



# The Contractualisation of Philanthropy

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*The legal framework governing charitable giving seeks to balance individual donor autonomy against the requirement that charities apply donations to charitable purposes for the public benefit. In Australia, contract law has been largely absent from this legal framework. However, as philanthropy has evolved, sophisticated donors making large charitable gifts are increasingly entering into gift agreements with charities stipulating how their donated funds are to be applied. These contemporary philanthropic transactions raise important doctrinal questions regarding the ability of these restricted charitable gifts to create legally enforceable contracts, as well as the normative implications of this emerging intersection of charity law and contract law on the legal framework for charitable giving in Australia.*

## Introduction

In 2019 the University of Sydney announced that it had raised \$1 billion through a 10-year philanthropic campaign.<sup>1</sup> While the university received donations of all sizes, a significant proportion came from just five donors whose gifts were earmarked for specific projects. These restricted charitable gifts, specifying how the university was to apply the donation, reflect the evolution of large-scale philanthropy from an informal undertaking to a sophisticated legal transaction. As philanthropy has evolved, restricted charitable gifts have become the predominant method of structuring large donations.<sup>2</sup> With its roots in the United States, this contemporary approach to philanthropy has been spearheaded by philanthrocapitalists, a new breed of entrepreneurial, highly engaged donors that apply business tools and techniques to philanthropy and use metrics to gauge the effectiveness of their donations.<sup>3</sup> This approach is notable for its high degree of donor control

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1 See The University of Sydney, 'INSPIRED! \$1 billion philanthropic achievement' (30 January 2019) <<https://sydney.edu.au/news-opinion/news/2019/01/30/inspired--the-university-of-sydney-announces--1-billion-philanth.html>>.

2 See Roger Colinvaux, 'Using Tax Law to Discourage Donor-Imposed Restrictions on Charitable Gifts', paper presented at the National Center on Philanthropy and the Law Annual Conference, Wrestling with Donor Intent: Strategies for Enforcement or Relaxation, New York University, 27–28 October 2016, pp 19–23. See also John Eason, 'Motive, Duty, and the Management of Restricted Charitable Gifts' (2010) 45 *Wake ForestLR* 123 at 704.

3 This term was first used in 2006 by Matthew Bishop, a journalist at *The Economist* who later authored with Michael Green, an economist, *Philanthrocapitalism: How the Rich Can Save the World* (Bloomsbury Press, 2008). Since then, philanthrocapitalism has received extensive scholarly attention. See Michael Edwards, 'Gates, Google, and the Ending of Global Poverty: Philanthrocapitalism and International Development' (2009) 15(2) *Brown J of World Affairs* 35; Garry Jenkins, 'Who's Afraid of Philanthrocapitalism?' (2011) 61(3) *CaseWResLRev* 753; Robin Rogers, 'Why Philanthro-Policymaking Matters' (2011) 48(5) *Society* 376; Linsey McGoey, 'The Philanthropic State: Market-State Hybrids in the Philanthrocapitalist Turn' (2014) 35(1) *Third World Quarterly* 109 at 109–10.

whereby philanthropists execute their personal social visions through their philanthropy.<sup>4</sup> This control is typically achieved through gift agreements, pursuant to which the donor agrees to make a gift to the charity in exchange for the charity's commitment to use the gift as specified in the agreement.<sup>5</sup> While there are strong arguments against wealthy donors exerting control and influence by making large gifts with strings attached,<sup>6</sup> the Australian Government continues to encourage philanthropy through tax incentives as a matter of public policy.<sup>7</sup> With total tax-deductible donations to charities and other eligible not-for-profits amounting to \$3.9 billion annually,<sup>8</sup> it is timely to consider the legal and normative implications of these contemporary philanthropic transactions.

To understand the legal implications, the next part examines whether the prevalence of restricted charitable gifts involving the transfer of property rights has created a role for contract law within the legal framework for charitable giving in Australia. In doing so, it considers whether these gifts can be treated as a contract giving rise to legally enforceable rights and obligations and, if so, whether contract law's remedial regime is well suited to addressing legal issues between the parties. This enquiry is concerned with restricted charitable gifts that are made during the donor's lifetime through a direct property transfer.<sup>9</sup> Normative considerations that arise when contract law is introduced into the legal framework for charitable giving are then considered; in particular, whether the contractualisation of philanthropy represents a shift towards individual (or private) values over those that are more collective (or public), such that charities dedicated to purposes in pursuit of public benefit are transformed into vehicles for effecting private intent.<sup>10</sup> The final part provides concluding thoughts on this emerging intersection between contract law and charity law.<sup>11</sup>

4 See Susan Ostrander, 'The Growth of Donor Control: Revisiting the Social Relations of Philanthropy' (2007) 36 *Nonprofit and Voluntary Sector Quarterly* 356 at 361.

5 See Eason, above, n 2 at 705; Susan Gary, 'Restricted Charitable Gifts: Public Benefit, Public Voice' (2017) 81(2) *AlabamaLR* 565 at 591.

6 See below, text at nn 72–88.

7 The gift deductibility provisions are set out in the Income Tax Assessment Act 1997 (Cth), Div 30 ('ITAA 1997').

8 Data is from 2018–19. Myles McGregor-Lowndes, Marie Balczun and Alexandra Williamson, 'An Examination of Tax-Deductible Donations Made by Individual Australian Taxpayers in 2018–19', ACPNS Working Paper No 74, 2021 <<https://eprints.qut.edu.au/212682/>>.

9 Such gifts can also be made by way of a testamentary disposition, which are subject to succession law and requires the involvement of executors who are tasked with ensuring that donor intent is followed.

10 See Colinaux, above, n 2 at 2, raising similar concerns.

11 This is not to say that contract law does not otherwise intersect with charity law. Contracts between charities and government whereby charities are paid to deliver services, such as health, welfare and education, are well established. Indeed, public policy has shifted from using grants to contracts where these services are commissioned or purchased. See Debra Morris, 'Charities in the Contract Culture: Survival of the Largest?' (2000) 20(3) *Legal Studies* 409; Myles McGregor-Lowndes and Amanda McBratney, 'Government Service Contracts: Restraining Abuse of Power' (2011) 22(4) *PublicLR* 279.

## Is There a Role for Contract Law within the Legal Framework for Charitable Giving?

The emergence of contract law in connection with restricted charitable gifts has been overlooked in the Australian academic discourse,<sup>12</sup> largely because under the existing legal framework for charitable giving the trust has provided the vehicle to effect such a gift for a charitable purpose.<sup>13</sup> This is a vestige of the historical evolution of charity law, whereby ‘the (charitable) trust was traditionally the favoured instrument in the law’s arsenal to give effect to charitable objects’.<sup>14</sup> Dal Pont notes that in Australia the courts are inclined ‘to find an intention to create a trust ... whenever a donor has gifted ... property to a [charity] with an intention, whether express or inferred, that the property be used for one or more charitable purposes’.<sup>15</sup> As a result, when property is transferred by way of a restricted charitable gift, the law treats the recipient charity as implicitly holding that gift in trust. This is because the charity’s use of the gift ‘is constrained by an obligation more confined than its objects may otherwise permit’.<sup>16</sup> This can be contrasted with an unrestricted or outright gift to a charitable entity, which arguably does not require a trust, ‘as its subject matter is necessarily devoted to charity under the auspices of the entity itself’,<sup>17</sup> such that the recipient takes the gift absolutely.<sup>18</sup>

Under this legal regime, the enforcement of charitable trusts is generally ‘a matter of public, rather than private significance’.<sup>19</sup> For restricted charitable gifts, ‘despite the fact that the [charity] is legally bound by specific terms of the gift, *legally* it is not the donor’s concern. It is *society’s* concern, to be

12 Cf the United States. See eg Allison Tait, ‘Keeping Promises and Meeting Needs: Public Charities at a Crossroads’ (2018) 102 *MinnLRev* 789; William Sullivan, ‘The Restricted Charitable gift as Third-party Beneficiary Contract’ (2017) 52 *RealProp, Trust & Estate LJ* 79; William Drennan, ‘Conspicuous Philanthropy: Reconciling Contract and Tax Laws’ (2017) 66 *AmULRev* 1323; Harvey Dale, ‘Embracing the Tension: Enforcing or Modifying Donor Intent’, Paper presented at the National Center on Philanthropy and the Law Annual Conference, *Wrestling with Donor Intent: Strategies for Enforcement or Relaxation*, New York University, 27–28 October 2016; Evelyn Brody, ‘The Legal Framework for Restricted Gifts: The Cy Pres Doctrine and Corporate Charities’ (2004), Annual Conference of the Association for Research on Nonprofit Organizations and Voluntary Action, November 2003; Richard Fox, ‘Planning for Donor Control and Other Strings Attached to Charitable Contributions’ (2003) 30(9) *Estate Planning* 441; and Ronald Chester, ‘Grantor Standing to Enforce Charitable Transfers under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?’ (2003) 37(4) *RealProp, Probate & Trust J* 611.

13 See G E Dal Pont, *Law of Charity*, 2nd ed, LexisNexis Butterworths, Australia, 2017, p 418.

14 G E Dal Pont, ‘“Charity” and Trusts: Mutuality or Intersection?’ (2016) 10 *JEq* 26 at 28 (‘Charity and Trusts’), who provides a useful synopsis of this historical development.

15 Dal Pont, *Law of Charity*, above, n 13, p 421.

16 Dal Pont, ‘Charity and Trusts’, above, n 14 at 33.

17 Dal Pont, ‘Charity and Trusts’, above, n 14 at 33. As Dal Pont notes at 44, Australian case law appears to endorse ‘the subsistence of trust law within charitable companies’. See *Joyce v Ashfield Municipal Council* (1959) 4 LGRA 195 at 205 (Herron J); *Sydney Homoeopathic Hospital v Turner* (1959) 102 CLR 188 at 221 (Kitto J); *Sir Moses Montefiore Jewish Home v Howell and Co (No 7) Pty Ltd* [1984] 2 NSWLR 406 at 416 (Kearney J).

18 See *Countess of Bective v Federal Commissioner of Taxation* (‘*Countess of Bective*’) (1932) 47 CLR 417; [1932] ALR 362 at 418 (Dixon J).

19 Dal Pont, ‘Charity and Trusts’, above, n 14 at 30.

pursued (or not) by society's representative, the attorney general'.<sup>20</sup> As a result, it is generally the Attorney-General who has standing to enforce the terms of a charitable gift by bringing an action for breach of charitable trust.<sup>21</sup> Since the Attorney-General represents the public, she or he can enforce the terms of the charitable gift on behalf of the unascertainable charitable beneficiaries,<sup>22</sup> while protecting charities from litigation by parties who may not have a tangible interest in the outcome.<sup>23</sup> The corollary of this common law standing rule is that there is no certainty that a donor who has made a charitable gift will have standing to bring an action to enforce its terms, and no guarantee that the Attorney-General will intercede on either the donor's or the charity's behalf.<sup>24</sup> While some state and territory legislation confers an entitlement to standing upon 'interested persons' to enforce a charitable trust and others provide 'open standing', whether these statutes are sufficiently expansive to give a donor standing to enforce the terms of a charitable gift remains uncertain.<sup>25</sup>

The absence of a private right of action to enforce the terms of a gift highlights an important issue that arises under the existing legal regime for charitable giving. Introducing contract law into this regime may provide a potential solution, while presenting further doctrinal questions.

### Can a Charitable Gift be Treated as a Contract?

Historically, the common law does not consider a gift to be a contract.<sup>26</sup> The 'quintessential gift' is 'an unforced, one-sided transfer, motivated by generosity and a spirit of selfless love without thought of reciprocity'.<sup>27</sup> The gift is not 'contractual' because the necessary element of consideration is missing. Consideration determines which promises create obligations that are contractual and therefore legally enforceable, as opposed to promises that are

20 Laura Chisolm, 'Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework' (1995) 6 *Nonprofit Management and Leadership* 141 at 147.

21 See *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (Lord Simonds); *Num-Hoi, Pon-Yu, Soon-Duc Society Inc v Num Pon Soon Inc* (2001) 4 VR 527; [2001] VSC 363 (Harper J). Whether or not this means that the Attorney-General must *initiate* the proceedings remains uncertain, although persons with a 'special interest' in the charity have been able to do so in some instances. See Gareth Jones, *History of the Law of Charity: 1532-1827*, Cambridge University Press, London, 1969.

22 Given that it is expressed for a purpose, the charitable trust lacks 'true' beneficiaries in a legal sense. See Dal Pont, 'Charity and Trusts', above, n 14 at 29-30.

23 Evelyn Brody, 'From the Dead Hand to the Living Dead: The Conundrum of Charitable-donor Standing' (2007) 41 *GeorgiaLRev* 1183 at 1192.

24 Dal Pont, 'Charity and Trusts', above, n 14 at 30-31.

25 Standing for 'interested persons' exists in the ACT, Queensland, South Australian and Tasmanian legislation. Western Australian legislation allows 'open standing' beyond interested persons, while New South Wales requires authorisation from the Attorney-General to grant standing. Victoria does not appear to confer such an entitlement to standing.

26 Richard Hyland, *Gifts: A Study in Comparative Law*, Oxford University Press, New York, 2009, p 579. However, there are a number of scholars who have argued that 'the rigid distinction between gift and exchange is misguided' based on the premise that 'people do not generally make a transfer unless they experience some benefit.'

27 Carol Rose, 'Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa' (1992) 44(3) *FloridaLRev* 295 at 302.

merely gratuitous. It is the agreed price of the promise; something of value in the eyes of the law that is given in return for a promise to make it legally binding.<sup>28</sup> A promise by a donor to make a gift does not give rise to a contract because the recipient has made no promise in return, resulting in the absence of a bargained-for exchange.

An unrestricted or outright charitable gift represents the ‘quintessential gift’ in the sense of being an act of generosity rather than self-interest, where the donor neither expects nor receives anything in return.<sup>29</sup> An unrestricted gift contains no directions or stipulations by the donor as to how the gift is to be used, giving the recipient charity full discretion to decide how the donated funds should be applied. In economic terms, it is ‘a strictly unilateral transfer in which the donor receives no price or quid pro quo in return for his gift’.<sup>30</sup> As a result, even though the donor intends to be bound by their promise to transfer property, it does not amount to a contractual promise because there is no element of exchange.

In contrast, a restricted charitable gift is more than a discrete one-sided transfer motivated by altruism. Instead, it typically involves a long-term economically significant reciprocal exchange. In this exchange, the donor promises to give money to the charity and, *in return*, the charity promises to use the donated funds in accordance with the restrictions set forth by the donor in the gift agreement; for example, where a donor promises to transfer property to a charity for the purpose of building a school and the charity promises in return to apply those funds to build the school as specified by the donor.<sup>31</sup> The charity’s promise to use the gift according to the donor’s specifications arguably constitutes valid consideration such that the gift is capable of giving rise to a contract.<sup>32</sup> The unique amalgam of gift and contract that exists in these contemporary philanthropic transactions has been described by American charity law scholar Evelyn Brody as a ‘giftract’.<sup>33</sup>

Due to the doubt surrounding whether consideration has been provided by the recipient charity for a restricted charitable gift, in Australia it has become

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28 See *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.

29 Some commentators have suggested that ‘the rigid distinction between gift and exchange is misguided’. See Melanie Leslie, ‘Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract’ (1999) 77(2) *NCarolinaLRev* 551 at 563. See also Rose, above, n 27 at 296–8. Economists have found that charitable giving provides a benefit for the donor in the form of a ‘warm glow’ that equates with an increased sense of well-being and personal satisfaction. See James Andreoni, ‘Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving’ (1990) 100 (401) *The Economic Journal* 464.

30 A J Culyer, J Wiseman and J W Posnett, ‘Charity and Public Policy in the UK — The Law and the Economics’ (1976) 10(1) *Social and Economic Administration* 32 at 33. See also John Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 *Yale LJ* 625 at 652, who notes that only the donor’s intent is relevant to ascertaining the terms of the transfer.

31 This can be contrasted with a conditional gift that does not give rise to a contract, whereby a donor promises to give money *if* the charity builds a school. Here, the element of exchange is not present. Yet the distinction between conditional gifts and contracts is murky and to a large extent depends on the intention of the parties. See J W Carter, *Contract Law in Australia*, 8th ed, J W Carter Publishing, Sydney, 2023, pp 117–118; Langbein, above, n 30 at 652.

32 See Sullivan, above, n 12 at 100.

33 See Brody, ‘Dead Hand’, above, n 23 at 1189, who argues that their unique character requires a ‘tailored legal regime’.

common practice for these gifts to be made via a deed under seal. While using a deed to effect a restricted charitable gift alleviates concerns that may arise concerning the enforceability of the terms of the gift, other issues may arise regarding the scope of potential remedies. For example, the equitable remedy of specific performance may not be available for a deed given that equity does not assist a volunteer.<sup>34</sup> This is significant for both the charity and the donor because the remedy of specific performance is likely to be preferable when seeking to enforce the terms of the contract.<sup>35</sup>

### Does Such a Contract Give Rise to Legally Enforceable Rights and Obligations?

In Australia, very few disputes involving restricted charitable gifts have reached the courts and, of those that have, tax law considerations as to whether the donation qualified as a gift for tax purposes were paramount.<sup>36</sup> The key tax issue involving restricted charitable gifts is whether the gift is complete in the sense that the recipient organisation obtains ‘immediate and unconditional right of custody and control’ of the property transferred.<sup>37</sup> This issue arose in *Re Australian Elizabethan Theatre Trust* (‘AETT’)<sup>38</sup> where the Federal Court considered whether unallocated donations to the AETT specifying a preference that the funds go to certain arts organisations constituted moneys held by the AETT on trust for those organisations. Following *Countess of Bective v Federal Commissioner of Taxation*,<sup>39</sup> Gummow J found that these preference donations ‘did not impose a legal or equitable obligation’ but rather were simply a statement of the donor’s ‘motive or expectation’.<sup>40</sup> He determined that based on a series of private tax rulings by the Commissioner of Taxation, ‘[t]he essence of the attitude consistently taken by the Commissioner was that, in order to qualify [for a tax deduction], a donation must be “unconditional” and “unfettered”’,<sup>41</sup> and concluded that because the donors had merely indicated a preference for a particular arts organisation, there was ‘an absence of qualification or obligation’. As a result, the gifts were .<sup>42</sup> His Honour noted in obiter that the donations would not have been given “unconditionally” if subjected to a trust power exercisable by the AETT in favour of one or other of the preferred arts organisations’.<sup>43</sup>

This case, along with subsequent private tax rulings and tax determinations have created the perception in Australia that in order to make a restricted

34 Carter, above, n 31, pp 116–17.

35 See below, text at nn 60–71.

36 For an analysis of the tax considerations that apply to restricted charitable gifts, see Natalie Silver, ‘The Tax Treatment of Donor-Restricted Charitable Gifts’ (2021) 36(1) *AustlTaxF* 103.

37 TR 2005/13 at [19].

38 (1991) 102 ALR 681; (1991) 30 FCR 491.

39 (1932) 47 CLR 417; [1932] ALR 362, where Dixon J discussed the situations where a gift for the benefit of a third party may also give rise to equitable obligations on the donee or equitable charges in favour of the third party, falling short of those giving rise to a trust.

40 *AETT* (1991) 102 ALR 681 at 697.

41 *AETT* (1991) 102 ALR 681 at 689.

42 *AETT* (1991) 102 ALR 681 at 697.

43 *AETT* (1991) 102 ALR 681 at 697.

charitable gift which will be considered complete for tax purposes, the use of the gift must be expressed as a preference, rather than a restriction as to how the gift is to be applied.<sup>44</sup> As I have argued elsewhere,<sup>45</sup> provided that the ultimate control of the restricted charitable gift resides with the charity, there seems to be no reason under the existing tax laws why the donation should not qualify for a deduction. This allows the charity to have the contractual right to receive the funds and use the gift as specified in the gift agreement, and the donor to have the right to enforce this specified use while retaining no property interest in the gift.

In the US, a number of cases involving restricted charitable gifts have come before federal and state courts. In some of these cases, the courts have invoked contract law doctrine to enforce the terms of the gifts as specified in the gift agreement.<sup>46</sup> For example, in *Family Federation for World Peace & Unification International v Hyun Jin Moon*, the District of Columbia Court of Appeals found that, pursuant to the gift agreement, the charity 'had an obligation to use funds for an express purpose, and it breached that obligation by allegedly diverting funds away from the specified purposes for which they were contributed'.<sup>47</sup> Recently, in *Thomas L Pearson and the Pearson Family Members Foundation v The University of Chicago* ('Pearson'),<sup>48</sup> an action in contract was brought by the donor to enforce a \$100-million restricted charitable gift to establish a research institute at the University of Chicago. The 60-page gift agreement contained a number of stipulations, including that an institute director was to be appointed by a certain date.<sup>49</sup> When no institute director was appointed by that date, the foundation sued the university for breach of several contractual obligations.<sup>50</sup> The university countersued for the foundation's failure to pay a \$13-million instalment, arguing that it had 'suffered substantial damages, including the loss of the amount owed under the agreement and lost income to support costs of the institute'.<sup>51</sup> The District Court for the Northern District of Oklahoma determined that most of the

44 See eg Australian Taxation Office, *Taxation Determination*, TD 2004/23, June 2004 [11] <<https://www.ato.gov.au/law/view/document?docid=TXD/TD200423/NAT/ATO/00001>>.

45 See Silver, above, n 36.

46 See eg *Stock v Augsburg College* Minn Ct App, No C1-01-1673, 16 April 2002; *LB Research & Education Foundation v UCLA Foundation* 29 Cal Rptr 3d 710 (Ct App, 2005); *Adler v Save* 74 A 3d 41 at 43 (NJ Ct App, 2013); *Pearson v Garrett-Evangelical Theological Seminary Inc* 790 F Supp 2d 759 at 769 (ND Ill, 2011); *New York University v International Brain Research Foundation Inc* NY Sup Ct, No 652954, 14 March 2016, slip op 30434(U); *Reed Foundation Inc v Franklin D Roosevelt Four Freedoms Park LLC* 964 S 2d 152 (NY Ct App, 2013); *Family Federation for World Peace & Unification International v Hyun Jin Moon* 129 A 3d 234 (DC Ct App, 2015).

47 129 A 3d 234 (DC Ct App, 2015).

48 ND Okla, No 18-CV-99-GKF-FHM, 29 June 2018.

49 Grant Agreement by and among the Thomas L Pearson and the Pearson Family Members Foundation, The University of Chicago and Thomas L Pearson, 3 April 2015 (on file with author).

50 *Pearson* ND Okla, No 18-CV-99-GKF-FHM, 29 June 2018, doc no 27. The foundation asserted four other causes of action in its complaint: breach of fiduciary duty; fraudulent concealment; breach of the duty of good faith and fair dealing; and anticipatory repudiation.

51 *Pearson*, ND Okla, No 18-CV-99-GKF-FHM, 29 June 2018, doc no 46.

alleged breaches of contract were actionable.<sup>52</sup> While US trust law is more influenced by contractual analysis than Australian trust law,<sup>53</sup> the US experience may inform future cases in Australia where a restricted charitable gift is made pursuant to a gift agreement.<sup>54</sup>

If contract law can determine enforcement, the parties to the gift agreement gain the benefits contract can provide over trusts, including greater certainty that the parties can enforce the terms of the agreement given the standing issues that arise under trust law.<sup>55</sup> There is also greater flexibility to amend the agreement through a contract variation should circumstances change in the future. Varying the terms of a charitable trust can be difficult, even where the gift has become impracticable or impossible for the charity to perform. In such situations, the charity may be able to invoke the doctrine of *cy-près*, which requires the trust property to be applied as close to the donor's original charitable intent as possible.<sup>56</sup> However, this doctrine has been strongly criticised, notably for its lack of flexibility.<sup>57</sup> Given that trust law standing rules say nothing about a donor's standing in their capacity as a party to a contract, the application of contract law doctrine to restricted charitable gifts does not appear to be incompatible with these rules. As a result, while the charity may hold the property on trust, it is possible that legally enforceable obligations could also be recognised through contract. This provides an opportunity for the parties to draw upon the practical strengths of each, including the available remedies for breach of trust<sup>58</sup> or contract.<sup>59</sup>

### Is Contract Law's Remedial Regime Well Suited to Addressing the Legal Issues that Arise in Relation to Restricted Charitable Gifts?

The principal legal remedy to enforce a contractual promise is an award of monetary damages. In Australia, contract damages are assessed on an expectation measure; that is, 'by protecting the expectation that the injured party had when making the contract by attempting to put that party in as good a position as it would have been in had the contract been performed'.<sup>60</sup> While

52 While the trial was originally scheduled to take place in 2019, it has been delayed due to several motions brought by both parties, primarily relating to the production of documents.

53 See Langbein, above, n 30.

54 Where the donor is no longer living, only persons who have been expressly assigned contractual rights to enforcement under the agreement could enforce its terms. See Chester, above, n 12 at 633.

55 See above, text at nn 19–25.

56 For a discussion of *cy-près* generally, see Dal Pont, *Law of Charity*, above, n 13 at 358–95.

57 See eg Rob Atkinson, 'Reforming Cy Pres Reform' (1992) 44 *HastingsLJ* 1111; Melanie Leslie, 'Time to Sever the Dead Hand: Fisk University and the Cost of the Cy prè's Doctrine' (2012) 31 *Cardozo Arts & Ent LJ* 1.

58 See *Wylde v Attorney-General* (1948) 78 CLR 224. The principal remedy for breach of trust includes an order for compensation, pursuant to which a trustee must restore the trust to its financial position prior to the breach. If the charity trustee has profited as a result of the breach, the appropriate remedy may be an account of profits. The court can also order an injunction to restrain trustees from applying charitable funds in breach of trust or specific performance. See Dal Pont, *Law of Charity*, above, n 13, pp 438–9.

59 See below, text at nn 60–71.

60 *Robinson v Harman* (1848) 154 ER 363; (1948) 1 Ex 850.



damages could be sought by the charity when promised funds have not materialised, it is not a suitable remedy for a donor who has made a restricted charitable gift that has not been used in accordance with the gift agreement. This is because the donor has not actually suffered any personal loss, such that a court would likely award nominal damages only.<sup>61</sup> Interestingly, in *Pearson v University of Chicago*, the donor sought an award of damages and the court found sufficient factual allegations to support this claim.

Given that damages for breach of contract are likely to be an inadequate remedy for the donor, the more common remedy sought by donors in the US is the equitable remedy of specific performance. Yet this remedy will generally not be available where the gift has been made via a deed, the common legal form used for gift agreements in Australia.<sup>62</sup> Where a restricted charitable gift embodied in a gift agreement is recognised as a contract, the remedy of specific performance would allow a donor to seek a court order mandating the charity's compliance with the restricted use of the gift pursuant to the gift agreement.<sup>63</sup> However, issues with this remedy may still arise. For example, generally an order for specific performance will apply to the whole contract.<sup>64</sup> Moreover, courts have discretion to make an order for specific performance and may refuse to do so where execution of the contract would require the court's continued supervision.<sup>65</sup>

When specific performance is not available, an alternative remedy is an injunction. Injunctions can be prohibitory in the sense of being used to restrain a breach of contract, or they can be mandatory, if designed to compel performance.<sup>66</sup> For a donor who has made a restricted charitable gift that has not been used by the charity in accordance with the gift agreement, the former would involve a direction to the charity to refrain from using the gift in a manner not specified by the donor,<sup>67</sup> while the latter would mandate the charity's compliance with the restricted use of the gift. A mandatory injunction is not dissimilar to an order for specific performance, while having the benefit of being able to apply to a particular term in the contract. However, Australian courts may refuse injunctive relief that is the equivalent of specific performance in circumstances where specific performance would be unavailable.<sup>68</sup>

Where specific performance or an injunction is not sought or is inappropriate, there are limits to the available remedies. One possibility is returning the gift to the donor through a 'reverter' contained in the gift agreement. In this situation, the contractual language arguably supports the

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61 *Beswick v Beswick* [1968] AC 58; *Trident v McNiece* (1988) 165 CLR 107. But see Chester, above, n 12 at 634 who argues that it may be possible to return an award of damages to the corpus of the gift to reinstate the gift to its original size.

62 See above, text at n 34.

63 See Chester, above, n 12 at 634; Dale, above, n 12 at 10.

64 Carter, above, n 31, p 922, noting that in certain circumstances 'specific performance of a severable part of a severable contract may sometimes be ordered.'

65 Carter, above, n 31, p 922.

66 Carter, above, n 31, p 931.

67 See *Lumley v Wagner* (1852) 42 ER 687; (1852) 1 De G M & G 604.

68 Carter, above, n 31, pp 932–3.

operation of a resulting trust.<sup>69</sup> However, this option is likely to result in the funds constituting taxable income to the donor. An alternative remedy that avoids this result would be a ‘gift over’ to another charity specified in the gift agreement.<sup>70</sup> Returning a gift to the donor is also an option for the charity where the donor engages in overreach in the charity’s affairs. A recent example in the US involves the University of Alabama School of Law’s decision to return a \$21.5 million gift to end ‘the continued outside interference by the donor in [its] operations’.<sup>71</sup>

This part has shown that from a doctrinal perspective there could be a role for contract law within the legal framework for charitable giving in Australia. While the certainty and flexibility provided by contract law can provide benefits to both parties, it is the donor who stands to gain the most in terms of enforcing a restricted charitable gift contained in a gift agreement. As a result, the contractualisation of philanthropy provides wealthy donors making large charitable gifts with increased control and influence, which raises important normative concerns.

### Normative Considerations

Normative concerns about high levels of donor control in contemporary philanthropic transactions arise from the ‘central tension’ in charity law between ‘protecting the autonomy of donors and charities and protecting the public interest in their activities’.<sup>72</sup> Charity law draws a bright line between that which is private or benefits the individual, and that which is public or benefits the community.<sup>73</sup> The public aspect of charity law is reflected in the legal definition of charity, which requires that charities dedicate themselves to benefiting the public through the pursuit of their charitable purposes. This derives from the seminal case of *Commissioners for Special Purposes of Income Tax v Pemsel* (*‘Pemsel’*).<sup>74</sup> Drawing upon the Statute of Charitable Uses 1601,<sup>75</sup> Lord Macnaghten classified charitable purposes under four heads: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.<sup>76</sup> With this last

69 As per Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377 at 403. See eg *Misra v Hindu Heritage Research Foundation Ltd*, Supreme Court of New South Wales, Young J, 21 June 1996, where Young J noted that ‘the dispute between the parties is whether the so-called donation ... was an out and out gift or was a conditional gift where the condition has failed so that the moneys donated should be held on resulting trust for the donor’.

70 See Dale, above, n 12 at 12–13.

71 See University of Alabama System, Press Release, ‘Statement’ (9 June 2019) <<http://uasystem.edu/assets/2019/06/Statement-060919.pdf>>.

72 Kathryn Chan, *The Public-Private Nature of Charity Law*, Hart Publishing, Oregon, 2016, pp 20–1. Chan specifically examined these competing values in the context of not-for-profit regulation.

73 Dal Pont, *Law of Charity*, above, n 13, p 49. See also Chan, above, n 69 at 12, noting that ‘the identity of charity law has always been significantly divided between its public and private elements.’

74 [1891] AC 531.

75 Also known as the Statute of Elizabeth, 43 Eliz 1, c 4.

76 *Pemsel* [1891] AC 531 at 583 (Lord Macnaghten).

catch-all classification, the concept of public benefit became central to the legal definition of charity.<sup>77</sup> As a result, contemporary philanthropic transactions are constrained by one of the contracting parties being established and operating to benefit the public through their charitable purposes.

The public–private tension inherent in charity law is reflected in the legal framework governing philanthropy — the voluntary use of private funds for public purposes.<sup>78</sup> This legal framework attaches importance to both the private interests of donors as property owners disposing of their property as they choose, and to the public interest in the effective use of property controlled by charities on behalf of their beneficiaries.<sup>79</sup> Efforts to keep the private conduct of donors out of the public realm have been incorporated into the tax laws governing charitable giving. Charities and other not-for-profits that qualify to receive tax-deductible donations are required to comply with rules intended to ensure that these taxpayer-funded subsidies — estimated to cost the public purse approximately \$1.8 billion per year<sup>80</sup> — are used appropriately for public good rather than private gain.<sup>81</sup> For example, there must be a complete transfer of custody and control of a charitable gift for the donor to obtain a tax deduction.<sup>82</sup> Tax-deductible charitable gifts are therefore constrained in the sense that they must be used for the public benefit in accordance with an organisation’s general charitable purposes, which are reflected in the gift categories contained in the income tax legislation.<sup>83</sup>

Yet even with these legal safeguards in place, the contractualisation of philanthropy raises particular concerns regarding the privileging of private interests of donors over the public beneficiaries of their gifts. Restricted charitable gifts embody the private law values of freedom and autonomy that are associated with contract law even if donors and charities entering into gift agreements are not contracting with complete freedom in the classical contract law sense. With charities under considerable pressure to secure large donations, the power imbalance inherent in the donor — charity relationship means that when negotiating restricted charitable gifts, charities may yield to donor-imposed restrictions threatening their independence and causing mission drift if donor restrictions direct the charity away from its primary

77 Dal Pont, *Law of Charity*, above, n 13, p 48. See also Jonathan Garton, *Public Benefit in Charity Law*, Oxford University Press, Oxford, 2013, pp 23–29, discussing statutory reforms whereby this definition has been codified in most common law jurisdictions including Australia.

78 See Helmut Anheier and Siobhan Daly, ‘Philanthropic Foundations: A New Global Force?’ (2004) 5 *Global Civil Society* 158 at 159.

79 See Kathryn Chan, ‘Not-for-profit Organizations, Public Law and Private Law’ in Matthew Harding, ed, *Research Handbook on Not-for-profit Law*, Edward Elgar, Cheltenham, 2018, p 211.

80 The Treasury (Cth) ‘Tax Benchmarks and Variations Statement 2021’ (January 2022) 46 <[https://treasury.gov.au/sites/default/files/2022-01/p2022-244177\\_0.pdf](https://treasury.gov.au/sites/default/files/2022-01/p2022-244177_0.pdf)>.

81 Most Deductible Gift Recipients (DGRs) are ‘charities’ as defined in s 12 of the Charities Act 2013 (Cth), although not all charities are DGRs. See Australian Charities and Not-for-profits Commission, ‘Australian Charities Report 2017’, p 27.

82 See above, text at n 37.

83 See ITAA 1997 Div 30.

charitable purposes.<sup>84</sup> This inequitable relationship dynamic has further consequences if the donor later seeks to enforce the terms of the gift agreement, given that contract law allows each party a private right of action to enforce the terms they have negotiated without the Attorney-General to represent the public interest. The end result, noted by Evelyn Brody, could be a failure ‘to take into account the public policy limits on private ordering that should apply to charitable assets’.<sup>85</sup>

In addition to critique of the contractualisation of philanthropy by legal scholars, political scientists and philosophers have also become increasingly critical of contemporary philanthropy. These scholars have focused on broader normative concerns, including philanthropy’s lack of democratic accountability, control and scrutiny, as well as the excessive plutocratic power exerted by wealthy donors over public policy and social outcomes.<sup>86</sup> As explained by University of Oxford philosopher Theodore Lechterman in *The Tyranny of Generosity*, while contemporary philanthropy has many virtues including ‘good intentions, careful strategy, and impressive results’,<sup>87</sup> ‘faith in philanthropy’s virtues often blinds us to another problem: that philanthropy as we know it threatens critical foundations of a democratic society. What we frequently fail to see is that philanthropy is too often a form of private power wielded on inequitable terms’.<sup>88</sup>

## Conclusion

The current philanthropic landscape is one in which large-scale giving is becoming increasingly contractualised. With Australian philanthropists following their American counterparts by making restricted charitable gifts utilising gift agreements, it is only a matter of time before these untested contracts come before the Australian courts. The US experience is informative, where the courts have invoked contract law doctrine to enforce the terms of charitable gifts made by living donors. From a doctrinal perspective, a restricted charitable gift embodied in a gift agreement could arguably give rise to a legally binding contract in Australia and there appears to be no significant barriers to the enforcement of such a gift, although the extent to which contract law’s remedial regime would be employed by the courts is uncertain. Recognising that restricted charitable gifts embodied in gift agreements are legally enforceable contracts achieves doctrinal clarity, providing both parties with certainty that the terms they have agreed to will be enforced, without jeopardising the favourable tax treatment that incentivises such giving in the first place.

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84 See Brody, above, n 12 at 1233; Colinviaux, above, n 2 at 1–2, who ultimately recommends using the US federal charitable giving incentive to discourage restricted charitable gifts by disallowing a federal income tax deduction.

85 Brody, above, n 12 at 1274.

86 See eg Theodore Lechterman, *The Tyranny of Generosity: Why Philanthropy Corrupts Our Politics and How We Can Fix It*, Oxford University Press, Oxford, New York, 2022 (*The Tyranny of Generosity*); Robert Reich, *Just Giving: Why Philanthropy Is Failing Democracy and How It Can Do Better*, Princeton University Press, New Jersey, 2018; Emma Saunders-Hastings, ‘Plutocratic Philanthropy’ (2018) 80(1) *The J of Politics* 149.

87 Lechterman, above, n 86, p 3.

88 Lechterman, above, n 86, pp 4–5.

However, achieving doctrinal clarity through the recognition and enforcement of agreements for restricted charitable gifts is not without societal costs. The contractualisation of philanthropy illuminates the public–private tension inherent in charity law between preserving the autonomy of donors and charities, while ensuring that the public interest in their activities is protected. Introducing contract law doctrine into the legal framework for charitable giving, which emphasises the primacy of the terms negotiated by the parties, signifies a shift towards the privileging of individual donor intent over charities’ interests in serving their beneficiaries. If contract law is to have a role in advancing the Australian Government’s public policy goal of encouraging philanthropy through the facilitation of socially valued transactions, an examination of whether the existing laws governing charitable giving are sufficient to safeguard the public interest of charitable beneficiaries from the private influence of wealthy donors is warranted.