

# The Conditions for Purpose-Based Governance

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## I Introduction

In recent important work, my colleague Rosemary Langford sets out an attractive vision of charity governance that she calls ‘purpose-based governance’.<sup>1</sup> In purpose-based governance, the trustees or directors of a charitable organisation approach the exercise of their governance powers in a certain frame of mind: they seek to further the abstract purposes for which their organisation was formed rather than advance the interests of the organisation or any stakeholder associated with it.<sup>2</sup> For Langford, this commitment to purposes rather than interests ‘presents a new lens through which to approach persistent governance problems’ in the charity setting.<sup>3</sup>

Langford has written on the implications of purpose-based governance for charitable organisations and for general and statutory law.<sup>4</sup> In this paper, I seek to supplement that work by considering purpose-based governance from one perspective. I aim to understand the conditions under which purpose-based governance can flourish. In looking at purpose-based governance from this perspective, I return to some basic questions about charity governance. I begin in Part 2 by considering the vexed question of ascertaining the purposes that underpin purpose-based governance. Then, in Part 3, I explore the question whether purpose-based governance looks different depending on the legal form in which a charitable organisation is brought to life. In Part 4, I address the question of the extent to which purpose-based governance ought to be responsive to considerations that are external to the furtherance of a charitable organisation’s purposes. Finally, in Part 5, I consider what model of enforcement of the duties of charity trustees and directors best complements purpose-based governance. Part 6 concludes.

## II Ascertaining Purposes

If purpose-based governance is to be achieved, then those whose responsibility it is must have a clear understanding of the purposes for which their governance powers are to be exercised. Purposes are to be ascertained based on an interpretation of the terms by which a charitable organisation is constituted.<sup>5</sup> Terms are the source of the governance powers that charity trustees or directors enjoy, and they are also the source

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<sup>1</sup> Rosemary Teele Langford, ‘Purpose-Based Governance: A New Paradigm’ (2020) 43(3) *University of New South Wales Law Journal* 954; see also Ian Murray and Rosemary Teele Langford, ‘The Best Interests Duty and Corporate Charities: The Pursuit of Purpose’ (2021) 15(1) *Journal of Equity* 92.

<sup>2</sup> Langford (n 1) 956–7. See also Paul B Miller and Andrew S Gold, ‘Fiduciary Governance’ (2015) 57(2) *William and Mary Law Review* 513, 517, discussing ‘fiduciary governance’.

<sup>3</sup> Langford (n 1) 957.

<sup>4</sup> Langford (n 1); Murray and Langford (n 1).

<sup>5</sup> *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, 217–19 [19]–[24], 225–6 [37]–[39].

of the parameters within which such powers are to be exercised.<sup>6</sup> In some circumstances, interpretation of terms is a relatively straightforward matter, demanding the construction of a written instrument such as a trust deed against the backdrop of general and statutory law. In other circumstances, interpretation of terms is more complex. This might be because the construction of a written instrument reveals the meaning of that instrument to be ambiguous.<sup>7</sup> Or it might be because an organisation has a dynamic character such that there is unease about limiting the ascertainment of purposes to a construction of the written instrument created at the inception of the organisation. The preference might be for a more encompassing exercise permitting inferences about purpose to be drawn from evidence of activities pursued over time.

In the more complex cases, interpretation of terms depends on the interpretive approach adopted by those charged with ascertaining purposes. In charity law, there has been a lack of clarity about the appropriate interpretive approach to adopt. Authorities highlight the centrality of expressed objects rather than the activities of the organisation.<sup>8</sup> Nonetheless, the prevailing approach, particularly in Australia, appears to be one in which the facts of activities are also to be considered.<sup>9</sup> Moreover, there is little guidance on the weight to be given to objects and activities when interpreting terms. And while the courts will permit significant changes to the terms of a charitable trust provided this does not undermine the substrate of the trust, there are limits to that approach.<sup>10</sup>

Perhaps more fundamentally, there is no worked out underpinning interpretive theory explaining why both the content of a written instrument and the facts of activities are relevant sources when looking for terms in the first place. Among other things, such a theory should answer the key question: why do inferences drawn from the facts of activities play a role in shaping – and presumably reshaping – terms over time?<sup>11</sup> Why are terms not simply set at the point when an organisation is first constituted, and then shaped and reshaped only by formal changes to the written constituting instrument?

A look sideways to a different area of law serves to underscore the importance of this question of underpinning interpretive theory. In 2022, the High Court of Australia decided two cases raising the question of the difference between a contract of employment and an ‘independent contractor’ arrangement.<sup>12</sup> The Court considered two interpretive approaches to resolving this difference. On the one hand was an approach that entails recourse to both the content of a written contract entered into at the

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<sup>6</sup> On terms in the trusts setting, see Jessica Hudson and Charles Mitchell, ‘Justificanda’ in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press, 2023) (forthcoming).

<sup>7</sup> *Re The Foundation for Anti-Aging Research* [2016] NZHC 2328 at [88].

<sup>8</sup> *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, [50]; *Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204, 214–19 [13]–[24].

<sup>9</sup> *Word Investments Limited* (n 8) 215 [14], 217 [17], 220–224 [26]–[34], 225–226 [37]–[38]; *Royal Australasian College of Surgeons v Federal Commissioner of Taxation* (1943) 68 CLR 436, 448–9 (Starke J), 450–1 (McTiernan J), 452–4 (Williams J); Ian Murray, ‘Purposes, Activities, and Modes of Action’ in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 54, 54–5.

<sup>10</sup> *In the matter of the Public Trustee of Queensland as Trustee of Queensland Community Foundation* [2016] QSC 276, [37] (‘There is no doubt an issue as to whether the power of amendment can be used to alter or defeat the main purpose of a trust’).

<sup>11</sup> See the sources cited at n 9.

<sup>12</sup> *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations v Jamsek* [2022] HCA 2.

inception of the parties' relationship and also the incidents of that relationship over time.<sup>13</sup> On the other hand was an approach that looks for terms only in the content of the written contract constituting the relationship between the parties.<sup>14</sup> The Court favoured the latter, narrower, approach. In two key passages from their judgment in one of the cases, Kiefel CJ, Keane and Edelman JJ spelled out why:

The employment relationship with which the common law is concerned must be a legal relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights.

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Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract.<sup>15</sup>

The interpretive approach here appears to be one in which terms expressed in a formal written contract both establish the parties' relationship and determine the correct interpretation of the circumstances and dealings of the parties over time. Presumably the interpretive theory underpinning the approach is one that places great emphasis on the fact that the parties have chosen to express their intentions in a formal written contract, as opposed to favouring a more informal approach that allows their contractual relationship to evolve dynamically.

*CFMMEU* is a decision dealing with interpretive questions as they arise in a common law setting. In charity law, which is infused with equitable modes of reasoning, it might be thought that highly formalistic approaches suited to the common law setting are not applicable. Nonetheless, it is worth pausing to consider how an interpretive approach such as that now preferred by the High Court in the employment contract setting might play out if adopted in ascertaining the purposes of a charitable organisation. Decision-makers would look for such purposes by construing the formal written instrument constituting the organisation in question. Ambiguities would either be resolved within the 'four corners' of the constituting instrument or, if they were unresolvable, might justify a finding that the organisation has no clearly articulated charitable purpose.

The governance powers of the trustees or directors of the organisation, along with all other rights, duties and powers allocated within the organisation, would be properly understood as directed at, and circumscribed by, the purposes disclosed by the constituting instrument. The meaning of any exercise of such powers to support the activities of the organisation over time would be ascertained in light of the expressed objects of the charity. Thus, far from supporting any finding about the organisation's purposes, an exercise of governance powers that was not in furtherance of purposes disclosed by the constituting

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<sup>13</sup> *CFMMEU* (n 12) [32]–[39] discussing the 'multifactorial approach'.

<sup>14</sup> *CFMMEU* (n 12) [40]–[62].

<sup>15</sup> *CFMMEU* (n 12) [44] and [59].

instrument would be a breach of duty by the trustees or directors of the organisation.<sup>16</sup> In short, activities would play no role in the interpretive work of ascertaining purposes.<sup>17</sup> As in the employment contract setting, this interpretive approach to ascertaining an organisation's purposes would place significant weight on the choice of a charity founder to formalise their intentions in a written instrument.

In considering the arguments for and against different interpretive approaches, respect for a founder's choice seems relevant.<sup>18</sup> Another relevant factor that is associated with the project of purpose-based governance is as follows: for purpose-based governance to be effective, charity trustees or directors must be able to readily ascertain the purposes in furtherance of which their governance powers are to be exercised. Where trustees or directors know that they must look to the content of the constituting instrument to discern their guiding purposes, they have a clear touchstone to work with in carrying out purpose-based governance. Where trustees or directors know that their own exercises of governance powers might affect the purposes of their organisation over time, they lack this clear touchstone. They are instead aboard a Ship of Theseus, building their ship even as they sail.

I raise the High Court's preferred interpretive approach in the employment contract setting not to advocate for it in the setting of charitable organisations, although I have just indicated some considerations that point in its favour. I raise it rather to press the more fundamental point that the arguments for and against different interpretive approaches to ascertaining the purposes of charitable organisations must be addressed and resolved before a preferred approach is adopted. At the present time, the preferred approach in Australia, which permits recourse both to the content of constituting instruments and to activities, lacks such a theoretical base. In the absence of the theoretical base, one of the key conditions of effective purpose-based governance is undermined.

### III Legal Form

A charity founder may select from a menu of legal forms when realising their charitable intention: these forms vary depending on the relevant jurisdiction but they include the purpose trust, the company, incorporated and unincorporated societies or associations, and other specialist charitable legal structures. Some questions relating to the conditions under which purpose-based governance might flourish relate to this diversity of legal forms. Are there particular legal forms that are especially conducive to purpose-based governance? Are there forms that complicate purpose-based governance in ways that are worthy of consideration? Relatively little attention has been paid to these questions in academic literature, but the questions should be taken up if the conditions of purpose-based governance are to be well understood.<sup>19</sup>

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<sup>16</sup> Note *Family First New Zealand v Attorney-General* [2020] NZCA 366, [87] per Clifford and Stevens JJ: 'the "bounds" of a trust are determined by the settlor. If the trustees of a charitable trust act outside its charitable purposes, they may [act] in breach of their duties'.

<sup>17</sup> Sue Barker, 'Focus on Purpose – What Does a World-Leading Framework of Charities Law Look Like?' (2019, New Zealand Law Foundation Te Manatū a Ture o Aotearoa) ch 2.

<sup>18</sup> See, eg, *Word Investments Limited* (n 8) 220 [25]; *Royal Australasian College of Surgeons* (n 9) 252, in which it was highlighted that the circumstances of the company's formation should be taken into account.

<sup>19</sup> For a more extended treatment of these questions, see Matthew Harding, 'A Fresh Look at Purpose Trusts' in Degeling et al (n 6).

When thinking about purpose-based governance against the backdrop of particular legal forms, a distinction immediately arises between the purpose trust and the company. A purpose trust has no legal personality. It is, rather, a mandate conferred on trustees to apply the assets of the trust in the furtherance of the purposes for which the trust has been constituted.<sup>20</sup> Lacking legal personality, a trust cannot be said to have interests that the law recognises. In contrast, a company has legal personality and, to that extent, interests that are recognised in law,<sup>21</sup> although the exact identification of these interests is fraught and much-debated.<sup>22</sup> Thus, while it is conceptually impossible for a situation to arise in which the trustees of a charitable purpose trust must choose between furthering the trust's purposes and furthering the trust's interests, it seems conceptually possible that the directors of a charitable company might have to choose between the company's purposes and the company's interests. In such circumstances, before the directors can carry out purpose-based governance, they must be satisfied that it is not preferable for them to adopt a more traditional model of governance that is responsive to interests.

One way in which the tension between the purposes and interests of a charitable company might be resolved is through conceptualising the company's interests in terms of the furtherance of its purposes.<sup>23</sup> On this view, a charitable company simply has no interests other than the furtherance of its purposes, and as a result there is no conceptual space for interests and purposes to conflict. This is a neat move, but there remains a question how well it explains all the situations in which the directors of a charitable company must exercise governance powers. It is not difficult to imagine circumstances in which a charitable company's purposes are best furthered by the company ceasing to exist, perhaps through merger with another charity.<sup>24</sup> In these circumstances, does it make sense to say that the company's interests are co-extensive with the furtherance of its purposes?<sup>25</sup> Or does this simply stipulate a meaning of interests that renders that obscures the difficulty of the governance dilemma in play in a case where a merger is under consideration? These questions, as well as whether the meaning of 'purpose' itself is abstract or shaped by the character of the company, must be worked through before the incidents of purpose-based governance in charitable companies can be known with certainty.

Purpose-based governance might be further complicated in a charitable company, as opposed to a charitable purpose trust, because in a charitable company, governance powers are exercised not only by directors but

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<sup>20</sup> See *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 222 per Dixon and Evatt JJ: 'A charitable trust is a trust for a purpose, not for a person. The objects of ordinary trusts are individuals, either named or answering a description, whether presently or at some future time. To dispose of property for the fulfilment of ends considered beneficial to the community is an entirely different thing from creating equitable estates and interests and limiting them to beneficiaries'.

<sup>21</sup> See, eg, *Corporations Act 2001* (Cth) s 181(1)(a): 'A director or officer of a corporation must exercise their powers and discharge their duties ... in good faith in the best interests of the corporation'.

<sup>22</sup> For discussion see Robert Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (online, LexisNexis) [1.390]–[1.390.9], [8.090]; Andrew Keay, *Directors' Duties* (4<sup>th</sup> ed, LexisNexis, 2020) 156–89 [6.71]–[6.145]; 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, 982–5 ('Revisitation').

<sup>23</sup> See Murray and Langford (n 1); Langford, (n 22). But see also Rosemary Teele Langford and Miranda Webster, 'The Australian Charitable Incorporated Organisation: A Reform Proposal' (2022) 39(6) *Company and Securities Law Journal* (forthcoming).

<sup>24</sup> Langford (n 1) 963.

<sup>25</sup> Murray and Langford (n 1).

also by members in general meeting.<sup>26</sup> A charity founder might stipulate purposes at the time when a charitable company is established. In purpose-based governance, these purposes should guide and constrain the exercise of governance powers on the part of all those within the company who hold such powers. However, it is not clear the extent to which purpose-based governance applies to members of a charitable company exercising their governance powers in general meeting. In a recent decision, the Supreme Court of the United Kingdom ruled that, in some circumstances, members of charitable companies owe fiduciary duties in the exercise of governance powers. To that extent, members must exercise their powers in what they in good faith believe will best further the charitable purposes of their company.<sup>27</sup> And more recently, in *Jaffer v Jaffer*,<sup>28</sup> it was held that members of an unincorporated association may owe fiduciary duties. Nonetheless, in *Lehtimäki* the Supreme Court left open the question of when members owe fiduciary responsibilities, especially in companies (or associations) with large numbers of members.<sup>29</sup> To the extent that the members of charitable companies are not bound by fiduciary responsibilities when exercising their governance powers, they are potentially free to exercise those powers in their own interests (although Australian company law may require that they use their powers in good faith and for proper purpose).<sup>30</sup> This seems to be at odds with purpose-based governance.

Recently, Langford has argued that there are reasons to reject the ruling in *Lehtimäki v Cooper* that members are sometimes under fiduciary duties when exercising their governance powers in general meeting.<sup>31</sup> Langford's preferred view is that members might be subject to liabilities under *Barnes v Addy*<sup>32</sup> where they exercise governance powers to aid breaches of fiduciary duty by a charitable company or its directors.<sup>33</sup> She also notes that in circumstances where members exercise their governance powers beyond the proper scope of those powers, the doctrine of 'fraud on the power' is potentially engaged.<sup>34</sup> In the case of members, the doctrine of fraud on the power breathes life into purpose-based governance in a distinctive way that does not turn on members being fiduciaries. The terms establishing a charitable company express that company's purposes, and those purposes establish the scope within which governance powers are properly exercised. To say, in a charity setting, that an exercise of power for ends beyond that scope is a fraud on the power is thus precisely to say that it is a failure of purpose-based governance.<sup>35</sup> Langford's analysis seems to resolve some of the difficulties associated with thinking that, in the case of members, purpose-based governance can flourish only to the extent that members are fiduciaries.

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<sup>26</sup> See *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155 ('*Lehtimäki*'), 199 [133].

<sup>27</sup> *Lehtimäki* (n 26) 186 [77], 189 [89].

<sup>28</sup> [2021] EWHC 1329 (Ch), [56].

<sup>29</sup> *Lehtimäki* (n 26) 193 [105].

<sup>30</sup> See, eg, *Ngurli Ltd v McCann* (1953) 90 CLR 425, [24].

<sup>31</sup> Rosemary Teele Langford, 'Charities and the Fiduciary Paradigm' (2022) 16(2) *Journal of Equity* 146, 157–62.

<sup>32</sup> (1874) LR 9 244 (CA).

<sup>33</sup> Langford (n 31) 170–2.

<sup>34</sup> *Ibid* 171–2. On fraud on the power generally, see *Vatcher v Paull* [1915] AC 372, 378 (Lord Parker); *Wong v Burt* [2005] 1 NZLR 91; *Kain v Hutton* [2008] 3 NZLR 589, [46]–[54] (Tipping J).

<sup>35</sup> Arguably, this is also true beyond a charity setting. See the discussion of the doctrine of fraud on a power in JE Penner, *The Law of Trusts* (11<sup>th</sup> ed, Oxford University Press, 2019) [3.61], [3.83]–[3.86].

Another sort of complication arises in circumstances where members enjoy powers to change the terms by which a charitable company is constituted.<sup>36</sup> To the extent that the ruling in *Lehtimäki* applies, members who seek to change terms to further their own interests act in breach of fiduciary duty, and self-interested exercises of power may be constrained by the doctrine of fraud on the power and in other ways. However, members may seek to change terms for selfless reasons, say because they would prefer to reorient the company away from the charitable purposes stipulated by the company's founder, and towards different charitable purposes of the members' own choosing. In these circumstances, it is difficult to see how members could be constrained by fiduciary responsibilities, or indeed the doctrine of fraud on the power, to exercise their governance powers in the furtherance of the founder's stipulated purposes. After all, the founder has authorised the members to change the terms that express those very purposes. Here, in an existential moment, purpose-based governance is arguably deactivated while the members replace one set of purposes with another. Purpose-based governance is then reactivated around the new set of purposes. There seems no requirement within purpose-based governance that it be carried out continuously in the furtherance of one set of purposes during the life of a charitable organisation.<sup>37</sup> To that extent, the existential moment is not one of concern for purpose-based governance itself. Nonetheless, the possibility that members of a charitable company might replace a founder's intentions with their own is one that might cause founders some disquiet when contemplating the charitable company as a legal form.<sup>38</sup>

#### IV External Considerations

In purpose-based governance, charity trustees or directors take as their touchstone the purposes for which their charitable organisation exists. And yet, considerations that are external to those purposes, and that indeed come into conflict with the furtherance of the purposes, might bear on the exercise of governance powers in significant ways. Three examples will serve to illustrate the point. First, imagine charity trustees who receive an unexpectedly large gift and are concerned that it might be most effectively deployed in the service of charitable purposes other than the purposes of their trust.<sup>39</sup> Secondly, consider charity trustees whose mandate is to provide educational scholarships to students of a certain racial and religious profile, and who are concerned that this mandate requires them to engage in unjust discrimination that offends prevailing public policy norms.<sup>40</sup> And thirdly, take the case of directors of a charitable association whose purpose is to provide housing to needy people from a particular group, but who are aware that their focus

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<sup>36</sup> See, eg, *Corporations Act 2001* (Cth) s 136(2): 'a company may modify or repeal its constitution, or a provision of its constitution, by special resolution'.

<sup>37</sup> There is, however, a requirement within charity law that assets dedicated to charity remain so in perpetuity. This ensures that purpose-based governance in a charity setting must always be directed to charitable purposes of one sort or another: Hubert Picarda, *The Law and Practice Relating to Charities* (4<sup>th</sup> ed, Bloomsbury Publishing, 2014) 650.

<sup>38</sup> In the context of corporations, however, note the potential availability of the oppression (or unfair prejudice) remedy and action for breach of directors' duties. See, eg, Langford, 'Revitalisation' (n 22).

<sup>39</sup> This example is drawn from the Australian case of *In the Matter of the NSW Rural Fire Service and Brigades Donations Fund* [2020] NSWSC 604.

<sup>40</sup> This example is drawn from the Canadian case of *In re Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4<sup>th</sup>) 321.

on this particular group means that needier people from other groups will miss out on housing in the district where they operate.<sup>41</sup>

In cases such as these, may charity trustees or directors seek to exercise their governance powers with an aim of reshaping their organisations so that those organisations are more responsive to relevant external considerations? Or must they confine themselves to purpose-based governance, faithfully exercising their governance powers even in the furtherance of purposes that they are concerned might contradict external imperatives or goals? The law provides an answer to these questions. As I discussed above, the doctrine of fraud on the power prohibits the trustees or directors of a charitable organisation from exercising their governance powers for ends beyond the scope of the purposes to which those powers must be directed. Nonetheless, charity trustees are and charity directors may be subject to the supervisory jurisdiction of the court,<sup>42</sup> and to the extent that this is so, they are free to seek judicial advice and orders in respect of the exercise of their governance powers or the terms by which their organisation is constituted. Thus, where trustees or directors are uncomfortable carrying out purpose-based governance in light of external considerations, they may invoke the supervisory jurisdiction to help them navigate a way forward. The court might then issue judicial advice to clarify the scope of the purposes for which the organisation exists,<sup>43</sup> or make cy-pres orders varying the terms that constitute the organisation to specify new purposes to guide purpose-based governance for the future,<sup>44</sup> or even in drastic cases declare that the purposes of the organisation are not charitable, for example because they offend public policy.<sup>45</sup> Or the court might make declarations or orders that leave trustees or directors with no choice but to set aside external considerations and continue carrying out purpose-based governance or resign.<sup>46</sup>

Thanks to the supervisory jurisdiction of the court, purpose-based governance in the charity setting is nested within a broader governance framework that needs to be better understood. One theoretical lens through which to understand this broader framework is provided by Evan Criddle and Evan Fox-Decent in their insightful analysis of ‘dual commission’ fiduciaries.<sup>47</sup> Criddle and Fox-Decent identify circumstances in which a fiduciary who owes ‘first order’ duties to beneficiaries might also, at the same time, owe ‘second

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<sup>41</sup> This example is informed by the English case of *R (on the application of Z) v Hackney London Borough Council* [2020] UKSC 40.

<sup>42</sup> On the court’s supervisory jurisdiction over charity, see *Lehtimäki* (n 26) [206]. It has been said that the supervisory jurisdiction generally turns on the existence of a trust: GE Dal Pont, *Law of Charity* (3<sup>rd</sup> ed, Lexis Nexis, 2021) [14.1]. On the other hand, it has been argued that trusts or trust-like obligations are embedded in charitable forms generally, and that the supervisory jurisdiction operates across charitable forms: Ian Murray and Murray Wesson, ‘Outsourcing to Not-for-Profits: Can Judicial Enforcement of Charity Law Provide Accountability for the Performance of ‘Public’ Functions?’ (2020) 43(4) *University of New South Wales Law Journal* 1309, 1331–2. The argument in this Part applies wherever the supervisory jurisdiction is active.

<sup>43</sup> This was done in *Rural Fire Service* (n 39), [51]–[55].

<sup>44</sup> This was done in *Canada Trust* (n 40).

<sup>45</sup> *BoE Trust Limited NO & others* [2012] ZASCA 147 [24]. See also Matthew D Turnour and Elizabeth A Shalders ‘Commentary on “Public Benefit and Public Policy” Keeping up with Discrimination?’ in Matthew Harding and Daniel Halliday, *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 155.

<sup>46</sup> See, eg, *Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292, where the Court upheld a testamentary trust expressed in racially discriminatory terms.

<sup>47</sup> Evan J Criddle and Evan Fox-Decent, ‘Guardians of Legal Order: The Dual Commission of Public Fiduciaries’ in Evan J Criddle et al (eds), *Fiduciary Government* (Cambridge University Press, 2018) 67. I am grateful to Joanne Murray for this reference and also for allowing me to read her own unpublished work on the supervisory jurisdiction.



order' duties to maintain the integrity of important public institutions such as the legal system or the health care system.<sup>48</sup> For Criddle and Fox-Decent, these second order duties limit the operation of the first order duties by preventing the discharge of those duties from 'producing dangerous spillover effects' for public institutions.<sup>49</sup>

Transposing Criddle's and Fox-Decent's analysis to the charity setting, it might be said that charity trustees and directors are dual commission fiduciaries. They owe first order duties to further the purposes for which their organisations have been formed; these are the duties entailed in purpose-based governance. But at the same time, charity trustees and directors are the custodians of an important public institution, which is the institution of charity itself. The public character of the institution of charity is evidenced in the central requirement of charity law that charitable purposes be for the public benefit.<sup>50</sup> It is also demonstrated in the fact that public officials such as Attorneys-General and Charity Commissioners have the right and the duty to enforce the duties of charity trustees and directors.<sup>51</sup> And it is expressed in the fact that charities are, at least to some extent, under the supervisory jurisdiction of the court.<sup>52</sup> Being custodians of an important public institution, charity trustees and directors have governance duties in respect of that institution that sit alongside, and where appropriate limit, the duties entailed in purpose-based governance. These are second order duties of the type that Criddle and Fox-Decent identify as the hallmark of dual commission fiduciaries.

Entailed in the second order fiduciary duties owed by charity trustees and directors are duties to bring to the attention of the court circumstances in which furthering the purposes of a charitable organisation might be at odds with relevant external considerations. The doctrine of fraud on the power means that charity trustees or directors cannot, in light of their own sense of the circumstances, refashion the purpose-based governance that they owe.<sup>53</sup> However, they are free to articulate questions and concerns about the alignment of the purposes of their organisations with external considerations and bring those questions and concerns to the court. The duties to bring these questions and concerns to the court help to safeguard the integrity of the public institution of charity by ensuring that charity remains consonant with the norms, values and expectations that animate the polity more generally. Where charity departs from such norms, values and expectations, there is a risk that public trust and confidence in charity might be undermined. The court's authority in respect of the charitable organisation in question is not sourced in the terms constituting the organisation; the origin of the court's authority here lies in ancient rights and duties of the Crown which have been vested over time in the judiciary.<sup>54</sup> Not being bound by constituting terms, the court is not required to carry out purpose-based governance and it is to that extent the appropriate forum in which to

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<sup>48</sup> Ibid 68–9.

<sup>49</sup> Ibid 68.

<sup>50</sup> See, eg, *Charities Act 2011* (UK) s 4 (England and Wales); *Charities Act 2013* (Cth) s 5 and Div 2 (Cth).

<sup>51</sup> For comprehensive treatment of the Attorney-General's standing in charity matters, see Dal Pont (n 42) ch 14; Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing 2016) 28; Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2010) 89 *Canadian Bar Review* 373.

<sup>52</sup> *Lehtimäki* (n 26) 196 [119], 209 [179], 222 [234].

<sup>53</sup> The doctrine is thus an expression of the broader commitment to institutional ordering that is theorised most famously in John Rawls, 'Two Concepts of Rules' (1955) 64(1) *The Philosophical Review* 3.

<sup>54</sup> Gareth Jones, *History of the Law of Charity, 1532–1827* (Cambridge University Press, 1969).

resolve questions and concerns about the alignment of purpose-based governance with external considerations.

Criddle's and Fox-Decent's analysis of dual commission fiduciaries helps us to see the sense in which it is appropriate for charity trustees and directors to raise for the court's consideration questions about the alignment of purpose-based governance with external considerations. However, it may be impractical for charity trustees and directors to seek advice from the court given the costs and efforts involved in doing so. Further, it is important to note that, even when such questions are brought before a court, there are limitations to what the court can do to give effect to those external considerations that the court considers relevant. Take, for example, the cy-pres doctrine, which permits the court to vary the terms of a charitable arrangement to specify new purposes. Even at its most expansive, this doctrine is available only where the purposes stipulated by a founder no longer provide an appropriate method for the application of charitable assets, and where the spirit of the founder's gift is consistent with the redirection of the assets to the proposed new purposes.<sup>55</sup> Thus, in the recent *Rural Fire Service* case from New South Wales, cy-pres was not even sought in circumstances where a charitable trust had unexpectedly received over \$50 million in donations and the question was raised whether the funds could be optimally distributed within the parameters of purpose-based governance.<sup>56</sup>

Moreover, it should be noted that charity trustees and directors are not the only agents who are responsible and empowered to raise questions about the alignment of purpose-based governance and external considerations. The Attorney-General, as protector of charities, may activate the court's supervisory jurisdiction through their own action.<sup>57</sup> In some circumstances, potential or actual beneficiaries of charitable organisations might also bring claims asserting that external considerations given formal expression in public law are at odds with the furtherance of charitable purposes.<sup>58</sup> And the legislature itself might pre-empt any conflicts of purpose-based governance and external considerations by enacting statutory rules restricting the purposes for which a charitable organisation may be formed.<sup>59</sup> A complete account of purpose-based governance and its interactions with external considerations ought to be sensitive to the full range of these possibilities.

## V Purpose-Based Enforcement

The success of purpose-based governance in charity settings depends in large part on the capabilities, skills and attributes of charity trustees and directors themselves.<sup>60</sup> However, it also depends in key ways on

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<sup>55</sup> See, eg, *Charities Act 2011* (UK) s 67; *Charitable Trusts Act 1993* (NSW) ss 9-10.

<sup>56</sup> *Rural Fire Service* (n 39).

<sup>57</sup> Dal Pont (n 42) [14.23]; Chan, *Public-Private Nature* (n 51) 28; Chan, 'The Role of the Attorney General' (n 51).

<sup>58</sup> This was the case in *Hackney London Borough Council* (n 41), where the claimant argued that the charity's pursuit of its purposes placed it in violation of provisions of the *Equality Act 2010* (UK).

<sup>59</sup> See, eg, *Equality Act 2010* (UK) s 193(4): 'If a charitable instrument enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits – (a) to persons of the class which results if the reference to colour is ignored; or (b) if the original class is defined by reference only to colour, to persons generally'.

<sup>60</sup> This, in turn, is influenced by the extent to which charity regulators carry out educational functions effectively: see, eg, Ursula Stephens, 'Reflections on Birthing a Regulator' in Myles McGregor-Lowndes and Bob Wyatt (eds), *Regulating Charities: The Inside Story* (Routledge, 2017), 251–2.

effective enforcement of the duties of charity trustees and directors. Traditionally, the burden of such enforcement, along with the powers to realise it, has rested with the Attorney-General representing the Crown. However, in different jurisdictions enforcement now also lies with charity regulators, company regulators,<sup>61</sup> and even members of the public.<sup>62</sup> Is there a model of enforcement of the duties of charity trustees and directors that is especially apt from the standpoint of purpose-based governance?

In section 115 of the English *Charities Act 2011* (UK), standing to enforce the duties of charity trustees or directors is conferred on ‘any person interested in’ the charitable organisation in question (subject to authorisation by the Charity Commission).<sup>63</sup> In an excellent study of this provision, Hui Jing notes that being ‘interested in’ a charitable organisation might mean one of two things. First, it might mean being a beneficiary of the charitable organisation in the sense of standing to receive benefits from the furtherance of the purposes of the organisation. Secondly, it might mean being interested in a general, more abstract, sense in the furtherance of the organisation’s purposes.<sup>64</sup> Jing argues that English courts have tended to favour the latter interpretation of section 115 but notes that the matter is not conclusively resolved.<sup>65</sup> From the standpoint of purpose-based governance – and noting the possibility that different people might wish to further a charity’s purposes in different ways – there are reasons to join the English courts in favouring the latter interpretation. In purpose-based governance, trustees or directors are focused on furthering the purposes of their organisation rather than the interests of the organisation or its stakeholders. It thus stands to reason that those best placed to enforce the duties entailed in purpose-based governance are also focused on furthering purposes rather than interests. Enforcers who seek to further interests risk misunderstanding the incidents and character of trustees’ or directors’ duties, and to that extent risk exercising enforcement powers in ways that are inconsistent with, and at worst undermine, the project of purpose-based governance.

Reflection on section 115 of the *Charities Act 2011* (UK) suggests that purpose-based enforcement, as opposed to enforcement motivated by a desire to promote interests associated with a charitable organisation, is the preferred model from the standpoint of purpose-based governance. But before leaving the topic of enforcement, one further question demands consideration. Enforcement of the duties of charity trustees and directors seems to be directed at two distinct objectives. First, enforcement seeks to ensure that there is public accountability for the deployment of assets dedicated to the public benefit. Secondly, enforcement seeks to ensure that charity trustees and directors faithfully carry out purpose-based governance, irrespective of any question of public accountability. These two objectives of enforcement in the charity setting might be pursued together, through unified enforcement mechanisms. For example, the Attorney-General historically exercised enforcement powers not only as the holder of a public office dedicated to the protection of charity but also as the person with standing to ensure the due administration of charitable

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<sup>61</sup> In Australia, for example, these include the Australian Securities and Investment Commission, consumer affairs agencies, and the Office of the Registrar of Indigenous Corporations.

<sup>62</sup> See, eg, *Charities Act 2011* (UK) s 115; *Trusts Act 1973* (Qld) s 106. See also the discussion of public enforcement of public trusts in the Scottish setting in Patrick Ford, ‘Third Sector Regulation in Post-Devolution Scotland Kiltling the Charity Cuckoo’ in Susan Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector: International Perspectives* (Taylor & Francis Group, 2010) 69.

<sup>63</sup> *Charities Act 2011* (UK) s 115(1).

<sup>64</sup> Hui Jing, ‘Enforcing Charitable Trusts: A Study on the English Necessary Interest Rule’ (2022) 42(2) *Legal Studies* 228, 232–6.

<sup>65</sup> *Ibid*, 234–6.

purpose trusts.<sup>66</sup> Today, charity regulators seek to maintain public trust and confidence in charitable organisations but also have standing and powers to enforce specific duties entailed in purpose-based governance.<sup>67</sup>

While public accountability for charity assets and the enforcement of duties including – but not limited to – those entailed in purpose-based governance can be pursued together, there is no reason why this must be the case. Indeed, there are enforcement models in which the enforcement of duties entailed in purpose-based governance is kept separate from the work of ensuring public accountability for charity assets. The duties entailed in purpose-based governance are not specific to charitable organisations. Those duties arise in any purpose-oriented organisation whether that organisation is charitable or not. And while historically it has been unusual to conceive of non-charitable organisations as purpose-oriented, increasingly there is a move to understand for-profit organisations as driven by purpose and to that extent sites for purpose-based governance.<sup>68</sup> My point is that the enforcement of duties entailed in purpose-based governance should ideally lie with a person or authority that is able to carry out such enforcement wherever purpose-based governance is to be found, irrespective of whether the setting is charitable. For purpose-based enforcement to lie with a person or authority whose remit is confined to charitable organisations is thus to arbitrarily restrict purpose-based enforcement to only one – albeit central – setting in which it is called for.

Separating purpose-based enforcement from the work of ensuring public accountability for charity assets opens up some interesting possibilities for the division of regulatory labour in the charity setting. One possibility might be for a charity regulator to confine its efforts to ensuring that charity trustees and directors are accountable to the public in respect of the public benefit generated by their organisations. Such a regulator might have a registration function, require reporting in respect of public benefit activities and outcomes, and seek to educate charity trustees and directors about the importance of maximising public benefit in the setting of their charitable organisations. Meanwhile, the work of purpose-based enforcement might be left to regulators whose remit is to ensure that purpose-based governance is carried out in a way that is appropriately sensitive to different legal forms. Such regulators could be agnostic as to the character of the purposes being carried out in different organisations; in particular, they could be uninterested in whether the purposes in question are charitable or not. Instead, their focus could be on ensuring that trustees and directors (and potentially members too) are oriented around purpose in the right way, and on taking enforcement action where this is not the case.

Whether such a model of charity enforcement is to be preferred to the current model is a large question that turns on a range of considerations. I do not offer any conclusive view on that large question here. All I hope to show is that multiple models of enforcement appear to be consistent with an overarching objective of securing purpose-based governance, and that there is no compelling reason founded in purpose-based

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<sup>66</sup> The function of the Crown as protector of charity was at one time separate from the function of the Court of Chancery as the site for enforcement of the duties of trustees. Arguably, current enforcement models owe much to the historical merger of the two functions, such that the Court of Chancery assumed jurisdiction over charity as well as trusts: Jones (n 54) ch XI.

<sup>67</sup> See, eg, the enforcement powers in Part 4-2 of the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth), especially as they relate to the ‘governance standards’ and ‘external conduct standards’ set out in Div 45 and Div 50 of the *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth).

<sup>68</sup> Langford (n 1); Langford (n 22).

governance for adhering to the model of charity enforcement that currently prevails in common law jurisdictions.

## VI Conclusion

Purpose-based governance is a distinctive way of approaching the exercise of governance powers in charitable organisations. Its implications for the day-to-day management of those organisations are various and well explored elsewhere. Here, I have sought to understand better the conditions that must obtain if purpose-based governance is to flourish in the charity setting. A coherent interpretive approach to ascertaining guiding purposes is necessary to ensure that charity trustees and directors know what their touchstone should be in matters of governance. Trustees, directors and members of charitable organisations are assisted by a clear understanding of the implications of different legal forms for purpose-based governance. Purpose-based governance succeeds in charitable organisations where it is nested in a broader governance framework that enables trustees or directors to have recourse to the court to determine when external considerations might be permitted to override or re-orient purpose-based governance. And purpose-based governance is aided by purpose-based enforcement, but there are reasons to think that purpose-based enforcement should be decoupled from the work of ensuring the public accountability of charity trustees and directors for the production of public benefit. Where these conditions are present, purpose-based governance is more likely to flourish, to the benefit of charitable organisations and therefore society as a whole.