THIRD SECTOR REVIEW

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THIRD SECTOR REVIEW

Australian and New Zealand Third Sector Research is a professional and academic organisation that aims to foster research and the dissemination of knowledge concerning the third sector in Australia and New Zealand. The third sector is constituted by all those organisations that are non-profit and non-government, together with the activities of volunteering and giving which significantly sustain them.

Third Sector Review provides a refereed publication outlet for scholars, researchers and practitioners who are working in the third sector.

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Australian New Zealand Third Sector Research Ltd (ANZTSR) is a network of people interested in pursuing and encouraging research into private, non-profit, community or voluntary organisations and the activities of volunteering and philanthropy.

What is the third sector?

The third sector is constituted by all those organisations that are non-profit and non-government, together with the activities of volunteering and giving which sustain them. These organisations are a major component of many industries, including community health services, rural, education, housing, sport and recreation, culture and finance. Although they differ amongst themselves, third-sector organisations differ as a group from for-profit businesses and from government departments and authorities. Third-sector organisations vary greatly in size and in their activities. They include neighbourhood associations, sporting clubs, recreation societies, community associations, chambers of commerce, churches, religious orders, credit unions, political parties, trade unions, trade and professional associations, private schools, charitable trusts and foundations, some hospitals, welfare organisations and even some large insurance companies.

What is ANZTSR?

ANZTSR was launched in 1993. It arose from the growing awareness of the importance of the third sector in Australia and New Zealand, the paucity of reliable information about it, and the difficulty of working as isolated researchers. ANZTSR is an incorporated association. ANZTSR joins similar organisations in the USA (ARNOVA), the UK (ARVAC) and the International Society for Third Sector Research (ISTR) as active networks that promote communication between researchers and help develop synergies in the research endeavour. Research networks have also formed in several European countries or regions, in Latin America and Japan. These all testify to the growing interest in the third sector. The third sector is an important but hitherto undervalued and under-researched sector of societies, political systems and economies.

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Third Sector Review is explicitly cross-disciplinary, with both theoretical and empirical papers invited from a range of disciplines and fields of practice. Critiques of existing theory or practice are invited. Contributions are encouraged from both practitioners and academics. There is a special 'From the Field' section. Contributions are invited relating to characteristics of the third sector or any aspect of its management, including governance, human-resources management, the labour market, financial management, strategic management and managing change, community development, fundraising, user rights, relations with government, legal issues, historical development, etc.

Papers should be written in a jargon-free, non-technical style accessible to managers, workers and board members of non-profit organisations, and to academic researchers, teachers and students from a variety of disciplines. Papers are subject to rigorous peer review, normally by two independent reviewers. A blind review process is adopted. For that reason, authors should indicate their names and affiliations on a separate page.

Authors should also include a brief abstract (100 words) and up to five keywords. Papers should be between 4000 and 6000 words in length, in 12-point Times New Roman, double-spaced and with 2.5-cm margins. Please use minimal formatting and styles; indicate headings through the use of CAPITALS, bold and *italics*. Authors should submit an electronic version of their paper in Microsoft Word format or Rich Text Format (RTF). If any images are used, please ensure that a high-resolution image fi le (jpeg or tiff) is supplied separately. If graphs are included, please ensure that the data used to create .them is available to our designer. Where quotations are more than 40 words, they should be indented, justified and set in italics, with the source following directly. Single quotation marks are to be used throughout the text, with double quotation marks within single when needed.

Citations

The Harvard style of referencing is used, with endnotes kept to a minimum. Examples: (Lyons 1999); (Lyons 1999: 20); (Lyons 1998a, 1998b); (Onyx & Bullen 1998). If there are three or more authors, use the form: (McDonald et al. 1998). List multiple references in ascending chronological order: (McDonald et al. 1998; Onyx & Bullen 1998; Lyons 1999).

References

List in alphabetical order by the first author's surname. List multiple references by the same author chronologically, the earliest first, with the author's name repeated. Refer to the following examples, including the punctuation and capitalisation.

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Editorial

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This year marks 30 years of the Australian and New Zealand Third Sector Research Inc (ANZTSR), culminating in the 15th Biennial conference to be held in Perth in a few months' time. As always, this year's conference promises to be a fantastic opportunity to share research and emerging trends in the third sector. The conference will see the inaugural Feilman Oration by Kate Chaney MHR, independent member for the Commonwealth seat of Curtin along with a Keynote address from Dr Richard Denniss. With themes ranging from advocacy to regulation and accountability in the third sector and related law reform, organisation of the third sector and new wave structures, to the role of community volunteers, there is something for all researchers, practitioners and advocates engaged in the third sector. As a researcher in law and religion I am most looking forward to papers addressing the conference theme of religion in the third sector.

Indeed, a key theme emerging from the papers in this issue is the need for law reform or education and guidance. Coshott argues for reform to better align the law with the expectations of donors to large fundraisers while Langford and Anderson examine the need for law reform in the regulation of charities. While this issue may at first appear a little law-heavy, these issues are very relevant to readers outside of the legal sphere. In particular, donors, those planning large scale fundraisers, and those involved in governance of the sector will find the papers in this issue particularly interesting and, I hope, useful.

As Derwent Coshott explains in his paper, *Reforming The Cy-Prés Doctrine: Lessons from Australia's Black Summer and Online Fundraisers*, in the wake of the Black Saturday bushfires, millions of dollars were raised with the expectation by donors that these funds would go to support victims of the fires as well as wild life rehabilitation. However, in the case of the funds raised by Australian comedian Celeste Barber for the New South Wales Rural Fire Service Trust (the "RFS Trust"), this expectation could not be met due to the terms of the trust. As Coshott outlined "the charitable purposes of the RFS Trust were limited to equipping and training the various Rural Fire Service Brigades." As a result, the expectations of the donors could not be met. In his paper, Coshott argues that the cy-prés doctrine could be expanded to enable courts to redirect funds so as to meet the expectations of future donors in circumstances similar to those surrounding the Black Saturday fires fundraisers *"*to take account of the broader social and economic context*."* As Coshott points out *"[w]*ith the rising prevalence of online fundraisers, it is highly likely that we will see future instances of fundraisers going viral and exceeding expectations" and we therefore need to "learn from the Barber fundraiser, and ensure that the law is appropriately prepared" (pp. 15).

Just as donors' expectations should be taken into account in the future direction of law reform, so too must directors' and managers' understandings and expectations in relation to their role. Rosemary Langford and Malcolm Anderson explore this question in their paper *Effectiveness*

of Charity Governance and Regulatory Frameworks: Australia and England and Wales Compared. They outline the results of empirical research into the effectiveness of the regulatory framework in both Australia and England and Wales. Interestingly, and if I might say unexpectedly, they found that "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." (pp. 35). However they also found that conflicts of interests were not declared as frequently as might have been expected suggesting education and guidance is needed in this area, potentially along with law reform.

Also in this issue is a book review of Henry Peter and Giedre Lideikyte Huber (eds) The Routledge Handbook of Taxation and Philanthropy by Ian Murray. As Murray notes, the book is comprehensive in its scope and depth exploring aspects of the topic not covered elsewhere.

Overall, the papers in this number are an intriguing read in the context of the changing fundraising laws impacting Australia in the short term and of benefit to readers who have an interest in this fundamental area of law.

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Reforming The Cy-près Doctrine: Lessons from Australia's Black Summer and Online Fundraisers

Derwent Coshott, The University of Sydney Law School

Abstract

Among the numerous fundraising efforts that took place during Australia's Black Summer bushfires was an online fundraiser set-up by comedian Celeste Barber. After massively exceeding its goal of raising $30,000 for the RFS Trust by collecting over $50 million, issues emerged as to what should be done with the moneys; especially when it was learned that many people donated under the belief that they were supporting bushfire victims and wildlife. The law is currently thought to be unable to address such a situation. Yet in a world where anyone can start an online fundraiser it is likely to occur again. This article, therefore, proposes a means of addressing this challenge through reforms to the cy-près doctrine; advocating in favour of reforming the doctrine to take account of the broader social and economic circumstances, so as to permit the courts to consider the kinds of issues that can arise from online fundraisers in the future.

Keywords

Cy-près; Trusts; Online Fundraisers; Black Summer Bushfires

Introduction

During the summer of 2019-2020, Australia was subject to some of the worst bushfires in its modern history, with tens of millions of hectares of land consumed by flame (Center for Disaster Philanthropy 2019). In response, charities and individuals throughout the world initiated numerous fundraising efforts (Cuthbertson and Irvine 2020). One of the most newsworthy was an online fundraiser started by an Australian comedian, Celeste Barber, for the New South Wales Rural Fire Service Trust ("the RFS Trust"), which is a charitable trust. The initial goal for this fundraiser was $30,000, but it soon garnered so much international attention that over $50,000,000 was raised (Zhou 2020). As a result, Barber made statements that she would 'make sure' that the moneys would be spread out to assist people and wildlife affected by the fires (Zhou 2020). The RFS Trustee publicly expressed agreement with such sentiments (9News 2020). But there was a problem: the charitable purposes of the RFS Trust were limited to equipping and training the various Rural Fire Service Brigades. The only

probable way around this would be to apply the moneys to other purposes under the cy-près doctrine, and on the basis that the RFS Trustee would refuse the funds, thereby rendering their application to the RFS Trust's purposes impossible (Benns 2020: 7).

However, this option was never pursued; and in the litigation that followed concerning how the funds could be used, the RFS Trustee asked the court a narrower question regarding the proper construction of the RFS Trust's purposes (*In the matter of the New South Wales Rural Fire Service & Brigades Donations Fund* 2020 ("*RFS case*"). Yet had the court been asked to consider the scope of any potential cy-près scheme, the likely answer would have still precluded any application of the funds to those expanded purposes which Barber envisioned. This would have been due to the limits currently placed on cy-près schemes which are inherent to what the term, cy-près, means: close by to the settlor's original intent; or close by to the originally designated charitable purposes (*Re Slevin* 1891). As such, despite the fact that there would have been no funds but for the actions of tens of millions of donors, their intentions are irrelevant for the purposes of any cy-près scheme. What matters is what were the purposes originally specified by the settlors of the trust. Thus, in the case of the RFS Trust, this would have restrained the court to select purposes that were similar to those already performed by the RFS Trust: i.e., equipping and maintaining the RFS Brigades.

Would this have been an acceptable result? Given the negative public and political response to the court's decision regarding the interpretation of the RFS Trust deed, it can be surmised that the answer, for many donors, would be no (Legislative Council, Portfolio Committee No. 5 2020). Indeed, a question that was at the very heart of proposed legislative amendments to the *Rural Fires Act 1997* (NSW) was, why should moneys that the public donated to the Barber fundraiser not be available for other important purposes, especially when many members of the public thought they were donating to those other purposes? A lawyer may be able to posit good reasons why in response, but that does not mean that the public would agree with those reasons; or, be convinced that the current state of the law is correct. Further, these issues raised by the Barber fundraiser do not just represent one-off problems: they are ones that we can expect to see again in a world where any person can set-up an online fundraiser. What happens the next time when there is a natural disaster that a celebrity takes an interest in; starting a fundraiser that exceeds expectations?

Accordingly, this article seeks to address these issues in the cy-près context. It does so by showing, first, that the cy-près doctrine is not so closely tied to settlor intention as is often thought, thus opening it up to consider the broader public interest. As the caselaw shows, it is highly questionable to what extent settlor intention is determinative of any eventual cy-près scheme; with references to settlor intention only being further eroded under presently existing legislation. At best, adherence to the settlor's intention appears to be a preference exercised by the courts, and one that can be weighed against other public interest factors. Secondly, this article argues that the exercise of this preference to remaining close-by makes little sense when considered in light of instances such as the Barber fundraiser, where millions of dollars (the vast bulk of the fundraising) are donated to charitable funds from non-settlors. If the basis of the cy-près doctrine's preference for remaining close-by is that the settlor chose to provide funds for a particular charitable purpose, then why should the wishes of those who provided so

many more funds be completely ignored; especially when there is a public interest in taking those wishes into account.

In light of this, the article will advocate in favour of statutory reforms of the cy-près doctrine along similar lines as those undertaken in England under s 67 *Charities Act 2011* (UK) wherein the 'social and economic' circumstances of the time are factored in when formulating cy-près schemes. Such reforms have required the English courts and Charity Commission to explicitly take into account public interest matters when allocating property cy-près, thus permitting the re-allocation of property to purposes quite at variance to those originally designated. If such laws were available with respect to the Barber fundraiser, then it is conceivable that the subsequent wishes of Barber, and many of the donors to her fundraiser, could have been fulfilled. Consequently, such reforms, if adopted in Australian jurisdictions would provide the cy-près doctrine with the capability to address the kinds of issues thrown up by the Barber fundraiser; issues that will undoubtedly continue to arise in the future if the law remains idle.

Cy-près and Settlor Intention

It is commonly accepted that when property is sought to be applied cy-près, the courts are required to select purposes that are 'as close as possible' to the settlor's originally designated charitable purpose as disclosed by the terms of the gift (*Phillips v Roberts* 1975: 217). The court is to consider 'the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or the conditions imposed to effect it' (*Vesani v Jesani* 1999: 234). Accordingly, while the court is free to consider evidence of the settlor's intention that was not contained in the terms of the original gift, it is not free to select any charitable purpose which it thinks is most deserving of the settlor's bounty. This is not only true under the general law, but also under various statutes, including (according to the interpretation of the courts) legislation that does not specifically require it.

However, despite the general adherence to this view, there are numerous instances which challenge its universality. For example, with respect to how close the cy-près purposes need to be those originally designated, there stands the celebrated 19th century English decision *Attorney-General v The Ironmongers' Company.* The case concerned moneys that had been bequeathed over a century earlier for the freeing of British slaves in Turkey and Barbary (modern day north Africa). The issue was that in the preceding century there had been few such slaves, and by the time the trustees applied to the court regarding a cy-près scheme, there were none. Further, there were no purposes which were in any way similar to the freeing of slaves. As such, the court was faced with a problem: the moneys had to be applied cy-près, but what purpose would be cy-près, or close by?

The answer that was arrived at was that, although in situations where a will or gift contains multiple charitable purposes which 'may be wholly unconnected' to each other, nevertheless, one purpose could be referred to 'as indicative of the testator's general views and intentions' regarding another (*Ironmongers'* 1840-1: 224). In this case, the testator had also left moneys for the support of Church of England Charity Schools in England and Wales. Accordingly, the

court decided to apply the moneys allocated for the freeing of slaves cy-près to that other purpose. How was this close by to the originally designated purpose? Simply put, it was not; rather, that purpose was selected simply due to the fact that the testator had provided for it elsewhere in his will. As such, while the court was wont to say that it would be wrong to directly apply property from one failed charitable purpose to another valid one, this was exactly what could be done under a cy-près scheme where no other, closer, purpose could be found (*Ironmongers'* 1840-1: 224).

The reasoning of *Ironmongers'* has found its way into modern discourse though the idea that when the courts are selecting cy-près purposes, they go 'in ever increasing circles' until a valid purpose is located (Luxton 2001: [15.21]). Thus, the courts seek purposes that are close by, but are not actually bound to select close by purposes; truly giving effect to the full phrase from which the term, cy-près, first emerged: *cy près comme possible*, which means as near as possible (Gray 1953: 32). Accordingly, the cy-près purpose—despite the nomenclature of cy-près—need not be close by to what was originally designated.

If the originally designated purpose is not imperative for the operation of the cy-près doctrine, then this raises the question of settlor intention, and to what extent does the settlor's originally designated purpose matter? This issue arose in two 20th century cases: *Re Morgan* and *Re Lysaght*. The former case involved moneys that were bequeathed to purchase and maintain a 'recreation ground' for 'amateur activities' for 'the maintenance and improvement of the health and welfare of the inhabitants of the parish of Jeffreyston' (*Morgan* 1955: 739). The parish, however, already had a cricket ground and a football pitch, and thus had no need for any more outdoor recreation spaces. What the parish did need were indoor facilities, such as a 'parish hall or gymnasium', and, consequently, the trustees asked the court to determine whether the funds could be applied cy-près to those purposes (*Morgan* 1955: 739).

The court held that they could, on that basis that '[t]here appears to be a real need for something of that sort in this place.' (*Morgan* 1955: 740-741). This was due to the construction given to the testator's will that 'the improvement of the health and welfare of the inhabitants of Jeffreyston' was the primary purpose of the gift, with the means specified for carrying that out—the purchase and maintenance of a recreation ground—being secondary. As such, the matter was dealt with in a seemingly straightforward manner, but one that belied what actually occurred when the property was applied cy-près: an intention was imputed to the testator to benefit the parish community in a completely different way than he originally specified. Yet this was not like *Ironmongers'* in which over a century had passed since the original bequest: i.e., there might be some justification in overwriting the testator's expressed wishes on the basis that circumstances had changed to such an extent that one could only look to a hypothetical intention to ascertain what he would have wanted. Here, the will was dated a mere nine years before the reported decision, and the testator himself only passed away two years prior. In other words, it is unlikely that he was not aware of the circumstances of the parish when making the bequest, and yet he purposefully chose to bestow his beneficence in the way that he did. Further, one can readily imagine a number of purposes relating to better providing for the existing recreation grounds, or even supporting those 'amateur activities' that would represent closer purposes to those originally designated (*Re Hadden* 1932; Luxton 2001: [4.139]-

[4.143]). Accordingly, the nature of the scheme ignored what the testator clearly wanted by directing that the funds should be applied in a particular way, with the court not even seeking to apply the property to purposes that would have been closer to those originally selected.

Re Lysaght proceeded similarly. It involved a testatrix bequeathing moneys to the Royal College of Surgeons ("the College") to provide student scholarships for students who, among other things, were 'not of the Jewish or Roman Catholic Faith.' (*Lysaght* 1966: 192). The College refused to accept the gift with the religious restrictions, which created an initial impossibility regarding it. As such, the question for the court was whether it could apply the property cy-près by giving it to the College absent the religious restrictions. As in *Re Morgan*, the answer depended upon whether the testatrix, by the terms of the original gift, had disclosed a general charitable—or 'paramount'—intention to benefit the College which overrode her 'particular' intentions regarding the religious requirements (*Lysaght* 1966: 201-202).

The court held that she had, and on the basis that the paragraph of the will—paragraph (D)—which contained the religious restrictions also specified that the student must be 'the son of a duly qualified British born medical man registered in the Medical Register of the United Kingdom' (*Lysaght* 1966: 192). The court reasoned that, if due to changes in the organisation of the medical profession in England, the Medical Register ceased to be maintained, it was highly unlikely that the testatrix would want to see her gift to the College fail. As such, the judge stated that 'If the requirements of paragraph (D) are not essential in this respect, it is at least possible and, I think, probable that they were not intended to be essential in other respects.' (*Lysaght* 1966: 204-205). Accordingly, the court proceeded to apply the property cy-près without the religious discriminatory aspect, on the basis that the testatrix had a general charitable intention to train surgeons that overrode the particular restrictions regarding religion.

To a normal person, possessed of common sense, such a result is rightly to be looked at askew; even though *Re Lysaght* is an oft-cited case and held to represent good law (*Attorney General v Zedra Fiduciary Services* 2020: [110] and [115]). While the court was correct to say that the maintenance of the medical register would be ancillary to the training of medical professionals, the very presence of this in the same paragraph with a far different kind of requirement—that of religion—can hardly mean that the same weight should be given to each of them. One can reasonably conclude why an English protestant woman in the mid-twentieth century would not want her bequest going to Jews and Catholics; and with very strongly held views, however offensive they might be to more modern sensibilities. Indeed, it defies belief that a judge living during the same time period would not be aware of such attitudes.

Consequently, *Re Morgan* and *Re Lysaght* both show that, despite the rhetoric of the courts in seeking to adhere to the settlor's wishes, the extent to which they must do so—the substance of their decisions—indicates a different attitude. In *Re Morgan*, this took the form of prioritising the needs of the community; while in *Re Lysaght*, the preferences of the College predominated. The testator's and testatrix's wishes were sublimated to each external factor and reconstrued in light of them. As Garton has stated with reference to *Re Lysaght*, and other similar cases, 'It seems, then, that in some cases the *cy-près* doctrine is used to frustrate, rather than give effect to, that part of the donor's original intention that is contrary to public policy.'

(Garton 2007: 141). With respect to *Re Morgan*, the same is true regarding the needs of a community.

However, the case law is not the only aspect of the cy-près doctrine's operation that calls into question the primacy of the settlor's intention: legislation has also significantly eroded its role. For example, statutes in New South Wales, South Australia, Western Australia and New Zealand presume a general charitable intention that settlors would want their property to be directed towards other charitable purposes cy-près; thereby sparing the courts the need to construe such an intention from the terms of the gift (*Charitable Trusts Act 1993* (NSW) s 10(2); *Trustee Act 1936* (SA) s 69B(3); *Charitable Trusts Act 1962* (WA) s 7(1); *Charitable Trusts Act 1957* (NZ) s 32(1)). Moreover, the events that trigger cy-près under the general law—that the originally designated purpose is impossible or impracticable to carry out—have further been expanded to include circumstances where 'the original purposes have ceased to provide a suitable and effective method of using the trust property' (*Charitable Trusts Act 1993* (NSW) s 9(1)), or where the carrying out of the original purposes would be 'inexpedient' (*Charitable Trusts Act 1962* (WA) s 7(1); *Variation of Trusts Act 1994* (Tas) s 5(2); *Charitable Trusts Act 1957* (NZ) s 32(1)). Indeed, legislation in Western Australia and New Zealand has gone further still, explicitly allowing for property to be applied cy-près 'for some other charitable purpose' without reference to settlor intention at all (*Charitable Trusts Act 1962* (WA) s 7(1); *Charitable Trusts Act 1957* (NZ) s 32(1)).

Having said that, it is important to note that the rhetoric of settlor intention still exerts considerable influence. This is evinced by decisions in Western Australia and New Zealand which, despite the above noted legislative provisions, have continued to limit their application with reference to settlor intention. For example, in *Re Twigger*, Tipping J of the High Court of New Zealand stated, 'the court owes a duty to the settlor of the trust property to dispose of it as nearly as possible in accordance with the intention of the settlor.' (*Twigger* 1989: 341) Similarly, Anderson J of the Supreme Court of Western Australia in *Penny v Cancer and Pathological Research Institute of Western Australia* held that, 'the court would not readily approve a scheme which did not have that degree of resemblance [to the originally designated purpose], even although a cy-près approach is not mandatory' under the legislation (*Penny* 1994: 318).

Yet it is important to understand that such statements are not necessarily as restrictive as they appear to be. The stated obligation to re-allocate the property 'as nearly as possible' does not necessarily indicate that the trust or gift should fail; only that it should be applied as nearly as possible. In other words, stating that the court may 'not readily approve a scheme which did not have' a 'degree of resemblance' is quite different than stating that a court would not approve a scheme at all; especially under legislative provisions that explicitly enable it to. That being said, while this may be construed as consistent with the result reached in a case such as *Ironmongers'*, it still represents a narrower application of the law than was seen in *Re Morgan* and *Re Lysaght*, despite each decision being accepted as good law.

Accordingly, the extent to which settlor intention genuinely matters for the application of the cy-près doctrine is questionable. It is true to say that in the vast majority of cases the application of the doctrine, with respect to selecting similar purposes to those that have failed, is fairly

straightforward. If a particular hospital or school did not exist then, undoubtedly, another could be found. But as with many matters in law, it is the cases at the extremes that provide us with the best insight into the functioning of a particular legal doctrine. What can be concluded is that while the cy-près doctrine is often expressed with reference to settlor intention, it has frequently operated in other ways that go against it. Indeed, this was recognised since at least the 18th century when the courts expressed considerable reluctance to apply the doctrine, stating that were they not bound by precedent they would not apply it, and observed that the cy-près doctrine imputed to testators artificial intentions to benefit other charitable purposes (*Mills v Farmer* 1815: 95).

While this aspect of the cy-près doctrine is worthy of greater discussion, nevertheless, this brief examination is illustrative of a clear point: the cy-près doctrine does not mandate a close adherence to the settlor's intention. It can be overridden provided that the courts can construe, however artificially, a link between the originally designated purpose and that which is sought under a cy-près scheme. Further, as *Re Morgan* and *Re Lysaght* show, the courts will draw such links where they see matters of public interest at play. The variable, therefore, is the degree of willingness possessed by courts in particular cases to do so. Accordingly, cy-près is a flexible doctrine, or a doctrine that has been applied flexibly by the courts; and which has only further been separated from settlor intention by legislation.

Cy-près and Modern Fundraising

The preceding discussion has called into doubt, as a matter of legal doctrine, the extent to which the application of cy-près is tied to settlor intention. Yet it also raises the question as to whether the cy-près doctrine should not be further unpegged from settlor intention when the broader needs and concerns of society come into play. Charity is focused on public benefit; and cases such as *Re Morgan* and *Re Lysaght* show that this can, at the very least, greatly influence the construction given to what is cy-près to the settlor's intention.

In this light, it is, therefore, unsurprising that steps in this direction have taken place in England in the form of s 67(3) *Charities Act 2011*, in which deference to remaining close-by to the originally designated purposes is balanced with 'the need for the relevant charity [under a cy-près scheme] to have purposes which are suitable and effective in the light of current social and economic circumstances.' In the recent case of *Attorney General v Zedra Fiduciary Services (UK) Ltd*, this resulted in the High Court of England and Wales holding that a charitable fund, which had been established in 1928 to pay off the British national debt, should not, in 2020, necessarily be used to pay off a miniscule fraction of that debt when the broader social and economic circumstances may indicate a better use for the moneys (Picton 2021).

What are those broader social and economic circumstances? The legislation does not define them; and, given the nature of most cy-près schemes in England being formulated by the Charity Commission behind closed doors, a case such as *Zedra* represents a rarity (Picton 2021: 363). As a result, and according to the court in *Zedra*, the legislation 'confers a broad discretion on the court, once a cy-près occasion has arisen, to make such scheme as it considers appropriate' (*Zedra* 2020: [155]). In other words, the court is free to consider whatever

circumstances it thinks are appropriate in formulating cy-près schemes with reference to the public good.

Therefore, and in light of the foregoing discussion, should the law in Australia advance similarly? The issues surrounding the Barber fundraiser are demonstrative of good reasons why.

Donor Frustrations and the Barber Fundraiser

As discussed above, the key problem that faced the Barber fundraiser was that it exceeded Barber's initial expectations; with many donors—either independently, or based on Barber's public statements—coming to believe that they were donating to purposes far broader than those advanced by the RFS Trust. However, as media reports containing advice from legal experts to the contrary began surfacing, such beliefs quickly turned to indignance and even anger. This was evident in public responses received by the *Inquiry into the provisions of the Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020*, which was held to inquire into legislation proposed by the NSW Greens that would allow the moneys raised through the Barber fundraiser to be used to assist bushfire victims and wildlife. For example, comments received by the inquiry in favour of the Bill argued that 'It overcomes a technical issue that affected the intent of the donations.' and 'The money was raised in good faith for victims. This current law needs amendment.' (Legislative Council, Portfolio Committee No. 5 – Legal Affairs 2020: 4). Further, these sentiments clearly arose from a belief that the moneys were not raised to support, or at least solely support, the RFS Trust (Legislative Council, Portfolio Committee No. 5 – Legal Affairs 2020: 2-5):

- 'The intent of the monies raised by Celeste Barber was to assist communities and families to rebuild after the unprecedented bushfires. There are thousands of people still displaced during this cold winter who require urgent assistance. By withholding the funds in the NSW Rural Fire Service Trust Deeds; it does not service the intent of donors or Ms Barber.'
- 'I support the amendment to have the funds released to the victims of the bushfires, if I had known the funds would be released to the bushfire brigade I would not have given, while I respect what they do, there were so many lives lost humans, animals and their homes. Give the money to the bushfires victims.'
- 'Obviously the people who donated expected it to go to the victims. No question the RFS is deserving, but that doesn't change the INTENT of the donors.'

Consequently, many people felt let down, or even betrayed, by seeing their donations go to purposes that they did not subjectively intend to benefit. Further, such sentiments should not be seen as being limited to the Barber fundraiser: given the advent of online fundraising platforms, it is highly likely that the Barber fundraiser represents the first example of a broader problem for charitable fundraising into the future. What happens the next time an online fundraiser goes viral?

The question then, is how to address such issues? The solution suggested by various commentators is for donors to be better informed, and charitable fundraisers to be clearer in their terms (Siebert 2020; Cheung and Chandra 2021: 71). However, to expect donors to put in the kind of effort that it takes to be properly informed is to effectively argue that it is the donors' fault if they misunderstand something that is, ultimately, a legal question of construction. Indeed, with respect to fundraisers being clear in their terms, the Barber fundraiser could not have been clearer given that it explicitly stated that it was for the RFS Trust in both its title and description (*RFS case* 2020: [15]). Any possible problems concerning technicalities and resulting confusion could have only emerged when the donations were initially made through Facebook to the PayPal Giving Fund. The latter is a Public Ancillary Fund, to which a donation is made with a recommendation by the donor that the donation is paid to a particular charity: here being the RFS Trust. This recommendation is legally non-binding; but in accordance with the PayPal Giving Fund Donation Delivery Policy, is usually paid to the nominated charity (PayPal Giving Fund Donation Delivery Policy 2020). In this case, the donations were paid according to the recommendations of donors as shown by their donating to a clearly defined Facebook fundraiser. It would not have been for the PayPal Giving Fund to refuse the donations, thereby creating a cy-près event; or return them to donors in the absence of requests being made by specific donors (Donation Refund Policy 2021). Rather, the problem concerning the Barber fundraiser was that, in greatly exceeding its initial fundraising goal it became something else—something greater in scope—for many of the people who were donating to it. This indicates that the problem is one surrounding changed circumstances, which is, broadly-speaking, what the cy-près doctrine exists to address. As such, the issue becomes, to what extent can the cy-près doctrine address such circumstances, and how should it?

Reforming The Cy-près Doctrine

As the preceding analysis has indicated, cy-près, in its current form, is not necessarily unable to address these issues. As both *Re Morgan* and *Re Lysaght* show, it is not as though funds cannot be applied to distant purposes under a cy-près scheme, or purposes that are of greater need to a community. The problem—or, more accurately, the restriction—is that the court will not do so when there are closer available purposes, and/or the court is unwilling to construe settlor intentions based on community needs.

Accordingly, to what extent should such deference to a settlor's original intentions (whether as a requirement or, simply, a preference of the cy-près doctrine) be maintained in light of broader societal concerns; specifically, the issues raised by the Barber fundraiser? The answer is ultimately one of public policy; but, as discussed above in the context of *Ironmongers'*, *Re Morgan* and *Re Lysaght*, there is no inherent doctrinal block in the law of cy-près itself that stands against minimising the wishes of settlors. In reality, as noted above, this is exactly what the legislation in England has done, and what similar legislative reforms could do in Australia.

Consequently, what are the public policy pros and cons of adopting similar reforms in Australian jurisdictions that take account of the broader social and economic context? In terms of the cons, Mulheron's answer, drawn from a number of scholarly works, is:

> '[1] the court owes a duty to the donor to dispose of the property in accordance with his intentions, given that it is the general charitable intent of the donor (either presumed if subsequent failure or proven if initial failure) to which the court is giving effect;
>
> [2] "keeping faith with donors" is important, because if property is diverted from the original purposes, donors will be deterred from giving to charity;
>
> [3] the cost of administering a charity that is close to the original purpose will presumably be less than some differently-focused scheme;
>
> [4] adherence to the donor's wishes prevents whimsical change, "with every fluctuation of popular opinion" about how the property may be "better applied"; and
>
> [5] because a charitable trust must be for the public benefit, by virtue of its legal definition, then choosing analogous purposes also serves a public utility.' (Mulheron 2006: 87).

However, these reasons are unpersuasive. First, as the proceeding discussion shows, whatever duty the court owes to settlors to dispose of property in accordance with their intentions is only one to remain as close as possible, not to actually remain close-by, to those wishes. Secondly, the idea that diverting property from its original purposes will somehow deter charitable giving is, at best, an untested hypothesis, as we have no empirical evidence that this would be the case. Indeed, it would be surprising to learn that settlors have little, if any, awareness of the cy-près doctrine. Thirdly, presuming that remaining close-by to the original purpose results in lower administration costs is just that, a presumption. In reality, it is difficult to imagine what additional costs would arise if, for example, property was transferred from one school to another (under the charitable heading of education) versus money being transferred from a school to the Red Cross (under a different heading, such as poverty). Fourthly, the idea that the courts would order cy-près schemes in any whimsical manner clearly ignores what the courts have done under legislation which has given them far greater latitude; such as in Western Australia and New Zealand, as noted above. Fifthly, the idea that because a charitable trust must be for the public benefit implies any kind of public utility where a similar purpose is selected appears to ignore the clear fact that the selection of any purpose recognised as charitable would do the same.

The pros, or benefits, on the other hand, are numerous. First, reforming cy-près to take account of the social and economic context would address the issues that arose concerning the Barber fundraiser in a way that diminishes public feelings of frustration: i.e., donors not having their wishes frustrated by what they see as technical and arcane laws, the rationales of which they are unaware of and do not understand. For instance, if there existed a legislatively reformed cy-près doctrine—which allows the court to take account of the broader social and economic circumstances—then, when the Barber fundraiser occurred, the RFS Trust could have refused the funds on the basis that the trustees believed that many donations were made with the intention of supporting bushfire victims and wildlife. In a cy-près application, the court could have taken this into account and, exercising its discretion under the legislation, made a proportion of the funds available to those other purposes through allocating them to more appropriate charities.

Secondly, from a purely legal perspective, such reforms would also better clarify the operation of the cy-près doctrine itself. Clearly, decisions such as *Re Morgan* and *Re Lysaght* proceeded on bases that prioritised the needs of the community over the wishes of settlors. Thus, reforming the law to explicitly take account of community needs would better accord with such results, and remove the need to engage in tortuous rhetoric that seeks to fit settlor intention in with these broader concerns.

Thirdly, such reforms would better align cy-près with the nature of charity itself. At its core, the legal concept of charity is concerned with advancing purposes that are for the benefit of the public; not for the benefit of the settlor (Coshott 2020: 239-244). Why then, should the public not get to decide on what is the best use for the property? In the private trust context, the beneficiaries can do so through what is known as the rule in *Saunders v Vautier*, which allows those beneficiaries who are legally capable, and with a vested interest, to bring the trust to an end and have the trust property transferred to them (*Saunders* 1841). This is based on the idea that a trust is something established for the benefit of the beneficiaries, not the settlor. Why should that logic not apply to charitable trusts, and charity more broadly, when charitable bodies and the Attorney-General, as representing the interests of the public, would actually be better placed to determine what is the best use of the resources that have been devoted to the public's benefit?

Consequently, there are persuasive arguments in favour of reforming the cy-près doctrine in Australia to explicitly take account of the social and economic circumstances at the time. Such reforms need not be complex, and could follow the English text which, as noted above, states that when formulating a cy-près scheme regard is to be had to 'the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.' (s 67(3)(c) *Charities Act 2011*). The English legislation also balances this with reference to the 'spirit of the original gift' and 'the desirability of securing that the property is applied for charitable purposes which are close to the original purposes,' and such could also be incorporated into any Australian enactments. This is recommended, given that, as explained above, while the importance of settlor intention has been eroded under Australian legislation, and to the point of practically being eliminated under Western Australian and New Zealand legislation, nevertheless, the courts continue to refer to the originally designated purpose in their decision-making. This makes sense as a relevant factor, but, as this article has argued, it should not be determinative in light of other broader social concerns.

As such, the adoption of legislative reforms along these lines will enable the cy-près doctrine to address the issues raised by the Barber fundraiser, in addition to better aligning the operation of the cy-près doctrine—and charity law more broadly—with public sentiment. This would avoid, or at least ameliorate, those public feelings of apathy and suspicion that arose surrounding the Barber fundraiser when such events occur again; and result in a cy-près doctrine that better serves the needs and interests of the community.

Conclusions

This article has argued in favour of reforming the cy-près doctrine in Australia to take account of the broader social and economic context. With the rising prevalence of online fundraisers, it is highly likely that we will see future instances of fundraisers going viral and exceeding expectations. It is, therefore, important, that we learn from the Barber fundraiser, and ensure that the law is appropriately prepared. Reforming the cy-près doctrine to take account of the broader social and economic circumstances is a simple way to do this; and one which is not inconsistent with how the cy-près doctrine has been applied when one recalls cases such as *Re Morgan*. Further, such reforms would enable the doctrine itself to operate in a more cohesive manner, avoiding much of the tortured rhetoric surrounding settlor intention that has plagued the caselaw in situations such as *Re Lysaght*. This would better prepare the law of charity for the future, and ensure that the wishes of donors, all donors, can properly be taken into account when the next natural disaster, and viral online fundraiser, occurs.

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Governance Duties and Conflicts of Interest in the Charities Sector: Australia and England & Wales Compared

Rosemary Teele Langford and Malcolm Anderson

Abstract

This article reports the results of an extensive survey of persons who govern charitable entities in Australia and in England & Wales in relation to governance duties and conflicts of interest. The results help discern respondents' understanding of, and confidence with, their governance duties, their enthusiasm for practical assistance with these duties, the strength of their conflicts management procedures, as well as compliance motivations and perceived barriers to enhanced governance and compliance. This in turn assists in critical evaluation of the effectiveness of the governance and regulatory system in each of Australia and England & Wales, and enables valuable comparisons between the jurisdictions in this respect.

Introduction

In 2012 a new governance and regulatory framework for charities was introduced into Australia with the advent of the Australian Charities and Not-for-profits Commission (ACNC) (see ACNC Act 2012; ACNC Regulations 2013). There is widespread recognition that this framework gives rise to inconsistences, incoherence, gaps in coverage and problematic interaction with other legal obligations (see, e.g., Brand et al. 2013; Heesh & Lobow 2015; Aroney & Turnour 2017; Ramsay & Webster 2017; Murray 2019; as to the complexity of the previous system see Woodward & Marshall 2004). Key problems include the multiple layers and sources of governance duties and the inconsistencies between these duties (arising from Australia's federated system and the lack of a referral of power), as well as the fact that the core obligations imposed by the ACNC are imposed on charitable entities rather than on the responsible persons who govern charities. As a result, the Australian charitable sector struggles with a complex governance system that lacks clarity and coherence. This confusing system can be contrasted with that of England and Wales which is more coherent, with a more straightforward system of governance obligations, a more expansive Charities Act, as well as a Charity Governance Code with diagnostic tool, and more prescriptive Charities Commission (CCEW) guidance concerning conflicts of interest (see CCEW 2012: 17–19 [6.3], [6.4]; CCEW 2014; CCEW 2020. For ACNC guidance, see ACNC 2015a).

This article represents the results of empirical research on the effectiveness of the governance and regulatory framework in each of Australia and England and Wales. 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?

Despite consistent national interest in the not-for-profit sector (as evidenced by four national inquiries), there is a clear absence of empirical studies into the governance framework of charitable entities. Commentators have drawn attention to the lack of studies from Australian researchers into not-for-profit governance, and particularly empirical research into governance challenges (see, e.g., Moi et al. 2014; Chelliah et al. 2016), with Chelliah et al stating that 'there is a dearth of academic research on the governance challenges faced by Australian not-for-profit organisations' (Chelliah et al. 2016: 4).

Methodology

An interactive survey was created using SurveyMonkey following ethics approval and pilot-testing directed at responsible persons (Australia) and charity trustees (UK).[i] The survey was kept as short as possible (with an estimated completion time of 14 minutes for the Australian survey and 16 minutes for the UK survey) to encourage maximum responses. The survey collected quantitative and qualitative data beginning with a series of demographic questions, followed by questions assessing respondents' understanding of their duties, barriers and motivations in relation to compliance, how conflicts are managed and understanding of conflicts of interest.

Participants were recruited as follows. First, survey links were distributed by peak sector bodies and charity law practitioners and contacts either via newsletter or email. Second, the research team researched the details of individual charities using the charities register in each jurisdiction and sent emails with survey links to them.

In probing governance and enforcement frameworks and testing reform proposals, the surveys focused on two aspects. The first aspect tested respondents' level of understanding of their governance duties.[ii] This aspect was chosen because the ACNC governance framework has been criticised as resulting in increased complexity and reduced accountability for individuals working for registered charities (see, e.g., Ramsay & Webster 2017). The second aspect probed how charities deal with conflicts in a practical sense—in terms of what protocols are in place, how often the issue of conflicts of interest arises and when conflicts do arise, how they are dealt with. This aspect was included because conflicts of interest are a key governance issue and one that is highlighted by the ACNC in its compliance reports (see, e.g., ACNC 2015b: 9, 17, 18; ACNC 2017: 17; ACNC 2018: 2; ACNC 2019: 28). Conflicts were also chosen due to their centrality in governance and their presence in general law, statutory and regulatory requirements. Moreover, the extent to which non-pecuniary and third party conflicts are encompassed within general law is unclear—ascertaining respondents' views on this is

therefore instructive.[iii] Management of conflicts is also indicative of broader understanding and compliance. The surveys help to develop a clearer picture of compliance motivations and perceived barriers to enhanced governance and compliance.

The total number of useable responses totalled 419 from Australia and 369 from England and Wales. As the method of contact was by way of notice to the respective peak bodies as well as word-of-mouth and personal solicitation, it is not possible to formally calculate a response rate. Of the Australian responses, the number answering individual items ranged from 397 to 418 for the demographic items (347 to 366 for England and Wales). Slightly less completed the survey to the end, so those answering the hypothetical examples (the last three questions on the surveys) was a minimum of 310 (Australia) and 270 (England and Wales).

As a rough guide, the standard error for 328 responses (for determining, for example, an estimate in the *population* returning a particular response) is plus or minus 2.8 percentage points; the 95 percent confidence error is plus or minus 5.4 percentage points (for the Australian responses for relevant likert items). The corresponding standard error for 298 responses (England and Wales) is plus or minus 2.9 percentage points with a 95 percent confidence error of plus or minus 5.7 percentage points. While reasonable effort was made to ensure that the samples returned were as representative of their populations as possible, we must allow that self-selection (that is, those inclined to respond or where personal contact facilitated a response) played some part in introducing a probable skew in the final sample composition. While efforts were made to ensure a representative population cross-section, we believe that some under-sampling of both smaller charities and religious-based entities should be declared as a note of caution. While Table 1 (legal entity) and Tables 2a and 2b (size of entity) below should be interpreted pre-eminently as a description of our samples, we believe them to be, with some exceptions, broadly reflective of the underlying populations.

A number of statistical techniques were employed to see if the differences in the respective samples would hold for (the Australian and UK)[iv] populations including
chi square tests of independence and *t-tests*. Other multivariate analyses were employed where relevant including *principal components analysis*, *correlatio*n, and *reliability analysis* with *Cronbach alpha* statistic, together with *multiple regression* and *logistic regression*.

Demographic Differences: The Entities

Demographic items are divided into those pertaining to the individual filling out the survey, and more relevant details about the entity itself. Turning to the latter—the entity itself—it was clear that the legal structure of charities in Australia differs markedly from those in the UK. Table 1 indicates that the great majority of charities in the Australian sample show that two legal arrangements predominate—company (28.7 percent) and incorporated association (51.7 percent). In the UK sample, by way of contrast, companies (only 12.0 percent), Charitable Incorporated Organisations (46.7 percent) and trusts (24.0 percent) account for the legal structure of four out of five charities. The CIO structure (which is specifically designed for charitable entities) is very popular in the UK (see, e.g., *Lehtimäki v Cooper* [2022] AC 155: [94]).[v]

Table 1: Legal structure of the organisation

Legal Structure	Australia (%)	Stat test Aust v UK	UK (%)
Company	28.7	**	12.0
Incorporated association	51.7		
Charitable Incorporated Org			46.7
Trust	3.6		24.0
Trustee company	0.5		1.6
Co-operative	0.5		
Community Benefit Society			0.8
Unincorporated association	2.9		4.9
Friendly Society			0.3
Statutory corporation	3.3		0.0
Do not know	3.8		2.7
Other	5.0		6.8

Notes: Statistical test (third column): ** statistically significant at 0.01 level (Chi-square test of independence). Only the proportion of entities structured as 'companies' (first row; statistically significant at the 0.01 level) was tested. The option of Aboriginal and Torres Strait Islander Corporation was included in the Australian survey but no respondents chose this option.

The size of the entities was not directly comparable (one categorised by revenue in Australian dollars; the other in pounds sterling); Tables 2a and 2b gives the relevant breakdown. Board sizes were broadly alike, the median number of members being eight in both regions (Table 3), though more of the UK entities had more than ten members on their boards (26.2 percent); for the Australian charities it was just 16.1 percent. Table 3 indicates that the average board size in the jurisdictions is nevertheless very similar.

The broad purposes of the charities were also virtually identical: 12.9 percent of the Australian charities self-designated as religious (13.8 percent in the UK); 18.6 percent health, age care or disability (17.6 percent of UK); and 8.8 percent education (10.8 percent in the UK sample). None of these differences between countries was statistically significant.

Table 2a: Annual revenue of organisation (Australia)

Revenue (Aust dollars)	Australia (%)
Under $50,000	12.6
$50,000 to < $250,000	17.7
$250,000 to < $1 million	24.6
$1 million to < $10 million	26.4
$10 million to < $100 million	14.5
$100 million or more	4.2

The percent indicating that either board members or 'their associates' were *paid* (for various services) differed depending on the main purpose of the organisation but was very similar overall between the Australian (15.4 percent) and UK (11.1 percent) samples[vi]. There was some

variability depending on the purpose of the organisation: typically, the proportion reporting that board members or their associates were paid was higher for religious entities (22.2 percent for Australia; 17.6 percent for the UK).

Table 2b: Annual income of organisation (England and Wales)

Revenue (Pounds sterling)	UK (%)
£10,000 or less	18.4
Over £10,000 but no more than £25,000	15.5
Over £25,000 but no more than £250,000	34.7
Over £250,000 but no more than £ 1 million	10.5
Over £1 million	20.9

Table 3: Size of organisation board

	Australia	UK
Median	8.0	8.0
Mean	8.1	8.6

Demographic Differences: The Respondents

Turning to the characteristics of the respondents themselves, a few items of interest deserve comment. The *age composition* of respondents varied between the two countries (see Table 4): the main finding is that more of the respondents in the UK were aged 55 or over (75.4 percent as opposed to only 65.7 percent of Australian respondents). Nevertheless, the duration respondents have held their current responsibility was very similar across the two surveys: 24.4 percent of the Australian respondents had been in the job over ten years, while it was 27.3 percent for the UK sample. Interestingly, far more of the Australian respondents were paid full-time employees (21.4 percent; only 5.9 percent in the UK sample), while nearly three-quarters of UK respondents were unpaid/volunteers (77.2 percent; just 53.4 percent of the Australians). More of the Australian respondents were senior staff or managers (21.7 percent) than of those in the UK sample (12.4 percent) (Table 5).

Table 4: Age group of respondents

Age Group	Australia (%)	UK (%)
Aged 18 to 24	0.7	0.3
Aged 25 to 34	3.2	2.8
Aged 35 to 44	9.6	7.6
Aged 45 to 54	20.7	13.8
Aged 55 to 64	34.1	29.7
Aged 65 and over	31.6	45.8

Notes: Difference between total percentage aged 55 and over (65.7 percent, Australia; 75.4 percent, England and Wales) statistically significant at 0.01 level (Chi-square test of independence).

Table 5: Position of respondents within the organisation

Position within organisation	Australia (%)	Stat test Aust v UK	UK (%)
Paid full time	21.4	**	5.9
Paid part time	8.6		5.6
Unpaid/Volunteer	53.4	**	77.2
Executive/Senior Manager	21.7	**	12.4
Other position	17.5		19.4

Notes: Statistical tests (third column): ** statistically significant at 0.01 level (Chi-square test of independence). Respondents could indicate multiple position self-descriptions, so totals will be in excess of 100 percent.

General Questions on Considering the Entity's Purpose in Decision-Making

There was little doubt that respondents closely connected board deliberations with the entity's purpose—and these considerations were the same across the two national surveys. To the question whether or not boards considered the entity's *purpose* in its decision-making: the 'rarely' or 'never' options were extremely low (both 2.1 percent). The combined proportion reporting 'always' or 'usually' was high in both jurisdictions (95 percent for Australian respondents'; 93.1 percent for those in the UK). Testing this is important given that purpose plays a central role in the charities sphere (and particularly in governance of charities) (see, e.g., Charities Act 2011: s. 1; ACNC Regulations 2013: reg. 45.5(2); *Charities Act 2013*: s. 5; Langford 2020b).

General Questions on Governance

A suite of propositions was presented regarding respondents' understanding of governance and board practices in respect of the running of their organisation. Testing these aspects is important given that monitoring the entity's financial position is a particularly important aspect of governance duties, particularly in terms of the duty of care and duties associated with insolvent (or fraudulent) trading. Table 6 shows the percentage agreement to each of these propositions. Respondents believed that they possessed both a clear understanding of governance duties (both above 95 percent agreement for both Australian and UK respondents) and financial accounts (also more than 95 percent agreement). They agreed that their boards are regularly updated on the organisation's financial position (also above 95 percent agreement for both regions). About a quarter of Australian respondents relied on 'someone else' to take responsibility for the entity's financial position versus a third of the UK respondents.

A significant divergence in national outlooks was revealed in governance duties training and whether respondents have read either the ACNC (for Australia) or Charity Commission (UK) guidelines on governance duties. As Table 6 shows, many more in the Australian sample have received such training (72.4 percent; just 59.5 percent of the UK group), while an overwhelming majority of the UK respondents have actually read the regulator's guidance (91.8 percent) as opposed to just 78 percent of Australian respondents.

Table 6: Governance duties

	Australia (% Agree)	Stat test Aust v UK	UK (% Agree)
I have a clear understanding of the governance duties to which I am subject.	95.6		96.1
I have a good understanding of the organisation's financial accounts (profit and loss/balance sheet).	95.1		95.1
I rely on someone else to take responsibility for the organisation's financial position.	25.9	*	34.5
The board is provided with regular updated financial information.	96.2		95.1
I have received training and guidance in relation to my governance duties.	72.4	**	59.5
I have read ACNC/Charity Commission guidance on governance duties.	78.0	**	91.8

Notes: Figures sum 'strongly agree' with 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

A further suite of questions presented more negatively worded propositions about whether or not respondents understood where to find such guidance, together with items on reasons why they felt it difficult to keep up with the regulatory material. But overwhelmingly, respondents felt themselves quite informed and knowledgeable about governance duties, and this result was consistent across both the Australian and UK jurisdictions (see Table 7). A small minority of Australian respondents, however, some 7.5 percent did not understand *where* to find an outline of their governance duties (just 3.7 percent of the UK sample), while around one in six complained that the governance duties are complex and difficult to keep up with (similar across jurisdictions: 16 percent of the Australian respondents; 18 percent of those in the UK). Some 13.4 percent of Australian respondents reported 'insufficient guidance as to how my governance duties apply in practice' (just 8.3 percent of the UK sample agreeing to this proposition). This is unsurprising given the complexity of the Australian framework and the more detailed guidance provided by the CCEW.

Reassuringly, perhaps, was the finding that very few respondents were 'unaware that I had governance duties' (3.9 percent for Australia; 2.4 percent for the UK): however, while most of this unaware-of-their-responsibilities minority were unpaid/volunteer respondents, there was a smattering of management and full-time position respondents in the Australian (but not the UK) samples who revealed their ignorance of governance responsibilities.

Table 7: Reasons that make it difficult to understand governance duties

	Australia (% Agree)	Stat test Aust v UK	UK (% Agree)
I do not understand where to find an outline of my governance duties.	7.5	*	3.7
I was unaware that I had governance duties.	3.9		2.4
I feel that the governance duties are complex and difficult to keep up with.	16.0		18.0
I do not understand what the duties mean.	2.8		2.1
I have insufficient time to understand my governance duties.	8.1		7.0
I have insufficient guidance as to how my governance duties apply in practice.	13.4	*	8.3

Notes: Figures sum 'strongly agree' with 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

A further group of items (eight in all) asked what would 'help you to understand and comply with your governance duties' and suggested several lines of assistance. These suggestions included a Charity Governance Code (with or without diagnostic tool), an online guide to the governance duties, access to professional advice, mentoring, training, and the availability of practical examples and scenarios.[vii] It is striking that—*for all eight items*—more respondents in the Australian sample than the UK agreed that these practical offerings would be welcome. In fact the differences in the proportions welcoming these suggestions by the Australian respondents (over the UK group) were statistically significant on seven out of the eight items (Table 8). For some of the items, the magnitude of the difference is not that great, but others were more striking. For example, 63.4 percent of the Australian sample agreed that access to professional advice would be helpful (against just 48.2 percent for the UK). Mentoring, also, was more welcomed as desirable by the Australian respondents (53.3 percent) than those in the UK (just 37.9 percent). Just under half of those in the Australian sample (45.2 percent) wanted more guidance from the regulator (versus just 31.7 percent for the UK). Some 71.8 percent of the Australian sample indicated they would be receptive to specific training on governance issues (compare this to just 62.1 percent for the UK respondents). For both Australian and UK respondents there was popular support for a detailed online guide setting out all the governance duties of responsible persons. The authors will prepare such a guide.

What then, might motivate respondents to comply with governance duties? And how do the two national samples compare? Ascertaining respondents' motives for compliance is instructive in evaluating regulatory and enforcement design and strategies and in assessing potential reforms.[viii] Seven items asked whether various concerns were important or not: the figures in Table 9 sum the 'very important' and 'fairly important' options. These included: concern for the respondent's personal liability; for their personal reputation; for liability or sanction; the organisation's reputation; and respect for the law. Almost all of these rated quite

high as motivational factors, for both the Australian and UK samples, and strikingly the proportion rating them as important was higher for the Australian sample *on all seven items* (three items showed a statistically significant difference between the national samples).

Table 8: What would help respondents understand and comply with governance duties

	Australia (% Agree)	Stat test Aust v UK	UK (% Agree)
Training on the governance duties.	71.8	**	62.1
A Charity Governance Code that sets out general principles for accepted modern practice of good governance.	76.2		73.1
A Charity Governance Code combined with a diagnostic (i.e., self-evaluation) tool for board members to fill in concerning their organisation's performance.	77.0	*	68.2
A detailed online guide that sets out all the governance duties of board members, with an optional self-evaluation tool.	79.5	*	71.3
More guidance from the ACNC/Charity Commission on the governance duties.	45.2	**	31.7
Access to professional advice.	63.4	**	48.2
Practical examples and scenarios showing how the duties are applied.	76.0	**	66.3
Mentoring.	53.3	**	37.9

Notes: Figures sum 'strongly agree' with 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Handling Conflicts of Interest

Although four-fifths of respondents affirmed that their organisation had an actual conflict of interest *policy* (80.5 percent of Australian respondents; 81.6 percent for the UK), the figures differed on the number of occasions that a board member had actually *declared* a conflict of interest. Only 17.9 percent of the Australian sample answered 'never' (in the past three years), half that of the UK sample (33.9 percent; a difference that was statistically significant). Conversely more than double the proportion of Australian respondents recalled 'five or more times' (in the past three years) than their UK counterparts (33.5 percent, Australia, to 15.5 percent, the UK).

But what of the occasions where a conflict of interest situation did arise within the board of the entity—how had this been managed? A number of questions were asked in reference to such conflicts of interest and respondents were presented with options ranging from 'always' to 'never': Table 10 lists these courses of action, summing the 'always' and 'usually' options.

Overall, the responses did not differ greatly between the Australian and UK samples: for example, around 90 percent of both groups noted that the conflicted board member usually or always 'disclosed the conflict to the board'; about three-quarters of the UK sample noted that the conflicted board member 'always' or 'usually' 'abstained from participating in discussion on the matter' (versus 67.7 percent of the Australians). Higher proportions noted that the conflicted member 'usually' or 'always' abstained from *voting* on the matter (the proportions were similar in both samples, 86.6 percent of Australians; 83.7 percent of the UK sample). Very rarely was it the case that boards sought guidance (or guidance and authority) from the charities regulator: only 6.3 percent of those in the UK sample reported that the board 'usually' or 'always' sought such guidance (whereas almost none in the Australian sample did so).[ix] This is interesting given that the CCEW Guidance specifically mentions obtaining independent expert advice, getting advice from the Commission, appointing new trustees, resigning, not making trustee appointments and following any specific requirements in the law or the charity's governing document.

Table 9: Factors that motivate respondents to want to comply with governance duties

	Australia (% Important)	Stat test Aust v UK	UK (% Important)
Concern for my personal liability.	84.2	*	76.2
Concern for my personal reputation.	85.3		80.5
Concern about liability or sanction for the organisation.	97.1	*	93.0
Concern about the organisation's reputation and public perception of the organisation.	98.3		97.0
My personal ethical or social values.	96.5		95.1
To enable optimal decision-making within the organisation.	96.8	*	92.4
Respect for the law.	96.3		95.1

Notes: Figures sum 'fairly important' with 'very important'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Working out which factors *determine* how a conflict of interest should be managed was the subject of the next suite of questions. These factors included: whether the conflict is considered serious or not; the extent to which the conflict affected the conflicted member's ability to decide; whether the conflicted member stood to gain a benefit; whether the organisation's reputation would suffer; and other factors. These are listed in Table 11 along with the sum of those who thought the factor was 'very important' or 'fairly important' (out of a five option suite). None of these factors differed appreciably between the Australian and UK samples and no difference was statistically significant. This is interesting given that, in contrast to ACNC Guidance, CCEW guidance specifically distinguishes between serious and minor conflicts and

also mentions all of the factors in Table 11. Perception receives more emphasis in the ACNC Guidance.[x]

Table 10: Where a board member has had a conflict of interest, how often has it been managed

	Australia (%)	Stat test Aust v UK	UK (%)
The conflicted board member disclosed the conflict to the board.	89.9		91.9
The conflicted board member abstained from participating in discussion on the matter.	67.7		75.3
The conflicted board member abstained from voting on the matter.	86.6		83.7
The conflicted board member or the board obtained approval from members.	49.3	*	60.2
The conflict was recorded in the organisation's conflicts register (or register of interests).	78.3		78.6
The board obtained independent expert advice.	5.5		9.9
The conflicted board member resigned.	0.8		2.4
The board sought guidance from the ACNC or guidance or authority from the Charity Commission.	0.4	**	6.3
Disclosure of conflicts of interest is a standing item on the agenda of meetings of the board.	74.1		68.1

Notes: Figures sum 'always' with 'usually'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Finally, a list was presented to respondents to test whether provision by the organisation of a benefit to certain individuals (identified only by their *relationship* to a conflicted board member) could be adjudged as constituting a conflict of interest. The question asked: 'Which of the following would you classify as a conflict of interest? You are committing your organisation to a transaction which results in a benefit to' and then listed a number of individuals and entities. These included the board member's sibling, spouse, friend, football club and so on: these are listed in Table 12 with the percentage of respondents indicating that the benefit to the individual (or entity) *would* constitute a conflict of interest.

There were two key reasons for testing these. The first is that in terms of the legal tests it is unclear the extent to which the duty to avoid conflicts of interest encompasses non-pecuniary and third party conflicts (see Langford 2020a). In this respect interests of close relatives are generally included within the legal duty and also within concepts such as related (or connected) parties but the inclusion of interests of less close persons is far from clear. For example, a

person's spouse or child would be included within the definition of related party and connected person in both jurisdictions but a nephew or daughter's boyfriend would not be so included (see ACNC n.d.; Charities Act 2011: s. 118; CCEW 2014: 5; AASB 2015). A benefit to a person's football team tests the outer boundary of the concept of conflicts, although the CCEW guidance does mention a situation involving a benefit to an organisation of which a charity

Table 11: Importance of factors in determining how a conflict of interest should be managed

	Australia (%)	UK (%)
Whether the conflict is serious or minor.	78.5	75.1
The extent to which the conflict affects the board member's ability to decide the matter in the best interests of the organisation.	94.2	92.2
Whether the conflicted board member or an associated/connected person or organisation stands to gain a benefit.	93.6	95.6
The provisions in the organisation's conflicts of interest policy or governing document.	86.1	86.0
Whether there is a perception/appearance of conflict (in the sense of whether an outsider or member of the public might think that the decision might be affected by the conflict of interest).	91.2	89.1
Whether the conflict will affect the charity's reputation.	93.0	93.6
Whether the conflict could affect trust or free discussion between board members.	94.8	91.4
Whether the conflicted board member is regularly affected by this conflict of interest.	83.8	77.7

Notes: Figures sum 'fairly important' with 'very important'. No statistically significant differences between Australian and UK samples across any items (Chi-square test of independence).

trustee is a member (see CCEW 2014: 11). Ascertaining respondents' views on the extent to which conflicts of interest include these types of interest is therefore instructive. These types of conflicts were probed further in the hypotheticals discussed below. The second is that the ACNC Guide specifically includes indirect financial interests and non-financial or personal interests (ACNC 2015a: 12–13) and the CCEW Guide has separate guidance for conflicts of loyalty (which are contrasted with financial conflicts). In general, the proportions from both the Australian and UK samples were fairly high (in affirming that a conflict of interest would occur); there were few notable differences between the two national samples.

Table 12: Which relationship/entity classifies as a conflict of interest if committing the organisation to a transaction in which they benefit

	Australia (%)	Stat test Aust v UK	UK (%)
Your sibling	99.1		98.3
Your spouse	99.1		99.3
Your friend	92.6		89.4
Your nephew	96.6		93.5
The football team you support	56.3	*	47.8
Another entity whose board you serve on	95.7		97.3
Another entity of which you are a member	84.1		84.7
Your daughter	98.8		99.0
Your daughter's boyfriend	93.6	*	88.4
The person or organisation that appointed you	79.1		81.7
Your employer	85.7		90.4
A business in which you are an investor	95.1		95.2

Notes: Response options were either 'yes' or 'no'; table reports percentage answering 'yes'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence). (Chi-square test of independence).

Hypothetical Examples on Conflict of Interest

The three final questions on the surveys presented three hypothetical exercises in which a conflict of interest might be extant. Respondents were then asked a series of questions about each of these situations (Tables 13, 14 and 15). It is of interest that very few statistically significant differences (between the Australian and UK samples) were apparent from these exercises.

In the first scenario, the de facto partner of a charity's CEO/trustee was included as one of three entities to quote for work (fixing a window for the charity). Respondents were quite unanimous that the CEO/trustee should declare a conflict of interest, but slightly less unanimous on whether the CEO/trustee should abstain from board discussions and voting. One third of respondents opined that 'more information is needed to make a decision on this scenario'. There was very little difference between the Australian and UK respondents (Table 13).

Table 13: Hypothetical example on conflict of interest (I)

Rachel is a CEO/trustee of 'Rising Suns', a charity that runs ballet classes for children with mental health issues. The windows of the charity's premises have been badly damaged in a thunderstorm. Rachel's de facto partner, Zac, runs a successful window company. Rachel has no involvement in the company. The board is considering whether to engage Zac's company to fix the windows. The charity obtains three quotes from window companies, including one from Zac's company. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
Rachel should declare a conflict of interest.	99.1		100.0
Rachel should abstain from being involved in discussions and voting.	94.2		94.8
Rachel does not have a conflict of interest because she does not have a direct interest in Zac's company—she can therefore participate in the decision.	3.7		5.2
If Zac's company provides the lowest quote, then the contract is on arm's length terms and there is no need for Rachel to declare a conflict.	3.4	**	8.7
It depends on other factors—more information is needed to make a decision on this scenario.	33.0		35.6

Notes: Response options were either 'agree' or 'disagree'; table reports percentage answering 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

In a second hypothetical, a board member of a counselling charity offers the free services of her brother to the organisation. The brother, however, 'gains' a benefit since the hours he provides assist toward his course accreditation. Unanimity was less forthcoming in this example; and other than one item, there is little discernible difference between the Australian and UK respondents. Tellingly, one in eight Australian respondents did *not* think the board member had a conflict of interest; with the UK sample, this rose to one in six. Nevertheless, respondents on the whole believed the relationship *would* certainly affect the affected board member's decision-making. The only point of difference between respondents from the two regions concerned whether a member of the public might perceive that the board member had a conflict and should therefore declare the conflict: 92.4 percent of the Australian sample thought the public would view this as a conflict of interest—only 86.8 percent of the British respondents agreed (Table 14).

Table 14: Hypothetical example on conflict of interest (II)

The charity, 'Listening for Life', has decided that it should seek the services of additional counsellors. Caroline is a board member of Listening for Life. Her brother, Edgar, provides counselling to individuals affected by suicide. During a board meeting Caroline offers to ask Edgar to provide counselling services to the charity for free. Although Edgar will not be paid for the counselling services

he provides, he will benefit from the practice hours, which will go towards his course accreditation. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
Caroline has a conflict of interest.	87.3		83.2
Caroline does not have a conflict of interest because the charity is getting something for free.	10.8		14.6
Caroline does not have a conflict of interest because she is not getting any benefit personally.	14.2		16.8
Caroline does not have a conflict of interest because a potential benefit to Edgar is unlikely to affect her decision-making.	14.2		18.5
Caroline does not have a conflict of interest because there is no financial benefit involved.	13.6		13.7
A member of the public might perceive that Caroline has a conflict and she should therefore declare the conflict of interest.	92.4	*	86.8

Notes: Response options were either 'agree' or 'disagree'; table reports percentage answering 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Finally, a more straight-forward conflict of interest scenario was presented as the third hypothetical, but the questions were more nuanced. A board member is asked to provide professional services (through her private company); further, she would be paid at the going rate for her advice. Overwhelming, as might be expected, respondents identified this scenario as a definite conflict of interest, and very little difference between Australian and UK respondents was apparent. However—and even though a conflict of interest was conceded by (virtually) all—the decision, in the face of a conflict of interest, was not necessarily overly problematic. Few entertained the possibility of the conflicted board member actually *voting* on the decision, but only one in five would have her excluded from board *discussions* on the matter. In addition, more than half thought that the board member's 'insight and thoughts' and 'participation' be permitted, although excluded from the actual board vote (half of all Australian respondents; 60 percent of the UK sample). We note the contradiction between these figures and the 82% of respondents (81.5% of Australian respondents; 81.7% of the UK sample) who said that the board member should withdraw from discussion during the meeting, unless the view was that the board member give her insights and then withdraw from subsequent board discussion. Nearly one in four thought it sufficient for the board member to 'enter her involvement in her company in the charity's register of interests'. (Table 15).

Table 15: Hypothetical example on conflict of interest (III)

The charity 'Teachers for Change' requires specialist advice on hiring casual teachers. One of the charity board members, Tran, is an expert in relation to hiring casual teachers and runs a successful

company which advises on this issue. The board of the charity decides to engage Tran's company to provide expert advice. Tran's company is one of a number of companies that specialise in the area and it provides the expert advice at the going rate. Please indicate which of the following statements you agree with.

	Australia (%)	Stat test Aust v UK	UK (%)
There is nothing that Tran needs to do because the advice is provided at the going rate—there is therefore no conflict of interest that needs to be declared.	3.2		4.0
It is enough for Tran to enter her involvement in her company in the charity's register of interests.	23.2		22.3
The charity should get quotes from at least two other companies to determine which is the best value.	94.3		96.4
Tran should declare her interest in her company at the meeting at which the charity's board decides which company to engage to provide the services.	97.2		98.2
Tran should withdraw from discussion during the meeting.	81.5		81.7
Tran should not vote on the decision as to which company is engaged to provide the services.	97.8		97.5
It would be helpful to have Tran's insight and thoughts during the board meeting at which the decision is made as to which company to engage to provide the services—Tran should therefore participate but she should not vote.	50.5	*	60.0
It depends on other factors—more information is needed to make a decision on this scenario.	36.4		40.8

Notes: Response options were either 'agree' or 'disagree'; table reports percentage answering 'agree'. Statistical tests (third column): * statistically significant at 0.05 level; ** statistically significant at 0.01 level (Chi-square test of independence).

Discussion

Overall, around 135 items were common to the Australian and UK surveys (additional items were probed on the UK survey). This number includes a slew of variables from the open-ended items that were converted to quantifiable data. In addition, some new items were created from principal component analysis factors, and two indices were computed from a collation of binary items.

As a matter of summary: of these 135 tests, forty (or 29.6 percent) returned statistically significant differences between the Australian and UK samples. The greatest concentration of difference, however, concerned the *demographics* (characteristics of either the charitable entity itself, or the respondents answering for themselves). Forty percent of the differences between the demographics of the Australian and UK responses were statistically significant. Among the notable important differences between the two jurisdictions are: the legal structure of the

entities (the company structure accounting for 28.7 percent of the Australian sample as against just 12 percent of the UK; and the fact that almost a quarter of the UK entities were organised as trusts; Table 1); age level of respondents (three-quarters of the UK sample aged 55 or over as against just under two-thirds of the Australians; Table 4); and level of volunteerism (a higher proportion of Australian respondents reporting they are paid full-time; three-quarters of the UK group were volunteers as against just over half of the Australians; Table 5).

By way of contrast, responses to questions related to *opinions, knowledge and outlooks* of the respondents (about charity governance, conflicts of interest and similar questions) reflected a *marked similarity of outlook* across the two jurisdictions. Of the 80 items relevant, 23 reported a statistically significant difference between the two regions (28.8 percent).[xi]

When tallying the differences between agreement to (mostly) likert items between the Australian and UK groups, the average was just 4.1 percentage points (with a median of 3.0). So, as an example, to the question whether or not a conflicted board member abstained from voting on a matter (third item in Table 10), 86.6 percent of the Australian sample reported an abstention 'always' or 'usually'—highly similar to that of the UK sample (83.7 percent). The difference between the UK and Australia on this result (just 2.9 percentage points), is pretty much the median value (3.0) for all 80 items relevant to opinions, knowledge and outlooks.

Noticeably, the (quantitatively derived) items calculated from the *open-ended items* (a mixture of factual and opinion items) also reported high levels of similarity: just four out of 26 items returned a statistically significant difference between the two geographical areas.

An important finding of interest concerned the *high level of agreement* (in both the Australian and UK questions) to many propositions relating to governance duties (Table 6), and motivations for compliance with good governance (Table 9). In addition, this was also true with respect to the numerous questions that probed 'conflict of interest' issues (Tables 11 through 15). In many cases, these attracted figures in the mid to high 90 percent levels consistently. In other words, respondents, overall, were, uniformly highly sensitive to the issues of conflict of interest.

Yet, while acknowledging the overall similarity between respondents of the two regions, nevertheless there exist some marked differences that call for comment. As mentioned, some 23 items reported statistically significant differences (the asterisked items in Tables 6 to 15). However, given the appreciable differences in the demographic makeup of both the entities and the respondents (vis-à-vis the Australian versus the UK samples) it could be argued that it is these demographic divergences (especially those presented in Tables 1, 4 and 5) that account for the international distinctiveness. To check this, we ran regressions on all 23 items (mostly Ordinary Least Square multiple regression, and where more appropriate, logistic regression) to factor out the influence of legal structure, age, time spent on the board, and employment status. In all but three regressions[xii] the international factor (whether Australia or UK) was *still* statistically significant: this validates the finding that cultural, legal and tradition environment of the respective national settings have a key part to play in determining opinions, knowledge and outlooks of the responses to governance and conflicts of interest. Perhaps most striking of all, responses to items concerned with that which would assist respondents to understand and comply with governance duties (Table 8) differed the most between the UK and Australian

samples: of the eight items, seven were statistically significant, and these seven also held up when demographics were filtered out in multiple regression analysis.

Conclusions

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 countries, however, there appears to be a disconnect between this perception 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. 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 respondents extend the concept of conflict of interest potentially further than the legal concept extends in terms of the reach of third party and non-pecuniary conflicts, although CCEW and ACNC guidance on conflicts of interest also gives the concept an expansive reach.

In both jurisdictions the most popular practical option to assist with understanding and complying with governance duties is an online guide setting out all the relevant governance duties, and we will be preparing such a guide. 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 UK respondents had read the guidance, there was not a great deal of different between the answers of respondents from each jurisdiction. Motivations were also not materially different.

A persistent theme in the Australian 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. These comments align with the data in Table 8, which indicates Australian respondents' greater receptiveness to assistance with understanding and complying with the duties, despite the fact that the majority had received training and guidance in relation to their governance duties (Table 6).[xiii]

NOTES

[i] The survey was developed after a detailed search of multiple legal, business and multidisciplinary databases and books to identify previous empirical studies on conflicts of interest in Australia, the UK and other common law jurisdictions in the charities, not-for-profit and commercial sectors.

[ii] The surveys provided the following definition: 'The term "governance duties" refers to the duties and responsibilities you have as a board member [or charity trustee] in making decisions and in overseeing the organisation. Governance duties include, for example, obligations relating to conflicts of interest and financial management.' The survey questions in each jurisdiction were largely identical, although there were small differences in terminology at some points and the UK survey included extra questions on the Charity Governance Code (see n 7 below).

[iii] In both jurisdictions the extent to which the general law conflicts rule encompasses non-pecuniary and third party conflicts is unclear (for discussion, see Langford 2020a) but ACNC and CCEW guidance clearly include such conflicts within the purview of conflicts that need to be disclosed and managed.

[iv] Note that the descriptor 'UK' will be used for short to refer to respondents from England and Wales.

[v] Interestingly, of those established as a *company*, two-thirds of the Australian entities had 'Limited' in their name, contrasting clearly with those in the UK: only one-third of entities with the 'company' legal structure had the word 'Limited' in their name. In Australia such companies are exempted from the related party regime in ch. 2E of the *Corporations Act 2001*; see also, s. 150. In the UK see Companies Act 2006, s. 60.

[vi] This difference was not, however, statistically significant.

[vii] England and Wales already has a Charity Governance Code. In testing knowledge of this Code, a minority of the UK respondents were not even aware of the Code (13.2 percent), while a similar number, while aware, had not read it (12.8 percent). The majority, however, had read some or all of the Code (74.0 percent). Of those who reported having read the Code, a fraction either 'do not use it' (3.3 percent) or 'do not find it helpful or useful' (4.1 percent). The vast majority of UK respondents who were aware of the Code reported finding it 'of some use and help' (71.9 percent) or 'highly useful and helpful' (20.7 percent).

[viii] There is, of course, a wealth of regulatory scholarship on compliance motives—for summary and appraisal see Nielsen & Parker 2012; see also, Freiberg 2017: 382–384; Parker & Nielsen 2017.

[ix] The Australian survey question asked about guidance from the ACNC, whereas the UK survey question asked about guidance and authority from the Charity Commission.

[x] Note also that Governance Standard 5 indirectly requires disclosure of perceived or actual material conflicts of interest—see ACNC Regulations 2013: reg. 45.25(2)(e). The Australian survey question asked about perception of conflict and the UK survey question asked about appearance of conflict.

[xi] Scales and indices, on the other hand, generally reflect a heightened sensitivity, so it is of interest that of the thirteen calculated from these items, almost half (46.2 percent) were statistically significant.

[xii] Neither of the asterisked items in Table 7 ('I do not understand where to find an outline of my governance duties' and 'I have insufficient guidance as to how my governance duties apply in practice') indicated a statistically significant t-stat for the UK dummy item in OLS regressions. And neither was one item in Table 12 ('Your daughter's boyfriend'). Two further items were significant at the 0.10 level: one item in Table 9 ('Concern about liability or sanction for the organisation'; p=0.0589), and one item in Table 14 ('A member of the public might perceive that Caroline has a conflict and she should therefore declare the conflict of interest'; p=0.0626).

[xiii] Although very few Australian respondents indicated that they did not understand where to find an outline of their governance duties (7.5 percent) and/or had insufficient guidance as to how their governance duties applied in practice (13.4 percent), somewhat more Australian respondents were in the dark than their UK counterparts (3.7 percent and 8.3 percent for UK respondents respectively: Table 7).

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The Routledge Handbook of Taxation and Philanthropy

By Henry Peter and Giedre Lideikyte Huber (eds.). Published in 2021 by Routledge, 4 Park Square, Milton Park, Abingdon, Oxon, ISBN 9780367688271, 738 pages.

Reviewed by Ian Murray, Associate Professor, University of Western Australia Law School.

The Handbook contains 30 chapters, contributed by over 45 scholars, aimed at elucidating whether it is appropriate for states to incentivise philanthropy via tax concessions. And, if so, how that should be done, including via cross-border philanthropic giving. A key strength of the book is that it considers these questions from a multidisciplinary and multijurisdictional perspective – with discipline experts from economics, sociology, public policy, political science, psychology, affective sciences, political philosophy, tax policy, management and law. The multijurisdictional coverage is broad in some ways (good coverage of Europe, North America and Australia), but narrow in others (only two authors are from the Global South, from India). As the book emerged from a project carried out in conjunction with the OECD, it also contains the OECD report on Taxation and Philanthropy released in November 2020 and upon which the book chapters comment.

There are four parts to the book, with the first part considering the justification of tax incentives for philanthropy. The second part examines how tax concessions should be implemented, drawing on theoretical and empirical insights into the efficiency and equity of tax concessions and donor behaviour. The third and fourth parts then examine particular aspect of this 'how to implement tax concessions' question, with the third part focussing on cross-border philanthropy and the fourth on philanthropy through hybrid entities such as social enterprises.

A very pleasing aspect of the Handbook is that it dedicates almost a third of the discussion to whether tax concessions should be provided for philanthropy at all. Often commentary on philanthropic tax concessions focusses more on the matters of equity and efficiency in implementation covered in the remainder of the Handbook, but this book unpacks the normative question first. Further, as mentioned above, its multidisciplinary approach is a real strength and this is demonstrated in the first part with the normative question tackled from a range of disciplinary perspectives including sociology and social science discourse analysis, in addition to the more standard approaches of economics, political science, public policy, law and liberal philosophy.

In particular, those broader perspectives show (see, eg, Honegger et al 2020), dishearteningly for this writer, that economic arguments often hold centre stage over matters of equity and support for democratic institutions, but, more reassuringly, that politicians are likely to have a

wider field of reference than just donors, focussing heavily on the civil society recipients of donations and the indirect effects that philanthropic tax incentives might have on these organisations. Ann O'Connell has a chapter in this first part from an Australasian perspective that links into this theme, looking at whether membership organisations like agricultural societies and business associations ought to benefit from philanthropic concessions. The first part also contains an insightful and deeply provocative essay that questions the whole premise of the Handbook and the OECD report. That is, whether states ought to be relying so much on private financing and action via philanthropy rather than public taxation and spending to pursue the public good (Atkinson 2020).

Even when moving to the more well-trodden path of how best to implement philanthropic tax concessions (Parts two to four), the Handbook does a good job of bringing in new perspectives. Some notable instances include application of psychology and neuroscience to donor motivation, which provides some support for earlier suggestions about altruistic versus strategic giving and pure versus impure (eg Andreoni 1990: warm-glow giving) altruism (Cutler 2020). Both Cutler and Sellen (2020) go further and identify that the effect of giving on a person's wellbeing is another dimension that bears investigation and that could be just as important as tax incentives in encouraging giving. There is also a chapter that sets out a roadmap for research combining behavioural economics and psychology approaches (Bernardic et al 2020).

From a more conventional economics perspective, Steinberg (2020) nevertheless upends much of the accepted understanding of key design elements of tax incentives for giving. By way of just one example, Steinberg demonstrates that the commonly expressed view in most student tax textbooks that tax deductions are less vertically fair than a matching tax credit, is actually misleading in that in most circumstances there is little practical difference between the two. There are also several further Australasian perspectives. Natalie Silver discusses lessons from Australia on tax barriers to cross-border philanthropy and Fiona Martin examines tax concessions for social enterprises.

The book will reward the reader and is freely available in electronic version from the Routledge website.

Disclosure

The reviewer has authored a chapter in the Handbook.

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