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CHARITY HOARDING IN A COVID-19 TIME OF NEED: THE ROLE OF ACTIVITY-BASED REGULATION

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Abstract

The COVID-19 pandemic has highlighted the urgent need for charities to expend their 'rainy day funds' now, rather than hoarding for the future. For charities lucky enough to have endowments or material investments, such as universities, philanthropic foundations and some schools and hospitals, the collapse in many investment markets and in current income may nevertheless generate reluctance to realise and utilise investments. This article examines the role of activity-based regulation in encouraging charities to spend now, when it is needed.

KEYWORDS

Charity law; charities; accumulation; reserves; activities; regulation

INTRODUCTION

Arguably, COVID-19 represents the greatest health and economic crisis since the Great Depression. If ever there were a time for charities to dip into their 'rainy day funds' of accumulated reserves, now is it. Yet, as with the Global Financial Crisis of 2008 (Fishman (2014): 205; Halperin (2011)), some charities, especially universities and philanthropic foundations, seem to be wrestling with whether to expend

accumulated assets or instead cancel projects and reduce operating budgets (Johnson et al (2020); Hanmer (2020); The Economist (2020); Rooney and Bergdoll (2020); compare Bell and Dubb (2020)).

Many Australian charities do hold material reserves, though it should be emphasised that asset levels vary significantly. In 2018, charity sector net assets amounted to $222 billion, with most of these assets held by education providers, hospitals and aged care providers, religious organisations and housing providers (ACNC (2020)). Data from several years earlier also indicates that over 21.5% of charities had net assets exceeding 5 years' expenditure and that 4.5% of charities not only had 5 years' expenditure worth of assets, but were growing those net assets at more than 10% per year (Cortis et al (2016): 77-80). Philanthropic intermediaries, such as grant-making foundations, are prominent in this regard, with 85% of these charities having net assets exceeding 5 years' expenditure and around 59% increasing their net assets annually. That is consistent with the anecdotal evidence about licensed trustee companies discussed later in this article and with taxation data for public and private ancillary fund intermediaries, despite the application of minimum annual distribution requirements (Australian Taxation Office (2018)).

This article investigates the role of activity-based regulation in tempering hoarding by charities, including other charities which have the potential to accumulate, such as private schools and hospitals (O'Neil and Hatch (2017); Eales (2017)). Perpetuities rules, tax requirements and governance duties also impact on charity accumulation. For example, duties to act upon genuine consideration and to act in the best interests of a charity's purpose(s) may apply to excessive hoarding, while duties to use powers for proper purposes may be relevant to matters such as accumulating assets to

enhance charity prestige or to increase fees due to charity controllers. Minimum annual distribution requirements that apply to deductible gift recipients in the form of public or private ancillary funds also restrict rates of accumulation by requiring some expenditure[1], though there is some evidence that, once in place, such rules tend to cap actual distribution rates at about the mandated rate (Deep and Frumkin (2005): 19-21). However, these restraints have been explored elsewhere (Murray (2014); Murray (2015); Murray (2017); Murray (2020)) and are largely found wanting, other than at the extreme of very material accumulation and limited current expenditure.

This article instead focuses on the accumulation rules that attach to certain charity activities. The first part considers regulation based on fundraising activities, with the second part of this article then analysing government funding. That is because fundraising or the receipt of government grants can result in requirements as to timely expenditure or claw-back of unspent funds. Following this, the article investigates charities undertaking highly regulated services, looking at the delivery of education in the third part of the article and the provision of health services in the fourth part. The regulation of licensed trustee company services (e.g. in respect of philanthropic foundations) is then examined in the fifth part of this article.

FUNDRAISING

While social distancing restrictions and the economic impact of COVID-19 have caused fundraising headwinds for charities, the pandemic has also spurred others to make donations (The Economist (2020); Cassidy (2020)). The recent Australian bushfire appeals demonstrate the potential for controversy over (alleged) hoarding of such donations (Kidd (2020)). Yet, fundraising activities result in duties and regulatory oversight at the federal, state and local government levels that go some

way to addressing such concerns over hoarding. These include public fundraising requirements under the *Corporations Act 2001* (Cth) (***Corporations Act***); prohibitions on misleading or deceptive conduct under the *Australian Consumer Law*; local government permits for carrying out activities in public spaces; and state-based licensing and regulation of charitable collections (Productivity Commission (Cth) (2010): 135-6).

It is the state and territory regulation of charitable collections that is typically most significant for charities, and it reflects material divergence in approaches (Treasury (Cth) (2012): 3, 8; Senate Standing Committee on Economics (2008): 95-6). Indeed, the Northern Territory does not have laws regulating charitable collections and other jurisdictions exempt certain entities from some requirements. However, in the context of accumulation, three broad matters are relevant and are discussed below: the risk that deferral through hoarding amounts to use of funds raised for an alternate purpose, public interest and dormant funds curbs on hoarding, and charity reporting.

Before moving to these three matters, there has been recent impetus to repeal state and territory fundraising legislation. Recent reviews of the *Australian Consumer Law* and of the Australian Charities and Not-for-profits Commission (ACNC) have recommended that the *Australian Consumer Law*'s application to charitable fundraising be clarified and that consideration be given to whether it should be amended to expressly deal with such fundraising (CAANZ (2017): 6-7, 75-6; McClure et al (2018): 96-103). However, the government's decision not to support this proposal (Seselja (2020): 19) means that the discussion in this part remains pertinent.

Deferral may amount to use for an alternate purpose

The manner in which fundraising occurs may suggest a time-limited purpose and, hence, restrictions on accumulation. For instance, an appeal for funds to assist the victims of a bushfire or those made temporarily unemployed by COVID-19 would necessitate a time-limited purpose, whereas an appeal to contribute to the general funds of a charity might not indicate any time limit on the provision of benefits. Seeking donations before the money is truly needed, simply to increase a charity's prestige and that of its controllers might also amount to using donated funds for a purpose different to the stated objective for which donations have been obtained. The governance duties applying to charity controllers regulate the latter example in that the charity controllers appear to be exercising their powers for an improper purpose. However, governance duties do not adequately address a situation where fundraising occurs for a time-limited objective, such as responding to COVID-19, but where a charity then retains the funds for its general purposes.[2]

Fundraising obligations can fill in some gaps for the time-limited purpose example. First, if a donor makes a conditional donation, it may give rise to obligations under the general law principles of contract or trust.[3] Those obligations might require the distribution of the donated funds and income within a certain time, as is the case for Warren Buffett's donations to the Bill and Melinda Gates Foundation (Buffett (2006)). Where private law obligations do not arise (for instance, because donors merely express a non-binding wish) or where donor enforcement is muted, state and territory fundraising legislation is relevant, though universities are typically exempt. If donations are invested and the income accumulated, there may be some scope for regulators in New South Wales, the Australian Capital Territory and Tasmania to argue that donations have been 'used'[4] or 'applied'[5] for a purpose other than the purpose for which they were obtained, thus enlivening regulatory enforcement powers

such as the appointment of an administrator (*Collections for Charities Act 2001* (Tas) s16; *Charitable Collections Act 2003* (ACT) s52; *Charitable Fundraising Act 1991* (NSW) s33(2)).

Of course, terms such as 'apply' or 'use' can potentially encompass accumulation (compare *FCT v Word Investments Ltd* (2008) 236 CLR 204: [37]; *IRC v Helen Slater Charitable Trust* [1982] Ch 49), a matter contemplated by the New South Wales and Australian Capital Territory legislation (*Charitable Fundraising Act 1991* (NSW) s21(1); *Charitable Collections Act 2003* (ACT) s46). The New South Wales provision is representative:

> *Money received in the course of a fundraising appeal which is not immediately required to be applied to the purposes or objects of the appeal may be invested only in a manner for the time being authorised by law for the investment of trust funds.*

The outcome will likely depend upon the nature of the fundraising appeal and the extent to which it emphasises a time-limited purpose. Charities registered with the ACNC are also exempt from most aspects of the licensing regime in the Australian Capital Territory (*Charitable Collections Act 2003* (ACT) s14(2)).[6]

Although slightly differently worded, the Western Australian and Victorian provisions and, potentially, the South Australian provisions apply in similar circumstances. The Western Australian commissioner may revoke a collections licence, including as a result of a recommendation by an advisory committee on the ground that funds have been 'substantially applied otherwise than for affording the relief for which the money or goods were collected' (*Charitable Collections Act 1946* (WA) ss8, 13(2)(a)).[7] In Victoria, the court can stop an appeal, or the director can deregister a charity, if the

appeal is not ‘conducted or administered in good faith for the purposes stated to those from whom money was, is being, or will be, sought’ (*Fundraising Act 1998* (Vic) ss33A(c)(ii), 34(1)(b)).[8] Further, the court can order the distribution of assets if the appeal assets ‘are not being applied for the purposes stated to the people from whom the assets were obtained’ (*Fundraising Act 1998* (Vic) s36(1)(b)). In South Australia, the ground is that donations have been ‘misapplied’ (*Collections for Charitable Purposes Act 1939* (SA) ss6(7)(a), 12(4)(a)).

The text of the above provisions does not make a distinction between a donor imposing a legal condition and a donor merely expressing a non-binding wish. Nor would such a distinction promote the consumer protection purpose of the fundraising legislation. Accordingly, the provisions should apply even in the case of non-binding wishes. Further, in relation to consumer protection, the *Australian Consumer Law* and some state fundraising legislation may also indirectly restrict accumulation by regulating fundraising that is misleading or deceptive due to statements to donors that imply less accumulation than ultimately occurs.[9]

Public interest and dormant funds - curbs on hoarding

Some of the fundraising legislation enables access to enforcement provisions in a broader range of circumstances. The provisions apply if there is ‘mismanagement’[10] or ‘maladministration’,[11] which can be thought of as a failure of governance duties. The provisions also apply on public interest-focused grounds. For instance, in New South Wales and Victoria, that it is in the ‘public interest’ - to the satisfaction of a minister (NSW), an administrative officer or the court (Vic) - to appoint an administrator, to stop a fundraising appeal or stop a person fundraising (*Charitable Fundraising Act 1991* (NSW) s33(2); *Fundraising Act 1998* (Vic) ss33A(c)(iv),

33A(e), 34(1)(c)). A fundraising licence or authority can also be revoked in other jurisdictions on public interest grounds (*Collections Act 1966* (Qld) s22(1)(b)), or in 'other circumstances' or for 'other reason[s]' (*Collections for Charitable Purposes Act 1939* (SA) ss6(7)(d), 12(4)(c); *Charitable Collections Act 1946* (WA) s13(1)(e)), which are likely to capture public interest considerations. As the public interest ground goes beyond mere failure to comply with governance duties, it provides an additional curb on hoarding.

In considering when it might be in the public interest, some legislation refers expressly to whether the fundraising expenses exceed a reasonable proportion of the funds raised (*Fundraising Act 1998* (Vic) s6B). However, public interest tests typically permit broad recourse to a range of policy matters (for instance, see *O'Sullivan v Farrer* (1989) 168 CLR 210: 216). Relevant matters might include the consumer protection/public trust and confidence goal of fundraising legislation (for instance, see Treasury (Cth) (2012): 5-6), which would clearly be relevant to misleading or deceptive conduct or to a failure of charity controller duties. The objective of fundraising efficiency is also likely to be relevant (for instance, see Treasury (Cth) (2012): 6). This objective arguably extends to allocation efficiency (Treasury (Cth) (2012): 5-6), such that if a charity is collecting and accumulating more than it needs, efficiency may favour fundraising by other charities that are spending on more pressing needs – such as COVID-19 relief - where expenditure might have a larger impact. In addition, public interest grounds may also permit recourse to charity law's objectives. One such objective is to incentivise the production of goods for the benefit of the public in pursuing charitable purposes (Murray (2015): 546; Dal Pont (2017): [2.6], [3.1]-[3.2]). This objective suggests some benefits should be produced before too distant a time and so might also be

relevant where there is large scale, long-term accumulation. While the Victorian provisions focus more narrowly on stopping fundraising, the New South Wales ground for appointing an administrator could thus have a real impact on accumulation.

The *Dormant Funds Act 1942* (NSW) is also directed toward ensuring the 'effective use' of charitable funds (Martin (1942): 347). Although the legislation likely only applies to trusts (Dal Pont (2017): [16.17]), it potentially enables the Commissioner for Dormant Funds to force the use of donated, collected or acquired property where, amongst other grounds, 'for at least the immediately preceding 6 years, the trustees have not used the fund genuinely for the purposes for which it was donated, collected or otherwise acquired', or 'it is not practicable to use the fund for those purposes', or 'it is unlikely that those purposes will be achieved within a reasonable time' (*Dormant Funds Act 1942* (NSW) s5A(1)). The legislation explicitly countenances that the mere retention of assets or income does not amount to a lack of genuine use.

Thus a lack of 'genuine use' is likely to require some failure on the part of charity controllers in exercising their discretionary powers, such as a failure to consider exercising a power. If so, this ground is unlikely to apply in circumstances beyond breach of the governance duties of charity controllers. The associations incorporation legislation in most jurisdictions also contains dormancy grounds for winding up an incorporated association, which appear even narrower. The grounds apply if an association 'has suspended its operations, or has in effect been dormant, for a whole year or more',[12] or 'suspends its operations for a whole year',[13] or is 'defunct'.[14] They could potentially apply where accumulation occurs because charity controllers have

ceased making decisions (*Johnson v Commissioner of Consumer Affairs (NT)* [2009] NTSC 4, [50]).

The 'practicable' ground likely overlaps with the 'impracticable' ground for a cy-près scheme, being a mechanism by which a charity's purposes can be varied. While cy-près principles need not be strictly followed by the Commissioner (*Dormant Funds Act 1942* (NSW) s18), they provide some guidance. The common law 'impracticable' ground permits variation where it is or has become 'practically impossible' to pursue a charitable purpose (*Re Weir Hospital* [1910] 2 Ch 124, 140). There is some breadth in the notion of practical impossibility, including situations where, 'due to the lapse of time and change of circumstances, it is no longer possible beneficially to apply the property in the exact way that the donors directed it to be applied' (*Parker v Moseley* [1965] VR 580, 583). Likewise, particular conditions of charitable gifts have been characterised as impracticable where they materially undermine the charitable purpose (Dal Pont (2017): [15.23]-[15.25]; Mulheron (2006): 101-2), including accumulation conditions in some instances (*Epstein* [1984] VR 577; *Re Stillman Estate* (2003) 68 OR (3d) 777; *Re Fenton Estate* (2014) BCSC 39). South Australia and Queensland also permit collected funds to be appropriated to, or have their use directed to, another charitable purpose in circumstances which mirror cy-près grounds, although extending also to where it has become 'inexpedient' to carry out the purpose (*Charitable Funds Act 1958* (Qld) s5; *Collections for Charitable Purposes Act 1939* (SA) s16). 'Inexpedient' means that the original charitable purposes have 'become unsuitable, inadvisable or inapt',[15] which can arise due to changed social and economic conditions (such as a pandemic) and changes in public policy,[16] though inexpedience will not inevitably result from such changes (*Re McElroy Trust* [2003] 2 NZLR 289). Inexpediency might, for instance, arise because

the rate of accumulation is resulting in only nominal benefits for a class of potential beneficiaries, such as the present generation (see, eg, *Re Lepton's Charity* [1972] Ch 276).

The reasonable time ground under the *Dormant Funds Act 1942* (NSW) likely covers cy-près impracticability circumstances (eg *Wallis v Solicitor-General (NZ)* [1903] AC 173). However, it is broader in that there is no need to show that due to time and changed circumstances, the property can no longer be beneficially applied as directed in pursuit of the charitable purposes. The focus is on how long it will take to achieve the charitable purposes. Accumulation that is so significant that there is no material pursuit of charitable purposes for the benefit of current generations would likely fall within this ground. However, this is unlikely to be common.

Reporting

Reporting is a key monitoring mechanism. To the extent disclosed to donors and the broader public, reporting also permits donor enforcement of restrictions and the application of market mechanisms to curb accumulation in excess of that implied by the fundraising purpose.[17] For charities that must be registered to carry out fundraising activities, states and territories typically require a level of financial reporting, although some impose this under the registration licence conditions, rather than in the regulatory legislation itself (Treasury (Cth) (2011): 43).[18] Some jurisdictions have removed this requirement for charities that are registered with and report to the ACNC,[19] though reporting then occurs to the ACNC. To the extent that charities raise finance by issuing investment instruments (rather than merely seeking donations) such as debentures or interests in managed investment schemes, financial

reporting obligations may also exist at the federal level (for example, see ASIC (2016)).[20]

GOVERNMENT FUNDING

Based on financial information provided by charities registered with the ACNC, government grants to such registered charities amounted to $74 billion in 2018, amounting to 47% of total revenue (ACNC (2020)). Contractual obligations under government funding contracts for the delivery of services or under grants can also be viewed as a form of regulation (Productivity Commission (Cth) (2010): 115; Garton (2009): 214-17). These obligations can, and often do, involve extensive reporting requirements, of a financial, organisational, performance-based and activity-based nature (for example, see, Treasury (Cth) (2011): 46; Ernst & Young (2014): 22), although their scope differs between government agencies, as well as depending on the nature of the particular program. Government grants for an entity's general purposes, rather than for the provision of specified services, can also entail substantive financial and non-financial reporting.

As an indication of the manner in which obligations may be imposed, the Commonwealth Grants Rules and Guidelines set out requirements for the Commonwealth to follow in making grants and that potentially apply to contracts to fund the delivery of particular services, as well as general purpose grants (Department of Finance (2017): [2.3]-[2.4]). The Guidelines do not mandate the claw-back of surplus funds, although principles of achieving value with relevant money and focusing on the achievement of outcomes clearly indicate that the efficient use of funds to achieve outcomes is to be promoted and monitored (Department of Finance (2017): [3.5], [10.1]-[11.5]). However, the template grant agreements developed by

the Commonwealth Department of Finance to help implement the Guidelines do include claw-back clauses. For instance:

> *If any of the Grant has been spent other than in accordance with this Agreement or any amount of the Grant is additional to the requirements of the Activity, the Grantee agrees to repay that amount to the Commonwealth unless agreed otherwise* (Department of Finance (2018a): sch 1 cl 10.1; Department of Finance (2018b): sch 1 cl 11.1).

The template agreements also provide an optional clause relating to the purchase of assets with grant funds, since assets will remain with the grantee at the end of the grant period. The optional clause includes a requirement to obtain Commonwealth approval for the purchase of assets over a threshold and mandates that assets be used for the purposes of the approved activities (Department of Finance (2018a): G7; Department of Finance (2019): cl CB.5). This has the potential to restrain accumulation of grant funding via asset purchases.

Similar repayment and asset purchase provisions are applied in the template grant agreements utilised by some of the major departmental sources of funding. For instance, see the Commonwealth Department of Social Services' *Streamlined Grant Agreement* and *Comprehensive Grant Agreement*.[21]

In addition, the provision of government-funded services or activities to the public can occur under a variety of relationships between government and the non-government entity that are not limited to contract (Verspaandonk (2001)). For instance, the legislative obligations accepted on opting-in to a funding regime, as

discussed for the education and health sectors in the following parts, can also impose expenditure and repayment requirements.

EDUCATION

This part examines the regulatory frameworks applying, first, to tertiary education providers and, second, to primary and secondary schools. It demonstrates that these frameworks ensure that teaching and research is carried out with a degree of quality and that the provider has a minimum level of organisational capacity, including financial viability. To the extent that providers rely on government funding, much, though not all, of that funding is tied to the relatively contemporaneous carrying out of teaching or research, although tertiary education providers have some flexibility to retain some funding. This promotes a minimum level of asset and income retention, along with promoting the delivery of a certain amount of quality research and education each year. However, student fees and donations represent significant alternate sources of income for many education providers and, subject to the need for a base level of expenditure to meet quality and capacity requirements, the regulatory regimes leave some scope for providers to accumulate fees and donations.

Tertiary education

The Australian tertiary education system comprises a range of providers: public universities, two private universities, a large number of non-university higher education providers and vocational education and training (**VET**) providers (Dow and Braithwaite (2013); Department of Education and Training (2015)). The regulatory arrangements applying to these providers are diverse, involving a number of regulators and regulatory networks. However, there are certain key elements that are

relatively unique to education providers, namely: the conditions imposed on Commonwealth funding for teaching and research; teaching quality accreditation and assurance; and international education accreditation requirements. The international requirements are not considered separately as they cover similar matters to the domestic quality assurance frameworks, as well as addressing discrete issues such as visa management.

While not all higher education providers receive Commonwealth funding, for those that do funding is largely linked to past or proposed research projects, to student completions or enrolments, to supporting specific infrastructure, or to activities that support these measures (see, eg, Watt (2015): 8-26; Commonwealth of Australia, (2015)). The arrangements also make funding contingent on compliance with aspects of quality standards and accountability requirements, as well as compliance with matters such as financial viability, fairness and, for higher education providers, compliance with a funding agreement and entry into a mission-based compact (*Higher Education Support Act 2003*(Cth) (***HESA***) ss16-25(1)(f), (fa), div 19, s22-15, sub-div 36-F, s41-25, s46-25, sch 1A ss6 and 33).

Of relevance to the question of accumulation:

- The financial viability condition requires that a provider is and is likely to remain financially viable (*HESA* s19-5, sch 1A s14).
- Fairness includes that providers must 'treat fairly' or treat 'equally and fairly' all current students and all persons seeking to enrol as students (*HESA* s19-30, sch 1A s18; *Higher Education Support (VET) Guideline 2015* (Cth) s41). This may impose some very loose limits as to fairness of provision of benefits over the

several cohort years of the enrolled and enrolling students – and hence be an initial step toward fair treatment over time.

- The mission-based compact articulates a higher education provider's overall mission and strategies for teaching and research (*HESA* s19-110). The compact might therefore be expected to impact in general terms on the time that research is undertaken and that educational benefits are provided to students.

In addition, quality assurance is also directly imposed for teaching and research training by way of registration and accreditation of institutions and courses, on-going quality standards[22] and on-going monitoring by bodies, such as the Tertiary Education Quality and Standards Agency and Australian Skills Quality Authority (for instance, see Dow and Braithwaite (2013): 12-16). Quality assurance is also indirectly imposed for much research funding through the research grant application selection process, especially for competitive grants and through Excellence in Research Australia assessments (compare Dow and Braithwaite (2013): 21-2).

Accordingly, the funding and quality assurance arrangements require tertiary education providers to carry out a certain amount of quality research and teaching activities, particularly as the unspent portion of some grants[23] may be clawed back (*HESA* ss41-10, 41-40, 46-35, pt 2-5; *Australian Research Council Act 2001* (Cth) s58). Nevertheless, it is possible for providers to retain surpluses from Commonwealth grants scheme amounts for Commonwealth supported student places and many universities have traditionally used such teaching surpluses to cross-subsidise research (Watt (2015): 12-13; Department of Education and Training (2015): 22). Research block grants based on historical research projects/funding could also potentially provide a surplus over the cost of those outputs or the indirect support

required for that funded research project. Increased solicitation of donations and (although prospectively less so, due to COVID-19 travel restrictions) fees from full fee paying domestic and international students suggests additional sources of income that are not subject to the Commonwealth funding requirements discussed above.

Many universities are also created by their own piece of legislation and so subject to specific requirements under that legislation. The objects provisions in some pieces of legislation explicitly provide for teaching, research and community service activities (for instance, see *University of Melbourne Act 2009* (Vic) s5; *University of Sydney Act 1989* (NSW) s6), which would mean that at least some level of such activities would need to be routinely engaged in so that the university senate or council members satisfy their duties. University establishment legislation or public body financial management legislation also commonly imposes financial administration, reporting and auditing requirements (See *University of Western Australia Act 1911* (WA) s41; *University of Melbourne Act 2009* (Vic) s47, pt 6 div 6; *Financial Management Act 1994* (Vic); *Audit Act 1994* (Vic)). This could influence donors if a university already appears to have sufficient assets. Further, universities are typically subject to additional internal and external influences that regulate their behaviour (Dow and Braithwaite (2013): 20). External league tables that rank education providers on measures comprising a range of teaching and/or research matters are likely to be one such important influence. So too are community expectations around support for students affected by the COVID-19 pandemic and provision of research assistance to governments in devising public health responses.

Primary and secondary education

Non-government primary and secondary education providers are subject to state regulation relating to registration and to ongoing compliance and review in relation to a range of operational quality, safety and organisational capacity requirements regarding curriculum, staff qualifications and governance procedures (Varnham (2013): [160-5]). In addition, to access funding provided by the Commonwealth via the States, non-government primary and secondary school providers must also be approved under the *Australian Education Act 2013* (Cth). This legislation requires, amongst other things, that providers be financially viable and have ongoing quality improvement processes in place; and generally within the year that it is received 'spend, or commit to spend' recurrent education funding, short term emergency assistance funding and capital funding (*Australian Education Act 2013* (Cth) ss 78(2)(a), 85(2)(a), 93(2)(b); *Australian Education Regulation 2013* (Cth) ss29, 30, 31). Failure to comply can result in the claw-back of funding (*Australian Education Act 2013* (Cth) pt 8). Significant financial and non-financial reporting is also imposed (*Australian Education Act 2013* (Cth) ss78(2)(b), 85(2)(b), 93(2)(c); *Australian Education Regulation 2013* (Cth) ss32 to 40). However, as for universities, privately sourced school fees and donations are also significant sources of income (Gonski et al (2011): 37).

HEALTH

This part focuses on private hospitals as a large number are NFPs (including charities) and they have been identified, at least in North America, as a potential accumulation source (O'Neil and Hatch (2017); Fricke (2015): 1153-61). In Australia, the safety and quality standards applying to hospitals effectively require a minimum level of activities from year to year and ministerial approval of health insurance premium

increases indirectly limits some fees. However, material scope for accumulation remains.

Individual states and territories have responsibility for licensing private hospitals and regulating the safety and quality of health services provided (Australian Institute of Health and Welfare (2018)). In broad terms, the licensing arrangements set safety and quality standards and impose suitability requirements for operators and licence holders that typically include financial viability (see Australian Institute of Health and Welfare (2018): 41-7). Nationally agreed safety and quality standards in the form of the *National Safety and Quality Health Service Standards* also apply (Australian Commission on Quality and Safety in Health Care (2017)). Safety and quality standards extend, to a degree, to matters such as staffing, to minimum numbers of patients for certain types of services and to on-going education and quality monitoring, thus requiring a certain level of activity by the private hospital (see Australian Commission on Quality and Safety in Health Care (2017): std 1; *Private Health Facilities Regulation 2017* (NSW) sch 1 standards 11, 23, 24, sch 2 standards 2, 20, 31, 61, 72; *Health Services Act 1988* (Vic) ss42, 83(1)(h), (i), (j); *Health Services (Health Service Establishments) Regulations 2013* (Vic)).

Funding is primarily sourced from private health insurance funds and payments from individuals, though still with over 30% of Commonwealth and state government funding, including payments under the Medicare Benefits Scheme and Pharmaceutical Benefits Scheme (which may therefore involve some direct pricing caps) (Australian Institute of Health and Welfare (2018): 61, figures are for 2015-16). Private hospitals that receive funding from private health insurers or under the Medicare Benefits Scheme are required to be declared by the minister under the *Private Health*

Insurance Act 2007 (Cth). Matters that the minister considers in making a declaration include the nature of the facility and the range of services provided, as well as whether state licences and accreditations are in place (s121-5(7)). As private health insurers are required to obtain ministerial approval for premium increases under the *Private Health Insurance Act 2007* (Cth), this may result in an indirect constraint on fees, reducing the ability to hoard.

LICENSED TRUSTEE COMPANIES

Based on data as at 2013, licensed trustee companies (LTCs) administered charitable trusts holding around half of all charitable trust assets; at the time amounting to $3.4 billion (CAMAC (2013): 17). LTCs are professional trustees prescribed by regulations to the *Corporations Act* and that are required to hold an Australian financial services licence (AFS licence) for the provision of traditional trustee company services, which include administering a charitable trust (*Corporations Act* ch 5D, especially s601RAC). It appears that the 'vast majority' of the charitable trusts administered by LTCs have trust terms that seek to preclude distributions of capital (Financial Services Council (2012): 16), suggesting a significant number of permanently endowed philanthropic foundations for which accumulation is a potential concern.

The *Corporations Act* regulatory regime for LTCs requires an LTC to be a fit and proper person and to be capable of providing traditional trustee services (s601RAB(2A)), contains rules about LTC fees (pt 5D.3), imposes duties on LTC officers and employees (pt 5D.4) and restricts the level of voting power a person is permitted to hold in an LTC (pt 5D.5). The AFS licence requirements bring further obligations. Some relate to the integrity, competence and organisational capacity of

the LTC. Amongst other things, the LTC must have adequate resources (*Corporations Act* s912A(1)(d)), have office holders who are fit and proper persons and are competent (ss912A(1)(e), (f), 913B) and have adopted an appropriate risk management framework (s912A(1)(h)). Some requirements relate more directly to trust administration. For instance, the AFS licence requirements to do all things necessary to ensure that services are provided 'efficiently, honestly and fairly' (s912A(1)(a))[24] and to provide a financial services guide to the charitable trust settlor (pt 7.7 div 2).

The above requirements clearly go to the fitness and capacity of LTCs and their officers and employees and hence help reduce the accumulation-related agency costs of mission drift or loss of trust assets. Indeed, the duties imposed on LTC officers and employees relate to acting honestly, acting with due care and diligence, not making improper use of information or position and taking reasonable steps to ensure LTC compliance with the *Corporations Act* and AFS licence conditions (*Corporations Act* pt 5D.4). They therefore reflect a number of charity governance duties, as well as extending to LTC specific requirements. The LTC requirements also help to ensure an LTC's capacity to give genuine consideration to intergenerational equity.

However, where LTC fees are based in some way on the level of trust assets, there is a lingering concern that LTCs might seek to maintain or increase trust capital to enhance their fees (compare Madoff (2010): 107-8). When reviewing LTC administration of charitable trusts, the federal government's Corporations and Markets Advisory Committee received divergent submissions on the reasonableness of fees charged by LTCs and ultimately recommended both 'stewardship audits' of the reasonableness of LTC fees and the addition of a 'fair and reasonable' fee

requirement (CAMAC (2013)).[25] Notably, post-Ch 5D charitable trusts administered by LTCs appear to involve fees determined by private agreement between the LTC and settlor or based on a statutory percentage of the annual value of trust assets, rather than on the statutory income (and one-off capital) commission approach (CAMAC (2013): 23-4), suggesting a focus on maintaining accumulated assets.

CONCLUSION

This article has demonstrated that concerns about charity hoarding are ameliorated to a degree by activities-based legal restraints. For instance, charities undertaking fundraising are potentially subject to slightly greater constraints on retention of the solicited funds as a result of private law obligations or fundraising regulation. This might involve a Warren Buffett-style condition that donated funds be spent within a set period, or, as a result of fundraising legislation requirements that funds be used for the purpose raised, a charity assertion or donor wish that collected funds be spent within a certain time. The existence of any such assertion or wish will depend on the nature of the fundraising appeal. For example, it is more likely for a COVID-19 pandemic relief appeal than for a university's endowment fundraising drive.

However, the above fundraising restrictions are based on the private choices of donors in selecting an express or implied time limit for their donation, or of charity controllers in framing the specific fundraising purpose and its temporal nature. Only some jurisdictions go further. The New South Wales fundraising legislation does provide for appointment of an external administrator on public interest grounds, which permits greater recourse to considerations such as efficiency or intergenerational justice, and to the underlying goals of charity law. Dormant funds legislation in New South Wales, South Australia and Queensland, that applies where

it is not practicable to use collected funds for the purpose collected, may also allow limited consideration of efficiency and intergenerational justice in a similar fashion to the cy-près scheme jurisdiction. Indeed, the New South Wales legislation focuses on the reasonableness of the time between collection and use of collected funds.

Those in receipt of government funding may also be subject to claw-back of unspent funds under the terms of the funding agreement. Further, the funding and quality and safety assurance legislative regimes for education and health providers such as universities and non-profit hospitals, impose a range of pertinent requirements. For instance, requirements as to financial viability and capacity, but also recoupment of unspent funds, as well as the obligation to provide a certain amount of contemporaneous quality teaching, research and care. Likewise, the LTC regime imposes fitness and capacity measures, along with some constraints on fees.

Thus, it is first worth noting that the requirements for education, health providers and LTCs, that go to viability and capacity, act as mechanisms to reduce governance risks such as mission drift due to an inappropriate focus on building up accumulated assets (compare Tuckman and Chang (1992): 79). As suggested by the LTC fee discussion, however, the measures do not appear to be entirely effective in eliminating governance risks of hoarding.

Second, the state's ability to intervene under fundraising or dormant funds legislation in some circumstances and to set expenditure and service-provision conditions for government funding does also mean that the current generation has some ability to alter accumulation approaches over time where funds have been raised by these means.

Third, activities-based regulation applying to sectors such as education and health does require a base level of activity for the benefit of present generations. Fundraising obligations may in limited circumstances also preclude indefinite accumulation of solicited funds.

Nevertheless, this activities-based regulation is somewhat piecemeal in its coverage of charities. Nor does it appear to be informed by any normative approach to the allocation of benefits between generations, albeit that it is possible to incorporate considerations of intergenerational justice and efficiency into service levels set for government funding, or within fundraising and dormant funds legislation public interest or practicability tests. Accordingly, while activity-based restraints do restrict hoarding, they still leave many charities significant opportunities for accumulation. Further, the lack of a clear normative approach to accumulation within the activities-based restraints is likely to dilute the general guidance that charity controllers might draw from the restraints. The once-in-a-lifetime COVID-19 pandemic therefore provides an opportunity for revisiting law reform options for the regulation of charity accumulation.

NOTES

[1] *Taxation Administration (Private Ancillary Fund) Guidelines 2019* (Cth) r15; *Public Ancillary Fund Guidelines 2011* (Cth) r19.
[2] Governance duties may, however, apply in limited circumstances if the fundraising objective results in a charitable trust for that fundraising purpose or if a donation obligation arises, such that the duty of care and diligence is enlivened.
[3] The conditional gift may be characterised as subject to a trust, a condition or a charge, that the donated funds be used for a purpose. As to the differing bases, see, eg, *Countess of Bective v FCT* (1932) 47 CLR 417, 418-20 (Dixon J); *Muschinski v Dodds* (1984-1985) 160 CLR 583, 604-7 (Brennan J).
[4] *Collections for Charities Act 2001* (Tas) s14.
[5] *Charitable Collections Act 2003* (ACT) ss44(1), (2); *Charitable Fundraising Act 1991* (NSW) s20(1).

[6] In South Australia, ACNC registered charities are deemed to have a collections licence and hence to be subject to the collections legislation: *Collections for Charitable Purposes Act 1939* (SA) s6(3).
[7] A further ground is that the charity 'has ceased effectively to carry out any charitable purpose': s13(2)(d).
[8] In which case the Director can appoint an administrator in relation to the appeal assets: s61B.
[9] A mere difference between the ultimate degree of deferral and an initial statement will not always render the making of the statement misleading or deceptive. As to application of the *Australian Consumer Law* to charitable fundraising (see, eg, CAANZ (2016): 13, 15-17; CAANZ (2017): 75-6). As to the inclusion in state fundraising legislation of prohibitions on misleading or deceptive statements and/or conduct, see, eg, Dal Pont (2017): ch 18.
[10] *Charitable Fundraising Act 1991* (NSW) s33(2) (appointment of administrator); *Collections Act 1966* (Qld) ss34(1), 35(1)(d) (potential vesting of donated property in the public trustee); *Collections for Charitable Purposes Act 1939* (SA) ss6(7)(a), 12(4)(a) (revocation); *Charitable Collections Act 1946* (WA) s13(2)(a) (revocation).
[11] *Collections for Charitable Purposes Act 1939* (SA) s17(1)(b) (vesting of funds in the Minister); *Charitable Collections Act 1946* (WA) ss5, 17(1)(b) (vesting of funds in the Minister); *Collections Act 1966* (Qld) s35(1)(f) (vesting of funds in public trustee).
[12] *Associations Incorporation Act 2015* (WA) s123, sch 4 item 4.
[13] *Associations Incorporation Act 2009* (NSW) s63(1)(b); *Associations Incorporation Reform Act 2012* (Vic) s126(1)(b). Cf *Associations Incorporation Act 1981* (Qld) s90(1)(a); *Associations Incorporation Act 1991* (ACT) s90(c).
[14] *Associations Act 2003* (NT) s73(2)(e); *Associations Incorporation Act 1985* (SA) s44. Cf *Associations Incorporation Act 1964* (Tas) s34.
[15] *Re McElroy Trust* [2003] 2 NZLR 289, [14] (Tipping J). See also *Knowles v A-G (Tas)* [2016] TASSC 25, [15]-[17] (Wood J); *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic* (2017) 94 NSWLR 340, [214] (Court of Appeal).
[16] *Re Radich* [2013] NZHC 2944.
[17] By addressing information asymmetry as a source of market failure (Treasury (Cth) (2012): 5-6).
[18] There are significant exceptions in some states and territories. For instance, Tasmania expressly excludes some categories of charities, such as charitable trusts: *Collections for Charities Order 2001* (Tas) s4. Some religious bodies are exempt from the *Charitable Fundraising Act 1991* (NSW).
[19] For instance, South Australia (*Statutes Amendment (Commonwealth Registered Entities) Act 2016* (SA) pt 3) and the Australian Capital Territory (*Red Tape Reduction Legislation Amendment Act 2017* (ACT) s18).
[20] Charitable fundraisers are able to access relief from some requirements.
[21] Department of Social Services (Cth), 'DSS Streamlined Grant Agreement – General Grant Conditions' (November 2014) cl 10.1; Department of Social Services (Cth), 'Streamlined Grant Agreement' (May 2014) G7; Department of Social Services (Cth), 'DSS Comprehensive Grant Agreement – Terms and Conditions' (July 2014) cl 10, 11, 13 (the Comprehensive Grant Agreement sets out more detailed rules for asset purchasing approval and asset ownership).
[22] Such as the Higher Education Standards Framework and the VET Quality Framework.

[23] Commonwealth grant scheme amounts for commonwealth supported places are not subject to a claw-back of this nature other than in limited circumstances.
[24] As to the scope and impact of this requirement, see Latimer (2006).
[25] The existing requirement to ensure that services are provided 'efficiently, honestly and fairly' would already appear to offer some bulwark against unfair or unreasonable fees.

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