

RESTORING PUBLIC TRUST IN CHARITIES: EMPIRICAL FINDINGS AND RECOMMENDATIONS

ROSEMARY TEELE LANGFORD* AND MALCOLM ANDERSON**

This article reports the results of an extensive survey of persons who govern Australian charities (known as ‘responsible persons’) in relation to governance duties and conflicts of interest. These results are significant in light of the complexity of the legal framework governing Australia’s charities sector and in light of the shortage of empirical research into the sector. The results, combined with comprehensive legal analysis, enable critical evaluation of the overall effectiveness of the governance and regulatory system of charities in Australia, in turn enabling recommendations to ameliorate the difficulties caused by complexity and to facilitate improved governance.

I INTRODUCTION

The charitable sector is crucial to the economy and to social inclusion in Australia, and is a key element of national life. Data from the most recent *Australian Charities Report* shows that charities employed 10.5% of the Australian workforce and received \$176 billion in revenue, with \$12.7 billion coming from donations.¹ More recently, public trust and confidence in charitable bodies has been damaged by high profile governance failures within such entities, which have attracted significant media attention. Particularly pertinent are the failings within the Returned and Services League (‘RSL’), which involved misuse of the charity’s money on multiple occasions for personal benefit.² A core problem was inadequate

* Professor, Melbourne Law School, University of Melbourne

** Researcher and Statistical Consultant, Melbourne Law School, University of Melbourne. We thank Miranda Webster for assistance with the development and administration of the survey. This research was funded by the Australian Government through the Australian Research Council.

1 Australian Charities and Not-for-profits Commission, *Australian Charities Report* (Annual Report No 8, 2022) (‘2022 Australian Charities Report’).

2 See New South Wales Government, *Report of the Inquiry under the Charitable Fundraising Act 1991 into the Returned and Services League of Australia (New South Wales Branch), RSL Welfare and Benevolent Institution, RSL LifeCare Limited* (Report, January 2018) (‘Bergin Report’); Angela Lavoipierre, ‘Former RSL NSW President Don Rowe Admits to Public Inquiry He Misused Charity Money’, *ABC News* (online, 19 September 2017) <<https://www.abc.net.au/news/2017-09-18/former-rsl-nsw-president-admits-to-misuse-of-charitys-money/8957590>>.

management of conflicts of interest. A number of other examples of misuse of charitable assets and resources have been reported in the media.³

Although a number of factors affect public trust and confidence in charities, a key factor is governance and regulation. Key problems include multiple layers and sources of governance duties and the inconsistencies between these duties, as well as the fact that the core obligations imposed by the Australian Charities and Not-for-profits Commission ('ACNC') are imposed on charitable entities rather than on senior officers who govern charities. Strong governance and regulation also equip charities to cope with disruptive factors, of which there are many.⁴

This article represents the results of empirical research on the effectiveness of the governance and regulatory framework of the sector. As of yet, there has been little academic consideration or empirical analysis of these aspects or concrete reform proposals. This critical analysis is particularly timely in light of the review of the ACNC in 2018, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* ('ACNC Review'),⁵ and publication of the Government's response to that review in March 2020.⁶ Drawing on the results of this empirical research, we recommend the development of an online guide setting out the duties of those who govern Australian charities based on a distillation of governance duties into five core principles, as well as consideration of other practical measures to assist with the understanding of, and compliance with, such governance duties.

II REGULATORY AND GOVERNANCE FRAMEWORK

The governance framework for charities consists of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act') and the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) ('Regulation'). The *Regulation* contains certain governance standards, with which entities must comply in order to be registered and remain registered with the ACNC.⁷

3 For details, see Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45(1) *University of New South Wales Law Journal* 70 <<https://doi.org/10.53637/OOLE6882>>.

4 The Panel reviewing the Australian Charities and Not-for-profits Commission ('ACNC') legislation identified the outsourcing of human services by government, leading to competition and the requirement for new standards relating to governance, finances, information technology, performance culture and staff development: see Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review* (Report, 2018) 16–17 ('ACNC Review'). This review was conducted to meet the Commonwealth Government's statutory obligation to undertake a review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act') and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) after their first five years of operation: see *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) s 16 ('ACNC (Consequential and Transitional) Act').

5 ACNC Review (n 4).

6 See Commonwealth of Australia, *Government Response to the Australian Charities and Not-for-profits Legislation Review 2018* (Report, 6 March 2020) ('Government Response').

7 These standards were introduced to address the issue of regulatory duplication whereby charities, depending on their legal form, were required to comply with duplicate laws in different jurisdictions: see Australian Government, 'Charitable Fundraising Regulation Reform' (Discussion Paper, February 2012) 8.

Governance Standard 5 (imposed under regulation 45.25 of the *Regulation*) sets out obligations required of individuals who are responsible for governing the registered entity (each such individual being known as a ‘responsible entity’ or ‘responsible person’) such as a director of a company, a trustee of a trust, a director of an incorporated trustee and a member of an incorporated or unincorporated association’s committee of management.⁸ However, rather than imposing liability on each individual, Governance Standard 5 requires a registered charity to ‘take reasonable steps to ensure that its responsible entities are subject to, and comply with’ the seven duties set out in the standard.⁹ These include duties relating to care and diligence, good faith and furtherance of purposes, misuse of position and of information, disclosure of perceived or actual material conflicts of interest, management of financial affairs, and insolvent trading. Registered charities that operate outside Australia or work with third parties that are operating outside Australia are subject to four external conduct standards.¹⁰

It is, however, important to note that Governance Standard 5 does not replace the governance duties to which individual responsible persons are subject – rather, it gives the ACNC grounds to intervene.¹¹ The only set of duties that have been ‘turned off’ for responsible persons are the duties in sections 180–3 and 191–4 of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) for directors of charitable companies.¹² General law duties of responsible persons and other statutory duties remain in force.¹³ This means that responsible persons may be subject to a number of layers of duties. These include the Governance Standards, general law obligations, statutory obligations (including tax and obligations associated with the entity’s form), industry-specific obligations and regulations, and voluntary codes.

There is widespread recognition that this governance framework, and in particular the model adopted by Governance Standard 5, gives rise to inconsistencies, incoherence, gaps in coverage and problematic interaction with

8 Section 205-30 of the *ACNC Act* (n 4) defines responsible entities to include directors, trustees and other persons involved in a charity’s governing body.

9 Ramsay and Webster have argued that Governance Standard 5 increases the risk that individuals will not perform their duties with sufficient care and responsibility since the obligation is not imposed upon them: see Ian Ramsay and Miranda Webster, ‘Registered Charities and Governance Standard 5: An Evaluation’ (2017) 45(2) *Australian Business Law Review* 127, 136.

10 See *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) regs 50.20(2), 50.25(2), 50.30(2), 50.35(2) (*‘ACNC Regulation’*).

11 Note that the fact that a responsible person is not complying with the duties in Governance Standard 5 does not on its own give the ACNC grounds to intervene. Rather, it is where the charity is not taking reasonable steps to ensure compliance that the ACNC has grounds to intervene.

12 See *Corporations Act 2001* (Cth) s 111L (*‘Corporations Act’*); ACNC (*Consequential and Transitional Act* (n 4) sch 3 pt 3 divs 1–2; Australian Securities and Investments Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (8 March 2018) 2–3; Australian Charities and Not-for-profits Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (19 January 2018) (*‘ACNC Submission’*). Although it is not certain that section 111L turns off the duties in sections 180–3 and 191–4 (and indeed there is a credible argument that these duties have not been turned off), both key regulators view the duties as not applying, meaning that authoritative clarification at the very least is required.

13 For detailed consideration see Langford and Webster (n 3).

other legislation.¹⁴ As far back as 2004, Woodward and Marshall stated that '[t]he regulatory framework that underpins the sector is complex and riddled with inconsistencies'.¹⁵ Unfortunately, despite concerted reforms, this is still the case.¹⁶

Aroney and Turnour have pointed to the problems with the constitutional underpinnings of the ACNC regime.¹⁷ These constitutional problems have in turn resulted in a complex and incoherent layer of governance obligations imposed on those who govern Australian charitable organisations. Indeed, Aroney and Turnour have drawn attention to the fact that the practical effect of the *ACNC Act* has been to transform the charity sector from being one of the least regulated to one of the most highly regulated sectors in Australian society.¹⁸ There is also deep and widespread concern about complexity and regulatory burden in the Australian charities framework. For example, a frequent theme of submissions to the *ACNC Review* was the compliance burden (with a number of submissions saying that this has increased since the advent of the new ACNC regime) and the need for reduction of red tape.¹⁹ The deep incoherence in the way that the myriad governance obligations imposed on responsible persons are expressed was highlighted by the Committee reviewing the ACNC legislation:

[T]he current system of different governance requirements is complex and confusing. It is unreasonable to expect volunteer directors working in the sector to understand and comply with multiple jurisdictional and sometimes inconsistent governance requirements.

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- 14 See, eg, Ramsay and Webster (n 9); Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41(2) *Melbourne University Law Review* 446; Vivienne Brand, Jeff Fitzpatrick and Sulette Lombard, 'Governance and Not-for-Profits: Regulatory Reform' (2013) 15(2) *Flinders Law Journal* 381; Josephine Heesh and Jessica Lobow, 'Uncertain Times for Volunteer Directors' (2015) 67(4) *Governance Directions* 236.
- 15 Susan Woodward and Shelley Marshall, *A Better Framework: Reforming Not-for-Profit Regulation* (Report, 2004) 1.
- 16 In terms of concerns received from the public that were assessed by the ACNC Compliance team, potential breaches of Governance Standard 5 were in the top two risk categories identified in the three most recent ACNC compliance reports: see Australian Charities and Not-for-profits Commission, *Charity Compliance Report 2015 and 2016* (Report, 2017) 17; Australian Charities and Not-for-profits Commission, *Charity Compliance Report 2017* (Report, 2018) 22; Australian Charities and Not-for-profits Commission, *Charity Compliance Report 2018* (Report, March 2019) 17.
- 17 Aroney and Turnour (n 14).
- 18 Ibid 457.
- 19 See, eg, Justice Connect, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018); Moores, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (27 February 2018); Australian Catholic Bishops Conference General Secretariat, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (7 March 2018); Ted Flack, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (16 February 2018); Institute of Public Accountants, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (27 February 2018); St Vincent de Paul Society National Council, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018); National Catholic Education Commission, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (February 2018).

While there are common themes across the competing governance requirements, such as duties to act honestly and avoid conflicts, the expression of those duties differs between them and imposes an unacceptable level of red tape.²⁰

Previous studies and articles, also backed up by anecdotal evidence from charity experts, have highlighted that a lack of time and resources hinder training, and that director recruitment is challenging.²¹ In this respect, there have been calls for training for a number of years.²²

This confusing system can be contrasted with that of England and Wales which has a more straightforward system of governance obligations, as well as a Charity Governance Code with a diagnostic tool,²³ and more prescriptive Charities Commission guidance concerning conflicts of interest.²⁴

In light of these complexities and concerns, there is a pressing need for empirical work in relation to governance and enforcement frameworks in the Australian charities sector and, in particular, into the way in which responsible persons of Australian charities understand their duties. There is also a clear need for critical evaluation of the effectiveness of Australia's system of governance of charities and for development of reform proposals to rectify and strengthen this system. The following Part outlines, and analyses the results of, the empirical research we undertook to ascertain these matters. This took the form of an extensive survey in two jurisdictions, to be followed by consultation and interviews.

III THE SURVEY

Despite consistent national interest in the not-for-profit sector, there is a clear absence of studies into the governance framework of charitable entities. While there is a substantial body of legal scholarship concerned with governance in the not-

20 ACNC Review (n 4) 47.

21 See, eg, John Chelliah, Martin Boersma and Alice Klettner, 'Governance Challenges for Not-for-Profit Organisations: Empirical Evidence in Support of a Contingency Approach' (2016) 12(1) *Contemporary Management Research* 3 <<https://doi.org/10.7903/cmr.14538>>; Domini Stuart, 'Fighting Back' (2015) 31(5) *Company Director* 36.

22 Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) 249 ('*Contribution of the NFP Sector*'); Woodward and Marshall (n 15).

23 Charity Governance Code Steering Group, 'Charity Governance Code for Smaller Charities' (Code, 2017); Charity Governance Code Steering Group, 'Charity Governance Code for Larger Charities' (Code, 2017).

24 See Charity Commission for England and Wales, 'Conflicts of Interest: A Guide for Charity Trustees' (Guidance, 31 October 2022) ('CC29'); Charity Commission for England and Wales, 'The Essential Trustee: What You Need to Know, What You Need to Do' (Guidance, 3 May 2018) 17–19 [6.3]–[6.4] ('Essential Trustee'); Charity Commission for England and Wales, 'Managing Conflicts of Interest in a Charity' (Guidance, 2 November 2020) ('Five Minute Guide'). As outlined in Part VI below, the survey included factors mentioned in Charity Commission guidance. This was because an equivalent survey was conducted in England and Wales: see Rosemary Teele Langford and Malcolm Anderson, 'Charity Trustees: Governance Duties and Conflicts of Interest' (2022) 28(7) *Trusts and Trustees* 673 <<https://doi.org/10.1093/tandt/ttac071>>. For a comparison of the results from each jurisdiction, see Rosemary Teele Langford and Malcolm Anderson, 'Governance Duties and Conflicts of Interest in the Charities Sector: Australia and England & Wales Compared' (2022) 28(1) *Third Sector Review* 18 <<https://doi.org/10.2139/ssrn.4268157>>.

for-profit sector,²⁵ the empirical research outlined in this article focuses specifically on charities. Charities form part of the not-for-profit sector, sometimes described as the ‘third sector’, which makes immensely important contributions to the community. It is made up of a diverse range of organisations: from large and well-known charities; to religious bodies; to community groups, sporting, recreational and self-help organisations. Charities comprise a distinctive part of this sector due to their specific character as organisations that produce public benefit that the state has decided is especially worthy, and due to the voluntary and altruistic way in which these public benefits are produced. The lack of studies from Australian researchers into not-for-profit governance, and particularly empirical research into governance challenges, has been specifically noted by commentators.²⁶ A key component missing from the body of existing research is an empirical investigation into the ways in which those who govern charitable entities in Australia understand their obligations and manage conflicts of interest, as well as a critical evaluation of the overall effectiveness of the governance and regulatory system of charities in Australia.

The aim of the empirical research outlined in this article was to gain insight into governance and enforcement frameworks in the charitable sphere in Australia. Particular focus was placed on ascertaining two matters. These were (1) how those who govern charities understand their governance duties;²⁷ and (2) how charitable bodies deal with conflicts of interest in a practical sense – in terms of what protocols are in place, how often the issue of conflicts of interest arises and, when conflicts do arise, how they are dealt with.

Conflicts of interest were chosen due to their importance in governance and their presence in general law, statutory and soft law requirements.²⁸ Appropriate regulation and management of conflicts of interest is arguably central to governance and regulation of charities, regardless of which theoretical perspective or

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- 25 See, eg, Gavin Nicholson et al, ‘Governance Training Needs in Community Organisations’ (2008) 49 *Just Policy* 5; Gavin Nicholson, Cameron Newton and Myles McGregor-Lowndes, ‘The Nonprofit Board as a Team: Pilot Results and Initial Insights’ (2012) 22(4) *Nonprofit Management and Leadership* 461 <<https://doi.org/10.1002/nml.21040>>; Chris Cornforth, ‘Nonprofit Governance Research: Limitations of the Focus on Boards and Suggestions for New Directions’ (2012) 41(6) *Nonprofit and Voluntary Sector Quarterly* 1116 <<https://doi.org/10.1177/0899764011427959>>; Alan Hough, Myles McGregor-Lowndes and Chris Ryan, ‘Board Monitoring and Judgement as Processes of Sensemaking’ in William A Brown and Chris Cornforth (eds), *Nonprofit Governance: Innovative Perspectives and Approaches* (Routledge, 2013) 142; Richard Tacon, Geoff Walters and Chris Cornforth, ‘Accountability in Nonprofit Governance: A Process-based Study’ (2017) 46(4) *Nonprofit and Voluntary Sector Quarterly* 685 <<https://doi.org/10.1177/0899764017691637>>; Gemma Donnelly-Cox, Michael Meyer and Filip Wijkström, *Research Handbook on Nonprofit Governance* (Edward Elgar, 2021) <<https://doi.org/10.4337/9781788114912>>.
- 26 See Chelliah, Boersma and Klettner (n 21); Sonia Moi, Fabio Monteduro and Luca Gnan, ‘Empirical Research on Nonprofit Boards: Main Features and Differences from the Literature on Corporate and Public Boards’ in Luca Gnan, Alessandro Hinna and Fabio Monteduro (eds), *Mechanisms, Roles and Consequences of Governance: Emerging Issues* (Emerald, 2014) 127 <<https://doi.org/10.1108/S2051-663020140000002004>>.
- 27 The survey stated that ‘[t]he term “governance duties” refers to the duties and responsibilities you have as a board member in making decisions and in overseeing the organisation. Governance duties include, for example, obligations relating to conflicts of interest and financial management’.
- 28 See Part IV below.

accountability model is adopted.²⁹ Moreover, charities and other not-for-profits are especially vulnerable to conflicts of interest and consequences of a conflict can be serious, particularly in terms of public trust and confidence in the particular charity and in the sector more broadly.³⁰ In addition, responsible persons' understanding and management of conflicts of interest is indicative of broader understanding and compliance. In this respect it is possible to test how conflicts of interest are managed more easily than it is to test other duties because there is a clear first step, namely declaration or disclosure of the conflict.

Conflicts of interest also pose a real issue in practice. In 2020–21, the ACNC received 2,001 concerns about charities, and the most common concern was alleged mismanagement of funds or individuals obtaining a private benefit from a charity.³¹ The ACNC has identified common examples as related party transactions,³² gifts, honorariums and other payments (including consultancy fees paid to directors despite consultancy services not being provided),³³ financial fraud³⁴ and founder syndrome.³⁵ Many or all of these constitute conflicts of interest. Some of these attract media attention.³⁶ As outlined in Part IV below, the extent to which non-pecuniary and third-party conflicts of interest are encompassed within the conflicts

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- 29 For discussion of theory, see Michael D Connelly, 'The Sea Change in Nonprofit Governance: A New Universe of Opportunities and Responsibilities' (2004) 4(1) *Inquiry* 6 <https://doi.org/10.5034/inquiryjrn1_41.1.6>; Chelliah, Boersma and Klettner (n 21); Stijn Van Puyvelde et al, 'The Governance of Nonprofit Organizations: Integrating Agency Theory with Stakeholder and Stewardship Theories' (2012) 41(3) *Nonprofit and Voluntary Sector Quarterly* 431 <<https://doi.org/10.1177/0899764011409757>>; Tracey M Coule, 'Nonprofit Governance and Accountability: Broadening the Theoretical Perspective' (2015) 44(1) *Nonprofit and Voluntary Sector Quarterly* 75 <<https://doi.org/10.1177/0899764013503906>>; Judith L Miller-Millesen, 'Understanding the Behaviour of Nonprofit Boards of Directors: A Theory-based Approach' (2003) 32(4) *Nonprofit and Voluntary Sector Quarterly* 521 <<https://doi.org/10.1177/0899764003257463>>.
- 30 See, eg, Chris Macdonald, Michael McDonald and Wayne Norman, 'Charitable Conflicts of Interest' (2002) 39(1) *Journal of Business Ethics* 67 <<https://doi.org/10.1023/A:1016379900781>>; Deborah A DeMott, 'Self-dealing Transactions in Nonprofit Corporations' (1993) 59(1) *Brooklyn Law Review* 131; *Charity Compliance Report 2018* (n 16) 28–31.
- 31 Australian Charities and Not-for-profits Commission, *Annual Report 2020–21* (Report, September 2021) 20.
- 32 Examples of related party transactions include charities receiving goods or services from organisations that are owned or operated by relatives of the charity's responsible persons (without conflicts of interest being managed or considered) and board members awarding contracts or projects to their own companies (without managing conflicts of interest or considering alternative providers): *Charity Compliance Report 2018* (n 16) 28. See, eg, Josh Bavas, 'Horses for Harmony Charity Sold Raffle Tickets for Corvette but Never Drew a Winner', *ABC News* (online, 3 November 2020) <<https://www.abc.net.au/news/2020-11-03/horses-for-harmony-charity-ran-corvette-affle-with-no-winner/12839488>>.
- 33 *Charity Compliance Report 2018* (n 16) 29.
- 34 For high profile examples, see *DPP v Cirianni* [2018] VCC 2288; Alison Xiao, 'Former NSW RSL President Don Rowe Found Guilty of Misappropriating Funds', *ABC News* (online, 28 February 2020) <<https://www.abc.net.au/news/2020-02-28/magistrate-finds-former-rsl-president-don-rowe-guilty/12010870>>; Jamie McKinnell, 'Former RSL President Don Rowe Fined \$2,000 but Avoids Jail over Credit Card Fraud', *ABC News* (online, 17 April 2020) <<https://www.abc.net.au/news/2020-04-17/nsw-rsl-president-don-rowe-sentenced-for-fraud-offences/12156880>>.
- 35 This is described by the ACNC as where 'the person or people that established the charity do not adequately separate their own interests and finances from the charity's interests or finances': *Charity Compliance Report 2018* (n 16) 31.
- 36 For examples see above nn 2, 32, 34.

rule is unclear – ascertaining responsible persons' views on this is therefore instructive.

Management of conflicts of interest is not, of course, the only aspect of governance. Another important aspect is financial management. Monitoring the charity's financial position is a particularly important aspect of responsible persons' governance duties, especially in terms of the duty of care and insolvent trading duties.³⁷ Section 55-5 of the *ACNC Act* also requires each registered charity to keep written financial records that correctly record and explain its transactions, financial position and performance, and enable true and fair financial statements to be prepared and to be audited.³⁸ Testing responsible persons' understanding of the charity's financial position is therefore important, and indicative of responsible persons' understanding of, and compliance with, their governance duties. Adequate care and attention to financial aspects also serve to further the charity's purposes given that inefficiency and waste may deprive a charity of funds for pursuit of those purposes.³⁹

Indeed, purpose is central to governance in the charities sphere (and is at the core of the charities sphere generally).⁴⁰ Our empirical research also probed responsible persons' knowledge of the charity's purpose and how frequently that purpose was considered in decision-making in order to ascertain if the practical reality of decision-making reflected this centrality. Establishment and pursuit of charitable purpose are central to continued registration as a charity, and responsible persons need to have the particular purpose or purposes of their entity at the centre of governance and strategy.

The empirical research also tested motivations in order to develop a clearer picture of compliance motivations and perceived barriers to enhanced governance and compliance. Motives play a fundamental role in explaining and encouraging

37 Company directors, in particular, are required to prevent insolvent trading under section 588G of the *Corporations Act* (n 12), which also applies to charitable companies and co-operatives: see, eg, *Co-operatives (Adoption of National Law) Act 2012* (NSW) app s 451. The *Co-operatives National Law* is set out in the *Co-operatives National Law (ACT) Act 2017* (ACT); *Co-operatives (Adoption of National Law) Act 2012* (NSW); *Co-operatives (National Uniform Legislation) Act 2015* (NT); *Co-operatives National Law (South Australia) Act 2013* (SA); *Co-operatives National Law (Tasmania) Act 2015* (Tas); *Co-operatives National Law Application Act 2013* (Vic) (together, '*Co-operatives National Law*'). In some states, the duty to prevent insolvent trading extends to incorporated associations: see *Associations Incorporation Act 2009* (NSW) s 68; *Associations Incorporation Act 1981* (Qld) s 70I; *Associations Incorporation Act 1985* (SA) s 49AD; *Associations Incorporation Reform Act 2012* (Vic) s 152; *Associations Incorporation Act 2015* (WA) s 127. Note also sub-regulation (2)(g) of Governance Standard 5 requires charities to take reasonable steps to ensure that their responsible persons do not allow the charity to operate while insolvent, meaning that the ACNC could take regulatory action in certain circumstances: see *ACNC Regulation* (n 10) reg 45.25(2)(g). Insolvency on its own would not, however, be sufficient to trigger regulatory action.

38 *ACNC Act* (n 4) s 55-5(1).

39 In this respect, see Connelly (n 29).

40 See, eg, *Charities Act 2013* (Cth) s 5; *ACNC Regulation* (n 10) reg 45.5(2); *Charities Act 2011* (UK) s 1; Rosemary Teele Langford, 'Purpose-based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954 <<https://doi.org/10.53637/TDWS1787>> ('Purpose-based Governance').

compliance, and thus in calibrating regulatory frameworks.⁴¹ Ascertaining respondents' motives for compliance is therefore important in determining and evaluating regulatory and enforcement design, strategies and reforms. There is a wealth of regulatory scholarship evaluating and categorising motives for compliance and non-compliance.⁴² Academics have provided a number of reasons for compliance with governance and regulatory requirements.⁴³ The ACNC mentions the following reasons for dealing with conflicts of interest: reputational risk; risking accountability and transparency; poor governance; and negatively affecting board dynamics.⁴⁴ At the same time, the potential impact of some factors (such as factors pertaining to individual liability) may be lessened due to the fact that the statutory directors' duties in the *Corporations Act* have been 'turned off' for directors of charitable companies, and that the duties in Governance Standard 5 apply to the entity rather than to the individual, with the ACNC having little regulatory power in relation to individuals.⁴⁵

A Survey Details

An interactive survey was created by the research team using SurveyMonkey.⁴⁶ The surveys were pilot-tested extensively following ethics approval, with minor changes to the surveys resulting from the pilot-testing. The estimated time taken to complete the survey was kept short to encourage maximum responses. Participants were recruited as follows. First, survey links were distributed by peak bodies either via newsletter or

41 Other factors that influence compliance behaviour include people's decision-making attributes, decision-implementation attributes, decision-implementation resources, and formal and informal institutions. For discussion, see Christine Parker and Vibeke Lehmann Nielsen, 'Compliance: 14 Questions' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 217 <<https://doi.org/10.22459/RT.02.2017.13>>.

42 For a summary, list and appraisal, see Vibeke Lehmann Nielsen and Christine Parker, 'Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance' (2012) 34(4) *Law and Policy* 428 <<https://doi.org/10.1111/j.1467-9930.2012.00369.x>>. See also Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 382–4.

43 Fishman, for example, writes that most charitable fiduciaries are faithful and attributes this to internalised norms of appropriate behaviour, also mentioning a sense of duty; fear of external non-legal sanctions; fear of self-criticism or criticism by others leading to shame; desire for respect, esteem or prestige from others; and other pressures to conform. Fishman identifies shame as the 'primary non-externally imposed sanction upon nonprofit trustees' and emphasises the important role and impact of social norms: James J Fishman, 'Improving Charitable Accountability' (2003) 62(2) *Maryland Law Review* 218, 242–6.

44 Australian Charities and Not-for-profits Commission, 'Managing Conflicts of Interest: A Guide for Charity Board Members' (Guide, November 2015) ('ACNC Conflicts Guide'). The Charity Commission for England and Wales guidance mentions a number of factors including whether the interest could (or could be seen to) interfere with the trustee's ability to make decisions in the best interests of the charity; the duty to act in the charity's best interests; doing what is best for the charity in decision-making; stopping the conflict from affecting the trustee's decision; negative impacts on both the charity and individual trustees including financial cost and reputational impacts damage; and the fact that decisions may be called into question or legally challenged or that regulatory action may be taken by the Charity Commission: see 'CC29' (n 24); 'Essential Trustee' (n 24); 'Five Minute Guide' (n 24).

45 Langford and Webster (n 3).

46 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 United Kingdom and other common law jurisdictions in the charities, not-for-profit and commercial sectors.

email to members and by charity sector contacts.⁴⁷ Second, the researchers researched the details of individual charities using the ACNC Charities Register and sent emails with survey links to them. Participants in the survey were asked to complete an online survey containing 26 core questions. The survey took approximately 14 minutes to complete. 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 of interest are managed; and their understanding of the concept of conflicts of interest, including by way of hypothetical scenarios.

The total number of useable responses totalled 419. As the method of contact was by way of notice to Australian peak bodies (as well as word-of-mouth and personal solicitation), it is not possible to formally calculate a response rate. Of the responses, the number answering individual items ranged from 397 to 418 for the demographic items and between 328 to 367 for the relevant Likerts (bearing in mind that there was no 'not applicable' option). Slightly fewer participants completed the survey to the end, so those answering the hypothetical examples (the last three questions on the surveys) was a minimum of 310. Most questions offered respondents a five-option Likert response ranging from 'strongly agree' to 'strongly disagree' with a 'neither' option in the middle. Some items offered a five-option response ranging from 'very important' to 'not important' (with a 'neutral' option as a middle option), while the final scenario items only offered a two choice agree-disagree option.

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% confidence error is plus or minus 5.4 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 degree of skew in the final sample composition. That we received responses expressing a range of demographic indicators (age of respondent, size and legal structure of entity, purpose of entity, etc) roughly consistent with what is known about charities in Australia at the time of the survey gives cause that the final sample is broadly representative of the population.⁴⁸

47 It was made clear that the surveys were anonymous and not connected with the contact, that there was no obligation to complete the survey and that the survey responses would be kept confidential so that the relevant contact would not find out who completed the survey nor receive any information from the surveys. The term 'board member' was used in the survey to refer to responsible persons. The survey stated: 'The term "board members" means members of the governance body of the charity – the people ultimately responsible for leading the charity and deciding how it is run. In your organisation they may be the directors of the board, members of the management committee, the governors or the trustees. (These are usually the people who would be "responsible persons" for the purposes of the ACNC Charity Register).'

48 A caveat to this is that our survey revealed an under-representation of both smaller-sized entities and religious charities: cf Australian Charities and Not-for-profits Commission, *Australian Charities Report* (Annual Report No 7, 17 May 2021) ('2021 Australian Charities Report'). We have addressed this, where necessary, by highlighting response differences by including entity-size breakdowns.

A number of statistical techniques were employed. To test percentage differences between sub-groups (for example between small and large entities), we employed the Chi-square test of independence; where the percentages were related (that is, paired), the McNemar test was used. To ensure some control over a large number of variables generated in the study, and facilitate finer analysis, we also employed a range of multivariate techniques (principal components analysis, and multiple regression).

IV CONFLICTS OF INTEREST: GENERAL LAW, STATUTE AND ACNC GUIDANCE

Given that a core focus of the survey was identification and management of conflicts of interest, this Part briefly outlines the law on conflicts of interest. Duties and requirements relating to conflicts and profits are imposed on responsible persons from a number of sources, including general law, statute and ACNC requirements. However, there is uncertainty as to how far these duties extend. It is instructive to briefly outline the contours of the general law duty in relation to conflicts of interest, from which these other duties stem.

A General Law and Statute

The duty to avoid unauthorised conflicts of interest is a central fiduciary duty, along with the duty to avoid profits from position. These proscriptive fiduciary duties exact loyalty of fiduciaries.⁴⁹ The conflicts rule encompasses conflicts of interest and conflicts of duty. The standard applied under the rule is one of real sensible possibility of conflict and this is an objective standard.⁵⁰ At general law fiduciaries may avoid breach of the conflicts rule by full disclosure and consent from the beneficiary⁵¹ and constitutional provisions may provide some leeway.

In addition, there are numerous statutory duties imposing conflicts-related duties and requirements on responsible persons (and other fiduciaries/officers). These duties can be grouped into four sub-categories⁵² relating to (1) material

49 See *Breen v Williams* (1996) 186 CLR 71, 93 (Dawson and Toohey JJ), 108 (Gaudron and McHugh JJ), 136 (Gummow J).

50 The duty to avoid conflicts was originally strictly applied: see, eg, *Aberdeen Railway Co v Blaikie Brothers* [1843–60] All ER Rep 249, 252 (Lord Cranworth LC). However, it has for a number of years been tested by reference to a ‘real sensible possibility of conflict’: see *Boardman v Phipps* [1967] 2 AC 46 (HL) 124. In Australia, the test is sometimes expressed as a ‘real or substantial possibility of conflict’: see *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78] (McHugh, Gummow, Hayne and Callinan JJ) (*‘Pilmer’*). See also *Bell Group Ltd (in liq) v Westpac Banking Corp [No 9]* (2008) 39 WAR 1, 560 [4512] (Owen J).

51 See, eg, *Pilmer* (n 50) 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

52 For outline and analysis, see Rosemary Teele Langford, ‘Conflicts and Coherence in the Charities Sphere: Would a Conflict by Any Other Name Proscribe the Same?’ (2020) 14 *Journal of Equity* 1 (*‘Conflicts and Coherence’*).

personal interest;⁵³ (2) being directly or indirectly interested;⁵⁴ (3) holding an office or having an interest in property whereby, whether directly or indirectly, duties or interests might be created that could conflict with the director's duties or interests as a director;⁵⁵ and (4) direct or indirect pecuniary interest in a contract or proposed contract with the association.⁵⁶

The conflicts rule is in turn related to the duty to avoid unauthorised profits from position and its statutory iterations (which are often expressed in the form of duties to avoid misuse of position and misuse of information from position). The conflicts and profits duties in turn support the operation of the duty to act in good faith in the interests of the entity.⁵⁷ In the charities sphere the interests of an entity are closely interlinked with its purposes, such that the duty to act in good faith in the interests of the entity could be expressed as a duty to act in good faith in the interests of the charity's purposes or a duty to exercise powers in good faith in the way the responsible person considers would further the charity's purposes.⁵⁸ In other work, the term 'purpose-based governance' has been used to describe the model of governance applicable in the charities sphere.⁵⁹ This model is consistent with, and draws on, the fiduciary model, in that fidelity to purpose(s) is a key strand (if not the overarching principle) of the fiduciary paradigm,⁶⁰ and

53 See *Corporations Act* (n 12) s 191; *Associations Incorporation Act 1991* (ACT) s 65; *Associations Incorporation Reform Act 2012* (Vic) s 80(1); *Associations Incorporation Act 2015* (WA) s 42.

54 See *Co-operatives National Law* (n 37) s 208; *Associations Incorporation Act 2009* (NSW) s 31; *Cooperatives Act 1997* (Qld) s 227; *Co-operatives Act 2009* (WA) s 220(1).

55 See *Co-operatives National Law* (n 37) s 208(5); *Co-operatives Act 1997* (Qld) s 227(5); *Co-operatives Act 2009* (WA) s 220(5).

56 *Associations Act 2003* (NT) s 31; *Associations Incorporation Act 1985* (SA) s 31. For outline and analysis, see Langford, 'Conflicts and Coherence' (n 52).

57 The duty to act in good faith in the interests of the entity also proscribes conflicts of interest and imposes additional requirements in situations of conflict: for discussion, see Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, 2019) 18–20 [2.2.5.2], 105–9 [4.9] <<https://doi.org/10.1093/oso/9780198813668.001.0001>>. In fact, one approach to more indirect conflicts is to put the burden on the fiduciary to demonstrate that the transaction is 'demonstrably in the best interests of the company': see *Newgate Stud Co v Penfold* [2004] All ER (D) 372 (Dec) [242] (David Richards J) ('*Newgate Stud Co*').

58 Langford, 'Purpose-based Governance' (n 40). The most suitable phrasing of the core duty is still being debated, with options including a duty to act in good faith to further the charity's stated charitable purposes in accordance with its rules (Sue Barker, *Focus on Purpose: What Does a World-Leading Framework of Charities Law Look like?* (Report, New Zealand Law Foundation Te Manatū a Ture o Aotearoa, 10 April 2022) 18 (Recommendation 2.1)); a duty to exercise powers in the way that the responsible person decides, in good faith would be most likely to further the purposes of the entity (adapted from *Charities Act 2011* (UK) s 221); and a duty, in exercising functions, to act in the interests of the charity and, in particular, to seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes (adapted from *Charities and Trustee Investment (Scotland) Act 2005* (Scot) ss 51, 66(1)(a)).

59 Langford, 'Purpose-based Governance' (n 40).

60 See, eg, Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015) 57(2) *William and Mary Law Review* 513, 561–3; Andrew S Gold and Paul B Miller, 'Fiduciary Duties in Social Enterprise' in Benjamin Means and Joseph W Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press, 2018) 321 <<https://doi.org/10.1017/9781316890714.019>>; Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31(1) *Queen's Law Journal* 259, 268.

in that the purposes of the relevant relationship or arrangement are fundamental in determining the best interests of a person or entity.⁶¹

It is unclear how far the general law and statutory conflicts rules extend in terms of non-pecuniary and third-party interests.⁶² For example, a pecuniary benefit to the spouse of a responsible person would raise a conflict of interest for that responsible person. A non-pecuniary benefit to a person or entity less close to the responsible person (such as a neighbour or sporting team) is less clear. In circumstances where a responsible person causes a charitable entity to transact with, or otherwise provide a benefit to, a relative or friend, there is a danger that the responsible person's judgment will be affected by the interests of the relative or friend.⁶³

It is also important to note that the existence of a conflict of interest is not a breach of duty in itself – it is the proper management of conflicts that is important. Such management in turn helps to prevent more serious conduct such as misuse and misappropriation or inappropriate related party transactions.

Conflicts obligations may also arise under industry codes, grants and fundraising regulations.

B ACNC Guidance

ACNC Governance Standard 5 requires charities to take reasonable steps to ensure that responsible persons are subject to, and comply with, a duty to disclose perceived or actual material conflicts of interest.⁶⁴ The Managing Conflicts of Interest: A Guide for Charity Board Members ('ACNC Conflicts Guide') defines a conflict as follows:

A conflict of interest occurs when your personal interests conflict with your responsibility to act in the best interests of your charity. The term 'personal interests' does not need to be your own interest, but may also arise from the interests of your family, friends, or other organisation you are involved with. It also includes a conflict between your duty to the charity and another duty that you have (for example, to another charity).⁶⁵

61 See, eg, Lord Nicholls, 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge' (1996) 70(3) *Australian Law Journal* 205, 211; Langford, 'Purpose-based Governance' (n 40).

62 Some jurisprudence recognises the inclusion of non-pecuniary and indirect interests within the conflicts rule: see, eg, *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143, [71] (McLure JA). See also JC Campbell, 'Obligations and Powers of Superannuation Trustees Concerning Situations of Actual or Possible Conflict' (2020) 49(1) *Australian Bar Review* 1. English and Australian case law demonstrates that the conflicts rule includes an interest as a shareholder and extends to partnerships of which the fiduciary is a partner and to corporate vehicles associated with the fiduciary: see Langford, 'Conflicts and Coherence' (n 52).

63 In *Newgate Stud Co* (n 57), David Richards J considered the application of the conflicts rule in relation to spouses and other couples (at [237]–[239]) and the danger that 'there is a significant risk that the director will be compromised by a desire to favour the other party' where a director causes his or her company to enter into a transaction with a close relation: at [240]. The test in cases involving non-pecuniary interests and interests of friends or relatives is arguably whether the interest amounts to a real sensible possibility of conflict on the part of the fiduciary: see, eg, *Breitenfeld UK Ltd v Harrison* [2015] All ER (D) 251 (Feb) [67] (Norris J).

64 *ACNC Regulation* (n 10) reg 45.25(2)(e).

65 'ACNC Conflicts Guide' (n 44) 3.

It divides conflicts of interest into actual, potential and perceived conflicts and discusses direct financial interests, indirect financial interests, non-financial or personal conflicts and conflicts of loyalties.⁶⁶ It is important to note that perception should be tested objectively, with the ACNC Conflicts Guide stating that the test is whether ‘an impartial observer [would] think that you are likely to, or may be likely to, be improperly affected by these personal interests’.⁶⁷

In terms of management of conflicts, the ACNC Conflicts Guide outlines the following steps:

- identify real, perceived or potential conflicts;
- prevent conflicts by taking steps to reduce the risks; and
- manage conflicts when they arise with appropriate remedial actions.⁶⁸

C Related Party Transactions

A particular type of conflict of interest that has proved problematic in the charities sphere is engagement of responsible persons and their associates in consulting work. Paid consulting arrangements also often constitute related party transactions, which have been a topic of particular concern in ACNC compliance reports and subject to a specific recommendation by the *ACNC Review*,⁶⁹ which was accepted by the Federal Government.⁷⁰ The Government has recently introduced new reporting requirements in relation to related party transactions by charitable entities.⁷¹

Problems caused by inadequate management of conflicts of interest and related party transactions (particularly in the form of consulting fees) were highlighted in the *Bergin Report* in relation to the RSL.⁷² These failures led to a lack of trust and confidence in the RSL entities,⁷³ arguably also contributing to lower trust and confidence in charities generally.⁷⁴

⁶⁶ Ibid 4, 12–13.

⁶⁷ Ibid 14.

⁶⁸ Ibid 2.

⁶⁹ *ACNC Review* (n 4) 60–3. For discussion of the appropriateness of such reporting, see Rosemary Teele Langford, ‘Charitable Companies and Related Party Transactions’ (2021) 38(2) *Company and Securities Law Journal* 55 (‘Related Parties’) <<https://doi.org/10.2139/ssrn.3772446>>.

⁷⁰ See *Government Response* (n 6) 14.

⁷¹ As to the new requirements for medium and large registered charities, see *ACNC Regulation* (n 10) s 60.30(2) (as amended by *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021* (Cth) sch 2 item 1), s 305.5(1) (as inserted by *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No 3) Regulations 2021* (Cth) sch 2 item 4). As to small charities and basic religious charities, see ‘Related Party Transactions’, *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/reporting-annually-acnc/related-party-transactions>> (‘Related Party Transactions’).

⁷² *Bergin Report* (n 2).

⁷³ Ibid 7 [1.31], 274 [8.4.46].

⁷⁴ In this respect, see also DeMott (n 30). For example, the *Bergin Report* (n 2) found, inter alia, a lack of understanding and appreciation of directors’ obligations in relation to conflicts (at 3 [1.18]) and that directors of RSL LifeCare approved their own consultancy contracts and approved increases in their own consulting fees: at 3–4 [1.17]. Bergin also found an inadequate regime of State Council level checking and/or approving the President’s expenses, fostering the opportunity for improper conduct: at 293–4 [8.6.6], 394–5 [9.3.93], 428 [9.4.4].

Related parties are defined in section 228 of the *Corporations Act* (which applies to charitable companies (other than those without the word ‘Limited’ in their names pursuant to section 150 of the *Corporations Act*)) to include directors and their spouses and de facto spouses, parents and children (as well as, for example, controlled entities). The Australian Accounting Standards Board’s AASB Standard: Related Party Disclosures (‘AASB 124’) defines related parties to include close members of the family of key management personnel, which is in turn defined as ‘those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity’ and includes: (a) that person’s children and spouse or domestic partner; (b) children of that person’s spouse or domestic partner; and (c) dependants of that person or that person’s spouse or domestic partner.⁷⁵

V MAIN FINDINGS

The main findings from the survey are as follows.

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

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

Respondents would welcome assistance with understanding and complying with their governance duties, with the most popular options being a detailed online guide setting out all the governance duties of board members (with an optional self-evaluation tool); a Charity Governance Code (combined with a diagnostic tool);

⁷⁵ Australian Accounting Standards Board, ‘AASB Standard: Related Party Disclosures’ (Standard No AASB 124, June 2021) (‘AASB 124’). The term ‘key management personnel’ is defined as ‘those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity’: at 7 [9].

and practical examples and scenarios showing how the duties are applied. In direct questioning, responsible persons gave the conflicts rule a wide ambit in terms of non-pecuniary and third-party interests. This accords with the ACNC Conflicts Guide, which extends conflicts to indirect financial interests, non-financial or personal conflicts and conflicts of loyalties. However, when respondents were presented with hypothetical examples (in respect of the concept of ‘conflict of interest’), their opinions did not always accord with their more theoretical ideals.

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

VI SURVEY RESULTS

This Part reports the results of the survey.

A Demographics

The survey first asked a series of demographic questions.

1 *Demographic Differences: The Entities*

Demographic items are divided into those pertaining to the *individual* filling out the survey, and those pertaining to the *entity* itself. We begin with the latter – characteristics of the entity itself.

Table 1 indicates that the great majority of charities in the Australian sample show that two legal arrangements predominate – company (28.7%) and incorporated association (51.7%).⁷⁶ Interestingly, of those established as a *company*, two-thirds of the Australian entities had ‘Limited’ in their name.⁷⁷

⁷⁶ Respondents who chose the ‘Other’ category were asked to specify what type their organisation was. A number of responses were ‘Church’ or ‘Letters Patent’, with some responses including companies limited by guarantee and bodies incorporated under legislation. With hindsight perhaps the option of ‘statutory corporation’ should have been worded as ‘body incorporated under statute’. Some responses indicated multiple types of organisation structure. Note that ‘Aboriginal and Torres Strait Islander corporation’ was also an option but that no respondents chose this option.

⁷⁷ Sixty five percent reported their entity had ‘Limited’ in their name; 31.6% did not, while another 3.4% were unsure. In Australia, such companies are exempted from the related party regime in chapter 2E of the *Corporations Act*: see also *Corporations Act* (n 12) s 150.

Table 1: Legal Structure of the Organisation

Legal Structure	(%)
Company	28.7
Incorporated association	51.7
Trust	3.6
Trustee company	0.5
Co-operative	0.5
Unincorporated association	2.9
Statutory corporation	3.3
Don't know	3.8
Other	5.0

Table 2 gives the relevant breakdown for the size of the entity. In terms of the annual revenue of the organisation, 12.6% classified as extra-small (less than \$50,000), 17.7% were small (\$50,000 or more but less than \$250,000), 24.6% nominated medium (\$250,000 or more but less than \$1 million), 26.4% were large (\$1 million or more but less than \$10 million), 14.5% were very large (\$10 million or more but less than \$100 million) and 4.2% were extra-large (\$100 million or more).

Table 2: Annual Revenue of Organisation

Revenue (Australian dollars)	(%)
Less than \$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 latest ACNC Australian Charities Reports state that in actual fact small charities make up 65% of the sector, large charities make up 19% and medium charities make up 16%.⁷⁸

78 See 2022 Australian Charities Report (n 1) 6; 2021 Australian Charities Report (n 48) 3.

Board size averaged at 8.1 (the median number of members being eight) with almost one in five made up of just five members or less, while 16.1% reported having 10 or more members on their board (Table 3). As might be expected, larger entities tend to have larger boards: just under a third of small organisations (those with an annual revenue under \$250,000) had boards of five persons or less (compared to 13.1% of larger entities), while nearly one in five of the larger organisations had 10 or more on the board (for smaller entities, just 8.5%).

Table 3: Board Size

Board Size	All (%)	Smaller Entities (%)	Larger Entities (%)
Between one and five members	18.6	31.6	13.1
Between six and ten members	65.2	59.8	68.6
Ten members or more	16.1	8.5	18.2

Notes: Here defining 'Larger' as those with revenues of \$250,000 per annum or more. The percentage difference between small and large entities was statistically significant at the 0.05 significance level (Chi-square test of independence). Totals may not add up to 100% because of rounding errors.

2 Demographic Differences: The Respondents

Turning to the characteristics of the respondents themselves, it was clear that, in the main, they tended to be in older age groups: almost two-thirds were aged 55 or over (detailed breakdowns given in Table 4).

Table 4: Age Group of Respondents

Age Group	(%)
Aged 18 to 24	0.7
Aged 25 to 34	3.2
Aged 35 to 44	9.6
Aged 45 to 54	20.7
Aged 55 to 64	34.1
Aged 65 and over	31.6

The breakdown of the position held by respondents is shown in Table 5. Interestingly over half were unpaid. The age profile diverges quite markedly, however: in our sample a greater proportion of those aged under 55 were found in managerial or full-time paid employment. Around one third had held their positions for less than three years, whereas nearly a quarter had been there a decade or more (see full breakdown in Table 6).

Table 5: Position of Respondents within the Organisation

Position within Organisation	(%)
Paid full-time	21.4
Paid part-time	8.6
Unpaid/Volunteer	53.4
Executive/Senior Manager	21.7
Other	17.5

Notes: Respondents could indicate multiple position self-descriptions, so totals will be in excess of 100%.

Table 6: Length of Time Respondents Have Held Their Position

Length of Time	(%)
One year or less	10.8
Between one and three years	26.4
Between three and five years	17.7
Over five years	20.7
Over ten years	19.0
Over twenty years	5.4

B Consulting

As highlighted in Part IV(C) above, a particular type of conflict of interest that has proved problematic in the charities sphere is engagement of responsible persons and their associates in consulting work. We therefore tested the extent of the practice of paid consultancy. It was found that the proportion indicating whether board members or ‘their associates’ were *paid* (for various services)⁷⁹ differed depending on the main purpose of the organisation. Nevertheless, the majority appeared to be purely voluntary, with 83.3% reporting no such consultancy monies were paid. Only 15.4% disclosed that either board members or their associates were paid (another 1.2% were unsure) – this rose to 22.2% for religious entities and 23.2% for respondents aged under 55. The top categories were legal and accounting work, administrative support and church-related roles.

79 The question asked:

Are any of the board members of your organisation, or persons or entities associated with a board member (such [as] family members or entities that the board member works with or has an ownership interest in), paid by your organisation for other work (for example, for legal, accounting or consultancy services)?

C Purpose

Given the importance of purpose in the governance of charities, the survey tested the frequency with which respondents considered the charity's purposes in decision-making and whether responsible persons could identify the entity's purpose.

1 Identification of Purpose

When asked whether they could state their organisation's purpose(s) and how often the organisation's purpose(s) is (or are) considered in decision-making, respondents' answers varied from brief descriptions,⁸⁰ to those who indicated closer knowledge of their organisation's specific purposes,⁸¹ to those who appeared to restate their organisation's objects clause. It is difficult to gauge from the briefer responses whether respondents are familiar with their organisation's actual purpose(s).

As mentioned, the survey did not present exact categories when asking for the specific nature of the charity's purpose; rather, an open-ended item was included which was coded to give a broad break-down. The main three categories respondents reported were health, aged care and disability (18.6%); religious (12.9%); and education (8.8%).⁸² By comparison, the ACNC *Australian Charities Report* for 2021 states that the most common activities for charities were religious activities (30%) and education (17%).⁸³

2 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: to the question whether or not boards considered the entity's *purpose* in its decision-making, the 'rarely' option was extremely low (2.1%; Table 7) and no respondent reported 'never'. The combined proportion reporting 'always' or 'usually' was high (95%). Testing this is important given the centrality of purpose in charitable governance and the key role of purpose in the charitable sector.⁸⁴

80 Examples were 'Religious non profit', 'Charitable NFP Trust', 'Advocacy', 'Hospital foundation', 'Aged Care Service provider', 'Surf Life Saving', 'Performing Arts', 'Disability support', 'Men's Community Shed', 'Animal welfare', 'philanthropy', 'environmental', 'Community Centre', 'Religious' and 'Education'.

81 Examples were to '[p]rovide for the educational, social, cultural and religious needs of an ethnic community and promote these in a multicultural society' and '[t]o develop and deliver programs and services in response to community need'. We have chosen not to extract other examples as this may identify the organisation.

82 In a very small number of cases, respondents described two of the categories above. By 'education', we defined that the purpose was strictly to do with formal education – schools, scholarships, schooling assistance, etc – and *not* 'to educate' as a synonym for 'to inform' (for example to 'educate' the public about environmental issues).

83 2021 *Australian Charities Report* (n 48) 7. The 2022 *Australian Charities Report* (n 1) does not provide specific percentages.

84 See, eg, *Charities Act 2013* (Cth) s 5; *ACNC Regulation* (n 10) reg 45.5(2); *Charities Act 2011* (UK) s 1; Langford, 'Purpose-based Governance' (n 40).

Table 7: How Often the Organisation's Purpose Is Considered in Decision-Making

Response	(%)
Always	71.1
Usually	23.9
Sometimes	2.9
Rarely	2.1
Never	0.0

D Understanding the Governance Duties

Given the challenges faced by responsible persons of Australian charities in terms of multiple layers of duties and anecdotal evidence, and reports of lack of time and understanding, further questions probed reasons for difficulties in understanding governance duties. These began with the extent of respondents' understanding of their duties; their understanding of, and experience with, the charity's financial position; and their receipt of training and guidance on governance duties. Despite the levels and layers of complexity outlined in Part II above, responsible persons expressed a high level of confidence in their understanding of their governance duties. Table 8 reports the results of a suite of propositions relating to respondents' understanding of governance and board practices in respect of the running of their organisation. The question included respondents' understanding of, and experience with, the entity's financial position. As mentioned, testing these aspects is important given that monitoring the entity's financial position is a particularly important aspect of governance duties, especially in terms of the duty of care and duties associated with insolvent trading.

Respondents believed that they possessed both a clear understanding of governance duties and financial accounts (profit and loss/balance sheet), with both above 95% agreement. This is encouraging in light of the complexity of Australia's governance and regulation frameworks. They agreed that their boards are regularly updated on the organisation's financial position (also above 95% agreement). Significantly, 25.9% agreed that they relied on someone else to take responsibility for the organisation's financial position.

Turning to training and guidance, the majority of respondents (72.4%) indicated that they had received training and guidance in relation to their governance duties. The majority (78%) had also read ACNC guidance on governance duties, with more of those aged 55 or above having read the ACNC guidance than their younger counterparts. This is highly relevant in light of repeated calls over the years for more training. A number of respondents commented that they were professionals or had qualifications from the Australian Institute of Company Directors ('AICD') or Governance Institute or experience on other boards.

Table 8: Governance Duties

Governance Duties	(% Agree)
I have a clear understanding of the governance duties to which I am subject.	95.6
I understand the organisation's financial accounts (profit and loss/balance sheet).	95.1
I rely on someone else to take responsibility for the organisation's financial position.	25.9
The board is provided with regular updated financial information.	96.2
I have received training and guidance in relation to my governance duties.	72.4
I have read ACNC guidance on governance duties.	78.0

Notes: Figures sum 'Strongly agree' with 'Agree'.

It is notable, however, that the survey did not seek to test respondents' understanding of the multiple layers (or detail) of the various applicable governance duties or the more extensive duties that apply to some responsible persons such as trustees and directors of trustee companies.⁸⁵ Anecdotal evidence from charity law practitioners suggests that responsible persons do not necessarily understand this level of detail or the application of the duties (particularly in more complex situations involving group charities) and that, although responsible persons might know the actual duties, they would not necessarily be able to apply them to practical situations or scenarios.

E Barriers to Understanding

In light of the concerns expressed by commentators and the *ACNC Review* in terms of increased complexity, we next probed reasons for difficulties in understanding the governance duties (reported in Table 9). One suite of items presented possible reasons (while an added item asked specifically if there were other reasons). When presented with the proposition 'I do not understand where to find an outline of my governance duties', a large majority (85.5%) disagreed. While this might be considered a good result, it should be borne in mind that one in seven (14.5%) were either ambivalent or unable to locate an outline of their duties. On a more positive note, a majority certainly knew they *were* responsible for governance duties: 94.2% could roundly disagree with the proposition 'I was unaware that I had governance duties'. Interestingly, while most of this 'unaware' minority were unpaid or volunteer respondents, there was a small number of management and full-time position respondents who revealed their ignorance of governance responsibilities.

Some potential reasons were then suggested to respondents (results also shown in Table 9). When presented with the statement 'I feel that the governance duties are complex and difficult to keep up with', the majority (60.2%) disagreed. A larger majority (88.6%) disagreed with the proposition 'I do not understand

85 For an outline, see Langford and Webster (n 3).

what the duties mean'. The issue of time constraints and insufficient guidance was also probed: a strong majority (82.4%) disagreed with the proposition 'I have insufficient time to understand my governance duties'. Relatively younger respondents (those aged under 55), however, were twice as likely to volunteer that they had insufficient time to understand their duties, with 12.4% agreeing with the proposition as against 6.1% of the older respondents. Likewise, nearly three quarters of respondents felt able to disagree with the proposition 'I have insufficient guidance as to how my governance duties apply in practice' (74.4%). However, a higher proportion in the smaller organisations agreed that they had insufficient guidance (21%), while only 1 in 10 respondents from larger organisations agreed with this proposition. Likewise, twice as many younger respondents (21.2%) claimed they had insufficient guidance than those aged 55 and over (9.8%). Finally, when asked whether there was *another* reason that made it hard for respondents to understand their governance duties, the overwhelming majority (92.1%) responded in the negative.

Table 9: Reasons That Make It Difficult to Understand Governance Duties

Difficulties in Understanding	(% Agree)
I do not understand where to find an outline of my governance duties.	7.5
I was unaware that I had governance duties.	3.9
I feel that the governance duties are complex and difficult to keep up with.	16.0
I do not understand what the duties mean.	2.8
I have insufficient time to understand my governance duties.	8.1
I have insufficient guidance as to how my governance duties apply in practice.	13.4

Notes: Figures sum 'Strongly agree' with 'Agree'.

A constant theme in the (open-ended) comments was the problems caused by complexity, inconsistency and change. Respondents commented on the proliferation of standards within and across governments, multiple reporting requirements, and problems caused by the turning off of the aforementioned duties in the *Corporations Act*. The burden of red tape was also a noteworthy theme, as was the sentiment that, although the respondent understood their governance duties, other responsible persons did not. There were numerous comments to this effect.⁸⁶ Respondents also raised the problem of time constraints. There were also a number of positive comments about governance training and guidance within organisations.

⁸⁶ Comments included: 'I understand well, but fellow board members don't and refuse to adhere to governance rules and principles', 'I have a much better understanding of and commitment to good governance than my board', and 'Other board members have limited understanding of governance duties and therefore this increases the burden on me to maintain standards'.

F Practical Help with Understanding and Complying with Governance Duties

A suite of items sought to discover what would help respondents understand and comply with their governance duties. Suggestions included specific measures such as training; a Charity Governance Code; a detailed online guide (setting out all the governance duties of board members, with an optional self-evaluation tool); increased guidance; access to professional advice; practical examples and scenarios; and mentoring. These options were suggested in light of consultation with charity advisers and in view of the availability of the Charity Governance Code in England and Wales.⁸⁷

Table 10 reports responses to these suggestions. High on the list of more appealing propositions included a ‘detailed online guide that sets out all the governance duties of board members, with an optional self-evaluation tool’ (with 79.5% of respondents welcoming this). We propose to develop such a guide (as outlined in further detail in Part VII below) and this empirical evidence therefore supports the attractiveness of such a guide.

Also highly welcome were a proposal for a ‘Charity Governance Code that sets out general principles for accepted modern practice of good governance’ (76.2% agreed) and ‘[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% agreed this would be helpful). In this respect, it is, however, notable that the AICD has developed comprehensive Not-for-Profit Governance Principles,⁸⁸ that the Australian Council for International Development (‘ACFID’) publishes a Code of Conduct⁸⁹ and also that the ACNC does in fact provide a diagnostic tool.⁹⁰ Feedback from charity lawyers, however, indicates that responsible persons and their advisers do not find this tool useful. Respondents showed strong support for ‘[p]ractical examples and scenarios showing how the duties are applied’. All of these propositions were supported by around three quarters of respondents.

The provision of formal training on governance duties (71.8% agreed) and access to professional advice (63.4%) also rated highly. Less important appeared to be the suggestion of mentoring (which 53.3% of respondents thought helpful). Finally, presented with the option of ‘[m]ore guidance from the ACNC on the governance duties’, respondents were less enthusiastic, with only 45.2% agreeing that this would be helpful. In this respect, it can be noted that current ACNC guidance is extensive. Overall, it should also be said that younger respondents were far more enthusiastic about any such assistance to understand and comply with governance duties.

87 See ‘Charity Governance Code for Smaller Charities’ (n 23); ‘Charity Governance Code for Larger Charities’ (n 23).

88 Australian Institute of Company Directors, *Not-for-Profit Governance Principles* (Report, 2nd ed, January 2019).

89 Australian Council for International Development, ‘Code of Conduct’ (rev ed, 1 January 2019) (‘ACFID Code’).

90 ‘Charity Self-evaluation: Meeting Obligations as a Registered Charity’, *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards/self-evaluation-charities>>.

In terms of comments, themes included that the aids are there already (with particular reference to AICD resources) and the need for any new resources to be practical and easy to use. Some respondents also opined that training (or other education) should be compulsory.

Table 10: What Would Help Respondent Understand and Comply with Governance Duties

Factors That Would Help Understanding	(% Agree)
Training on the governance duties.	71.8
A Charity Governance Code that sets out general principles for accepted modern practice of good governance.	76.2
A Charity Governance Code combined with a diagnostic (ie self-evaluation) tool for board members to fill in concerning their organisation's performance.	77.0
A detailed online guide that sets out all the governance duties of board members, with an optional self-evaluation tool.	79.5
More guidance from the ACNC on the governance duties.	45.2
Access to professional advice.	63.4
Practical examples and scenarios showing how the duties are applied.	76.0
Mentoring.	53.3

Notes: Figures sum 'Strongly agree' with 'Agree'.

G Motivations

Table 11 reports strength of agreement and disagreement to possible reasons regarding motivations. The items were prefaced by the question, 'What factors motivate you to want to comply with your governance duties? Please indicate how important the following motivations might be'. The majority of respondents agreed that each of the suggested factors motivated them, although the size of the majority varied. For example, the majority (84.2%) thought that '[c]oncern for my personal liability' was important. A majority (85.3%) also thought that '[c]oncern for my personal reputation' was important. 'Concern about liability or sanction for the organisation' was an important motivator, with 97.1% nominating this as important. The most influential motivator was '[c]oncern about the organisation's reputation and public perception of the organisation', with 98.3% rating this as important. Also very influential was '[m]y personal ethical or social values', with 96.5% of respondents saying this was important. The penultimate motivating factor, '[t]o enable optimal decision-making within the organisation', was also rated highly by respondents, with 96.8% rating this as important.⁹¹ The final potential motivating factor was '[r]espect for the law' and again a majority (96.3%) thought this was

⁹¹ Enabling effective decision-making is identified in Charity Commission for England and Wales guidance: see above n 24.

important. Other reasons were given in the comments, some raising complexity and time⁹² and others religious reasons.⁹³

Table 11: Factors That Motivate Respondents to Want to Comply with Governance Duties

Factors That Motivate Compliance	(% Important)
Concern for my personal liability.	84.2
Concern for my personal reputation.	85.3
Concern about liability or sanction for the organisation.	97.1
Concern about the organisation's reputation and public perception of the organisation.	98.3
My personal ethical or social values.	96.5
To enable optimal decision-making within the organisation.	96.8
Respect for the law.	96.3

Notes: Figures sum 'Fairly important' with 'Very important'.

H Identification and Management of Conflicts of Interest

The next part of the survey tested identification and management of conflicts of interest.

1 Conflicts of Interest Policies

In response to the question, 'Does your organisation have a policy in relation to conflicts of interest?', 80.5% said yes, 12.8% said no and 6.7% said they did not know. There was, however, a difference between large and small-sized entities: clearly, the presence (or adoption) of a conflicts of interest policy is highly consistent with size, since more than 90% of larger entities reported having such a policy, while one in three of the smaller organisations did not have a conflicts of interest policy (see Table 12).

92 'Governance is more demanding and complex for a Board (where the org. is registered with the ACNC) than for a typical NFP management committee' and 'I think that we comply well with the normal principles of governance, but this is done in a seat of the pants fashion'.

93 'Respect for church law or policy', 'Biblically-based Christian values'. Other comments included: 'To not leave a legacy that impacts negatively on the society or future committee members', 'A wish to support the social contract' and 'Most important for me is to maximise funds to end recipients'.

Table 12: Whether Organisation Has a Policy in Relation to Conflict of Interest

Existence of Policy	All (%)	Smaller Entities (%)	Larger Entities (%)
Yes	80.5	57.4	90.3
No	12.8	32.7	4.2
Don't know	6.7	9.9	5.5

Notes: Here defining 'Larger' as those with revenues of \$250,000 per annum or more. The percentage difference between small and large entities was statistically significant at the 0.05 significance level (Chi-square test of independence).

2 Conflicts of Interest in Practice

The next question asked, 'To your knowledge on how many occasions, if any, in the past three years has a board member declared or discussed a conflict of interest?'. Somewhat surprisingly (as reported in Table 13), nearly one in five answered '[n]ever' (17.9%). This proportion rose to more than one third for smaller entities (37.6% versus just 10.0% for larger charities). Just under half of all respondents answered with '[l]ess than five times' (44.2%), while another 21.1% 'five to 10 times' and 12.4% more than 10 times. Concerningly, this was very low.

Table 13: Number of Occasions in Past Three Years a Board Member Has Declared or Discussed Conflict of Interest

Number of Declared Conflicts	All (%)	Smaller Entities (%)	Larger Entities (%)
Never	17.9	37.6	10.0
Less than five times	44.2	42.6	45.4
Five to 10 times	21.1	10.9	25.8
More than 10 times	12.4	5.0	15.0
Don't know	4.3	4.0	3.8

Notes: Here defining 'Larger' as those with revenues of \$250,000 per annum or more. The percentage difference between small and large entities was statistically significant at the 0.05 significance level (Chi-square test of independence). Totals may not add up to 100% because of rounding errors.

Based on responses to subsequent questions in the survey that tested identification and management of conflicts of interest (which indicate high recognition), it appears there is a disconnect between recognition and management in practice (unless it so happens that not many conflicts of interest have arisen). On any of the measures (ie, whether general law, statute or Governance Standard

5), the first step in conflicts management is declaring a conflict.⁹⁴ Other measures mentioned in the ACNC Conflicts Guide are adopting a conflicts of interest policy, maintaining a register of interests, promoting a culture of disclosure, and managing any conflict of interest appropriately.⁹⁵ It also mentions options such as refraining from participating in any discussion and removing oneself (from the room) during the time of any discussion.⁹⁶ Under general law, responsible persons have the option of disclosure and informed consent in order to avoid breach of the conflicts rule.⁹⁷

3 *Definition of Conflicts of Interest*

The next suite of questions tested respondents' views of what a conflict of interest is and how far the concept of a conflict of interest extends, particularly in terms of conflicts relating to third parties and non-pecuniary conflicts. The key reason for these questions was that the law is not clear on how far a conflict of interest extends – testing responsible persons' views on this is therefore instructive. Indeed, finding an accurate and all-encompassing legal definition is difficult.⁹⁸

Respondents' answers to the question 'How would you define or describe a "conflict of interest"?' demonstrated a very good understanding of the concept.

4 *Management of Conflicts of Interest*

This was followed by items asking about how conflicts of interest were managed, the question form being: 'Where a board member has had a conflict of interest, how often has it been managed in the following ways?'⁹⁹ In this respect, conflicts of interest are inevitable – the important thing is that conflicts are disclosed and managed appropriately, and this will depend on a number of factors. Results are reported in Table 14.

An important and relevant aspect of the following suite of questions is that, in some cases, a considerable proportion of respondents indicated that they *did not know* the answers to many of these questions. In the discussion below, we report the proportions for the major options as a percentage of the meaningful categories (that is, whether always, frequently, sometimes, rarely, or never), since this allows valid comparisons among the various items and also accurate comparisons of individual

94 For example, the ACNC Conflicts Guide (n 44) outlines four stages: 'Stage 1: A board member identifies that they have a conflict of interest ... Stage 2: The conflicted board member notifies the board of their conflict ... Stage 3: Remaining board members determine the appropriate remedial action ... Stage 4: Remaining board members inform the conflicted board member of the outcome': at 18.

95 Ibid 15.

96 Ibid 19.

97 See Part IV above.

98 The survey did not define the concept of conflict of interest, which might have influenced respondents' answers.

99 The options in this question were based partly on the ACNC Conflicts Guide (outlined above), partly on general law (which requires conflicts and profits to be authorised by members, subject to provisions of the constitution) and partly on the more detailed and prescriptive Charity Commission for England and Wales guidance (see 'CC29' (n 24)) which 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.

items between smaller and larger charity organisations. In a separate column in Table 14, we also report separate figures for smaller and larger entities' proportion, as well as the proportion of the *raw* data that indicated they did not know.

The first option was that '[t]he conflicted board member disclosed the conflict to the board', which the majority of respondents (68.5%) said *always* happened, with 21.3% saying frequently, and 5.2% sometimes. Very few respondents reported rarely (3.0%) or never (1.9%).

Less than half of respondents (48.3%) said that the conflicted board member abstained from participating in discussion on the matter, although 19.4% said that this frequently happened, while another one in five (20.9%) reported sometimes. It is of interest that more than 1 in 10 reported 'rarely' or 'never', a figure that rises to 15.3% for smaller organisations.

More encouraging was the response to the option '[t]he conflicted board member abstained from voting on the matter' to which 72.4% answered always and 14.2% frequently. However, it must flag some concern that more than a handful of respondents reported that the conflicted board member rarely or never abstained (6.5%), with this proportion rising to 1 in 10 for smaller entities.

In answer to the proposition that '[t]he conflicted board member or the board sought authority from members', more than a third (37.6%) replied 'always', and 11.8% 'frequently', while 1 in 10 opted for 'sometimes'. This is surprisingly high given the inconvenience of seeking such authority and the fact that some charities (such as trusts) do not have members. Concerningly, however, 15.2% of respondents said that they did not know.¹⁰⁰

In terms of the conflict being recorded in the organisation's conflicts register (or register of interests), 69.2% of respondents answered always (less than half of the smaller entities answered always), while another 9.2% indicated frequently. The fact that almost one in five (19.6%) answered never or rarely and that as many as 13% did not know is troubling.¹⁰¹

Asked about whether the board obtained independent expert advice (which is, of course, not a legal requirement),¹⁰² only a very small number answered always (3.4%) or frequently (2.0%). Concerningly, 13.6% said they did not know.

Probed on whether the conflicted board member resigned (which would not be expected except in cases of acute or persistent conflicts),¹⁰³ unsurprisingly no respondents said always, interestingly 0.8% said frequently and 4.5% said sometimes. Again, it is concerning that 10.7% of respondents did not know. Very few respondents had sought guidance from the ACNC. Of concern, again, was the fact that 14.4% said that they did not know.

The majority agreed with the proposition that '[d]isclosure of conflicts of interest is a standing item on the agenda of meetings of the board', with 70.7% saying always

100 This was calculated on the raw data (as per the explanation in Table 14).

101 This was calculated on the raw data.

102 This is recommended by the Charity Commission for England and Wales in relation to serious conflicts: see 'CC29' (n 24) annex 3.

103 The Charity Commission for England and Wales guidance mentions this as a solution where effective decision-making is undermined: see *ibid*.

and 3.3% saying frequently. However, overwhelmingly it was the larger entities that said that it was a standing item always (80.8%) – among the smaller charities this fell to 34.5%. Another management option, that of recording the conflict in the minutes, was not presented in the question but was noted in a number of comments – nine respondents (or 3%) stated that conflicts of interest were recorded in the minutes. Other respondents noted that conflicts were managed in accordance with the organisation's rules of governance or conflicts of interest policy.¹⁰⁴

Table 14: Where a Board Member Has Had a Conflict of Interest, How Often Has It Been Managed

Management of Conflicts	ALL Always or Frequently (%)	ALL Did not know (%)	Smaller Entities Always or Frequently	Larger Entities Always or Frequently
The conflicted board member disclosed the conflict to the board.	89.9	(3.6)	88.1	90.7
The conflicted board member abstained from participating in discussion on the matter.	67.7	(4.7)	66.1	67.3
The conflicted board member abstained from voting on the matter.	86.6	(5.4)	82.8	87.4
The conflicted board member or the board sought authority from members.	49.3	(15.2)	58.8	46.6
The conflict was recorded in the organisation's conflicts register (or register of interests).	78.3	(13.0)	54.2	84.0
The board obtained independent expert advice.	5.5	(13.6)	6.0	5.5
The conflicted board member resigned.	0.8	(10.7)	4.0	0.0
The board sought guidance from the ACNC.	0.4	(14.4)	2.0	0.0
Disclosure of conflicts of interest is a standing item on the agenda of meetings of the board.	74.1	(2.2)	41.4	82.7

Notes: Figures sum 'Always' with 'Frequently' and are presented as a percentage calculated only from all meaningful categories ('Always', 'Frequently', 'Sometimes', 'Rarely' or 'Never'). The 'Don't know' figure is calculated as a percentage of the *raw data* (excluding only those who did not answer the question). Here defining 'Larger' as those with revenues of \$250,000 per annum or more. The percentage difference between small and large entities was statistically significant at the 0.05 significance level (Chi-square test of independence) for the fifth, seventh and ninth rows.

¹⁰⁴ One interesting comment noted: 'A conflicted Board member has stood aside for a period of time when the conflict was active'.

Based on these answers there appears to be a need for tighter processes and encouragement of abstention, as well as more frequent disclosure of conflicts of interest – the fact that the average number of responsible persons on each board was eight and there were nevertheless so few conflicts declarations suggests that the management of conflicts could be improved. In this respect, the *Bergin Report* into the RSL found that the relevant responsible persons realised there was a conflict¹⁰⁵ – it was appropriate management of conflicts that was lacking. The answers also indicate a gap between respondents' perception of the level of their understanding of their governance duties and their compliance with such duties.

5 Factors That Influence How a Conflict of Interest Is Managed

The next question asked: 'Please indicate how important the following factors are, in your opinion, in determining how a conflict of interest should be managed.' The factors most important to responsible persons were the extent to which the conflict affects the board member's ability to decide the matter in the best interests of the organisation and whether the conflicted board member or an associated person or organisation stands to gain a benefit, although all of the factors were nominated as important by responsible persons (see Table 15).¹⁰⁶ The following responses were received.

In terms of whether a conflict of interest is serious or minor,¹⁰⁷ 78.5% of respondents indicated this was important. 'The extent to which the conflict affects the board member's ability to decide the matter in the best interests of the organisation' was important to 94.2% of respondents (and very important to 82.9%). Another factor that rated very highly with respondents was '[w]hether the conflicted board member or an associated person or organisation stands to gain a benefit', with 93.6% indicating that this was important (including 83% as very important). The provisions in the organisation's conflicts of interest policy or governing document were rated as important by a majority (86.1%).

Perception of conflict is a significant factor in the ACNC Conflicts Guide and, indeed, paragraph (2)(e) of ACNC Governance Standard 5 requires disclosure of 'perceived or actual material conflicts of interest'. Accordingly, the next factor was '[w]hether there is a perception of conflict (in the sense of whether an outsider or member of the public might think that the decision might be affected by the

105 See *Bergin Report* (n 2) 364 [9.3.16].

106 The factors specifically mentioned in Charity Commission for England and Wales guidance include the charity's best interests; whether trust and free discussion amongst trustees will be inhibited; whether effective decision-making is undermined; the charity's reputation; and whether the decision is high risk or controversial. The guidance notes that the key issue is whether the trustee's other interest could, or could be seen to, interfere with the trustee's ability to decide the issue only in the best interests of the charity: see 'CC29' (n 24); 'Essential Trustee' (n 24); 'Five Minute Guide' (n 24).

107 This is explicit in Charity Commission for England and Wales guidance but not mentioned in the ACNC Conflicts Guide or Australian law. Note, however, the use of the word 'material' in the concept of 'material personal interest' in section 195 of the *Corporations Act* and also the term 'perceived or actual material' conflicts used in ACNC Governance Standard 5: see *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) reg 45.25.

conflict of interest)', with a majority (91.2%) rating this as important, although only 57.6% as very important.

The charity's reputation was an important factor, with 93% saying that whether the conflict of interest will affect the charity's reputation was either very important (77.8%) or fairly important (15.2%). Whether the conflict could affect trust or free discussion between board members¹⁰⁸ was rated as important by the majority of respondents (94.8%). The final factor was 'whether the conflicted board member is regularly affected by this conflict of interest', which 83.8% ranked as important (although only 59.8% rated this as very important).

Interesting comments were made, including that '[a]ll conflicts are relevant to be disclosed irrespective' and a number of comments to the same effect.

Table 15: Importance of Factors in Determining How a Conflict of Interest Should Be Managed

Factors That Determine Management Approach	(%)
Whether the conflict is serious or minor.	78.5
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
Whether the conflicted board member or an associated person or organisation stands to gain a benefit.	93.6
The provisions in the organisation's conflicts of interest policy or governing document.	86.1
Whether there is a perception 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
Whether the conflict will affect the charity's reputation.	93.0
Whether the conflict could affect trust or free discussion between board members.	94.8
Whether the conflicted board member is regularly affected by this conflict of interest.	83.8

Notes: Figures sum 'Fairly important' with 'Very important'.

6 *How Far Does a Conflict of Interest Extend?*

We next sought to test the contours and boundaries of the concept of a conflict of interest given that these are unclear in law and also given the expansive view taken in the ACNC Conflicts Guide. 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 respondents were asked to answer yes or no in relation to a number of persons or organisations.

Ranking highly (see Table 16) were your sibling or spouse (both of which received 99.1% yes responses), your daughter (98.8%), your nephew (96.6%), another entity whose board you serve on (95.7%), a business in which you are an investor (95.1%), your daughter's boyfriend (93.6%), and your friend (92.6%). Of

¹⁰⁸ This is mentioned in 'CC29' (n 24).

slightly less importance were your employer (85.7%), another entity of which you are a member (84.1%), and the organisation that appointed you (79.1%). The entity that the least respondents (56.3%) indicated affirmatively to was '[t]he football team that you support'.

The reasons for testing these were as follows. First, the extent to which the duty to avoid conflicts of interest encompasses non-pecuniary and third-party conflicts is unclear.¹⁰⁹ Although the interests of close relatives are generally included within the legal duty and also within the concept of a related party, inclusion of interests of less close persons is unclear. For example, the definition of related party would include a person's spouse or child but not a nephew or daughter's boyfriend.¹¹⁰ A benefit to a person's football team tests the outer boundary of the concept of conflicts. Ascertaining respondents' views on the extent to which conflicts of interest include these types of interest is therefore instructive. Second, the ACNC Conflicts Guide specifically includes indirect financial interests and non-financial or personal interests.¹¹¹ These types of conflicts were probed further in the hypotheticals discussed below.

Table 16: Which Relationship/Entity Classifies as a Conflict of Interest if Committing the Organisation to a Transaction in Which They Benefit

Relationship	(% yes)
Your sibling.	99.1
Your spouse.	99.1
Your friend.	92.6
Your nephew.	96.6
The football team you support.	56.3
Another entity whose board you serve on.	95.7
Another entity of which you are a member.	84.1
Your daughter.	98.8
Your daughter's boyfriend.	93.6
The person or organisation that appointed you.	79.1
Your employer.	85.7
A business in which you are an investor.	95.1

Notes: Response options were either 'Yes' or 'No'. Respondents were asked whether they would like to elaborate on any of the above.

¹⁰⁹ See Langford, 'Conflicts and Coherence' (n 52).

¹¹⁰ See 'AASB 124' (n 75); 'CC29' (n 24) 5; *Charities Act 2011* (UK) s 118.

¹¹¹ 'ACNC Conflicts Guide' (n 44) 12–13.

Conflicts of duty were raised by the options of '[a]nother entity whose board you sit on', your appointor and your employer. There was confusion in relation to these last two options. The issue of appointors' interests may arise, for example, where a funder or donor or other third party nominates or appoints a particular responsible person to the board – there could be a temptation for that responsible person to act in the interests of the appointor or nominator.

Respondents rightly pushed back in the comments, expressing views that it would depend on the circumstances,¹¹² and that everything should be treated as a conflict.¹¹³ In particular, respondents identified nuances in relation to the football team option, such as distinctions between being a supporter as opposed to a member or director and between local and national teams. They also distinguished between the size or significance of investment. These comments demonstrate a good understanding of appropriate conflicts management.¹¹⁴ Admittedly this question could have been tested in a more nuanced and detailed way but a balance needed to be struck between detail and not making the survey so long that people gave up.

7 Scenarios

The final three substantive questions probed identification, perception and management of conflicts of interest further by presenting three scenarios with different types of conflict. The first presented an indirect financial benefit to a de facto partner, the second a non-pecuniary conflict of interest involving a family member, and the third a financial benefit to a related party.

(a) First Scenario

In the first scenario (see Table 17), the de facto partner of a charity's Chief Executive Officer ('CEO') was included as one of three entities to quote for work (fixing a window for the charity). Almost all respondents (99.1%) thought that the CEO should declare a conflict of interest and 94.2% thought that the CEO

112 Comments included: 'All of the relationships listed above are potential conflicts. Whether they are actually conflicts, or appropriate steps can be taken to manage them by disclosure alone will depend on the circumstances', 'Some of the relationships concerning other organisations are difficult to classify in a binary way. It depends heavily on the degree of support from other board members and the nature and value of what the transaction is all about', 'Materiality is important. Where the benefit is to a business of a public company where you are a small investor is very different to a private small business', 'All the above give rise to conflict – some can be managed via full disclosure and exclusion from decision making, some are completely no-go', 'In a number of cases it will depend on the scale of your personal interest (e.g. if your self-managed superannuation fund has an interest of less than 1% in one of Australia's four major banks with which the charity has dealings, or you are member of an entity which has more than 10,000 members such as the NRMA)', 'It would often depend on the extent of some of these relationships', and 'Depends on the nature of the relationship, not just the perception of a conflict'.

113 Comments included: '[A]nything and everything is a conflict of interest if it is not only directly and serving the purpose of the organization at hand', 'Any potential conflict of interest should be revealed', 'Any relationship at all, except for example where the potential beneficiary is a public listed company and the person holds a minuscule proportion of the total shares on issue (e.g. 500 BHP shares)', and 'What is in the best interests of the organisation surpasses the above list'.

114 One interesting comment raised the fact that providing a benefit to a friend or entity might result in 'social kudos'.

should abstain from being involved in discussions and voting (among respondents from smaller charities, only 9 in 10 thought the CEO should abstain).¹¹⁵ Slightly contradictorily, however, 3.7% of respondents then said that the CEO did not have a conflict of interest because she did not have a direct interest in her de facto partner's company and that she could therefore participate in the decision. And 3.4% of respondents also agreed that if the de facto partner's company provided the lowest quote, then the contract was on arm's length terms and there was no need for the CEO to declare a conflict. A third of respondents (33%) agreed that it depended on other factors and that more information was needed to make a decision on this scenario. This rose to 42.2% for younger respondents (those aged under 55).¹¹⁶

Table 17: Hypothetical Example on Conflict of Interest I

Rachel is a CEO 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.

Possible Actions	(% agree)
Rachel should declare a conflict of interest.	99.1
Rachel should abstain from being involved in discussions and voting.	94.2
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
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
It depends on other factors – more information is needed to make a decision on this scenario.	33.0

Notes: Response options were either 'Agree' or 'Disagree'. Respondents were asked to specify other factors or additional comments.

Most comments reiterated or elaborated on the respondents' chosen answers, with a number saying that if the conflict was declared and it was the lowest quote or in the best interests of the charity, then the charity should proceed with the transaction. This reflects the fact that the existence of conflicts of interest does not necessarily mean improper conduct – it is the management of conflicts that is important. This was summed up perfectly in the comment: 'A conflict of interest

115 This result was significant at the 0.10 level of significance: the p-value in the Chi-square test of independence was p=0.0699.

116 This result is statistically significant at the 0.05 level of significance (Chi-square test of independence).

does not mean it is bad, it is how it is handled that is important.’ A number of comments raised the issue of perception of conflict.

A couple pointed out (quite rightly) that it is not just the price that is relevant but also factors such as the quality and reputation of the de facto partner’s business. Other interesting comments raised issues such as whether the CEO would pursue the de facto partner’s business for restitution if the work was done badly.¹¹⁷

(b) Second Scenario

In the second hypothetical, a board member of a counselling charity offers the free services of her brother to the organisation (Table 18). This is a benefit to the brother because he benefits from the practice hours, which will go towards his course accreditation. In contrast to the first scenario, only 87.3% of respondents thought that the board member had a conflict of interest,¹¹⁸ with 10.8% of respondents saying that the board member did not have a conflict of interest because the charity was getting something for free; 14.2% that the board member did not have a conflict of interest because a potential benefit to her brother was unlikely to affect her decision-making, and 13.6% that the board member did not have a conflict of interest because there was no financial benefit involved. This fell to under 1 in 10 for respondents representing larger organisations, while it rose to one in five for those answering for smaller entities.¹¹⁹ Significantly, 92.4% agreed that a member of the public might perceive that the board member had a conflict of interest and she should therefore declare the conflict of interest. There was also considerable variance between older and younger respondents on the items in this scenario. Overall, respondents aged 55 and over were more relaxed about issues of conflict of interest raised by this scenario.

This demonstrates a potential gap between perception (which is the standard adopted by the ACNC) and what respondents really think is a real conflict of interest. This suggests that the perception standard should be treated with caution by the ACNC and that responsible persons should err on the side of caution given the wording in Governance Standard 5 and the ACNC Conflicts Guide.

117 Another comment said that: ‘The issue, in the real world, is (i) the emotional control Rachel has over the other deciders – as CEO; (ii) other deciders being blasé about their responsibly [sic] and their desire to please the CEO & (iii) most charities are cash strapped so will look for the cheapest option’.

118 The difference in percentages was significant at the 0.01 level of significance (McNemar paired sample test).

119 Those agreeing that the CEO ‘does not have a conflict of interest because there is no financial benefit involved’ were 21.6% for respondents from smaller entities (ie, with revenue under \$250,000 per annum), and 9.8% for those from larger entities (this difference was statistically significant at the 0.01 level of significance).

Table 18: 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.

Possible Actions	(% agree)
Caroline has a conflict of interest.	87.3
Caroline does not have a conflict of interest because the charity is getting something for free.	10.8
Caroline does not have a conflict of interest because she is not getting any benefit personally.	14.2
Caroline does not have a conflict of interest because a potential benefit to Edgar is unlikely to affect her decision-making.	14.2
Caroline does not have a conflict of interest because there is no financial benefit involved.	13.6
A member of the public might perceive that Caroline has a conflict and she should therefore declare the conflict of interest.	92.4

Notes: Response options were either 'Agree' or 'Disagree'. Respondents were asked if there was any comment they would like to add.

Comments again reiterated or elaborated on respondents' answers, with a number expressing caution, and some pointing out that interests or benefits are not just financial, with others pointing to the issue of perceived or potential conflicts. A number noted the importance of assessing the suitability of the brother's services and his qualifications. Interesting comments included: 'Three people could offer to provide services for free so due process of appointment of service best suited to the organisation to get best client experience should be considered', and 'Edgar's voluntary assistance could lead to a future paid opportunity so Caroline ought to declare an interest'.¹²⁰

(c) Third Scenario

In the third hypothetical, a charity requires specialist advice and a charity board member runs a company that can provide advice at the going rate (Table 19). The charity decides to engage the board member's company, which is one of a number of companies that specialise in the area. More nuanced questions were asked in relation to this scenario.

¹²⁰ Other comments included 'Freebies by contacts can be great. They can also turn. Counselling is a sensitive area. Great care advised', and 'The question is whether the conflict of interest is declared and considered. It is not inherently wrong for her brother to volunteer or get credit. It could be a win-win'.

A small minority of respondents (3.2%) thought that there was nothing that the board member needed to do because the advice was provided at the going rate, meaning there was therefore no conflict of interest that needs to be declared. A larger minority of respondents (23.2%) thought that it was enough for the board member to enter her involvement in her company in the charity's register of interests – slightly higher for respondents answering for smaller entities (29.5%).¹²¹ A large majority (94.3%) thought that the charity should get quotes from at least two other companies to determine which was the best value (though a lower percentage, at 85.6%, was obtained from smaller entities)¹²² and an even larger majority (97.2%) agreed that the board member should declare her interest in her company at the meeting at which the charity's board decides which company to engage to provide services. A decent majority (81.5%) thought that the board member should withdraw from discussion during the meeting and a very large majority (97.8%) thought that the board member should not vote on the decision as to which company is engaged to provide the services. A bare majority (50.5%) agreed with the proposition that it would be helpful to have the board member's insight and thoughts during the board meeting at which the decision was made as to which company to engage to provide the services – the board member should therefore participate but she should not vote. More than one third of respondents (36.4%) thought that it depended on other factors and that more information was needed to make a decision on this scenario.

There are, of course, slight contradictions in these responses. For example, 23.2% of respondents said that it was enough to enter the board member's involvement in her company in the charity's register of interests, but a large majority agreed that she should withdraw from discussion and not vote.¹²³

121 Those agreeing that it is enough for the board member 'to enter her involvement in her company in the charity's register of interests' were 29.5% for respondents from smaller entities (ie, with revenue under \$250,000 per annum), and 20.3% for those from larger entities. This difference was not statistically significant at the 0.05 level, however it was statistically significant at the 0.10 level of significance (p-value of the Chi-square test of independence was 0.0811).

122 Statistically significant difference at the 0.01 level of significance (Chi-square test of independence). The figure for respondents from larger organisations was even larger, at 97.7%.

123 Note also the contradiction between the 50.5% in favour of the board member participating but not voting and the 81.5% who said that the board member should withdraw from discussion during the meeting, unless the view was that the board member gives her insights and then withdraws from subsequent board discussion.

Table 19: 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.

Possible Actions	(% agree)
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
It is enough for Tran to enter her involvement in her company in the charity's register of interests.	23.2
The charity should get quotes from at least two other companies to determine which is the best value.	94.3
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
Tran should withdraw from discussion during the meeting.	81.5
Tran should not vote on the decision as to which company is engaged to provide the services.	97.8
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
It depends on other factors – more information is needed to make a decision on this scenario.	36.4

Notes: Response options were either 'Agree' or 'Disagree'. Respondents were asked to specify other factors or any additional comments.

A number of interesting comments were made, many suggesting that the board member could share her insights then withdraw. Some pointed to the potentially limited options for service provision in regional areas (with factors of that type likely to be well-known before the discussion commences). Other comments included: 'You don't want employees feeling like their board is hovering over every action. The line between management and operations needs to be respected',¹²⁴ and 'Tran's insights may in fact be helpful in making a decision however, the other services providing quotes would need to be offered the same opportunity to discuss their services ... [a] level playing field and being transparent is important'.

¹²⁴ The comment continued: 'Casualisation in the work place is a hot button issue. If lots of companies out their [sic], play safe and go independent. Then if advice is incorrect or whatever, any contract issues down the track are at arms length and don't sully the board integrity.' Other comments included: 'This is simplistic. [T]he board would need to discuss Tran's involvement before any discussion at any meeting',

I Final Comments

Finally, respondents were given the opportunity to add anything further, with an open-ended question: 'Is there anything you would like to add about conflicts of interest or governance duties or this survey' and 98 respondents took the opportunity to comment.

Comments brought out the need for a realistic approach in terms of the fact that charities value services and benefits provided by responsible persons and their associates.¹²⁵ Others mentioned the importance of training, the importance of understanding conflicts of interest and of transparency, the fact that different responsible persons have different understandings of governance and conflicts, the situational nature of conflicts and the need to distinguish between different types, the difficulties posed by dominant personalities and friendships, the importance of erring on the side of caution in relation to conflicts,¹²⁶ the importance of increasing the performance of the organisation, problems of board members condoning inappropriate behaviour when faced with employee complaints, the need for an induction tool, and a suggestion to use 'External Interest Declarations' rather than the term conflict of interest.

Amongst the comments, there was a strong and persistent theme that other responsible persons and organisations do not understand or comply with their governance duties and responsibilities. Despite the theme of erring on the side of caution in relation to conflicts of interest, there were also multiple comments on the need for a realistic approach and also on the benefits of being able to access the benefits of services and donations from friends and relatives, as well as the reality that 'people relate relationally and people usually engage or employ others based on recommendations'.¹²⁷ There was a theme of the onerousness and complexity of requirements.¹²⁸ Comments on training included the importance of training for all

and 'I would question whether Member approval is required here. Either under common law or related party transaction (assuming it is [a company limited by guarantee])'.

- 125 Comments included: 'When the organisation is relying on volunteers who work in related service provision agencies, sometimes the free provision of information or connections is invaluable', and 'We live in a small regional town so often conflicts of interest arise without ulterior motives. Using existing contracts is a way of getting things done for an organisation.'
- 126 One comment expressed the sentiment that for charitable organisations conflicts provisions should be stricter or on par with those of listed companies because a charity's stakeholders are no different to shareholders and members of listed companies, and '[t]here is also far greater social responsibilities that extend to the community, and a charity has reputation as key to protect and evolve in the growth'.
- 127 One respondent commented: 'Lots of increased admin in box ticking to avoid conflicts can also result in quality people with a contribution being excluded. Cannot legislate for perfection and all restrictions come at a potential cost.' This comment highlights the balance needed between accountability and over-regulation and the importance of not extending the concept of perception too far.
- 128 Comments (taken from throughout the survey) included: 'The ACNC governance standards should mirror Corps Act duties[;] ACNC standards confuse things unnecessarily', 'The pace of change, and increasing complexity, of duties in certain areas of my charity's activities can make it difficult to keep up-to-date with the detail of some governance duties', 'Too much red tape. Shouldn't need to pay to see an accountant, should be able to do accounts ourselves but it's too complex. No time to run a volunteer charity with full time work when there's so much red tape. Wish we never registered', '[C]omplexity and change, and/or introduction of new regulations', 'Rapid changes in rules and compliance', and 'A commitment to

board members, compulsory training,¹²⁹ and free online training opportunities for organisations with limited financial resources.

Some particularly instructive comments include the following:

I think that the biggest problem in this area is a lack of understanding about the range of different conflict management strategies that can be applied and the need for a Conflict Management Plan especially where the conflict will be ongoing. All too often it is presumed that just declaring the conflict is sufficient

and that '[t]he sector seems to misunderstand conflicts of interest. A well-connected and capable board will likely always encounter conflicts. The culture needs to change so that conflicts are handled rather than feared/avoided'. These comments support the point made above about the importance of appropriate management of conflicts.

VII RECOMMENDATIONS

In light of the complex nature of Australia's charities governance and regulatory scheme and respondents' clear understanding of the concept of conflicts of interest, we recommend as follows based on the results of the survey. A core need in legal and academic terms is for the myriad governance duties applicable to responsible persons to be reconciled and connected under four to five duties or principles.¹³⁰ It can be shown that this tangled system of governance duties and requirements can be condensed into five core principles. These principles in turn correspond largely to the central duties of fiduciaries,¹³¹ centred in a purpose-based governance model,¹³² namely a duty to exercise powers in good faith in the way the responsible

rationalise and clarify across the various levels of government, independent of partisan politics would be very useful'.

129 One respondent commented: 'Organisations where directors do not participate in continuous training do not necessarily understand governance or conflict. Should encourage persons who sit on all boards do continuous governance/duties training. I would like to see compulsory at least 5 hours a year training'.

130 Due to word limit restrictions, we will not go into detail on these central principles or how they were arrived at. These will be the subject of a separate publication.

131 The appropriateness of imposing fiduciary duties on responsible persons of Australian charities has been established elsewhere: see Rosemary Teele Langford, 'Charities and the Fiduciary Paradigm' (2022) 16(2) *Journal of Equity* 146 <<https://doi.org/10.2139/ssrn.4269102>>. See also AS Sievers, 'What Is the Future for Honorary Directors and Committee Members? Their Duties and Liabilities' in Myles McGregor-Lowndes, Keith Fletcher and AS Sievers (eds), *Legal Issues for Non-profit Associations* (LBC Information Services, 1996) 22, 30; Charles Parkinson, 'Duties of Committee Members under the Associations Incorporation Acts' (2004) 30(1) *Monash University Law Review* 75, 79. After citing Sievers and Parkinson, Cowley and Knight 'identify a stream of judicial authority that supports the tenor of these observations': see Bruce Cowley and Stephen Knight, *Duties of Board and Committee Members: A Guide for Corporations, Associations and Committee Members* (Lawbook Co, 2018) 464 [13.130], citing *Bonnyrigg Turkish Islamic Cultural Association v Abdullah* [2002] NSWSC 100; *Vannini v Campbelltown City Soccer & Social Club Inc* [2003] SASC 113; *Pine Rivers, Caboolture and Redcliffe Group Training Scheme Inc v Group Training Association Queensland & Northern Territory Inc* [2015] 1 Qd R 542.

132 Although the fiduciary classification of the duties to act in good faith in the interests of the company and for proper purposes and the duty of care is contested, it would be unusual for fiduciaries not to be subject to these duties: see, eg, Richard Nolan and Matthew Conaglen, 'Good Faith: What Does It Mean for Fiduciaries

person considers would further the charity's purposes; a duty to act for proper purposes; duties to avoid unauthorised conflicts and profits from position; and a duty of care (which incorporates a duty to prevent insolvent trading).¹³³

From this, an online workbook could be developed, linking responsible persons' statutory and soft law obligations to the central duties. This could incorporate tables that reconcile all the statutory duties, general law duties, and ACNC Governance Standards, with optional space to add other layers such as the Australian Council for International Development Code of Conduct ('ACFID Code') and requirements from funding grants and fundraising licences.¹³⁴ For example, in a previous article, Langford has shown that the myriad duties relating to conflicts of interest imposed on responsible persons are all subsumed by the requirement that fiduciaries avoid a real sensible possibility of conflict, which is a core duty of responsible persons as fiduciaries.¹³⁵ We will undertake this exercise in relation to the other applicable duties. Such a guide was the most popular practical tool nominated by respondents in the survey.

Second, a number of other practical measures could be considered. These include provision of low cost and accessible training (currently being developed by the ACNC),¹³⁶ educating the charities sector about the impact of conflict management techniques, and amendment of the ACNC Conflicts Guide to emphasise the importance of such management processes and to highlight the importance of abstention from voting (and potentially also from discussion). In this respect, guidance provided by overseas charities regulators (such as the Charity Commission for England and Wales) is instructive. Further guidance could also be provided to responsible persons on the issue of benefits to responsible persons and their related parties, particularly given the arguable unsuitability of AASB 124 in the charities context.¹³⁷ There is also merit in suggestions made to the *ACNC Review* that Governance Standard 5 should be amended to require management (not just disclosure) of conflicts.¹³⁸ Caution is also needed in relation to the concept

and What Does It Tell Us about Them?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 319, 321, 330 <<https://doi.org/10.1017/CBO9780511779213.016>>.

There is overlap between the content and application of these duties: see Rosemary Teele Langford, *Directors' Duties: Principles and Application* (Federation Press, 2014) 159 [9.7.3].

133 The duty of care takes into account the (charitable) nature of the company and the skills and responsibilities of the responsible person: see Langford, 'Purpose-based Governance' (n 40); Langford and Webster (n 3).

134 'ACFID Code' (n 89).

135 Langford, 'Conflicts and Coherence' (n 52).

136 Since the survey was undertaken, the ACNC has developed a suite of e-learning modules for responsible persons: see 'Online Learning', *Australian Charities and Not-for-profits Commission* (Web Page) <<https://www.acnc.gov.au/tools/online-learning>>.

137 In this respect closer attention arguably needs to be paid to the form and detail of such requirements given the unique nature of charitable entities: see Langford, 'Related Parties' (n 69). Note that the ACNC has recently provided new guidance on related party transactions: see 'Related Party Transactions' (n 71).

138 See, eg, 'ACNC Submission' (n 12) 64; Queensland Law Society, Submission to Treasury, *Review of the Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 12. The need for the ACNC to explain how equitable duties interact with the governance standards and to educate responsible persons in relation to other duties was highlighted in submissions to the ACNC Review: see Prolegis Lawyers, Submission to Treasury, *Review of Australian Charities and Not-for-profits*

of perceived conflicts.¹³⁹ There is a particular need to further support and empower volunteer responsible persons, especially younger responsible persons and those from smaller charities.¹⁴⁰ Younger respondents expressed less confidence in relation to governance duties and respondents from smaller entities were more challenged by conflicts management. There were also some comments that the issues in the survey were not relevant to small charities.

Although a Code was popular in terms of assistance with governance duties, and the Charity Governance Code for England and Wales appears to have been well received,¹⁴¹ we do not propose recommending development of such a Code (with or without a diagnostic tool) in Australia given the availability of the ACFID Code and AICD Not-for-Profit Governance Principles, and based on consultation with charity experts in Australia and in England and Wales. Further consultation in both jurisdictions will be undertaken.

There is a pressing need to reduce red tape and regulatory overlap, particularly given respondents' comments on the problems of complexity and inconsistency of requirements, red tape and time constraints.

These recommendations would assist in ensuring an appropriate balance between ensuring accountability, on the one hand, and not having a regulatory system that is so complex as to discourage volunteer responsible persons and the institutions of civil society, on the other. Ensuring an appropriate balance between the two is vital. As has been noted by Mundine: 'There are ... people who would make very good directors but are discouraged by the complexity of the regulatory environment, the demands of corporate governance and their personal legal liabilities.'¹⁴² There is a clear need to ensure that charity legal frameworks are not inconsistent or complex and thus impose undue compliance costs and dissuade volunteering. A central set of governance principles, operating as core standards, will assist in meeting this need given that more extensive obligations (applicable to responsible persons of larger and more complex charities) can be appended to, and organised around, these principles.

VIII CONCLUSION

The governance and regulatory frameworks applicable to the Australian charities sector are burdensome and complex. This article reports the results of extensive empirical research into how responsible persons understand their governance duties and how charitable bodies deal with conflicts of interest in a practical sense. In light of these results, this article made recommendations as to ways of simplifying and

Commission Legislation (28 February 2018) 7; Law Council of Australia, Submission to Treasury, *Review of Australian Charities and Not-for-profits Commission Legislation* (28 February 2018) 10. Our proposed guide will fulfil this function.

139 See also Aroney and Turnour (n 14) 467.

140 See also Woodward and Marshall (n 15).

141 'The Charity Governance Code', *IBB Law* (Web Page, 27 November 2018) <<https://www.ibblaw.co.uk/insights/blog/charity-governance-code?view=microsite>>.

142 Nyunggai Warren Mundine, quoted in Stuart (n 21) 39. See also *Contribution of the NFP Sector* (n 22) 249.

clarifying governance duties and regulatory burdens to strengthen and maximise the Australian charity sector's capacity to contribute to the social and economic life in Australia. A key way of simplifying governance requirements, and thus of bringing a measure of certainty and coherence, is to develop core central governance principles around which other layers of governance duties can be organised and connected. Respondents to the survey were keen on additional assistance with understanding and complying with their duties and a detailed online guide setting out all the governance duties was the most popular option. We will undertake this simplification and organisation.

These results demonstrate that responsible persons have a good understanding of conflicts of interest, which supports the arguments of this article as to the suitability of the fiduciary paradigm as the basis of a governance framework. In practical terms, the surveys appear to demonstrate a gap between responsible persons' understanding of their duties and the reality of how conflicts of interest are managed. Clearer and more prescriptive guidance was therefore suggested. Reduction of red tape and overlapping regulatory requirements is also needed, as expressed by respondents in comments in the survey and in submissions to the *ACNC Review*. We recommend further consultation between the ACNC and other regulators, informed by proposals by charity sector experts, with a view to streamlining regulatory requirements. Given the important role played by charities in social cohesion and wellbeing,¹⁴³ empowering and enabling those who govern charities is of significant practical importance.

143 See Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector* (Report, September 2021) 32.