

A Research Project funded by Lotterywest and the University of Western Australia and conducted by researchers from the University of Western Australia, Murdoch University and Curtin University

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## **GUIDANCE MATERIALS FOR WA CHARITIES**

# **Building Resilience: Utilising Restricted Reserves**



**Ian Murray, Jeanette Jensen, Natalie Skead, Robyn Carroll, Marco Rizzi, Robyn Honey and Donovan Castelyn**



## Acknowledgments

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All views in these guidance materials (and any errors) are those of the authors in their capacity as researchers and do not represent the views of any of the people or organisations that have supported the research.

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## Role of these guidance materials

These guidance materials are not intended to encourage charities to ignore donor's wishes. However, the research we conducted suggests that often charities are unsure whether donor wishes are legally binding and, if so, are also unsure of the character of the legal obligation and the legal pathways to amend or lift such restrictions.

Accordingly, these guidance materials:

1. Provide information on the six main potential legal characterisations of donor restrictions and set out the available legal mechanisms for amending or lifting those restrictions. This information is contained in the **Accessing Existing Restricted Assets diagram**. The aim of the diagram is to empower charities when considering an amendment to restrictions and to provide them with a solid basis for any conversations with donors.
2. Make recommendations for preventative actions that charities can take in respect of future gifts, to avoid unwanted or inappropriate restrictions. These recommendations are set out in the **Preventative Measures diagram**.

This guidance is general in nature and does not constitute legal advice. However, it should materially help charities in obtaining legal advice.

## The research project

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.

## What are restricted reserves?

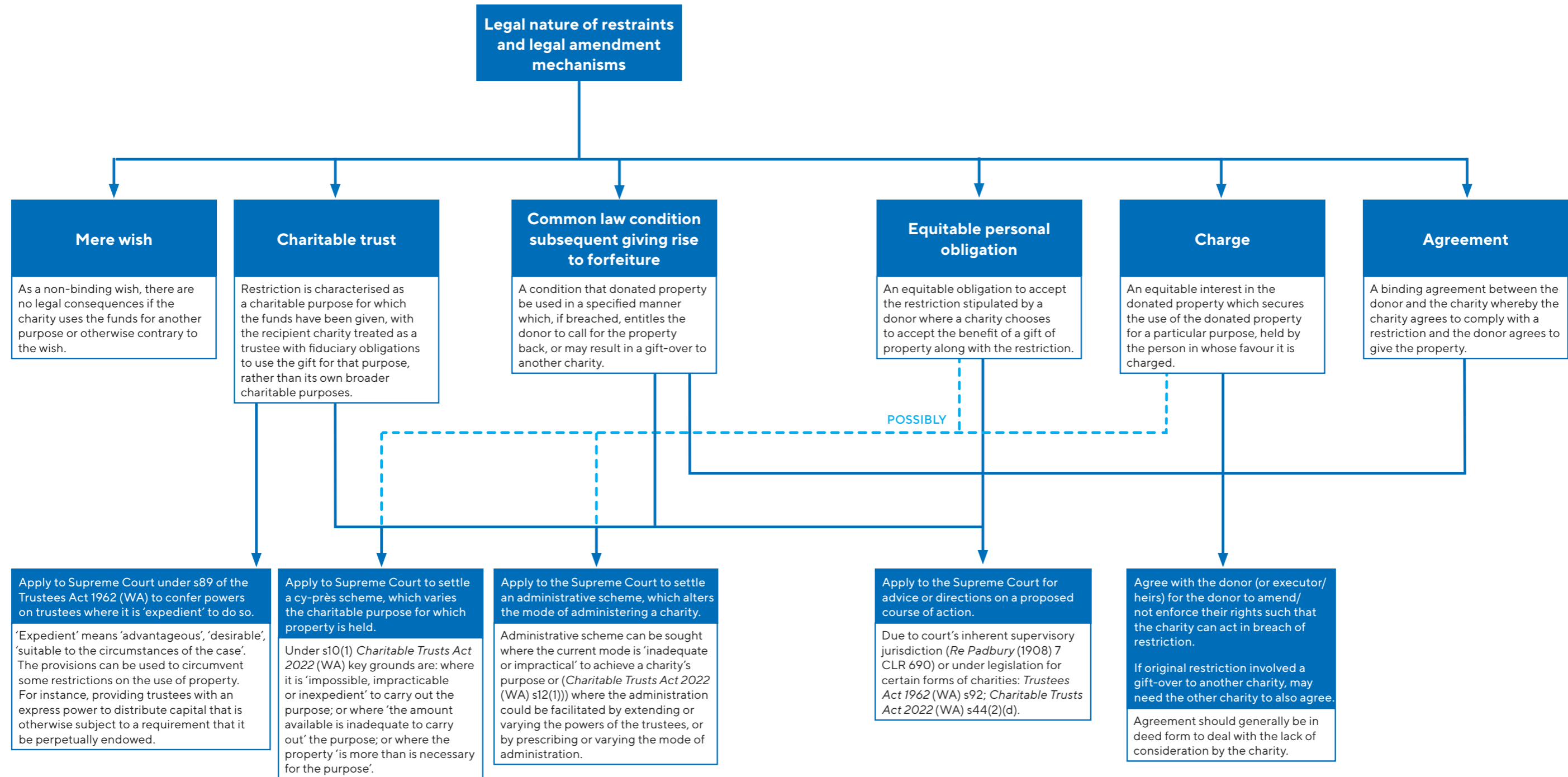
By '**reserves**' we mean a charity's **net assets**. So, 'restricted' reserves means charity assets that are subject to conditions on the way in which they can be used.

Of course, all charities must use their assets for their **charitable purpose**. However, additional conditions can often arise when gifts are made to charities. For instance, funds might be given with the condition that only the **interest** and not the **capital** can be spent. By way of another example, a gift might be for a specific activity within the charity's broader purpose, such as to provide a particular type of healthcare or to fund a scholarship for education in a particular field.

## Restrictions and crises

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. However, recent crises such as COVID-19 and the earlier Global Financial Crisis pose challenges for society and the charitable sector and have shown that some charities can face legal and non-legal difficulties in accessing their reserves in times of great need. Donor restrictions on gifts – which may no longer be appropriate in the changed circumstances of a crisis – are a key reason.

# ACCESSING EXISTING RESTRICTED ASSETS



**Consider also:** Internal charity controls on the use of assets, impact on reputation and donor perceptions, and impact on financial sustainability.

**Note:** Legal constraints might apply in particular circumstances, such as consumer protection requirements on fundraising, or Crown lease or grant conditions.



# PREVENTATIVE MEASURES

Preventative measures

LEGAL DRAFTING OF GIFT TERMS		
Measure	Summary	Intended effect / example
Gift agreements or acknowledgments	Written documents that clearly set out the restrictions on the gift but are worded to incorporate some flexibility if circumstances change. <ul style="list-style-type: none"> <li>• <b>'Agreement'</b> (in deed form) intended to be binding</li> <li>• <b>'Acknowledgment'</b> not intended to be binding (maximises flexibility because charity has moral not legal obligation)</li> </ul>	It is not possible to foresee the future. Change of circumstance can mean that restrictions make it difficult to effectively pursue charitable purpose. Terms in the agreement should seek to maximise flexibility around: <ul style="list-style-type: none"> <li>• Broad wording for the restricted purpose.</li> <li>• Expressly allowing for a change of use if circumstances change.</li> </ul> <p>Eg: 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.</p>
Template terms for wills	Template terms for wills that incorporate some flexibility if required.	As above. <p>Eg: 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.</p>

EDUCATION AND SUPPORT		
Measure	Summary	Intended effect
Education & support for charity officers	Education support on matters such as the legal effect of restricted gifts, associated costs to charities and donors, and mechanisms to address historic restrictions.	Prevent unnecessary or unintended restrictions on gifts and address historic restrictions.

INTERNAL CONTROLS ON ACCEPTING GIFTS		
Measure	Summary	Intended effect
Formal gift acceptance policy	Policy/practices should cover: <ul style="list-style-type: none"> <li>• fit with the charity's purpose and values</li> <li>• unacceptable donors/circumstances</li> <li>• the types of property accepted as a gift</li> <li>• circumstances in which donors are permitted to specify restrictions (eg by value/risk thresholds) and the nature of those restrictions</li> <li>• delegations of authority specifying who can accept gifts (eg by value thresholds)</li> <li>• record-keeping and feasibility checks for conditions</li> </ul>	Reduce administrative costs associated with restricted gifts, and instances of receiving restricted gifts that cannot be accessed.
If formal thresholds are controversial and limiting for the charity, more informal decision checklist	Delegations of authority should still be in place (eg above a low threshold it might be for the board/trustees to consider the various factors and decide whether to accept a restricted gift). <p>Decision checklist covering the other above matters as relevant considerations.</p>	Provide more flexibility than a formal policy, but still ensure some protection for charity.

DONOR & COMMUNITY RELATIONS		
Measure	Summary	Intended effect / example
Build trust with donors and the community	Requires charity to be <b>responsible</b> and <b>transparent</b> about its use of gifts and more broadly in relation to its management and outcomes achieved.	Trust that the charity will appropriately use gifts, lessening need for restrictions in the first place.
Pre-acceptance conversations with donors	<b>Explain</b> to donors the <b>potential problems</b> arising from restricted gifts, and the need for flexibility and seek to understand donor reasons for seeking restrictions, to see whether those reasons can be addressed in other ways.	Limit or eliminate unnecessary restrictions on gifts in order to make the gift more effective. And where restrictions are accepted, the charity will have a very good understanding of their basis.
Information evenings with potential testators	Information evenings with people considering leaving a bequest to the charity in their will. Staffed by <b>volunteer lawyers</b> and <b>charity fundraising staff</b> .	Provides an opportunity to explain charity's preferred will terms and the reasons for building in some flexibility.

ONGOING MANAGEMENT OF RESTRICTED GIFTS		
Measure	Summary	Intended effect
Sound governance processes	<b>Sound overarching governance systems</b> for the charity and specifically relating to the management of gifts. <p>Charities might stress the value of unrestricted gifts to supporting governance and gift management processes.</p>	Can avoid difficulties accessing reserves and help build trust with donors.
Centralised records and customer relations system for restricted gifts	<b>System that captures all relevant information</b> relating to restricted gifts, including gift conditions and agreements and any subsequent acquittals against those conditions, as well as outcomes achieved.	Minimise uncertainty about what the assets were gifted for or whether they have been spent or can be used for another purpose. <p>Avoid funds sitting idle (potentially unbeknownst to the charity).</p>
Implementation plan & delegations of authority for gift expenditure	Especially 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.	Avoid funds sitting idle & ensure compliance with conditions or early identification of any issues due to changed circumstances. <p>Build trust with donors.</p>

## Further information

The key findings of the research are:

- 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 **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 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.
- 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.
- Most 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 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.
- **Most charities treated restricted gifts as giving rise to a legally or morally binding agreement with the donor** (ie 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). **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 administrative 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 administrative 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.

The research underpinning these guidance materials is available on the UWA research repository at: [research-repository.uwa.edu.au](https://research-repository.uwa.edu.au)



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