

# Journal of Equity (JOE)

## Volume 16 Part 2

*(editorial and articles included in this part are linked to the LexisNexis platform)*

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There seems to be little understanding of, and minimal attention paid to, the fact that most universities are identified as charities in law. This paper imagines the sorts of questions that arise when one takes a long hard look at universities through a charity law lens. The most fundamental of these — are they charities at all? — highlights the difficulties in delineating the boundaries of charity and, in particular, the line to be drawn between charity and government. Other questions arise in respect of universities' internal operations — with regard to education and research strategies, executive remuneration and governance — and in respect of their relations with the State, where charity's hallmark of independence may appear to be challenged. The focus is on English universities, but many of the issues that arise in charity law and in the university literature will be recognisable in other jurisdictions. The answers to those questions will be explored elsewhere, but this brief paper seeks to provide an aperitif that stimulates and encourages much-needed reflection and debate.

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Corporate law scholarship is witnessing a resurgence of interest in corporate purpose, emphasising the potential role of purpose in governance. This is all the more so for incorporated charities, which are for-purpose entities. However, while purpose-based governance promises many benefits, it also generates difficulties for director decisions relating to change of purpose or to actions that simultaneously advance and hinder the achievement of a purpose. The traditional controls on the exercise of directors' discretionary powers, the best interests duty and the proper purpose duty, are very difficult to apply in these situations if they are construed primarily as focusing on advancement of an entity's purposes. This article examines the duty of care as an alternative control mechanism or as a prism for highlighting material considerations that ought to be taken into account by charity directors if the best interests duty and proper purpose duty are characterised in a more process-oriented way. Articulating material considerations can help directors satisfy the duty of care or the alternatively interpreted best interests and proper purpose duties.

In *Lehtimäki v Cooper* [2020] UKSC 33 the UK Supreme Court held that members of a charitable company limited by guarantee owed a fiduciary duty to act in good faith in the interests of the company in certain circumstances. The decision is, however, arguably fact-specific and is distinguishable for the purposes of Australian law due to different charity law and regulatory frameworks. There are, in addition, strong policy reasons why the imposition of fiduciary duties on members is undesirable. This article critically analyses the decision. It argues that members are instead subject to restrictions based on the rule in *Barnes v Addy*. This position arises due to the unique nature of charitable companies (and other charitable entities), which in turn results in the existence of a fiduciary relationship between responsible persons and the charitable entities they govern.

## ‘Beneficiaries’ under the Chinese charitable trust

— Hui Jing

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This article examines the role of objects in Chinese charitable trusts. At common law, charitable trusts are purpose trusts and that they do not have beneficiaries is already very much the orthodox view. In contrast, the terms ‘beneficiary’ and ‘beneficiaries’ are widely used in legislative texts concerning Chinese charitable trusts. However, the law makes no mention of how the concept of ‘beneficiary’ should be understood in the context of Chinese charitable trusts. Two arguments have been raised by scholars and practitioners: the beneficiary argument and the recipient argument. This article examines the way in which the two arguments are developed and the extent to which they shed light on the legal nature of Chinese charitable trusts. It argues that the beneficiary–recipient arguments are premised on the private law understanding of standing and are unable to provide a complete picture of the role of objects under a Chinese charitable trust. Following on this reasoning, this article outlines the public law norms that legislators have incorporated into the structure of the Chinese charitable trust, and discusses the insights that these norms can provide into the analysis of an object’s role in the context of Chinese charitable trusts.