

## RESTRICTED PHILANTHROPIC GIFTS: PARADIGM CLASH BETWEEN LAW AND PRACTICE OR SIMPLY A MUDDLE?

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*Restricted philanthropic gifts are becoming more common, yet their legal characterisation is unsettled. Moreover, other than from anecdotal evidence, it is unclear how charities treat such gifts in practice. This article investigates the potential legal characterisations of restricted gifts and identifies the charitable trust as a commonly preferred construction by the courts. It then examines original empirical interview evidence from charities to show that, contrary to legal expectations, charities do not typically treat restricted gifts as being on charitable trust, but rather as being subject to an agreement or an extra-legal set of agreed norms with donors. This indicates a move away from a publicly regulated arrangement (the charitable trust) to private ordering arrangements, which has implications for the pursuit of public goals and the degree of power afforded to donors over social, cultural and environmental projects.*

### I INTRODUCTION

Commentators have increasingly noted over the last few decades that donors, especially large donors, are seeking more control over the philanthropic undertakings funded by their donations.<sup>1</sup> Much of this commentary is based on a growing use

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1 Aaron Horvath and Walter W Powell, 'Seeing Like a Philanthropist: From the Business of Benevolence to the Benevolence of Business' in Walter W Powell and Patricia Bromley (eds), *The Nonprofit Sector: A Research Handbook* (Stanford University Press, 3<sup>rd</sup> ed, 2020) 81, 116–17 <<https://doi.org/10.1515/9781503611085>>; Evelyn Brody, 'From the Dead Hand to the Living Dead: The Conundrum

of gift restrictions in the United States, but some refer to activities more broadly outside the United States,<sup>2</sup> including in Australia.<sup>3</sup> One potential reason is donor desire to apply the practices that were successful for them in the business world,<sup>4</sup> which would reflect broader application of for-profit business norms to the charity sector and the rise of the social enterprise movement.<sup>5</sup> There are also often likely to be reasons linked to an attempt to project the donor's values and interests into the future.<sup>6</sup> Most charity recipients are, however, perpetual or long-lasting and social mores and environmental and economic circumstances change over time as starkly demonstrated by the COVID-19 pandemic. Accordingly, charities typically prefer unrestricted gifts to maintain flexibility to best pursue their purpose over time.

This potential divergence between the aims of donors and charities reflects a tension in the broader institutional settings. That is, charity law – through cy pres rules, Australian Charities and Not-for-profits Commission registration requirements and tax law requirements for deductible gifts – seeks to provide a degree of respect for donor intent (so as to incentivise donations), while also permitting that intent to be overridden in some circumstances to achieve greater public benefit or to prohibit private benefit for donors.<sup>7</sup> However, the manner in which these institutions manage that tension varies markedly with the legal characterisation of the restrictions imposed by a donor. For instance, restrictions that give rise to a charitable trust (the characterisation historically preferred by the

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of Charitable-Donor Standing' (2007) 41 *Georgia Law Review* 1183, 1188–90; John K Eason, 'The Restricted Gift Life Cycle, or What Comes Around Goes Around' (2007) 76(2) *Fordham Law Review* 693, 704–5; Susan A Ostrander, 'The Growth of Donor Control: Revisiting the Social Relations of Philanthropy' (2007) 36(2) *Nonprofit and Voluntary Sector Quarterly* 356 <<https://doi.org/10.1177/0899764007300386>>; Paul Valley, *Philanthropy: From Aristotle to Zuckerberg* (Bloomsbury Publishing, 2020) 465–7, 672–3; Roger Colinvaux, 'Strings Are Attached: Shining a Spotlight on the Hidden Subsidy for Perpetual Donor Limits on Gifts' (2023) 56(4) *Loyola of Los Angeles Law Review* (forthcoming); Natalie Silver, 'The Tax Treatment of Donor-Restricted Charitable Gifts' (2021) 36(1) *Australian Tax Forum* 103, 103–4 ('Tax Treatment').

2 Valley (n 1) 465–7, 672–3.

3 Silver, 'Tax Treatment' (n 1) 103–4.

4 Horvath and Powell (n 1) 117; Valley (n 1) 465–7.

5 Helmut K Anheier and Stefan Toepler, *Nonprofit Organizations: Theory, Management, Policy* (Routledge, 3rd ed, 2023) 325–7 <<https://doi.org/10.4324/9780429299681-2>>. For discussion of these trends taken to extremes, see Dana Brakman Reiser and Steven A Dean, *For-profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving* (Oxford University Press, 2023) <<https://doi.org/10.1093/oso/9780190074500.001.0001>>.

6 By analogy with the application of donative economics to the creation of perpetual charitable trusts to understand donor motivation: John Picton, 'Regulating Egoism in Perpetuity' in John Picton and Jennifer Sigafos (eds), *Debates in Charity Law* (Hart Publishing, 2020) 53 <<https://doi.org/10.5040/9781509926862.ch-004>>. See also Teresa Odendahl, *Charity Begins at Home: Generosity and Self-Interest among the Philanthropic Elite* (Basic Books, 1990) 232; Miranda Perry Fleischer, 'Subsidizing Charity Liberally' in Matthew Harding (ed), *Research Handbook on Not-for-profit Law* (Edward Elgar Publishing, 2018) 418, 440 <<https://doi.org/10.4337/9781785369995.00029>>.

7 See, eg, Rachael P Mulheron, *The Modern Cy-près Doctrine* (Routledge, 2013) 87–9; GE Dal Pont and S Petrow, *Law of Charity* (LexisNexis Butterworths, 3rd ed, 2021) [6.6]; Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016) 53–4; Ian Murray, 'The Donor Control/Public Benefit Balance Underlying Philanthropic Tax Concessions' in Henry Peter and Giedre Lideikyte Huber (eds), *The Routledge Handbook of Taxation and Philanthropy* (Routledge, 2021) 138, 139–40 <<https://doi.org/10.4324/9781003139201-10>>; Silver, 'Tax Treatment' (n 1) 105.

courts) would typically mean that reform of purpose, or even of the administrative machinery for carrying out the purpose, would require court (or sometimes Attorney-General) approval, as well as involvement of the Attorney-General as a party. In that case, the Attorney-General as an actor with a view to the public interest plays a key role. That is because it is the duty of the state to ensure the proper administration of charitable trusts and as chief law officer of the state, this duty is carried out by the Attorney-General.<sup>8</sup> In contrast, if a restriction is viewed as a term of a binding agreement, amendment may involve only the private parties: the donor (or their representative) and the charity.

Given the consequences for the public and the growing incidence of restricted donations, it is surprising that these divergent treatments remain under-examined.<sup>9</sup> This article therefore examines whether these developments are evidence of a paradigm clash between public and private conceptions of restrictions on charitable donations and how in practice charities perceive restrictions to operate. Part II explains briefly what is meant by ‘restricted’ donations or gifts. Part III investigates the range of potential legal characterisations of restricted gifts and considers which characterisation is typically preferred by the courts and why. Part IV presents empirical evidence about how a sample of Western Australian charities are interpreting restricted gifts in practice, demonstrating that the charities do not have a good understanding of the legal characterisation of the gifts and that the process most often adopted for intended breaches of a restriction is to reach agreement with the donor or their representative.

The finding of privately agreed variation in Part IV runs directly counter to the public variation procedures generally required for restricted donations based on the law’s preferred charitable trust characterisation. Accordingly, in Part V we consider why such a divergence might be arising and its implications for charities and the regulation of philanthropy. Part VI concludes this article.

## II RESTRICTED PHILANTHROPIC GIFTS

Any philanthropic gift made to a charity is, in a sense, restricted. A gift to the trustee of a charitable trust that is intended to be an addition to the trust must be used for the charitable purpose articulated in the trust deed. A gift to an incorporated charity to be used as it sees fit must still be used for the charitable purposes set out in the constitution.<sup>10</sup> The trustees or the charity hold the donation under the terms of

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8 Dal Pont and Petrow (n 7) [14.24].

9 With the exception in Australia of Natalie Silver, who has recently investigated the tax treatment of restricted gifts and a contractual agreement analysis of such gifts: Silver, ‘Tax Treatment’ (n 1); Natalie Silver, ‘The Contractualisation of Philanthropy’ (2022) 38(2–3) *Journal of Contract Law* 248 (‘Contractualisation’). This article builds on Silver’s analysis by expanding the tax analysis to *Income Tax Assessment Act 1936* (Cth) s 78A and by applying the analysis to the broader range of legal characterisations set out in Part III, as well as by discussing the potential for tax analysis to drive a preferred characterisation of donor restrictions.

10 This article focuses on incorporated charities and trustees of charitable trusts as donation recipients because that reflects the sample of Western Australia charities in the empirical study. Unincorporated

the trust deed or the constitution, as applicable. That constituent document requires the trustees/the charity to apply the assets for the charitable purpose, such that the trustees or incorporated charity can potentially be compelled to use assets for the stated purposes.<sup>11</sup> Pursuant to the constituent document, the trustees or directors of an incorporated charity may also have created internal policies or rules about the use of gifts, which could amount to self-imposed restrictions.

This article is focused on additional gift conditions expressed by a donor. By way of an example of a restricted donation, a donor may give money subject to the restriction that the initial gift (the capital) be invested and only the income earned on the invested capital be spent. This is typically what is meant when a gift is said to be ‘endowed’. Alternatively, the donor might select a specific purpose that falls within a charity’s overall purposes, such as giving money to an educational charity for bursaries for students to attend an outdoor education camp, as opposed to the broader purpose of advancing education.<sup>12</sup>

### III CHARACTERISING RESTRICTED GIFTS AT LAW

Determining the legal effect of a restriction on a donation can be difficult, as there is a range of possibilities that may differ in some ways for gifts under a will and lifetime gifts. Identifying the applicable legal character of a gift requires ascertaining the objective intention of the donor or testator,<sup>13</sup> although this may be in circumstances where the donor or testator may well not be aware of all the different legal characterisations available. Evidence of a donor’s objective intention

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associations have legal disincentives as property-holding structures and so the skew in the sample is unsurprising. However, it is worth noting that some medium and large Australian charities, primarily religious charities, are in the form of unincorporated associations: Natasha Cortis et al, *Australian Charities Report 2015* (Report, December 2016) 104. The analysis of the results of the empirical study is also relevant to unincorporated associations, though may need slight adjustments in some instances. In any event, many religious charities have property holding arrangements created under statute (corporation, corporation sole, statutory trust, etc).

- 11 In the case of trustees, the donation will be held on charitable trust and the discussion below about restrictions imposed via charitable trusts is applicable. In the case of incorporated charities, there is debate about whether such charities hold their general assets subject to obligations analogous to trustees and as to the precise bases upon which compliance with obligations might be achieved. For recent discussion, see, eg, Gino Dal Pont, “‘Charity’ and Trusts: Mutuality or Intersection?” (2016) 10(1) *Journal of Equity* 26, 42–9 (“‘Charity’ and Trusts”); Ian Murray and Rosemary Teele Langford, ‘The Best Interests Duty and Corporate Charities: The Pursuit of Purpose’ (2021) 15(1) *Journal of Equity* 92, 99, 106–9.
- 12 In the case of a gift to an incorporated entity, the conditionality could arise simply from the gift being expressed to be for a purpose that is narrower than the range of purposes permitted under the entity’s constitution: cf *A-G (Old) ex rel Nye v Cathedral Church of Brisbane* (1977) 136 CLR 353, 371–2 (Jacobs J), discussing donations for building a hospital made to a religious body.
- 13 *Gill v Gill* (1921) 21 SR (NSW) 400, 407 (Harvey J); *A-G v Dean and Canons of Windsor* (1860) 8 HL Cas 369; 11 ER 472, 481–2 (Lord Campbell LC), 494, 496 (Lord Wensleydale) (charity case) (“*Dean and Canons of Windsor*”); *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 498, 502–3 (Gummow J) (“*Australian Elizabethan Theatre Trust*”) (charity case), 498, 502–3 (Gummow J); *Byrnes v Kendle* (2011) 243 CLR 253, 273–5 [53]–[59] (Gummow and Hayne JJ), 284 [98], 286–90 [102]–[115] (Heydon and Crennan JJ); *Re Field* [2023] VSC 210, [17]–[22] (Moore J). See also JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) [2-26]–[2-39], [5-02]–[5-03].

can be found in the language used by the donor, the nature of the property and the nature of the condition imposed, as well as the whole of the circumstances of the relationship between the donor and the recipient charity.<sup>14</sup>

## A Key Categories

Previously, there has been no list provided of the legal characterisations that apply to restricted donations in Australia.<sup>15</sup> However, cases on conditional gifts, trusts texts and overseas charity law monographs suggest six main potential legal characterisations of restrictions.<sup>16</sup> These characterisations are analysed below, along with an overview of other potentially applicable characterisations.

### 1 *Mere Wish*

A ‘restriction’ might be interpreted as a mere wish or expression of desire on the part of the donor that the funds be used for a particular purpose.<sup>17</sup> Under this construction as a non-binding wish, there are no legal consequences if the charity uses the funds for another purpose or otherwise contrary to the wish. Of course, the charity would still need to use the gift in accordance with its own charitable purposes. But this could permit the charity to, for example, spend a gift to pursue its purposes today, rather than following a wish to spend only the income and maintain the capital.

14 See above n 13. See also *Misra v Hindu Heritage Research Foundation Ltd* (Supreme Court of New South Wales, Young J, 21 June 1996) 8–13 (charity case) (‘*Misra*’).

15 Including Australia’s leading charity law monograph, Dal Pont and Petrow’s *Law of Charity*: see above n 7 (albeit Dal Pont does discuss several of these characterisations).

16 As to the potential differing bases for restricted gifts, see, eg, *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 418–20 (Dixon J) (payment under trust) (‘*Countess of Bective*’); *Australian Elizabethan Theatre Trust* (n 13) 498, 502–3 (Gummow J) (lifetime donations received by cultural charity with preference for passing onto other cultural organisation charity recipients); *Re Boning* [1997] 2 Qd R 12, 21–5 (White J) (will case involving gift to a charity to be used for benefit of a third party charity); *Gill v Gill* (n 13) 407 (Harvey J) (non-charitable bequest); *Muschinski v Dodds* (1985) 160 CLR 583, 604–7 (Brennan J) (lifetime non-charity case). See also Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4<sup>th</sup> ed, 2014) 320–1; Heydon and Leeming (n 13) [2-26]–[2-39]; William Henderson and Jonathan Fowles, *Tudor on Charities* (Thomson Reuters, 10<sup>th</sup> ed, 2015) [6-030]–[6-042]; Law Commission (UK), *Technical Issues in Charity Law* (Report No 375, 13 September 2017), 204–6 (noting the tendency toward a trust characterisation for permanent endowment assets); *Hammond v Hammond* [2007] NSWSC 106, [12]–[37] (Young CJ in Eq) (will case, gift to second person on condition that it be applied for the benefit of a third person – non-charity case); *Re Potter* [1970] VR 352, 353–4 (Menhennitt J) (non-charitable bequest). Contract is not often stated as a basis, but see Dal Pont, ‘“Charity” and Trusts’ (n 11) 40–1; TC Thomas, ‘Conditions in Favour of Third Parties’ (1952) 11(2) *Cambridge Law Journal* 240, 240 <<https://doi.org/10.1017/S0008197300005237>>; Silver, ‘Contractualisation’ (n 9) 251–3; *Charity Commission for England and Wales v Framjee* [2015] 1 WLR 16, 29 [42] (Henderson J) (‘*Framjee*’).

17 See, eg, *Australian Elizabethan Theatre Trust* (n 13) 504–7, 510 (Gummow J). For discussion of the cases analysing precatory wording to determine whether it evidences an intention to create an express trust or just a mere wish, see Heydon and Leeming (n 13) [5-05]–[5-11].

## 2 Charitable Trust

A restriction might be characterised as being a charitable purpose for which the funds have been given, with the recipient charity treated as a trustee of the gift with fiduciary obligations to use the gift for that restricted charitable purpose, rather than for its own broader charitable purposes.<sup>18</sup> For instance, a donation to a university expressed to be subject to a requirement that the university use the interest earned each year on the donation to provide an annual scholarship to a female engineering student, might be characterised as meaning that the university holds that donation on charitable trust for the purpose of advancing education by the provision of such a scholarship.

Indeed, for charitable trusts intended to last in perpetuity, it is common for courts to interpret the trust (where the trust deed, if any, does not expressly authorise termination of the trust or distribution of capital) as involving an endowment restriction on the use of capital even absent an express prohibition.<sup>19</sup> In any event, the majority of charitable trusts appear to contain terms in their deeds prohibiting or limiting distribution of capital.<sup>20</sup>

Alternatively, if the purpose of the charitable trust is narrower (for example, to treat symptoms of a disease) than that of the recipient charity (for example, the advancement of health), then that would restrict the recipient charity from using the funds for its broader purposes – for example, to support prevention of a disease as opposed to treating its symptoms.

A restricted gift will be more likely to be treated as giving rise to a charitable trust if the donor states that it should be kept in a separate account and recorded in the recipient charity's accounts as being 'earmarked' for a particular purpose.<sup>21</sup>

## 3 Common Law Condition Subsequent Giving Rise to Forfeiture

A restriction could be construed as a 'condition subsequent'<sup>22</sup> that if the donated property is not used for the specified purpose or in the specified manner, then the

18 See, eg, *Re Smith* [1967] VR 341, 343 (Menhennitt J) (lifetime gift, albeit the recipient was a government entity, not a charity); *A-G v Wax Chandlers' Co* (1873) LR 6 HL 1, 12–13 (Lord Chelmsford) (bequest to non-charity to be used for a charitable purpose) ('*Wax Chandlers' Co*'); *Save the Heritage Simpson Covenant Society v City of Kelowna* [2008] BCSC 1084, [145] (Bruce J) (favourable sale agreement of land to local government entity gave rise to charitable trust). That the recipient is a charity will be relevant if the purported restrictions are merely a reference to its purposes (discretion as to how to apply the amount as amongst those purposes resting with the recipient), in that a trust interpretation is less likely since the entity will already be subject to restraints on its use of the gift for its overall charitable purposes: *Bowman v National Secular Society* [1917] AC 406, 440–1 (Lord Parker).

19 See, eg, *Re Roberts* [1963] 1 WLR 406, 414, 416 (Wilberforce J). See also Henderson and Fowles (n 16) [21-022]–[21-025].

20 Financial Services Council, Submission to Corporations and Markets Advisory Committee, *Administration of Charitable Trusts* (21 December 2012) 16.

21 *Australian Elizabethan Theatre Trust* (n 13) 498, 505–6 (Gummow J); *Framjee* (n 16) 25 [28] (Henderson J). Keeping funds in separate bank accounts and earmarking them in the accounts for a specific purpose might also demonstrate an intention on the part of the recipient charity to create a trust.

22 Rights of entry upon failure of a condition subsequent and possibilities of reverter were historically recognised in relation to hereditaments, but over time, the circumstances in which a common law condition can be attached to property appear to encompass most forms of property: Henderson and

donated property will either revert to the donor if the donor exercises their right of re-entry,<sup>23</sup> or be gifted-over to another charity.<sup>24</sup> A donor can typically pass such rights of re-entry on (for example, to a spouse or children) under their will.<sup>25</sup> A gift-over mechanism would typically be expressly noted in the gift. For instance, a donor might give a gift to a social welfare charity to benefit disadvantaged children in Perth, subject to a condition that should the social welfare charity fail to apply the gift for the benefit of disadvantaged children, the gift should be handed over to a school to support the education of disadvantaged children.<sup>26</sup>

An alternative, but infrequent, interpretation of the restriction might be that it automatically results in the property reverting to the donor, with no need for the donor to take any action (a possibility of reverter).<sup>27</sup>

The rules against perpetuities have a bearing on how a condition subsequent will operate in Australia. In Western Australia, for example, for gifts made before the statutory reform of perpetuities rules in 1962,<sup>28</sup> such conditions and rights of re-entry are likely to be void as infringing the rule against perpetuities.<sup>29</sup> This would

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Fowles (n 16) [6-036]; *Muschinski v Dodds* (n 16) 605–6 (Brennan J), cited in *Islamic Association of Wanneroo Inc v Al-Hidayah Mosque Inc* [No 2] [2009] WASC 404, [71]–[72] (Murphy J) (*‘Islamic Association of Wanneroo’*). They may give rise to a resulting trust in favour of the donor if the condition is breached: *Misra* (n 14) 5 (obiter).

- 23 See, eg, *Islamic Association of Wanneroo* (n 22) [71]–[72] (Murphy J) (land transferred subject to restrictions applied as permitted by the *Land Administration Act 1997* (WA)); *Jack v Burnett* (1846) 12 Cl & Fin 812; 8 ER 1632, 1639 (Lord Cottenham LC) (inter vivos gift to educational charity on condition that the charity provide for three scholars nominated from time to time by the donor and his heirs); *A-G v Cordwainers’ Co* (1833) 3 My & K 554; 40 ER 203, 207 (Sir Leach MR) (bequest of Inn and lands to Cordwainers’ Company on condition that certain charitable and non-charitable legacies were paid and with right of forfeiture given to brother of testator (or his heirs) if Cordwainer’s Company failed to fulfil conditions); Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Lawbook Co, 7<sup>th</sup> ed, 2020) [2.230].
- 24 *A-G v Coopers’ Co* (1840) 3 Beav 29; 49 ER 12, 14–15 (Lord Langdale MR) (bequest to Coopers’ Company with income to be used for charitable purposes and some retained by Coopers’ Company, with gift-over to the Grocers’ Company if Coopers’ Company failed to fulfil the conditions). A condition subsequent was the preferred construction at first instance and in the Court of Appeal for *Wax Chandlers’ Co* (n 18) in the context of a gift-over condition (subsequently set aside on appeal in favour of a charitable trust characterisation). As to the basis for the imposition of a condition, see *Wax Chandlers’ Co* (n 18) 19 (Lord Cairns).
- 25 See *Wills Act 1970* (WA) s 6; John Hockley and Peter MacMillan, LexisNexis, *Wills, Probate and Administration WA* (online at 10 January 2024) [24,015.5]. As for the ability to transfer such rights more broadly, see also Brendan Edgeworth et al, *Sackville and Neave: Australian Property Law* (LexisNexis Butterworths, 11<sup>th</sup> ed, 2021) [3.33]–[3.34], [7.63]; *Property Law Act 1969* (WA) s 11(1) (*‘Property Law Act’*). In an English context, see JHC Morris and W Barton Leach, *The Rule against Perpetuities* (Stevens & Sons, 2<sup>nd</sup> ed, 1962) 210.
- 26 Cf *Corporation of London as Trustee of Christ’s Hospital v Grainger* (1848) 1 Mac & G 460; 41 ER 1343, 1345 (Lord Cottenham LC) (*‘Grainger’*).
- 27 See above n 22.
- 28 *Law Reform (Property, Perpetuities, and Succession) Act 1962* (WA), the relevant provisions of which are now contained in the *Property Law Act* (n 25).
- 29 Edgeworth et al (n 25) [7.63]–[7.64]; Morris and Leach (n 25) 210–18. However, as these authors discuss, if the condition is analogous to a possibility of reverter such that the property reverts automatically, the common law perpetuities rules would probably not be breached, so that the condition would apply. See also *Freemasons Hospital v A-G (Vic)* [2010] VSC 373, [107]–[109] (Gardiner AsJ).

mean that the charity took the gift free from any restriction.<sup>30</sup> For gifts made after reform of the perpetuities rules, the condition would likely only be valid for the perpetuity period (generally 21 years if no period is specified in the gift),<sup>31</sup> such that the charity would only be legally obliged to comply with the condition for that period.<sup>32</sup> If the consequence is a gift over from one charity to another, no perpetuity limit applies and the condition would continue to restrict the use of the gift.<sup>33</sup>

#### 4 Equitable Personal Obligation

If a charity chooses to accept the benefit of a gift of property to which the donor links a restriction, then it may be treated as having an equitable obligation to also accept the restriction stipulated by the donor.<sup>34</sup> In other words, equity imposes an obligation because it would be unjust to accept the benefit but not the burden.<sup>35</sup> For instance, a donor might give money to an Australian environmental charity and stipulate that the charity should use the money to support the activities of its affiliated international coordinating environmental charity.<sup>36</sup>

Failure to perform the obligation could result in an order for a mandatory injunction being made on application by the donor,<sup>37</sup> or a liability to pay equitable compensation. This may mean that the recipient of the restricted gift is subject to greater liability than arises from some of the other legal characterisations. This is because the remedial consequence of breaching the obligation is not limited by the value of the property donated.<sup>38</sup> If the restriction refers to a gift-over upon failure to meet the restriction, however, then it is unlikely to be characterised as giving rise to an equitable personal obligation.<sup>39</sup>

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30 Cf *Re Smith* (n 18) 346–7 (Menhennitt J).

31 *Property Law Act* (n 25) ss 103, 111. For a restricted gift to a charity there would not appear to be any obvious lives in being to be added to the 21 years at common law. See generally, Morris and Leach (n 25) 218.

32 Where a condition becomes impossible to perform, it will also cease to apply: Thomas (n 16) 244.

33 *Property Law Act* (n 25) s 111(2); *Grainger* (n 26) 1344 (Lord Cottenham LC); Dal Pont and Petrow (n 7) [6.12].

34 *Re Boning* (n 16) 22–3 (White J) (gift to charity under will to be used for the benefit of a third-party charity). See also *Gregg v Coates* (1856) 23 Beav 33; 53 ER 13, 15 (Lord Romilly MR) (non-charity case, bequest); *Gill v Gill* (n 13) 406–7 (Harvey J) (non-charitable restricted bequest); *Re Williames* (1885) 54 LT 105 (non-charity case, restricted bequest).

35 Although the cases are not entirely clear on the legal basis for this characterisation, the strongest suggestions are that it is based on the equitable doctrine of election: *Gill v Gill* (n 13) 406 (Harvey J); *Hammond v Hammond* (n 16) [19] (Young CJ in Eq).

36 Cf *Re Boning* (n 16) 12–17 (White J).

37 *Ibid* 22 (White J) (charity case); *Hammond v Hammond* (n 16) [12]–[38] (Young CJ) (non-charity case); *Muschinski v Dodds* (n 16) 605 (Brennan J), 624–5 (Dawson J) (non-charity case).

38 *Countess of Bective* (n 16) 419 (Dixon J). Tentative support is also provided by Heydon and Leeming (n 13) [2-38]; *Hammond v Hammond* (n 16) [13] (Young CJ). See also *Gregg v Coates* (n 34) 15–16 (Lord Romilly MR).

39 *Public Trustee v Beckham* (1914) 15 SR (NSW) 6, 8–9 (Harvey J) (non-charity case involving gift over from life tenant).



## 5 Charge

Donated property may be given subject to a charge securing the use of the property for a particular purpose.<sup>40</sup> A charge is an equitable interest in the donated property held by the person in whose favour it is charged. It is a security interest in the property permitting access to the property to satisfy the obligations owed by the grantor of the charge.<sup>41</sup> So, for example, a donor might give land to a social welfare charity and provide that the land is subject to a charge to secure payment by the social welfare charity of the rental income by way of emergency financial grants to Western Australians who are in need.

A charge does not create an interest greater than the security interest, so that when the obligation or liability is fulfilled, the person holding the property retains the residue.<sup>42</sup> Although it would be unusual, it appears that the restriction need not be a purely monetary obligation, with some cases suggesting that restrictions can give rise to a charge where those restrictions relate to non-monetary obligations such as using a gift to provide clothing or housing, or to support the saying of masses.<sup>43</sup>

## 6 Legally binding agreement

Agreeing to comply with a restriction and to accept property can in some circumstances be characterised as creating a legally binding agreement between the donor and the charity. This characterisation would not apply to testamentary bequests but could apply to property given during the donor's lifetime. Without more, restrictions on a gift are not legally binding on the recipient unless the parties bind themselves to the terms of the gift by deed. This is because a gift other than by deed does not create a legally binding agreement in the absence of

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- 40 *Dean and Canons of Windsor* (n 13) 483–5 (Lord Campbell LC), 496–7 (Lord Wensleydale), 502–4 (Lord Chelmsford), 507 (Lord Kingsdown) (gift to incorporated charity with rules as to various charitable purposes to which a portion of the funds had to be applied; see also at 487–8, 492–3 (Lord Cranworth)); *Southmolton v A-G* (1854) 5 HL Cas 1; 10 ER 796, 804–6 (Lord Cranworth LC), 808 (Lord Brougham), 808–9 (Lord St Leonards) (bequest to local government body with charge to pay an annuity for the benefit of a school); *Henderson and Fowles* (n 16) [6-007]; *Picarda* (n 16) 321. See also *A-G v Fishmongers' Co* (1841) 5 Myl & Cr 11; 41 ER 276, 276–7 (Lord Cottenham LC) (restricted gift under will to Fishmongers' Company to pay legacies from part of rent derived from land to poor persons or prisoners); *Pearce v Wright* (1926) 39 CLR 16, 19 (Knox CJ, Isaacs J agreeing), 20–1 (Higgins J) (non-charitable bequest of interest in land, subject to payment of legacy to wife of testator). Sometimes restrictions may create both an equitable personal obligation and a charge related to that obligation: *Commissioners of Charitable Donations and Bequests v Wybrants* (1846) 2 Jo & Lat 182, 197–8 (Sugden LC) ('*Wybrants*') (property left under will subject to annuities, including several annuities to charities); *Welby v Rockcliffe* (1830) 1 Russ & My 571; 39 ER 219, 221 (Lord Lyndhurst LC) ('*Rockcliffe*') (non-charity will case); *Heydon and Leeming* (n 13) [2-35].
- 41 See, eg, *Associated Alloys Pty Ltd v ACN 001452106 Pty Ltd (in liq)* (2000) 202 CLR 588, 595–6 [6] (Gaudron, McHugh, Gummow and Hayne JJ), citing *Re Bank of Credit and Commerce International SA (in liq) [No 8]* [1998] AC 214, 226 (Lord Hoffmann).
- 42 This being a reason for finding that there was a trust and not a charge in *Merchant Taylors' Co v A-G* (1871) LR 6 Ch App 512, 517–18 (Lord Hatherley LC), 519 (James LJ), 523–4 (Mellish LJ) ('*Merchant Taylors' Co*').
- 43 *Dean and Canons of Windsor* (n 13) 484–5 (Lord Campbell LC) 488–9, 492; *Merchant Taylors' Co* (n 42) 512, 516–18 (Lord Hatherley LC), 522–3 (Sir Mellish LJ) (though, ultimately, the will was characterised as giving rise to a trust not a charge).

consideration provided by the recipient. In the absence of consideration, there is no legally binding agreement or contract. Consideration may be provided, however, if the restrictions on the gifted property involve material obligations on the part of the charity. In this case, a gift agreement could be construed as a contract on the basis that the charity is promising to act in a way that benefits the donor in exchange for the property.<sup>44</sup> In some situations, a charity might be characterised as charging an administration fee in return for providing a service to the donor of paying money onto another charity.<sup>45</sup>

Where a gift agreement is executed as a deed, consideration is not required by law, meaning that the restriction is enforceable as a term of a legally binding agreement. Breach of a restriction in a contract or a deed gives rise to common law and equitable remedies for the parties to the agreement.<sup>46</sup> For instance, a donor may seek an injunction or specific performance in equity to hold the recipient to the agreed restriction.<sup>47</sup> Injunctions and specific performance are discretionary remedies that might not be awarded to a donor.<sup>48</sup> In particular, specific performance will not be ordered where it is impossible to perform the contract or where the other party has a right to terminate the contract,<sup>49</sup> either of which may be the case when a charity's failure to comply arises, for example, from a crisis that involves a material change of circumstances.<sup>50</sup>

Historically, an order for specific performance or an injunction has been regarded as inappropriate if it would require ongoing supervision by the court to ensure the agreement is carried out.<sup>51</sup> However, there are indications that this limit on specific relief is not applied so vigorously now as in the past.<sup>52</sup> In the context

44 As to this possibility, including discussion of North American examples, see Silver, 'Contractualisation' (n 9) 251–5; NC Seddon and RA Bigwood, *Cheshire & Fifoot: Law of Contract* (LexisNexis Butterworths, 11<sup>th</sup> ed, 2017) 191–2 [4.15]. The one Australian case cited by these commentators (as providing potential support for this approach) contains obiter discussion about when a promise by a donor to give money to a charity to be used for a specific purpose might be binding on the donor or their estate: *National Trustees Executors and Agency Co Ltd v O'Hea* (1904) 29 VLR 814, 821–3 (Beckett J). The possibility of consideration and the formation of a contract in circumstances where a gift is made (or promised to be paid in the future) to be used for a specific purpose has been accepted in obiter by the Canadian Supreme Court: *Governors of Dalhousie College v Boutilier* [1934] SCR 642, 648 [12] (Crockett J). As to the requirement of consideration, see JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2018) ch 6.

45 *Framjee* (n 16) 19 (Henderson J).

46 See, eg, Nicholas Seddon, *Seddon on Deeds* (Federation Press, 2<sup>nd</sup> ed, 2022) 265–90 [6.17]–[6.40]. In addition, as to potential limits on remedies, see also Silver, 'Contractualisation' (n 9) 255–7.

47 In addition to the difficulties identified below, for more detail on the limits on availability of specific performance or an injunction, see Carter (n 44) chs 39–40; Seddon and Bigwood (n 44) ch 24; Silver, 'Contractualisation' (n 9) 253, 256.

48 Carter (n 44) 924, 934–5; Seddon and Bigwood (n 44) 1236 [24.1].

49 Carter (n 44) 924.

50 As to termination for frustration of a contract due to the impact of crises, see, eg, Michael Douglas and John Eldridge, 'Coronavirus and the Law of Obligations' [2020] *University of New South Wales Law Journal Forum* 3:1–11, 3–5.

51 See, eg, *JC Williamson Ltd v Lukey* (1931) 45 CLR 282, 297–8 (Dixon J); Seddon and Bigwood (n 44) 1255–6 [24.13], 1268 [24.20].

52 Carter (n 44) 924; Seddon and Bigwood (n 44) 1256–8 [24.13]. In the context of injunctions, see also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*

of a charity that is subject to the general supervision of the court,<sup>53</sup> such a limit would make little sense. Even more so if the gift agreement and the restriction are relatively straightforward to comply with such that it is clear what must be done and by whom.

Further, equitable relief such as specific performance or an injunction may not be granted where this would cause hardship to the charity recipient.<sup>54</sup> What is required is ‘genuine hardship’ that would make performance an ‘injustice’ or ‘highly unreasonable’, not just a difficult bargain.<sup>55</sup> It may also be denied due to delay in pursuing relief whether by analogy with statutory limitation periods<sup>56</sup> or otherwise due to the injustice caused to the defendant charity (or third party recipients of funds),<sup>57</sup> which may mean that long-term failure to comply with restrictions may effectively become unenforceable by a donor and their representatives.

Finally, while it may be difficult to obtain an equitable remedy for breach of a promise under deed for which no consideration is provided (which may be the case for the charity recipient),<sup>58</sup> in the case of a donor the property donated would generally be consideration for the promise and so there should be no reluctance on this basis for providing equitable relief.<sup>59</sup>

Where equitable relief is either not sought or is unavailable, a donor may recover common law damages for loss arising from the breach of a restriction and, in some circumstances, terminate the agreement for breach or repudiation (for example, if the donor has an ongoing obligation to make a series of payments). The availability of a range of remedies for breach of a restriction on a gift is important because often it would be unclear what loss a donor has suffered as a result of a charity failing to comply with the restriction.

There do not appear to be many examples of Australian or United Kingdom courts construing restricted gifts as agreements. *Charity Commission for England and Wales v Framjee* (‘*Framjee*’) provides a rare example, albeit the court found that a charitable trust had been created alongside an agreement.<sup>60</sup> *Framjee* involved a conduit gift context in which the trustees of a charitable trust (the Dove Trust) maintained a website via which donors were invited to make donations to be handed on to charities selected by the donor. The website stated that donations would be

(LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) [21-215].

53 Cf Heydon, Leeming and Turner (n 52) [20-065] in reference to supervisory jurisdiction for trustees, receivers and provisional liquidators.

54 Carter (n 44) 924.

55 Ibid 930, citing *ANZ Executors & Trustees Ltd v Humes Ltd* [1990] VR 615, 635, 639 (Brooking J); Seddon and Bigwood (n 44) 1248–9 [24.8], citing *Gall v Mitchell* (1924) 35 CLR 222, 230–1 (Isaacs J); Heydon, Leeming and Turner (n 52) [20-100]–[20-110], [21-460].

56 Section 18 of the *Limitation Act 2005* (WA) provides a time period of 12 years. However, where equitable relief, such as specific performance or an injunction is sought, it is arguable that section 27 halves this to six years: Seddon (n 46) [6.34].

57 Carter (n 44) 930; Seddon and Bigwood (n 44) [24.20] 1268; Heydon, Leeming and Turner (n 52) ch 38 (noting that mere delay will not generally suffice).

58 On the basis that equity does not usually ‘assist a volunteer’: Carter (n 44) 118.

59 Seddon (n 46) [6.21]–[6.22]. See generally Carter (n 44) 118, for the situation where consideration is provided for a promise.

60 *Framjee* (n 16).

separately accounted for and reserved only very limited discretion for the trustees to do anything other than pay donations to the selected charities. The trustees charged a 3.99% commission for the service if a gift aid tax payment was received from HM Revenue and Customs. Henderson J found that these circumstances demonstrated an intention to create express charitable trusts (potentially in the form of sub-trusts under the umbrella terms of the Dove Trust) on the part of donors, and provided a basis for a contract between donors and the trustees of the Dove Trust, since the trustees were providing a processing service and receiving a fee for that service.<sup>61</sup>

Further, in *Jack v Burnett*,<sup>62</sup> the House of Lords considered such a characterisation in relation to a lifetime gift of property to King's College Aberdeen that was subject to a restriction that the College would accept and maintain and educate three students (at any one time) nominated from time to time by the donor and his heirs. Lords Cottenham and Campbell emphasised the element of agreement that was present.<sup>63</sup> However, ultimately the House of Lords did not characterise the restriction as the term of a legally binding agreement, but rather as a condition subsequent attaching to the property (of the type discussed above).

## 7 Other

Restrictions on the use of gifts may also arise from other sources. Importantly, consumer protection laws are likely to apply to fundraising in a range of circumstances, with potential impact on donations. The Australian Consumer Law ('ACL')<sup>64</sup> may impose obligations not to engage in fundraising conduct that is misleading or deceptive or that is likely to mislead or deceive (for example, saying that money will be used for one purpose and then using it for another) and remedial consequences for contravening the prohibition.<sup>65</sup> Beyond the ACL, state charitable collections legislation is also likely to apply to fundraising, such as the *Charitable Collections Act 1946* (WA). Mismanagement or substantially applying funds otherwise than for affording the relief for which money or goods

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61 Ibid [27]–[46] (Henderson J). See also the discussion in Part III(B) of *Grain Technology Australia Ltd v Rosewood Research Pty Ltd* [No 3] [2023] NSWSC 238.

62 (1846) 12 Cl & Fin 812; 8 ER 1632.

63 Ibid 1638–9 (Lord Cottenham LC), 1639–40 (Lord Campbell).

64 *Competition and Consumer Act 2010* (Cth) sch 2 ('ACL').

65 As to the application of the ACL to the activities of charities, see Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, March 2017) 75–6; Access Canberra et al, 'A Guide to the Australian Consumer Law: For Fundraising and Other Activities of Charities, Not-for-profits and Fundraisers' (Guide, Commonwealth of Australia, November 2022). Typically, the charity would need to be fundraising in an organised, continuous and repetitive way, or engaging in a fundraising activity involving a supply of goods or services or be using the services of a professional fundraiser. Note that it was the Australian Consumer Law that was used by regulators in the Belle Gibson litigation: *Director of Consumer Affairs (Vic) v Gibson* [No 2] [2017] FCA 366. The Australian Consumer Law also prohibits engaging in unconscionable conduct (something not done in good conscience, and more than just unfair): ACL (n 64) s 21(1). However, it is harder to see how this prohibition would apply to create a restriction on use of donated funds.

were collected would breach the *Charitable Collections Act 1946* (WA) and lead to sanctions, including revocation of a charitable collections licence.<sup>66</sup>

Further, when Parliament creates a charity under statute (for example, most Australian public universities) or the government grants or leases Crown land to a charity, it is relatively common for the state to include restrictions on the use of property given to the charity. For instance, the *University of Western Australia Act 1911* (WA) prohibits the sale or long-term lease of endowed Crown lands, without governmental approval.<sup>67</sup> By way of another example, Crown land grants or leases to many religious charities include a condition that the land be used only for ecclesiastical purposes.<sup>68</sup> Charity registration or tax endorsement of a charity in relation to specific purposes (for example, a Public Benevolent Institution) might also limit the breadth of (charitable) purposes to which donated funds might be put.

These and other sources of restrictions may involve highly specific statutory provisions for a particular charity and go beyond the characterisation of a restriction on a gift by a donor which is the focus of this article.

## B Preferred Characterisation

As set out in Part III, the applicable characterisation of a restriction on a donation is determined by ascertaining the objective intention of the parties/donor. This is a highly fact-specific exercise. Nevertheless, as a general proposition, restricted gifts are not typically characterised by Australian courts as giving rise to an agreement.<sup>69</sup> Rather, a trust construction or mere wish construction are far more common.<sup>70</sup> For instance, in *Re Smith*, Menhennitt J construed an instrument of transfer donating land as giving rise to a charitable trust even though the instrument did not use the term trust and referred to the land being provided ‘subject nevertheless to and upon this express condition [as to mode of use of the land]’ and stated that the land should revert to the donor and his heirs (such that they held a right of re-entry) if the condition was breached.<sup>71</sup>

Several reasons have been suggested for why Australian courts might prefer a charitable trust characterisation where a restriction is recognised as amounting

66 *Charitable Collections Act 1946* (WA) ss 8, 13(2)(a), 17(1)(b).

67 *University of Western Australia Act 1911* (WA) ss 14A, 15.

68 In Western Australia, for example, the removal of such restrictions often requires consent of the Minister for Lands and payment of the difference between what the charity paid and the current market value of the land: *Land Administration Act 1997* (WA) s 75(7); ‘CRW-01 Crown Land – General’, *Landgate* (Web Page, 7 August 2023) <<https://www0.landgate.wa.gov.au/for-individuals/Land-Transactions-toolkit/land-titles-registration-policy-and-procedure-guides/practice-manual/crown-land/crw-01-crown-land-general>>.

69 That has traditionally also been the case in the United States: Brody (n 1) 1225.

70 See, eg, *Dal Pont and Petrow* (n 7) [17.7]; *Misra* (n 14) 11–13 (charity case); *Re Turkington* [1937] 4 All ER 501, 504 (Luxmoore J) (non-charity case). Especially where the conditionality applies to the whole use of the gift: *Re Smith* (n 18) 345–6 (Menhennitt J). However, it should be acknowledged that the different characterisations are not always exclusive, and it may be that a particular gift results in more than one applying at the same time. See, eg, *Framjee* (n 16) 29 (Henderson J); *Wybrants* (n 40) 197–8 (Sugden LC); *Rockliffe* (n 40) 221 (Lord Lyndhurst LC); *Heydon and Leeming* (n 13) [2-35].

71 *Re Smith* (n 18) 341. Menhennitt J found that the right of re-entry was invalid due to the rule against perpetuities: at 347–8.

to more than a mere wish.<sup>72</sup> The two reasons that are most pertinent to the donor restrictions considered in this article, loss of gifts to charity and taxation implications, are discussed below. A third rationale has also been suggested in the United States and, potentially, is also applicable in Australia. That is, an agreement characterisation might result in less flexibility in the use of restricted gifts over time, since *cy pres* variation would not remove the donor's contractual rights.<sup>73</sup> However, this third rationale is only slightly persuasive, as it does not take account of the potential for agreeing variations with a donor and the costs and difficulties associated with *cy pres* variation, for which reason it is not discussed further here.

Before examining the two pertinent rationales, *Grain Technology Australia Ltd v Rosewood Research Pty Ltd [No 3]* warrants some attention.<sup>74</sup> The case concerned a unique factual context. Rosewood Research Pty Ltd ('Rosewood') and its subsidiaries owned a valuable piece of land in Sydney. Rosewood had originally been incorporated by an industry association to carry out bread manufacturing and grains research and member service activities and had acquired the land from the Commonwealth Scientific and Industrial Research Organisation ('CSIRO') on which to carry out those activities. Rosewood received Commonwealth and other grants over many years to carry out its research, as well as member levies. Over time, grant funding and levies reduced and fee for service income increased. Rosewood provided various services to its members, including technical advisory services.

The litigation involved applications by the Attorney-General (NSW) and various bread industry representatives, as well as Rosewood, for declarations that Rosewood and its subsidiaries held the land on charitable trust for purposes related to research and development into bread manufacturing, grains and by-products. The applications for declarations resulted from the settlement of proceedings against three directors and members<sup>75</sup> who were allegedly attempting to distribute the land to themselves. To the parties' surprise, Parker J found that Rosewood and its subsidiaries did not hold their assets on charitable trust and suggested that grants received from CSIRO and other bodies were best viewed as payments under contracts, rather than gifts giving rise to charitable trusts.

To some extent this can be viewed as contrary to the suggestion above that Australian courts tend to adopt a charitable trust or mere wish characterisation for conditional gifts. However, the case does not really run counter to the general tendency for four reasons. First, consistent with what has been said above, Parker J

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72 Dal Pont and Petrow (n 7) [17.10]. See also *Wax Chandlers' Co* (n 18) 9–13 (Lord Chelmsford), 19–20 (Lord Cairns); Thomas (n 16) 242–4. The suggestion that only certain conditions subsequent would satisfy perpetuity rules, whereas if the restriction is a charitable trust purpose there is no perpetuity issue, would also favour a trust construction, but it is also true that the other interpretations (including agreement) should also not typically raise perpetuities risks.

73 Brody (n 1) 1226.

74 [2023] NSWSC 238.

75 Ibid [129] (Parker J). The directors were the same as the members. One had died by the time of the hearing and another had been declared bankrupt and so was no longer eligible to be a director: at [11], [25].

emphasised the importance of ascertaining donors' objective intentions.<sup>76</sup> Second, Parker J found that Rosewood's corporate objects were not charitable.<sup>77</sup> So it was not a context of a restricted gift being made to an incorporated charity or for the charitable purposes of an incorporated charity. Third, it appears that limited evidence was adduced of the conditions on which members or grant-makers provided funds to Rosewood, with reliance largely placed on Rosewood's corporate objects and the way in which Rosewood described its activities in its annual reports and publications.<sup>78</sup> Unsurprisingly, Parker J characterised member levies and fees for services as being payments for member benefits rather than restricted gifts.<sup>79</sup> Only limited evidence was provided about grant conditions, so in the context of a non-charitable corporation, it is again unsurprising that Parker J found that grants from the CSIRO or industry bodies were likely subject to contractual obligations as to their use for a particular research project (albeit the contractual obligations were not examined) rather than giving rise to charitable trusts.<sup>80</sup> Fourth, the main contention by the parties focussed not on donors' intentions creating an express charitable trust, but rather asserted that Rosewood held all assets it received on charitable trust because its corporate objects were charitable.<sup>81</sup> Yet the law in Australia is still unsettled on the question of when incorporated charities hold their assets subject to trust or quasi-trust obligations; and the parties provided fairly minimal evidence of any declaration of trust by Rosewood, that evidence being limited to the adoption of a new corporate constitution.<sup>82</sup>

### ***1 Loss of Gift to Charity***

Courts tend to favour a construction of gift terms that result in an effectual charitable gift, rather than a gift that is void or that may be forfeited.<sup>83</sup> In this way charity law promotes the public goal of encouraging the dedication of private resources to public benefit.<sup>84</sup> Failure to comply with the obligation under a charitable trust to apply the trust assets to the trust's charitable purposes is a breach of trust by the trustee, in relation to which the Attorney-General could seek a range of remedies, including equitable compensation from the trustee and, potentially, replacement of the trustee or a constructive trust against third party accessories who have received trust property.<sup>85</sup> Even in circumstances where a donor is permitted to apply to the Court for such remedies,<sup>86</sup> the compensation or property recovered is not given to the donor, but held by the trustee or new trustee under the charitable trust for the charitable purposes. By contrast, in most cases

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76 Ibid [315], [337].

77 Ibid [384]–[420].

78 Ibid [315]–[318].

79 Ibid [319].

80 Ibid [320]–[322].

81 Ibid [327]–[369].

82 Ibid.

83 Dal Pont and Petrow (n 7) [6.1]–[6.3], [17.10].

84 Ibid [6.1].

85 Ibid [17.36]–[17.37].

86 See below n 114 and accompanying text.

a non-trust characterisation potentially means that where there has been a failure to comply with the restriction, the donor could seek the return of their property or seek equitable compensation or damages for themselves.<sup>87</sup> While this will not always be the case – since the restriction could, for instance, involve a gift-over to another charity upon failure – it is fair to say that failure to comply with a non-trust restriction raises a much greater risk that donated property will not be applied to charitable purposes, but rather repaid to a donor. This is likely to result in courts preferring a trust characterisation.<sup>88</sup>

## 2 Taxation

Any characterisation other than that of a charitable trust (or mere wish) might raise tax law implications for treating the gift as a deductible donation. A trust is therefore the preferred instrument for achieving both the desired tax outcome and effective restrictions.<sup>89</sup>

The primary tax issue arising is whether a deductible gift has been made, such that the donor can claim an income tax deduction. The questions around characterisation as a gift do, however, also extend to Goods and Services Tax ('GST') and whether the charity is making a taxable supply subject to GST in agreeing to the restrictions.

For tax purposes, the core characteristics of a 'gift' are that:

- the beneficial interest in property is transferred;
- it is made voluntarily;
- it arises by way of benefaction; and
- the donor does not receive a material benefit or advantage in return.<sup>90</sup>

The imposition of restrictions by donors raises questions about whether the first, third or fourth characteristic are satisfied.<sup>91</sup> Natalie Silver has recently examined these questions.<sup>92</sup> Silver does not examine the various legal characterisations identified in Part III(A) above but refers broadly to the potential creation of 'legally enforceable obligations' from a range of legal characterisations.<sup>93</sup> Silver's discussion focuses on whether restricted gifts giving rise to such enforceable rights on the part of donors are 'gifts' for tax purposes. Silver concludes that the current administrative practice of the Commissioner of Taxation is based on the view that

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87 Albeit the amount may potentially be (much) less than the restricted gift if the donor is unable to show loss: Silver, 'Contractualisation' (n 9) 255–6.

88 Cf Dal Pont and Petrow (n 7) [17.10].

89 A conduit trust characterisation, whereby the gift is held on trust to be handed on to another (even another charity) would also imperil deductibility: see, eg, *Australian Elizabethan Theatre Trust* (n 13) 506–7 (Gummow J).

90 We adopt the core characteristics as articulated by the Commissioner of Taxation in Australian Tax Office, *Income Tax: Tax Deductible Gifts – What is a Gift?* (TR 2005/13, 20 July 2005) [13] ('TR 2005/13') and drawn from *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111, 116 (Owen J) ('McPhail') and *Leary v Federal Commissioner of Taxation* (1980) 47 FLR 414, 415–17 (Bowen CJ) ('Leary'). See also Ann O'Connell, *Taxation of Charities and Not-for-profits* (LexisNexis, 2020) 360.

91 The requirement of voluntariness, ie, that the property is not given subject to some prior obligation, is not inherently challenged by a restriction.

92 Silver, 'Tax Treatment' (n 1). See also extensive treatment of donations in O'Connell (n 90).

93 Silver, 'Tax Treatment' (n 1) 105.



restricted donations are not ‘gifts’, but that this is open to challenge on the basis that a contractual characterisation would not result in the donor retaining an interest in the property the subject of the gift, and that the contractual rights obtained are often likely to be below a materiality threshold.

Provided the contractual obligations do not relate to passing the gift on to another (so that the benefaction requirement is also satisfied), a contract characterisation should not preclude a restricted donation from being a ‘gift’,<sup>94</sup> albeit it may have GST implications.<sup>95</sup>

Extending beyond Silver’s analysis, a donation given on charitable trust to be used for a specified purpose that falls within the recipient entity’s stated purposes does not create any rights in a donor<sup>96</sup> and nor does the donor retain any interest in the property donated. Provided the trust does not require the recipient entity to pass the donation on to another person,<sup>97</sup> then given that a trust does not necessarily involve any separation of legal and equitable ownership,<sup>98</sup> there should equally be no issue with the requirement of benefaction for a gift (and the GST implications identified above should not arise).<sup>99</sup>

Several Australian Taxation Office (‘ATO’) rulings on conduit gifts – that is, a gift given to a recipient charity on the basis that it is to be handed on to another ultimate recipient – also raise an administrative risk for the recipient charity.<sup>100</sup> The

94 Ibid 105, 114.

95 Ibid 105, 118–20.

96 Of course, the donor may have standing in some jurisdictions and some circumstances to seek a court order enforcing the charitable trust pursuant to the court’s inherent or statutory supervisory jurisdiction.

97 The Australian Tax Office (‘ATO’) rulings dealing with restricted donations and trusts are focused on a conduit trust characterisation whereby the gift is held on trust to be handed on to another person (such as another charity): *TR 2005/13* (n 90) [129]–[137]; Australian Tax Office, *Income Tax: Where a Trustee of a Public Fund under Item 2 of the Table in Section 30-15 of the Income Tax Assessment Act 1997 Has an Obligation or Otherwise Gives an Assurance to Apply Funds in Accordance with Requests from a Donor, Is a Separate Fund Created?* (TD 2004/23, 30 June 2004) (‘TD 2004/23’). Such a conduit arrangement was accepted as imperilling deductibility in *Australian Elizabethan Theatre Trust* (n 13) 506–7 (Gummow J) on the basis of a lack of benefaction. This conduit risk was the impetus for the schemes to distribute trust assets in *Public Trustee v A-G (SA)* [2019] SASC 172, [30] (Hinton J). See also O’Connell (n 90) 372–5. Interestingly, in the UK conduit case of *Framjee* (n 16), while the availability of tax concessions seemed a relevant factor in Henderson J’s reasoning (at [7]), there was no analysis of whether the conduit arrangements and creation of sub-trusts might impact on availability of those tax concessions.

98 *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98, 111–13 [22]–[28] (The Court).

99 It is debatable whether the creation of equitable obligations under a charitable trust involves ‘entry into’ an obligation (which would constitute a supply): *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 9-10(2)(g) (‘GST Act’). The ATO accepts that in some circumstances the creation of a charitable trust will not be a supply: see Australian Tax Office, *Goods and Services Tax: Financial Assistance Payments* (GSTR 2012/2, 30 May 2012) [57], [116]–[118]. The ruling refers to a New Zealand decision which actually provides some support for finding a supply under the broader Australian definition of supply, but that supports a finding that there is no nexus between any such supply and the consideration provided: *Chatham Islands Enterprise Trust v Commissioner of Inland Revenue* [1999] 2 NZLR 388, 393 [18] (Blanchard J for Keith and Blanchard JJ). In any event, as opposed to entry into an agreement, it seems hard to characterise the creation of charitable trust obligations as being in return for the donation (ie, there is no supply for consideration, this nexus being a requirement for a taxable supply): *GST Act* (n 99) s 9-5(a).

100 See above n 97, discussing rulings *TR 2005/13* (n 90); *TD 2004/23* (n 97).

risk is that a restricted gift may create a new and separate charitable trust, in respect of which the recipient charity trustee does not hold deductible gift recipient status, because the recipient charity has not been endorsed by the ATO in respect of that new trust. However, the ATO rulings focus on gifts to the trustee of an ancillary fund (a philanthropic intermediary in the form of a charitable trust whose function is to pass donations onto other deductible gift recipients that more actively ‘do’ charity) that are subject to direction as to the ultimate conduit recipient of the gift.<sup>101</sup> The reasoning does not translate to other forms of restricted gifts. Further, for gifts to incorporated charities, where the entity is itself endorsed for deductible gift recipient (‘DGR’) purposes, rather than endorsed for operation of a fund, this administrative issue would not arise provided the donation amounts to a ‘gift’.<sup>102</sup>

Consistently with Silver, the authors consider that conditions (other than a conduit condition) do not necessarily prevent a donation from being a ‘gift’. However, Silver only very briefly discusses another tax provision, section 78A of the *Income Tax Assessment Act 1936* (Cth) (‘ITAA36’). Section 78A is a broadly worded anti-avoidance provision.<sup>103</sup>

If it is technically correct that conditions do not necessarily prevent a donation from being a ‘gift’, which may be inconsistent with the ATO’s administrative practice, then it would not be surprising if the ATO sought to apply section 78A to preserve its existing practice. In certain circumstances the gift anti-avoidance provisions of section 78A of the *ITAA36* may operate to deny an income tax deduction ordinarily allowable under division 30 of the *Income Tax Assessment Act 1997* (Cth).

Section 78A of the *ITAA36* applies if:

- by reason of ‘any act, transaction or circumstance that has occurred ... as part of, in connexion with or as a result of’ the making of a gift or a related agreement or scheme, the amount or value of the benefit derived by the DGR as a consequence of the gift is, or will be, or may reasonably be expected to be, diminished subsequent to the receipt of the gift (section 78A(2)(a));
- by reason of ‘an act, transaction or circumstance’ of the kind described in section 78A(2)(a), another fund, authority or institution, other than the recipient DGR makes, or becomes liable to make, or may reasonably be expected to make a payment, or transfer property to any person or incur any other detriment, disadvantage, liability or obligation (section 78A(2)(b));
- by reason of ‘an act, transaction or circumstance’ of the kind described in section 78A(2)(a), the donor or the donor’s associate obtains, or will obtain, or may reasonably be expected to obtain ‘any benefit, advantage, right or privilege’ apart from the benefit of a tax saving associated with the gift deduction (section 78A(2)(c)); or

101 *TR 2005/13* (n 90) [137]; *TD 2004/23* (n 97).

102 For instance, see *Income Tax Assessment Act 1997* (Cth) s 30-25(1) item 2.1.1: a restricted donation made to a public university that is endorsed in its own right as a DGR, is still a gift to an institution covered by a table in sub-division 30-B even if it results in the creation of a charitable trust.

103 See Explanatory Memorandum, *Income Tax Assessment Amendment Bill* (No 4) 1984 (Cth) 25.

- by reason of any agreement or scheme entered into as part of or in association with the making of the gift, the recipient DGR or another fund, authority or institution acquires property, directly or indirectly, from the donor or the donor's associate (section 78A(2)(d)).

Under section 78A(3) *ITAA36*, a donation of property may not be deductible where the donor retains the right to use the donated property:

Without limiting the application of subsection (2), where the terms and conditions on which a gift of property other than money is made are such that the fund, authority, institution or person to which the gift is made does not receive immediate custody and control of the property, does not have the unconditional right to retain custody and control of the property in perpetuity to the exclusion of the donor or an associate of the donor or does not obtain an immediate, indefeasible and unencumbered legal and equitable title to the property, paragraph (2)(c) shall be deemed to apply in relation to that gift.

Considering section 78A(2)(c), where the terms upon which a gift is made result in the creation of rights in or attached to the property gifted, or the creation of personal rights against the donee, this would appear to come within a transaction or circumstance that has occurred as part of or as a result of the making of the gift, or to form part of the terms and conditions on which a non-monetary gift is made.

Thus, while Silver notes that the ATO's practice has been to read down these broadly worded provisions,<sup>104</sup> the donor's rights or interests obtained via the condition subsequent, charge or agreement characterisations seem at significant risk of amounting to 'rights' or 'privileges' under section 78A(2)(c).

The ordinary meaning of these terms is relatively broad, with the Macquarie Dictionary definitions of these two terms:

Right – *noun*, a just claim or title, whether legal, prescriptive, or moral.<sup>105</sup>

Privilege – *noun*, a right or immunity enjoyed by a person or persons beyond the common advantages of others.<sup>106</sup>

The cases, limited as they are, also suggest a broad interpretation. *Federal Commissioner of Taxation v Arnold [No 2]* involved donors incurring a liability to pay for property (pharmaceuticals) that the donors then gifted to a charity.<sup>107</sup> Because the purchase agreements for the pharmaceuticals failed to comply with applicable sale of restricted substances legislation, the agreements were void, no liabilities arose and any payments were made under a mistake of law. Accordingly, the donors had a right to repayment of the purchase price and the court characterised this as amounting to a 'benefit, advantage, right or privilege', enlivening section 78A(2)(c).<sup>108</sup> Such rights seem very similar to condition subsequent rights of re-entry.

104 Silver, 'Tax Treatment' (n 1) 108–9.

105 *Macquarie Dictionary* (online at 25 September 2023) 'right' (def 18).

106 *Ibid* 'privilege' (def 1).

107 (2015) 100 ATR 529. The tax effectiveness of the scheme was enhanced by the fact that 92.5% of the liability for purchasing the pharmaceuticals did not have to be paid by the donor until 50 years in the future: at 534 [6] (Edmonds J).

108 *Ibid* 562–4 [124]–[131] (Edmonds J). Another interpretation of the term 'benefit' is provided in *Forrest v Federal Commissioner of Taxation* (2010) 78 ATR 417, 442 [140]–[141] (Spender, Sundberg and McKerracher JJ), where the sale (from a donor to an associate) of subsequently donated property at greater than market value was treated as a 'benefit'.

An expansive approach to construction of these terms was also suggested by the Deputy President of the Administrative Appeals Tribunal in *Hodges v Deputy Commissioner of Taxation* ('*Hodges*')

The words '*benefit, advantage, right or privilege*' [in section 78A(2)(c)] appear in a statute and must be given a meaning. They must add something to the meaning of the word '*benefit*'. The phrase consists of words of enlargement, rather than restriction. The phrase, it seems to me, is intended to catch any benefit properly described in terms of any of the four words. In this case, the applicant received his airfare, food and accommodation. This in itself must be regarded as a benefit even when that word is narrowly construed. He received what Brennan J referred to as '*pecuniary and proprietary benefits*'. However other words in the statutory phrase are apt to describe the applicant's residual quid pro quo. Privilege is defined (relevantly) by the Macquarie Dictionary as '*a prerogative, advantage or opportunity enjoyed by anyone in a favoured position (as distinct from a right)*'. In the present case, the applicant had the privilege of taking part in the Philippines project. It was not an opportunity to be enjoyed by anyone. It was an advantage or prerogative extended only to those chosen who had also agreed to pay the stipulated money.<sup>109</sup>

The decision in *Hodges* concerned the deductibility of a contribution made by a volunteer to an overseas aid fund. The contribution (in accordance with the overseas aid fund's standard practice) enabled the volunteer to participate in an overseas aid project and was used to purchase air travel, accommodation and food for the volunteer. The '*benefit*' or '*privilege*' here did not really involve a material financial benefit. After all, the volunteer was volunteering to help the charity build a nutrition centre in the Philippines. In substance, the issue was that the volunteer obtained a right to require the charity to spend the contribution on particular matters: his airfare, accommodation and food. This is another way of illustrating the Commissioner's interpretation that the decision concerned a benefit that was not a '*pecuniary or proprietary [benefit]*' but was instead '*the advantage of taking part in the project*'.<sup>110</sup>

A donor's rights or interests obtained via the condition subsequent, charge or agreement characterisations would appear to come within the above conceptions of a '*right*' or '*privilege*' as being a just claim or as being rights enjoyed beyond the common advantages of others, analogous to the participation rights in *Hodges*.

If a restriction is characterised as giving rise to a personal equitable obligation on the charity, the focus is instead on the personal obligation of the donee rather than on the rights of the donor. However, as a number of cases appear to accept that the donor or their representative can seek orders to enforce the obligation,<sup>111</sup> this characterisation potentially amounts to a privilege on the part of the donor (or associate). In contrast, a charitable trust would not result in the creation of any rights in the donor. A limited ability to seek enforcement orders under the inherent supervisory jurisdiction of the courts or specific statutory provisions in some jurisdictions<sup>112</sup> is highly unlikely to amount to a benefit, advantage or privilege

109 [1997] AATA 394 (McMahon DP) (emphasis in original) ('*Hodges*').

110 *TR 2005/13* (n 90) [218].

111 *Gill v Gill* (n 13) 406 (Harvey J); *Muschinski v Dodds* (n 16) 605–7 (Brennan J), 624–5 (Dawson J). In a charity context, see application of the reasoning in *Muschinski v Dodds* (n 16), discussed in *Re Boning* (n 16) 22 (White J).

112 See below n 114.

in that the primary responsibility for enforcement of a charitable trust lies with the relevant Attorney-General,<sup>113</sup> and status as a ‘donor’ would not often provide greater standing than for other interested persons.<sup>114</sup>

It may be possible to argue that the words ‘benefit, advantage, right or privilege’ were included based on previous commentary in tax cases on the meaning of ‘gift’, which make reference to materiality in relation to such benefits; for example, an ‘advantage of a material character’.<sup>115</sup> However, as a matter of statutory construction, the text of section 78A(2)(c) contains no reference to materiality. The purpose of the provision as an anti-avoidance provision would likewise support a broad interpretation of the terms, with less emphasis on materiality and the context also suggests no, or a low, materiality threshold. For instance, section 78A(4) provides that a deduction will not be denied (under section 78A(2)(a)) on the basis that the value derived by the gift recipient is less than the value of the gift when it was made, purely due to reasonable gift solicitation expenses of the recipient. One would anticipate that reasonable gift solicitation expenses would often be low in comparison to the value of a gift, such that concepts of materiality are not generally at play under section 78A. Further, *Hodges* suggests that the words of section 78A (unlike the meaning of ‘gift’) are not necessarily subject to any such threshold, or if there is one that it would be very low.<sup>116</sup>

Turning to section 78A(3), in the case of a condition subsequent or a charge, these characterisations would seem to preclude a charity from having the unconditional right to custody and control of the property in perpetuity or from obtaining unencumbered title. Accordingly, any non-monetary restricted gifts giving rise to a condition subsequent or charge potentially breach section 78A(3). By contrast, the creation of a charitable trust that is not a conduit trust need not necessarily result in any separation of legal and beneficial ownership<sup>117</sup> and would not typically give the donor or their associates any custody or control rights over donated property.

#### IV CHARACTERISING RESTRICTED GIFTS IN PRACTICE

Over 2021 and 2022, the authors of this article and Robyn Honey, a team of researchers from the University of Western Australia, Murdoch University and

113 See, eg, Dal Pont and Petrow (n 7) [14.23]–[14.25].

114 As to standing generally in relation to enforcement of charitable trusts, see, eg, Hui Jing, ‘Bringing Proceedings against Trustees of Australian Charitable Trusts: The Standing of Objects’ (2021) 27(2) *Third Sector Review* 35 <<https://doi.org/10.2139/ssrn.4096473>>; Dal Pont and Petrow (n 7) [14.37]–[14.50]. Indeed, in Western Australia, the *Charitable Trusts Act 2022* (WA) section 44(2) provides open standing to seek such enforcement orders.

115 *McPhail* (n 90) 116 (Owen J). See also *Leary* (n 90) 424 (Bowen CJ), 438 (Deane J); *Federal Commissioner of Taxation v Clendon Investments Pty Ltd* (1977) 7 ATR 493, 502 (Jenkinson J).

116 *Hodges* (n 109) [19]–[22] (McMahon DP). Including even in the context of the meaning of gift, where *Hodges* suggests that it is only de minimis advantages that would be disregarded: at [12]–[13]. See also *TR 2005/13* (n 90) [50].

117 See above n 98 and accompanying text.

Curtin University conducted a study focused on Western Australian charities' experiences in accessing their restricted assets.<sup>118</sup> The research was prompted by concerns that donor restrictions were one of the material impediments to charities responding to crises such as the COVID-19 pandemic by accessing accumulated assets. While the research project covered a broader range of questions, a key focus was to better understand charities' conceptualisation of donor restrictions.

## A Methodology

The research project was a mixed methods qualitative study involving doctrinal and qualitative empirical research.<sup>119</sup> The research was designed around two phases. In phase one, we conducted a scoping investigation of the legal characterisation of donor restrictions and the mechanisms that charities might use to access or redeploy reserves, as well as key difficulties arising from the use of those mechanisms. This was done through doctrinal analysis and exploratory workshops with a 'Research Advisory Group'. In phase two, through further doctrinal analysis and semi-structured interviews with stakeholders, we further investigated the possible legal characterisations of restrictions, potential legal mechanisms for lifting restrictions and ascertained how the participants had characterised restricted gifts and whether or not the legal mechanisms had been successfully used. We also investigated participants' perceptions of legal guidance materials and potential policy responses to identified difficulties.

The research was conducted with the assistance of the 'Research Advisory Group', being a reference group of 16 senior charity officers plus one charity law advisor. We identified members for the Research Advisory Group and interviewed participants through purposive sampling to ensure a cross section of voices were represented.<sup>120</sup> The criteria used for the purposive selection were based on the following factors identified by the Productivity Commission when mapping the charity/not-for-profit sector:<sup>121</sup> field of activity (for example, religion, education,

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118 Ian Murray et al, *Building Resilience: Utilising Restricted Reserves* (Final Report, 23 March 2023) <<https://research-repository.uwa.edu.au/en/publications/final-report-for-wa-charities-building-resilience-utilising-restr>> ('*Final Report for WA Charities*'). See also Ian Murray et al, 'Building Resilience: Utilising Restricted Reserves' (Guidance Materials, 3 March 2023) <<https://research-repository.uwa.edu.au/en/activities/guidance-materials-for-wa-charities-building-resilience-utilising>> ('*Guidance Materials for WA Charities*').

119 Sharan B Merriam and Elizabeth J Tisdell, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 4<sup>th</sup> ed, 2016) 3, 5–6, 15–16, 23–5; Frans L Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, 2016) 3–4 <<https://doi.org/10.4337/9781782549413>>; Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 4–5 <<https://doi.org/10.1093/oxfordhb/9780199542475.001.0001>>.

120 Merriam and Tisdell (n 119) 96–8. Research Advisory Group members helped to identify interview participants within a number of the purposive sample categories.

121 Productivity Commission (Cth), 'Contribution of the Not-for-profit Sector' (Research Report, January 2010) 6–8. The Productivity Commission's further factor of whether a charity's purpose is primarily member or community serving was not considered as all charities must have an other-regarding purpose, not a primarily member-serving purpose.

etc),<sup>122</sup> legal form, taxation treatment, market or non-market facing,<sup>123</sup> scale<sup>124</sup> and geographic location.

We organised the charity selection primarily according to their ‘field of activity’ to ensure a mix of charities primarily across fields of activity indicated as having higher reserves levels. In addition, in selecting Research Advisory Group members and interview participants (as representatives of, or able to comment on, charities spread across the above factors) we considered two main criteria:

1. That the member or participant worked for a registered charity or peak charity body in a role relating to the charity’s restricted donations, such as a fundraising/development officer, chief financial officer, chief executive officer, or legal advisor; or
2. That the member or participant was in a position with sector overview.

The selection process resulted in 17 Research Advisory Group members and 31 interview participants. Not all members were able to participate in all workshops or subsequent meetings, but most did so. Table 1 displays a breakdown of workshop participants from the Research Advisory Group, and Table 2 displays a breakdown of interview participants. Appendix Table 1 categorises, by factor, the organisations from which interview participants were drawn.

Table 1: Workshop Participants

Organisation by field of activity	Arts & Culture	Health	Education	Religious	Human Services	Philanthropic	Other*	Total
No. of Participants	1	2	4	1	2	1	2	13

\*Other charity and legal advisor.

122 The most common activities for charities are (in this order): religion; education; human services (including aged-care); health (including nursing homes); community and economic development; and arts and culture: Australian Charities and Not-for-profits Commission, *Australian Charities Report* (Report, 9<sup>th</sup> ed, 21 June 2023) 17. The CLASSIE classification system used for activities in the most recent report obscures some major classes of activities that have been highlighted in previous reports, such as research (previously included with education) and philanthropic promotion: *Australian Charities Report* (Report, 7<sup>th</sup> ed, 17 May 2021) 8. Some fields of activity have been found to demonstrate higher levels of accumulation, such as philanthropic intermediaries, secondary and tertiary education bodies, hospitals and other health bodies, religious bodies and some cultural institutions such as museums: Ian Murray, *Charity Law and Accumulation: Maintaining an Intergenerational Balance* (Cambridge University Press, 2021) 34–5 <<https://doi.org/10.1017/9781108854283>> (‘Charity Law and Accumulation’).

123 That is, whether the charity sells its goods and services in a market or not.

124 Small charities are unlikely to have significant financial resources for accumulation. Therefore, the charities selected were medium to large charities, adopting the *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth) regulation 205.1 thresholds of annual revenue greater than \$500,000 (medium) or \$3,000,000 (large).

Table 2: Interview Participants

Organisation by field of activity	Arts & Culture	Health	Education	Religious	Human Services	Philanthropic	Other*	Total
No. of Participants	5	4	8	3	2	3	6	31

\* Executives/directors of other charities, government officers, and legal advisors.

We conducted 28 semi-structured interviews (with the 31 participants) of approximately 40 minutes to an hour each. The semi-structured interview questions are set out in Appendix Table 2, with two of those questions being:

- Were there, are there, or might there be legal restrictions to accessing reserves? If so, what do you understand to be the nature of the legal restriction(s)?
- Have you used, or would you consider using, any legal mechanisms to successfully gain access to restricted assets?

The interviews were transcribed and then coded in NVivo.

## B Limitations

The purposive selection of Research Advisory Group members and interview participants resulted in most participants being drawn from medium to large charities (which also reduced representation of unincorporated associations). Due to cost and time constraints, the process also largely involved metropolitan-based charities. The findings are therefore most relevant to larger metropolitan charities. Further, even constrained to large metropolitan charities, there is still a range of potential combinations of relevant factors not represented in our sample, such that some caution should be applied in generalising results within this group.

Further, reflecting the very diverse nature of the charity sector, even with 28 interviews, we did not achieve saturation on all issues.<sup>125</sup> However, there were many commonalities on a number of the core issues examined, including the treatment of restricted gifts as largely giving rise to legally or morally binding commitments to the donor (rather than society more broadly) such that the main approach to amending restrictions was to seek agreement with the donor.

## C Results

The exploratory workshops suggested that many participants' charities focussed on donor and public perceptions of their use of restricted gifts, rather than on an analysis of the legal nature of restrictions. Therefore, when a charity was considering acting contrary to a restriction, many participants indicated that

<sup>125</sup> 'Saturation' refers to the situation in which enough people have been interviewed to 'begin to see or hear the same things over and over again, and no new information surfaces as you collect more data': Merriam and Tisdell (n 119) 247–8.



their charity typically adopted an approach of liaising with the donor, or with the donor's executor or heirs, rather than obtaining legal advice on the nature of the restriction and its variation.

We explored this theme in the semi-structured interviews by specifically asking about interviewees' understanding of the legal nature of restrictions and of mechanisms used by interviewees' organisations to vary or lift those restrictions (see the two questions set out in Part IV(A)).

Excluding eight interviews with charities that had experienced no difficulties in accessing reserves<sup>126</sup> and three government interviews, in 14 of the remaining 17 interviews (82%), the interviewees indicated that rather than seeking legal advice on the nature of restrictions and amendment mechanisms, their charities typically preferred to agree variations with the donor, or, if the donor had passed away, the relevant executor or the donor's family. For example, as four different participants expressed:

Technically, the easiest way is to go speak to the donors. And ask them, here's the situation, would you allow us to do, and explain ... And if the donor says, yes, not a problem.<sup>127</sup>

... [m]ay often be a bequest with conditions that are somewhat outdated. [We] [o]ften approach executors to deal with change of circumstances.<sup>128</sup>

And yes, we have had quite specific bequests, one that comes to mind, yes, was a donor who stayed in one of our services and wanted a Japanese water garden installed ... But when we spoke to the hospital executive, they said, actually, that's an OH&S risk in terms of having water in a clinical environment, or you know, that close to a clinical environment. So, we learned from that experience and included in our gift acceptance policy that essentially we need to make sure before we accept the gift that we, the service provider or the hospital, can actually deliver on that gift. In that particular instance, what we did was go back to the executor and say, we can't do a water garden, but we can do a Japanese garden [with no water]. Do you feel that that meets the intent of the late, the person, the donor? They said yes, absolutely that does. We got that in writing and we kind of moved forward.<sup>129</sup>

You know, we'll have a couple of shows next year that we're offering, and we'll say to that [donor], is there a particular show that you would like to support? And we would recommend it's probably this or this. And they'll go, yes, actually, probably that one. And if for some reason, you know, COVID hit or whatever, we would probably just go back to them and say, oh, so that show can't happen because of ... you know, are you happy with that? Your attachment being shifted to [a new] show. And nine times out of 10 that would be fine.<sup>130</sup>

Of those 17 interviews, in 12 cases (71%), interviewees nominated at least one instance in which they were unsure whether a restricted gift gave rise to a legally binding restriction or, to the extent they considered there was a legally binding restriction, they were unsure of the legal form of that restriction.

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126 Eight participants did not have difficulties accessing reserves, either because assets were unrestricted or because they did not need to access reserves for purposes other than the purpose for which funds were given.

127 Interview with Former University Advancement Services Executive (9 November 2021).

128 Interview with University Advancement Services Executive (19 October 2021).

129 Interview with Health Organisation Executives (31 August 2021).

130 Interview with Arts Organisation Executive (6 September 2021).

This uncertainty applied not just to smaller gifts, but also in 6 of the 12 cases to gifts considered large by the relevant charity, and in one additional case appeared to apply generally to gifts (that is, 7 out of 17 interviews where the charity needed to access restricted assets, or 41%). For instance, according to two participants:

The other restriction I have is a capital fund called the [X] Fund that is one of my anonymous donors he named the fund [X], which means beautiful [art form], because he loves [art form]. So that's holding \$150,000 now, and that's got to be capital. I can spend the interest ... But I can't spend the capital funds ... I scanned in a little scrap of paper with a handwritten note to me from the person who I know well, who said I want to remain anonymous; I want to give you this amount, I want you to spend it wisely on beautiful singing. I want you to call it the [X] Fund, never tell anybody who gave it to you. I just kind of scanned that, that was it. It was really informal, so no, no deed of gift.<sup>131</sup>

No, they don't believe in gift agreements. This is why [X field of study], so, the [X field of study] fundraising took place in I think, gosh, the late nineties, early 2000s, if I'm not mistaken. And they raised a massive amount of cash from big donors across Perth. But there is no gift agreement. So, what happened then, the money was invested. It stays in an interest-bearing account and then the university decided there's no more [X field of study] ... They've decided that they need to, they want to move the funding over to another school, but when I left, I was working with the legal team on getting a lawyer to review the whole situation and to come up with what needs to be done.<sup>132</sup>

To the extent that interview participants identified one of the legal characterisations discussed in Part III(A), the most common characterisation for inter vivos gifts was to view the restrictions as forming terms of a legally binding agreement, whether in the form of a contract or a deed. Participants identified this characterisation in 19 of the 28 interviews (68%). In particular, gifts from philanthropic foundations or from major donors were reported as giving rise to a contract in 13 cases (46%). For example:

There is a legal contract between us and the [X Family] Foundation that restrict[s] the use of those funds. And I'm just about to get it in front of me. For example, one of those, the purpose of the future fund is about the long-term goal of sustainability and safeguarding the company.<sup>133</sup>

So, the legal advice was a donation or gift made by donor to either entities, [X] Inc or Foundation Trust as donee, is a binding contract in which both parties must comply with their obligations. Number two, where the donor specifies the purpose of the donation or some other form of condition to the donation, we must comply with that condition. Failure to comply with that, with those conditions or purposes, express could result in unwanted legal consequences and reputational damage.<sup>134</sup>

So, we've got a pretty basic template [gift agreement], which, you know, captures the main gift purpose. And like it's basically, it's a two pager with a set of conditions on it, and it will have, you know, purpose of ... And then it has something general, ... which is 'to the extent possible' or 'with our best intentions'. So, it sort of gives us a softening. So that's our standard. But in reality, if it was going to be a significant gift, like a bigger gift, there would be a bespoke agreement.<sup>135</sup>

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131 Interview with Arts Organisation Executive (10 August 2021).

132 Interview with Former University Advancement Services Executive (9 November 2021).

133 Interview with Arts Organisation Executive (6 September 2021).

134 Interview with Health Organisation Executives (31 August 2021).

135 Interview with University Advancement Services Executive (20 September 2021).

The next most common characterisation found in 11 interviews (39%) was of restrictions as a mere wish (Part III(A)(1)). The possibility of restrictions resulting in the creation of a charitable trust (Part III(A)(2)) was not widely recognised, but participants in six interviews (21%) suggested that a charitable trust had arisen from gift conditions. For instance, in the words of two participants:

Yes, we do have one major donor at a significant level where we've got a separate trust deed. So those financials are completely separately managed, a separate fund for that.<sup>136</sup>

Some are. There's a deed of trust, like bigger gifts, and that's the bit that has to go to [the Supreme Court] ...<sup>137</sup>

Only one interviewee (4%) characterised a restriction as a common law condition subsequent (Part III(A)(3)),<sup>138</sup> and no interviewees identified restrictions as giving rise to a personal equitable obligation (Part III(A)(4)) or to a charge (Part III(A)(5)).

Reflecting the predominant approach of characterising the legal effect of restricted gifts as giving rise to a binding agreement with the donor, participants in 18 interviews (64%) indicated that their charity had, or the charity they advised or funded had, sought to agree variations to restrictions with the donor. Interestingly, (albeit a binding agreement characterisation would not fit) the next most common mechanism suggested by participants across eight interviews (29%), was agreeing a change (for a conditional bequest) with the executor. In six interviews (21%), participants suggested (explicitly or implicitly) that they had experience with applying to the court for a *cy pres* or administrative scheme to amend restrictions, but two of those interviewees were legal advisors or government lawyers. Recognition of the supervisory role of the court in this way suggests some recognition of a charitable trust characterisation since it acknowledges that obligations may be owed not just to a donor, but also to the state.

Two interviewees (7%) suggested self-help remedies involving a self-determined variation or distribution to a charity that could use the funds without restrictions. This approach involves an implicit rejection of legally binding restrictions and provides some support for a mere wish characterisation. One interviewee (4%, who was also one of the six referring to schemes) also suggested applying to the court for advice or directions, a step that would be consistent with any of the six characterisations.

## V DISCUSSION OF THE CLASH

In conducting the interviews, it was expected that most charities would treat a major restricted donation as giving rise to a charitable trust, in line with established judicial attitudes and the underlying rationales examined in Part III(B). Amending

136 Interview with Health Organisation Executives (31 August 2021).

137 Interview with Former University Advancement Services Executive (9 November 2021).

138 Interview with Legal Advisor (31 August 2021). The legal advisor acknowledged in theory that the charge and equitable personal obligation characterisations were possible.

the restrictions would then amount to amending the charitable purpose or the means of pursuing that purpose, which would typically require an application to the Supreme Court (or, in some limited circumstances, the relevant Attorney-General) for a cy pres scheme to amend the purpose, or an administrative scheme to amend the means.<sup>139</sup> Seeking powers to override restrictions via trustee expediency provisions in trustee legislation, or charitable proceedings legislation, would also require an application to the court.<sup>140</sup>

These various provisions not only require a public body to approve the change, but they are only available in particular, in some cases relatively narrow, circumstances. For instance, cy pres schemes are generally only available in circumstances such as where it is ‘impossible, impracticable or inexpedient’<sup>141</sup> to carry out the purpose, or where the purpose has ‘ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust’.<sup>142</sup> In addition, whether by explicit legislative requirement or conservative construction of the provisions, courts typically require such changes to retain some similarity with the donor’s original intention.<sup>143</sup> These mechanisms do not permit charities and donors to simply agree amendments to restrictions between themselves.

Contrary to our expectation, most of the interviewees did not view restricted donations as giving rise to charitable trusts and the overwhelming approach they employed to amend restrictions was to agree a variation with the donor, with only limited instances of application to court for a scheme. There appear to be at least two possible explanations for this divergence. First, that charities do not have a good understanding of the legal characterisation of their restricted gifts: there is a muddle. Second, that charities and donors view restricted gifts as a matter of private ordering, pursuant to which donors are entitled to retain ongoing rights relating to the specific use of their donated property: the private ordering paradigm. These explanations and their implications are discussed below.

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139 For discussion of cy pres and administrative schemes, see Dal Pont and Petrow (n 7) [14.1]–[14.15], chs 15–16. A charitable trust deed could contain a variation power permitting amendment of the charitable purpose, but the variation power is likely to be narrowly construed and arguably would not permit a change to a non-charitable purpose. See, eg, Murray and Langford (n 11) 106–7.

140 For examples of trustee expediency provisions, see, eg, *Trustees Act 1962* (WA) s 89(1); *Trustee Act 1925* (NSW) s 81. For examples of charity proceedings legislation permitting application for orders relating to the administration of a charitable trust, see, eg, *Charitable Trusts Act 2022* (WA) s 44(2)(d); *Trusts Act 1973* (Qld) s 106. For discussion of the full range of trustee expediency provisions and charity proceedings legislation, see Dal Pont and Petrow (n 7) [14.17]–[14.18], [14.38]–[14.50].

141 *Charitable Trusts Act 2022* (WA) s 10(1)(a); *Variation of Trusts Act 1994* (Tas) s 5(2).

142 *Charitable Trusts Act 1993* (NSW) s 9(1). See also *Trusts Act 1973* (Qld) s 105(1)(e)(iii); *Trustee Act 1936* (SA) s 69B(1)(e)(iii); *Variation of Trusts Act 1994* (Tas) s 5(3)(e)(iii); *Charities Act 1978* (Vic) s 2(1)(e)(iii). Or in some other specified circumstances, such as where ‘the amount available is inadequate to carry out’ the purpose, or where the property ‘is greater than is necessary for the original purpose’: see, eg, *Charitable Trusts Act 2022* (WA) ss 10(1)(b), (e).

143 See, eg, Dal Pont and Petrow (n 7) [14.6], [14.18], [16.1]–[16.14]; *Re Lutheran Laypeople’s League of Australia Inc* [2016] SASC 106, [19] (Hinton J).

## A The Muddle

Interviewees were drawn from medium to large size charities that had varying degrees of access to legal advice, with most having a lawyer on the board or a pro bono advice arrangement with a law firm. Many charities also had in-house lawyers or budget to pay for legal advice. However, even for the larger charities, in-house lawyers and even external counsel were not often experts in restricted gifts. As several interviewees said:

So, we're not getting any specific advice, I don't think, from experts around this sort of stuff. I mean, I wouldn't be able to tell. And I don't know that anybody else on the ground would particularly be able to tell, when the conditions on a will, for example, are just a suggestion, just a preference and when they're binding. I think we have taken again the conservative line, always of: if it says it, then that's what we're stuck with.<sup>144</sup>

But he's [the in-house lawyer] about, his role is technically HR, so if we had a different skill set in that role that would be something, if I put my hand on my heart, would we? Probably not. We wouldn't. I wouldn't go to the school lawyer and go, what does this mean? It's always been that gentleman's agreement ...<sup>145</sup>

That, unfortunately, is a question for [alumni relations]. I haven't seen that yet. Yes, I can see how it might arise. And my background is, this is not my area of law, so I can't really give you a, any kind of response on the top of my head as to how that might wash out. Sorry ... And then I'd either, either I'd hit the books or a member of our legal team would do so. Or if we didn't feel that we have the requisite expertise because the gift was so large and significant or because time-wise, we're confined very much, for some reason, we'd brief out and find a law firm in Perth with the requisite expertise and would say, we'd brief them ...<sup>146</sup>

It should not be surprising that few legal advisors are experts in the characterisation of restricted gifts. The key categories discussed in Part III(B) above were investigated and collated from a wide range of primary and secondary sources. Even in Silver's recent writing on restricted gifts, there is no catalogue of characterisations. Moreover, most charities do much more than receive restricted gifts, such that the demand for legal advice on restricted gifts is but a part of the range of demands on finite levels of legal services.

Even for charities that have some budget to pay external experts, paying for external legal advice is not often viable unless the gift is above a certain size. One participant provided the following example:

[I]t would be at minimum, just for the letter of advice that looks at, and I guess the discovery of documents and things like that, you're looking at, at least, 10 grand for that original first foundational bit of work being done. ... Especially if you're looking at a fund or an account of just say, a 100 to 150K, you can see that the impact of those funds diminishes with more administration or legal costs to spend it.<sup>147</sup>

That charities often do not know the legal characterisation of a restricted donation is consistent with the results discussed in Part IV(C) above. In particular, it is consistent with the finding that for charities seeking to access restricted assets, 82% preferred to approach the donor to agree a variation than to seek legal

144 Interview with Religious Organisation Executive (30 August 2021).

145 Interview with Education Organisation Executives (12 January 2022).

146 Interview with University In-house Lawyer (30 August 2021).

147 Interview with University Advancement Services Executive (2 November 2021).

advice on the nature of the restrictions and amendment mechanisms. It is also consistent with the finding that 71% of charities seeking to access restricted assets expressly indicated at least one instance in which they were unsure about the legal characterisation of a restriction, and, moreover, that for 41% of the charities, this uncertainty related to large gifts.

## B The Private Ordering Paradigm

An alternative explanation is that charities and donors view the making of a restricted gift as a private exchange to be governed by privately agreed norms, perhaps facilitated by contract law (under the binding legal agreement characterisation), not involving any material role for the state. That is, they view the making of a restricted gift as a matter of ‘private ordering’.<sup>148</sup> Indeed, many conceptions of private ordering emphasise the extra-legal norms governing parties’ conduct and lack of reliance on state provided rules and enforcement processes.<sup>149</sup> This alternative explanation, therefore, potentially complements the suggestion that charities do not have a good understanding of the legal characterisation of gift restrictions. They do not need to have this understanding if they rely on standard fundraising practices that form shared norms with donors.

Such an approach emphasises the private dimensions of the public benefit test in charity law, in that charity law has traditionally left charity founders significant leeway to determine the benefits to be provided to the public.<sup>150</sup> However, as discussed by Kathryn Chan, there are a range of public norms that also apply to ensure a degree of pursuit of collective, not individual, projects.<sup>151</sup> Additionally, once a charitable trust has been created, it has typically been the courts that are the arbiters of what is for public benefit and of changes to the public benefit set out in the charitable purpose.<sup>152</sup>

The finding in Part IV(C) above that many of the charities interviewed preferred to approach donors (or their representatives) to agree a variation rather than obtain legal advice on the nature of the relevant restrictions supports a private ordering view of restricted gifts. Indeed, expanding the earlier quote in Part IV(C), the following language strongly emphasises this perspective:

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148 As to private ordering, see, eg, Kevin A Kordana and David H Blankfein Tabachnick, ‘The Rawlsian View of Private Ordering’ (2008) 25(2) *Social Philosophy and Policy* 288 <<https://doi.org/10.1017/S0265052508080278>>; Steven L Schwarcz, ‘Private Ordering’ (2002) 97(1) *Northwestern University Law Review* 319, 324 <<https://doi.org/10.2139/ssrn.298409>>; Victor P Goldberg, ‘The Enforcement of Contracts and Private Ordering’ in Claude Ménard and Mary M Shirley (eds), *Handbook of New Institutional Economics* (Springer, 2008) 491, 491 <[https://doi.org/10.1007/978-3-540-69305-5\\_20](https://doi.org/10.1007/978-3-540-69305-5_20)>; Margaret Jane Radin, ‘The Fiduciary State and Private Ordering’ in Paul B Miller and Andrew S Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016) 315, 315 <<https://doi.org/10.1093/acprof:oso/9780198779193.003.0014>>.

149 See, eg, Schwarcz (n 148) 324; Barak D Richman, ‘Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering’ (2004) 104(8) *Columbia Law Review* 2328, 2338–40 <<https://doi.org/10.2307/4099361>>.

150 Chan (n 7) 75–80.

151 Ibid.

152 Ibid. See also above n 7.

Technically, the easiest way is to go speak to the donors. And ask them, here's the situation, would you allow us to do ... And if the donor says, yes, not a problem. Then we can draw up some sort of contract, signed and dusted and, you know, we work on making sure there's no issues with the ATO.<sup>153</sup>

Further, viewing a restricted donation as a private exchange is consistent with the interview findings that the most commonly identified legal characterisation for restricted gifts charities was a binding agreement between donor and charity. Indeed, while a charitable trust characterisation was identified by a minority of interviewees, several of those interview participants expressly noted that their charity actively tried to dissuade donors from creating a charitable trust due to perceptions of additional obligations and less flexibility in redeploying assets.<sup>154</sup> This is consistent with a view of the restricted donation as a private arrangement. This framing also fits with interviewees' experiences of amending restricted gifts with the majority of interviewees referring to a private variation agreement between the charity and the donor. In contrast, only a minority of interviewees mentioned the use of public institutions, such as the courts.

The interviews also evidenced reliance on extra-legal norms to guide decisions about gift restrictions. As noted in Part IV(C) above, in many cases there was uncertainty about the legal characterisation of restrictions. In addition, when asked about non-legal barriers to breaching restrictions, after excluding eight interviews with charities that had experienced no such difficulties and three government interviews, in 13 of the remaining 17 interviews (76%), interviewees identified concerns about the effect on charities' reputations with donors or the broader public. For instance, as two participants stated:

So the perception on that wasn't good and then donor perceptions. It was really hard for us to get other money from donors who were aware of that person. And if you're an avid [x] lover, you all knew the person who had passed away giving that money and, well, that's what happened to her money, why would I give you any more?<sup>155</sup>

So, as members, you know, it's a self-regulated thing, but as members, we have what, we expect all members ... to actually read the [Fundraising Institute of Australia] code and do a test on it ... we're not interested in a one night stand, we want a long term relationship. So, if we take your money and run and piss you off because you wanted it to go to youth homelessness and we've just chucked it into the coffers. And you know, we lost you ... So, it's in our best interest to do the right thing by these people. And it's really funny when you talk about the legalities versus the ethical, because the way that I look like, you know, as individuals, yes, I would always put ethics at the forefront.<sup>156</sup>

The emphasis on extra-legal norms might also explain the finding that the second-most common method for dealing with gift restrictions was to agree a variation to a conditional bequest with the executor of the donor's estate. As it is a fundamental duty of executors to distribute the estate in accordance with the terms

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153 Interview with Former University Advancement Services Executive (9 November 2021).

154 Interview with University In-house Lawyer (30 August 2021); Interview with Former University Advancement Services Executive (9 November 2021). See also Interview with Health Foundation Executive (11 October 2021).

155 Interview with Arts Organisation Executive (10 August 2021).

156 Interview with Social Services Organisation Executive (11 January 2022).

of a will,<sup>157</sup> which means that there are likely to be limits to the executor's ability to agree to such changes, there is some suggestion here that non-legal bequest norms are being relied upon.

### C Implications of the Paradigm Clash

Uncertainty about the legal characterisation of gift restrictions raises several risks for charities and their officers. If charity officers are unsure about the legal characterisation of restricted gifts and permit their charity to act in breach of the restrictions with the mere concurrence of the donor, there is a risk that this may amount to a breach of a charitable trust. This could expose the charity to liabilities, including claims for compensation or sanctions imposed by a regulator such as the Australian Charities and Not-for-profits Commission or the Attorney-General.<sup>158</sup> Material and persistent breaches might put a charity's status as a registered charity (and hence its tax concessions) in jeopardy.<sup>159</sup> Exposing their charity to such risks might amount to a breach of a duty of care or breach of fiduciary duties for charity officers,<sup>160</sup> with consequent personal liability.

In an effort to address these issues, while being conscious of the degree of diversity within the charities sector, the project team developed basic guidance materials on the legal characterisation of donation restrictions and permitted mechanisms for varying those restrictions.<sup>161</sup> The guidance materials summarise the legal characterisations set out in Part III(A) above and also provide information about mechanisms to vary restrictions, such as *cy pres* and administrative schemes, charity proceedings legislation orders and trustee expediency provisions. Following feedback from participants, the materials provide guidance on steps to be taken at

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157 See, eg, Gino Dal Pont, *Law of Succession* (LexisNexis, 3<sup>rd</sup> ed, 2021) [12.1].

158 As to breach and remedies, see, eg, Dal Pont and Petrow (n 7) [1.21], [17.36]–[17.37].

159 Breach of a donation restriction (viewed as the term of a charitable trust) would not typically amount to failure to comply with the charity's purposes, since the charitable trust purposes would fit within the broader purposes of the charity that acts as trustee. The route to revocation is therefore circuitous. Non-compliance with a term of the trust is likely to amount to a breach of the duty of care on the part of charity officers: see below n 160 and accompanying text. Registered charities are subject to certain governance standards, including Governance Standard 5, which requires a registered charity to take reasonable steps to ensure that its responsible entities (ie, high-level officers, such as the directors of an incorporated charity or trustees of a charitable trust) comply with various duties, including the duty of care: *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-10; *Australian Charities and Not-for-profits Commission Regulations 2022* (Cth) reg 45.25(2). Failing to have systems in place to ensure that charity officers obtain legal advice on the characterisation of restricted gifts would make it difficult to show that reasonable steps have been taken if an officer breaches their duty of care. Breach of Governance Standard 5 would then enable revocation of charity registration: *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 35-10(1)(c)(ii). Charity tax concessions, such as deductible gift recipient status and income tax exempt charity status, require the entity to be a registered charity with the Australian Charities and Not-for-profits Commission, along with satisfying other requirements: see, eg, *Income Tax Assessment Act 1997* (Cth) sub-div 30-B (tables typically require an entity to be an Australian government agency or registered charity), s 50-5 item 1.1. Such that loss of registered charity status would mean loss of the tax concessions.

160 By direct application of the duty, not by way of any purported 'stepping-stone' liability. As to the duties of charity trustees, directors or management committee members, see, eg, Dal Pont and Petrow (n 7) [17.25], [17.61], [17.63]; Murray, *Charity Law and Accumulation* (n 122) 96–105.

161 See above n 118.



the point of receiving a gift to prevent issues relating to restrictions arising, as well as on how to address restrictions on historic gifts. Early preventative guidance takes the form of, for example, putting in place a gift acceptance policy that covers unacceptable donations or gift circumstances, outlining circumstances in which donors are permitted to specify restrictions (for example, by reference to value/risk thresholds) and the nature of those restrictions, identifying delegations of authority specifying who can accept restricted gifts, and ensuring accurate and accessible record-keeping and feasibility checks for restricted gifts. Including template gift agreements or gift acknowledgment wording for charities to use when accepting restricted gifts is useful in providing greater legal certainty for charities and donors about which legal characterisation might apply to a particular restriction.

It appears, however, that the lack of legal certainty is tied to the broader issue of charities and donors viewing restricted gifts as primarily private exchanges, rather than matters of public ordering. This has important societal ramifications. A common view of private ordering over public ordering is that this might enhance efficiency,<sup>162</sup> but potentially at the cost of other public goals,<sup>163</sup> which in a charity context might well include goals such as promoting autonomy, promoting equity through redistribution of assets or pluralism.<sup>164</sup> These different goals are likely to be incommensurable and the extent to which society might expect philanthropy to promote them will differ depending on the societal context and on the range of other institutions that exist to promote the goals. For instance, there may be less concern about non-efficiency goals in the presence of effective inheritance or estate tax regimes. But Australia does not impose such taxes.

Ultimately, selecting a desirable balance between competing goals is likely to be a political decision. There are, however, some things that can be said about what might be expected from philanthropy and its regulation, in relation to these goals. For a start, there should be recognition of the complex dynamics at play in the context of philanthropic donations. For instance, the efficiency of letting donors dictate perpetual terms for their donations has been questioned by John Picton on the basis that motivations for giving range from purely egoistic to purely altruistic, with most giving sitting somewhere in-between.<sup>165</sup> To the extent that egotism motivates giving rather than aiming to benefit others, this is likely to result in less efficient means of achieving public benefit. Writers such as Roger Colinvaux also point to the difficulty in predicting the future and the potential for inefficiency to

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162 See, eg, Johnathan R Macey, 'Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules' (1997) 82(5) *Cornell Law Review* 1123, 1140–3, noting also that private ordering might not in reality compare that badly with public ordering at achieving redistribution, by way of a public choice analysis of the actual operation of government; Schwarcz (n 148) 320–3.

163 See, eg, Schwarcz (n 148) 320–3. As to the desirability of applying Rawlsian principles of justice to private ordering, which would affect the economic dimension of private ordering, see Kordana and Blankfein Tabachnick (n 148) 305–7.

164 See, eg, James Douglas, *Why Charity?: The Case for a Third Sector* (Sage Publications, 1983) chs 7–8; Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 78–85 <<https://doi.org/10.1017/CBO9781139136358>>; Fleischer (n 6) 418–19.

165 See, eg, Picton (n 6) 53, 59–65.

set in over time, as circumstances change.<sup>166</sup> Hence, a degree of inefficiency is built into restricted giving, raising the importance of public ordering in reforming these arrangements.<sup>167</sup>

On the other hand, there are numerous references to processes such as *cy pres* and administrative schemes being rarely used and not well understood, which can generate difficulties and preclude the efficient use of restricted donations.<sup>168</sup> In addition, the resourcing and political interest of an Attorney-General are likely to be factors that influence their involvement in proceedings to vary donation restrictions,<sup>169</sup> with ramifications for the practical achievement of public goals beyond efficiency.

It is also possible to view an emphasis on private ordering as shifting some power from the state to donors in deciding the circumstances in which restrictions might be lifted. This would in turn mean some shift in the balance of power between charity recipients and donors. This is likely to affect the extent to which donors demand conditions and the nature of those conditions. Especially since this would reflect the broader trend, referred to in the Introduction, of applying for-profit business practices to charities. More extensive imposition of conditions and more particular conditions are likely to reduce efficiency compared with unconditional gifts due to the extreme difficulty of anticipating the future. An increase in restricted versus unrestricted donations, especially if those restrictions are framed with reference to for-profit business norms, might also pose risks for goals related to pluralism and enhancing autonomy.<sup>170</sup>

## VI CONCLUSION

Although it has not previously been much examined, restricted donations can be legally characterised in a number of different ways, including as giving rise to a charitable trust. This article identifies the main legal characterisations, setting out their doctrinal bases and key effects. This enhanced understanding of the potential characterisations should be of considerable benefit to charities and their advisors when seeking to lift or vary restrictions on historic gifts or establish policies for new donations.

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166 Colinvaux (n 1).

167 Ibid 69–73.

168 Mulheron (n 7) 139–41; Kerry O’Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 46–9 <<https://doi.org/10.4324/9780203640142>>; Melanie B Leslie, ‘Time to Sever the Dead Hand: Fisk University and the Cost of the *Cy Pres* Doctrine’ (2012) 31(1) *Cardozo Arts and Entertainment Law Journal* 1, 10–12. As to a discussion of mechanisms in the United States, see Brody (n 1).

169 See, eg, Myles McGregor-Lowndes, ‘Australia: Co-production, Self-Regulation and Co-regulation’ in Oonagh B Breen, Alison Dunn and Mark Sidel (eds), *Regulatory Waves: Comparative Perspectives on State Regulation and Self-Regulation Policies in the Nonprofit Sector* (Cambridge University Press, 2017) 176, 179–81 <<https://doi.org/10.1017/9781316711446.010>>. In a US context, see, eg, Terri Lynn Helge, ‘Policing the Good Guys: Regulation of the Charitable Sector through a Federal Charity Oversight Board’ (2009) 19(1) *Cornell Journal of Law and Public Policy* 1, 27–30.

170 For a discussion of benefits and risks to pluralism, see Colinvaux (n 1) 33–5.

More fundamentally, this article argues that a charitable trust characterisation is often preferred by the courts and that there are tax and charity-protection reasons for this. However, interviews with a range of Western Australian charities suggest that practice departs significantly from this expectation, with uncertainty over the legal characterisation or an assumption that there is a legally binding agreement being far more common than viewing restricted gifts as creating a charitable trust.

We suggest that there are two, connected, reasons for this. First, charities often have not obtained legal advice on the characterisation of gift restrictions. Second, charities and donors largely adopt a private ordering paradigm for such gifts. As discussed, lack of legal clarity raises liability and regulatory action risks for charities and charity officers. To the extent that lack of clarity creates uncertainty, this could be addressed by appropriate guidance for charities directed at both historical and future donations.

The broader implications of adopting a private ordering approach to restricted gifts are more difficult to predict. However, some broad comments can be made about the implications for society arising from more privately ordered philanthropy, as well as some implications for recipient charities. For society, there is clearly a risk that public goals other than efficiency might be neglected. This is heightened by the desire of some donors to project their values and interests into the future, which can perpetuate the cultural, political and economic interests of a wealthy donor class.<sup>171</sup> This would seem to run counter to public goals intended to be promoted by charity law and the regulation of philanthropy.

There is also the risk that, with a lesser role for the state, a private ordering approach shifts the balance of power from charities to donors. A shift in the balance of power might lead to even greater imposition of gift restrictions in future, with ramifications for efficiency, as well as for individual charity recipients.

What is clear, is the need for charities to make an informed choice between public ordering and private ordering at the time that restricted gifts are made. Indeed, despite the potential extra costs of dealing with change, it may be in charities' interests to push a little harder for public-ordering for restricted gifts, so as to forestall future demands for restrictions and to help ensure that the way they go about pursuing their purposes results in public, not private, benefit.

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171 See, eg, Odendahl (n 6) 232; Fleischer (n 6) 418, 440.

## APPENDIX

Table 1: Interview Participants by Charity Mapping Factors

Charity Type by Field of Activity	Number of participants	Legal Form	Taxation Treatment	Market or Non-market Facing	Field of Activity with Propensity to Accumulate	Geography (Metropolitan versus Rural/Regional/Remote) (* means programs carried out in RRR locations)	Scale (Medium or Large)	Total Number of Participants
Arts & Culture	1	Inc Association	ITEC/DGR1	Market-facing	Yes	Metropolitan*	Large	5
	1	Co Ltd	ITEC/DGR1	Market-facing	Yes	Metropolitan	Large	
	1	Co Ltd	ITEC/DGR1	Market-facing	Yes	Metropolitan/Remote	Large	
	1	Inc Association	ITEC/DGR1	Market-facing	Yes	Metropolitan*	Large	
	1	Co Ltd	ITEC/DGR1	Non-market	Yes	Metropolitan	Large	
Health	2	Main entity is an Inc Association, with subsidiaries in various forms	ITEC	Non-market	Yes	Metropolitan*	Large	4
	1	Co Ltd	HPC <sup>172</sup> /ITEC/DGR1	Non-market	Yes	Metropolitan*	Large	
Education	1	Co Ltd	HPC/ITEC/DGR1	Non-market	Yes	Metropolitan	Large	8
	3	Statute	ITEC/DGR1	Market	Yes	Metropolitan/Regional	Large	
	1	Statute	ITEC/DGR1	Market	Yes	Metropolitan*	Large	
	1	Inc Association	ITEC	Market	Yes	Metropolitan	Medium	

	1	Statute	ITEC/DGR1	Market	Yes	Metropolitan/Regional	Large	
	2	Inc Association	ITEC	Market	Yes	Metropolitan	Large	
Religion	1	Statute	ITEC	Non-market	Yes	Regional	Large	3
	1	Inc Association	PBI <sup>173</sup> //ITEC/ DGR1	Non-market	Yes	Metropolitan*	Medium	
	1	Mix: Corp Sole/ Charitable Trust/Statute	ITEC/Public Ancillary Fund/ ITEC/DGR2	Non-market	Yes	Metropolitan*	Large	
Human Services & Development	1	Co Ltd	PBI//ITEC/ DGR1	Non-market	No	Metropolitan*	Large	2
	1	Inc Association	PBI//ITEC/ DGR1	Primarily non- market	No	Metropolitan*	Large	
Philanthropic Funding	1	Charitable Trust	Public Ancillary Fund//ITEC/ DGR2	Non-market	Yes	Metropolitan	Medium	3
	1	Charitable Trust	Private Ancillary Fund/ ITEC/DGR2	Non-market	Yes	Metropolitan*	Large	
	1	Charitable Trust	Public Ancillary Fund//ITEC/ DGR2	Non-market	Yes	Metropolitan*	Large	

172 Health Promotion Charity.  
173 Public Benevolent Institution.

Table 2: Semi-structured Interview Questions

<b>Topic</b>	<b>Question Number</b>	<b>Question</b>
<i>Accessing Reserves</i>	1	What is your role? And what is your experience and background in the not-for-profit sector?
	2	What are the sources of your charity's funds/assets? [We are placing outside the scope of this research government funding for services because it is commonly structured so as not to result in any material surplus.]
	3	Why/for what purposes have you wanted to, do you want to, or might you in the future want to access your reserves? [We have a broad meaning in mind for reserves – 'net assets'.]
<i>Barriers to Accessing Reserves</i>	4	What do you perceive as the main (non-legal) difficulties your organisation has had, has, or might have in accessing reserves?
	5	Were there, are there, or might there be legal restrictions to accessing reserves? If so, what do you understand to be the nature of the legal restriction(s)?
<i>Legal Mechanisms</i>	6	Have you used or would you consider using any legal mechanisms to successfully gain access to restricted assets?
	7	Do you see/have you had any difficulties in using any of the legal mechanisms?
<i>Law Reform</i>	8	Would it be useful to be able to ask an independent body to authoritatively interpret or approve changes to gift conditions?
<i>Internal Measures or Policy</i>	9	What measures does or could your organisation have in place to help ensure that you don't receive gifts subject to undesirable, inappropriate, overly burdensome or inflexible restrictions?
<i>Close</i>	10	Do you have any other comments about what we have discussed or the research project?