciary model in that fidelity to purpose(s) is a key strand (if not the overarching principle) of the fiduciary paradigm¹⁵ and in that the purposes of the relevant relationship or arrangement are fundamental in determining the best interests of a person or entity.¹⁶ Indeed on one view duties of those who govern charitable entities are owed to the purposes.¹⁷ The core duty of charity governors could be rephrased as a duty to act in good faith in what the charity governor considers would further the charity's purposes, although there are a number of other potential formulations.

Centrality of purpose in governance of charities is not purely theoretical. Empirical research conducted in Australia and in England & Wales confirms the centrality of purpose in practical terms. Surveys completed by 419 charity governors of Australian charities and 369 charity governors in England & Wales tested the frequency with which respondents considered the charity's purposes in decision-making and whether respondents could identify the entity's purpose.¹⁸ There was little doubt that respondents closely connected board deliberations with

¹⁴ Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954. The interests of a charitable entity are equated with its purposes, with the identity and nature of the entity shaping its purposes – see Ian Murray and Rosemary Teele Langford, 'The Best Interests Duty and Corporate Charities' (2021) 15 *Journal of Equity* 92. This purpose-based governance model serves (at least in part) to meet calls for a new theory of not-for-profit governance in light of the fact that the for-profit sphere's principal/agent paradigm is less appropriate in the not-for-profit sphere because not-for-profits have multiple stakeholders rather than owners.

¹⁵ See, eg, Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015) 57(2) *William and Mary Law Review* 513, 561–3; 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) 321; Evan Fox-Decent, 'The Nature of State Legal Authority' (2005) 31(1) *Queen's Law Journal* 259, 268.

¹⁶ See, eg, Lord Nicholls of Birkenhead, 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge' (1996) 70(3) *Australian Law Journal* 205, 11; Langford, 'Purpose-Based Governance' (n 14).

¹⁷ *Lehtimäki v Cooper* [2020] UKSC 33 [50], reported as *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155.

¹⁸ See Rosemary Teele Langford and Malcolm Anderson, 'Restoring Public Trust in Charities: Empirical Findings and Recommendations' (2023) 46(2) *University of New South Wales Law Journal* (forthcoming); Rosemary Teele Langford and Malcolm Anderson, 'Charity Trustees: Governance Duties and Conflicts of Interest' (2022) 28(7) *Trusts and Trustees* 673.

the entity's purpose: to the question whether or not boards considered the entity's purpose in its decision-making, a tiny minority answered 'rarely' (2.1% in Australia, 1.8% in England & Wales) or 'never' (0% in Australia, 0.3% in England & Wales) and the combined percentage reporting 'always' or 'usually' was very high (93.1% in Australia, 95% in England & Wales).¹⁹

This paper builds on this previous enunciation of purpose-based governance²⁰ by articulating more closely, and critically analysing, these five core principles based on purpose and by including empirical insights. In addition to simplifying the duties of charity governors to assist charity governors and their advisors, the articulation of five core principles based on purpose-based loyalty could arguably inspire and motivate charity governors,²¹ as well as provide guiding principles through the maze of accountability requirements.²²

The central principles or standards relate to exercising powers in good faith in the way the charity governor considers would further the charity's purposes, acting for proper purposes, avoiding (or managing) unauthorised conflicts and profits from position, and care and diligence (which incorporates requirements in relation to the accounts and insolvent or fraudulent trading).²³ These could perhaps be summed up as: 'Diligently pursue your purpose in good faith' or 'Pursue your purpose diligently in good faith'.²⁴

¹⁹ A small number of respondents answered 'sometimes' (2.9% in Australia, 4.8% in England & Wales).

²⁰ Note also an ongoing project with Ian Murray and Sue Barker on the content of the core duty of charity governors.

²¹ It has been expressed to me that good governance principles are those that inspire and that make people want to govern well.

²² It is, however, acknowledged that this is not the answer to every accountability conundrum.

²³ There are, of course, other duties, eg the duty to have regard to the Charity Commission's public benefit guidance (see *Charities Act 2011* (UK) s 17); duties relating to accounts, reporting and investment – see Section 2.2 below. There are, in addition, extra duties that apply, eg, to trustees and directors of charitable companies. Overseas examples of distillation of central principles include the Corporate Laws Committee of the Business Law Section of the American Bar Association, Model *Business Corporations Act* and the American Law Institute, *Restatement of the Law, Charitable and Nonprofit Organisations*, although the latter is very detailed.

²⁴ A separate question arises as to who can enforce these standards (or duties). The traditional view is that governance duties are owed to the entity, although this is problematic in the case of unincorporated associations. On another view, the duties are owed to the purpose (see n 17 above). Duties of trustees of charitable trusts are not owed to beneficiaries. Where an entity is incorporated, it is for the entity principally to take action against charity governors in the event of breach of duty. Members may be able to bring an action. Standing and remedies will need to be the subject of a separate paper except to note that the oppression (or unfair prejudice) remedy is

Articulating a core set of fiduciary standards or principles in the charities sphere would bring clarity and coherence and foster loyalty. Moreover, provision of central core principles would establish a common basis for all charity governors regardless of the legal structure of the particular charity and would include religious charities. The relevance of the connection with the fiduciary concept is explored in Section 3 below.

The legislating of one set of duties for all charity governors is not, however recommended given that there are legitimate differences between different types of charitable entities that in turn affect the appropriate nature and intensity of the applicable governance duties. For example, where charities choose an incorporated form (particularly a company) and benefit from the privileges and benefits that flow from that form (such as limited liability and the ability to operate nationwide) then extra duties and regulatory burdens are arguably appropriate.²⁵

These principles could form the basis for development of an online workbook linking charity governors' general law, statutory and soft law governance obligations to the central principles. This should incorporate tables that reconcile all the statutory duties, general law duties (and, in Australia, the ACNC Governance Standards and External Conduct Standards) with optional space to add other layers such as requirements from codes, funding grants, fundraising licences and other regulatory authorities.

This proposal of a central set of principles combined with a more detailed workbook is supported by the empirical research described above and outlined in Appendix 1. The surveys sought to ascertain what would help charity governors to understand and comply with their governance duties. Suggestions included specific measures such as training, a Charity Governance Code (with or without a diagnostic tool),²⁶ a detailed online guide (setting out all

arguably underappreciated as a mechanism for bringing actions in circumstances of breach or potential breach of duty by charity governors – see, eg, Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43(3) *University of New South Wales Law Journal* 977.

²⁵ These central standards could form core duties imposed if there was a referral of power in Australia allowing for a comprehensive federalised regime. Extra duties could be added depending on the charity type – for example trustees and company directors are appropriately subject to additional duties.

²⁶ The Charity Governance Code and diagnostic tool are, of course, already available. However, a considerable segment of respondents to the survey in England and Wales was not even aware of the diagnostic tool.

the governance duties of charity governors, with an optional self-evaluation tool), increased guidance from the charity regulator, access to professional advice, practical examples and scenarios, and mentoring. A high proportion of respondents in each jurisdiction favoured an online guide setting out the governance duties (79.5% of Australian respondents, 71.3% from England and Wales). Also highly welcome were a Charity Governance Code (76.2% of Australian respondents, 73.1% of respondents from England and Wales), a Charity Governance Code combined with diagnostic tool (77% of Australian respondents, 68.2% of respondents from England and Wales) and ‘practical examples and scenarios showing how the duties are applied’ (76% of Australian respondents, 66.3% of those from England and Wales) and training on the governance duties (78.1% Australia, 62.1% England and Wales).

The following discusses the contours of the core principles.

2.1 Good faith and proper purposes principles

Charity governors are subject to general law duties to exercise powers in good faith in the interests of the entity and for proper purposes. These duties apply when charity governors exercise powers.²⁷ The duties are formulated in different ways, partly depending on the type of legal structure adopted by the charity (although general law duties arguably apply to all charity governors).²⁸ For example, directors of charitable companies, as fiduciaries, are currently subject to general law duties to act in good faith in the interests of the company and for proper purposes and statutory duties apply to charity governors based on legal structure.²⁹

²⁷ Thus, for example, the duty to act in good faith in the interests of the entity is not an absolute duty to act in the interests of the entity, dependent on the success of a particular decision or course of action. In the context of directors see, eg, *Re Smith & Fawcett Ltd* [1942] Ch 304, 306.

²⁸ See Section 3 below.

²⁹ In the UK see, eg, *Companies Act 2006* ss 171, 172; *Charities Act 2011* s 221. Note also that the duty of directors of charitable companies under s 173 of the *Companies Act 2006* (UK) to exercise independent judgment can be seen as part of, or appended, to this core duty. In Australia see *Associations Incorporation Act 1991* (ACT) s 66B; *Associations Incorporation Act 1981* (Qld) s 70F; *Associations Incorporation Reform Act 2012* (Vic) s 85; *Associations Incorporation Act 2015* (WA) s 45; *Co-operatives National Law* s 193 (under *Co-operatives (Adoption of National Law) Act 2012* (NSW) Appendix); *Co-operatives National Law (ACT) Act 2017* (ACT); *Co-operatives (Adoption of National Law) Act 2012* (NSW); *Co-operatives National Law Act 2020* (Qld); *Co-operatives National Law (South Australia) Act 2013* (SA); *Co-operatives National Law (Tasmania) Act 2015* (Tas); *Co-operatives National Law Application Act 2013* (Vic); *Co-operatives Act 2009*

Debate surrounds the appropriate formulation of a central principle that could be applied in the charities context, given the importance of pursuing the charity's purposes.³⁰

The core principle applicable to charity governors could be rephrased in terms of acting in good faith in what the governor considers would further the charity's purposes,³¹ although there are a number of other potential formulations, as outlined in the next paragraphs. There is also an issue as to whether a separate requirement of acting for proper purposes (i.e. in addition to furthering the charity's purposes) is necessary. In my view it is because, despite overlap, these requirements are different. A requirement to further the charity's purposes arguably requires charity governors to direct their endeavours towards furthering the charity's purposes (and this requirement would be breached where they are inattentive to these purposes and/or where they pursue other purposes). A requirement to act for proper purposes operates at a lower level in requiring charity governors to exercise powers for the purposes for which they have been conferred.³² I therefore propose that forms of both requirements should apply to charity governors.³³

(WA). For detailed tables summarising the relevant Australian statutory duties see 'Statutory Provisions – Australia – Good Faith, Proper Purposes, Care'

<https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>.

³⁰ Some of the following is based on Rosemary Teele Langford and Miranda Webster, 'The Australian Charitable Incorporated Organisation: A Reform Proposal' (2023) 39 *Company and Securities Law Journal* 347

³¹ Langford, 'Purpose-Based Governance' (n 14) 962.

³² This requirement overlaps with questions of authority - see the Hon Justice James Edelman, 'The Future of the Australian Business Corporation: A Legal Perspective' (Paper presented at Supreme Court of New South Wales Annual Corporate and Commercial Law Conference, 29 October 2019). Note also *Companies Act 2006* (UK) s 171.

³³ Ramsay and Webster note that to further the purposes of the charity is not the same as exercising powers for a purpose – see Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45(2) *Australian Business Law Review* 127. Note also the submission that a charity governor could further the purposes of a charity while exercising a power improperly – see Queensland Law Society, *Review of the Australian Charities and Not-for-profits Commission Act and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (28 February 2018) 14. Ramsay and Webster also note that it is possible that 'to act' (in the context of ACNC Governance Standard 5, outlined below) may be broader than 'to exercise powers and discharge their duties.' In this respect, although ACNC Governance Standard 5 is not expressed in terms of the exercise of powers, it would arguably be interpreted in that way due to statements in the explanatory material and by Treasury. For example, the Explanatory Statement to the

A number of models are available for consideration in this respect. The first are the general law duties to act in good faith in the interests of the company and for proper purposes. The second is the indirect duty in ACNC Governance Standard 5 to act in good faith in the charity's best interests, and to further the purposes of the charity.³⁴ The third is the duty that applies to charity trustees of CIOs who 'must exercise the powers and perform the functions that the charity trustee has in that capacity in the way that the charity trustee decides, in good faith, would be most likely to further the purposes of the CIO.'³⁵ This model replaces the interests of the entity with the entity's purposes. Sue Barker has advocated a duty to act in good faith to further the entity's stated charitable purposes in accordance with its rules.³⁶ Likewise s 172(2) of the *Companies Act 2006* (UK) provides:

Where and to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.³⁷

Australian Charities and Not-for-profits Commission Regulation 2013 (No1) (Cth) 11 states that the duties in Governance Standard 5 'have been derived from the common law and the *Corporations Act* and they have well established meanings. Consequently, it is intended that the meaning of these duties will be interpreted with reference to the existing common law and relevant legislation.' The Treasury consultation document stated that the duties in Governance Standard 5 were intended to 'be substantially the same as the duties of directors under the *Corporations Act*' – see Australian Government, Treasury, *Development of Governance Standards* (Consultation Paper, December 2012) 21.

³⁴ ACNC Governance Standard 5 requires registered charities to take reasonable steps to ensure that its responsible persons are subject to, and comply with a duty to act in good faith in the registered entity's best interests, and to further the purposes of the registered entity – see *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.25(2)(b).

³⁵ *Charities Act 2011* (UK) s 221(1).

³⁶ Sue Barker, *Focus on Purpose – What Does a World-Leading Framework of Charities Law Look Like?* (Report prepared for the New Zealand Law Foundation Te Manatū a Ture o Aotearoa for the 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao) (22 February 2022) 20.

³⁷ Section 172(1) of the *Companies Act 2006* (UK) requires directors to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and in so doing have regard to a number of factors.

However, charity trustees of CIOs are not subject to an additional duty to act for proper purposes; whereas directors of UK companies are.³⁸

On the other hand, in Scotland a charity trustee of a SCIO must, in exercising functions in that capacity, act in the interests of the charity and must, in particular, seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes.³⁹ This model separates requirements relating to the interests of the charity and furthering the charity's purposes, and retains a role for both. This separation can also be seen in ACNC Governance Standard 5. There are, in addition, other formulations.

I propose that a charity's interests are largely tied up with its purposes. There is, however, potentially a residual role for the interests of the charity, particularly given that the nature and identity of the charity shapes the pursuit of its purposes.⁴⁰ It is also important to note that the duty to act in good faith in the interests of the entity (at least when applied to directors) incorporates a number of requirements, such as considering the interests of the entity, considering the interests of creditors, focusing on the interests of the particular entity (rather than the interests of the group) where the entity is part of a group, avoiding conflicts of interest and benefits to third parties.⁴¹ Although these requirements have been applied as part of the duty to act for proper purposes under Australian case law, these requirements are most clearly imposed under the duty to act in good faith in the interests of the entity.⁴² These requirements could potentially be encompassed under the 'good faith' element of a requirement to act in good faith in what the charity governor considers would further the charity's purposes.

The key alternatives therefore include:

³⁸ See *ibid* s 171.

³⁹ *Charities and Trustee Investment (Scotland) Act 2005* (Scot) s 66(1)(a).

⁴⁰ For example, the fact that a charity had a particular cultural or religious character – and pursues its purposes in accordance with that particular culture or religion – would arguably shape the charity's purposes. As noted by Murray and Langford (n 14) 114, 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.'

⁴¹ See, eg, Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press, 2014) 61–74 [4.3], 76–83 [4.6] ('*Directors' Directors*').

⁴² Langford, *Directors' Duties* (n 41) 118–125 [7.3]–[7.4].

- (a) A duty to act in good faith in what the charity governor considers would further the charity's purposes.⁴³
- (b) A duty to act in good faith to further the entity's stated charitable purposes in accordance with its rules.⁴⁴
- (c) A duty to act in good faith in the registered charity's best interests, and to further the purposes of the registered charity.⁴⁵
- (d) A duty to exercise the powers and perform the functions that the charity governor has in that capacity in the way that the charity governor decides, in good faith, would be most likely to further the purposes of the charity.⁴⁶
- (e) A duty to act in the way the charity governor considers, in good faith, would be most likely to achieve the purposes and in so doing have regard to a number of factors.
- (f) A duty, in exercising functions in capacity as officer, to act in the interests of the charity and, in particular, seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes.⁴⁷

Feedback to-date indicates an overwhelming preference for a requirement phrased in terms of purposes rather than interests.

However, a requirement to act for proper purposes should also be included. Although the duty to act in good faith in the interests of the entity subsumes many aspects of the duty to act for proper purposes, the duty to act for proper purposes does have a small distinct sphere of operation in situations in which a charity governor believes action is in the best interests of the entity but the purpose is nevertheless found to be improper.⁴⁸ Retention of the requirement to

⁴³ Langford, 'Purpose-Based Governance' (n 14).

⁴⁴ Sue Barker, *Focus on Purpose – What Does a World-Leading Framework of Charities Law Look Like?*

(Report prepared for the New Zealand Law Foundation Te Manatū a Ture o Aotearoa for the 2019 International Research Fellowship Te Karahipi Rangahau ā Taiao) (22 February 2022) 20.

⁴⁵ ACNC Governance Standard 5 – see *ACNC Regulation 2013* (Cth) reg 45.25(2)(b).

⁴⁶ *Charities Act 2011* (UK) s 221(1).

⁴⁷ *Charities and Trustee Investment (Scotland) Act 2005* (Scot) s 66(1)(a).

⁴⁸ Langford, *Directors' Duties* (n 41) 124 [7.4.4].

act for proper purposes is all the more important in relation to charitable entities given that pursuit of purposes is at the forefront of a charity's endeavours.

2.2 Care and diligence

Charity governors are also generally subject to a duty of care, skill and diligence, whether via general law, statute and/or contract.⁴⁹ These duties of care are moulded to the context. For example, it is well recognised that the duty of care and diligence as applied to company directors takes account of the company's circumstances and the director's position and responsibilities.⁵⁰ This would include the fact that the company is charitable in nature and that (if relevant) the director is acting in a volunteer capacity, although there are minimum standards. This latitude shown to directors of not-for-profit and charitable companies can be seen in other contexts, such as in determining whether charitable company directors have acted honestly and ought reasonably to be excused under Australian corporations legislation⁵¹ and in the context of disqualification.⁵² Falk J, in the recent UK case of *Re Keeping Kids Co* (in the context of disqualification of directors of a charitable company (referred to as 'charity trustees')), noted as follows:

... courts have long taken a benevolent approach to charity trustees in circumstances where (as here) no dishonesty or wilful conduct is alleged. There are good reasons of public policy for this approach. It reflects the real risk that any other approach would deter individuals who would otherwise be well suited to becoming charity trustees from doing so. It also reflects the court's recognition of the public service that charity trustees provides.⁵³

⁴⁹ For detailed tables summarising the relevant Australian statutory duties see 'Statutory Provisions – Australia – Good Faith, Proper Purposes, Care'

<https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>.

⁵⁰ See, eg, *Corporations Act 2001* (Cth) s 180; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [100] (Brereton J); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 330 [165] (Middleton J). Note that the duties of care in each of s 174 of the *Companies Act 2006* (UK), s 1 of the *Trustee Act 2000* (UK) and s 221(2) of the *Charities Act 2011* (UK) (as concerns charity trustees of CIOs) take account of the circumstances. In this respect, although the indirect duty in ACNC Governance Standard 5 does not mention these factors it would arguably be interpreted in this way due to statements in the relevant explanatory statement and consultation paper – see n 33 above.

⁵¹ See *Commonwealth Bank v Friedrich* (1991) 5 ACSR 115, 197-8.

⁵² See *Re Keeping Kids Co* [2021] EWHC 175 (Ch), [852].

⁵³ *Ibid* [848].

Her Honour also said

The fact that the Trustees were non-executive directors is a relevant part of the factual context ... Similarly, in determining the nature and attendant responsibilities of that role the fact that the Trustees were volunteers should not be ignored ... In principle, the fact that a director is an unpaid volunteer, in circumstances where there is a paid executive team with responsibility for day to day management, must affect the part that the director could reasonably be expected to play.⁵⁴

Linked with, or included as subsets of, the duty of care are accounting and other financial requirements,⁵⁵ as well as duties and requirements to avoid insolvent or fraudulent trading. In particular, charity governors need to give diligent attention to the financial affairs of the entity and make sure the entity's financial affairs are managed in a responsible way (requiring charity governors to understand the entity's financial accounts and ask questions if they do not or have concerns about any aspect). A principle requiring care and diligence could therefore be the basis around which such other duties are organised. Alternatively, accounting and reporting and financial requirements could form a separate core duty.⁵⁶ In this sense the framing of the core duties allows flexibility.

2.3 Avoiding unauthorised conflicts and profits

The final central principles relate to avoiding unauthorised conflicts and profits, although feedback to-date is that it is likely to be preferable to phrase the duty to avoid conflicts in terms of managing conflicts (or in terms of 'avoiding or managing' conflicts). Another factor, which came out in the comments contributed by respondents involved in the Australian empirical research, is the need for a realistic approach to conflicts of interest. In this respect, one

⁵⁴ Ibid [863].

⁵⁵ In terms of accounting and reporting duties in the UK see, eg, *Charities Act 2011* (UK) ss 130-134, 137, 138, 162, 163, 166, 169, 171-2; *Companies Act 2006* (UK) ss 286, 394. Note that duties in relation to investment are imposed on trustees under the *Trustee Act*. Additional duties apply to trustees (eg specific investment duties, duty to comply with the terms of the trust and duty in relation to cy-pres).

⁵⁶ There is no doubt that financial (and other) reporting play a central role in accountability, although the appropriate form, content and publicity of such reporting are thorny issues. As to the centrality of the accounts see Phil Saj and Chee Chong, 'The Application of the Reporting Entity Concept by Australian Charities' (2020) 30 *Australian Accounting Review* 283; Jean Warburton, 'Charities, Members, Accountability and Control' [1997] *Conveyancer and Property Lawyer* 106, 106.

possibility would be to adopt an approach based on pursuit of a conflict, as is reflected in some Australian cases in the corporate law context. This approach is now outlined.⁵⁷

The orthodox test for whether there is a breach of the duty to avoid conflicts of interest is whether there is a real sensible possibility of conflict.⁵⁸ However, some judges have favoured a test based on pursuit of a conflict. The concept of pursuit can be traced to the judgment of Deane J in *Chan v Zacharia*, who said:

The equitable principle governing liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement ‘in which he has, or can have, a personal interest conflicting ... with the interests of those whom he is bound to protect’ ... or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed.⁵⁹

It is, however, difficult to enunciate precisely what pursuit entails. In *Bell Group Ltd (in liq) v Westpac Banking Corporations (No 9)* Owen J said:

It is the promotion of the personal interest that equity finds abhorrent ... Generally speaking, liability arises not from the mere existence of the conflict but from the pursuit of personal interest by, for example, actually entering into a transaction in which the relevant conflict exists or the actual receipt of personal benefit in circumstances of such conflict ... The mischief is not so much being in a position of conflict but rather in pursuing that conflict.⁶⁰

In *Re Colorado Products Pty Ltd (in prov liq)* Black J stated that ‘the rule against conflict of interest prohibits a fiduciary acting in a manner inconsistent with that rule, rather than simply occupying a position of conflict or potential conflict.’⁶¹ The concept of pursuit therefore appears to require positive action in the face of a conflict. This can be seen in the references to

⁵⁷ The following is based on Rosemary Teele Langford and Ian M Ramsay, ‘Conflicted Directors: What Is Required to Avoid a Breach of Duty?’ (2014) 8 *Journal of Equity* 108 and Rosemary Teele Langford, ‘Pursuit Revisited’ (2020) 13 *Journal of Equity* 267.

⁵⁸ See *Boardman v Phipps* [1967] 2 AC 46 (HL) 124.

⁵⁹ *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J). See also *Bell Group (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 [4504]; *Gemstone Corporation of Australia Ltd v Grasso* (1994) 62 SASR 239, 255; *Fitzsimmons v The Queen* (1997) 23 ACSR 355, 357-9; *Streeter v Western Areas Exploration Pty Ltd (No2)* (2011) 278 ALR 291 [69]; cf *Agricultural Land Management Ltd v Jackson (No2)* (2014) 48 WAR 1 [266]-[267].

⁶⁰ *Bell Group (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 [4503]-[4504].

⁶¹ (2014) 101 ACSR 233 [360].

‘actually entering into a transaction, or engagement’ and ‘actual receipt of personal benefit or gain’.⁶² Examples include a fiduciary proceeding to enter into a transaction where that fiduciary has a conflict or making a personal gain in circumstances involving such a conflict. The concept does, however, lack precision. Perhaps the clearest that can be said is that pursuit is equated with taking advantage of a conflict. Although in other work I have argued against adoption of the concept of pursuit (as opposed to real sensible possibility of conflict) as the baseline standard for application of the duty to avoid conflicts,⁶³ it would be possible to employ this less stringent standard in the application of the conflicts duty to charity governors.

Statutory conflicts duties are phrased in a number of ways.⁶⁴ UK statutes (such as the *Companies Act 2006* (UK) and the *Charities Act 2011* (UK) as concerns CIOs) concerning charitable entities tend to combine duties arising from the conflicts and profits duties, also providing for authorisation (sometimes via disclosure and sometimes via authorisation).⁶⁵ These statutory provisions also include the interests of third parties. Grounding applicable principles in the fiduciary duties to avoid conflicts and profits (with the inclusion of third party interests and benefits) is therefore appropriate.

In Australia the relevant statutory duties can be grouped into four sub-categories⁶⁶ relating to (1) material personal interest;⁶⁷ (2) being directly or indirectly interested;⁶⁸ (3) holding an office or having an interest in property whereby, whether directly or indirectly, duties or interests might be created that could conflict with the director’s duties or interests as a

⁶² *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J).

⁶³ See Rosemary Teele Langford and Ian M Ramsay, ‘Conflicted Directors: What Is Required to Avoid a Breach of Duty?’ (2014) 8 *Journal of Equity* 108.

⁶⁴ See ‘Statutory Provisions – Australia – Conflicts and Profits’

<https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>.

⁶⁵ See *Companies Act 2006* (UK) ss 175, 176, 177; *Charities Act 2011* (UK) s 222; Charitable Incorporated Organisations (General) Regulations 2012 (UK) regs 34, 35.

⁶⁶ For outline and analysis 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.

⁶⁷ See *Associations Incorporation Reform Act 2012* (Vic) s 80(1); *Associations Incorporation Act 1991* (ACT) s 65; *Associations Incorporation Act 2015* (WA) s 42; *Corporations Act* s 191.

⁶⁸ See *Co-operatives National Law* s 208; *Cooperatives Act 1997* (Qld) s 227; *Co-operatives Act 2009* (WA) s 220(1); *Associations Incorporation 2009* (NSW) s 31.

director;⁶⁹ and (4) direct or indirect pecuniary interest in a contract or proposed contract with the association.⁷⁰ These duties can be reconciled under the requirement that charity governors manage situations in which there is a real sensible possibility of conflict in the Australian context.⁷¹

Empirical research indicates that charity governors understand the concept of conflicts of interest and give that concept a broad reach in terms of third party and non-pecuniary interests, but do not necessarily manage conflicts well. In this respect it should also be noted that conflicts of interest are inevitable and not necessarily a sign of bad governance – rather, it is appropriate management of such conflicts that is important. This in turn aids in preventing more serious misconduct in the form of misuse and misappropriation of charitable assets. For this reason, framing the core principle in terms of managing conflicts (rather than avoiding conflicts) is sensible. Appropriate guidance plays a key role in this respect, as outlined in Section 4 below.

The Australian statutory provisions related to the fiduciary duty to avoid profits from position are narrower in the sense that they tend to focus on misuse of position or on misuse of information from position rather than profits from position more generally.⁷² Some of these provisions require proof of impropriety and proof that the relevant charity governor had a

⁶⁹ See Co-operatives National Law s 208(5); *Co-operatives Act 1997* (Qld) s 227(5); *Co-operatives Act 2009* (WA) s 220(5).

⁷⁰ *Associations Act 2003* (NT) s 31; *Associations Incorporation Act 1985* (SA) s 31. For outline and analysis see Langford, 'Conflicts and Coherence' (n 66). Note also that the concept of perceived conflict (which is used in the context of ACNC Governance Standard 5, which requires charity governors to disclose perceived or actual material conflicts of interest) is problematic – see Nicholas Aroney and Matthew Turnour, 'Charities and the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446. When assessed objectively the concept of perceived material conflict is equivalent to the standard of real sensible possibility of conflict. There is, however, merit in suggestions that the word 'perceived' be removed from Governance Standard 5.

⁷¹ In this respect there are proposals that ACNC Governance Standard 5 be amended to require management (rather than just disclosure) of conflicts - see, eg, Australian Charities and Not-for-profits Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (19 January 2018) 64; Queensland Law Society, Submission to Treasury, *Review of the Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 12.

⁷² An example is s 182 of the *Corporations Act*, which provides that a director or other officer or employee of a corporation must not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation.

purpose of gaining an advantage for themselves or someone else or causing detriment to the entity in order to found a breach.⁷³ However, these statutory provisions are wider than the fiduciary duty to avoid profits from position in that they more clearly encompass advantages and benefits to third parties.⁷⁴ The statutory provisions also include detriment to the entity and misuse of information from position.

I propose that the central principle of charity governors be expressed more broadly in terms of unauthorised profits or benefits (rather than in terms of improper use of (or misuse of) position or information). The principle should extend to profits/benefits to third parties (given that a number of statutory sections so extend even if the fiduciary duties do not clearly so extend) as well as to detriment to the entity and misuse of information (although note that these aspects would be covered by the principle of acting in good faith in what the charity governor considers would further the charity's purposes). In Australia the core duty could be phrased in terms of avoiding unauthorised profits from, or misuse of, position (including information from position).⁷⁵ It is also relevant to note the possibility of authorisation (which for some sections just requires disclosure rather than disclosure and authorisation).

⁷³ Cf the indirect duty in Governance Standard 5, which, as noted by the Queensland Law Society, is not so limited and could apply where the misuse causes a detriment to people/entities other than the charity – see Queensland Law Society, *Review of the Australian Charities and Not-for-profits Commission Act and the Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (28 February 2018) 15.

⁷⁴ The statutory provisions explicitly include advantages to third parties (as well as detriment to the entity). By contrast, the fiduciary duty to avoid profits from position does not clearly include profits to third parties. In *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 a chairman who arranged for a friend and two companies (in which the chair had an indirect interest) to take up shares in the company was not liable for breach of fiduciary duty when the shares were sold at a profit, in contrast to the other directors who took up shares themselves. In other cases relating to profits made by corporate vehicles associated with directors courts have been prepared to impose liability – see, eg, *CMS Dolphin Ltd v Simonet* [2001] EWHC Civ 415; [2002] BCC 600 (Ch); *Cook v Deeks* [1916] 1 AC 554; *Grimaldi v Chameleion Mining NL (No2)* (2012) 200 FCR 296; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).

⁷⁵ It would be preferable to have one or other of these parts of the duty (rather than both) but this is arguably not possible. It is not possible to adopt only the fiduciary duty because it does not cover detriment to the entity and less clearly covers third parties. It is also not possible to adopt only misuse of position as the overarching duty because profits from position (in the fiduciary sense) can occur without misuse, particularly given that in some contexts misuse of position has required proof of purpose.

Related party transactions (or transactions with connected persons) are a form of conflict of interest and/or profit from position that need to be particularly carefully managed. However, at the same time, it is important to guard against overreach. Regulations recently introduced in Australia to require reporting of related party transactions based on complex accounting standards more appropriate for business contexts are causing confusion and concern amongst advisers and arguably impose a disproportionately high compliance burden on charities.⁷⁶

2.4 Central duties propounded by charities commissions

Charities commissions do, of course, propound statements of key duties. For example, the Charity Commission of England and Wales outlines six key duties⁷⁷ and the ACNC propounds seven indirect duties as part of Governance Standard 5.⁷⁸ The core principles proposed above

⁷⁶ As to the new requirements for medium and large registered charities, see *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 60.30(2) (as amended by *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021* (Cth) sch 2 item 1), s 305.5(1) (as inserted by *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021* (Cth) sch 2 item 4). As to small charities and basic religious charities, see 'Related Party Transactions', *Australian Charities and Not-for-profits Commission* (Web Page) <https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/related-party-transactions>.

⁷⁷ These are: 1. The charity trustee must ensure that the charity is carrying out its purposes for the public benefit (which corresponds to the first principle outlined in Section 2.3 above); 2. The charity trustee must comply with the charity's governing document and the law (which is connected with the second and third principles outlined in Section 2.3 above); 3. The charity trustee must act in the charity's best interests (which corresponds to the first principle outlined in Section 2.3 above, noting that purpose is arguably a more appropriate focus); 4. The charity trustee must manage the charity's resources responsibly (connected with the duty of care); 5. The charity trustee must act with reasonable care and skill (again connected with the duty of care); and 6. The charity trustee must ensure that the charity is accountable (again connected with the duty of care) - see Charity Commission for England and Wales, *The Essential Trustee: What You need to Know, What You Need to Do* (2018).

⁷⁸ Governance Standard 5, contained in reg 45.25(2) of the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth), requires registered charities to take reasonable steps to ensure that their charity governors are subject to, and comply with, the following duties: (a) to exercise the charity governor's powers and discharge the charity governor's duties with the degree of care and diligence that a reasonable individual would exercise if they were a charitable governor of the registered charity (see the third principle in Section 2.3 above); to act in good faith in the registered charity's best interests and to further the purposes of the registered charity (see the first principle in Section 2.3 above); (c) not to misuse the charity governor's position (see the final principle in Section 2.3 above); not to misuse information obtained in the performance of the charity governor's duties as a charity governor of the registered charity (see the final principle in Section 2.3 above); (e)

could instead be organised around these duties propounded by the charities commissions, although these central duties propounded by each of the CCEW and ACNC are arguably not reflective enough of the actual legal duties applicable to charity governors.⁷⁹ The advantage of the central principles outlined above is that they encompass the relevant general law and statutory duties and (in the case of Australia) the indirect duties imposed via Governance Standard 5.

3. Corresponding to duties of fiduciaries

It was stated in Section 2 above that the five core duties *correspond* to the duties applied to fiduciaries rather than that these five duties are *fiduciary in nature*. The significance of this grounding in equity – and connection with the fiduciary paradigm – is now explored.⁸⁰ It will also be shown that the relationship between charity governors and charities should be characterised as fiduciary in nature. The significance of this characterisation is also explored. In a number of jurisdictions it is accepted that those who govern charitable entities are in a fiduciary position and owe fiduciary duties. In Australia this is more contested due to narrower theories of the fiduciary principle. Although the relationship between charity governor and charity is fiduciary in nature, this does not mean that each of the duties is fiduciary in nature.

As stated above, purpose-based governance – and these five central principles (or standards) – are consistent with the fiduciary principle – indeed fidelity to purpose has the potential to bring a new unity to fiduciary law.⁸¹ It has been shown elsewhere that the relationship between

to disclose perceived or actual material conflicts of interest of the charity governor (see the final principle in Section 2.3 above); (f) to ensure that the registered charity's financial affairs are managed in a responsible manner (see the third principle in Section 2.3 above); and (g) not to allow the registered charity to operate while insolvent (see the third principle in Section 2.3 above). The differences between the contours of these indirect principles and the central duties propounded in Section 2.3 above are identified in footnotes to Section 2.3.

⁷⁹ As to the CCEW duties see Debra Morris, 'The Charity Commission for England and Wales: A Fine Example of Another Fine Mess' (2016) 91 *Chicago-Kent Law Review* 965, 989. As to the ACNC duties see Ian Ramsay and Miranda Webster, 'Registered Charities and Governance Standard 5: An Evaluation' (2017) 45 *Australian Business Law Review* 127.

⁸⁰ This Section is based on Rosemary Teele Langford, 'Charities and the Fiduciary Paradigm' (2022) 16 *Journal of Equity* 146.

⁸¹ See, eg, Evan Fox-Decent, 'The Nature of State Legal Authority' (2005) 31(2) *Queen's Law Journal* 259, 268; Paul B Miller, 'Corporations' in Andrew S Gold et al (eds), *The Oxford Handbook of the New Private Law* (OUP, 2021).

charity governor and charity is fiduciary in nature.⁸² There are a number of reasons for this.⁸³ First, a fiduciary relationship can be established on the facts in that charity governors 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 charitable entity.⁸⁴ Second, although charity governors of non-charitable entities do not necessarily owe fiduciary duties, charity governors of charitable entities do owe fiduciary duties due to the unique nature of charitable entities. This has consequential effects for the duties of such charity governors. This uniqueness stems from the altruistic⁸⁵ and other-regarding⁸⁶ nature of charities and from the fact that charitable entities hold their assets analogous to trustees.⁸⁷ This does not mean,

⁸² See Langford, 'Charities and the Fiduciary Paradigm' (n 80); see also 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; 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 Redcliffe Group Training Scheme Inc v Group Training Association Queensland & Northern Territory Inc* [2015] Qd R 542 [38]. In some jurisdictions this analysis is not necessary because it is clearly accepted that the relationship is fiduciary. Charity governors such as directors of charitable companies, directors of trustee companies and trustees are, of course, status-based fiduciaries.

⁸³ These traditional methods of determining fiduciary status — and the relevance of fiduciary status itself — have more recently been challenged. 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. Fiduciary loyalty applies when there are particular terms, being terms requiring a power to be held for or on behalf of another — see Jessica Hudson, 'Justifying Equity's Control of Power: Fiduciary Status and Beyond' in Paul Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume II* (Oxford University Press 2022). In this respect it is clear that this is the case for responsible persons of charities, who hold powers for charitable purposes.

⁸⁴ *Hospital Products Ltd v United States Surgical Corporation* (1956) 156 CLR 41, 96-7 (Mason J); *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* [2010] HCA 19, (2010) 241 CLR 1 [87].

⁸⁵ 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.

⁸⁶ See Ian Murray, Submission to the Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018).

⁸⁷ See, eg, *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193; *Lehtimäki v Cooper* [2020] UKSC 33 reported as *Children's Investment Fund Foundation (UK) v Attorney-General* [2022] AC 155.

however, that charity governors are trustees per se (thus owing all the duties owed by trustees). Rather, it is the entity that is in a trustee-like position and subject to trust-like duties or fiduciary duties. The duties of the charity governors are, however, coloured or shaped by the fact that the body is in a trustee-like position in relation to its assets and funds.⁸⁸ 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 charity governors. 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.⁸⁹

This characterisation has particular significance in relationships that are the subject of less regulation (in Australia at least) such as in religious contexts⁹⁰ and where the charity takes the form of an unincorporated association.⁹¹ Empirical research establishes that charity governors understand the concept of conflicts of interest, which forms a core part of the fiduciary paradigm. Articulating a core set of fiduciary-based duties in the charities sphere would bring clarity and coherence and foster loyalty, as well as accountability.

As mentioned above, 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 charity governors. Charitable entities are established to pursue certain

⁸⁸ 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.

⁸⁹ 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); James J Fishman, 'Improving Charitable Accountability' (2003) 62(2) *Maryland Law Review* 218.

⁹⁰ For discussion of the scope of fiduciary principles in the context of canon law see Richard H Helmholz, 'Fiduciary Principles in the Canon Law' in Evan J Criddle, Paul B Miller and Robert H Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019).

⁹¹ In this respect see *Trustees of the Celestial Church of Christ, Edwards Street Parish (a charity) v Lawson* [2017] EWHC 97 (Ch); *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 707. Note that seeing the duties as owed to the purpose removes some of the difficulties in the context of unincorporated associations.

articulated charitable purposes (rather than to act in the interests of people or entities) and the fiduciary (and other) duties of charity governors emanate from, and support, those purposes.

However, the fiduciary characterisation of the relationship does not mean that each of the central duties is recognised as fiduciary in nature. For a number of years it has been recognised that fiduciary duties vary⁹² and that not all duties imposed on fiduciaries are fiduciary in nature.⁹³ The fiduciary characterisation of the duties to avoid conflicts and profits is uncontested. It is reasonably settled that the duty of care is not fiduciary in nature.⁹⁴ It would, however, be unusual for a fiduciary not to be subject to a duty of care and many charity governors will be subject to statutory or contractual duties of care.⁹⁵

Particular debate surrounds the fiduciary characterisation of the duties to act in good faith in the interests of the entity and for proper purposes. In the UK and in Australian company law jurisprudence these duties are characterised as fiduciary in the context of the relationship between director and company, but their fiduciary classification is doubted in wider Australian equity jurisprudence. The better view is arguably that these duties, when applied to directors at least, are properly characterised as fiduciary in nature.⁹⁶ At the very least such duties arise in equity. For example, Nolan and Conaglen argue that, although good faith is not a peculiarly

⁹² See, eg, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 206; *Re Coomber: Coomber v Coomber* [1911] 1 Ch 723 (CA) 728-9; *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41, 69 (Gibbs CJ); *Pilmer* p 198 [77] (McHugh, Gummow and Callinan JJ).

⁹³ See, eg, *Bristol and West Building Society v Mothew* [1998] Ch 1, 16; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237-8.

⁹⁴ See *Bristol and West Building Society v Mothew* [1998] Ch 1, 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. Some scholars and judges assert that the duty of care is fiduciary – see, eg, *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 (*Bell Group (No 3)*); *BCI Finances Pty Limited (in liq) v Binetter* (2018) 132 ACSR 1 [596]–[598]. As outlined by Conaglen, courts in the past have used the existence of a fiduciary relationship as a justification for the recognition of duties of care (citing *Woods v Martins Bank* [1959] 1 QB 55 and *Nocton v Ashburton* [1914] AC 932) – see Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 37.

⁹⁵ There is also overlap between the best interests duty and the duty of care – see Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press 2014) 159 [9.7.3]).

⁹⁶ For critical analysis see Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) ch 2.

fiduciary duty (in that it is not unique to fiduciaries), it is a ‘core fiduciary duty of a fiduciary and demands a specific and unique form of behaviour from fiduciaries as opposed to others’⁹⁷ and that fiduciaries are always subject to the requirement of good faith.⁹⁸ For this reason fiduciaries are undoubtedly subject to a duty of good faith – whether fiduciary or equitable in nature. It is my personal view that fidelity to purposes or interests (in the form of a requirement to act in good faith to further the purposes of the entity or in the interests of the entity) is fundamental to loyalty and therefore properly classified as fiduciary in nature. As outlined in Section 2 above, there is, however, a notable difference in the contours of this requirement as applied to charity governors in the charities sphere due to the paramountcy of purpose rather than interests.

4. Guidance

Guidance and resources provided by charity commissions and regulators play a key part in empowering and enabling good governance, particularly for those without legal or accounting advice. The contours of such guidance, as well as dissemination and promotion of such guidance, are therefore very important. This Section undertakes a comparison of the guidance on conflicts of interest provided by charity commissions in a number of jurisdictions (namely England and Wales, Australia, Germany, Irish Republic, New Zealand, Scotland, Switzerland and Northern Ireland), highlighting different approaches.⁹⁹ For example, the Charity Commission for England and Wales (CCEW) guidance on conflicts of interest¹⁰⁰ is comprehensive and prescriptive, providing detail on different types of conflict, severity of conflicts and conflicts management techniques (which vary according to the type of

⁹⁷ 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).

⁹⁸ Ibid 330. ‘To say that a person may not act in circumstances where some interest or other obligation conflicts or may conflict, with his duties, and yet to allow him to act in bad faith simply makes no sense.’

⁹⁹ The focus of this Section is conflicts of interest (which was also a core facet of my empirical research) due to the centrality of conflicts in governance of charities, the presence of conflicts regulation in general law, statutory and regulatory guidance and the problems caused by conflicts of interest in practice.

¹⁰⁰ See Charity Commission England and Wales, *Conflicts of Interest: A Guide for Charity Trustees (CC29)* (1 May 2014) (‘CC29’). For detailed outline see Rosemary Teele Langford and Malcolm Anderson, ‘Charity Trustees: Governance Duties and Conflicts of Interest’ (2022) 28(7) *Trusts and Trustees* 673.

conflict).¹⁰¹ In addition to the detailed guidance, the CCEW provides a section on conflicts of interest in a document known as *The Essential Trustee*,¹⁰² and, more recently, a Five Minute Guide on conflicts¹⁰³ and short podcast.¹⁰⁴ A disadvantage of this approach is that it is difficult to follow. Despite a helpful flowchart, it is difficult to connect the various concepts and guidance without constructing flowcharts to connect these parts together. Guidance on what to do in particular scenarios is separated from the scenarios themselves. However, the introduction of Five Minute Guides and podcasts is arguably meritorious.

By contrast, the guidance on conflicts provided by the Australian Charities and Not-for-profits Commission¹⁰⁵ adopts a simpler framework, which is easier to follow and therefore beneficial in terms of charity governors obtaining an overall understanding of their obligations concerning conflicts. In addition, the ACNC guidance contains more examples. An arguable disadvantage of the ACNC guidance is that it is less definite about what should be done where a responsible

¹⁰¹ One of the issues that has arisen in relation to obligations relating to conflicts of interest in a number of settings (at general law, under statutory provisions) is the extent of the concept of a conflict of interest. Particular questions surround whether this concept includes non-pecuniary or third party interests and religious, political or personal views. It has been submitted by Smith that there is a need for a de minimis limit – see Lionel Smith, ‘Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance’ in Paul B Miller and Matthew Harding (eds), *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, 2020). The approach taken by the CCEW Guide is arguably appropriate. In including these sorts of interests or views as conflicts of loyalty the guide alerts trustees to the need to make sure that these interests or views do not impact a trustee’s ability to make decisions in the interests of the charity. At the same time because the guide specifies different (and more relaxed) processes where a conflict is low risk and does not involve trustee benefit, these interests and views require less in terms of management. This graduated approach allows interests that may not traditionally have been viewed as conflicts of interest to be managed but does not impose the same (sometimes onerous) requirements as conflicts that are more squarely within the concept of conflicts of interest, such as pecuniary interests – see CC29 (n 100).

¹⁰² Charity Commission for England and Wales, *The Essential Trustee: What You Need to Know, What You Need to Do* (3 May 2018) 17-19 [6.3], [6.4].

¹⁰³ Charity Commission for England and Wales, *Five Minute Guide: Managing Conflicts of Interest in a Charity* (2 November 2020).

¹⁰⁴ Note also the CCEW introductory video on conflicts of interest, available at <https://www.youtube.com/watch?v=kEg9sFWT78w>.

¹⁰⁵ See Australian Charities and Not-for-profits Commission, *Managing Conflicts of Interest: A Guide for Charity Board Members* (2015) (‘ACNC Conflicts Guidance Note’). For outline see Rosemary Teele Langford and Malcolm Anderson, ‘Restoring Public Trust in Charities: Empirical Findings and Recommendations’ (2023) 46 *UNSWLJ* (forthcoming).

person is conflicted. It is left to the other responsible persons to determine the appropriate remedial action and inform the conflicted member. Whilst it is appropriate that responsibility be placed on these other charity governors, the CCEW guidance is arguably more helpful in guiding such charity governors in what they should do. In particular, there should, arguably, be more encouragement of abstention as the baseline management technique. This is backed up by empirical research, which shows that there appears to be a disconnect between respondents' perception of their understanding of their governance duties and the observance of governance duties in practice given that conflicts of interest are not declared as frequently as could be expected given the sizeable average number of charity governors on boards. This suggests a potential need for tighter formal processes and encouragement of abstention. The ACNC has recently introduced a detailed series of online training modules, which are to be commended.

The Scottish guidance on conflicts is similar to the Australian guidance except that it is clearer as to when a trustee should withdraw from a meeting, namely when the trustee is unable to put the interests of the charity first.¹⁰⁶ The guidance promulgated by the Charity Commission for Northern Ireland is also clear as to what steps charity trustees should take in managing particular types of conflicts.¹⁰⁷ Similarly, the New Zealand guidance is more definite on conflicts management processes depending on the type of conflict.¹⁰⁸ In terms of simple principles, the Swiss Foundation Code on conflicts of interest presents four clear simple principles, followed by more detail.¹⁰⁹ Guidance propounded by the An Rialálaí Carthanais

¹⁰⁶ See <https://www.oscr.org.uk/guidance-and-forms/guidance-and-good-practice-for-charity-trustees/conflict-of-interest/>. Note also that some countries place more emphasis on 'appointment conflicts'. This is the case for Scotland and the Irish Republic.

¹⁰⁷ See The Charity Commission for Northern Ireland, *Running Your Charity: Support for Charity Trustees on Key Aspects of Running a Charity Effectively* (CCNI EGO24, May 2019) 32 [6.3]. The guidance states that conflicted trustees should declare the conflict and leave the meeting (while the other trustees decide whether their absence is appropriate or necessary). The next steps depend on the nature of the conflict. Where there is a low level or no conflict the relevant trustee can attend. In other circumstances they may need to absent themselves. If conflicts are serious or frequent, the trustee may need to resign or cease the conflicting activity. The process needs to be recorded.

¹⁰⁸ See <https://www.charities.govt.nz/im-a-registered-charity/running-your-charity/conflict-of-interestpanga-rongorua/>

¹⁰⁹ <https://www.swissfoundations.ch/wp-content/uploads/2021/06/9783727206849.pdf> (Recommandation 11). The Guiding Principles of Good Practice for Foundations in Germany (adopted at the General Assembly of the

Charities Regulator has multiple examples with significant detail on what trustees should do in each situation.¹¹⁰ Empirical research shows that charity governors would welcome practical examples and scenarios.¹¹¹

The ideal guidance would arguably draw on features of each of these approaches. Just as the complexity of governance duties can be simplified by identification of central principles around which the myriad other duties can be organised, a similar approach could arguably be adopted to make practical guidance provided by charity regulators more effective. In other words, central core principles could be identified, coupled with more detailed guidance and examples (in the style of the Northern Irish guidance). In this respect the CCEW model of Five Minute Guides and video modules, together with more detailed guidance (perhaps with the addition of more detailed examples such as those in the guidance from Northern Ireland or Australia), is arguably attractive, particularly given the more explicit guidance as to how to manage different types of conflicts. This could potentially be improved by interlinking or hyperlinking the documents at various points (to enable users to go from the shorter to the longer guidance and vice versa at various points).¹¹²

Association of German Foundations on 6 June 2019 in Mannheim) provide that '[i]n the event of any direct advantage or disadvantage for themselves or any related person or party' certain persons 'must disclose any issues that lead to a conflict of interest on their own accord and voluntarily cease having further involvement in the decision-making process ...' (Principle 19) – see <https://www.stiftungen.org/en/home/german-foundations/establishing-a-foundation/guiding-principles-of-good-practice-for-foundations.html>. This inclusion of disadvantage is pertinent given that a conflict of interest may well relate to the loss of a benefit to a charity governor if a certain course of action is followed by a charity.

¹¹⁰ <https://www.charitiesregulator.ie/media/1417/managing-conflicts-of-interest-may-2018.pdf>.

¹¹¹ The empirical research outlined in Appendix 1 and empirical research conducted by the Small Charities Commission in relation to the refresh of the Charity Governance Code show enthusiasm for practical guidance and examples. As to the latter see *Refreshing the Charity Governance Code: Summary of Consultation Responses* (August 2020) <https://www.charitygovernancecode.org/en/about-the-code-1/refreshing-the-charity-governance-code-1.pdf/view>

¹¹² The following recommendations can be made specifically as to guidance on conflicts of interest provided by the ACNC:

The ACNC guidance on conflicts could be amended to include advantageous features from the guidance given by charities regulators in other jurisdictions. This could include the following. First, in line with the increased (and more prescriptive) guidance given to trustees of charities in England and Wales, the ACNC guidance could provide more tailored advice as to how conflicts should be managed. This could, for example, distinguish between serious conflicts and conflicts that pose low or no risk to decision making being made in the interests of the charity. The concept of a conflict of loyalty, as defined in the CCEW guidance, is also very helpful and could be employed by the ACNC. However, although the CCEW guidance is comprehensive, it is also at times confusing. It would be possible to provide increased guidance and detail without providing as much as the

Changes to guidance should also, of course, be subject to extensive consultation with the sector and sector advisers.

There is also the question of how to make such guidance known. Empirical evidence shows that this is a particular need as concerns younger charity governors and those who run smaller organisations and religious charities.

5. Conclusion

Against a background of challenges faced by charities in a number of jurisdictions and the arguable need to further empower and enable those who govern charities, this paper has articulated five core purpose-based governance principles and proposed the refinement of practical guidance on conflicts of interest in the form of simple principles combined with more detailed (and potentially prescriptive) guidance. In so doing, the paper combines two aspects of my detailed project on governance and regulation of charities in a number of jurisdictions, namely doctrinal investigation of core standards and empirical investigation of practical tools

Charities Commission. For example, the Scottish Guidance provides that trustees should withdraw from a meeting where they are unable to put the interests of the charity first.

More importantly, the issue of benefits to responsible persons (and persons and entities connected with those persons) needs to be more fully addressed and clear guidance given. At present Governance Standard 5 requires charities to take reasonable steps to subject their responsible persons to requirements to disclose conflicts and to not misuse their position or information from their position. While many benefits to responsible persons fit within these requirements, more direct obligations, accompanied by more direct guidance, on financial or other measurable benefits to trustees directly or indirectly via a connected person or entity, would be beneficial. Such benefits include related party transactions, which have recently become more regulated, and on which the ACNC has released new guidance.

Second, in line with guidance provided in the Irish Republic and Scotland, the guidance could specifically include ‘appointment conflicts’ and make it clear that responsible persons need to act in the interest of the charity rather than the interests of their appointor/s.

Third, in line with Germany’s guidance for foundations, there may be merit in including disadvantage within the concept of conflict of interest in the sense that the potential to be disadvantaged by a decision or transaction may amount to a conflict of interest.

Fourth, consideration could be given to benefits given by third parties, as is the case for charitable companies and charitable incorporated organisations in the UK and also for foundations in Germany.

Fifth it is recommended that, like the Scottish guidance, the ACNC emphasizes more the responsibility of all responsible persons to manage conflicts so that it does not appear to be the responsibility of the conflicted responsible person alone.

and assistance.¹¹³ Although primarily focused on Australia and England and Wales, these central principles (and approach to guidance) have the potential to simplify governance and regulation, and therefore assist charity governors, in other jurisdictions (perhaps with adjustments).

¹¹³ For detail see <https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>.

APPENDIX 1: EMPIRICAL RESEARCH

In 2020-2021 I undertook extensive empirical research on the effectiveness of the governance and regulatory framework in Australia and in England and Wales in the form of surveys directed at responsible persons of Australian charities and charity trustees of charities in England and Wales. Particular focus was placed on ascertaining two matters, namely (1) how those who govern charities understand their governance duties and (2) how charitable bodies deal with conflicts of interest in a practical sense – in terms of what protocols are in place, how often the issue of conflicts arises and, when conflicts do arise, how they are dealt with. Conflicts were chosen due to their importance in governance and their presence in general law, statutory and soft law requirements and their centrality to good governance. In addition, conflicts also pose a real issue in practice in Australia at least. The surveys also tested financial understanding and management and motivations for compliance.

For further detail see ‘Empirical Research’:

<https://law.unimelb.edu.au/centres/mccl/research/projects/projects/restoring-public-trust-in-charities>

(a) Australia

A total of 419 responses were received. The main findings of the Australian survey are as follows.

Despite the complexity, respondents seemed to have a good grasp of conflicts of interest, although a question arises as to how diligently these are being managed in practical terms. Respondents felt they had a clear understanding of their governance duties and the financial accounts, although around one quarter relied on someone else to take responsibility for the entity’s financial position. There appears to be a disconnect between respondents’ perception of their understanding of their governance duties and the observance of governance duties in practice given that conflicts of interest are not declared as frequently as could be expected given the sizeable average number of responsible persons on boards. This suggests a potential need for tighter formal processes and encouragement of abstention.

There was little doubt that respondents closely connected board deliberations with the entity’s purpose, thus confirming that governance based on purpose (or purpose-based governance) is practical and not just theoretical. The concept of perceived conflict — which is central to the governance of conflicts in the ACNC regime — is complex, with some respondents emphasising the importance of including perceived conflicts and others pushing back in noting the need for a realistic approach.

Respondents would welcome assistance with understanding and complying with their governance duties, with the most popular options being a detailed online guide setting out all the governance duties of board members (with an optional self-evaluation tool); a Charity Governance Code (combined with diagnostic tool); and practical examples and scenarios showing how the duties are applied. In direct questioning, responsible persons gave the concept of conflicts of interest a wide ambit in terms of non-pecuniary and third party interests. This accords with the ACNC’s Conflicts Guide, which extends conflicts to indirect financial interests, non-financial or personal conflicts and conflicts of loyalties. However, when

respondents were presented with hypothetical examples (in respect of the concept of ‘conflict of interest’), their opinions did not always accord with their more theoretical ideals.

Key predictors of results appear to be the size of the entity and the age of the respondent. For example, respondents from smaller entities were less likely to have received training or read ACNC guidance, and less likely to report sufficient guidance as to how governance duties are applied in practice. Younger respondents were less confident with their duties and more enthusiastic about practical assistance.

A persistent theme in the comments was the problems caused by complexity, inconsistency and change. These included comments on proliferation of standards within and across governments, multiple reporting requirements, as well as problems caused by the turning off of the duties in the *Corporations Act*. There was also a noteworthy theme of the burden of red tape. Another noticeable sentiment was that, although the respondent felt that they understood their governance duties, other responsible persons did not. Time constraints were also raised in the comments. There were also a number of positive comments about governance training and guidance within organisations.

(b) England and Wales

A similar survey was conducted in England and Wales, with 369 responses received. The survey asked the same questions as the Australian survey (adjusted to reflect different circumstances in England and Wales – such as currency, charity reporting thresholds and the existence of a specialist charity structure (the CIO)), with additional questions on respondents’ experience with the Charity Governance Code and diagnostic tool.

The key findings of the survey are that charity trustees are very confident of their understanding of their duties and the charity’s financial position. They exhibit a good understanding of what a conflict is, also indicating that conflicts extend beyond financial conflicts to conflicts of a non-pecuniary nature and conflicts involving third parties, although this was somewhat tempered when tested more closely via scenarios. There is, however, a question as to whether conflicts are being managed properly in practice given the overall infrequency in which they arise at board level. It was concerning that a number of respondents did not know how conflicts were managed in their organisation. A number of factors motivate trustees to comply with their governance duties, with more concern for the organisation than for personal factors. Purpose is important in decision-making for the majority.

The Charity Governance Code was generally well regarded by charity trustees but there was poor awareness of the diagnostic tool that accompanies the Code. Over 90% of respondents had read Charity Commission guidance and a number of positive comments were made about this guidance. Despite the existence of the Code and extensive Charity Commission guidance, a majority of respondents would appreciate the provision of an online guide setting out all the duties. A majority would also welcome practical examples and scenarios showing how the duties are applied and training.

The respondent’s age and the size of the organisation were the main and consistent predictors of a large range of opinions and thoughts. For example, younger respondents were less confident in their understanding of the governance duties, with more expressing the view that they had insufficient guidance as to how the duties apply in practice and had insufficient time to understand their governance duties. Younger respondents were also less aware of the Charity

Governance Code. Such respondents were also keener on the practical options offered to help with duties, particularly training on the governance duties, a detailed guide, access to professional advice, practical examples and mentoring.

Trustees of small charities were less likely to have a policy in relation to conflicts of interest and less inclined to disclose conflicts as frequently. These respondents were more relaxed about conflicts management when presented with hypothetical scenarios. Interestingly, however, respondents from larger organisations were more receptive to practical assistance with understanding and complying with their governance duties. Trustees of religious organisations tended to be more cautious in their approach to conflicts of interest.

(c) Comparison

It is instructive to compare the survey results from both jurisdictions. This is because the charity governance and regulatory regime in England and Wales is more coherent, with a more straightforward system of governance obligations, as well as a Charity Governance Code with diagnostic tool, and more prescriptive Charities Commission for England and Wales (CCEW) guidance concerning conflicts of interest.¹¹⁴ As mentioned, surveys were undertaken in both jurisdictions to enable comprehensive critical comparative analysis. This enables a comparison to be drawn to ascertain whether the more coherent English system in fact leads to a better understanding of duties and superior dealing with conflicts in practice. In other words, does the less complex framework and clearer Charities Commission guidance in England and Wales make a practical difference?

Interestingly, the complexity of the Australian charities framework (and, in particular, the multiple and overlapping governance and reporting requirements) did not appear to be significant in terms of differences between respondents' perceptions of their understanding of their duties. In both jurisdictions there appears to be a need for tighter formal processes for managing conflicts given that there appears to be a disconnect between respondents' perception of their understanding and compliance and their observance of governance duties in practice given that conflicts of interest are not declared as frequently as could be expected. Australian respondents were, however, more interested in practical help and there were multiple comments from Australian respondents (but not from UK respondents) about complexity and also about other responsible persons not understanding and complying with their duties.

In both jurisdictions the most popular practical option is an online guide setting out all the relevant governance duties. Interestingly, despite CCEW guidance being specific about factors that influence how a conflict should be dealt with and steps to be taken by charity trustees (in contrast to ACNC Guidance) and despite the fact that a larger majority of English respondents had read the guidance, there was not a great deal of difference between the answers of respondents from each jurisdiction. Motivations were also not materially different.

¹¹⁴ See Charity Commission England and Wales, *Conflicts of Interest: A Guide for Charity Trustees (CC29)* (1 May 2014); Charity Commission England and Wales, *The Essential Trustee: What You Need to Know, What You Need to Do* 17-19 [6.3], [6.4]; Charity Commission England and Wales, *Five Minute Guide: Managing Conflicts of Interest in a Charity* (2 November 2020). For ACNC guidance see Australian Charities and Not-for-profits Commission, *Managing Conflicts of Interest: A Guide for Charity Board Members* (2015).