

**Grasping the Nettle: Respecting Donor Intent and Avoiding the Dead Hand – An
Australian Perspective**

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Dr Myles McGregor-Lowndes
Director – Centre for Philanthropy and Nonprofit Studies
Queensland University of Technology
GPO Box 2434
Brisbane, Queensland, Australia
Phone: (07) 3864 2936
Fax: (07) 3864 1812
E mail m.mcgregor@qut.edu.au
<http://cpns.bus.qut.edu.au>

OVERVIEW

The Australian Context

While it is estimated that there are some 700,000 nonprofit organisations in Australia,¹ there are only about 47,720 strictly English or 501(3) c “charitable” institutions or funds.² An unknown but most likely a small number of these are in the legal form of a charitable trust; the rest are corporations with charitable objects. The nonprofit sector employs 6.8% of Australians in employment (similar to US, but larger than UK) and contributed 3.3% to GDP. Its sources of income are about 58% from sale of goods and services, 30% from government contracts and fees and 9% from household transfers.³ Compared to the US and UK, the Australian sector is more reliant on fees and charges and has less philanthropic income.⁴

In 2004 giving by Australians amounted to approximately \$AU11b (excluding the Asian Tsunami contributions) with \$AU7.7b from individuals and \$AU3.38 from business. This is 0.68% of the Australian GDP while during the same period in the USA giving was 1.6% of GDP.⁵ Over the past decade, philanthropy has significantly increased in Australia as a percentage of GDP.

During 2004, forty-one percent of Australians volunteered a total of 836 million hours of labour for non-profit organisations of all sizes. This voluntary contribution was equivalent to an additional \$8.9 billion worth of income to the non-profit sector. Including volunteer labour boosts the sector’s contribution to GDP to 4.9%.⁶

¹ Lyons, Mark, *Third Sector. The Contribution of Nonprofit and Cooperative Enterprises in Australia*. Crows Nest: Allen and Unwin, 2001.

² CPNS, *Current Issues Information Sheet 2005/2, ATO Data: Deductible Gift Recipients*, available at <http://www.bus.qut.edu.au/research/cpns/howwecanhelp/documents/DGR11-QCFPhilProj.pdf>

³ Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Cat No. 526.0, Canberra, 2002.

⁴ LM Salamon, SW Sokolowski & R List, *Global Civil Society: An Overview*, The Johns Hopkins Comparative Nonprofit Sector Research Project, Baltimore, 2003.

⁵ Australian Government, *Giving Australia: Research of Philanthropy in Australia, Summary of Findings*, Canberra, October, 2005.

⁶ Australian Bureau of Statistics, *Non-Profit Institutions Satellite Account*, Cat No. 526.0, Canberra, 2002.

The English Legacy of Charity Supervision for Australia

Australia received English common law at the time of colonisation. The common law of charitable trusts and charity still dominate the legal and regulatory landscape. Although Australia adopted the common law of charities originating in the Statute of Charitable Uses of 1601⁷ (Statute of Elizabeth), it has not adopted the English specialist regulatory agency model of a Charities Commission. The Australian federal taxation authority, Australian Taxation Office (ATO) has also not played an active regulatory role in relation to the taxation affairs of nonprofit organisations as occurs in the USA. There is no central public registry of all nonprofit organisations for tax or other purposes and no requirement for filing of financial reports to any central register. This lack of a central regulatory body is increasingly seen as a deficiency in the Australian regulatory environment of the nonprofit sector.⁸

The constitutional responsibility for charities and nonprofit organisation lies with the state and territory governments. The common law still serves as a significant basis of the regulation of nonprofit organisations, however the costs of accessing the superior courts has slowed the development of precedent. State statute laws with respect to charities and nonprofit organisations are not uniform and little attempt has been made to rationalise the different rules that apply to nonprofit organisations.

Structure of the Paper

The Australian jurisdiction, like many of those with an English heritage, grapples with:

- the special ability of charitable trusts to be created in perpetuity; and
- devoted to a public benefit purpose chosen by the founding donor; with
- changing circumstances which may initially or over time render the donor's chosen public benefit less effective or even impossible.

⁷ 43 Eliz. I, c.4.; this act is a modification of a prior *Statute of Uses* in 1597, 39 Eliz. I, c.6.

⁸ Industry Commission, *Charitable Organisations in Australia*, Report No 45, AGPS, Canberra, 1995, at p. 210; Commonwealth of Australia, *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001, Canberra p 291.

The paper first examines the Australian legal approach to dealing with instances where a donor's intention to place assets in a public charitable trust are thwarted. This closely follows the tradition of English equity law with some adoption of English statutory extensions. However, no Australian jurisdiction has an administrative body such as the Charity Commission in dealing with such issues on an administrative or quasi judicial basis.

The paper then examines the scant evidence available as to what is actually happening in practice. There appears to be limited legal proceedings involving formal *cy prés* applications which are usually processed through the courts rather than administratively. A number of recent cases are examined and show that there are considerable delays in bringing the matters before the courts.

The bulk of nonprofit enterprise in Australia is conducted through nonprofit corporations, rather than charitable trusts. The paper turns to examine how donor intent is dealt with in nonprofit corporations and what legal mechanisms regulate the issue of donor intent. In many nonprofit organisational structures the legal situation is unclear and potential abuse of donor intention could occur. Some unique statutory provisions relating to churches are examined and may have potential for wider application.

AUSTRALIAN LEGAL APPROACH

Cy Prés

The perpetual nature of charitable trusts brings with it the possibility that some time in the future the purposes of the trust designated by the donor may be frustrated. Generally, the law will not allow a charitable trust to fail and will through the doctrine of *cy prés* seek to redirect the trust to a useful purpose.⁹ The doctrine of *cy prés* has a history that can be traced

⁹ A term of probable French origins, "cy prés comme", "cy" being this and "pres" being near, near to it; refer L.A. Sheridan & V.T.H. Delany, *The Cy Prés Doctrine*, Sweet & Maxwell Limited, London, 1959, at pp.5-11.

back to Roman law, where it was used to redirect funds from one activity that was illegal or impossible to another without reverting to the donor's heirs.¹⁰

There are five possible situations where the inherent authority of the courts (and more rarely the Crown) may be invoked to facilitate the removal of frustrations arising in charitable trusts so that the assets can be diverted to proper purposes:

- (1) where the proposed terms of the initial settlement of trust property is so indefinite that it can not be applied;
- (2) the immediate failure or impracticability of the named purpose of the trust;
- (3) later failure of the purpose;
- (4) immediate surplus of funds to achieve the stated purpose; and
- (5) subsequent surplus of funds arising from receding purposes or an increase in the funds.

These frustrations can be classified as initial or subsequent. A testamentary gift that has a charitable intent may, for example, fail at its inception (initial frustration) because the institution to which it is to be given no longer exists. A subsequent frustration occurs where the charitable trust is established but later fails due to a frustration.

The court may provide a sanctioned scheme, which resolves the frustration without the assets lapsing back into the funds of the estate to be distributed elsewhere, often to relatives.¹¹ A scheme is devised that will apply the property to another charitable purpose that is as similar as possible to the frustrated charitable intention or purpose.¹²

In England and Wales, a *cy prés* scheme for subsequent frustrations is basically administered by the Charity Commission with oversight by the judiciary.¹³ The powers given to the court and the Charity Commission have been widened to include other circumstances such as permitting amalgamation of charities and funds, dispensing with outdated donor restrictions and modernisation of the areas of benefit and qualifications of beneficiaries.¹⁴

¹⁰ The notion as used before the time of Constantine A.D. 240 and is illustrated by a reference in *Digest of Justinian* 33:2:16 by the writer Modestinus.

¹¹ S.G. Maurice & D.B. Parker, *Tudor on Charities*, 7th ed., Sweet & Maxwell, London, 1984, at p.215.

¹² *Ironmongers' Co. v. Attorney-General* (1844) 10 Cl.&F 908.

¹³ *Charities Act* 1991 (U.K.), section 15.

¹⁴ *Charities Act* 1991 (U.K.), section 15.

The use of such procedures has been criticised as being ineffective from an administrative perspective because of the slow, expensive and complicated nature of the process.¹⁵

In Australia, the determination of initial frustrations of charitable intent remains with the courts and is largely a matter for common law. It relies heavily on English precedent. The early UK legislation (1960) has found its way into Australia state jurisdictions, but not the later provisions which allow for administrative interventions.¹⁶ The paper now turns to examine in detail the nature of an initial frustration and a subsequent frustration and the way in which Australian law deals with the issues.

Initial Frustration

Gifts in favour of a charity that suffers from a defect that would ordinarily cause a lapse may be saved by judicial intervention. If there is a lapse situation and a general charitable intent can be discovered, the gift will not lapse but be applied *cy prés*.¹⁷ This is a departure from the normal provisions of trust or testamentary law that would have deemed the attempted transfer to have failed and directed the gift elsewhere according to the donor's wishes. The reason given for this favour of charity is that its origin is prior to the acceptance of the concept of resulting trusts where heirs could not benefit from residues or gift overs.¹⁸ This clearly is not the case today in Australia or England.

The English medieval church which controlled the supervision of testamentary estates used the *cy prés* doctrine.¹⁹ The church actively encouraged the notion that a testator could

¹⁵ P. Luxton, 'Whither *Cy-prés*? An Anglo-American Analysis of Practical Problems', *New Law Journal*, Apr 24, 1987, pp.34-44; Great Britain, 'Efficiency Scrutiny of the Supervision of Charity', Report to the Home Secretary and the Economic Secretary to the Treasury, HMSO, London, 1987, paragraphs 78-95 (known as the Woodfield Report); Great Britain, 'Charities: A Framework for the Future', HMSO, cmd 694, 1989, at pp.33-37.

¹⁶ *Trusts Act* 1973 (Qld.), section 105, *Charities Act* 1978 (Vic.), sections 2 and 3, *Charitable Trusts Act* 1962 (W.A.), section 7.

¹⁷ *Re Rowell* (1982) 31 S.A.S.R. 361.

¹⁸ H. Gray, 'The History and Development in England of the *Cy Prés* Principle in Charities', *Boston University Law Review*, Vol.33, 1953, pp.30-51 at p.30; H.A.J. Ford & W.A. Lee, *Principles of the Law of Trusts*, The Law Book Company Limited, Sydney, 1990 at p.899; *Attorney-General v. Mayor of Bristol* (1820) 2 Jac.&W. 294 at 307; 37 E.R. 640 at 645.

¹⁹ J. Willard, 'Illustrations of the Origin of *Cy Prés*', *Harvard Law Review*, Vol. 8, No.2, 1894, pp.69-92; E.L. Fisch, 'The *Cy Prés* Doctrine and Changing Philosophies', *Michigan Law Review*, Vol.51, 1953, pp.375-388.

save his soul by donating property to religious purposes.²⁰ The Ordinary (bishop) was usually the person responsible for the administration of the deceased's estate and the custom was that property not specifically disposed of should be used for the good of the testator's soul.²¹ The church adopted the practice that if a donor was seeking "for the health of his soul" to donate money to a charity and for some reason this was impossible, then the person's position in the heavenly kingdom ought not to be denied. The donation did not revert to the testator's heirs, but applied to other similar purposes.

After the reformation, the English Chancellors with their ecclesiastical heritage applied the doctrine generally to charities to the disadvantage of heirs. As Lord Chief Justice Wilmot remarked,

The right of the heir at law seems to arise naturally in this case as in any other. But instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of - perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish.²²

The Chief Justice went on to say,

the Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would enable him to the same reward.²³

The Crown also had a prerogative flowing from its *parens patriae* jurisdiction to provide for gifts to charity that failed. In 1754 a gift to a Jesuba or Jewish seminary was held to be illegal and the Crown redirected the gift to a hospital that the King was personally interested in.²⁴ Today the Crown still enjoys the privilege, but it is rarely used and guided by the same principles as the courts.

²⁰ Willard *op. cit.*, substantiates the view of Lord Chief Justice Wilmot in the case of *Attorney General v. Downing* Wilmot's Notes 1, at 33.

²¹ *pro salute animae*, it was customary to divide an estate into three parts, that for the wife, the children and the good of his soul, the same prevails with intestacy.

²² *Attorney-General v. Downing* Wilmot's Notes 1, 33.

²³ *Id.*

²⁴ *Da Costa v. De Pas* Amb. 228.

A series of English cases towards the end of the Eighteenth century were not so favourable to charity *cy prés*,²⁵ perceiving the doctrine as taking liberty with the testator's wishes. The cases of Crown *cy prés* that were distasteful to judges²⁶ and the undesirability of locking up capital needed for the industrial revolution²⁷ are reasons given for this attitude. The cases also arose at a time where middle class wealth was growing. In contrast to the landed aristocracy who passed on their wealth through marriage settlements, the middle classes transferred wealth after their death. Land could also be the subject of a will where previously this was the sole province of common law. The testamentary disposition took on an importance that it had not previously possessed in medieval society and the consequences of dispossessing an heir became more serious.

The rights of a testator to dispose of his property without fetter, the claims of the heir at law, and the provision of gratuitous property transfers for approved purposes to benefit society were reconciled by the development of the notion of general charitable intention.²⁸ If the court finds that the testator intended only the named specific institution to benefit so that the testator would prefer that the gift fail if it cannot be precisely implemented, and the gift fails, then the residuary beneficiaries or next of kin will take the property. If the court can find that there was an intention that any impractical direction is not to be regarded as indispensable to the gift, then *cy prés* will be applicable.²⁹

Initial frustrations of charitable property transfers have attracted the intervention by the judiciary and the Crown itself to be redirected from lapse recipients to the public benefit. While this could be interpreted as an appropriate facilitation of the donor's wishes, Willard comments that the compromise adopted by the courts may result in,

... the modern testator, not intending a purchase of heaven with his *bonis caducis* but a specific bequest to a specific charity, may be presumed to have known not merely what he intended, but what he did not intend, in the case of a charity, as well as of any testamentary disposition made by him; or that the court in imputing

²⁵ Refer *Attorney-General v. Bishop of Oxford* 1 Bro. C.C. 44n, 1786; *Attorney-General v. Golding* 2 Bro. C.C. 428 1789; *Attorney-General v. Bishop of Chester* 1 Bro. C.C. 444, 1785.

²⁶ Gray, *op. cit.*, at p. 38.

²⁷ Gray, *op. cit.*, at p.39.

²⁸ *Attorney-General v. Boulton* a Ves. Jun. 379, 1794.

²⁹ *Attorney-General (NSW) v. Perpetual Trustee Co. Ltd* (1940) 63 CLR 209.

to him what he did not say, because he might have said it, may not run some risk of making him say what he would have emphatically repudiated.³⁰

Given that the basis of the common law is to save initial frustrations derived from heirs being unable to benefit from gift overs and residues, it may be arguable that our law should not treat intended charitable gifts which initially fail any differently to other testamentary failures.

Subsequent Failure

Where a charitable trust has been established and a subsequent failure occurs, the trustee is usually obliged by force of law to initiate assistance from the state to alter its purpose and overcome the failure. The state facilitates the unlocking of a trust's perpetual existence and its unalterable objectives. Given the increasingly rapid change in the social environment, this facilitation may become increasingly necessary.

In England the administration of such schemes has been increasingly delegated to the Charity Commission with oversight by the judiciary.³¹ In Australian jurisdictions, the state represented by the Attorney-General is empowered to supervise the schemes and there is little administrative machinery such as a Charity Commission.³² The powers given to the court and the Charity Commission have been widened to include other circumstances such as permitting amalgamation of charities and funds, dispensing with outdated donor restrictions and modernisation of the areas of benefit and qualifications of beneficiaries.³³ The use of such procedures has been criticised as being ineffective from an administrative perspective because of the slow, expensive and complicated nature of the process.³⁴

³⁰ Willard, *op. cit.*, at p.92.

³¹ *Charities Act* 1991 (U.K.), section 15.

³² For example the *Charitable Funds Act* 1990 (Qld.), section 6.

³³ *Charities Act* 1991 (U.K.), section 15.

³⁴ P. Luxton, 'Whither *Cy-près*? An Anglo-American Analysis of Practical Problems', *New Law Journal*, Apr 24, 1987, pp.34-44; Great Britain, 'Efficiency Scrutiny of the Supervision of Charity', Report to the Home Secretary and the Economic Secretary to the Treasury, HMSO, London, 1987, paragraphs 78-95 (known as the Woodfield Report); Great Britain, 'Charities: A Framework for the Future', HMSO, cmd 694, 1989, at pp.33-37.

As noted above, the early UK legislation (1960) has found its way into Australia state jurisdictions, but not the later provisions which allow for administrative interventions.³⁵ Australian courts have inherent powers to deal with subsequent frustrations. However, they have no power to vary a charitable purpose that is defined and legally capable of being executed. The court cannot vary the donor's original charitable purposes to what it considers to be more beneficial to the public, or even what the court may surmise that the founder would have himself contemplated if he could have foreseen the changes in circumstances.³⁶ In New South Wales, the courts are given widened powers to devise *cy prés* schemes where the original purposes have "ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust."³⁷ Queensland, South Australia, Tasmania and Victoria follow New South Wales with slight variations in wordings.³⁸

One piece of legislation that has broken this pattern is the Queensland *Charitable Funds Act* 1990. It is without parallel in the Australian jurisdictions. The Act applies to property that has been raised wholly or in part by public voluntary contribution.³⁹ It provides mechanisms for charitable bodies, donees, donors, a state, or a public person authorised by the state to convene a meeting of stakeholders to form a committee in order to decide whether the purpose is frustrated and, if it is, to prepare and submit a scheme for the approval of an administrative officer. The administrative officer then submits a report on the scheme to a judge for approval.⁴⁰ This procedure has the advantage of involving a cross-section of the stakeholders, being largely administrative and not needing to rely on technical notions of equity law. However, the Act has rarely been used. It is cheaper and quicker to handle the matter by administrative fiat under a provision of the *Collections Act* 1977 (Qld) which regulates fundraising.⁴¹

³⁵ *Trusts Act* 1973 (Qld.), section 105, *Charities Act* 1978 (Vic.), sections 2 and 3, *Charitable Trusts Act* 1962 (W.A.), section 7.

³⁶ *Attorney-General v Sherborne Grammar School* (1854) 18 Beav 256.

³⁷ *Charitable Trusts Act* 1993 (NSW) s 9(1).

³⁸ *Trusts Act* 1973, (Qld) section 105; *Trustee Act* 1936 (SA), section 69B(1); *Variation of Trusts Act* 1994 (Tas), section 5(3); *Charities Act* 1978 (Vic), section (2) (1).

³⁹ *Charitable Funds Act* 1990 (Qld.), sections 2 and 3.

⁴⁰ *Charitable Funds Act* 1990 (Qld.), section 8.

⁴¹ Section 35. B. Cliff of the Queensland Department of Consumer Affairs, Charities Section, personal communication [interview] dated 10 August, 1993.

While Australian courts have an inherent and statutorily extended jurisdiction to deal with frustrations of charitable purposes, there is no provision of administrative means to address such frustrations as exists through the Charity Commission in England and Wales. The paper next turns to discuss whether these judicial avenues are in fact being used.

WHAT ACTUALLY HAPPENS?

It appears that there is little activity by the courts as initiated through the Attorneys General in relation to reform of frustrated charitable trusts. While all Australian jurisdictions place a positive duty on charitable trustees to bring *cy prés* actions before the court with the joining of the Attorney General, there are few reported cases and most take a long time to be resolved. Attorneys General rarely initiate *cy prés* action on their own. In England the power of the Attorney General has been effectively delegated by the Charities Act to the Charity Commissioners.⁴² The English Attorney General performs just a few functions that are initiated by recommendation from the Charity Commission. These include criminal prosecutions of charity related matters and *cy prés* scheme presentations before the judiciary.⁴³ Australia does not have the administrative machinery of the Charity Commission to advise the Attorney General.

It is theoretically possible for individuals who may be concerned about a frustrated charitable trust to use the name of the Attorney General to sue. The Attorney General gives such permission in what is known as a relator action.⁴⁴ The grant of the Attorney General's fiat to bring such an action may be *ex officio* or *ex relatione* and it usually will not be granted until all other appropriate steps to resolve the matter have been exhausted.⁴⁵ The Attorney General may conduct the case, and if this occurs, the relator cannot appear separately or take an opposite view to the Attorney General. In any case the costs are borne by the relator.⁴⁶ These are severe restrictions on a concerned individual and the process is very rarely used.

⁴² *Charities Act* 1991 (U.K.), section 6.

⁴³ For example section 18 of the *Charity Act* 1960 (U.K.).

⁴⁴ *Wylde v. Attorney-General* (1948) 78 C.L.R 224.

⁴⁵ F.M. Bradshaw, *The Law of Charitable Trusts in Australia*, Butterworths, Sydney, 1983 at p.165.

⁴⁶ *Attorney-General v. Logan* [1891] 2 QB 100.

On inquiry of Australian State Attorneys General in 1993, there were a handful of *cy-prés* applications involving the redistribution of charitable assets. Over the past ten years, New South Wales had approximately twenty *cy-prés* applications and a dozen will interpretations a year whereas in the past five years, Victoria had 63 *cy-prés* applications. Western Australia had six *cy-prés* scheme applications in 1993 alone. The Northern Territory had never been involved in a *cy-prés* application and South Australia had only a "handful" of cases at any one time. New Zealand had twenty to thirty *cy-prés* cases a year.

Some recent *cy-prés* applications do not arouse a great deal of faith in the efficient redeployment of dormant charitable funds. For example, *Re Application by Perpetual Trustees Queensland Ltd* No 4239 of 1999 involved an endowment fund of \$A64,000 for charitable purposes. Between 1937 and 1950, there was not a meeting of trustees and, thereafter concerning the future of the trust, the judge noted,

"Thereafter at various times the incumbent Lord Mayor of Brisbane, officers of the Justice Department, and the present applicant raised questions as to the future management of the trust, the desirability of passing legislation with respect to it, and otherwise debated among themselves the future management of the trust. However, nothing concrete has ever been done."⁴⁷

In another recent case, *Re Anzac Cottages Trust*⁴⁸ involved a charitable fund established in 1915 to provide housing to war widows. Cottages were gradually sold over the years with funds going into a trust fund. The last sale of a cottage was in 1983. Since then in excess of \$500,000 sat in an investment account to support the last remaining cottage which the judge described as "although historically and culturally significant, is a modest wooden cottage, badly in need of repair."⁴⁹ The matter was finally dealt with in May 2000.

In *Roman Catholic Trusts Corp. for Diocese of Melbourne v Att. Gen. (Vic)*,⁵⁰ the Roman Catholic Diocese, as trustee of a trust, applied for a *cy-prés* order. In 1908 a

⁴⁷ Williams J, *Re Application by Perpetual Trustees Queensland Ltd*, No. 4239 of 1999, at para 15.

⁴⁸ [2000] QSC 175.

⁴⁹ *Ibid* at para 12.

⁵⁰ [2000] VSC 360.

person gave the Diocese 90 hectares of land at Shoreham in Victoria in trust for the establishment of an educational farm for orphan boys. A farm was never constructed, but the Christian Brothers erected a dormitory on part of the land as a holiday site. Even this dormitory had fallen into disrepair at the time of the application. Although 92 years had passed, the parties argued that,

"It was put on behalf of the Corporation that the trust was never practicable so that, notwithstanding the passage of so many years, this is a case of initial impracticability rather than a supervening impracticability."⁵¹

The court ordered that the land was to be sold and the proceeds applied for the benefit of disadvantaged children. In any view, ninety years is a considerable time to reach the conclusion that the trust's purpose was impractical from the start.

It appears that many formal charitable trusts avoid going before the courts and simply arrange to divest themselves of any remaining assets with little fuss. This is not surprising given that charitable trusts are not required to register or provide any financial return to any government body. Concerned individuals have no effective standing in these matters and there is no dedicated administrative body to which they can turn.

Another matter of practice also contributes to the inability of Australian donors to control their gifts from the grave. The overwhelming majority of nonprofit institutions that receive gifts from donors are corporate bodies that are not formally within the equity jurisdiction. It is to an examination of these bodies that the paper now turns.

CORPORATIONS WITH CHARITABLE PURPOSES

Clearly in Australia, the nonprofit corporate legal form is both more numerous and influential in nonprofit enterprise than the pure charitable trust. However, donors wishing to bind the corporation to their wishes face a difficult task and the law is far from clear in many respects. Often there are large numbers of donors of small gifts over a long period to

⁵¹ Ibid, a para 5.

nonprofit corporations. Many donors volunteer in the delivery of services or development of assets such as buildings and other capital infrastructure. They do so on the understanding that

- the organisation is nonprofit and for the general public benefit;
- the non-distribution constraint will prevent any private inurement; and
- any surplus assets on dissolution will go to another worthy cause.

Outside of a formal charitable trust, there is no guarantee that this will always be the case in Australia.

Nonprofit corporations appear to have far more flexibility than a formal charitable trust in avoiding the dead hand, but there is the prospect of abuse of this situation. While the corporate governance regime of directors and members appears to meet community expectations, there appears to be no clear or effective administrative or judicial means of redressing a departure from community expectations. The legal situation is quite unclear as the following description indicates.

It is possible for a corporation to be a trustee of a charitable trust. The corporation, as a trustee, is then subject to the common law of equity and statutory provisions governing trusts. The crucial issue is that it has the power from its constitution to act as a trustee. If a frustrating event occurs, then the general equitable principles of *cy prés* will apply to the situation. The donor can make clear their wishes through the trust deed and the courts, with the Attorney General, will handle the issue.

However, when the corporation has solely charitable objects itself, the role of equitable doctrines is less clear. It is an unresolved issue in Australian law as to whether such a company is perceived to be in a position analogous to a trustee to its own property or ordinary corporate relationships remain unchanged. If the corporation dissolves, undergoes fundamental change, members change its objects or change a pre-existing *cy prés* style dissolution distribution of surplus clause, then the issue is whether the matter is governed by corporate law or trust law.

A cursory glance at American authorities also indicates some doubt as the drafters of the Model Nonprofit Corporations Law expressly rejected the doctrine "that corporations formed for charitable purposes hold their assets in trust for stated purposes at the time of

acquisition of the respective assets and that the directors are trustees with respect thereto."⁵² However, a leading American authority on trust law prevaricates, writing:

The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee... Ordinarily the rules that are applicable to trusts are applicable to charitable corporations... although some are not. It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.⁵³

The English judiciary has started to develop some charitable trust principles in the context of the corporation. Tudor notes on the basis of comments in *Liverpool and District Hospital for Diseases of the Heart v. Attorney-General*⁵⁴

With regard to the general property of a charitable company, the better view would seem to be that it is not subject to a trust in the strict sense but holds it subject to a binding legal obligation to apply it for charitable purposes only; the position of a charitable company in relation to its assets is, therefore, "analogous" to that of a trustee.⁵⁵

However Tudor goes on to comment about the cases⁵⁶ in point that,

Whilst the above cases may appear to be strong authority for the proposition that a charitable company holds all its assets on trust, in two of the cases the presence of a trust was assumed and the question was considered only incidentally in another.⁵⁷

Warburton argues that as the property is vested in the company and not the directors, some directors are to be more accurately described as "quasi-trustees or fiduciaries."⁵⁸ She

⁵² L.A. Moody, 'The Who, What, and How of the Revised Model Nonprofit Corporation Act', *Northern Kentucky Law Review*, Vol.16, 1989, pp.251-283 at p.263.

⁵³ W Fratcher, "Scott on Trusts", Vol IV A. 4th, 1989, 348.1 at 23.

⁵⁴ [1981] Ch. 193.

⁵⁵ S.G. Maurice, D.B. Parker, *Tudor on Charities*, *op. cit.*, at p.410.

⁵⁶ *Re Manchester Royal Infirmary* (1889) 43 Ch.D. 420; *Soldiers', Sailors' and Airman's Family Association v. Attorney-General* [1968] 1 W.L.R. 313; *Construction Industry Training Board v. Attorney-General* [1973] Ch. 173.

⁵⁷ Maurice et. al., *op. cit.*, at pp.410-411.

⁵⁸ J. Warburton, 'Unauthorised Acts by Charities', *Trust Law & Practice*, October, 1987, pp.46-50 at p.48.

asserts that the Liverpool case may allow "the courts to apply full equitable remedies in the event of misapplication of charitable property."⁵⁹ This assumes that it is in fact charitable property, which is different from directors or the company acting in a fiduciary like manner. Statutory measures have sought to plug this gap. In England the Charity Commission has jurisdiction to supervise such companies and this largely resolves the *cy prés* issues.⁶⁰ Charitable companies are clearly restricted in altering constitutions, particularly their objectives, winding up and distribution of surplus assets which is all supervised by the Charity Commission and the courts.

In Australia individual state legislation, in varying degrees, places controls on such corporations and associations, but it is rudimentary compared to the English Charity Commission and associated legislation.⁶¹ The matter has been indirectly addressed in the Australian courts through the issue of whether a gift to a charitable corporation is a gift in trust or a gift to the corporation generally for its objects. Although the decisions espoused differing judicial views, it appears that a disposition to a charitable corporation will presumptively take effect as a trust for the purposes of the corporation rather than a gift to the corporation.⁶²

There are no provisions in company law statutes regulating corporate forms preventing:

- a change of a corporation's charitable objects to non-charitable objects;
- altering its non-distribution constraint clause;
- or how its surplus assets are to be distributed on dissolution.

Those organisations that have either taxation exemption or a tax deductible gift status are required by the ATO to have non-distribution constraint and dissolution clauses in their

⁵⁹ *Ibid.*, at p.49.

⁶⁰ Section 64 (1), *Charities Act* 1993 (U.K.) and section 35A *Companies Act* 1989, (U.K.); J. Warburton, 'Charitable Companies and the Charities Act 1992', *The Charity Law & Practice Review*, Vol.1, 1992-3, pp.203-208; J. Warburton, 'Charity Corporations: The Framework for the Future', *The Conveyancer and Property Lawyer*, Vol.54, 1990, pp.95-105.

⁶¹ For example, *Charitable Collections Act* 1934, (N.S.W.); *Charitable Collections Act* 1952 (Qld); *Charitable Collections Act* 1946 (W.A.).

⁶² *Re Inman* [1965] V.R. 258; *Sir Moses Montefiore Jewish Home v. Howell and Co, (No.7) Pty Ltd* [1984] 2 N.S.W.L.R. 406 and Victoria, 'Report on Charitable Trusts', Chief Justice's Law Reform Committee, Melbourne, 1965 at p.26; H.A.J. Ford, 'Dispositions for Purposes', in *Essays in Equity*, ed., P. Finn, Law Book Company Limited, Sydney, 1985 at p.168.

constitutions whilst claiming the taxation benefits, but there appears to be no effective block to an organisation relinquishing their taxation status and then altering their constitution.

There have been some examples of nonprofit companies that have, over decades, received taxation concessions and donations from the public to perform public functions during which time they have acquired substantial real property. Then the situation in the local community changes and the public function is no longer required. The company membership dwindles to a handful of persons who, instead of distributing assets to a similar organisation on winding up as per the dissolution clause, alter the constitution and distribute the surplus to the remaining members. Despite some media disquiet, there appears to be no action taken to either remedy the situation or protect past donors' contributions. Some of the organisations whilst having public functions are organised on quasi membership frameworks where it is not uncommon to return surplus assets to the remaining members on dissolution.⁶³

There are a number of statutory provisions which apply to incorporated associations (these are different to companies limited by guarantee discussed above) managing the distribution of surplus funds on dissolution as directed by the members. The incorporated association legislation in each state and territory often requires some government approval for the distribution of surplus funds as well as some stipulation to ensure a *cy prés* style distribution. For example in New South Wales, the provisions of the Associations Incorporation Act requires that a government officer must approve the distribution, it may not go to the members and that,

Surplus property or any part of it that consists of property supplied by a government department or public authority, including any unexpended portion of a grant, must be returned to the department or authority that supplied it or to a body nominated by the department or authority⁶⁴

A handful of special corporations are given statutory powers to allow internal *cy prés* of frustrated trusts. These provisions allow large church corporations to vary trusts through

⁶³ *Brown v Dale* (1878) 9 Ch. D 78

⁶⁴ Associations Incorporation Act 1984 (NSW), s 55B (3).

internal administrative procedures without the intervention of the court.⁶⁵ The statute gives power to the corporation to determine by resolution whether it is a trust that is “impossible or inexpedient to carry out or observe”. This applies whether the corporation is a trustee of a charitable trust or the property is vested in trust to the corporation. The corporation may then resolve to use the property as nearly as may be possible to the original purpose, or if it believes that this is not possible, as it otherwise decides. This is a wide grant of powers and used frequently by such bodies who are all large religious property holding trusts.

This device saves the expense and delay of court procedures to formally redirect trust assets. However, it does place a great deal of trust in the fidelity of the controllers of the trust. Apart from such organisations’ internal governance controls, there appears to be no sanctions or review of inappropriate decisions apart from the Parliament repealing the statutory provisions or the inherent jurisdictions of the courts to review such decisions.

CONCLUSION

The Australian jurisdiction, like many of those with an English heritage, balances the special status in law of perpetual charitable trusts devoted to a public benefit purpose chosen by the founding donor with changing circumstances which may initially or over time render the chosen public benefit less effective or even impossible. The Australian court’s inherent jurisdiction has been extended by statute to cover a greater scope of frustrating events than allowed by the common law, but the use made of this appears to be low. There may be a number of reasons for this lack of engagement with the courts such as the expense and delay of court proceedings combined with no specially tasked administrator to facilitate such proceedings. Unlike England and Wales, Australia has not adopted any administrative or quasi-judicial processes as illustrated by the Charity Commission to redress the issues of cost and delays of the judicial process.

⁶⁵ Section 17, Roman Catholic Church Communities' Lands Act 1942 (NSW); Section 9C, Roman Catholic Church Trust Property Act 1936 (NSW); Section 32 Anglican Church of Australia Trust Property Act 1917 (NSW).

In any case, the majority of donative behaviour is found outside charitable trusts in various nonprofit corporate forms. In Australia, the standard corporate laws do not cater for the special circumstances that face nonprofit corporations and the expectations of donors as well as the general public that both the non-distribution constraint and dissolution procedures will apply in perpetuity. Although most governance arrangements internal to such corporations appear to prevent any deviation from these expectations, some form of law governing the matter may serve to make clear these expectations and prevent any future deviations.