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FINAL REPORT FOR WA CHARITIES

Building Resilience: Utilising Restricted Reserves



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Executive Summary

The Western Australian charity sector plays a fundamental role in relation to almost every aspect of the lives of Western Australians. For instance, health support at the time of birth, education, religious and social services, cultural enrichment during our lives, aged care in our later years and protecting the environment for future generations. Crises such as COVID-19 – with its health and employment/organisational operation impacts – and the earlier Global Financial Crisis pose challenges for society and the charitable sector. One restraint on the way that the charity sector can respond arises from donor restrictions placed on gifts which may no longer be appropriate in the changed circumstances of crisis. There are good reasons for respecting donor intent. However, lack of clear expression of the legal rules applying to gift restrictions and of the legal mechanisms that permit amendment is not a good reason. Yet, this is the situation in which Western Australian charities, and charities around Australia, find themselves.

This report examines these legal rules and mechanisms so that Western Australian charities are better empowered to make informed choices about gift restrictions. The report presents the results of doctrinal and empirical legal research on the circumstances under which Western Australian charities might wish to access reserves (defined broadly to mean net assets), the difficulties they face in accessing reserves, the legal mechanisms that are available to address these difficulties and how such difficulties may be avoided in the first place. It:

- Identifies difficulties experienced by charities in seeking to access their reserves of restricted assets.
- Maps the legal effect of restrictions on donations that result in restricted assets.
- Based on the mapping of legal effects, outlines the legal avenues available to charities seeking to access their reserves of restricted assets.
- Provides guidance material for charities wishing to access historically restricted assets and considering how to approach future donations.

While crises were the impetus for considering the need to access reserves, the findings and research are relevant beyond that context. Further, while the report focuses on Western Australian charities, there are many similarities with the regulatory contexts in other Australian states and territories and hence the report is also relevant beyond Western Australia.

Research methodology

The research was conducted with the assistance of a Research Advisory Group, being a reference group that was established specifically for this project to help shape its focus to ensure that it is useful to Western Australian charities. The research methods comprised the following:

1. Two exploratory workshops, held with members of the Research Advisory Group to help with the process of shaping the research design.

2. Doctrinal legal research concerning the legal characterisation of restrictions on gifts and concerning legal mechanisms to amend or lift those restrictions.
3. Twenty-eight interviews conducted with 31 charity executives, legal advisors and others with a sector overview.

Several additional meetings were held with the Research Advisory Group over the course of the research project.

Key findings

Legal analysis of restricted gifts

- There are six main potential legal interpretations of restrictions placed on gifts by donors: mere wish, charitable trust, common law condition subsequent giving rise to forfeiture, equitable personal obligation, charge or agreement.
- Determining the correct legal interpretation is a matter of ascertaining the objective intentions of the parties/donor and this is a highly fact-specific exercise. However, the courts have not typically characterised restrictions as giving rise to an agreement, generally favouring other interpretations, such as a charitable trust or mere wish construction.
- There are several legal mechanisms for permitting the lifting or amendment of restrictions that can apply to some or all of the legal interpretations of restrictions. In particular, seeking advice or directions from the Supreme Court, seeking a *cy-près* scheme, seeking an administrative scheme, using the trustee expediency provisions, or agreeing a variation.

Context for accessing restricted gifts

- Western Australian charities obtain their funds from a wide variety of sources, ranging from individual donors to charitable foundations, government funding for services, corporate sponsorships, in-kind gifts and self-generated funds.
- Perceived levels of need and reasons for accessing reserves varied markedly. For instance, some charities accessed reserves only for crises, such as COVID-19, others to expand operations, some for standard operations, and some did not need to access reserves at all.

Difficulties accessing restricted gifts

- The majority of interviews suggested there were perceived legal and non-legal difficulties in accessing reserves.
- For some charities, the non-legal difficulties were more significant than any legal restrictions. In particular, the non-legal difficulties included a lack of centralised and easily accessible records, concern over donor perceptions and reputational damage and resourcing for legal advice on gift restrictions as opposed to other areas of operations.

- The key legal difficulty was that most charities were unsure whether their restricted gifts gave rise to a legally binding restriction and, if so, the nature of that legal restriction. This was not necessarily because the participating charities lacked access to legal advice. Rather, it was an expertise and resourcing issue. Most in-house lawyers lacked specific expertise in characterising restricted gifts and paid or pro bono support from external lawyers was typically prioritised for other operational matters.

Addressing the legal difficulties of access

- Most charities treated restricted gifts as giving rise to a legally or morally binding agreement with the donor (i.e. a mere wish or agreement characterisation) and considered that any amendment or lifting of restrictions should therefore take place by way of agreement with the donor (or their executor or heirs).
- Very few participating charities considered whether approval to amend or lift restrictions might also be required from the Supreme Court or the Attorney-General (which would be the case for a charitable trust characterisation of restrictions). Failure to consider this issue raises a material risk of governance breaches for charity officers.
- Very few organisations had used the legal processes of the courts, including administrative and cy-près schemes, or advice or directions from the court to lift restrictions. Most organisations, in any event, expressed concern about the cost (in time and money) and risk of adverse donor perceptions from seeking court approval for amendment of restrictions.
- Participants were generally ambivalent about the benefits of creating an independent body (as opposed to the courts) to interpret or approve changes to restrictions to potentially reduce the time, cost and adversarial perceptions of going to court for assistance with restrictions. To the extent that an independent body was supported, the participating charities wanted it to provide a level of relatively informal advice and assistance – akin to an advice line/simple rulings system.
- Most charities wanted guidance on preventative measures that they could take to deal with the risks posed by restricted assets.

Recommendation 1: Charities should review their internal controls on accepting gifts and their systems for ongoing stewardship of gifts

Charities should adopt a gift acceptance policy (or more informal guidelines) that covers:

- Whether the gift and gift restrictions fit with the charity's purpose and values.
- Unacceptable donors or gift circumstances.
- Types of property accepted as a gift.
- Circumstances in which donors are permitted to specify restrictions (e.g. by value/risk thresholds) and the nature of those restrictions.
- Delegations of authority specifying who can accept gifts (e.g. by value thresholds).
- Record-keeping and feasibility checks for restrictions.

Once a charity has decided to accept a gift, it should then have processes in place to record the terms of that gift and provide for its ongoing stewardship. In particular, it should have a centralised and integrated records and donor relations system for restricted gifts that captures all relevant information relating to restricted gifts, including gift conditions and agreements, and any subsequent acquittals against those restrictions, as well as outcomes achieved.

For longer term gifts, an implementation plan for how the gift will be used, delegations for who can authorise spending, an investment mandate and, potentially, a regular review of implementation should also be considered.

Recommendation 2: Education for charity officers

Educating charity officers could help to avoid unnecessary or unintended restrictions on future gifts. It should also help officers understand their governance obligations and reduce the risk of inadvertent breaches of trust for historic gifts. Thus, charities should educate charity officers on:

- The potential legal characterisations of restricted gifts.
- The full range of legal mechanisms available to amend or lift restrictions. This would also help reduce concerns about cost and time and perceptions that the process is adversarial.
- The potential for the Attorney-General to approve amendment of restrictions where the restricted assets are less than \$100,000 (or the annual income is less than \$20,000).
- Preventative measures that could be undertaken before receiving a restricted gift to reduce the risk of unwanted restrictions and the potential risk of more onerous charitable trust amendment mechanisms.

Guidance materials have been developed to support this education.

Recommendation 3: Charities should consider adopting gift agreement or gift acknowledgment wording for general use when accepting restricted gifts and for testators to use when making bequests

Charities should consider adopting gift agreement or gift acknowledgment wording when accepting restricted gifts and for testators to use.

Gift agreements (intended to be legally binding, e.g., in the form of a deed of gift) or gift acknowledgements (intended to be morally, but not legally, binding) should clearly set out the restrictions on a gift and incorporate some flexibility if circumstances change.

Flexibility can be accommodated by:

- Framing the restricted purpose broadly.
- Expressly allowing for a change of use if circumstances change.
- Expressly stating that the gift is not intended to create a charitable trust.
- If the restriction is intended to be legally binding, by expressly characterising the restriction as a condition subsequent.

For example:

If a change in circumstances should render the Gift Purpose no longer practical or reasonably achievable, then [the organisation] after consulting with any living Donor (if applicable), may use the remaining balance of the [fund] as deemed prudent to further the objectives and purposes of [the organisation], giving due consideration to the original Gift Purpose.

Template terms for testators to use when making wills should also reflect such flexibility. For example:

I give to [organisation] [X]% of my residuary estate or \$[X]. I express the wish, but without creating any binding trust that this gift be applied towards [insert broad purpose, within the organisation's purposes]. However, if circumstances change and my wishes cannot be fulfilled, I direct that the [organisation] allocate the bequest in such a manner as best approximates my wishes.

Recommendation 4: Investigate avenues to provide charities with advice and guidance

The researchers and interested charities should approach the Attorney-General (WA) and the Australian Charities and Not-for-profits Commission to investigate ways in which existing bodies (such as the Australian Charities and Not-for-profits Commission, Justice Connect and Law Access (WA)) could provide/be funded to provide charities with greater access to low-cost informal advice on:

- Characterising and interpreting restricted gifts.
- Changing or lifting restrictions.

One longer-term approach to providing this advice that should be investigated is the establishment of a simple rulings system such as that administered by the Commissioner of Taxation. Even for the limited range of issues arising for restricted gifts, such a rulings system would likely require a referral of powers by states to the commonwealth. Accordingly, the issue should be raised as part of the broader cross-jurisdictional discussions and planning that are currently taking place in relation to fundraising and the definition of 'charity'.

1. Introduction

Recent crises, such as the Global Financial Crisis (GFC) and the COVID-19 pandemic, have highlighted the profound ethical, economic and social considerations raised by the significant role of the charity sector in responding to crises, including whether charities should be able to access their reserves to do so. These crises materially disrupted funding for many charities at the same time that members of the community became increasingly dependent on charitable support.¹ The economic, social, political and historical rationales for the separate existence of the charity sector (from government) suggest that government alone cannot be expected to address these needs.² So, if ever there was a time for charities to access their reserves, then now seems to be it. Yet, charities around the world have wrestled with questions of whether and how to expend accumulated assets,³ reflecting what occurred during the GFC of 2008.⁴

To emphasise the scale of the problem, during the GFC, universities such as Harvard and Yale each had endowments larger than the GDP of half the countries in the world.⁵ Yet, rather than fully replacing lost revenue with reserves, the universities cancelled or delayed projects, laid off staff or reduced staff hours and materially reduced operating budgets.⁶ It is apparent that,

¹ Ralph Kober and Paul Thambar, 'Coping with COVID-19' (2021) 34(6) *Accounting, Auditing and Accountability Journal* 1416, 1416; Xintong Chen, 'Are Disasters Disastrous to Nonprofit Organizations? Investigating the Financial Implications of Hurricane Sandy for Nonprofits' (2022) 51(1) *Nonprofit and Voluntary Sector Quarterly* 53, 54; Mostafa Rachwani, "'People are hurting": food charities in demand in Sydney's Covid hotspots', *The Guardian* (online, 19 September 2021); Manjulika Das, 'UK charities call for emergency government funding' (2021) 22(4) *The Lancet Oncology* 434, 434; Juliette Astrup, 'Covid strikes the third sector', *Community Practitioner* (online, 11 January 2021); Social Ventures Australia and Centre for Social Impact, *Will Australian Charities be COVID-19 Casualties or Partners in Recovery? A Financial Health Check* (2020); Julie Power, 'Helpless hearts: now COVID-19 is crueling charities', *The Sydney Morning Herald* (online, 20 June 2020); Emma Horn, 'Can Assist's revenue down thousands due to COVID-19 restrictions', *The Daily Advertiser* (online, 1 May 2020). But see Barbara Shecter, 'Charities hoarded cash and failed to address crises during COVID: report', *Financial Post* (online, 6 August 2021).

² Burton Weisbrod, *The Nonprofit Economy* (Harvard University Press, 1988); Lester Salamon, 'Of Market Failure, Voluntary Failure and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' (1987) 16 *Journal of Voluntary Action Research* 29; Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 78-85.

³ Shecter (n 1); Ian Murray, 'Charity Hoarding in a Covid-19 Time of Need: The Role of Activity-Based Regulation' (2020) 26(1) *The Third Sector Review* 140; Geoff Hanmer, 'It's Important for Universities to Continue their Building Programs', *The Australian* (online) 5 May 2020 <theaustralian.com.au>; Danielle Kost, 'Nonprofits Hurt by COVID-19 Must Hoard Cash to Hold On', *Harvard Business School Working Knowledge* (online, 8 May 2020); 'Like toilet paper hoarders, some charities unnecessarily fill reserves', *Charity Intelligence Canada* (online, 24 March 2020); Patrick Rooney and Jon Bergdoll, 'What Happens to Charitable Giving when the Economy Falts?', *The Conversation*, 23 March 2020; Jeanne Bell and Steve Dubb, 'Will Donor-Advised Funds Meet Their 'Rainy Day' Promise?' (2020) *Nonprofit Quarterly*.

⁴ Peter Conti-Brown, 'Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis' (2011) 63(3) *Stanford Law Review* 699; Daniel Halperin, 'Tax Policy and Endowments: Is excessive accumulation subsidized? (Part II)' (2011) 67(2) *Exempt Organization Tax Review* 125; James Fishman, 'What Went Wrong: Prudent Management of Endowment Funds and Imprudent Endowment Investing Policies' (2014) 40(2) *Journal of College and University Law* 199.

⁵ International Monetary Fund, 'World Economic Outlook Database' (2020) <<https://www.imf.org/en/Publications/WEO/weo-database/2020/October>>.

⁶ Conti-Brown (n 4) 744-47.

while charities respond to crises in different ways, there appear to be some general barriers to accessing reserves in crises.

The reasons for this reluctance to access reserves and redeploy assets are various. Non-legal matters such as charity reputation and administrative systems are important.⁷ But legal restrictions also loom large,⁸ including the potential mischaracterisation of the legal nature of restrictions and overlooking legal mechanisms for amending restrictions.⁹ In particular, while some charity assets are subject to restrictions on their use, others are permanently endowed. Some donors retain rights under deeds of gift. Other assets are held subject to a separate charitable trust. Generally, mechanisms to lift or modify these restrictions are not well understood – even the common approach of agreeing variations with the donor. Limited use and understanding of the available mechanisms typically gives rise to significant difficulties and costs.¹⁰ Without a better understanding by charities of options to access these reserves in times of need, the funds may remain locked up to the detriment of the charity, those who benefit from its purposes and the broader community.

With these concerns in mind and using doctrinal and empirical legal research, this project aims to:

1. Advance understanding of the difficulties experienced by charities in seeking to access their reserves of restricted assets.
2. Advance understanding of the legal avenues for charities seeking to access their reserves of restricted assets.
3. Generate guidance material for charities in accessing existing restricted assets and in approaching future donations.

These aims are investigated in Western Australia (WA), with insights from other comparable common law jurisdictions that utilise the charity concept (US, UK, Canada and New Zealand). By helping charities build their resilience to pursue their missions, this project helps the WA community, especially the most disadvantaged and marginalised members of the community who have been most impacted by COVID-19.

The legal issues for charities seeking to access their reserves are novel, under-researched and involve multiple and overlapping areas of law. This project provides charities, their legal advisers and regulators with a roadmap of legal mechanisms that can potentially be employed, along with guidance material on approaching new donations. By gathering the experiences of charities on the key difficulties with existing legal mechanisms, the project generates insights for guidance materials and education.

⁷ See Part 4.2.3 Difficulties and Successes in Accessing Reserves.

⁸ Conti-Brown (n 4) 729; Evelyn Brody, 'Charitable Endowments and the Democratization of Dynasty' (1997) 39(3) *Arizona Law Review* 873, 943-44.

⁹ See Parts 4.2.3 Difficulties and Successes in Accessing Reserves and 4.2.4 Use of Legal Mechanisms to Access Restricted Reserves.

¹⁰ Rachael Mulheron, *The Modern Cy-près Doctrine* (UCL Press, 2006) 139-41; Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 46-49; Melanie Leslie, 'Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Près Doctrine' (2012) 31(1) *Cardozo Arts & Entertainment Law Journal* 1, 10-12.

1.1 Background

Much has been written in charity law on two topics. First, the type of benefits that charities can provide; this being the issue of what purposes are ‘charitable’.¹¹ Second, to whom such benefits must be directed; that is, the public benefit question.¹² However, the issue of *when* those benefits can or should be provided has attracted only limited attention, which is primarily focused on philanthropic foundations, donor advised funds and university endowments in the United States.¹³

Crises such as COVID-19 remind us that accumulating reserves has implications for fairness, efficiency and social cohesion by affecting the way in which the public benefits produced by charities are shared between different generations. It is, after all, inherent in the notion of accumulation, that the delivery of some benefits will be deferred for the future. Rules that provide too much deference to ‘intergenerational allocation’ choices made by yesterday’s donors or charity-creators also raise the related issue of the intergenerational distribution of decision-making freedom. For example, most Australian charitable trusts have trust deed terms that seek to preclude distributions of capital.¹⁴ It must be asked, however, if it is appropriate that a donor who died 50 years ago should be able to stop the trustees spending trust capital to alleviate the effects of a global crisis such as COVID-19? Likewise, for how long and to what degree should gift agreement restrictions prevent charities from expending gifts to address such a crisis?

Data on retained asset levels of Australian charities suggests that many charities have some reserves – with sector net assets of \$254 billion in 2020 – and a substantial number have large reserves.¹⁵ In particular, the most recent set of reserves data suggests that over 21.5% of charities have net assets exceeding five years’ expenditure.¹⁶ This is reflected in other

¹¹ Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 3rd edn, 2021); William Henderson and Jonathan Fowles, *Tudor on Charities* (Thomson Reuters, 10th ed, 2015); Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, as amended by the 1st Supplement, 2014); Pauline Ridge, ‘When is the Advancement of Religion not a Charitable Purpose?’ (2020) *Canadian Journal of Comparative and Contemporary Law*.

¹² Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013); Mary Synge, *The ‘New’ Public Benefit Requirement* (Oxford: Hart Publishing, 2017); Gino Dal Pont, ‘Conceptualising “Charity” Parameters – The Prism of Public Benefit’ (2013) 7(1) *Journal of Equity* 1; Fiona Martin, ‘Convergence and Divergence with the Common Law: The Public Benefit Test and Charities for Indigenous Peoples’ in Matthew Harding, Ann O’Connell and Miranda Stewart, *Not-for-profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014); Patrick S Atiyah, ‘Public Benefit in Charities’ (1958) 21(2) *Modern Law Review* 138.

¹³ Michael Klausner, ‘When Time Isn’t Money: Foundation Payout Rates and the Time Value of Money’ (2003) 1(1) *Stanford Social Innovation Review* 51; Brian Galle, ‘Pay it Forward? Law and the Problem of Restricted Spending Philanthropy’ (2016) 93(5) *Washington University Law Review* 1143; Brody, ‘Charitable Endowments’ (n 8); Henry Hansmann, ‘Why do Universities Have Endowments?’ (1990) 19 *Journal of Legal Studies* 3; Roger Colinvaux, ‘Donor Advised Funds: Charitable Spending Vehicles for 21st Century Philanthropy’ (2017) 92(1) *Washington Law Review* 39.

¹⁴ Financial Services Council, *Submission to the Corporations and Markets Advisory Committee: Administration of Charitable Trusts* (2012) 16.

¹⁵ Natasha Cortis, Andrew Young, Abigail Powell, Rebecca Reeve, Roger Simnett, Kerrie-Anne Ho, and Ioana Ramia, *Australian Charities Report 2015* (Centre for Social Impact and Social Policy Research Centre, 2016) 77-80. The more recent reports do not contain equivalent data on reserves, though see also ACNC, *Australian Charities Report: 8th Edition* (June 2022) at 17 as to net asset levels.

¹⁶ Cortis et al (n 15).

jurisdictions where accumulation of assets also appears to be quite marked, in some specific areas. For example, the UK charity sector demonstrates modest levels of accumulation for most charities, but with material reserves held by research charities, grant-making foundations, religious organisations and some universities.¹⁷ In the US, there is evidence that some universities,¹⁸ hospitals, museums and religious organisations have built up substantial endowments or reserves.¹⁹ Likewise, the foundation sector is subject to fierce debate over the payout rates applicable to grant-making private charitable foundations.²⁰ Canadian accumulation concerns appear to centre on such foundations, with the Special Senate Committee Report focussing on the long term ‘parking’ of donated funds.²¹ In New Zealand, accumulation concerns are focussed on foundations and charities operating businesses.²²

In this report, references to ‘reserves’ mean the net assets of a charity; that is assets minus liabilities. Although definitions of ‘reserves’ are sometimes limited to unrestricted (and hence potentially available) assets, the definition used here also includes restricted assets, since we are interested in the extent to which those restrictions are precluding use and whether they can be lifted or amended.²³ To say that some reserves are restricted or that some assets are held subject to restrictions means that conditions apply to the manner in which they can be used. Clearly, as all charities must have a charitable purpose, their general use assets are subject to a broad requirement that they be applied toward that purpose. However, conditions can arise in addition to this general requirement in various ways. For instance, a gift to a charity to be used for a purpose that is narrower than its stated purposes might be characterised as giving rise to a charitable trust such that the charity holds the funds, as trustee, only for that narrower purpose. Alternatively, funds might be given with the condition that only the interest and not the capital can be spent.

The effect of such restrictions on reserves and the legal mechanisms to access these accumulated reserves are not well understood or studied. The literature that relates generally to different legal avenues for accessing reserves is quite patchy. There has been some consideration of cy-près principles and administrative schemes, especially in the US and also

¹⁷ NCVO, *UK Civil Society Almanac 2019* (2019) <<https://data.ncvo.org.uk>>; Ian Murray, *Charity Law and Accumulation: Maintaining an Intergenerational Balance* (CUP, 2021). The Australian-focused thesis upon which the book is based is available at:

https://eprints.utas.edu.au/28606/1/Murray_whole_thesis_ex_pub_mat.pdf.

¹⁸ NACUBO, *US and Canadian Institutions Listed by Fiscal Year (FY) 2019 Endowment Market Value and Change* in Endowment Market Value from FY18 to FY19* (2020).

¹⁹ Joshua Hatch and Megan O’Neil, ‘Taking it to the Bank’ (2017) 29(10) *Chronicle of Philanthropy* 24, 24; Michael Fricke, ‘The Case Against Income Tax Exemption for Nonprofits’ (2015) 89(4) *St John’s Law Review* 1129, 1153-61.

²⁰ Galle (n 13); Klausner (n 13); Marion Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* (Harvard University Press, 2008) 272-76.

²¹ Special Senate Committee on the Charitable Sector, Canada, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* (Senate, 2019) 110-11.

²² Tax Working Group, New Zealand Government, *Future of Tax: Final Report* (2019) 21-22; Department of Internal Affairs, New Zealand Government, ‘Information Briefing: Accumulation of Funds by Large Charities’ (Community and Voluntary Sector Briefing Paper, 31 March 2021). See also Priyanca Rahdakrishnan, Minister for the Community and Voluntary Sector, Media Release (2 June 2022).

²³ For a discussion of reserves and accumulation definitions, see Murray, *Charity Law and Accumulation* (n 17) 12-14.

in the UK,²⁴ but far less in Australia. The US has been far more inclined to treat the donor/charity relationship as contractual and hence there has been analysis in the US of contract law as a basis for permitting access to retained assets.²⁵ However, this analytical lens is in its infancy in many other jurisdictions, including Australia, and the implications of such ‘contractualisation’ are still being worked through.²⁶

1.2 Project Overview and Research Questions

This research project addresses the gaps in the literature by examining the legal effect of restrictions on donations and the potential avenues for lifting or modifying those restrictions; and by interviewing charities to better understand their experience with restrictions and the practical application of legal avenues to lift or modify restrictions.

The purpose of the project is twofold: to provide guidance to WA charities on how to access restricted reserves; and on how to avoid/have greater control over restricted reserves in the first place. To this end, the following four questions constitute the research questions of this project:

1. What are the legal effects of restricted donations?
2. What legal mechanisms currently exist for WA charities to access or redeploy their restricted reserves?
3. What hindrances or successes have WA charities experienced in using these legal mechanisms?
4. What guidance can be provided or how can the law be reformed to enable greater use of these mechanisms while still respecting donor intent?

When considering restrictions, this report does not generally focus on government funding for services, as it is commonly structured to preclude the existence of any material surplus and therefore does not often contribute towards reserves.

2. Methodology

This research project may be categorised as a basic mixed methods qualitative study.²⁷ To answer the research questions, we have conducted a mix of doctrinal and qualitative empirical legal research. Doctrinal legal research involves seeking to analyse and synthesise – in a selected area – what is the law and how does it apply and cohere with the broader legal system, having regard to bodies of rules (such as case law and legislation) and legal reasoning

²⁴ Brody, ‘Charitable Endowments’ (n 8) 942-42; Fremont-Smith (n 20) 183; Roger Sisson, ‘Relaxing the Dead Hand’s Grip: Charitable Efficiency and the Doctrine of *Cy Près*’ (1988) 74(3) *Virginia Law Review* 635, 644; Law Commission (UK), *Technical Issues in Charity Law: Report No 375* (UK Government, 2017).

²⁵ Iris Goodwin, ‘Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment’ (2005) 58(4) *Vanderbilt Law Review* 1093; William Sullivan, ‘The Restricted Charitable Gift as Third-Party-Beneficiary Contract’ (2017) 52(1) *Real Property Trust & Estate Law Journal* 79.

²⁶ Natalie Silver, ‘The Contractualisation of Philanthropy’ (2023) 38(2) *Journal of Contract Law* (forthcoming).

²⁷ Sharan B Merriam and Elizabeth J Tisdell, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 4th ed, 2016) 3, 23-25.

processes.²⁸ Qualitative empirical legal research utilises qualitative social science methodologies and methods to understand the social context of regulation and policy, including the causes and consequences of relevant issues.²⁹

The research was designed around two phases that each include both types of research. In Phase 1, we scoped the legal characterisation of 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 the Research Advisory Group.

In Phase 2, through doctrinal analysis and semi-structured interviews with stakeholders, we further investigated the possible legal characterisations of restrictions, the identified legal mechanisms and ascertained whether or not the participants had characterised restricted gifts in these ways and whether or not the legal mechanisms had been successfully used. We also investigated participants' understandings of the workability of guidance materials and policy responses to the difficulties participants identified. The doctrinal analysis of the legal characterisation of restrictions and of the available legal mechanisms informed the interview questions.

The research has been conducted with the assistance of a Research Advisory Group, being a reference group that we established specifically for this project to: help shape its focus to ensure that it is useful to WA charities, assist with contacts for interview participants, help shape interview questions and useful avenues for guidance and provide comments on the guidance materials. The exploratory workshops discussed in Part 4.1 were held with members of the Research Advisory Group plus several other participants to help shape the research design. The experiences shared during the exploratory workshops informed the interview questions.³⁰ Further, periodic meetings were held with the Research Advisory Group over the course of the project. Part 2.1 below and Appendix II provide an overview of the Research Advisory Group members.

The exploratory workshops and semi-structured interviews, which constitute the empirical research part of this project, were conducted from a social constructivist viewpoint with the aim of understanding and constructing an understanding of restricted reserves from participants' perspectives.³¹ Hence, the employment of these data collection methods recognised the knowledge and wealth of experience that charities already hold and their frequent involvement with marginalised communities. We were conscious of asking charities to share their successes as well as challenges. This qualitative research thus employed the

²⁸ Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2018) 8, 13-21.

²⁹ Frans L Leeuw with Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar, 2016) 3-4; Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 4-5. See also Merriam and Tisdell (n 27) 5-6, 15-16; Sally Wheeler and Phil Thomas, 'Socio-Legal Studies' in David Hayton (ed), *Law's Future(s)* (Hart, 2000) 267, 267, 271.

³⁰ Merriam and Tisdell (n 27) 110 (Table 5.1).

³¹ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (Sage Publications, 4th edn, 2017) 21-4; *ibid* 9.

collaborative and strengths-based ethos inherent in participatory inquiry and appreciative inquiry.³² Pursuit of this ethos was facilitated by the establishment of the Research Advisory Group, which served to guide the project’s design and implementation.

2.1 Sample Selection and Process

We identified members for the Research Advisory Group and interview participants through purposive sampling combined with ‘network’ or ‘snowball’ sampling, to ensure a cross section of voices were represented.³³ In purposive sampling, participants are chosen on the basis of criteria that relate to their special experience and competence.³⁴ We approached most participants or organisations based on these criteria, and a small number were identified through snowball sampling, which denotes the process of locating a few key participants who are then asked to identify other participants.³⁵ For this purposive selection, we identified a range of charities based on the following factors identified by the Productivity Commission when mapping the charity/not-for-profit sector:³⁶

Factor	Relevance and description
Field of activity	Field of activity is relevant as some areas of activity/charitable purposes have been found to demonstrate higher levels of accumulation. In particular, these include philanthropic intermediaries, secondary and tertiary education bodies, hospitals and other health bodies, religious bodies and some cultural institutions such as museums. Also relevant, is that the most common charity activities ³⁷ are (in this order): religion; education and research; human services (including aged-care); health (including nursing homes); community and economic development; arts and culture; philanthropy promotion. ³⁸ Combined, these fields constitute around 85% of charity activities.
Legal form	Legal form is critical to the governance duties applicable to controllers and the applicable regulatory environment. The most common legal forms are: incorporated associations, unincorporated associations, companies limited by guarantee and charitable trusts. Other significant structures are <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) corporations, cooperatives, bodies created by individual Act of Parliament, and bodies created by the Executive by means of letters patent.

³² John Heron and Peter Reason, ‘A Participatory Inquiry Paradigm’ (1997) 3(3) *Qualitative Inquiry* 274; David Cooperrider and Diana Whitney, *Appreciative Inquiry: A Positive Revolution in Change* (Berrett-Koehler Publishers, 2005); Jacques Chevalier and Daniel Buckles, *Participatory Action Research: Theory and Methods for Engaged Inquiry* (Routledge, 2013).

³³ Merriam and Tisdell (n 27) 97-98.

³⁴ Ibid 96, quoting I Chein, 'Appendix: An Introduction to Sampling' in Louise H Kidder (ed), *Selltiz, Wrightsman, and Cook's Research Methods in Social Relations* (Holt, Rinehart, and Winston, 4th ed, 1981) 418, 440.

³⁵ Merriam and Tisdell (n 27) 98.

³⁶ Productivity Commission, Australian Government, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) 6-8.

³⁷ Purposes are linked to a large extent in that the activities promote the purpose.

³⁸ ACNC, *Australian Charities Report* (2020) 9.

Taxation treatment	Taxation treatment may be relevant to inhibiting (as well as promoting) accessing of reserves. In terms of differentiation between charities due to tax status, all charities are eligible for income tax exemption, so that should not drive differences. However, some charities may also qualify for other concessions, such as deductible gift recipient status as a private or public ancillary fund (DGR 2 status). Private and public ancillary funds are subject to minimum distribution requirements that might slow the build-up of reserves but might also dissuade trustees from departing too far from these minima (because they fear that this might be a breach of the duty of care).
Market/non-market facing distinction (i.e. whether the charity sells its goods and services in a market or not)	The market/non-market facing distinction is likely to be relevant to a charity's ability to accumulate assets and also to the types of conditions that might be attached by e.g. donors, rather than purchasers of services. This also captures, to a large degree, the Productivity Commission's reference to 'financing sources'.
Scale	Scale is likely to be highly relevant to whether the charity has assets to accumulate. Small charities are unlikely to have significant financial resources for accumulation. Therefore, the charities selected for this project are medium to large charities, adopting the current Australian Charities and Not-for-profits Commission (ACNC) Act definition of annual revenue greater than or equal to \$500,000 (medium) or \$3 million (large).
Geographic location	Geographic location should not necessarily be associated with any differences in ability to access reserves, but we have been mindful of this as a factor that may influence the ability to access reserves of metropolitan charities versus charities operating primarily in rural/regional/remote areas.

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.

In order to ensure that most charities selected had some experience in dealing with reserves, we organised the charity selection primarily by way of the 'field of activity' factor.

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. Namely, that the member or participant:

1. 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. was in a position with sector overview.

The selection process resulted in 17 Research Advisory Group members and 31 interview participants. One member from an education organisation withdrew from the Research Advisory Group after the workshops due to an increase in workload, but then another member was added from a social service organisation. Thus, we ended up with a Research Advisory Group consisting of 17 members. Not all members were able to participate in all of the workshops or subsequent meetings, but most did so. Table 1 and 2 below display the breakdown of workshop and interview participants by type of organisation. Appendix I categorises in more detail (i.e., 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.

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 the exploratory workshops and semi-structured interviews between July 2021 and January 2022. We held two identical, half-day exploratory workshops in July 2021, as all Research Advisory Group members were not available on any one date. The workshops were structured around the following discussion points:

1. The extent to which charities hold restricted assets and the level of need charities have felt recently to access those assets.
2. Experiences with accessing restricted assets, including legal difficulties and successes using legal mechanisms to do so.
3. The difficulties and successes in accessing restricted assets that charities would find it most helpful for us to focus on.

We conducted 28 semi-structured interviews (with 31 participants) of approximately 40 minutes to an hour each between July 2021 and January 2022, some face to face, some online through video calls, and one over the phone. The following 10 questions constituted the interview structure:

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']
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)?
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?
8. Would it be useful to be able to ask an independent body to authoritatively interpret or approve changes to gift conditions?
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?
10. Do you have any other comments about what we have discussed or the research project?

In advance of the interviews, we provided participants this list of questions, including an appendix with some information on potential legal characterisations of restrictions and legal mechanisms to address restrictions (see Appendix III).

Additionally, we consulted the Research Advisory Group throughout the project. Following the exploratory workshops, we held several videoconference meetings of approximately one hour where the Research Advisory Group provided feedback on findings and guidance on next steps.

2.2 Limitations

In selecting charities for the Research Advisory Group and for workshops/interviews, we selected medium to large charities (which also reduced the number of charities in the legal form of an unincorporated association, with our sample containing no charities in this form) and, due to cost and time constraints, largely selected metropolitan based charities. The findings are therefore of most relevance to larger metropolitan charities. Further, even constrained to large metropolitan charities, there is still a range of potential combinations of relevant factors (activity type, legal form, tax status, market-facing) not represented in our sample, such that some caution should be applied to generalising results even within this

group. Further reflecting limitations arising from the diversity of the sector, even with 28 interviews, we did not achieve saturation on all issues.³⁹

That we did not achieve saturation on a range of issues is unsurprising given the great diversity of the charity sector. However, there were many commonalities on a number of the core issues examined in this study, such as historically poor record-keeping and the lack of integrated management systems, as seen in Part 4 below. In addition, there was an overwhelmingly predominant approach on the part of charities in treating 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.

3. Legal Analysis of Restricted Gifts

Research on the law applying to restricted gifts yielded the following key findings, which are discussed in more detail below.

Key findings:

- There are six main potential legal characterisations of restrictions placed on gifts by donors: mere wish, charitable trust, common law condition subsequent giving rise to forfeiture, equitable personal obligation, charge or agreement.
- Determining the correct legal interpretation is a matter of ascertaining the objective intentions of the parties/donor and this is a highly fact-specific exercise. However, the courts have not typically characterised restrictions as giving rise to an agreement, generally favouring other interpretations, such as a charitable trust or mere wish construction.
- There are several legal mechanisms permitting the lifting or amendment of restrictions that can apply to some or all of the legal interpretations of restrictions. In particular, seeking advice or directions from the Supreme Court, seeking a *cy-près* scheme, seeking an administrative scheme, using the trustee expediency provisions, or agreeing a variation.

3.1 The Different Legal Interpretations of Restrictions

Donations may be made unconditionally or subject to conditions (i.e., restricted). If a donation is made unconditionally, then the donor would not typically have any expectation, or any legal or moral basis, for seeking to compel the recipient to use the donation for a particular purpose. Though, of course, if an unconditional donation is made to an incorporated charity or to trustees for the general charitable purposes set out in the trust

³⁹ '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 27) 247-48.

deed or the charity's constitution,⁴⁰ the trustees or the charity will hold the donation under the terms of the trust deed or the constitution, as applicable. That constituent document would require 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.⁴¹ 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.

However, it is in relation to conditional, or 'restricted', donations⁴² that charities may be subject to restrictions on how and when they use funds and where donors may be most interested in enforcing the relevant restriction over time. 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.

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 means ascertaining the objective intentions of the donor or testator,⁴³ although this may be in circumstances where the donor or testator may not be aware of all the different legal characterisations available. Evidence of a donor's objective intention can be found in the language used by the donor, the nature of the property (including money) and the nature of the condition imposed, as

⁴⁰ We have focused on incorporated charities and trustees of charitable trusts as donation recipients because that reflects our sample of WA charities. Unincorporated associations have legal disincentives as material property holding structures and so the skew in our 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 (Cortis et al (n 15) 104). Our analysis 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).

⁴¹ 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, e.g., Gino Dal Pont, "'Charity' and Trusts: Mutuality or Intersection?' (2016) 10(1) *Journal of Equity* 26, 42-9; Ian Murray and Rosemary Langford, 'The Best Interests Duty and Corporate Charities: The Pursuit of Purpose' (2021) 15(1) *Journal of Equity* 92, 99, 106-109.

⁴² 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: *Attorney-General (Qld) v Corporation of the Lesser Chapter of the Cathedral Church of Brisbane* (1977) 136 CLR 353, 371-2 (Jacobs J).

⁴³ *Gill v Gill* (1921) 21 SR (NSW) 400, 407 (Harvey J); *Attorney-General v Dean and Canons of Windsor* (1860) 8 HL Cas 369 (charity case), 393-4 (Lord Campbell LC), 425, 431 (Lord Wensleydale); *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 (charity case), 498, 502-3 (Gummow J); *Byrnes v Kendle* (2011) 243 CLR 253, [53]-[59] (Gummow and Hayne JJ), [98], [102]-[115] (Heydon and Crennan JJ). See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (8th edn, LexisNexis Butterworths 2016) [2-26]-[2-39], [5-02]-[5-03].

well as the whole of the circumstances of the relationship between the donor and the recipient charity.⁴⁴

There are six main potential legal characterisations of restrictions.⁴⁵ They are:

1. **Mere wish**

The 'restriction' is interpreted as a mere wish or expression of desire on the part of the donor that the funds be used for a particular purpose.⁴⁶ However, 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. However, this could permit the charity to, for example, spend all of a gift to pursue its purposes today, rather than following a wish to spend only the income and maintain the capital.

2. **Charitable trust**

The restriction is 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.⁴⁷ Indeed, for charitable trusts intended to last in perpetuity, it is common for courts to interpret the trust (where the trust deed 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.⁴⁸ In any event, the majority of charitable trusts appear to contain terms in their deeds prohibiting or limiting distribution of capital.⁴⁹ Alternatively, if the purpose of the newly created charitable trust is narrower (e.g. treat symptoms of a

⁴⁴ See n 43. See also *Misra v Hindu Heritage Research Foundation Ltd* (Supreme Court of New South Wales, Young J, 21 June 1996) (charity case).

⁴⁵ As to the potential differing bases for restricted gifts, see, e.g., *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 418-420 (Dixon J) (payment under trust); *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 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 QdR 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* (1921) 21 SR (NSW) 400, 407 (Harvey J) (non-charitable bequest); *Muschinski v Dodds* (1984-1985) 160 CLR 583, 604-607 (Brennan J (lifetime non-charity case). Contract is not often stated as a basis, but see Silver, 'The Contractualisation of Philanthropy' (n 26).

⁴⁶ See, e.g., *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491.

⁴⁷ See, e.g., *Re Smith* [1967] VR 341 (lifetime gift, albeit the recipient was a government entity, not a charity); *Attorney-General v Wax Chandlers' Co* (1873) LR 6 HL 1, 12-13 (Lord Chelmsford) (bequest to non-charity to be used for a charitable purpose); *Save the Heritage Simpson Covenant Society v City of Kelowna* (2008) 296 DLR (4th) 419 (BCSC) (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).

⁴⁸ See, e.g., *Re Roberts* [1963] 1 WLR 406, 414, 416 (Wilberforce J). See also Henderson and Fowles (n 11) [21-022]-[21-025].

⁴⁹ Financial Services Council, *Submission to the Corporations and Markets Advisory Committee, Administration of Charitable Trusts*, 21 December 2012, 16.

disease) than that of the recipient charity (e.g., advancement of health), then that would also restrict the recipient charity from using the funds for its broader purposes – e.g. 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 it is recorded in the recipient charity's accounts as being 'earmarked' for a particular purpose and kept separate from its other funds (eg in a separate bank account).⁵⁰

3. Common law condition subsequent giving rise to forfeiture

The restriction could amount to a 'condition subsequent'⁵¹ that if the donated money or other property is not used for the specified purpose or in the specified manner, then the donated property will revert to the donor if the donor exercises their right of re-entry⁵² or be gifted-over to another charity.⁵³ A donor can typically pass such rights of re-entry on (e.g. to a spouse or children) under their will.⁵⁴ A gift-over mechanism would typically be expressly noted in the gift.

For gifts made after statutory reform of perpetuities rules in WA in 1962, the condition would likely only be valid for the perpetuity period (generally 21 years if no period is specified in the gift),⁵⁵ such that the charity would only be legally obliged to comply with the condition for that period.⁵⁶ If the consequence is a gift-over from

⁵⁰ *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 498, 505-6 (Gummow J).

⁵¹ An alternative 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). Possibilities of reverter and rights of entry upon failure of a condition subsequent 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 Fowles* (n 11) [6-036]; *Muschinski v Dodds* (1984-1985) 160 CLR 583, 605-6 (Brennan J); *Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) (No 2)* [2009] WASC 404, [71]-[72] (Murphy J). They may give rise to a resulting trust in favour of the donor if the condition is breached (*Misra v Hindu Heritage Research Foundation Ltd* (Supreme Court of New South Wales, Young J, 21 June 1996) (obiter))

⁵² See, e.g., *Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) (No 2)* [2009] WASC 404, [71]-[72] (Murphy J); *Jack v Burnett* (1846) 12 Cl & Fin 812 (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).

⁵³ *Attorney-General v Coopers' Company* (1840) 3 Beav 29 (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). A condition subsequent was the preferred construction at first instance and in the Court of Appeal for *Attorney-General v Wax Chandlers' Co* (1873) LR 6 HL 1 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 *Attorney-General v Wax Chandlers' Co* (1873) LR 6 HL 1, 19 (Lord Cairns).

⁵⁴ See *Wills Act 1970* (WA) s6; John Hockley and Peter MacMillan, *Wills, Probate and Administration WA* (Perth: LexisNexis, November 2022 update) [24,015.5]. And as to the ability to transfer such rights more broadly, see also *Property Law Act 1969* (WA) s11(1).

⁵⁵ *Property Law Act 1969* (WA) ss103, 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, J H C Morris and W B Leach, *The Rule Against Perpetuities* (London: Stevens & Sons, 2nd edn, 1962) 218.

⁵⁶ Where a condition becomes impossible to perform, it will also cease to apply: TC Thomas, 'Conditions in Favour of Third Parties' (1952) 11(2) *Cambridge Law Journal* 240, 244.

one charity to another, no perpetuity limit applies and the condition would continue to restrict the use of the gift.⁵⁷

4. Equitable personal obligation

If a charity chooses to accept the benefit of a gift of money or other property with a restriction attached, then it may be treated as having an equitable obligation to also accept the restrictions stipulated by the donor.⁵⁸ Failure to perform the obligation could result in a liability to pay equitable compensation or an order for specific performance or an injunction.⁵⁹ This means that the recipient of the restricted gift may be subject to greater liability than arises from some of the other legal characterisations because the obligation is not limited to (the value of) the property donated.⁶⁰ If the restriction refers to a gift-over upon failure to meet the restriction, then it is unlikely to be characterised as giving rise to an equitable personal obligation.⁶¹

5. Charge

The money or other property may be given subject to a charge securing the use of the donated property for a particular purpose.⁶² 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.⁶³ It does not create an interest greater than the security interest, so that when the obligation or liability is fulfilled, the person

⁵⁷ *Property Law Act 1969* (WA) s111(2); *Corporation of London as Trustee of Christ's Hospital v Grainger* (1849) 1 Mac&G 460; Dal Pont, *Law of Charity* (n 11) [6.12].

⁵⁸ *Re Boning* [1997] 2 QdR 12, 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 E.R. 13, 38 (Romilly MR) (non-charity case, bequest); *Gill v Gill* (1921) 21 SR (NSW) 400 (non-charitable restricted bequest); *Re Williams* (1885) 54 LT 105 (non-charity case, restricted bequest). 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* (1921) 21 SR (NSW) 400, 406 (Harvey J); *Hammond v Hammond* [2007] NSWSC 106 [19] (Young CJ).

⁵⁹ *Re Boning* [1997] 2 QdR 12, 22 (White J) (charity case); *Hammond v Hammond* (unreported NSW SC 21 Feb 2007) [12]-[38] (Young CJ) (non-charity case); *Muschinski v Dodds* (1984-1985) 160 CLR 583 (non-charity case), 605 (Brennan J), 624-5 (Dawson J).

⁶⁰ *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417, 419 (Dixon J). Tentative support is also provided by Heydon and Leeming (n 43) [2-38]; *Hammond v Hammond* [2007] NSWSC 106 [13] (Young CJ). See also *Gregg v Coates* (1856) 23 Beav 33.

⁶¹ *Public Trustee v Beckham* (1914) 15 SR (NSW) 6, 8-9 (Harvey J – non-charity case involving gift over from life tenant).

⁶² *Attorney-General v Dean and Canons of Windsor* (1860) 8 HL Cas 369 (gift to incorporated charity with rules as to various charitable purposes to which a portion of the funds had to be applied); *Corporation of Southmolton v A-G* (1854) 5 HL Cas 1 (bequest to local government body with charge to pay an annuity for the benefit of a school); Henderson and Fowles (n 11) [6-007]; Picarda (n 11) 321. See also *Attorney General v Fishmongers' Company* (1840-41) 5 Myl & Cr 11 (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 (non-charitable bequest of interest in land, subject to payment of legacy to wife of testator).

⁶³ See, e.g., *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 (Gaudron, McHugh, Gummow and Hayne JJ) at [6] citing Lord Hoffman in *In re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214.

holding the property retains the surplus.⁶⁴ Although 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.⁶⁵

6. Legally binding agreement

Agreeing to comply with a restriction and to accept money or other property might, alternatively, be characterised as an 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. Normally, a restricted gift would not give rise to a legally binding contract on the basis that while there may be an agreement, the charity recipient does not provide any consideration for the property received. However, if the restrictions on the property given involve material obligations undertaken by the charity it is not inconceivable that a gift agreement could be construed as a common law contract on the basis that the charity is promising to act in a way that benefits the donor in exchange for the property.⁶⁶

Further, if a gift agreement is in the form of a deed, then the requirement of consideration would not apply, meaning that the restriction may be a term in a legally binding agreement. Breach of a restriction in the deed could result in common law or equitable remedies.⁶⁷ For instance, a donor may be able to recover damages and may also be entitled to terminate for breach (e.g. if the donor has an obligation to make a series of payments), or alternatively, potentially obtain an injunction or specific performance in equity.⁶⁸ Note that injunction or specific performance are discretionary remedies and that there may be some impediments for a donor to achieving this relief.⁶⁹ In particular, specific performance will not be ordered where it is impossible to perform the contract or where the other party has

⁶⁴ This being a reason for finding that there was a trust and not a charge in the charity, will, case of *Merchant Taylors' Co v A-G* (1871) LR 6 Ch App 512, 517-518 (Lord Hatherley LC), 519 (Sir James LJ), 523-4 (Mellish LJ).

⁶⁵ *Attorney-General v Dean and Canons of Windsor* (1860) 8 HL Cas 369; *Merchant Taylors' Co v A-G* (1871) LR 6 Ch App 512 (though, ultimately, the will was characterised as giving rise to a trust not a charge).

⁶⁶ As to this possibility, including discussion of North American examples, see Silver, 'The Contractualisation of Philanthropy' (n 26); N C Seddon and R A Bigwood, *Cheshire & Fifoot Law of Contract* (Chatswood: LexisNexis, 11th Australian Edn, 2017) [4.15] 191-192). As to the requirement of consideration, see JW Carter, *Contract Law in Australia* (Chatswood: LexisNexis, 2018) Ch 6..

⁶⁷ See, e.g., Nicholas Seddon, *Seddon on Deeds* (Federation Press, 2015) [6.18]-[6.22]. As to potential limits on remedies, see also Silver, 'The Contractualisation of Philanthropy' (n 26).

⁶⁸ In addition to the difficulties identified below, for more detail on the limits on availability of specific performance or an injunction, see Carter (n 66) Ch 39 and ch 40; Seddon and Bigwood (n 66) Ch 24; Silver, 'The Contractualisation of Philanthropy' (n 26).

⁶⁹ Carter (n 66) 924, 934-5; Seddon and Bigwood (n 66) [24.1] 1236. There have also been historical suggestions that specific performance (or an injunction) may be inappropriate if that would require ongoing supervision by the court to ensure the carrying out of an agreement. However, there are suggestions from commentators that this limit is no longer being applied so vigorously as in the past: Carter (n 66) 924; Seddon and Bigwood (n 66) [24.13] 1256-58. In the context of injunctions, see also J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th edn, 2015) [21-215].

a right to terminate the contract,⁷⁰ either of which situation which may be the case for a charity's failure to comply arising from a crisis that involves a material change of circumstances.⁷¹ However, while it may be difficult to obtain specific performance or injunction for a promise under deed for which no consideration is provided (which may be the case for the charity recipient),⁷² in the case of a donor who has provided property, there would generally be consideration for the promise and so no reluctance to provide equitable relief.⁷³

The range of remedies is important as it would often be unclear what damage a donor has suffered as a result of a charity failing to comply with a gift restriction.⁷⁴

As set out above, determining which is the applicable category is a matter of ascertaining the objective intentions of the parties/donor. This is a highly fact-specific exercise, permitting the range of characterisations. It is worth noting, however, that restricted gifts are not typically characterised by Australian courts as giving rise to a binding agreement.⁷⁵ Instead, a trust construction (or mere wish construction) is far more common.⁷⁶

Several reasons have been suggested for why Australian courts might prefer a charitable trust characterisation.⁷⁷ Two seem pertinent to this project. First, because the courts favour charitable gifts. If failure of a non-trust restriction might mean that the gift is lost to charity, then the courts would prefer a trust characterisation. Of course, this will not always be the case as the restriction could, for instance, involve a gift-over to another charity upon failure. However, in most cases a non-trust characterisation does potentially mean that the donor could seek the return of their property or else equitable compensation or damages.⁷⁸

⁷⁰ Carter (n 66) 924.

⁷¹ 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] 3 *UNSW Law Journal Forum*.

⁷² On the basis that equity does not usually 'assist a volunteer': Carter (n 66) 118.

⁷³ Carter (n 66) 118, referring generally to the situation where consideration is provided for a promise; Seddon (n 67) [6.21]-[6.22].

⁷⁴ The lack of damages as an adequate remedy is relevant (though less so for an injunction) to the availability of equitable remedies like specific performance or an injunction: Carter (n 66) 923-4, 935; Seddon and Bigwood (n 66) [24.1] 1238-9, [24.19] 1263.

⁷⁵ That has traditionally also been the case in the United States: Evelyn Brody, 'From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing' (2007) 41 *Georgia Law Review* 1183, 1225.

⁷⁶ See, e.g., Dal Pont, *Law of Charity* (n 11) [17.7]. Especially where the conditionality applies to the whole use of the gift: *Re Smith* [1967] VR 341, 345-6 (Menhennitt J). Although 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. Or a construction that the restriction is a mere wish: *Misra v Hindu Heritage Research Foundation Ltd* (Supreme Court of New South Wales, Young J, 21 June 1996, charity case); *In Re Turkington* [1937] 4 All ER 501 (non-charity case).

⁷⁷ Dal Pont, *Law of Charity* (n 11) [17.10]. See also *Attorney-General v Wax Chandlers' Co* (1873) LR 6 HL 1, 9-13 (Lord Chelmsford), 19-20 (Lord Cairns); Thomas (n 56) 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.

⁷⁸ Albeit the amount may potentially be (much) less than the restricted gift, if the donor is unable to show loss: Silver, 'The Contractualisation of Philanthropy' (n 26).

Second, any construction other than charitable trust or mere wish might raise tax law implications for treating the gift as a deductible donation – thus favouring the trust as a way of achieving both the desired tax outcome and effective restrictions.⁷⁹

Restrictions on the use of gifts may also arise from a range of other sources. In particular, various consumer protection laws are likely to apply to fundraising in a range of circumstances, with potential impact on how collected funds may be used. For instance, the Australian Consumer Law⁸⁰ may prohibit engaging in fundraising conduct that is misleading or deceptive or that is likely to mislead or deceive (such as saying that money will be used for one purpose and then using it for another).⁸¹ Beyond the Australian Consumer Law, 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 were collected would breach the *Charitable Collections Act* and lead to sanctions, including revocation of a charitable collections licence.⁸²

Further, when Parliament creates a charity under statute (e.g. most Australian 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.⁸³ 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.⁸⁴ Charity registration or tax endorsement of a charity in relation

⁷⁹ For further discussion, see Ian Murray, Jeanette Jensen, Marco Rizzi, Robyn Carroll, Donovan Castelyn and Natalie Skead, 'Restricted Philanthropic Gifts: Paradigm Clash Between Law and Practice or Simply a Muddle' (forthcoming). A conduit trust characterisation, whereby the gift is held on trust to be handed on to another person (even a charity) would also imperil deductibility: see, e.g., *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 506–7 (Gummow J), Taxation Ruling TR 2005/13 [129]–[137]. For a discussion of the tax risks of an interpretation that provides a donor with enforceable rights, see Natalie Silver, 'The Tax Treatment of Donor-Restricted Charitable Gifts' (2021) 36 *Australian Tax Forum* 103. Silver's discussion focuses on whether restricted gifts giving rise to enforceable rights on the part of donors are truly 'gifts' and she concludes that the current tax practice is that they are not, but that this might be open to question. However, Silver only very briefly discusses another tax provision, *Income Tax Assessment Act 1936* (Cth) s78A, which is incredibly broad and could well apply.

⁸⁰ *Competition and Consumer Act 2010* (Cth).

⁸¹ Primarily under section 18 of the Australian Consumer Law (see *Competition and Consumer Act 2010* (Cth), schedule 2). 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* (Parkes: Treasury (Cth), 2017) 75–76; Access Canberra et al, *A Guide to the Australian Consumer Law: For Fundraising and Other Activities of Charities, Not-for-profits and Fundraisers* (Parkes: Treasury (Cth), 2017); *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197 (not-for-profit).

⁸² *Charitable Collections Act 1946* (WA) ss8, 13(2)(a), 17(1)(b).

⁸³ Sections 14A, 15.

⁸⁴ With removal of such restrictions often requiring 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) s75(7); Landgate, *CRW-01 Crown Land – General* (Webpage) <<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>>.

to specific purposes (e.g., a Public Benevolent Institution) might also limit the breadth of (charitable) purposes to which donated funds might be put.

As these other sources of restrictions are affected by even more varied factors than the basic scenario of a donor expressly seeking to restrict use of a gift or involve highly specific statutory provisions for a particular charity, we did not focus on these additional sources of restriction in this research. However, we have referred to them in this report where they were raised by interview participants.

3.2 Legal Mechanisms to Amend or Lift Restrictions

With a better understanding of the key legal characterisations of gift restrictions, it is possible to identify legal mechanisms that could be used to amend or lift the restrictions. It is worth noting that many of the following mechanisms are rarely used and not well understood, which can generate difficulties and increase costs.⁸⁵ However, this report is a step in the process of improving awareness about these mechanisms.

Further, there is likely to be a relatively pragmatic approach that can be adopted for historic restricted gifts. As discussed below, it may be possible to apply for a scheme (a *cy-près* scheme to amend purpose or an administrative scheme to amend the means of pursuing a purpose) in most circumstances where gift restrictions are legally binding, even if the charity is unclear on the precise legal characterisation. There is some uncertainty about precisely which legal characterisations of restrictions can be varied by these schemes (it is unlikely that they would remove agreement rights, for instance, even if applying to the charitable property). However, where a charity requests a scheme, the Attorney-General and, to some extent the courts, are likely to favour an interpretation of the scheme provisions and characterisation of the gift terms that require public supervision of any amendments to restrictions by way of a scheme.

3.2.1 Mechanisms applicable to all 6 legal characterisations

Preventative measures

The easiest way to deal with unwanted restrictions on the use of assets is to ensure that the gift is not subject to those restrictions from the start. Part 4.2.5 of this report therefore discusses preventative measures in some detail. The aim is to build trust and understanding on the part of donors so that the gift is made subject to a mere wish. Part 4.2.5 also discusses legal wording that might be used in a gift agreement or acknowledgment to try to achieve the desired legal characterisation of a restriction.

If a donor wishes to have an enforceable right, then, due to the operation of perpetuity rules, the next most preferable characterisation may be a condition subsequent (provided the condition does not operate to forfeit the property automatically, but only on election by the donor). That is because the perpetuity rules are often likely to result in a 21-year time limit on the enforceable rights and during that 21-year period, the charity can still agree to

⁸⁵ Mulheron (n 10) 139-41; O'Halloran (n 10) 46-9; Leslie (n 10) 10-15. As to a discussion of mechanisms in the United States, see Brody, 'From the Dead Hand' (n 75).

variations with the donor. Additionally, as set out below, there is some case authority that a cy-près scheme can be settled, which may not be the case for agreements.

Seek advice/directions from the Court

Regardless of the legal form of a charity, the court's supervisory jurisdiction will typically apply,⁸⁶ such that the officers/responsible persons for the charity may (and in some cases might have a duty to) apply to the Supreme Court for advice or directions on a proposed course of action.⁸⁷ Obtaining the court's advice or a direction telling the officers/responsible persons what to do, will potentially limit their liability for any breach of duty when acting in accordance with the advice or direction.⁸⁸

3.2.2 Mechanisms applicable to charitable trusts and common law conditions subsequent and possibly equitable personal obligations and charges

Cy-près schemes

A cy-près scheme is an approved change to the charitable purpose for which property is held.⁸⁹ The WA legislation refers to 'property held for a charitable purpose'.⁹⁰ The key relevant grounds upon which a scheme may be settled are where it is 'impossible, impracticable or inexpedient' to carry out the purpose, or where 'the amount available is inadequate to carry out' the purpose, or where 'the value of the property is greater than is necessary for the original purpose'.⁹¹ Until recently, there was also an additional, broader ground, where the value of the property subject to the restriction is less than \$30,000 and is 'too small, in relation to the charitable purpose, for any useful purpose to be achieved by the expenditure of only the income derived from that property'.⁹²

Where restrictions have resulted in multiple lots of small funds being essentially warehoused because it is no longer feasible to carry out the intended restricted purpose, *Charitable Trusts Act 2022* (WA) s10(1)(b) would potentially enable a charity to lift the restriction. Further, in some circumstances, restrictions (such as endowment of capital requirements) that materially impede the pursuit of a charitable purpose for the present generation might be characterised as inexpedient or as giving rise to accumulated property

⁸⁶ See, e.g., Dal Pont, *Law of Charity* (n 11) [14.1] – [14.5]. Whether due to the court's inherent supervisory jurisdiction (*Re Padbury* (1908) 7 CLR 690, 695-6 (O'Connor J) or, potentially, under a statutory provision (see n 87). See also *Kostka v Ukrainian Council of NSW Inc* [2013] NSWSC 222, [52]– [56] (Young AJ).

⁸⁷ Some statutory provisions also explicitly provide this right for certain forms of charities. See, e.g., *Trustees Act 1962* (WA) s92; *Charitable Trusts Act 1962* (WA) s21(1)(d). And note newly enacted (but not yet commenced at the time of writing) *Charitable Trusts Act 2022* (WA) s44(2)(d). As to the application of trustee provisions permitting advice and directions, see *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66.

⁸⁸ See, e.g., Heydon and Leeming (n 43) [21-34]

⁸⁹ See, generally, Dal Pont, *Law of Charity* (n 11) ch 15 and ch 16.

⁹⁰ *Charitable Trusts Act 2022* (WA) s10(1). As to the application of administrative and cy-pres scheme provisions to charities other than in the form of trusts, see Murray, *Charity Law and Accumulation* (n 17) 129-131. Note also that the reference to property held for a charitable purpose is as an alternative to being held on trust – e.g. 'property that is held on trust for, or is otherwise to be applied to, a charitable purpose' (s4 (definition of 'property held for a charitable purpose')).

⁹¹ *Charitable Trusts Act 2022* (WA) s10(1). The WA provisions have replaced the court's inherent cy-près jurisdiction: *Taylor v Princess Margaret Hospital for Children Foundation Inc* (2012) 42 WAR 259 [43]- [59] (Edelman J).

⁹² *Charitable Trusts Act 1962* (WA) s7A (this provision has not been included in the *Charitable Trusts Act 2022* (WA)); *Charitable Trusts Regulations 2015* (WA) r2A.

that is more than necessary for the purpose.⁹³ Likewise, restrictions requiring that land be held and used to pursue a purpose, might be found inexpedient if to do so would be hugely inefficient.⁹⁴ Though these circumstances are still narrow, crises such as COVID-19 potentially evidence a material change of circumstances that could result in ‘inexpedience’. For instance, changed social and economic conditions and changes in public policy have been held to be relevant in demonstrating that a particular purpose is inexpedient.⁹⁵

Cy-près schemes are clearly available to amend the terms of a charitable trust. It is less obvious that they are available in relation to the other legal characterisations of restrictions. They have, however, also been applied to amend the stated purpose of incorporated charities.⁹⁶ Further, the WA provisions are expressly worded to apply to circumstances in which property is held for a charitable purpose in ways other than a charitable trust.⁹⁷ There are also cases in which cy-près schemes have been applied to remove or modify a condition subsequent – e.g. as to accumulation, with no gift-over,⁹⁸ or as to the manner in which property will be maintained and displayed - with no gift-over,⁹⁹ or in the circumstances of a gift-over from one charity to another.¹⁰⁰ There are also cases which accept that cy-près and administrative schemes can be applied to restrictions arising in broader circumstances. For instance: ambiguities in will restrictions not amounting to a trust;¹⁰¹ restrictions on spending capital and some income imposed on a bequest, which were found to not result in a trust, but with the condition subsequent/personal equitable obligation/charge characterisation left unstated.¹⁰² Thus there seems a reasonable basis for seeking a cy-près scheme in respect of conditions subsequent and possibly also equitable personal obligations and charges.

In WA, applying for a cy-près scheme typically requires an application to the Supreme Court, with the scheme to first be provided to the Attorney-General for a scheme report and advertised.¹⁰³ However, where the value of the property to which the scheme relates is less

⁹³ As to the application of these grounds to endowment/accumulation restrictions, see Murray, *Charity Law and Accumulation* (n 17) 137-146. For a recent broad application of expediency provisions to expand those who could benefit from spouses to de facto partners (on the basis that the outdated nature of the language had made it inexpedient to continue limiting assistance to spouses), see *Dilworth Old Boys Benevolent Trust* [2022] NZHC 2755. And for recent broad application of differently worded South Australian ‘cessation’ provisions, see *University of Adelaide v Attorney-General (SA)* [2023] SASC 17, [33]-[34] (McDonald J).

⁹⁴ *Cancer Council of Western Australia v A-G (WA)* [2016] WASC 297.

⁹⁵ *Re Radich* [2013] NZHC 2944.

⁹⁶ See, e.g., *Re Dominion Students Hall Trust* [1947] Ch 183 (company limited by guarantee, which had a discriminatory restriction in its objects).

⁹⁷ See n 90.

⁹⁸ In the US, see *MacCurdy-Salisbury Educational Fund v Killian* 30 Conn Supp 203 (1973) (Cohen J) 209-10.

⁹⁹ In the US, see *Re Stuart's Estate* (1944) 46 NYS 2d 911, 914-16 (Surrogate's Court of New York) (cy-près principles, as also enunciated under legislation applying to gifts to charities). The court found that the condition subsequent was not one that could give rise to forfeiture.

¹⁰⁰ *Re Connington's Will* (1860) 2 LT 535; *Re Hanbey's Will Trusts* [1956] Ch 264 also indicates that a condition subsequent in the form of a gift-over can be circumvented by way of a cy-près scheme: at 273-5 (Danckwerts J).

¹⁰¹ *Kostka v Ukrainian Council of NSW Inc* [2013] NSWSC 222 (not a trust).

¹⁰² *MacCurdy-Salisbury Educational Fund v Killian* 30 Conn Supp 203 (1973) (Cohen J) 209-10.

¹⁰³ *Charitable Trusts Act 2022 (WA)* ss13, 14, 18, 19, 21 (previously *Charitable Trusts Act 1962 (WA)* ss9, 10, 11, 15).

than \$100,000 or the annual income from the property is less than \$20,000, the Attorney-General may approve the scheme, without the need to apply to the Supreme Court.¹⁰⁴

Administrative schemes

An administrative scheme is an approved change to the mode of administering a charity. It is usually sought where there is some uncertainty as to the internal rules of a charity relating to the means to pursue the charitable purpose.¹⁰⁵ However, other descriptions of the circumstances in which an administrative scheme will be settled are broader, referencing circumstances where the current mode is 'inadequate or impractical' to achieve the charitable purpose.¹⁰⁶ In keeping with this, the statutory articulation of the administrative scheme jurisdiction in WA is very broad:¹⁰⁷

This section applies to property held for a charitable purpose if the administration of the property could be facilitated by —

- (a) extending or varying the powers of the persons in whom the property is vested; or
- (b) specifying or varying the mode of administering the property.

This breadth is bolstered by another provision (contained within the charity proceedings provisions) under the *Charitable Trusts Act 2022* (WA), that permits any person (including a charity) to apply to the Supreme Court for an order 'giving directions in respect of... the administration of a charitable trust'.¹⁰⁸

Accordingly, an administrative scheme may be available where restrictions on the means adopted (e.g. restrictions on accessing capital or retaining land) make it impractical to achieve a charity's purpose,¹⁰⁹ or would substantially impair achievement of the overarching charitable purpose.¹¹⁰ Administrative schemes should be available in respect of the same legal characterisations of restrictions as *cy-près* schemes: i.e. charitable trusts and conditions subsequent and possibly also personal equitable obligations and charges.

Applying for an administrative scheme follows the same process as that for *cy-près* schemes.¹¹¹ An application under the charity proceedings provisions does not formally involve the same requirements, but it is likely that the process will often be similar in practice, especially as a copy of the application must be served on the Attorney-General.¹¹²

¹⁰⁴ *Charitable Trusts Act 2022* (WA) s16 (previously *Charitable Trusts Act 1962* (WA) s10A; *Charitable Trusts Regulations 2015* (WA) r3).

¹⁰⁵ See, e.g., Dal Pont, *Law of Charity* (n 11) [14.10]. For a recent discussion of the potential overlap in circumstances between administrative schemes and *cy-près* schemes, see *Perpetual Trustee Company Ltd v A-G (NSW) (Will of Hon George Nesbitt)* [2018] NSWSC 1456 [50]-[55].

¹⁰⁶ *Corish v Attorney-General's Department (NSW)* [2006] NSWSC 1219 [9] (Campbell J). For other cases on broader grounds, see also *Re University of London Charitable Trusts* [1964] Ch 282, 284-285 (Wilberforce J); *Re J W Laing Trust* [1984] Ch 143, 153, 155 (Peter Gibson J); *A-G v Dedham School* (1857) 23 Beav 350, 356-7 (Romilly MR).

¹⁰⁷ *Charitable Trusts Act 2022* (WA) s12(1) (formerly *Charitable Trusts Act 1962* (WA) s8). Note that *Charitable Trusts Act 2022* (WA) s12(1) refers to 'property held for a charitable purpose' rather than to a trust.

¹⁰⁸ *Charitable trusts Act 2022* (WA) s44(2)(d) (formerly *Charitable Trusts Act 1962* (WA) s21(1)(d)). For recent application of charity proceedings provisions in South Australia to enable extensive amendment to a trust deed to update it to meet changed tax requirements, see *Seaton, Noble & Motteram* [2022] SASC 152.

¹⁰⁹ See, e.g., *Re Tikipunga Protestant Children's Home* [2012] NZHC 3078.

¹¹⁰ See, e.g., *Merchant Bank & Trust Co v Garrett* 33 So 2d 603 (Miss, 1948).

¹¹¹ See nn 103 to 104.

¹¹² *Charitable Trusts Act 2022* (WA) s47(2) (formerly *Charitable Trusts Act 1962* (WA) s21(2)).

3.2.3 Mechanisms applicable to charitable trusts only

Where a charity is in the form of a trust, the *Trustees Act 1962* (WA) permits the Supreme Court to confer powers on trustees where it is ‘expedient’ to do so.¹¹³ Expedient has been interpreted widely to mean ““advantageous”, “desirable”, and “suitable to the circumstances of the case””.¹¹⁴ In the case of a charitable trust, that means focussing on whether the power would further the trust’s charitable purpose.¹¹⁵

These expediency provisions could potentially be used to circumvent restrictions on the mode of using property to pursue a purpose.¹¹⁶ For instance, providing trustees with an express power to distribute capital that is otherwise subject to a requirement that it be perpetually endowed.¹¹⁷ However, judges are likely to be cautious in making orders under the expediency provisions, such that amending or removing a restriction that goes to the purpose or substantive nature of the trust is likely to require a *cy-près* scheme.¹¹⁸ In any event, the Attorney-General is likely to seek orders requiring a similar process (as to notification/advertisement and opportunity for submissions) to that provided for schemes under the *Charitable Trusts Act 2022* (WA).

3.2.4 Mechanisms applicable to common law conditions subsequent, charges, personal equitable obligations and agreements

Provided the condition subsequent does not automatically result in forfeiture of the gift or in a gift-over, then for conditions subsequent, charges and personal equitable obligations, it is possible for the charity to agree with the donor, their executor, or – in some cases – their heirs,¹¹⁹ that the charity can act in a way that would otherwise breach the restriction. Where restrictions are characterised as amounting to an agreement, a charity could also agree with a donor (or potentially executor¹²⁰ or heirs)¹²¹ to amend the condition itself or to waive enforcement rights.

¹¹³ *Trustees Act 1962* (WA) s89(1).

¹¹⁴ *Riddle v Riddle* (1952) 85 CLR 202, 222 (Williams J), 214 (cf Dixon J).

¹¹⁵ *Freeman v A-G (NSW)* [1973] 1 NSWLR 729, 735-6 (Helsham J).

¹¹⁶ *Trustees Act 1962* (WA) s89(3) expressly contemplates that the court order might contradict a requirement in the trust deed.

¹¹⁷ *Colonial Foundation Ltd v A-G (Vic)* [2007] VSC 344, [22] (Smith J). See also *Norman v Australasian Conference Association Ltd* [2008] VSC 573, [17], [27] (Judd J).

¹¹⁸ Dal Pont, *Law of Charity* (n 11) [14.18]. See also *Baptist Union of New Zealand v Attorney-General* [1973] 1 NZLR 42.

¹¹⁹ Rights of entry can typically be passed on under a will (n 54). A charge is an equitable interest in the donated property, which could potentially be assigned or passed on under a will (see e.g. *Wills Act 1970* (WA) s6; *Property Law Act 1969* (WA) s11(a)). The position is less clear for an equitable personal obligation, which may not amount to property.

¹²⁰ Seddon notes that if an obligee (in our case, the donor who has provided property to the charity) dies, then to the extent that it is possible for the deed to be effective, it will remain so for the benefit of the obligor’s estate: (n 67) [6.12]. However, if the obligations owed are such that they can only be enjoyed by a living person, such that they have a ‘personal element’, the death of the obligee would result in frustration of the deed and application of the doctrine of frustration: Seddon (n 67) [6.12]; Seddon and Bigwood (n 66) [8.55], [19.18]. If the restriction can be clearly interpreted, then it seems that it should not be ‘personal’.

¹²¹ Whether heirs have rights will depend on the circumstances. These include whether the deed is a deed poll, which can be enforced by a person sufficiently identified as a beneficiary of rights: Seddon (n 67) [6.9] (a deed of gift is unlikely to be a deed poll). If the deed is executed as a deed inter partes, then typically, privity rules would mean that heirs cannot enforce a deed of gift without more: Seddon (n 67) [6.6], [6.10], citing *Chesterfield and Midland Silkstone Colliery Co (Ltd) v Hawkins* (1865) 3 H & C 677, 692; *Accordent Pty Ltd and*

The process for all four characterisations of restrictions is likely to be similar, with any such agreement to waive rights or for amendments likely needing to be in the form of a deed to deal with any lack of consideration on the part of the charity. To the extent that it is possible for donor rights to be passed on to heirs, it is likely that, as time progresses, those rights will be at increasing risk of the perpetuity rules (in the case of conditions subsequent) or of statutory limitation periods and equitable defences like laches or acquiescence (on the basis that changed circumstances are likely to progressively result in inadvertent breaches of restrictions over time that are not enforced).

If the original restriction involved a gift-over to another charity, then it may be necessary for that charity to also agree not to enforce the restriction.¹²²

It would not normally be possible to agree to vary a charitable trust restriction with the donor alone, because Supreme Court or Attorney-General approval would typically be required under the *cy-près* or administrative scheme provisions or the trustee expediency legislation.¹²³

4. Workshop and Interview Findings & Discussion

We set out here the key themes from the exploratory workshops and interviews and discuss their implications.

What this discussion shows is that most of the charities participating in the research held some reserves and that a portion of those reserves was restricted, with restrictions arising from the receipt of funds in a range of circumstances. A majority of the participating charities had experienced difficulties in accessing their reserves and non-legal difficulties were just as important as legal difficulties.

When discussing legal difficulties, it became apparent that most charity participants did not fully understand the legal effect of restrictions. Most charities approached restrictions with an assumption that they should be characterised as giving rise to either a ‘contractual’ or moral obligation to the donor, such that seeking changes to restrictions would primarily involve liaising with the donor. This relatively uniform ‘contractual’ characterisation is unlikely to be correct in law in all cases due to the range of possible legal characterisations discussed in Part 3. This means that there are some additional options available to charities to free up their reserves that they might not have fully considered.

Charities were generally supportive of guidelines being developed to help manage future restricted gifts, so as to increase their ability to make use of the restricted funds.

Portellos v Bresimark Nominees Pty Ltd [2008] SASC 196 [66]-[67]. Property Law Act 1969 (WA) s11 only affects this position in limited circumstances, not including choses in action under a deed: *Seddon* (n 67) [6.7].

However, it is possible to assign or pass on benefits arising under a deed, if the deed permits this (acknowledged in *JV Property Syndicates Pty Ltd v Croakybill Ltd* [2005] QCA 479; *Accordent Pty Ltd & Portellos v Bresimark Nominees Pty Ltd* [2008] SASC 196 [67]), such that if the donor’s rights under the deed of gift amount to a benefit, they could potentially be assigned or passed on to heirs.

¹²² As to the right of the gift-over recipient to call for the property, see: *Corporation of London as Trustee of Christ’s Hospital v Grainger* (1849) 1 Mac&G 460.

¹²³ Though it is possible for a trust deed to enable variation in this way. See, e.g., *Murray & Langford* (n 41).

4.1 Exploratory Workshops

As mentioned above in Part 2.1, we held two identical exploratory workshops in July 2021 with a total of 13 participants. The following four key themes emerged from the workshops:

1. Sources of assets that form reserves.
2. Administration of reserves and records.
3. Charities' experiences of accessing restricted assets.
4. Strategies to support charities.

These key themes are detailed below.

4.1.1 Sources of Assets that Comprise Reserves

The charities with which workshop participants were familiar received their reserves assets from a broad range of sources, including:

- Bequests made under a donor's will, potentially with restrictions.
- Lifetime gifts from individuals, often made under a deed of gift or gift agreement, sometimes under an express trust.
- Corporate donors or philanthropic foundations, again often under a deed of gift or gift agreement. Some gifts of property (not money) required donor consent before sale of the property.
- General gifts made in response to a public fundraising campaign.
- Grants of land from the State, subject to various statutory restrictions.
- Self-generated funds, e.g., from the provision of educational services.
- Income from investments.

Government funding for services was a common revenue source for charity participants, but typically made on conditions that permitted no material surplus or on the explicit or implicit expectation that any surplus would be returned or rolled over into the next funding tranche. As such government funding agreements often preclude reserves arising in the first place, analysis of government service agreement restrictions is largely beyond the scope of the project. However, the workshop feedback raised the question of whether government services agreements should be structured to encourage a surplus for charity recipients where the charity provides resources and bears the risks. When conducting interviews (see Part 4.2) it became apparent that government block grant funding is often structured quite differently and can enable a surplus to be retained. Indeed, it appeared from interviews that state government funding to arts organisations often involves an expectation that performing arts organisations would endeavour to have a reserves ratio of around 20%.¹²⁴

¹²⁴ Interview with government executive officers (13 September 2021).

4.1.2 Administration of Reserves and Records

A key difficulty for many charity participants seeking to access reserves was that they did not have readily accessible records articulating the restrictions (if any) on reserves and/or the legal meaning of any restrictions. This is not to say that charities have failed to record the terms of their gifts. Rather, it appears that the costs of maintaining a central and readily accessible register of restricted gifts and the legal and administrative costs of ascertaining the legal meaning of those restrictions have often meant that charities have adopted very conservative approaches to accessing restricted reserves. In addition, for a number of charities, decision-making about gift restrictions frequently occurred in a devolved way at the level of the organisational unit that received the gift, rather than in a centrally coordinated fashion.

Very few charities had undertaken stocktakes of historical gifts. Where this had occurred, it was typically in response to a crisis, such as the need to make Redress Scheme payments or a shift in public sentiment about donations from classes of donors – such as tobacco companies.

Many charities also self-imposed restrictions on their use of assets. For instance, due to a board decision or delegated decision to spend only the income and not capital. This was sometimes based on maintaining donor relations and sometimes (for endowment restrictions) on the basis that funds should be used in a ‘generationally neutral’ manner – meaning that the real value of the gift should be maintained and only the remaining income spent.

4.1.3 Charities’ Experiences of Accessing Restricted Assets

Many charities adopted practices to reduce the risk of accepting gifts with unacceptable restrictions, therefore reducing the risk of difficulties in accessing those restricted assets (see theme 4.1.4 below).

Further, in preference to considering the legal nature of restrictions and legal mechanisms for removing restrictions, most charities considered donor and public perceptions of using a gift outside the original restrictions and elected to consult with the donor or their family before doing so. For lifetime gifts, this was the standard approach to dealing with restrictions on the gift.

Restrictions imposed under bequests were typically seen as more difficult to address, especially for historic bequests. However, some charities had experienced success in dealing with executors.

A small number of charities had successfully approached the Supreme Court for directions on how to interpret restrictions and on the permitted range of uses of the restricted assets, but this was seen to be an expensive process.

Statutory restrictions on the use or disposal of land granted by the State were seen by affected charities as often imposing unduly narrow restrictions and as requiring a high political burden in that approval to lift the restrictions often required ministerial consent or

amendment of legislation. That said, some charities had experienced success in obtaining ministerial approval.

Addressing restrictions also raised the varied ability of charities to obtain legal advice on gift restrictions and mechanisms for removing restrictions. Some charities had in-house legal teams, others had pro bono advisers or access to a panel of legal advisers shared with other charities.

Several charities emphasised that tax rules can also narrow the range of ways in which assets can be used. For instance, the limited deductible gift recipient categories relevant to secondary schools, such as school building funds and scholarship funds.

4.1.4 Strategies to Support Charities

The strategies discussed were split between prophylactic measures to reduce the risk of inappropriate restrictions in the first place and law reform that might help to address restrictions on historic gifts.

Suggested prophylactic measures included:

- Development of a gift acceptance policy.
- Publication of the gift acceptance policy, including suggested wording for donors to use when making gifts under a will or a deed of gift.
- Including a term in the deed of gift permitting the charity to change the use of funds where circumstances require.
- Providing guidance and education material, such as training for lawyers advising charities and donors about the legal effect of restrictions and ways to ensure certainty for donors, but with some flexibility for the charity.

The main law reform measure discussed was the establishment of an independent body (other than the Supreme Court of WA) from which to obtain (a) authoritative interpretation of gift restrictions; and (b) approval for changes to restrictions in appropriate circumstances. For instance, the Australian Charities and Not-for-profits Commission. This suggestion was aimed at addressing two issues:

- Donor perceptions about a charity recipient approaching the Supreme Court for directions/advice or for a scheme, which was seen as an adversarial process.
- The cost and time involved in applying to the Supreme Court.

4.2 Semi-Structured Interviews

The results from interviews are discussed below by reference to:

- The context of participant charities' reserves.
- Purpose for accessing reserves.
- Difficulties and successes in accessing reserves.

- The use of legal mechanisms to access restricted reserves.
- Law reform and preventative measures.

4.2.1 Context

For context, we asked interview participants about their role, experience and background in the not-for-profit sector, and the sources of their charity's funds or assets. The vast majority of participants were executive directors, trustees or senior officers, such as the Chief Executive Officer or Chief Financial Officer, and have worked in the sector for more than five years and many for 10 to 30 years. A minority were legal advisers.

The interview responses demonstrated a wide variety of sources of assets, ranging from individual donors to charitable foundations, corporate sponsorships and self-generated funds. The complete range of identified sources is listed below. The sources include all of those already identified in the workshops with the addition of state government funding through Lotterywest and Healthway, and in-kind gifts. Most of the organisations rely on a number of these sources reflecting broader sector reliance (especially amongst larger charities) on multiple sources.¹²⁵

The list below outlines identified sources of assets in order of frequency of identification, not by way of the relative monetary value of each type of source:

- Individual donors, including lifetime gifts from individuals, often made under a deed of gift or gift agreement, sometimes under an express trust.
- Bequests made under a donor's will, potentially with restrictions.
- Corporate donations and sponsorships under contract.
- Philanthropic intermediaries, again often using a deed of gift.
- General gifts made in response to a public fundraising campaign.
- Income from investments.
- State government funding through organisations like Lotterywest and Healthway.
- Self-generated funds, e.g., from provision of educational services.
- In-kind gifts, such as art and equipment.
- Crown grants and leases.
- Other sources, such as affiliated organisations and historic assets.

Individual donors featured as an asset source for the majority of charities and were fundamental to the health, religious and arts organisations with which we spoke. Donations from individuals appeared to be vastly different in nature, ranging from one-off gifts to on-going contributions to scholarships, and from no restrictions, however rare, to severely restricted. Such restrictions and their legal status are discussed below in Part 4.2.3. The form

¹²⁵ ACNC, *Australian Charities Report* (2020) 18; Sarah Mitchell, *Charity Management: Leadership, Evolution, and Change* (Routledge, 2021) 54.

of property given also varied, with several participant organisations, predominantly in the arts, having received shares in a large WA company some years ago, which are integral to the charities:

Today, they're [the shares] actually keeping me alive. The dividends and the franking credits on that many shares have been absolutely fantastic.¹²⁶

From our interviews, the charities that received the most and largest bequests seemed to be educational, followed by health and religious organisations, while bequests for the arts were more infrequent. Likewise, 'other' and social services organisations receive none to a small number of bequests, except for one of the social services organisations that had recently seen its bequests increase materially due to the intergenerational transfer of wealth from the baby boomer generation.

Corporate donors and sponsorships were significant to the operations of many charities in arts and education, while much less significant for health and religious organisations. Other corporate donations included gifts to set up an endowment fund and in-kind gifts, which are discussed further below. Sponsorships, where the donor gets something in return, typically involved the delivery of a certain program or activity.

Philanthropic intermediaries consist of both corporate foundations and public and private ancillary funds, including family foundations. The interview data showed that educational organisations received funds from both kinds of foundations, whereas the relevant arts organisations received funds mainly from corporate foundations. This source of income was typically tied to a certain program, activity or facility rather than being unrestricted.

Roughly, one third of participants mentioned income from public fundraising, self-generated funds, Lotterywest and Healthway, and in-kind gifts. Public fundraising includes events, such as galas and bake sales, end-of-year campaigns, ongoing public appeals and parish collections, many of which are for specific purposes. To ensure unrestricted funds for administration and unexpected events (such as crises like COVID-19), an education organisation participant noted that '[a] fundraising program ought to be 20% unrestricted'.¹²⁷ Self-generated funds were mentioned by participants from arts, education, religious (opportunity shops and disposal of land and buildings) and social service organisations.

Income from investments was predominantly interest from endowment and term deposits and dividends on shares. There were also some examples of buildings and land being used to earn income.

While we scoped out government funding, we did include government funding distributed through quasi-philanthropic intermediaries like Lotterywest and Healthway that fund in the form of grants, including both project and operating grants. The organisations that had the most success in receiving such grants were in the arts and social services. Religious organisations and educational charities had also received Crown land grants and leases.

¹²⁶ Interview with arts organisation executive (10 August 2021).

¹²⁷ Interview with former university advancement services executive (9 November 2021).

Finally, in-kind gifts featured most prominently in the education sector, but one arts organisation and one religious organisation also reported such gifts, which ranged from legal advice, to artwork, to equipment, to permission to use land.

Another interesting point that emerged from the interviews is that COVID-19 highlighted the need to diversify income streams for many of the charities, especially those in the arts that, to some extent, rely on box-office income.¹²⁸ Two other arts organisation participants were also considering setting up an endowment fund to secure the future, one of them with the ultimate goal of replacing government funding, due in part to worries about the future stability of government funding. These responses emphasise the importance of informing charities about how to avoid unnecessary restrictions on their reserves.

Key finding:

- Western Australian charities obtain their funds from a wide variety of sources, ranging from individual donors to charitable foundations, government funding for services, corporate sponsorships, in-kind gifts and self-generated funds.

4.2.2 Purposes for Accessing Reserves

To understand attitudes toward reserves, we asked participants why they might want to access reserves. The results show varied needs to access reserves. Some charities access reserves only for crises and/or to expand operations, some for standard operations, and some do not need to access reserves at all.

Naturally, to access reserves, one must hold some in the first place. As mentioned above, there are broadly two kinds of reserves: restricted and unrestricted. Restricted reserves include funds gifted for specific purposes and endowment funds. Unrestricted reserves include all other net assets that have no legal or formal restrictions on access.

All of the participant charities had some reserves, albeit, of various sizes and accessibility. Generally, the larger organisations had more significant reserves, while one of the medium-sized religious organisations found it difficult to build reserves. One religious organisation and, overall, the arts organisations, reported the most significant reserves, with some arts organisations having enough to cover operations for approximately one year.¹²⁹ The other participating organisations did not put a number on their reserves, including universities, some of which are likely to hold very material reserves. These findings are partially consistent with the expectation in Part 1.1 that most Australian charities hold some reserves and the expectation based on overseas jurisdictions that education, health, religious and some arts and culture charities would hold reserves.

Below are the reasons provided for wanting to access reserves, in order of frequency:

¹²⁸ See, e.g., Interview with arts organisation executive (13 September 2021).

¹²⁹ For perspective, a common reserves target for non-profit organisations is three months of funds to cover operating costs, but, arguably the correct amount will depend on the individual organisation's revenue volatility: Renée A Irvin and Craig W Furneaux, 'Surviving the Black Swan Event: How Much Reserves Should Nonprofit Organizations Hold?' (2021) 00(0) *Nonprofit and Voluntary Sector Quarterly* 1, 1.

- Crises, such as COVID-19 and the Global Financial Crisis.
- Support standard operations.
- Changed circumstances.
- Royal commission into institutional responses to child sexual abuse and the National Redress Scheme.
- Impact of the move to the National Disability Insurance Scheme (NDIS).

While the most popular reason given was crises, the data showed some unexpected results. First, the health organisations interviewed had not needed to access reserves due to COVID-19. This may be due to the relatively mild direct health impact in WA and the allocation of government resources to meeting these impacts. Secondly, the participating arts organisations saw growth in reserves in 2020 after COVID-19. As one participant explained,

... when you don't put on shows, you make money. It costs you more to put on a work than in, you know, in terms of what you would expend and then return in revenue, as opposed to not putting on the show, not getting the revenue. You end up in front that way.¹³⁰

However, the participant further noted that 2021 was different in the sense that they still put shows on, but every show was impacted by COVID-19 through reduced capacity, having to change dates or shorten the season, and change the show structure. In this case, they were still spending but not generating normal levels of revenue. Thus, this organisation was forecasting a loss for 2021 to be covered by unrestricted reserves.

Other organisations did have a need to access reserves due to COVID-19. One of the social service organisations accessed reserves in 2021 due to COVID-19 and an education organisation accessed reserves for a student hardship fund. Another education organisation wanted to access reserves due to COVID-19 but could not due to restrictions:

... there has to be a specialist fundraising programme for unrestricted funds. And what that is, it will give the university or the charity the freedom to make use of unrestricted funds for the pandemic ... it just makes our process a bit more efficient if we know, great, we need to have students, for example, during the pandemic, and we got the reserves that we can release to do that. But we didn't have that. And all the funds ... they were all restrictive with no gift agreement. So, we can't usually release that. We knew the university needed some funds to help students for emergency purposes, but our hands were tied. Now, we couldn't use, you know, the gift that was left in the account ... they're in the interest-bearing account. There's just this accumulating interest.¹³¹

From another angle, the three philanthropic foundations that we spoke to saw an increase in demand for funds or at least requests to keep funds although the recipients were not able to deliver the intended program or activity due to the pandemic.

Accessing reserves to cover standard operations was mentioned by six of the participant organisations, including two from the arts, two health organisations, one education organisation, and one philanthropic foundation. In the case of the arts organisations, this included funding to put on a new production.

¹³⁰ Interview with arts organisation executive (6 September 2021).

¹³¹ Interview with former university advancement services executive (9 November 2021).

Several participants also referred to changed circumstances as a reason to access restricted assets. For instance:

...the reserve for us, it's not restricted to certain circumstance. It's restricted because we had probably a terrible agreement with the donor who wants to give to a very specific thing. [X University] accepted a major, major bequest, agreeing with the donor to do a PhD in a field that was in [Y], that no longer exists, that the money has been sitting there for five years and it's just, it's bad.¹³²

I think the advice... [was] you have a legal obligation to fulfil the donor intent. And, you know, we asked questions around a range of incidents. So, what if we don't have information? You know, the records from 10 years ago aren't sufficient. What if the donation is to a clinician, and that service is still going, but that clinician is gone, we had a few scenarios like that.¹³³

I have seen instances in the past where I worked briefly at a girls' college where, and this I think ties into some, maybe the later questions, where they had a scholarship for a physically disabled young lady from rural or regional areas to attend the boarding school, which was received as a bequest. So, there was no conversation to be had with the estate, and it kind of just sat there on the shelf because rural and regional people weren't sending their girls to the boarding school as much as they used to. And then on top of it, it had to be, you know, this physically disabled young lady. And of course, you're narrowing down half the population once you split into gender as well.¹³⁴

We had a donor that came to us that [gave \$X] to the refurbishment of [a hospital health facility], and that was all well and good. And it was taking time, it's taking sort of three years, and the donor understood that we were doing all the right things there. However, the [hospital health facility] then got seconded and created into the COVID clinic... So those funds are still sitting pending at the moment... my next step with [the donor] because just where things are going, you know, I'm talking to her actually about changing course of her donation and looking at the transport. We need to purchase a new vehicle for the transport service that they offer, the voluntary service.¹³⁵

Three of the charities mentioned the National Redress Scheme or the impact of the establishment of the NDIS. Two of the three religious organisations that we spoke to had accessed reserves due to the National Redress Scheme. One of the philanthropic foundations noted that they work with several human services organisations that had needed access to reserves and to other funds because of the change to the NDIS.

Several participants also mentioned a range of other reasons for accessing reserves. For instance, maintaining and restoring artefacts; covering evolving community issues and solutions; and particular circumstances in which it is hard to raise funding, such as for the cost of funerals for people who have committed suicide.

¹³² Interview with university advancement manager (9 November 2021).

¹³³ Interview with health organisation executives (31 August 2021).

¹³⁴ Interview with university advancement services executive (7 December 2021). Further difficulties in applying scholarship funds due to the restrictions attached to scholarships were noted in an interview with education organisation executives (12 January 2022).

¹³⁵ Interview with health research foundation executive (1 November 2021).

Key finding:

- Perceived levels of need and reasons for accessing reserves varied markedly. For instance, some charities accessed reserves only for crises, such as COVID-19, others to expand operations, some for standard operations, and some did not need to access reserves at all.

4.2.3 Difficulties and Successes in Accessing Reserves

The majority of participant organisations had experienced difficulties in accessing reserves, comprising both legal and non-legal difficulties. 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. The imposition of restrictions was, however, relatively common for at least some gifts to most charities, with one participant noting the frequent tension between acceding to donor requirements and obtaining a useful gift:

But it is quite difficult because depending on who the donor is, they do want to attach an anchor's worth of conditions to a gift, which, you know, that tension is constant. And it's a, you know, there's lots of things going on in the tension of that relationship because it might be a significant amount of money. They might be a significant influencer around the [charity], which is often the case in a place like Western Australia. So, you know, they might want to be a donor, but actually they're not giving you a gift. They're trying to buy some sort of control or something. So that, it's a continual tension.¹³⁶

For other charities, it was more common for restrictions to arise because donors had given funds to the charity for a particular project or program developed by the charity rather than for overtly egoistic reasons. For instance:

[T]here was a chap who wanted to see a particular building, a church hall essentially, built. There'd been a bequest for a partial amount of the money from a woman who had wanted to see facilities for children in the church, which couldn't happen in the church building. They said, well, we're going to hold that and they had that for several years, probably several decades until they had the rest of the money. And this chap had then said, you know, I like the plan that you're coming up with.

...But again, it's the same sort of thing. It's, the project is something that already has been established usually. It's not people trying to invoke a direction or inflict the direction on us with their money, which I think I was hearing from other charities.¹³⁷

And also:

finance prefer a limited number of clusters of funds, a limited number of projects, limited number of fund buckets. And I think their preference would be that we only accept, you know, why don't you tell people you'll only accept money for X, Y and Z. We try to explain to them, well, that's lovely in principle and yes, there's things that we actively solicit funds for,

¹³⁶ Interview with university advancement services executive (20 September 2021). See also interview with health foundation executive (11 October 2021).

¹³⁷ Interview with religious organisation executive (30 August 2021).

and we have priority areas that we actively solicit funds for. But then there's the aspect of donor led. So there's a foundation led but then there's donor led.¹³⁸

In some cases, the restrictions expressly related to non-use of donated capital, with only the interest to be spent. For instance:

The other restriction I have is a capital fund... 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...¹³⁹

Key findings:

- The majority of interviews evidenced perceived legal and non-legal difficulties in accessing reserves.
- For some charities, the non-legal difficulties were more significant than any legal restrictions. In particular, the non-legal difficulties included a lack of centralised and easily accessible records, concern over donor perceptions and reputational damage and resourcing for legal advice on gift restrictions as opposed to other areas of operations.
- The key legal difficulty was that most charities were unsure whether their restricted gifts gave rise to a legally binding restriction and, if so, the nature of that legal restriction. This was not necessarily because the participating charities lacked access to legal advice. Rather, it was an expertise and resourcing issue. Most in-house lawyers lacked specific expertise in characterising restricted gifts and paid or pro bono support from external lawyers was typically prioritised for other operational matters.

Non-legal Difficulties

The interviews confirmed the finding of the exploratory workshops that non-legal difficulties in accessing restricted assets are important and, in some cases, more significant than legal restrictions. The list below summarises identified non-legal difficulties in accessing restricted assets in order of frequency:

- Administrative, such as lack of central and easily accessible records.
- Self-imposed restraints, including governance processes and complying with moral obligations.
- Donor perceptions.
- Reputational damage.
- Lack of, or limited access to, legal advice.
- Risk-aversion of charity decision-makers.
- Practical difficulties liquidating assets.

¹³⁸ Interview with health organisation executives (31 August 2021).

¹³⁹ Interview with arts organisation executive (10 August 2021).

- Fear of spending due to uncertainty of income.

In 12 of 28 interviews, interviewees reported administrative restrictions or difficulties with accessing reserves. This includes at least two organisations from each charity category of arts, health, education, human services and religion. An education participant explained:

And to give you an example of the scale of the challenge, we've been focusing on, just trying to ... nibble a little bit at the gigantic problem. So, we've decided to focus on one school here where they have a large number of big, chunky gifts, a lot of endowed gifts and significant bequests over the years, some of them have been around for a long period of time. ... So, we've gone through basically all of our databases. You know, looked through the archives and found the original deed of gift for every single one that we could think of and summarised the purpose and the main terms of the gift etc. and what was originally there. ... but then in order for it to be meaningful ... [w]e not only needed to know what was in the original deed of gift, we also needed to find how that deed of gift was interpreted by the university from time to time. So, what actually happened? Where did it go and who was in charge of it? Because as well as accepting it for the purpose, you then have to have some way of implementing it with a governance framework, so that exists in a live way.

That was more tricky because often there was, it could be a letter that we have to find on a file from someone ... saying, 'good idea, let's give this to', you know, it's a gift for the medical science. It could go to any, it's so broad it could go to Alzheimer's research, it could go to cancer research. ... And so finding the bit of paper which told us what that was, is more difficult than finding the original deed of gift.

Once that happens, then it needs to appear in the financial records, which it would do with a capital identifier, so it would have a number which would carve it out as part of the overall endowment if it's an endowed gift. But then that capital account could generate into any number of income accounts, which are out across the campus. So, one bequest could have an account for a funded position, for scholarship research, for general funds supporting activity. It could have lots of different areas that it's allocated to, it could be allocated to multiple schools. And the problem we have in our system is that they don't necessarily map to each other. If you have the capital account you can map it to an associated account, but you can't do the reverse.¹⁴⁰

This description of the problem largely matches what other participants reported: difficulty tracing files due to lack of information and to systems that were not integrated. This boils down to the lack of a centralised database of gift restrictions and implementation. As one participant responded to a question about a central record-keeping system from which information can be accessed easily:

Yes, wouldn't that be lovely? No, it's not organised that way. At least not from where I'm sitting. If somebody has those, that information organised, I'd dearly love to be able to access it because it would actually make my life a lot easier. But, no, the [charity] is not organised that way.¹⁴¹

Another participant noted:¹⁴²

We've got a pool of money sitting in a bucket or several buckets, and we don't know whether

¹⁴⁰ Interview with university advancement services executive (20 September 2021).

¹⁴¹ Interview with in-house lawyer (30 August 2021).

¹⁴² Interview with health organisation executives (31 August 2021).

they were, in many cases, lots of small donations from community members, major donations, a bequest or several bequests, moneys from PAFs [private ancillary funds]. We only have part of the picture in the central donor management system that we can refer to until we bring on centralised gift management, which is what we're trying to do at the moment.

Some organisations are working on or planning to establish such systems. The two main reasons for this problem appear to be a lack of both financial and human resources to manage funds, and insufficient record-keeping and integration. As several participants noted, the lack of records meant that they had to seek legal advice to release the funds, which is a barrier in itself, discussed below. This means that funds may be sitting untouched, in some cases without the organisation even being aware of having the funds.

The most common self-imposed restraints were strict governance processes and honouring donors' wishes although not legally required to do so. In 18 interviews, interviewees mentioned governance or approval processes, essentially to protect funds and the organisation, as a difficulty in accessing reserves. For example:

So, for instance, for the current year that we are in, we got the board to agree to a deficit for this year, which would dig into those reserves. And there's a very, very long discussion around arriving at that position, over probably five months, five to six months, where you look at the pros and cons of the sustainability of the organisation, the balance of reserves that we need to keep, the KPIs that we have with the state and federal government in terms of what we need to deliver.¹⁴³

This makes sense due to the insolvency risks if organisations spend too much of their reserves and the associated potential for breach of duties by the directors or responsible persons for the charity.

In some cases, charity participants reported that their board had designated a portion of reserves as endowment, restricting access to capital due to internal policies rather than donor restrictions.¹⁴⁴ As for honouring donors' wishes when not legally required to do so, a number of participants stated that they felt a moral obligation to do so, as well as noting concern about donor backlash and reputational damage.

Many organisations were very concerned about donor backlash in terms of damaging relationships and/or broader reputational damage. In fact, half of the participants mentioned these concerns as a barrier to accessing reserves. As several participants explained:

Yes, it's interesting you say that because in a lot of cases, they're not [donor restrictions]. They're expressions of intent, I guess. They, the ultimate test of their strength will be if you fail against a couple of conditions, what's the consequence? And often that will just be a straight out, well, you know, you get a letter saying you're not, you know, you're not working to the spirit of the MoU. You know, here's our requirement restated, and if you continue to be a habitual bad offender, that particular donor will just walk away from you...

¹⁴³ Interview with arts organisation executive (6 September 2021).

¹⁴⁴ See also Irvin and Furneaux (n 129) 2, citing Woods Bowman, Elizabeth Keating and Mark Hager, 'Investment income' in Dennis R Young (ed), *Financing Nonprofits: Putting Theory into Practice* (Altamira Press, 2007).

A lot of the agreements are very, and I might say, you know, those funding agreements with the donors, they're often very weighted to the donor. That's another issue, like donors say, you know, at any point we can walk away ... with little or no notice at all. And they can give themselves fairly generous clauses of what can, you know, what triggers a mechanism for them to walk away. So, it's not ideal, legally, but I think it's given that relationships are at stake. Brands are on the line here...¹⁴⁵

So, the idea of us going to the High Court and saying, we'd like some more money from someone, and we don't want to do what they asked to do. It's not a good look for us.¹⁴⁶

The issues most probably would be liquidity, as I've kind of touched upon, but I'd also say public perception as well... Whereas if the university started selling its buildings, there could be an outcry from former students, let's say, you know? Why are you no longer operating from this building or that building? Because there are people that have had lived experiences in those buildings and an emotional attachment.¹⁴⁷

In short, the general sentiment was 'don't bite the hand that feeds you'.¹⁴⁸ Indeed, one health organisation considered reputational risk the biggest risk that they faced.

As examined in more detail below, having no or limited access to legal advice to clarify the accessibility of reserves is a significant difficulty. While some larger organisations have a legal team, they are often not specialised in charity law or restricted gifts. Other organisations rely on having a lawyer on their board or pro-bono legal advice, but such lawyers are again often not specialists. In both cases, access to legal advice is a finite resource and accessing advice in relation to restrictions will mean that legal advice will have to be foregone on other, perhaps more pressing, matters. Paying for external legal advice is not often viable unless the gift is above a certain size. An education organisation participant provided the following example:

...it 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 100-150 K, you can see that the impact of those funds diminishes with more administration or legal costs to spend it.¹⁴⁹

The barrier of the board being risk-averse overlaps with governance processes and fear of spending due to uncertainty of income and the need to protect the financial sustainability of the organisation. Another reason given for the board being conservative with reserves is that, essentially, it is not their money; it is imbued in some way with the donors' intentions. It is no doubt a challenge to find the right balance between protecting reserves for a 'rainy day' and distributing funds in accordance with current needs.

This leaves the practical difficulties around liquidating land, buildings and other items, such as antiques and artwork, which three participants from three different types of organisations

¹⁴⁵ Interview with health foundation executive (11 October 2021).

¹⁴⁶ Interview with religious organisation executive (30 August 2021).

¹⁴⁷ Interview with university advancement services executive (7 December 2021).

¹⁴⁸ Interview with charity executive (12 November 2021).

¹⁴⁹ Interview with university advancement services executive (2 November 2021).

identified. These difficulties include the time it would take to sell such assets and the economic impact of obtaining government approval to lift restrictions frequently imposed on Crown land grants.¹⁵⁰

Legal Difficulties

The key legal difficulty was that participants were unsure in many cases about whether restricted gifts gave rise to a legally binding restriction and, to the extent they considered there was a legally binding restriction, were in most cases unsure of the legal form of that restriction.

This was not necessarily because there was no access to legal advice – most interviewee charities had a lawyer on the board or a pro bono advice arrangement with a law firm. Some charities had in-house lawyers or budget to pay for legal advice. However, in-house lawyers were not often experts in restricted gifts, and they also had limited time. Thus, for non-major gifts, most interviewees appeared unconcerned about the technical legal characterisation, instead treating restrictions as morally binding. As two 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.¹⁵¹

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...¹⁵²

Several participants noted a desire to build donors' general trust in the charity so that the need for legally binding restrictions was lessened:

The ideal of a development strategy, bequest strategy, advancement strategy is, and this is based on the American model of, I guess, cultivating your alumni community, is that you should have built enough loyalty in a prospective donor alumnus in the university and trust in the university's management of funds that at the time, at the point of bequeathing funds, they would largely be unrestricted.¹⁵³

My message to fundraisers would be, the gift is to [the university] and the purpose is a lovely intention. And because we've got a donor charter and we're a responsible organisation, we will do whatever we can to use that gift to purpose, and we'll let you know if that changes. But actually, you can't have your money back because you gave it to us. So, you kind of have to trust us.¹⁵⁴

¹⁵⁰ Interview with religious organisation executive (30 August 2021).

¹⁵¹ Interview with religious organisation executive (30 August 2021).

¹⁵² Interview with education organisation executives (12 January 2022).

¹⁵³ Interview with university advancement services executive (2 November 2021).

¹⁵⁴ Interview with university advancement services executive (20 September 2021).

Some major gifts also appear to have been made informally without a written agreement. For instance:¹⁵⁵

The other restriction I have is a capital fund called the [X] Fund... So that's holding \$150,000 now...

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.

Some public fundraising initiatives for larger donors also appear to have proceeded without the use of deeds of gift. For example:

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.¹⁵⁶

Despite the lack of a gift agreement, much fundraising in these cases occurred for particular projects or, in some cases, expressly for the building up of endowment or future funds and was hence viewed as giving rise to restrictions. In some cases, this was due to restrictions adopted by an organisation under its own charter or internal rules, including religious law:

Well, the charter, so basically, for that particular event, that fundraising event, it was run on the basis that all of that money would go into the restricted fund. All of the money. We didn't even deduct operating costs for that event. So, that is held on that, under those preconditions. And that is a requirement of the future fund...¹⁵⁷

Church Law is called Canon Law. And these Canons include that funds raised for a specific purpose must be used for that purpose.¹⁵⁸

In some instances, charities had ensured that their internal rules provided an ability to access such restricted funds in case of major opportunities or major crises threatening the charity's continued operation:¹⁵⁹

Yes, certainly the internal constitution that was built up from the endowment reserve sits under the whole constitution of [arts organisation] and it quite clearly states that at any time if the operation of the [arts organisation] is at risk that the board would sell down. But other than that, the first clause in it says that preservation of capital is the number one process for

¹⁵⁵ Interview with arts organisation executive (10 August 2021).

¹⁵⁶ Interview with former university advancement services executive (9 November 2021).

¹⁵⁷ Interview with arts organisation executive (6 September 2021).

¹⁵⁸ Interview with religious organisation executive (25 October 2021).

¹⁵⁹ See also: interview with arts organisation executive (6 September 2021); interview with foundation executive officer (13 July 2021); interview with philanthropic foundation executive (16 August 2021).

that, and that it was the board's intent, and the Constitution of the endowment fund says that it is just solely to generate returns, and it's the returns that they want to use to fund for live performing arts creation...¹⁶⁰

Some charities recognised that fundraising legislation or broader consumer protection legislation might also apply to funds raised for particular purposes.¹⁶¹

Gifts from philanthropic foundations or Lotterywest were usually more clearly classified as giving rise to contractually binding restrictions. Deed of gift 'contractual' restrictions or gift agreements with major donors were also commonly reported. For example:

So, the vast majority of our donations are unrestricted. ... But technically there isn't a gift agreement that says we have to spend that gift on a particular activity. The exception to that is trust and foundation grants that are acquitted, that relate to specific areas of our activity... There is one that I can think of, a big gift, \$300,000 a year and the conditions that we have to, we have to include in the program orchestral and fine music.¹⁶²

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.¹⁶³

So, the legal advice was a donation or gift made by donor to us 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.¹⁶⁴

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.¹⁶⁵

Interestingly, several charities had received legal advice that deeds of gift for major donations were not actually legally binding:

Yes, they said it's just you two parties that believe it has bound [you]. But by the letter of the law, they've paid you a gift. They're acknowledging they've paid you a gift and that you're going to use the proceeds of that gift to fund, you know, in their case it's young artists scholarships, but they said for all intents and purposes it's yours. They have no control over it.

¹⁶⁰ Interview with arts organisation executive (13 September 2021).

¹⁶¹ See, e.g., interview with health organisation executives (31 August 2021).

¹⁶² Interview with arts organisation executive (2 August 2021).

¹⁶³ Interview with arts organisation executive (6 September 2021).

¹⁶⁴ Interview with health organisation executives (31 August 2021).

¹⁶⁵ Interview with university advancement services executive (20 September 2021).

There is no, there's no further binding aspect... And then once actually the proper law legal team looked at it. They went. You know, you can actually just walk away with this...¹⁶⁶

Restrictions set out in bequests were also common, with some conditions restricting access to the property bequeathed or prohibiting access to capital. For instance:

Probably the most restrictive one that we've currently got on our books, which I can't believe we accepted really, but is a bequest and I think it's about \$400,000. So, it's a decent amount of money to build a rectory. But they have specified in the will where the rectory must be built, i.e. the address of the site, which is on the church land that we already own next to the church. But we may not have wanted to put a rectory there, but you know, that's where it has to go. They specified that it can only be built when there's actually a priest going to live in it, and they have specified where we must hold the funds and how the interest for the funds must be kept for the same purpose.... So, it's super specific...¹⁶⁷

Several charities, however, suggested, or implied that formal gift agreements tended to be weighted in favour of donors, such that they preferred to employ gift acknowledgments, with the intent of creating lesser obligations or perhaps a mere moral obligation.¹⁶⁸

Other less common types of legal barriers to accessing reserves were:

- Statutory or crown land grant conditions.¹⁶⁹
- Steps needed to remove a caveat (reflecting restrictions imposed on title to property) on the land titles register.¹⁷⁰

Charitable trusts were not widely recognised, but some participants did suggest that they had arisen from gift restrictions. For instance:

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.¹⁷¹

Yes, correct. Some are. There's a deed of trust, like bigger gifts, and that's the bit that has to go to [the Supreme Court], ...¹⁷²

Several charities indicated that they actively tried to dissuade donors from insisting on the creation of a charitable trust due to the extra obligations, administrative matters and lower flexibility of use of assets.¹⁷³

¹⁶⁶ Interview with arts organisation executive (13 September 2021). See also interview with health foundation executive (11 October 2021).

¹⁶⁷ Interview with religious organisation executive (30 August 2021).

¹⁶⁸ Interview with in-house lawyer (30 August 2021). To a lesser extent, Interview with health foundation executive (11 October 2021).

¹⁶⁹ Interview with religious organisation executive (25 October 2021); Interview with in-house lawyer (30 August 2021); interview with religious organisation executive (30 August 2021).

¹⁷⁰ Interview with funding organisation executive (18 January 2022); Interview with in-house lawyer (30 August 2021); Interview with religious organisation executive (25 October 2021).

¹⁷¹ Interview with health organisation executives (31 August 2021).

¹⁷² Interview with former university advancement services executive (9 November 2021).

¹⁷³ Interview with in-house lawyer (30 August 2021); interview with former university advancement services executive (9 November 2021).

Perhaps due to the lack of clarity around the legally binding nature of restrictions and the common approach of treating restricted gifts as giving rise to a legal or moral obligation, some participants questioned what would happen to restrictions when the donor passed away:

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. ... The problem becomes, what happens if the donor passed away? Or has gone abroad and cannot be contacted? ... And that's the case when we have to take it to the Supreme Court and get it reviewed.¹⁷⁴

[T]hat's actually quite interesting if the individual passed ... But, yeah, beyond his lifetime, what happens to that legacy? Because I think when there's a, the individual determines that they would like it to be a capital gift or they've got, you know, certain caveats around it. I think, look the two that I've got, the anonymous donor and [X], they both had a wish, but their foundation or their legacy, their family members or foundation members might not necessarily share the same view.¹⁷⁵

Key finding:

- Most charities treated restricted gifts as giving rise to a legally or morally binding agreement with the donor (i.e. a mere wish or agreement characterisation) and considered that any amendment or lifting of restrictions should therefore take place by way of agreement with the donor (or their executor or heirs).

4.2.4 Use of Legal Mechanisms to Access Restricted Reserves

We asked participants whether they had used or contemplated any legal mechanisms to gain access to restricted assets and if they foresaw, or had experienced, any difficulties using such mechanisms. Only a few organisations had used judicial process to deal with restrictions, including administrative and *cy-près* schemes and advice or directions from the court.¹⁷⁶ The main reasons for this appeared to be concerns about costs and donor relations. For instance:

And the cost, just simply the cost, you know. We don't have the sort of liquid assets to be hiring a lawyer to do what's needed for submissions to the Supreme Court ... I don't think any of our bequests, to be honest, are worth enough.

And, you know, our eagerness to go and challenge stuff in the court is like next to nothing. It's never good publicity for us,... So, the idea of us going to the High Court and saying, we'd like some more money from someone, and we don't want to do what they asked to do. It's not a good look for us.¹⁷⁷

¹⁷⁴ Interview with former university advancement services executive (9 November 2021).

¹⁷⁵ Interview with arts organisation executive (10 August 2021).

¹⁷⁶ E.g., interview with university advancement services executive (19 October 2021); interview with university advancement services executive (20 September 2021); interview with former university advancement services executive (9 November 2021); interview with religious organisation executive (25 October 2021); interview with legal advisor (31 August 2021). See also interview with legal advisor (25 October 2021). Other charities had contemplated using court processes in some circumstances where testamentary gifts had been challenged by family members.

¹⁷⁷ Interview with religious organisation executive (30 August 2021).

When asked how large a gift would need to be to justify the time and cost of engaging in a judicial process, one interviewee responded:

It's difficult to say. It would depend on so many factors. Supreme Court, say it was something really simple, a really simple issue that's unlikely to be contested, I think you'd be looking at a gift in the hundreds of thousands before you kind of said to yourself like, this is worth everything that comes with it. And then if you found that despite your expectation, it was, in fact contested, then you'd start to think critically about how far you were prepared to push the barrier before it became a law of diminishing returns.¹⁷⁸

Several interviewees also reported that the time involved and limited access to legal advice presented barriers to using legal mechanisms. Smaller charities might not be able to afford court proceedings and even larger charities indicated that they would only consider using such mechanisms for significant gifts in the order of hundreds of thousands or millions of dollars.

Instead, organisations often preferred to agree variations with the donor, or, if the donor had passed away, the executor or the donor's family. Excluding the eight interviews for charities that had experienced no difficulties in accessing reserves and three government interviews, 14 of the remaining 17 interviews (i.e. over 80%), reflected charities that had adopted this approach. For example:

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 the... And if the donor says, yes, not a problem.¹⁷⁹

May often be a bequest with conditions that are somewhat outdated. Often approach executors to deal with change of circumstances.¹⁸⁰

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.¹⁸¹

The trust and foundation income sometimes has conditions attached to it that we'll deliver programme X, an education programme or whatever it might be. We found that even in those cases, foundations were pretty understanding. So, one example was [Y corporate foundation donor] has a multi-year funding arrangement with us. Some of that programme was affected by COVID at the very beginning. We weren't able to deliver those programmes and we

¹⁷⁸ Interview with in-house lawyer (30 August 2021).

¹⁷⁹ Interview with former university advancement services executive (9 November 2021).

¹⁸⁰ Interview with university advancement services executive (19 October 2021).

¹⁸¹ Interview with health organisation executives (31 August 2021).

explained to them the situation and they acknowledged that most of their funding organisations were in the same situation, and they were very, very understanding.¹⁸²

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 the show. And nine times out of 10 that would be fine.¹⁸³

Where the restricted gift gives rise to a legal condition in the form of a gift-over, one interviewee suggested that a charity might be able to negotiate with the organisation that would benefit from the gift-over for that organisation to surrender/agree not to enforce their interest for a fee.¹⁸⁴ This approach matches the finding above that most organisations apply a contract lens to donations or consider it a moral obligation to honour a donor's wishes.

In a number of instances, no legal mechanisms were used to address restrictions that could not be met and so funds were either returned to the donor or sat unspent for many years, even decades.¹⁸⁵

Finally, the limited use of court-related legal mechanisms is consistent with the finding that non-legal restrictions are often considered the first and only barrier to accessing restricted assets, which means that legal mechanisms are not considered and, therefore, not deemed an issue.

Key findings:

- Very few participating charities considered whether approval to amend or lift restrictions might also be required from the Supreme Court or the Attorney-General (which would be the case for a charitable trust characterisation of restrictions). Failure to consider this issue raises a material risk of governance breaches for charity officers.
- Very few organisations had used the legal processes of the courts, including administrative and *cy-près* schemes, or advice or directions from the court to lift restrictions. Most organisations, in any event, expressed concern about the cost (in time and money) and risk of adverse donor perceptions from seeking court approval for amendment of restrictions.

4.2.5 Law Reform and Preventative Measures

We asked participants two interview questions concerning law reform and self-help preventative measures. First, we asked whether it would be useful to have recourse to an independent body (other than the courts) to authoritatively interpret or approve changes to gift restrictions. Second, we asked what measures their organisation had, or could have, in

¹⁸² Interview with legal advisor (2 August 2021).

¹⁸³ Interview with arts organisation executive (6 September 2021).

¹⁸⁴ Interview with legal advisor (31 August 2021).

¹⁸⁵ See change of circumstance examples at n 132 to 135.

place to help ensure that it did not receive gifts subject to undesirable, inappropriate, overly burdensome or inflexible restrictions.

The availability of an independent body (as opposed to the courts) to interpret or approve changes to restrictions could potentially reduce the time, cost and adversarial perceptions of going to court for assistance with restrictions. However, participants were generally ambivalent about the benefits of this suggestion, with some identifying risks to charity independence that may result from giving new powers to a regulator as well as questioning whether the risk of reputational damage would really be reduced. To the extent that views were expressed (four interviewees did not see the potential benefit of such a body, while seven interviewees were open to it, others did not express a view), a charity commission body (such as the ACNC) was preferred to expanding the powers of the Attorney-General. However, many comments were made on the preference that the independent body should provide a level of assistance to charities in seeking a ruling or obtaining interpretation – akin to an advice line or source of suggestions for best practice. For instance:

I think having that expert advice and having a hotline almost where people can get advice ... would be a useful thing. More like a service that interprets what exists [rather] than building more caveats into legislation.¹⁸⁶

What is clear is that such guidance and advice would be useful, and that, as some participants pointed out, the ACNC does not presently fulfil this need.

Perhaps in keeping with the limited use of legal mechanisms to access restricted assets (other than agreement with the donor), most charities seemed to favour preventative measures they could undertake themselves to deal with the risks posed by restricted assets. Many of the proposed measures are directed toward encouraging donors to make unrestricted gifts or lessening the likelihood that donors' wishes are interpreted as legal restrictions.

Key findings:

- Participants were generally ambivalent about the benefits of creating an independent body (as opposed to the courts) to interpret or approve changes to restrictions to potentially reduce the time, cost and adversarial perceptions of going to court for assistance with restrictions. To the extent that an independent body was supported, the participating charities wanted it to provide a level of relatively informal advice and assistance – akin to an advice line/simple rulings system.
- Most charities wanted guidance on preventative measures that they could take to deal with the risks posed by restricted assets.

Suggested preventative measures fell into five broad groups, as set out below.

Preventative Measure	Description
Internal controls on the acceptance of gifts	For instance, adoption of a gift acceptance policy setting out the circumstances in which the charity will accept donations, including the extent to which donors may specify restrictions. This could include

¹⁸⁶ Interview with university advancement services executive (7 December 2021).

	value thresholds for when a donor may impose restrictions to justify administrative costs.
Legal assistance in drafting preferred gift terms	This included the creation and use of template gift agreements or gift acknowledgements. Ideally, the agreement or acknowledgment should use broad and general wording for the restricted purpose and ideally expressly permit a change of purpose if circumstances change. Additionally, some charities placed suggested text for bequests on their website or encouraged a meeting with the potential testator to discuss suggested terms.
Donor and community relations	Charities emphasised the fundamental importance of pre-acceptance conversations with donors to understand potential restrictions and to explain the need for flexibility. Some charities held information evenings with potential testators staffed by volunteer lawyers and with suggested will terms for consideration by potential testators.
Ongoing management of restricted gifts	Internal measures suggested by participants included the ongoing management of restricted gifts. In particular, the adoption of centralised records and customer relations systems to permit recording of the gift restrictions and subsequent acquittal of the gift against those restrictions as well as appropriate access to these systems to permit people outside the fundraising team to access the restrictions. For longer term gifts, further internal controls were suggested such as an investment mandate, an implementation plan for how the distribution will be used, delegations for who can authorise spending, and, potentially, a regular review of implementation.
Education and support for charities	Several participants highlighted the importance of providing education and support for charities and the community to better understand the ways that legal restrictions may come into being and the legal mechanisms available to amend or lift those restrictions.

We expand on these suggestions below.

Internal controls on gift acceptance

Internal controls on gift acceptance would cover matters such as unacceptable donors or circumstances, such as no gifts from tobacco companies for a health charity; the types of property accepted as a gift, for example cash and listed shares in all cases, but with unlisted shares and real property requiring a level of review; and the circumstances in which donors are permitted to specify restrictions and the nature of those restrictions. Controls would likely also include delegation of authority to accept gifts, with delegations set by thresholds based on the value and level of risk of the gift. These controls might also align with controls on the ongoing management of gifts discussed below in that acceptance controls could include requirements relating to record-keeping and feasibility checking and the requirement for a gift agreement for gifts above a threshold value. Typically, the interview participants referred to such internal controls as comprising a 'gift acceptance policy'.

Opinions about the usefulness of formal written gift acceptance policies were divided. Seven of the organisations interviewed did not have one, albeit at least four of the seven had more informal guidelines and practices. A further seven organisations affirmed that they had a formal gift acceptance policy. For the remainder of the participants, this question was not relevant, or they did not say that it was.

According to the interviewees, the main reason for not having a formal gift acceptance policy was that setting boundaries for acceptable donations can be contentious and limiting. For instance:

We don't have a formal policy in place. Gift acceptance policies, I find it very difficult to ... they're quite, they can be quite loose. So, because when we talked about it, we said, and a lot of them say, you know, we don't accept money from firearms or whatever, but then when you look into corporates or you go down that route and you look at what they invest in, you know, they're shareholders in X, Y and Z. ...

Because you do, you start going and then you go, but hang on, if we do that, then we get money from those guys and hang on a minute, but we're sponsored by them and their winery. And we're taking from, oh, hang on. ... so, it's kind of like, in my opinion, I sometimes think, well, what's the point of it? ... I mean, we know that we would never accept anything that doesn't align with our values.¹⁸⁷

Likewise, another organisation did not have a formal policy in place but relied on value judgements. For example, this participant would not 'go anywhere near' Coca Cola Amatil or McDonald's for children's performances but acknowledged that it is a real dilemma.¹⁸⁸ Another participant emphasised the role of the charity board or trustees in having flexibility and responsibility to make these value judgements, reducing the need for a formal policy:

The mechanism we have is that... people can't give us stuff with any restrictions on it without it coming to trustees because, you know, whether it's a heritage grant or a lotteries or any sort of thing like that, somebody, the trustees have to sign to say, yes, we agree to be bound by the restrictions. ... So, that's our process. If something like that comes in, we take it to a full trustees' meeting unless it's a rollover, something we've already agreed to. And we make a considered decision about whether we can get on board with it or not.¹⁸⁹

While not having a formal gift acceptance policy, two participants warned about organisations accepting gifts that do not fit the organisation's values and purpose. In the words of the first participant,

You know, if someone comes our way and they're not right for us ... and I'm really OK to say no to a gift if it doesn't fit with who we are and what we do and direct them to somebody else that might be able to help them. ...

If it doesn't align, you can't put a square peg in a round hole. So, we're really good, and I'm really proud to say that we pass on that, we pass them on. ... And we have to be comfortable in having conversations about what works for us as an organisation and the programs we're running, our mission and what we're trying to achieve because there's no point in creating more work because it's just a waste of money.¹⁹⁰

The second participant agreed:

¹⁸⁷ Interview with social services organisation executive (11 January 2022).

¹⁸⁸ Interview with arts organisation executive (10 August 2021).

¹⁸⁹ Interview with religious organisation executive (30 August 2021).

¹⁹⁰ Interview with social services organisation executive (11 January 2022).

...something that I often say to my teams here is, don't just chase any money, chase the right money, but that so often goes down to the smaller charities. Someone wants to give you half a million, you kind of, you'll bend over backwards to get it. And as you're saying, you're signing up to things that you don't really understand because the good part of your brain is going, oh my God, imagine the difference I could make with half a million dollars. This is amazing. And then you get screwed over a year later.¹⁹¹

For the charities with formal gift acceptance policies, it was clear that these policies can be used to specify the circumstances in which donors are permitted to impose restrictions and the nature of those restrictions. Often, these charities adopted value thresholds to justify the administrative costs of complying with restrictions. As a participant explained,

I think it is always a question of balance. So, the smaller the gift, you know, it's like that matrix, if it's a very small gift with a lot, a lot of baggage, then no [to acceptance]. ...

So, for example, I know that one particular uni will only accept a sort of named specific scholarship, if it's over a certain amount of dollar value. I think it's a \$25,000 minimum. Likewise, they won't accept a prize unless it's X amount and if you want to give a prize of a lower amount, you can donate to the prize fund or the scholarship fund. ... because I think because of the complexity, standardisation makes it really easy. ...

And when they're really complicated, like gifts come with a cost. They are difficult to administer. So, making it seamlessly structured and just having standard terms. Like, for example, on any gift under a certain amount, making sure that they're essentially an unrestricted gift with a gentle wish rather than a stricter restriction. That would be ideal.¹⁹²

Likewise, another organisation would only accept specific restrictions for gifts above a certain amount:

So basically, you come to us with \$50,000 and you tell us you want us to spend it on something relevant. Sure, we'll set up a gift, you know, but come to us with five bucks and say that, it's just not, you know - practical, we can't set up a separate gift purpose.¹⁹³

Several participants noted that a gift acceptance policy should also discourage acceptance of restrictions on gifts and ensure that the charity enters into a gift agreement or acknowledgment that expressly refers to the potential for the removal or amendment of restrictions if circumstances change.¹⁹⁴

Legal assistance in drafting preferred gift terms

In 18 of 28 interviews, participants commented on the use of gift agreements or gift acknowledgments as a measure to prevent burdensome restrictions and to ensure flexibility. A gift agreement (typically in the form of a deed) would be used where the parties intend the agreement to be legally binding. A gift acknowledgment would typically be used where the

¹⁹¹ Interview with social services organisation executive (14 December 2021).

¹⁹² Interview with university advancement services executive (7 December 2021).

¹⁹³ Interview with health organisation executives (31 August 2021).

¹⁹⁴ Interview with education organisation executives (12 January 2022). See also interview with in-house lawyer (30 August 2021).

charity intends to record the terms on which the gift was received, but intends that those terms are not legally binding, i.e. a mere wish.

Gift agreements and acknowledgments can help to document expectations, as well as expressly provide for flexibility and removal or amendment of restrictions if circumstances change. For instance:

In reality, it's just never going to, like you cannot see into the future. So, we need something around gifts in perpetuity, which the donor can sign up to cover them for a future, which they can't foresee. ... Often, we would not be accessing gifted funds because we could no longer spend them in the way they were intended. And we didn't have a mechanism for repurposing them, which is why you end up going to, you know, the Supreme Court or whatever it is, if it's a major gift. But actually, internally, you can have your own due process, which is transparent and open ... So, that's what we're sort of trying to establish. And I think that the documentation around our gift receipt is very important. So, like that deed of gift, making sure that's absolutely transparent and clear is important.¹⁹⁵

...then what happens when you've acquitted the funds to meet the donor intent, but there's \$312.05 left sitting in that bucket. ... You know that could just sit there for years. What are you doing with that? And how do we write things into ... the gift agreements that say, you know, if there's five bucks left, we'll put it into a general, we'll put it into the area of greatest need. We've met your intent, and it did cost this less five bucks or less 50 bucks interest.¹⁹⁶

I think if I get to the heart of it, it is really the lack of gift agreements. With gift agreements, we could have easily accessed ... whatever funding is left [and which could no longer be applied to a program that had been cancelled].¹⁹⁷

I have been involved in putting together a standard gifting agreement, gifting arrangement, for people who wish to donate to the university. And we try and make sure that that has as few strings attached to it as we possibly can. Because, of course, that gives us maximum flexibility. And it also avoids a number of problems that might arise where the gift is very, very specific and the circumstances that surrounds the giving of that gift change. So, we can no longer make good on the gift, or we can no longer give effect to the original intent for wanting a better way of putting it. So, what would an example of that be? Say somebody gave us a gift for the purposes of helping to maintain the tree that goes over the path that people are so in love with and the tree goes, then, you know, we can find another tree, but it would help if the gifts were more general.¹⁹⁸

Clauses to ensure flexibility in case of changed circumstances may also be included in wills and other documents. This can avoid getting 'stuck in a difficult conundrum',¹⁹⁹ or even having to return the funds.²⁰⁰

Gift agreement terms can potentially address the need for flexibility in two ways. First, through the use of broad and general wording for the restricted purpose (e.g. 'the purpose of the grant for the visibly impaired community in the town of Vic Park or for just the

¹⁹⁵ Interview with university advancement services executive (20 September 2021).

¹⁹⁶ Interview with health organisation executives (31 August 2021).

¹⁹⁷ Interview with former university advancement services executive (9 November 2021).

¹⁹⁸ Interview with in-house lawyer (30 August 2021).

¹⁹⁹ Interview with legal advisor (31 August 2021).

²⁰⁰ See, e.g., interview with religious organisation executive (30 August 2021).

community in general, because we try and make it as broad as we can').²⁰¹ This can also incorporate flexibility in the extent to which the purpose is pursued (e.g. 'to the extent possible' or 'with our best intentions').²⁰² As one participant noted:

What we are getting, you know, what I am encouraging my team to do moving forward is to say, let's ask for a gift for youth homelessness and then we have the flexibility to move it amongst our youth homelessness services as needed, because that's really important to us is that if we fill the bucket on [specific service X], you know, we've got that there.²⁰³

Second, by expressly allowing for a change of purpose if circumstances change. Suggested wording includes:

[gift agreement clause] ... if a change in circumstances should render the Gift Purpose no longer practical or reasonably achievable, then [the organisation] after consulting with any living Donor (if applicable), may use the remaining balance of the [fund] as deemed prudent to further the objectives and purposes of [the organisation], giving due consideration to the original Gift Purpose.²⁰⁴

Or

should this project be completed, or be ... unable to go ahead, then these funds can be released for general use.²⁰⁵

Similarly, specific wording suggestions for bequests was provided:²⁰⁶

I give to [organisation] [X]% of my residuary estate or \$[X]. I express the wish, but without creating any binding trust that this gift be applied towards [insert broad purpose, within the organisation's purposes]. However, if circumstances change and my wishes cannot be fulfilled, I direct that the [organisation] allocate the bequest in such a manner as best approximates my wishes.

Some participants also noted the potential availability of template terms from peak bodies. For instance, an education organisation mentioned two resource platforms that have template terms and best practice agreements for tertiary and secondary education charities: Council for the Advancement and Support of Education, and Educate Plus. Other sector bodies that provide useful resources are the Fundraising Institute of Australia and Justice Connect. The Fundraising Institute of Australia, for instance, expressly recommends that charities identify what will happen with surplus funds raised.²⁰⁷

Some organisations provide suggested bequest terms on their websites or in brochures, while others prefer not to provide such terms and instead encouraged donors to contact them for a conversation. Potential reasons for requiring contact include operational planning (knowing that a bequest is likely to be received) and the ability to explain why the organisation has

²⁰¹ Interview with funding organisation executive (18 January 2022).

²⁰² Interview with university advancement services executive (20 September 2021).

²⁰³ Interview with social services organisation executive (11 January 2022).

²⁰⁴ Terms provided via interview with university advancement services executive (19 October 2021).

²⁰⁵ Interview with religious organisation executive (30 August 2021).

²⁰⁶ Terms provided via interview with university advancement services executive (19 October 2021).

²⁰⁷ FIA, *Practice Note: Fundraising for and During National Disasters* (2020) clause 3.9. The FIA Code also requires that members not change the conditions of a donation without first gaining the donor's consent: FIA, *Code* (2018) clause 4.10(e).

preferred legal terms, to avoid the risk of a testator changing the terms.²⁰⁸ An identified benefit of having terms on the website was:

I would prefer having it up there on the off chance that someone doesn't want to interact with us because, I think particularly in Australia and then more conservatively than most in West Australia, sometimes people think philanthropy should be a quiet thing and a very private thing and ... a deeply personal decision where I would usually say there's a happy balance between that and the tall poppy syndrome. But I'd rather they would accurately inform their executor by having the wording on the Web versus coming up with their own wording.²⁰⁹

While most participants saw the benefit of gift agreements, they were not used in all circumstances. Common reasons for not having a gift agreement related to the size of a gift (and a proportionate level of administration costs) and a lack of knowledge and resources to create gift agreements as seen in these examples:

And when they're really complicated, like gifts come with a cost. They are difficult to administer. So, making it seamless structured and just having standard terms. Like, for example, on any gift under a certain amount, making sure that they're essentially an unrestricted gift with a gentle wish rather than a stricter restriction. That would be ideal. Saying it's for a scholarship is sort of fine but saying it's for a scholarship in this school for the subject for this person with one leg. But then something gets very difficult and suddenly you think, did I really want that money?²¹⁰

...there's plenty of training on how to run an appeal, plenty of training on how to solicit a major gift and all of that. But you really don't see the same kind of training on how to write a gift agreement. If you need technical advice, who do you or your lawyer go to?

...if I'm rather well off and I want to set myself up structurally. I would have resources in the form of money to do it properly before I set up a path for a trust or foundation. ... Whereas on the other side of the coin, you know, most charities are doing their best with limited resources ... but they're not resourced to that extent.²¹¹

For smaller value gifts, instead of standalone gift agreements or gift acknowledgments, some participant organisations provided an array of donation options that the donor could choose from, by way of 'ticking the box' and selecting standardised terms or expressions of wishes, along with an open-ended option that leaves discretion with the charity for the 'area of greatest need'.²¹²

Donor and community relations

The issue of trust emerged as a general theme from the interviews. Building trust with donors and the community can assist in preventing gift restrictions. Organisations that experienced fewer problems accessing reserves due to restrictions, largely attributed it to trust – that donors trust that the organisation will put the funds to good use. For example:

²⁰⁸ Interview with university advancement services executive (19 October 2021).

²⁰⁹ Interview with university advancement services executive (7 December 2021).

²¹⁰ Interview with university advancement services executive (20 September 2021).

²¹¹ Interview with university advancement services executive (7 December 2021).

²¹² See, e.g., interview with health organisation executives (31 August 2021); interview with arts organisation executive (6 September 2021).

She [donor] kept saying whatever you think is best. So, but again it comes down to the relationship in this instance, it's down to the relationship we've built with her. So there's trust, there's respect all of those sorts of things. But I just want to honour her basically, and make sure we do the right thing.²¹³

...the ideal of a development strategy, bequest strategy, advancement strategy is, and this is based on the American model of, I guess, cultivating your alumni community, is that you should have built enough loyalty in a prospective donor alumnus in the university and trust in the university's management of funds that at the time, at the point of bequeathing funds, they would largely be unrestricted. So, it's university directed where it's needed most.²¹⁴

The sense for me is that by and large, people are giving to our organisation because they trust what we do across the board. It's less focused, and they then judge the impact more so on what ends up on stage than anything.²¹⁵

Such trust and loyalty are built over years and require that the organisation be responsible and transparent.

Linked to trust, there was broad agreement among interviewees about the fundamental importance of pre-acceptance conversations with donors to understand, and possibly avoid, potential restrictions and to explain the need for flexibility. A participant explained how this is achieved:

...we're very clear on donors, particularly the ones that want to give us tied money that, you know, our constitutional remit is very clear. You know, we won't fund what we think governments should fund. ... And, you know, we have a very clear mandate with them about that. And then when we have third party fundraisers, you know, a lot of fundraising on our behalf, very much the advice is be generic in your tie ... So, you do those kind of things to offset future dilemmas, right?

Because that's, the biggest source of those problems is, you know, when you're unclear, and then you get into a dispute about, well, what happens now? That's where they want the money to go. So, what are you going to do? You know, so we won't put our own regulatory operation status at risk, you know. It's all about what work you can do up front. ... And with donors, it's all about the right communication up front. And when we apply for grants with trusts and foundations, we're very clear on, we've come to you for this grant on the basis of this, it's within our remit and our constitution.²¹⁶

Another participant explained how a reluctance to have conversations with donors up front can cause unnecessary problems:

I think, in the past, the university ... has sometimes accepted gifts without fully thinking through the obligations it was taking on when it did. And I wonder whether, with the wisdom of hindsight, we would've necessarily accepted some of the gifts that we have knowing that. And it may well be that some of the people who gave those gifts back in the day, if they had been asked, would not have attached the strings they did, but I don't know whether those conversations ever happened.

²¹³ Interview with health research foundation executive (1 November 2021).

²¹⁴ Interview with university advancement services executive (2 November 2021).

²¹⁵ Interview with arts organisation executive (6 September 2021).

²¹⁶ Interview with health foundation executive (11 October 2021).

And my preference would be that if we are in a discussion with somebody who wants to give us a significant gift that might come with problems that we find, try to find some way of explaining what those problems are, which I think people are generally reluctant to do because they're kind of, on the whole, you know, you don't want to look a gift horse in the mouth, so to speak.

I think ... the best way of dealing with it is at the front end, not necessarily with the agreement itself, but in having conversations that, perhaps, people who are accepting gifts are sometimes reluctant to have. But it does, in fact, make the gift potentially much more effective and much more capable of giving effect to the actual intent.²¹⁷

Up front conversations are not necessarily easy. As one charity executive noted, it requires courage to have pre-acceptance conversations and say, 'it's really wonderful and kind, but that's not what we need your money for. This is what we need your money for'.²¹⁸

As an extension of conversations with donors, several organisations held information evenings with potential testators, staffed by volunteer lawyers. This provided an opportunity to encourage donors to adopt no, or at least general, restrictions. A legal advisor noted the problem as well and urged people to update their wills:

And anybody who's leaving huge amounts of money really should regularly update their wills because it's horrible to leave an amount of money that could do something amazing and then by the time it's used, it's not what's needed and there's something else that is really needed ... if you trust the organisation you are giving it to, just leaving it to them. Maybe talking about your wishes, but not making it strictly legally binding could really do a lot more good ... And think about what is the broadest possible wording of what you're comfortable with to allow for changes in conditions and settings at a time. ... But just generally, be really wary of giving a gift that is too narrowly directed either in its purpose or the recipient.²¹⁹

Processes for ongoing management of restricted gifts

Several participants noted the importance of sound overall governance processes as a general strategy to avoid difficulties with accessing reserves and building trust with donors and the community:

To your other point, you know, being preventative, I think you've got to have really strong internal governance. I mean, before you even sign up to anything ... because you go out to your donors on the basis that this ... is a good deal, right? You're going ... to be funding a very high impact piece of research or a piece of equipment that's game changing for a particular area. And it's been very thoroughly vetted and gone through our whole system, internally and with our board ... And of course ... competing against, you know, everything else from ... animal shelters right the way through. So, you've got to be good at that. But then once you're in and you sign up, you're protecting your interest in it in the sense of when we propose this to you, this is what we said we could deliver ... If you suddenly whack a whole bunch of conditions on top, you're going to find that we'll just be very honest and go, wow, stop. Before you're saying give us a dollar, you're being punitive unfairly, or ... you're asking us to do things we can't do.²²⁰

²¹⁷ Interview with in-house lawyer (30 August 2021).

²¹⁸ Interview with social services organisation executive (11 January 2022).

²¹⁹ Interview with legal advisor (25 October 2021).

²²⁰ Interview with health foundation executive (11 October 2021).

I think the old ways were very much trust us, you know, and then they would have sort of ad hoc reporting and, you know, and the relationship would get them through. I think that's really moved now that it's more formalised agreements, and, you know, your whole brand is built around your capacity to, I think, to provide good, high-quality governance, and evidence of, you know, the money is being well spent, and it's making an impact. Otherwise, it's pretty simple for a donor, they'll just walk away.²²¹

As another participant suggested, stressing the contribution of unrestricted gifts to building good governance processes could itself feature in bequest or donor education programs.²²² More specifically, and especially for longer term gifts, some participants emphasised the importance of an implementation plan for how the donation will be used, delegations for who can authorise spending, an investment mandate and, potentially, a regular review of implementation. For instance:

And so, hopefully, for future generations, when an endowed gift is given it will have an associated plan, which will have a governance structure, a review period, and there will be a sort of established sort of sign off, like when you receive an endowed gift you document how it's going to be invested, how the distribution will be used, who decides on how it's going to be signed off, and you would do a minimum of a five year plan for any gift. ... if you accept a gift and you haven't come up with an implementation plan to ensure that that can be, you know, and actually saying to the donor, you know, if you want to leave me a massive collection of artwork, that's lovely, but actually you need to leave me a separate bequest to cover its care in perpetuity because... So, I guess when people are accepting gifts, thinking through the, which is why I'm sort of pushing this, implementation plan because it's all, you know, it all comes unstuck, doesn't it? ... Or you could change your policy and say, no, we don't necessarily guarantee that 100% of gifts go to purpose.²²³

So, we've got the contracts governance team who have a contract management system. They're starting to work, so contracts governance are starting to work, this is only quite a new thing because they sat very separately, so they're working with all of our big gift agreements or contracts that we might have in place or anything that is tied funds with acquittal requirements or reporting requirements, we work with contract governance.²²⁴

The recent court case of *The Uniting Church in Australia Property Trust (Vic) v Attorney-General (Vic)*²²⁵ emphasises the high risk of inadvertently breaching gift restrictions (eg as to preservation of capital) in the absence of ongoing monitoring and regular reviews.

A number of participants emphasised the fundamental importance of centralised records and customer relations systems that make all relevant information, including gift agreements, gift restrictions, and acquittal and use against those restrictions, generally available. Accurate and accessible records and systems can help to ensure access to reserves by obviating uncertainty about the purpose of the gift, whether it has been spent or can be used for another purpose, and to avoid funds sitting idle. An education participant explained what they need:

²²¹ Interview with health foundation executive (11 October 2021).

²²² Interview with legal advisor (31 August 2021).

²²³ Interview with university advancement services executive (20 September 2021).

²²⁴ Interview with social services organisation executive (11 January 2022).

²²⁵ [2022] VSC 610.

So, the ideal for any university is having that one system that records all of the prospects, their donor information, their donor interactions, their gift agreements, the gift payments, so the financials attached to those donors as well as the disbursement [are] all in one system. ...

But what we often see is again there's a separation of donor relationship management system and financial system. And so a really successful operation would have two systems that speak well to each other, and they'd just be well integrated ... So, for example, you would find a gift agreement on that donor record as well as on that any transaction journals in the financial system...

The other thing that was, I guess, compulsory at ... was ensuring that a record of the donor agreement or gift agreement was uploaded to ... the university wide record keeping system ...²²⁶

As another participant pointed out, comprehensive and integrated systems and records can provide clarity and certainty in gift management.²²⁷

The consequences of poor record-keeping can be exacerbated by generational changes and staff transitions:

...it really has been that transition and loss of corporate knowledge of who knows where the file is, who knows what was agreed and having that sit somewhere because between one [executive] to another, letters fell off because the poor incoming [executive] didn't know that's what was done. It's the normal, I guess, loss of corporate knowledge that every business has.²²⁸

Education and support for charities

Some participants identified the importance of education for charity officers to prevent unnecessary restrictions and uncertainty about how to address them. In particular, one participant suggested that most charities are unaware of the Attorney-General's ability to approve small value schemes without court proceedings,²²⁹ and the waiver of the Attorney-General's costs for very small value schemes.²³⁰

Several legal advisors also questioned whether concerns about the cost and time of court proceedings were accurate:

...very often, schemes are not contentious, and they're decided on the papers. You know... people put together their affidavit that supports the scheme. It gets advertised. There's no opposition. We both file submissions, and the court can make the orders on the papers. And, yes, there's no reason why that should be hugely expensive. And everyone in the process is doing what they can to avoid being prohibitively expensive... I wonder what the charities' perception of the cost is versus what it actually is. Especially, if you have to go and get legal advice about, do I need to? You know, I've got this problem, how can I solve it? That's going to cost you already. I wonder how much more it is to go through the process... Occasionally, you get a bit of messiness that will increase the cost, but a few thousand dollars up to \$10,000. Yes,

²²⁶ Interview with university advancement services executive (2 November 2021).

²²⁷ Interview with legal advisor (31 August 2021).

²²⁸ Interview with education organisation executives (12 January 2022).

²²⁹ See *Charitable Trusts Act 2022 (WA)* s16.

²³⁰ Interview with legal advisor (25 October 2021). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 June 2022, 2763 (Attorney-General John Quigley).

maybe a little bit more once you're paying [the Attorney-General's] costs as well. But not orders of magnitude greater than that.²³¹

I think that the lawyer will do everything to work around an application to the court. And I don't know whether that is fear of expense or experience of expense. I suspect that some of it is fear of expense, because the courts tend to try to do these things on the papers. And I don't think they're as onerous as one might first anticipate.²³²

One legal advisor noted that costs could be reduced if charities engage early on with the relevant regulator, who can then point charities and their lawyers in the right direction.²³³ Indeed, the interviewee highlighted that the State Solicitor's Office would often provide material assistance to charities in navigating the process:

I'm sure the charities would think, oh no, there's another layer of regulation for us. But also, sometimes [the Attorney-General] can solve problems that people have because it's a charitable trust in a way that couldn't be done if it was just a contract, you know. Schemes most significantly, but also directions from the court or that sort of thing, or the Attorney-General's consent to a breach of trust for limited purpose. All of those things might be helpful to charities...

So, my experience is the things that take the longest are identifying the fact that you might need a scheme, trying to draft the scheme, but once you actually get into the process, it's not too bad. And [the State Solicitor's Office] will help people to the extent of reviewing the draft affidavit that's going to go to the court to say, I think it should include this sort of evidence or, you know, [the State Solicitor's Office] will say the court might be interested to know whether it's a gift.²³⁴

A willingness to help on the part of the State Solicitor's Office, along with the non-adversarial nature of the court proceedings, was also highlighted by the Attorney-General when the new Charitable Trusts Act 2022 (WA) was introduced in Parliament.²³⁵

Another legal advisor commented that courts are becoming somewhat more liberal in lifting restrictions and hence that charity trustees or officers would frequently be able to find a legal solution.²³⁶ Further, one legal advisor noted that scheme or advice proceedings are typically some of the least adversarial proceedings:

some of those schemes are the least adversarial court proceedings possible. Everybody is on the same page, which is get this through as quickly and smoothly as possible with as little cost to the charity. And so, you know, we draft things together. We work together to help make that process as smooth as possible and to minimise cost.²³⁷

Nevertheless, legal advisors accepted that some of the court mechanisms, particularly cy-

²³¹ Interview with legal advisor (25 October 2021).

²³² Interview with legal advisor (31 August 2021).

²³³ Interview with legal advisor (31 August 2021).

²³⁴ Interview with legal advisor (25 October 2021).

²³⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 June 2022, 2763 (Attorney-General John Quigley).

²³⁶ Interview with legal advisor (31 August 2021).

²³⁷ Interview with legal advisor (25 October 2021).

près schemes, still have limits and might not always assist charities to access reserves:

...let me give you a hypothetical one... the NDIS changes, for example, all these people who have left, set up charitable trusts or left provisions under their will for disability care and then the whole funding mechanism has been completely changed. A lot of those gifts are not going to work well, but it's unlikely they'll satisfy that test of being impossible, impracticable or inexpedient. It would still be possible to spend the money for that purpose, it's just not the best use of the money. So, at the moment, that wouldn't be grounds for a [statutory cy-près] scheme.²³⁸

5. Recommendations

Recommendation 1: Charities should review their internal controls on accepting gifts and their systems for ongoing stewardship of gifts

Charities should adopt a gift acceptance policy (or more informal guidelines) that covers:

- Whether the gift and gift restrictions fit with the charity's purpose and values.
- Unacceptable donors or gift circumstances.
- Types of property accepted as a gift.
- Circumstances in which donors are permitted to specify restrictions (e.g. by value/risk thresholds) and the nature of those restrictions.
- Delegations of authority specifying who can accept gifts (e.g. by value thresholds).
- Record-keeping and feasibility checks for restrictions.

Once a charity has decided to accept a gift, it should then have processes in place to record the terms of that gift and provide for its ongoing stewardship. In particular, it should have a centralised and integrated records and donor relations system for restricted gifts that captures all relevant information relating to restricted gifts, including gift restrictions and agreements, and any subsequent acquittals against those restrictions, as well as outcomes achieved.

For longer term gifts, an implementation plan for how the gift will be used, delegations for who can authorise spending, an investment mandate and, potentially, a regular review of implementation should also be considered.

²³⁸ Interview with legal advisor (25 October 2021).

Recommendation 2: Education for charity officers

Educating charity officers could help to avoid unnecessary or unintended restrictions on future gifts. It should also help officers understand their governance obligations and reduce the risk of inadvertent breaches of trust for historic gifts. Thus, charities should educate charity officers on:

- The potential legal characterisations of restricted gifts.
- The full range of legal mechanisms available to amend or lift restrictions. This would also help reduce concerns about cost and time and perceptions that the process is adversarial.
- The potential for the Attorney-General to approve amendment of restrictions where the restricted assets are less than \$100,000 (or the annual income is less than \$20,000).
- Preventative measures that could be undertaken before receiving a restricted gift to reduce the risk of unwanted restrictions and the potential risk of more onerous charitable trust amendment mechanisms.

Guidance materials have been developed to support this education.

Recommendation 3: Charities should consider adopting gift agreement or gift acknowledgment wording for general use when accepting restricted gifts and for testators to use when making bequests

Charities should consider adopting gift agreement or gift acknowledgment wording when accepting restricted gifts and for testators to use.

Gift agreements (intended to be legally binding e.g., in the form of a deed of gift) or gift acknowledgements (intended to be morally, but not legally, binding) should clearly set out the restrictions on a gift and incorporate some flexibility if circumstances change.

Flexibility can be accommodated by:

- Framing the restricted purpose broadly.
- Expressly allowing for a change of use if circumstances change.
- Expressly stating that the gift is not intended to create a charitable trust.
- If the restriction is intended to be legally binding, by expressly characterising the restriction as a condition subsequent.

For example:

If a change in circumstances should render the Gift Purpose no longer practical or reasonably achievable, then [the organisation] after consulting with any living Donor (if applicable), may use the remaining balance of the [fund] as deemed prudent to further the objectives and purposes of [the organisation], giving due consideration to the original Gift Purpose.

Template terms for testators to use when making wills should also reflect such flexibility. For example:

I give to [organisation] [X]% of my residuary estate or \$[X]. I express the wish, but without creating any binding trust that this gift be applied towards [insert broad purpose, within the organisation's purposes]. However, if circumstances change and my wishes cannot be fulfilled, I direct that the [organisation] allocate the bequest in such a manner as best approximates my wishes.

Recommendation 4: Investigate avenues to provide charities with advice and guidance

The researchers and interested charities should approach the Attorney-General (WA) and the Australian Charities and Not-for-profits Commission to investigate ways in which existing bodies (such as the Australian Charities and Not-for-profits Commission, Justice Connect and Law Access (WA)) could provide/ be funded to provide charities with greater access to low-cost informal advice on:

- Characterising and interpreting restricted gifts.
- Changing or lifting restrictions.

One longer-term approach to providing this advice that should be investigated is the establishment of a simple rulings system such as that administered by the Commissioner of Taxation. Even for the limited range of issues arising for restricted gifts, such a rulings system would likely require a referral of powers by states to the commonwealth. Accordingly, the issue should be raised as part of the broader cross-jurisdictional discussions and planning that are currently taking place in relation to fundraising and the definition of 'charity'.

Appendix I

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 ²³⁹ / DGR1 ²⁴⁰	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		Metropolitan	Large	
Health	2	Main entity is an Inc Association, with subsidiaries in various forms	ITEC	Non-market	Yes	Metropolitan*	Large	4

²³⁹ Income Tax Exempt Charity.

²⁴⁰ Item 1 Deductible Gift Recipient.

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
	1	Co Ltd	HPC ²⁴¹ /ITEC/DGR1	Non-market	Yes	Metropolitan*	Large	
	1	Co Ltd	HPC/ITEC/DGR1	Non-market	Yes	Metropolitan	Large	
Education	3	Statute	ITEC/DGR1	Market	Yes	Metropolitan / Regional	Large	8
	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		Metropolitan	Large	
Religion	1	Statute	ITEC	Non-market	Yes	Regional	Large	3
	1	Inc Association	PBI ²⁴² /ITEC/DGR1	Non-market	Yes	Metropolitan*	Medium	
	1	Mix: Corp Sole/Charitable Trust/Statute	ITEC / Public Ancillary Fund/ITEC/DGR2 ²⁴³	Non-market	Yes	Metropolitan*	Large	
	1	Co Ltd	PBI/ITEC/DGR1	Non-market	No	Metropolitan*	Large	2

²⁴¹ Health Promotion Charity.

²⁴² Public Benevolent Institution.

²⁴³ Item 2 Deductible Gift Recipient.

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
Human Services & Development	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	

Other type	Number of participants
Government/quasi-government funders	2
Legal advisor	2
Experience in a mix of charities across the sector	1

Appendix II

Research Advisory Group Members

Member	Organisation
Alexandra Allan	The University of Western Australia
Murray Baird	Legal Practitioner and Advisor
Sari Baird	Oxfam Australia
Ven. Julie Baker	Bunbury Anglican Diocese
Nathan Bennett	Peth International Arts Festival
Justine Bolton	West Australian Ballet
Carolyn Chard	West Australian Opera
Graham Donnelly	RUAH Community Services
Mark Gummer	Astley Care
Jane den Hollander	Vice-Chancellor/former Vice-Chancellor of a number of universities
Angelita Martini	Brightwater Care Group
Liane Papaalias	Wanslea
Krystian Seibert	Philanthropy Australia
Sue Stepatschuk	Fremantle Foundation
Lynne Thomson	Chair, Anglican Schools Commission
Chris Twomey	Western Australian Council of Social Services
Nick Wood	Telethon Kids Institute

Appendix III

Questions & Associated Material Provided to Interview Participants

Indicative interview schedule for semi-structured interview

Background

- Aim of interview: To ascertain the ways in which legal mechanisms have been or may be successfully used to access charities' reserves (for the purposes of guidance materials) and the workability of law reform policy responses to difficulties encountered in this regard.
- Note: **Participant Information Form** to be reviewed and **Participant Consent Form** to be completed prior to interview.
- We will provide you with the opportunity to review and comment on the draft research report before it is released.

Questions/Topics

Accessing reserves

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".]

Barriers to accessing reserves

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)?

Legal mechanisms

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?

Law reform

8. Would it be useful to be able to ask an independent body to authoritatively interpret or approve changes to gift conditions?

Internal measures or policy

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?

Close

- Do you have any other comments about what we have discussed or the research project?

Appendix: Further comments or examples for questions 2-9

2. What are the sources of your charity's funds/assets?

- Bequests made under a donor's will, potentially with conditions.
- Lifetime gifts from individuals.
- Corporate donors or philanthropic foundations.
- General gifts made in response to a public fundraising campaign.
- Grants of land from the State, subject to various statutory conditions.
- Self-generated funds, e.g. from provision of educational services.
- Income from investments.

3. Why/for what purposes have you wanted to or do you want to access your reserves?

- Redress Scheme (for victims of institutional abuse, primarily religious institutions).
- Crises, such as COVID-19 or Bushfires.
- Aged Care Royal Commission or National Disability Insurance Scheme changes/inquiries
- Standard operations, including to cover increasing regulatory costs.

4. What do you perceive as the main difficulties your organisation has had in accessing your reserves?

- Administrative difficulties in keeping track of what gifts have been received and what are their terms – or in easily accessing a central register of gift terms; burdensome reporting and other admin requirements.
 - Have you undertaken any stocktakes of historical gifts?
- Lack of/limited access to legal advice on (interpretation and effect of conditions) – or the cost of such advice?
- Self-imposed restraints (e.g. a decision to spend only the income and not touch the capital).
- Donor perceptions.
- Difficult to liquidate donated buildings and land or assets used for operations.
- The board being risk averse to interpretation of restrictions/use of funds.
- Fear of spending reserves due to uncertainty of income.

5. Sometimes you will have difficulty due to legal restrictions. What do you understand to be the nature of the restriction? Some examples of legal restrictions include:

- **Mere wish:** subject only to a non-binding wish that the funds be used for a particular purpose – no legal consequences if the recipient uses the funds for another purpose.
- **Trust:** subject to a trust that the donated funds be used for a particular purpose (recipient as trustee can then be compelled to use them for that purpose).
- **Common law condition subsequent giving rise to forfeiture - under will or inter vivos gift:** condition subsequent that the donated funds be used for a particular purpose (failure of which would cause the donated property to revert to the donor or be gifted-over to another charity).

- **Condition in equity – personal obligation:** stipulated by donor and accepted by recipient of property (breach of which, potentially resulting in equitable compensation or specific performance).
- **Charge:** the property may be given subject to a charge securing the use of the donated property for a particular purpose (so rights retained in the property itself).
- **Contract:** conditions may give rise to a contract.
- Restrictions imposed under constituent documents of charity (trust deed or company constitution).
- **Consumer protection law**
 - a. Prohibition against misleading or deceptive, or unconscionable conduct.
 - b. Mismanagement or substantially applying funds otherwise than for affording the relief for which money or goods were collected → potential revocation of licence.
- Specific **restrictions under statute** creating a charity (e.g. Endowed Crown lands, whose sale or lease may require governmental approval).

6. Have you used any legal mechanisms to successfully gain access to restricted assets? For instance:

- (*broadly applicable, though probably not to contract restrictions or consumer law restrictions*) **Administrative schemes:** the court may settle administrative schemes, which alter the administrative machinery of a charitable trust.
- (*broadly applicable, though probably not to contract restrictions or consumer law restrictions*) **Cy-près schemes:** the court may settle cy-près schemes, which vary the charitable purpose of the trust.
- (*broadly applicable, though probably not to contract restrictions or consumer law restrictions*) **Charity proceedings legislation:** permits, e.g., the Attorney-General, or any other person, to apply for ‘orders on the grounds of breach of trust, but also more broadly on the basis that it would assist in the administration of the trust’.
- (*Charitable trusts only*) **Trustee expediency provisions:** permit ‘a court to confer powers on trustees where it is “expedient” to do so’.²⁴⁴
- For charities with members, **member action** could assist with restrictions under constituent documents. Members may be able to ‘amend the charity’s constitution to remove requirements to accumulate assets or prohibitions on accessing accumulated assets’.
- **Agree variation with donor.** Relevant to contract. Probably also relevant to common law condition, condition in equity and charge, but not to the extent that failure of the condition is expressed to result in a gift-over to another charity. Then that charity may also need to agree.
 - Negotiate outcome.
- **Seek advice/directions from the Court.** This is a mechanism to limit liability for charity responsible persons.
- **Prophylactic measures** when receiving gifts (to avoid accepting on a legal basis that is not wanted or to avoid consumer law protections unduly limiting the use of the gift).

7. Do you see/have you had any difficulties in using any of the legal mechanisms?

- Cost and time.
- Lack of/limited access to legal advice.
- Donor perception (possibly the same as above or more pronounced).

²⁴⁴ *Trustees Act 1962 (WA)* s 89(1).

8. **Law Reform.** Would you prefer to be able to ask an independent body to authoritatively interpret or approve changes to gift conditions?

- E.g. the ACNC or independent commissioner.

9. What measures does your organisation have in place to help ensure that you don't receive gifts subject to restrictions that your organisation doesn't like or can't change?

- Adopted a gift acceptance policy and publicised the policy online or otherwise to donors.
- Template terms for Deeds of Gift / Wills permitting the charity to change the use of the funds when circumstances require.

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