



## FAITH, HOPE, AND CHARITY - RELIGION AS A PUBLIC BENEFIT IN MODERN AUSTRALIA

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- 1 Some of you may be aware that, on the 20<sup>th</sup> of next month, the ninth film in the *Star Wars* movie franchise will arrive in cinemas. The most recent film in that franchise was entitled “The Last Jedi”. In the *Star Wars* universe, the Jedi are a group of warriors trained in the mystic ways of “the Force”. Some of you are no doubt also aware that the fictional Jedi have spawned a purported religion, ‘Jediism’, with its ‘philosophy based on the beliefs of the Jedi ... in the *Star Wars* films’.<sup>2</sup> Although initially viewed as a humorous approach to a census question, ‘Jediism’ is said to have grown to encompass 177,000 self-identifying adherents in the United Kingdom.<sup>3</sup> In Australia, 48,000 people identified as Jedi in the latest census.<sup>4</sup>
- 2 Why do I mention this in the context of this paper?
- 3 Like Australia,<sup>5</sup> within the last decade, the United Kingdom enacted charities legislation,<sup>6</sup> with taxation and other economic benefits for entities that meet the statutory definition.<sup>7</sup>

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<sup>2</sup> Cambridge Dictionary, ‘Jedi’ <<https://dictionary.cambridge.org/dictionary/english/jedi>>.

<sup>3</sup> Russell Sandberg, ‘The Charity Commission’s Jediism Religion Decision is a Rogue One’, *The Conversation* (Blog Post, 21 December 2016) <<https://theconversation.com/the-charity-commissions-jediism-religion-decision-is-a-rogue-one-70667>>.

<sup>4</sup> Australian Bureau of Statistics, *Census reveals Australia’s religious diversity on World Religion Day* (18 January 2018) Australian Bureau of Statistics <[https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFC\\_A25821800203DA4?OpenDocument](https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFC_A25821800203DA4?OpenDocument)>.

<sup>5</sup> *Charities Act 2013* (Cth).

<sup>6</sup> *Charities Act 2011* (UK).

<sup>7</sup> G E Dal Pont, ‘Charity law and religion’ in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) 205; Pauline Ridge, ‘Religious Charitable Status and Public Benefit in Australia’ (2011) 35 *Melbourne University Law Review* 1071, 1073–4.

4 In 2016, a group in the United Kingdom called ‘The Temple of the Jedi Order’ applied to the Charity Commission for England and Wales for registration as a charity pursuant to the *Charities Act 2011* (UK).

5 To qualify for charitable status in the United Kingdom, a religious group must establish:

- that the group represents a ‘religion’;
- that the group exists to advance that religion; and
- that the advancement of that religion is for the public benefit.<sup>8</sup>

6 In the Temple’s application, ‘Jediism’ was defined as: ‘...a religion based on the observance of the Force, the ubiquitous and metaphysical power that a Jedi (a follower of Jediism) believes to be the underlying, fundamental nature of the universe’.<sup>9</sup> The purposes of the proposed charity were said to be, inter alia: ‘[t]o advance the religion of Jediism, for the public benefit worldwide, in accordance with the Jedi Doctrine’.<sup>10</sup>

7 Advancing religion is a recognised charitable purpose under both the Australian and United Kingdom legislation.<sup>11</sup> However, after detailed consideration, the Charity Commission rejected the application. It found that the Jedi Temple had provided ‘insufficient evidence that the characteristics of a religion in charity law’ were met.<sup>12</sup> Furthermore, it concluded that:

The Commission is not satisfied that the public benefit requirement is met either for the advancement of religion or the promotion of moral or ethical improvement for the reasons set out above.

8 I will return shortly to the definition of a ‘religion’. The focus of my paper this evening is the ‘public benefit’ requirement for charitable status. Specifically, the normative question of whether, in an increasingly secular era, the law should continue to presume, as it does by statute, that religion has an intrinsic public benefit that makes it worthy of charitable status?

9 Before doing that, it is worth highlighting the longstanding interface between charity law and religion throughout history.

## I SOME HISTORY OF RELIGIONS AND CHARITY LAW

10 Religion has been intertwined with the regulation of charities for centuries.<sup>13</sup> It has been suggested that the origins of the law of charity lie in Roman law, and in gifts of property to the Early Christian Church

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<sup>8</sup> Dal Pont (n 7).

<sup>9</sup> Charity Commission for England and Wales, *The Temple of the Jedi Order – Application for Registration: Decision of the Commission* (16 December 2016) [6].

<sup>10</sup> Ibid [4].

<sup>11</sup> *Charities Act 2013* (Cth) s 12; *Charities Act 2011* (UK) s 3.

<sup>12</sup> Charity Commission for England and Wales (n 9) [35].

<sup>13</sup> See S Petrow, ‘England and the United States’ in G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) 79, 79-82; Hubert Picarda, ‘The Preamble of the Statute of Charitable Uses 1601: Peter Pan or Alice in Wonderland’ in Malcolm Cope, *Interpreting Principles of Equity* (Federation Press, 2014) 27, 29; Joshua Getzler, ‘Morice v Bishop of Durham (1805) in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 157.

by Roman citizens after permission to bequeath property to the Church was given by Emperor Constantine.<sup>14</sup> Such gifts had become common by the reign of Justinian.<sup>15</sup>

- 11 During the medieval period, it was the Church that was responsible for the administration of charities, and the operation of charitable bodies.<sup>16</sup> Charity and religion were synonymous. Charitable bequests were within the jurisdiction of the ecclesiastical courts.<sup>17</sup> From the early fifteenth century, however, litigants became dissatisfied with the ecclesiastical courts and, consequently, the jurisdiction of the Court of Chancery over charitable legacies, and, in particular, charitable trusts, grew in importance.<sup>18</sup> The equitable jurisdiction became important as ‘the bulk’ of charitable property came to be held under charitable uses (later, trusts). Professor Getzler has described how privileges given to charitable dispositions by ecclesiastical law came to be adopted and employed by Chancery:

A key element of the ecclesiastical law of charity, which was engrafted into England from general canon law, was the idea that a charitable gift administered by the Church would not fail for want of certainty. Once the quality of charity attached to a bequest, the Church had powers to apply the gift to *piae causae* as was expedient. This rule allowing latitude to Church executors in selection of objects was later to enter the secular jurisdiction of the Court of Chancery as the doctrine of *cy-près*; the Court (or the Crown) could take over a charitable but vague bequest and allocate the gift to more definite charitable objects.<sup>19</sup>

- 12 The *cy-près* doctrine, as it continues to be applied broadly to charitable trusts today, thus has canon law origins.<sup>20</sup>

- 13 After the Reformation, the Church’s control of charitable causes was weakened.<sup>21</sup> This continued the ‘shift of jurisdiction to the Court of Chancery on the one hand and the Crown on the other’.<sup>22</sup> There was also an expansion in permissible charitable objects to include secular causes, most significantly, in 1601 the *Statute of Charitable Uses*, often referred to as the *Statute of Elizabeth I*,<sup>23</sup> was enacted.<sup>24</sup> The statute set up a procedure for commissioners to be appointed for the administration of charitable trusts.<sup>25</sup> The Preamble to the statute set out a range of charitable trusts to which the statute was intended to apply. It included the upkeep of churches, but as Picarda has observed it did not include the advancement of religion itself.<sup>26</sup>

- 14 The reason for the omission of advancement of religion from the statute is contested.

- 15 Professor Dal Pont suggests that

[i]ts substantive omission was not accidental, but stemmed from the secular orientation of Elizabeth I, and the Puritan desire for religion free of State interference ... the Preamble marked ‘a watershed change to try to convert religious charity to predominantly the State’s secular agenda for public purposes’ and was ‘the beginning of the legal secularisation of charity ... [T]his did not deny that, in English society,

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<sup>14</sup> Melville M Bigelow, *Story’s Commentaries on Equity Jurisprudence* (Little, Brown, and Co, 13th ed, 1886) 477.

<sup>15</sup> *Ibid* 478.

<sup>16</sup> Petrow (n 13) [4.1].

<sup>17</sup> *Ibid* [4.1]; Gareth Jones, *History of the Law of Charity, 1532-1827* (Cambridge University Press, 1969) 4.

<sup>18</sup> Jones, *Ibid* 5–7.

<sup>19</sup> Getzler (n 13) 164.

<sup>20</sup> Petrow (n 13) [4.3].

<sup>21</sup> Jones (n 17) 10-111; Petrow (n 12) [4.2]–[4.3].

<sup>22</sup> Getzler (n 13) 164.

<sup>23</sup> Picarda (n 13) 28.

<sup>24</sup> Petrow (n 13) [4.3].

<sup>25</sup> *Ibid*.

<sup>26</sup> Picarda (n 13) 29.

the concept of charity was essentially religious in origin, and retained a strong religious flavour after 1601.<sup>27</sup>

16 Picarda, on the other hand, contends that:

It was implicit in ... the preamble that religious institutions were charitable. The preamble addresses *secular* purposes which were handed over to secular institutions unconnected with the government of the day. The preamble did not mark out the limits of legal charity or condemn as non-charitable those uses which were outside its letter and equity. Religious purposes were still recognised in the law as charitable but their enforcement fell outside the administrative apparatus for the enforcement of charitable purposes established by the statute.<sup>28</sup>

17 In any event, as Picarda notes, the Preamble to the *Statute of Elizabeth I* was not intended to supply a legal definition of charity. It was not until the case of *Morice v Bishop of Durham* in 1804 that ‘the preamble to the [*Statute of Elizabeth I* was] equated with the legal definition of charity’.<sup>29</sup> In that case, Lord Eldon held that, to be upheld as a charitable trust, the purpose had to be within the objects in the preamble or ‘which by analogies are deemed within its spirit and intendment’.<sup>30</sup> Getzler describes Lord Eldon’s decision as having ‘a legislative quality, making a policy decision that charitable objects should be derived from the preamble’ to the *Statute of Elizabeth I*.<sup>31</sup>

18 Nonetheless, this approach persisted. It was further developed in *Commissioners for Special Purposes of Income Tax v Pemsel*,<sup>32</sup> where Lord Macnaughten held that in order to be a charity for taxation purposes:

‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.<sup>33</sup>

19 By this stage, a trust for the advancement of religion was clearly considered to be a charitable purpose and, arguably, considered by Lord Macnaughten to be within the *Statute of Elizabeth I*.<sup>34</sup>

20 What this discussion shows, is that religion has been intimately tied to the legal doctrines surrounding charities since their inception – evolving out of religious causes, and the advancement of such causes being confirmed by the common law as charitable.

## II THE MODERN LAW OF CHARITY AND RELIGIOUS CAUSES

21 Let me then turn to consider the requirements imposed by the modern law on a religious entity that seeks charitable status.

22 The modern Australian law of charity is an amalgam of common law, federal legislation and State and territory statutes.<sup>35</sup> Charitable trusts remain governed by the doctrines and principles of Equity. The list of recognised charitable purposes still reflects the principles derived from the *Statute of Elizabeth*

<sup>27</sup> G E Dal Pont, ‘Advancement of Religion’ in G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) 201, [10.1].

<sup>28</sup> Picarda (n 13) 29. See also Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury, 4th ed, 2014) 89–90.

<sup>29</sup> Jones (n 17) 120.

<sup>30</sup> *Morice v Bishop of Durham* (1803) 32 ER 656, 659.

<sup>31</sup> Getzler (n 13) 196.

<sup>32</sup> [1891] AC 531.

<sup>33</sup> Ibid 583.

<sup>34</sup> Picarda (n 13) 41.

<sup>35</sup> Pauline Ridge, ‘When is Advancement of Religion Not a Charitable Purpose?’ (ANU College of Law Research Paper No 19.24, 2019) 4.

*I*, as interpreted in *Morice and Pemsel*.<sup>36</sup> There is a further requirement that the charitable purpose be for the public benefit.<sup>37</sup>

- 23 For the purposes of Commonwealth law, the definition of a charity is provided by the *Charities Act 2013* (Cth). Section 5 of the Act defines a charity as a ‘not-for-profit entity’, all of the purposes of which are either ‘charitable purposes ... that are *for the public benefit* ... or ... purposes that are incidental or ancillary to, and in furtherance or in aid of’ charitable purposes of the entity. There is also a requirement that none of the purposes be disqualifying purposes, as set out in s 11 of the Act, along with a requirement that the entity not be ‘an individual, a political party or a government entity’.<sup>38</sup> The purpose of ‘advancing religion’ is a recognised charitable purpose under the Act<sup>39</sup> – ‘advancing’ includes, protecting, maintaining, supporting, researching and improving.<sup>40</sup>
- 24 The long-standing equitable principles about charitable purpose help inform the interpretation of the statute.
- 25 The recognised charitable purpose of ‘advancing religion’ raises the question of what is a ‘religion’ for the purposes of charity law. As has been observed by Dal Pont, there is a legitimate question as to whether ‘religion’ ought to carry the same definition in all cases. Persuasive policy grounds exist for adopting different approaches in cases which involve claims for rating exemptions as compared with those concerned with individual rights or non-establishment cases.<sup>41</sup>
- 26 Australian law has adopted a broad definition of religion that ‘recognises that some, mostly Eastern, religions are not theistic, and thereby releases the law from Judeo-Christian notions of religion’.<sup>42</sup> The principle of Equity treating all religions equally within this context has a long history.<sup>43</sup> The description of religion provided by Mason ACJ and Brennan J in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* of

belief in a supernatural Being, Thing or Principle; and, the acceptance of canons of conduct in order to give effect to that belief,<sup>44</sup>

has recently been described by Mark Fowler as ‘one of our most widely recognised judicial exports’.<sup>45</sup> Mason ACJ and Brennan J observed that the guarantees provided by s 116 of the *Constitution* would lose their character as a bastion of freedom if religion were defined so as to exclude from its ambit minority religions outside the mainstream of religious thought.<sup>46</sup> In the context of the current political debate surrounding the Religious Discrimination Bill, it is important to recall Mason ACJ and Brennan J’s observation that what was protected were not the tenets of each religion, but rather that:

<sup>36</sup> JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts* (LexisNexis Butterworths, 8th ed, 2016) [10–01]–[10–04].

<sup>37</sup> *Gilmour v Coats* [1949] AC 426.

<sup>38</sup> *Charities Act 2013* (Cth) s 5(d).

<sup>39</sup> *Ibid* s 12.

<sup>40</sup> *Ibid* s 3.

<sup>41</sup> Dal Pont (n 7) 207–208.

<sup>42</sup> *Ibid* 206.

<sup>43</sup> See, eg, *Thorneton v Howe* (1862) 54 ER 1042, 1043–44, where Sir John Romilly MR stated that: ‘the Court of Chancery makes no distinction between one sort of religion and another ... Neither does the Court, in this respect, make any distinction between one sect and another’.

<sup>44</sup> (1983) 154 CLR 120, 136.

<sup>45</sup> Mark Fowler, ‘Discrimination bill goes beyond matters of religion’ (*The Australian*, 23–24 November 2019, 22).

<sup>46</sup> (1983) 154 CLR 120, 131–132.

Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.<sup>47</sup>

27 So, why was ‘the Force’ not with the Jedi when they sought charitable status?

28 Professor Ridge has observed that the definition of religion adopted by the Charity Commission of England and Wales for the purposes of the *Charities Act 2011* (UK) ‘conflates the meaning of ‘religion’ with questions concerning whether a religious group should qualify for charitable status’ (emphasis added).<sup>48</sup> It did so by including a requirement that the religion ‘...be capable of providing moral and ethical value or edification to the public and characterised by a certain level of cogency, seriousness, cohesion and importance’.<sup>49</sup> In Ridge’s view:

These requirements go beyond definitional issues to the normative question of whether the religious purposes in question *should* qualify for charitable status. They are also difficult to apply in a neutral manner as they require a judgment on the merits of the belief in question.<sup>50</sup>

29 Professor Sandberg, writing in the *Ecclesiastical Law Journal*, has also criticised the Commission’s decision.<sup>51</sup> It may be that Jedi Temple would at least be considered to be a religion in Australia, though there may be a need to show sufficiently concrete and observed canons of conduct.

### III THE PUBLIC BENEFIT REQUIREMENT

30 I turn now to consider the question of ‘public benefit’ in the context of religion.

31 As I have adverted to, s 6(1) of the *Charities Act 2013* (Cth) requires that a charity be ‘for the public benefit’.<sup>52</sup>

32 The public benefit requirement also exists at common law<sup>53</sup> and there is a common law presumption that advancement of religion is for public benefit.<sup>54</sup> This presumption now has statutory force by reason of s 7 of the *Charities Act 2013* (Cth).

33 At common law, questions about whether a particular religious cause was for ‘public benefit’ have typically arisen in circumstances where:<sup>55</sup>

- membership is restricted to a particular closed group of persons;
- entry to a place of worship is restricted; or
- the religious entity is conducted for private profit.

34 Cases involving closed, contemplative religious orders have also grappled with this issue. In *Gilmour v Coats*,<sup>56</sup> the House of Lords rejected a submission that a contemplative order of nuns engaged in religious activity for public benefit. The common law of Australia may differ on this point,<sup>57</sup> but in any

<sup>47</sup> Ibid 132.

<sup>48</sup> Ridge (n 35) 8.

<sup>49</sup> Charity Commission for England and Wales (n 8) [134].

<sup>50</sup> Ridge (n 35) 9.

<sup>51</sup> Russell Sandberg, ‘Clarifying the Definition of Religion under English Law: The Need for a Universal Definition’ (2018) 20 *Ecclesiastical Law Journal* 132.

<sup>52</sup> *Charities Act 2013* (Cth) s 5.

<sup>53</sup> *Cocks v Manners* (1871) 7 LR Eq 574, 585; *Nelan v Downes* (1917) 23 CLR 546, 599, 573.

<sup>54</sup> *Public Trustee v Attorney-General (NSW)* (1997) 42 NSWLR 600, 604.

<sup>55</sup> See Dal Pont (n 27) [10.33]–[10.40]; Ridge (n 35) 11–16.

<sup>56</sup> [1949] AC 426.

<sup>57</sup> See Dal Pont (n 27) [10.48].

event s 10 of the *Charities Act 2013* (Cth) provides that, in the case of closed or contemplated religious orders that regularly undertake prayerful intervention at the request of members of the general public, the public benefit test does not apply.

35 Section 11 of the *Charities Act 2013* (Cth) disqualifies entities that are engaged in either of the following examples of a ‘disqualifying purpose’:

- engaging in, or promoting, activities that are unlawful or contrary to public policy; or
- promoting or opposing a political party or a candidate for political office.

36 The latter of these reflects the fact that following the High Court decision in *Aid/Watch Inc v Commissioner of Taxation*,<sup>58</sup> a religious charity would be permitted to advocate on matters of policy, provided that the advocacy related to the advancement of religion for public benefit;<sup>59</sup> the disqualifying purpose in s 11 means, however, that such advocacy cannot extend to promoting particular political candidates.<sup>60</sup>

#### IV THE CONTINUED PUBLIC BENEFITS OF RELIGION

37 The more fundamental normative question that arises, is whether the law should presume that religion has a public benefit? Is such a presumption justifiable in a society where 30% of the population identifies as having ‘no religion’<sup>61</sup>, and in which a significant number of people hold the view that religion is basically a private matter and best kept out of the public zone – a view expressed forcefully by the Hon Michael Kirby AC CMG in a recent letter to the Editor of the *Australian Law Journal* protesting the lack of balance in the special issue dealing with religious rights and discrimination law.<sup>62</sup>

38 Professor Ridge has argued that the ‘public benefit requirement permeates charity law precisely because the function of charity law is, broadly speaking, to facilitate activities that are beneficial to society’.<sup>63</sup> This mirrors the comments of Professor Jones, in the context of the *Statute of Elizabeth I*, which, as I have described, was the foundation of contemporary charity law, that ‘[p]ublic benefit was the key to the statute’.<sup>64</sup> Ridge argues that the public benefit requirement is a ‘*quid pro quo* for the fiscal benefits of charitable status’.<sup>65</sup>

39 Several reasons are advanced for retention of the presumption that religion has a public benefit, namely that religion:

- promotes moral and community values;

<sup>58</sup> (2010) 241 CLR 539.

<sup>59</sup> Prior to this decision, a charity could not pursue a political purpose, based on the rationale that a court could not determine whether a particular policy would be for public benefit: *Bowman v Secular Society Ltd* [1971] AC 406; *McGovern v Attorney-General* [1982] Ch 321.

<sup>60</sup> For a discussion of the law on political advocacy by religious charities, see Mark Fowler, ‘The Bounds of Religious Charitable Speech’ (Eternity News, 30 May 2019) [www.ernitynews.com.au/opinion/the-bounds-of-religious-charitable-speech](http://www.ernitynews.com.au/opinion/the-bounds-of-religious-charitable-speech)

<sup>61</sup> Australian Bureau of Statistics, *Census reveals Australia’s religious diversity on World Religion Day* (18 January 2018) Australian Bureau of Statistics <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFCA25821800203DA4?OpenDocument>.

<sup>62</sup> ‘A letter from The Hon Michael Kirby AC CMG’ 11 November 2019 <http://sites.thomsonreuters.com.au/journals/2019/11/11>.

<sup>63</sup> Ridge (n 35) 1081.

<sup>64</sup> Jones (n 17) 27.

<sup>65</sup> Ridge (n 7) 1082.

- confers broad social and economic benefits.

*A The Promotion of Moral and Community Values*

40 A common argument is that religion is for the public benefit as it promotes moral and community values.<sup>66</sup>

41 Professor Dan Ariely, the James D. Duke Professor of Psychology and Behavioral Economics at Duke University, discusses the power of religion in shaping morality in his book, *Predictably Irrational*.<sup>67</sup>

42 In an experiment conducted at Harvard University, MIT, UCLA, and Yale University, Professor Ariely and his colleagues asked a number of undergraduate and MBA students to take a 50-multiple choice question general knowledge test. Each correct answer would earn a student 10 cents.

43 The students were divided into a number of groups. Each group was given 15 minutes to complete the test, after which time they were asked to transfer their answers to a scoring sheet. However, each group was subject to different conditions:

- The first group received a blank scoring sheet and then handed both their answer and scoring sheets to the proctor who calculated the number of correct answers.
- The second group received a scoring sheet on which the answers were already marked. Accordingly, this group could decide whether to mark their original answers or to lie and change their answers when filling out the scoring sheet. This group was asked to write the number of questions they had answered correctly at the top of the scoring sheet and hand both sheets to the proctor, who paid them in accordance with the number written at the top of the scoring sheet.
- The third group also received a pre-marked scoring sheet, however, this group was instructed to shred their original answer sheet before handing the scoring sheet to the proctor who paid them for their correct answers.
- The final group also received a pre-marked scoring sheet however they were instructed to shred both their answer and scoring sheets before withdrawing their earnings for correct answers from a jar at the front of the room.

44 Perhaps unsurprisingly, depending on the extent of your faith in mankind (or at least students at the world's leading universities) the students in the first group, who did not have the opportunity to cheat, scored noticeably lower than the reported scores of the students in any other groups. In his book, Ariely suggests that this is consistent with the propensity of individuals to take advantage of an opportunity to cheat in circumstances in which the risks and consequences of getting caught are low.

45 What is noteworthy for present purposes, however, is the results of a later, though similar, study in which those students who were to be given the opportunity to cheat were asked before the test to recall either the names of 10 books they read in high school, or as many of the Ten Commandments as they could remember. The students who had been asked to recall books they read in high school were found to cheat to the same extent as the students who had been given the opportunity to cheat in previous studies. However, those students who were asked to recall the Ten Commandments did not cheat at all,

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<sup>66</sup> Dal Pont (n 27) [10.41].

<sup>67</sup> Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (Harper, 2008) [11].



even if they could not remember all of the Ten Commandments. Thus, the mere thought of the Ten Commandments, or likely any other religious teaching or doctrine which broadly relates to honesty and moral behaviour, appears sufficient to positively influence social behaviour.<sup>68</sup>

- 46 At first blush, the results of this and other studies which have yielded similar results, seem to support the view that religion is for the public benefit as it promotes moral and community values. However, even if is this so, the utility of using religion to promote moral and community values is questionable. For example, in 2012, a professor at Middle Tennessee State University sought to have MBA students sign a pledge to comply with the Ten Commandments that stated that, if they cheated on their exam, they would ‘be sorry for the rest of [their] life and go to Hell’.<sup>69</sup> Unfortunately for that professor, the students whose behaviour he was trying to influence revolted and media scrutiny ensued.<sup>70</sup> We know, I think, from recent posts by certain sportsmen (I was hoping to avoid mentioning that particular matter at all...) that similar reactions might be expected if religious teachings were used in this manner to discourage immoral conduct in broader society. Indeed, even those giving testimony in the courts are no longer required to provide an oath in accordance with any particular religious text.
- 47 Practicality aside, Professor Ariely’s study is not in fact as supportive of the notion that religion provides a public benefit as it may at first seem. This is because, as a further study of Ariely’s demonstrated, ‘it was not the [Ten] Commandments themselves that encouraged honesty, but the mere contemplation of a moral benchmark of some kind’.<sup>71</sup> In that further study, which followed the same structure as those previously described, one group of students who were given the opportunity to cheat were asked to sign a declaration acknowledging that the test fell within their university’s honour system. As you may have surmised, like those students who were asked to recall the Ten Commandments, those students did not cheat at all, despite the fact that the university did not in fact have an honour system.
- 48 So, whilst we might be able to conclude that religion has the potential to promote moral behaviour, there is no evidence that it is necessary; in which case its public benefit in this regard may be questioned.<sup>72</sup> This, however, leads to a deeper question – one that I am not at all equipped to answer: is religion necessary for morality? That is, is it possible for individuals and society to develop morals and moral codes in the absence of any religious beliefs?
- 49 On the one hand, some argue that there can be no morals without religion, as it is the existence of a higher or superior being that compels moral behaviour. This has been suggested as ‘one of the key reasons why believers would rather trust people who believe in the “wrong god” (that is, someone of another religion), than they would trust people of their own culture who believe in no god...’<sup>73</sup> If this is indeed so, we might conclude that religion is necessary to conceptions of morality, but by no means sufficient – scandalous and disgraceful conduct within churches and church institutions provides an overwhelming basis for such a conclusion.
- 50 On the other hand, it is suggested, predominantly by psychologists, that ‘core human moral instincts, such as empathy, compassion, and shame are much more ancient than religiously motivated

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<sup>68</sup> For a further example of the effects of religious priming on honesty see, for example, Brandon Randolph-Send and Michael E Nielsen, ‘Honesty: One Effect of Primed Religious Representations’ (2007) 17(4) *International Journal for the Psychology of Religion* 303.

<sup>69</sup> Aditya Chakraborty, ‘How to stop cheating’ (2010) *The Guardian*. Retrieved from: <https://www.theguardian.com/commentisfree/2010/jun/15/exam-cheating-brain-food>.

<sup>70</sup> Ibid.

<sup>71</sup> Ariely (n 67).

<sup>72</sup> Ara Norenzayan, ‘Does religion make people moral?’ (2014) 151 *Behaviour* 365, 377–379.

<sup>73</sup> Ibid 377.

prosociality, and are deeply rooted in the primate heritage'.<sup>74</sup> The capacity for emotional contagion, consolation, and grief found in chimpanzees and elephants, together with the moral intuitions of babies as young as 6-months, is said to support this view.<sup>75</sup>

- 51 Proponents of the view that religion is not necessary for morality also argue that the requirement for a higher or superior being to monitor immoral behaviour is superfluous, particularly in communities with a strong rule of law.<sup>76</sup> This is because, it is argued, morality, including cheating and fair competition, can be monitored and enforced by strong public institutions.<sup>77</sup> Public scandals resulting from systemic and embedded immoral behaviour within large organisations, such as the collapse of Enron, and the findings of the recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, suggest that the monitoring and enforcement of seemingly 'strong' public institutions is inefficient and ineffective. Whilst additional legislation and regulation has, and will no doubt continue to, follow from those and other similar scandals, the utility of such an approach to curbing immoral behaviour has been doubted.<sup>78</sup> It is arguably difficult to suggest that a strong rule of law and strong public institutions act as monitors of immoral behaviour.
- 52 The theologians, philosophers and ethicists must be left to grapple with the task of determining whether religion is in fact a necessary basis for morality. What can be said, however, is that if religion is neither necessary nor sufficient for moral conduct, then the argument that religion is for the public benefit (in that it promotes moral and community values) is weakened. Conversely, if religion is a necessary for morality and the development of moral principles and standards, then religion's social benefit will likely provide a legitimate basis for the retention of the presumption of public benefit.
- 53 Let me turn now to two further interrelated reasons as to why the presumption of the public benefit of religion that exists in charity law might continue to be justified, namely, because of its social and economic benefits.
- 54 The Australian Bureau of Statistics reports that in 2018, 61% of Australians reported being affiliated with a religion or spiritual belief.<sup>79</sup> However, it is suggested that it is not just this 61% of Australians who enjoy the social and economic benefits of religion; rather, by their very nature, those benefits are spread throughout broader society.

<sup>74</sup> Ibid citing FB de Waal, 'Putting the altruism back into altruism: the evolution of empathy' (2008) 59 *Annual Review of Psychology* 279.

<sup>75</sup> Ibid. Also citing J. Kiley Hamlin, Karen Wynn and Paul Bloom, 'Social evaluation by preverbal infants' (2007) 450 *Nature* 557.

<sup>76</sup> Norenzayan (n 72) 379. See also Benedikt Hermann, Christian Thöni and Simon Gächter, 'Antisocial Punishment Across Societies' (2008) 319 *Science* 1362; A Norenzayan and WM Gervais, 'The origins of religious disbelief' (2013) 17(1) *Trends in Cognitive Sciences* 20.

<sup>77</sup> Ibid.

<sup>78</sup> William A. Niskanen, 'Repeal Sarbanes-Oxley – Lock, Stock and Barrel' (2008) Cato Institute. Retrieved from: <https://www.cato.org/publications/commentary/repeal-sarbanesoxleylock-stock-barrel>.

<sup>79</sup> Australian Bureau of Statistics, *Census reveals Australia's religious diversity on World Religion Day* (18 January 2018) Australian Bureau of Statistics <[https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFC\\_A25821800203DA4?OpenDocument](https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/8497F7A8E7DB5BEFC_A25821800203DA4?OpenDocument)>.

### *B The Social Benefits of Religion*

- 55 The main societal benefits of religion can be broadly categorised as relating to social capital, social cohesion, and community health and well-being, and it is through its contribution to these social facets that religion is said to affect the economy in a positive way.
- 56 Social capital and social cohesion are related concepts. Whilst the OECD defines social capital as ‘networks together with shared norms, values and understandings that facilitate co-operation within or among groups’,<sup>80</sup> a cohesive society is defined as one which ‘works towards the well-being of all members, minimising disparities and trying to avoid marginalisation within and between groups’.<sup>81</sup> The positive effects of religion on these concepts have been well documented, albeit predominantly in the context of the United States. For example, religious participation and increased religiosity has been linked to lower levels of criminal behaviour at both an individual and society level,<sup>82</sup> increased civic involvement and volunteering,<sup>83</sup> and increased levels of education.<sup>84</sup> In the context of volunteering and wider social benefits, research suggesting that religious individuals are more likely to volunteer at both religious and secular organisations than the non-religious or atheists is particularly noteworthy.<sup>85</sup> Several studies also indicate a link between the practice of religion and marital satisfaction, lower divorce rates, and a decreased likelihood of domestic violence.<sup>86</sup>
- 57 More recently, evidence has emerged of the significant role played by religion in shaping post-industrial cities and communities and, more concerningly, that the shutting down of religious congregations in inner city areas ‘precedes and contributes to the socio-economic collapse of the community in which the congregation was located’.<sup>87</sup> This effect is attributed to the connection of heterogenous social groups brought about through religious congregations.<sup>88</sup> Given broad community concern for the need for societal connectedness and integration between all social groups, the social value of religion ought not be understated.

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<sup>80</sup> Organisation for Economic Co-operation and Development, *The Well-Being of Nations: The Role of Human and Social Capital* (2018) Organisation for Economic Co-operation and Development. <http://www.oecd.org/site/worldforum/33703702.pdf>.

<sup>81</sup> Organisation for Economic Co-operation and Development, *Social Cohesion* (2019) Organisation for Economic Co-operation and Development <https://www.oecd.org/dev/inclusivesocietiesanddevelopment/social-cohesion.htm>.

<sup>82</sup> T. David Evans, Fancis T. Cullen, R. Gregory Dunaway, Velmer S. Burton JR, ‘Religion and Crime Reexamined: The Impact of Religion, Secular Controls and Social Ecology on Adult Criminality’ (1995) 33 *Criminology* 195; Jody Lipford, Robert McCormick and Robert Tollison, ‘Preaching Matters’ (1993) 21 *Journal of Economic Behaviour and Organisations* 235; Colin J. Baier and Bradley R. Entner Wright, ‘“If You Love Me, Keep My Commandments”: A Meta-Analysis of the Effect of Religion on Crime’ (2001) 38(1) *Journal of Research in Crime and Delinquency* 3.

<sup>83</sup> Stijn Ruiter and Nan Dirk De Graaf, ‘National Context, Religiosity, and Volunteering: Results from 53 Countries’ (2006) 71 *American Sociological Review*, 191.

<sup>84</sup> Jonathan Gruber, ‘Religious Market Structure, Religious Participation, and Outcomes: Is Religion Good for You’ (2005) NBER Working Paper No. 11377.

<sup>85</sup> Ruiter and Nan Dirk De Graaf (n 83) 207.

<sup>86</sup> Mahoney, A, Pargament, KI, Tarakeshwar, N and Swank, AB, ‘Religion in the home in the 1980s and 1990s: a meta-analytic review and conceptual analysis of links between religion, marriage and parenting’ (2001) 15(4) *Journal of Family Psychology* 559; Christopher G. Ellison and Kristin L. Anderson, ‘Religious Involvement and Domestic Violence Among U.S. Couples’ (2001) 40(2) *Journal for the Scientific Study of Religion* 269.

<sup>87</sup> Brian J. Grim and Melissa E. Grim, ‘The Socio-economic Contribution of Religion to American Society: An Empirical Analysis’ (2016) 12 *Interdisciplinary Journal of Research on Religion*, 1, 4 citing Nancy T Kinney and Todd Bryan Combs, ‘Changes in religious ecology and socioeconomic correlates for neighborhoods in a metropolitan region’ (2015) 38(3) *Journal of Urban Affairs* 409.

<sup>88</sup> Grim and Grim (n 87) 4.

58 In relation to community health and well-being, research also suggests a positive relationship between the practice of religion and, increased mental health,<sup>89</sup> increased physical health, for example, through lower rates of heart disease and lower blood pressure,<sup>90</sup> increased life expectancy,<sup>91</sup> and increased subjective well-being.<sup>92</sup> Whilst the reason for such positive relationships are yet to be established, Professors Mochon, Norton, and Airely, of the Yale School of Management, Harvard Business School, and Duke University respectively, posit that ‘a number of factors underlie the link between religiosity and well-being, from the social support and prosocial behaviours that religion encourages, to the coherent framework that religion provides, [and] the coping mechanisms that alleviate stress and assuage loss.’<sup>93</sup> Whatever the reason, the broad public benefits of increased health and well-being, even if only enjoyed by those who identify as religious, are relatively uncontroversial.

### C The Economic Benefits of Religion

59 These, and other, social benefits of religion have been shown to translate into economic benefits which, in turn, benefit the broader community. Although it is difficult to quantify the benefits of religion, particularly those relating to subjective feelings of well-being and community cohesion, the available data is telling.

60 A 2015 study conducted by researchers at Georgetown University and the Newseum Institute in Washington DC, considered the annual revenue from the goods and services of religious organisations and the impact of religion on American businesses and concluded, conservatively, that religion contributed approximately \$1.2 trillion to the US economy each year.<sup>94</sup> This equates to around 7% of American GDP. The organisations and revenue streams examined in that study included churches themselves and congregational activities as well as church-run educational institutions, hospitals, other healthcare providers, and charities.<sup>95</sup> Two years earlier, in his book *America’s Blessings*, sociologist Rodney Stark estimated the contribution of religion to the US economy to be approximately \$2.6 trillion annually.<sup>96</sup> Professor Stark’s estimate accounts for, among other things, the long-term unemployment benefits brought about by increased levels of education and money saved on healthcare and law

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<sup>89</sup> Hackney, C H and Sanders, G S, ‘Religiosity and mental health: A meta-analysis of recent studies’ (2003) 42(1) *Journal for the Scientific Study of Religion* 43; Kendler KS, Liu XQ, Garnder CO, McCullough ME, Larson D and Prescott CA, ‘Dimensions of religiosity and their relationship to lifetime psychiatric and substance use disorders’ (2003) 160(3) *American Journal of Psychiatry* 496.

<sup>90</sup> George W Comstock and Kay B Partridge, ‘Church attendance and health’ (1972) 25 *Journal of Chronic Diseases* 665, 671; Larson DB, Koenig HG, Kaplan BH, Greenberg RS, Logue E and Tyroler HA. ‘The impact of religion on men’s blood pressure’ (1989) 28(4) *Journal of Religion and Health* 265, 265.

<sup>91</sup> Linda K. George, Christopher G. Ellison and David B. Larson, ‘Explaining the Relationship between Religious Involvement and Health’ (2002) 13(3) *Psychological Inquiry* 190; Weber SR and Pargament KI, ‘The role of religion and spirituality in mental health’ (2014) 27(5) *Current Directions in Psychological Science* 358.

<sup>92</sup> Daniel Mochon, Michael I. Norton and Dan Ariely, ‘Who Benefits from Religion’ (2011) 101 *Social Indicators Research* 1; David G Myers, ‘The funds, friends and faith of happy people’ (2000) 55(1) *American Psychologist* 56; Christopher G Ellison, ‘Religious Involvement and Subjective Well-Being’ (1991) 32(1) *Journal of Health and Social Behaviour* 80.

<sup>93</sup> Mochon et al (n 92) 2.

<sup>94</sup> Grim and Grim (n 87) 27.

<sup>95</sup> Ibid 5–25.

<sup>96</sup> Sarah Pulliam Bailey, *Christianity is declining at a rapid pace, but Americans still hold positive views about religion’s role in society* (16 November 2019) The Washington Post <<https://www.washingtonpost.com/religion/2019/11/15/christianity-is-declining-rapid-pace-americans-still-hold-positive-views-about-religions-role-society/>>.

enforcement as a result of religion's effect on the physical and mental health and criminal behaviour. Of course, as with all economic benefits, the benefits of religion have some corresponding costs. These include, among other, the pure economic costs of religious donations, the costs of the favourable tax treatment of religious organisations, and the social costs felt by some individuals, such as those with waning beliefs,<sup>97</sup> and those who feel excluded or discriminated against because of a religious organisation's rejection of their personal circumstances, whatever they may be. Nevertheless, the research suggests that the overall economic benefits of religion far outweigh those costs. Despite the disparity between the two estimates, it is clear that the economic contribution of religion to the US economy is significant.

- 61 There has been less research undertaken in this country into the economic value of religion. Some insights can be gleaned, however, from a study published by Deloitte Access Economics in 2018 into the impact of religiosity on giving and volunteering behaviour in Australia. The study estimated that religiosity, defined by reference to those who attend places of worship or devotion on a regular basis, is associated with 194,320 additional volunteers in Australia each year who collectively contribute 30.5 million hours in volunteering time (2.4% of total volunteering hours), the monetary value of which was estimated at \$339 million. The study also estimated that religiosity positively affects the likelihood of an individual to donate, bringing about an additional \$142 million in donations each year (or 1.7% of total donations). The total annual value to society of volunteering and giving associated with religiosity was \$481 million.<sup>98</sup>

#### V CONCLUSION

- 62 The various studies that I have discussed this evening, suggest that there exist strong arguments for the retention of the presumption of the public benefit of religion, even within the increasingly secular nature of 21st Century Australian society. From a purely economic perspective, a public benefit will remain until the overall cost of religion exceeds its overall benefits. Given the apparent magnitude of the contribution of religion to the economy at large, even extrapolating from the US studies, some fundamental change would appear to be necessary in order for those benefits to be outweighed by the economic costs of religion. From a societal perspective, even if a relatively smaller proportion of society enjoys the direct social benefits of religion, the remainder of society will continue to enjoy indirect benefits to varying degrees. The social costs of religion are generally carried only by a small number of individuals and are therefore unlikely to exceed its social benefits.

- 63 So, might any of this have helped the Jedi in the UK?

- 64 Whilst the Temple of Jedi Order may still not meet the definition of religion under charity law, at least in the United Kingdom, it may well have an argument that it satisfies the public benefit test. If moral behaviour is dictated by a sense of belief in a higher or superior monitoring being, the Jedi belief of "the Force" and understanding that they should protect and defend the helpless, and avoid acting on "dark side emotions", must surely stop at least some immoral behaviour. Moreover, as I have discussed, many of the social benefits of religion stem from the sense of community brought about through religious practice. When one thinks of the scale and hysteria that surrounds mega-events such as Comic Con, it is difficult to imagine a more cohesive community than those centered around fictional stories and characters. The social, health, and well-being benefits of religion experienced directly by those members of the Jedi Temple will all have flow-on effects to broader society. Finally, in addition to

<sup>97</sup> Mochon et al (n 92) 12–13.

<sup>98</sup> Deloitte Access Economics, 'Economic value of donating and volunteering behaviour associated with religiosity' (SEIROS, 2017).

those economic benefits brought about through the social benefits of the Jedi Temple, if the group contributes even a small amount to the overall value of the Star Wars franchise, it is likely that the Jedi Temple makes a positive contribution to the economy of the countries in which it operates.

- 65 As the Jedi Master Obi-Wan Kenobi himself said, “[t]he Force is what gives a Jedi his power. It’s an energy field created by all living things. It surrounds us and penetrates us. It binds the galaxy together.” Perhaps the same might be said of religion – and hence its capacity to benefit both the religious and the non-religious.

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