

THE SOCIO-POLITICAL AND LEGAL HISTORY OF THE TAX DEDUCTION FOR DONATIONS TO CHARITIES IN AUSTRALIA AND HOW THE ‘PUBLIC BENEVOLENT INSTITUTION’ DEVELOPED

ABSTRACT

Every year the Australian revenue grants tax concessions of around \$1.3 billion in respect of tax deductibility of donations to specific charities and not-for-profits (NFPs). This article explains the historical development of the tax deduction for charitable donations. It explores the exemption of charities and other NFPs from land and income tax in order to explain how this tax deduction arose. The discussion will establish that the tax deductibility of donations arose in an ad hoc fashion due to war and depression, that the concession was shaped by the personal issues and ideologies of influential politicians, that the ‘person in the street’ opinion about charities was important and that Britain and the United States of America also played a part. It will also demonstrate how the revenue was taken into account in the development of a tax deductible NFP that is unique to Australian taxation law, the ‘Public Benevolent Institution’.

I INTRODUCTION

Tax concessions for charities and specific not-for-profits (‘NFPs’) in Australia are more extensive, complicated and generous than in many other developed nations.¹ Tax concessions to NFPs represent a significant amount of public sector revenue in Australia. The Australian Treasury estimates that the tax deductibility of donations to specific eligible NFPs (including charities) costs the Commonwealth revenue over \$1.3 billion per year.² The main type of charity that is

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¹ See generally Ann O’Connell, ‘The Tax Position of Charities in Australia — Why Does it Have to be So Complicated?’ (2008) 37 *Australian Tax Review* 17. Since this article was written, the Federal government has issued a discussion paper considering potential reforms to the tax deduction for donations: See The Treasury (Cth) ‘Tax Deductible Gift Recipient Reform Opportunities’ (Discussion Paper, 15 June 2017).

² The Treasury (Cth) ‘Tax Expenditures Statement 2015’ (Report 29, January 2016) 26–7. No amount is estimated for revenue foregone in respect of the income tax exemption. ‘Tax expenditure’ is a term used to refer to tax exemptions, deductions or offsets, concessional tax rates and deferrals of tax liability: at 4–7.

eligible for tax deductibility of donations is termed in the income tax legislation a ‘Public Benevolent Institution’ (‘PBI’).

In order to understand the breadth and depth of these concessions, and, in particular, the tax deduction for donations, it is essential to examine their historical development. The imposition of government taxation is a social process and without an understanding of how and why taxation develops, it is impossible to comprehend the present system or the dynamics which precipitate change. An understanding of how and why taxation develops and changes further promotes the evolution of opinions about likely and potentially fruitful future policy directions.

This article concentrates on the historical development of the tax deduction for charitable donations and explores the exemption of charities and other NFPs from land and income tax in order to explain how this tax deduction arose. The article builds on the work of Chia and O’Connell³ and will demonstrate that the tax deductibility of donations arose in an ad hoc fashion due to war and depression, that the concession was shaped by the personal issues and ideologies of influential politicians, that the ‘person in the street’ opinion about charities was important and that Britain and the United States of America also played a part. It will demonstrate how the revenue was taken into account in the development of a type of charity that is unique to Australian taxation law, the PBI.

II THE EARLY HISTORY OF INCOME TAX IN THE AUSTRALIAN COLONIES WITH SPECIFIC REFERENCE TO CHARITIES

A The Earliest References to Tax Exemptions from Tax for Charities

Initially the colonies relied on taxes on imports in order to provide for the administration of the colonial governments. In 1875, 90.4 per cent of New South Wales’ revenue came from customs and excise duties and 0.4 per cent from probate and stamp duty.⁴ There was no income tax and additional revenue was obtained in an ad hoc nature from the sale of land.⁵

In 1880, Tasmania was the first Australasian colony to pass a Bill that imposed tax, in a limited way, on income.⁶ Section 17 of the *Real and Personal Estates Duties Act 1880* (Tas) stated that in order to impose land tax, the value of the relevant land would

³ Joyce Chia and Ann O’Connell, ‘Charitable Treatment? — A Short History of the Taxation of Charities in Australia’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2011) vol 5, 91, 91.

⁴ Steve Gibson, ‘A Short History of Taxation in Australia’ (1999) 41 *Australian Marxist Review* 31, 32.

⁵ Ibid.

⁶ *Real and Personal Estates Duties Act 1880* (Tas) sch B imposed tax on company dividends; Peter A Harris, ‘Metamorphosis of the Australasian Income Tax: 1866 to 1922’ (Research Study No 37, Australian Tax Research Foundation, 2002) 55–65.

be the equivalent of the annual rent reasonably expected to be payable. Corporate dividends would be the only other taxable income.⁷ Section 14 of the Act exempted from land tax ‘any Hospital, Benevolent Asylum, or other building used solely for charitable purposes’. The Act used the term ‘charitable purposes’ and exempted any building used only for charitable purposes from a modified land tax, but it offered no definition of what this meant and certainly no deduction for gifts to charities. According to Myles McGregor-Lowndes, ‘[t]he exemption of charitable bodies follows the English legislative pattern of charitable organizations being exempt from income tax and relying upon the common law definition of charity stemming from the *Statute of Elizabeth 1601*.’⁸

McGregor-Lowndes is referring to the fact that in 1799 the British government imposed its first income tax.⁹ The legislation was introduced by William Pitt the Younger in his budget of December 1798 to pay for weapons and equipment in preparation for the Napoleonic wars. Within this statute was an exemption from income tax of any ‘Corporation, Fraternity or Society of Persons established for charitable Purposes only’.¹⁰ This ‘exemption appears to have its origins in the 1671 and 1688 land tax exemptions for hospitals and charitable institutions, which was then continued in the income tax context.’¹¹ For example, s 25 of the *Taxation Act 1692*¹² exempted specified organisations including: universities, colleges and schools; charities for the relief of the poor; and hospitals and alms houses.¹³ These three areas of public good — educational institutions, charities in the ‘narrow’ sense being those for the relief of the poor, and hospitals — have remained at the core of tax concessions for NFP organisations both in the United Kingdom and subsequently, Australia.

There is no Tasmanian Hansard to support or refute McGregor-Lowndes’ argument. Although the other Australian states operated Hansard services since colonial times,

⁷ *Real and Personal Estates Duties Act 1880* (Tas).

⁸ Myles McGregor-Lowndes, ‘Defining Charity’ (Paper presented at the National Centre on Philanthropy and the Law Defining Charity 14th Annual Conference, New York, 24–25 October 2002) 2.

⁹ *Income Tax Act 1799*, 39 Geo 3, cl 13.

¹⁰ *Ibid* s 5.

¹¹ Fiona Martin, ‘The Legal Concept of Charity and its Expansion after the Aid/Watch Decision’ (2011) 3s *Cosmopolitan Civil Societies Journal* 20, 23. In respect of some hospitals it can be traced back even further as St Bartholomew’s Hospital, London was exempt from tax as early as the reign of Edward I (1272–1307): *Ibid*. See also John F Avery Jones, ‘The Special Commissioners from Trafalgar to Waterloo’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2007) vol 2, 3, 14–16; Michael Gousmett, ‘The Public Benefit Test’ (2006) *New Zealand Law Journal* 57, 57.

¹² 4 Wm & M, c 1.

¹³ O’Connell, ‘The Tax Position of Charities in Australia’, above n 1, 93.

Tasmania's Hansard did not officially commence until mid-1979.¹⁴ However, it seems likely that the Australian colonies would follow their Imperial founder in such matters.

Four years after Tasmania, the South Australian Government succeeded in passing the first broad-based income tax of the Australasian colonies, the *Taxation Act 1884* (SA).¹⁵ This took the South Australian Government seven years and five attempts.¹⁶ Section 9 imposed income tax on all income with the exception of the income of companies, public bodies and societies that did not carry on any business for the benefit of shareholders or members and the income of all friendly societies.¹⁷ So the legislation exempted NFPs such as friendly societies and companies not carrying on business for the benefit of shareholders from income tax but not specifically charities. Section 7(III) of the *Taxation Act 1884* (SA), on the other hand, exempted from land tax land used solely for any religious or charitable purposes, or by an institute under the *Institute Act 1874* (SA). So charities were exempt from land tax, where the land was used solely for their charitable purposes, but not income tax. It is difficult to know why this distinction was drawn, but it may be that the government of the time needed as much revenue as possible and saw income tax as one of the sources of this revenue. Forty years earlier the South Australian government had been gaining revenue from fees for land grants.¹⁸ But by 1884 most of the saleable land had been sold.¹⁹ South Australia also raised revenue from customs duty,²⁰ but by 1884 South Australia's population had significantly increased²¹ and there had been severe droughts,²² so there was need for greater government revenue to support its services.

After many failed attempts, Tasmania finally passed a Bill that imposed tax on a broad income base in 1894. This Act, the *Income Tax Act 1894* (Tas), imposed tax on all income 'arising, accruing, received in or derived from Tasmania'.²³ Section 15(II)

¹⁴ The Legislative Council Hansard began on 6 June 1979 and the House of Assembly Hansard on 12 June 1979: Tasmanian Parliamentary Library, *Hansard: Background — Tasmania* (12 July 2015) <<http://www.parliament.tas.gov.au/tpl/Backg/Hansard.htm>>.

¹⁵ Harris, above n 6, ch 4; *Taxation Act 1884* (SA).

¹⁶ Harris, above n 6, 66.

¹⁷ *Taxation Act 1884* (SA) ss 9(II)–(III).

¹⁸ *An Act to Authorise the Levying of Fees on Land Grants 1841* (SA).

¹⁹ C M H Clark, *A History of Australia* (Melbourne University Press, 1981) vol 1, 180–219.

²⁰ *An Act to amend the Laws for the Regulation of the Customs and Trade in South Australia 1842* (SA). There were acts imposing customs duty in South Australia until 1897.

²¹ State Library of Victoria, *Early Australian Census Records — South Australia* (13 April 2017) <<http://guides.slv.vic.gov.au/earlycensus/sa>>.

²² Government of South Australia, *A History of Agriculture in South Australia: The Measure of the Land*, Primary Industries and Regions SA <http://www.pir.sa.gov.au/aghhistory/left_nav/land_settlement_in_sa/the_measure_of_land>.

²³ *Income Tax Act 1894* (Tas) s 14.

exempted income from companies and other entities that did not carry on business for the benefit of shareholders or members,²⁴ a provision similar to s 9 of the *Taxation Act 1884* (SA). Charities were not referred to, although they had been in earlier Bills.²⁵ Again it is hard to know why this omission occurred although it was possibly in order to maximise income tax revenue.

New South Wales first attempted, but failed, to introduce an income tax into the colony in 1886.²⁶ It had previously tried, unsuccessfully, to introduce a land tax;²⁷ and even income tax was considered only as an aspect of taxing land. As Premier Patrick Jennings stated:

This tax is ancillary to the land-tax ... and it will not be fair or just to tax the real property of the country, and allow incomes derived from commerce and trade, from professions, from the civil service, and from other sources, to go untouched.²⁸

B New South Wales, Income Tax and Exemptions for Charities

Several years earlier, however, New South Wales had enacted the *Municipalities Act 1867* (NSW) which established specific municipalities or local governments in the state and enabled them to levy property taxes. This Act exempted hospitals; benevolent institutions; and buildings used exclusively for public charitable purposes; churches, chapels, and other buildings used exclusively for public worship; and all public schools, colleges and universities.²⁹ This is possibly the earliest reference to ‘Benevolent Institutions’ — a term which was not used in the English legislation, although it was used in the early days of the colony.³⁰ Furthermore, the New South Wales government was clearly concerned about problems relating to poverty and lack of education as is demonstrated by the introduction of schools to assist poverty stricken boys.³¹

New South Wales did not enact an income tax until 1895. At this stage, the State was in the grip of a deep depression and revenue was needed from sources other

²⁴ Ibid s 15(II).

²⁵ Harris, above n 6, 59, 131–2.

²⁶ Ibid 94.

²⁷ Ibid 98.

²⁸ Ibid.

²⁹ *Municipalities Act 1867* (NSW) s 163.

³⁰ In 1813, Edward Smith Hall, an influential figure in the colony, founded the ‘NSW Society for Promoting Christian Knowledge and Benevolence’. In 1818 the organisation was renamed The Benevolent Society of NSW and became a non-religious organisation. Its purpose was to ‘relieve the poor, the distressed, the aged, and the infirm’: The Benevolent Society, *Timeline* (2015) <<http://www.benevolent.org.au/200--year--celebration/last--200>>.

³¹ New South Wales, *Minutes of the Proceedings*, Legislative Council, 2 July 1867, 2.

than the sale of government land.³² This legislation resulted after many bitter parliamentary debates, several elections and many draft Bills that were never enacted.³³ The final Act was called the *Land and Income Tax Assessment Act of 1895* (NSW). Section 11(v) exempted from land tax lands occupied or used exclusively for, or in connection with, public NFP hospitals whether or not supported by grants from consolidated revenue, benevolent institutions, public charitable purposes, churches, chapels for public worship, universities, affiliated colleges and the Sydney Grammar School. This Act offered an exemption from land tax for land used for charitable purposes and also for ‘benevolent institutions’. Section 17(v) exempted from income tax ‘[t]he incomes and revenues of all ecclesiastical, charitable, and educational institutions of a public character, whether supported, wholly or partly, by grants from the Consolidated Revenue Fund or not’. There is no reference to benevolent institutions for this exemption, although there is for the land tax. There is no discussion in the parliamentary debates to shed light on this difference, nor is there a definition of benevolent institution in the legislation. As the legislation refers to three types of organisations — ‘benevolent institutions’, ones with ‘public charitable purposes’, and ‘churches’ — there are clearly distinguishable.

C Victoria, Queensland and Western Australia: Then a Commonwealth is Formed

In 1895, Victoria introduced income tax on all income, whether derived by persons or companies.³⁴ Section 7(1) provided for a long list of exempt income including the income of religions, mining companies and companies and other entities that did not carry on business for the benefit of shareholders or members. This latter exemption being similar to that in the contemporaneous legislative provisions in South Australia and Tasmania.³⁵

During the 19th century, Queensland and Western Australia relied heavily on indirect taxation, as did all the states. This was mainly in the form of customs and excise duties.³⁶ Queensland had enacted a tax on dividends in 1890.³⁷ In 1902 it enacted an income tax act, of which s 12 (vi) exempted the income of ‘religious, charitable and educational institutions of a public character’.³⁸

Western Australia did not progress to responsible government until 1890³⁹ and did not enact a full income tax act until 1907 with the enactment of the *Land and Income*

³² Bureau of Census and Statistics (Cth), *Official Year Book of the Commonwealth of Australia No 15* (Bureau of Census and Statistics, 1922) xxxvi.

³³ Harris, above n 6, ch 5.

³⁴ *Income Tax Act 1895* (Vic).

³⁵ *Taxation Act 1884* (SA); *Income Tax Act 1894* (Tas).

³⁶ Harris, above n 6, 160.

³⁷ *Dividend Duty Act 1890* (Qld).

³⁸ *Income Tax Act 1902* (Qld).

³⁹ *Constitution Act 1889* (WA).

Tax Assessment Act 1907 (WA).⁴⁰ Western Australia was the last of the colonies to do this. The legislation imposed income tax on all income of persons and companies but exempted, inter alia, the income of all ‘ecclesiastical, charitable, and educational institutions of a public character, whether supported wholly or partly, or not at all, by grants from the Consolidated Revenue Fund.’⁴¹

The *Australian Constitution* changed the taxation landscape as s 51(ii) granted the Commonwealth Parliament power to ‘make laws for the peace, order and good government of the Commonwealth with respect to [...] taxation; but so as not to discriminate between States or parts of States’.⁴² The states retained the right to tax land and income but this was concurrent with the Commonwealth.⁴³ The *Australian Constitution* gave the power to impose customs and excise solely to the Commonwealth.⁴⁴

By this stage, the taxation exemptions for charities seemed to be fairly well entrenched in the state legislation, although the boundaries of the concessions granted varied. For example, the *Land and Income Taxation Act 1910* (Tas) exempted from land tax ‘[I]and on which is built any hospital, benevolent asylum, or other building used solely for charitable or religious purposes’.⁴⁵ This provision continued the principle of exempting from land tax land that is used for charitable purposes. However, s 27(1)(ii) exempted the incomes of companies, societies, public bodies, or public trusts that did not carry on business or trade for the purpose of distributing profit to members or shareholders. So although Tasmania felt that it could exempt from land tax buildings used for charitable purposes, it needed to keep the income tax exemption narrow, thus protecting its revenue base.

D 1890–World War I: Taxation Powers under the Australian Constitution

The colonies held an Australasian Federal Conference in 1890.⁴⁶ One of the major topics of discussion at this conference was taxation and who would be able to levy which types of taxation. Eleven years later, Australia became a Commonwealth and the Commonwealth government was given power under s 51(ii) of the *Australian Constitution* to impose income tax (although this was a concurrent power with the

⁴⁰ The Western Australian government had earlier imposed a tax on company profits under the *Companies Duty Act 1899* (WA).

⁴¹ *Land and Income Tax Assessment Act 1907* (WA) s 19(6).

⁴² *Australian Constitution* s 51(ii).

⁴³ Ibid; Cynthia Coleman and Margaret McKerchar, ‘The Chicken or the Egg? A Historical Review of the Influence of Taxation Administration on the Development of Taxation Law in Australia’ in John Tiley (ed), *Studies in the History of Tax Law* (Hart Publishing, 2004) vol 1, 285, 287–8.

⁴⁴ *Australian Constitution* s 90.

⁴⁵ *Land and Income Taxation Act 1910* (Tas) s 15(v).

⁴⁶ *Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890, held in the Parliament House, Melbourne* (Government Printer, 1890).

states).⁴⁷ Section 90, however, gave the Commonwealth the exclusive power to levy customs and excises and it was thought that this would provide adequate revenue for the Commonwealth so that the states could continue to levy income tax.⁴⁸ Although there was now a Commonwealth, as the states were still in a position to impose income and land tax, several continued to do so during the period leading up to and after World War I (WWI).

E 1920–1923: The Royal Commission on Taxation

From 1920 to 1923 there was a Royal Commission on Taxation.⁴⁹ One aspect of the series of reports that resulted from this Royal Commission was the recommendation that the Commonwealth impose income tax and that the states have sole ability to impose land tax.⁵⁰ However, the Commonwealth did not take over sole responsibility for imposing income tax until 1942 and did not cease imposing land tax until 1952–3.⁵¹

Nonetheless, in 1915 the Commonwealth enacted its first income tax legislation.⁵² This legislation contained an exemption for the income of religious, scientific, charitable or public educational institutions and also a deduction for gifts to certain charitable organisations.

III THE DEDUCTION FOR GIFTS TO CHARITIES

A 1907: Victoria Enacts a Deduction Provision

Victoria was the first government to introduce the innovation of allowing tax deductions for gifts to certain charities. A Victorian Royal Commission on Charitable

⁴⁷ *Australian Constitution* s 51(ii); Coleman and McKerchar, above n 43, 287–8.

⁴⁸ *Australian Constitution*; Denis James, ‘Federal and State Taxation: A Comparison of the Australian, German and Canadian Systems’ (Current Issues Brief No 5, Parliamentary Library, Parliament of Australia, 1997–98) 5–6.

⁴⁹ Commonwealth, Royal Commission on Taxation (Cth), *The Royal Commission on Taxation Second Report* (1922).

⁵⁰ *Ibid* 77, [234].

⁵¹ James, above n 48, 9. In 1942 the Commonwealth reached agreement with the states that they should cede to it their income taxing powers on a ‘temporary’ basis. Several states were still imposing income tax at this time. The Commonwealth needed to raise income taxes to finance World War II, but if it set its income tax at a uniform high level, this would impose a serious burden on those inhabitants in states with high income tax. Imposing low Commonwealth tax would not yield sufficient revenue. In 1946, the Commonwealth informed the states that it would retain the sole income taxing position, but would make appropriate tax reimbursement grants to the states on condition that they did not attempt to reimpose their own taxes. In 1957, the High Court ruled that the imposition of this condition on the provision of general revenue assistance to the states was a valid use of s 96 of the *Australian Constitution*: at 7.

⁵² *Income Tax Act 1915* (Cth).

Institutions in 1891 had recommended that charities were funded by monies raised from an entertainment tax.⁵³ This suggestion was not successful, but, by 1907, the idea was mooted that taxpayers be entitled to a tax deduction for certain charitable donations.⁵⁴

The first British income tax was imposed in 1799⁵⁵ and there was an exemption in this legislation for the income of charities. Initially, there was no direct tax relief for private donations in Britain. Wealthy donors, however, could get around this by the use of a deed of covenant. Under this deed they would promise to make regular payments to a trust or individual, over a period of time, and the income tax liability could be transferred to the holder of the deed, in this case a charity. As charities were exempt from income tax this was one way for individuals to avoid paying income tax on regular donations.⁵⁶ This was not, however, the approach taken in Australia.

The *Income Tax Act 1907* (Vic) was enacted in order to amend the rate of income tax and add some provisions to the *Income Tax Act 1895* (Vic). Section 3 of the 1907 Act provided that:

In estimating the income for any year of any taxpayer liable to deductions for tax there shall be deducted from the gross amount of such taxpayer's income any gift of any sum over Twenty pounds paid by him during such year to or for any free public library or any free public museum or any public institution for the promotion of science and art (including Working Men's Colleges and Schools of Mines) or any public university or any public hospital or public benevolent asylum or public dispensary or any woman's refuge or ladies' benevolent society or miners' benevolent fund whether any such library or other institution is or is not in existence at the time of such gift. Provided that such public library or museum or other public institution is situate within Victoria.

This provision contained a rather eclectic mix of organisations that the government of the time considered worthy of assistance, ranging from free public museums, public universities and public hospitals to 'public benevolent asylums' and refuges for women. The reference to 'public benevolent asylum' and 'ladies' benevolent society' is a reference to the organisations actual names and does not appear to be the legislature differentiating between charitable and benevolent. Furthermore, there is no reference to 'charitable' or 'charitable purposes', which is unusual considering that other state tax legislation of this time had used these terms. The 1895 Act had also exempted from income tax the income of a mixture of entities including religions,

⁵³ 'The Charities Commission Supplementary Report — Tax on Sports Advocated', *The Argus* (Melbourne), 20 August 1895, 7.

⁵⁴ Chia and O'Connell, 'Charitable Treatment?', above n 3, 101.

⁵⁵ *Income Tax Act 1799*, 39 Geo 3, cl 13.

⁵⁶ Kimberley Scharf and Sarah Smith, 'Charitable Donations and Tax Relief in the UK' (Paper presented at Charitable Giving and Tax Policy: A Historical and Comparative Perspective, Centre for Economic Policy Research Conference, Paris School of Economics, 11–12 May 2012) 120, 121.

NFPs, the University of Melbourne and the Working Men's College in Melbourne.⁵⁷ As we can see from the following discussion in Parliament, there was debate in 1907 about the use of a more general term in respect of the donation deduction.

George Prendergast raised the omission of a general reference to charities in the 1907 Bill when he stated in parliamentary debate that it would be better to include 'or such other organization existing for the purpose of giving charity as may be determined by the Governor in Council.'⁵⁸ He was concerned that societies that did good work such as the St Vincent de Paul Society were not included and commented that:

It would be better to have the discretion in the hands of the Governor in Council. Even if it were provided that all societies affiliated with the Charity Organization Society were included that would considerably enlarge the scope of the clause. If certain organizations were mentioned it might mislead, and some people would say that it was done purposely.⁵⁹

William Beazley supported this argument when he said that 'the only fear he had (sic) was that the clause ... would have the effect of directing the attention of benefactors to particular institutions ... It should be provided that the clause should apply to any charitable institution without distinction.'⁶⁰ The arguments of Prendergast and Beazley were however unsuccessful.

The rationale for the deduction was the encouragement of taxpayers to donate money to charity. The Premier, Sir Thomas Bent, explained that he had included this proviso because:

he had found that in one or two cases, gentlemen had stated that they would not give to charities the large amounts they otherwise would give because the Government were charging income tax upon them. Therefore, he thought it only fair that any one giving over £20 should not be charged income tax upon the amount.⁶¹

J M Davies argued in the upper house, the Legislative Council, that the deduction would motivate donors. He also thought that providing for charities through donations would mean that they were able to increase their public good and this would make up any lost revenue.⁶² He does not provide any basis, even anecdotal, for these arguments.

⁵⁷ *Income Tax Act 1895* (Vic) s 7(1).

⁵⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1907, 1273.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1907, 1214.

⁶² Victoria, *Parliamentary Debates*, Legislative Council, 2 October 1907, 1356–7.

Twenty pounds is the approximate equivalent of \$2872 in terms of what it can purchase in 2016,⁶³ so it was a relatively large amount. It is also important to remember that the provision only applied if the donation of over £20 was to a particular organisation. It was not a cumulative deduction.

The identical deduction was continued in the 1915 income tax legislation⁶⁴ and also the last comprehensive income tax legislation for Victoria, the *Income Tax (Assessment) Act 1936* (Vic). However the minimum donation had been reduced by this time to £1, presumably to ensure that it was available to a greater range of taxpayers, and the list of eligible donees was amended to include public hospitals, public benevolent institutions, public funds established and maintained for the purpose of providing money for public hospitals or public benevolent institutions in Victoria, or for the establishment of such hospitals or institutions, or for the relief of persons in Victoria who were in necessitous circumstances. It also included: public funds established and maintained for providing money for the construction of an intermediate hospital in Victoria; public authorities engaged in research into the causes, prevention or cure of disease in human beings, animals or plants; public universities; funds to build public memorials relating to WWI and institutions or funds for the benefit of returned soldiers.⁶⁵ At no time were general charitable institutions included in the donation provision, even though by 1936 their income was exempt from income tax.⁶⁶ Religious entities were not included either although their income was also exempt from income tax⁶⁷ and had been in the 1915 legislation.⁶⁸

The parliamentary debates surrounding the 1936 Bill took place in November and December 1936, yet there is no reference in these debates to tax deductions for donations. Some reasons for continuing the deduction may be gleaned from a debate in 1935 regarding the raising of funds for the Royal Melbourne Hospital. During this debate James Murphy stated:

private benevolence is not what it was years ago. In years past there were numbers of outstanding benefactors, whose contributions to the public hospitals were noteworthy. The Edward Wilson estate has contributed in all about £140 000 to the Royal Melbourne Hospital; but we do not now hear of benefactions such as were fairly common in the old days, and something else must be done.⁶⁹

⁶³ Reserve Bank of Australia, *Pre-Decimal Inflation Calculator* (2016) <<http://www.rba.gov.au/calculator/annualPreDecimal.html>>.

⁶⁴ *Income Tax Act 1915* (Vic) s 29.

⁶⁵ *Income Tax (Assessment) Act 1936* (Vic) s 70(1)(a).

⁶⁶ *Ibid* s 14(e).

⁶⁷ *Ibid*. This provision also exempted the income of scientific, charitable or public educational institutions.

⁶⁸ *Income Tax Act 1915* (Vic) s 17(c).

⁶⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 November 1935, Vol 198, 4568.

These points may also explain why public hospitals were specifically included in the list of eligible donees.

B 1915: The First Commonwealth Income Tax and a Deduction for Donations

The *Australian Constitution* had allocated the majority of expenditure responsibilities to the states with the expectation that the federal government would carry out functions that the states were not able to conduct efficiently themselves, such as defence and foreign affairs.⁷⁰

Under the *Australian Constitution*, the states retained major control of land and income taxes, although these were concurrent with the Commonwealth,⁷¹ and the Commonwealth was solely responsible for customs and excise.⁷²

Until 1915, the revenues derived from customs and excise duties had been enough to meet the Australian government's revenue needs. Thus it was not until 1915 that the Commonwealth enacted the *Income Tax Assessment Act 1915* (Cth) in order to raise funds for the war effort, and to deal with the economic crisis arising from Australia's part in WWI.⁷³

The Act exempted from income tax the income of religious, scientific, charitable or public educational institutions.⁷⁴ It also granted a deduction for gifts, each exceeding £20, to 'public charitable institutions'.⁷⁵ Unlike the Victorian provision, the concession was expressed (at least at first glance) to be for a very broad group of donees, 'public charitable institutions', although the 'greater than' £20 minimum remained. It seems that this is only the second Australian Act that granted a tax concession for charitable donations.⁷⁶ In fact, Harris, in his comprehensive analysis of the historical development of Australian taxes, states that '[s]ection 18(h) allowed a deduction for gifts to certain institutions or public war fund and had no obvious counterpart in the prior Acts considered by this study.'⁷⁷

Again it was a Victorian who strenuously argued for a tax deduction for gifts to charities. As Chia and O'Connell point out, this was a Victorian pastoralist, James

⁷⁰ Sam Reinhardt and Lee Steel, 'A Brief History of Australia's Tax System' (Paper presented at the 22nd APEC Finance Ministers' Technical Working Group Meeting, Khanh Hoa, Vietnam, 15 June 2006) 6.

⁷¹ *Australian Constitution* s 51(ii); James, above n 48.

⁷² *Australian Constitution* s 90.

⁷³ Reinhardt and Steel, above n 70, 7; Harris, above n 6, 175–6.

⁷⁴ *Income Tax Assessment Act 1915* (Cth) s 11(d).

⁷⁵ *Ibid* s 18(h).

⁷⁶ Chia and O'Connell, 'Charitable Treatment?', above n 3, 108–9; Harris, above n 6, 187.

⁷⁷ Harris, above n 6, 187.

Chester Manifold.⁷⁸ James Manifold's father, William Thomson Manifold, had been a noted philanthropist. He had donated to the Church of England cathedral and chapter house at Ballarat and Ballarat Grammar School; endowed scholarships and super-annuation funds; and gave £280 000 to Trinity College, University of Melbourne.⁷⁹

His son, James Chester Manifold also gave generously to many causes.⁸⁰ During the House of Representatives debate on the Income Tax Assessment Bill 1915 (Cth) on 1 September 1915 he noted that although there was a tax deduction for contributions over £5 for war funds there was no similar tax deduction for gifts to charitable institutions.⁸¹ Manifold argued that a tax deduction might induce the public to donate to these organisations.⁸² William 'Billy' Hughes, who was Attorney-General at this time, expressed concern about the breadth of such a concession, however, he also noted that he had discussed the issue with the Commissioner of Taxation and that he would consider it.⁸³ The original Bill did not include the deduction, but when it was returned to the House of Representatives from the Senate for further debate on 9 September,⁸⁴ it had been amended to include deductions for 'gifts exceeding twenty pounds each to public charitable institutions'.⁸⁵ The discussions of both houses indicate that protection of the revenue was important, and that a possible solution to this was to ensure a relatively high threshold for the deduction. The discussions also highlight the view that a deduction would motivate greater donations.

It was Manifold who suggested the phrase 'public charitable institution' in the debate of 1 September 1915. He stated at that time that this phrase was already defined in some state legislation.⁸⁶ Manifold was correct; examples from this period included the *Charitable Institutions Act 1888* (Tas) which defined 'Charitable Institution' as:

Any hospital established for the treatment of the sick: Any home or refuge for destitute or unfortunate persons: Any institution for the gratuitous education or gratuitous maintenance and education of children: Any society or association of persons established or associated for the purpose of raising and disbursing

⁷⁸ Chia and O'Connell, 'Charitable Treatment?', above n 3, 108.

⁷⁹ Paul H De Serville, 'Manifold Brothers' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography*, (Melbourne University Press, 1986), vol 10, 391, 391.

⁸⁰ *Ibid.*

⁸¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 1915, 6608.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Although the Bill was debated in the Senate on 2 September 1915, there was no discussion of the gift to charities provision: Commonwealth, *Parliamentary Debates*, Senate, 2 September 1915, 6620–36.

⁸⁵ Income Tax Assessment Bill 1915 (Cth), cl 18.

⁸⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 September 1915, 6608.

moneys for the relief or maintenance of indigent persons: And any other institution which the Attorney-General may certify as a fit and proper institution to be registered under this Act.⁸⁷

The *Charitable Institutions Management Act 1885* (Qld) provided that the Governor may declare as a ‘public charitable institution’:

any public institution which is maintained wholly or in part at the public expense for the reception, maintenance and care of indigent persons, or other persons requiring medical or other aid or comfort, not being a Hospital for the Insane or a Hospital established under the Statutes relating to Hospitals, and not being an Orphanage within the meaning of the *Orphanages Act 1879*.⁸⁸

These provisions demonstrate that the phrase ‘public charitable institution’ was directed at those institutions that treated the sick or educated, relieved, or otherwise assisted the poor.

When the Bill was before the Senate for the second time on 9 September 1915, the only discussion was about whether the threshold minimum of £20 was too high.⁸⁹ It is interesting to note that the continuance of the £20 minimum not only protected the revenue but also restricted the concession to relatively wealthy taxpayers, unlike today where the threshold is \$2.⁹⁰ In all this discussion, there was no articulation of real policy analysis or evaluation although it does seem clear that donations to the traditional class of charities, relief of poverty, and assistance to the sick was the intended beneficiary of the concession.

The *Income Tax Assessment Act 1918* (Cth) continued the deduction but reduced the threshold to £5.⁹¹ However, its passage through Parliament was also a difficult one. Chia and O’Connell note that, although it did not attract any comment in the committee deliberations, there were ‘multiple objections, which echoed earlier debates’ when it got to the House of Representatives.⁹² Four issues were raised: first, that the £20 threshold was too high and therefore discriminated against poorer donors; second, that removing the threshold would be too large a cost to the revenue; third, that WWI had diverted moneys to patriotic funds and charities had suffered; finally, that the provision did not motivate donation and should be abolished altogether.⁹³ The House ultimately recommended that the provision be deleted.⁹⁴

⁸⁷ *Charitable Institutions Act 1888* (Tas) s 2 (definition of ‘Charitable Institution’).

⁸⁸ *Charitable Institutions Management Act 1885* (Qld) s 2.

⁸⁹ Commonwealth, *Parliamentary Debates*, Senate, 9 September 1915, 6744–5.

⁹⁰ *Income Tax Assessment Act 1997* (Cth) s 30–15.

⁹¹ *Income Tax Assessment Act 1918* (Cth) s 14(f)(iii).

⁹² Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 110.

⁹³ *Ibid* 110–1.

⁹⁴ *Ibid*.

At around this time, several Victorian newspapers reported concerns about the lack of public funding of various charities including hospitals.⁹⁵ One in particular noted that there was a general shortage of private benevolence from wealthy citizens.⁹⁶ The Secretary of the Charity Organisation Society was vocal in his condemnation of the deletion of the deduction, comparing Australia unfavourably to the United States (which had introduced a deduction):

Sir, — The House of Representatives has deleted from the Income Tax Assessment Bill the clause providing for deductions from gross income of gifts of £20 or over to charities. Contrast with this the attitude of the United States Legislature towards the same question ... It was realised that the proposal was a patriotic and a just one, and that, as one authority put it, ‘the Government can well afford such an investment of whatever it would lose in taxes thereby, and can easily recoup its losses by increased taxes on excess war profits, or increased rates of income tax on the income it selects as taxable income.’⁹⁷

The United States of America had introduced an income tax in 1913. In 1917 it introduced an income tax deduction for gifts to charities at the same time increasing the income tax rates in order to finance its war effort.⁹⁸ The same argument, of motivating wealthy people to donate to charity, was given by politicians as the rationale.⁹⁹

The Senate ultimately did not agree that the provision should be deleted and the Bill was sent back to the House of Representatives.¹⁰⁰ Once returned to the House there was further heated debate; however, this time the proponents of the deduction were successful, and the threshold was also reduced.¹⁰¹ The main reason given for the continuation of the concession was that it motivated people to donate to charities.¹⁰² There was, however, no empirical evidence for this, as demonstrated by the comments in 1922 of the Royal Commission on Taxation.

⁹⁵ ‘Tax for Charities’ *The North Western Advocate and the Emu Bay Times* (Melbourne), 1 March 1918, 3; ‘Municipal Tax for Charities’, *Kilmore Advertiser* (Victoria), 20 April 1918, 2; ‘Grants to Charities. Government Action Criticised’, *The Age* (Melbourne, Victoria), 23 January 1918, 8.

⁹⁶ ‘Grants to Charities. Government Action Criticised’, above n 95.

⁹⁷ S Greig Smith, ‘Charities and Income Tax, Letter to the Editor of the Argus’, *The Argus* (Melbourne, Victoria), 28 May 1918, 5.

⁹⁸ Charles T Clotfelter, ‘Charitable Giving and Tax Policy in the US’ (Paper presented at Centre for Economic Policy Research Public Policy Conference on Altruism and Charitable Giving, Paris School of Economics, 11–12 May 2012) 40.

⁹⁹ *Ibid.*

¹⁰⁰ Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 110–1.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

*C Royal Commission on Taxation Recommends the Abolition
of Deductions for Donations*

In 1921, the Commonwealth government established a Royal Commission on Taxation to report on a number of issues relating to taxation, including the equitable distribution of the burden of taxation and the harmonisation of Commonwealth and state taxes.¹⁰³ The third report of the Royal Commission strongly recommended the abolition of the deduction for donations to charities. There were two reasons for this. First, the fact that, depending on the income tax rate of the donor, the taxpaying community was in effect paying part of the gift and second, that the Royal Commissioners did not have any evidence that the concession had stimulated private benevolence.¹⁰⁴

Parliament ignored the recommendation of the Royal Commission. In 1922 Commonwealth land tax was modified¹⁰⁵ and Commonwealth income tax was consolidated and amended by the *Income Tax Assessment Act 1922* (Cth). The Act continued the deduction of £5 for each gift to ‘public charitable institutions’ in Australia.¹⁰⁶ Again, there was heated debate about the provision in the lower house, with some members of Parliament stating that the concession was really only relevant in wartime, but these objections were not successful.¹⁰⁷ This was a time when unemployment for unskilled men was significant,¹⁰⁸ although Australia was not experiencing financial depression. It may be that the majority in Parliament felt that by motivating donors with a tax deduction, donations would increase and charities generate greater benefits to the poor and disadvantaged.

The income tax legislation was again amended in 1927 and the deduction for gifts to public charitable institutions continued but with a lowering of the threshold to £1.¹⁰⁹ The deduction was also amended to include public universities and their colleges and also public memorials relating to WWI.¹¹⁰

¹⁰³ Commonwealth, Royal Commission on Taxation, *Royal Commission on Taxation Third Report* (1922).

¹⁰⁴ *Ibid* 162–3.

¹⁰⁵ *Land Tax Act 1922* (Cth).

¹⁰⁶ *Income Tax Assessment Act 1922* (Cth) s 23(1)(h)(ii); *Income Tax Assessment Act 1922* (Cth) s 14(1)(d) also continued the exemption of income of ‘religious, scientific, charitable or public educational institution[s]’ that was originally provided for in the *Income Tax Assessment Act 1915* (Cth) s 11(d).

¹⁰⁷ Chia and O’Connell, ‘Charitable Treatment?’, above n 3, 112.

¹⁰⁸ Colin Forster, ‘Unemployment and Minimum Wages in Australia, 1900–1930’ (1985) 45 *The Journal of Economic History* 383, 387–8.

¹⁰⁹ *Income Tax Assessment Act 1927* (Cth) s 14(c).

¹¹⁰ *Ibid*.

But, as discussed below, the term ‘public charitable institution’ was intended to be defined narrowly,¹¹¹ so that the concession was clearly aimed at assisting those in poverty, necessitous circumstances or the sick. Various twists and turns in the historical development of the law of charity, including the views of the High Court and the Privy Council would ensure that the core concept of charity, (relief of poverty or of those in necessitous circumstances) would be enshrined in Australian legislation in respect of the tax deduction.

D 1920–1926: *Australian Judicial Perspectives on Charitable Purpose*

At the same time as Parliament debated whether or not to continue the deduction for charitable donations, the High Court had its first opportunity to consider the provision in the case of *Swinburne v Federal Commissioner of Taxation*.¹¹² This case concerned the issue of whether or not a gift of £1000 by Mr Swinburne to the Swinburne Technical College was deductible under s 18(1)(h)(iii) of the *Income Tax Assessment Act 1915–1918* as a gift in excess of £5 to a ‘public charitable institution’. The High Court held that this provision, both as a matter of community knowledge and also referring to the state legislation in effect at the time of its enactment, referred to charities in the ordinary sense. In other words, the provision was aimed at those organisations for the relief of people in necessitous or helpless circumstances.¹¹³ The Court looked back at the legislation in effect at the time of the first enactment, discussed earlier in this article, as well as the list of entities that were specifically listed as being eligible for the deduction in the *Income Tax Assessment Act 1915–1918*, and held that Parliament clearly intended that the provision was limited to the ordinary or common view of charity.¹¹⁴ It did not include charities in the broader technical legal sense established by the House of Lords in *Commissioners for Special Purposes of the Income Tax v Pemsel*, which extended the meaning of charity to the relief of poverty; advancement of religion; advancement of education; and other purposes beneficial to the community.¹¹⁵ Similar reasoning was followed by the High Court in *Kelly v Municipal Council of Sydney*,¹¹⁶ although that case dealt with exemption from local government rates and the provision was narrowly drafted to allow the exemption only for places of worship, hospitals, benevolent asylums or other buildings used ‘solely for charitable purposes’.¹¹⁷

¹¹¹ Ibid. Section 14(c) defined ‘public charitable institution’ as ‘[A] public hospital, a public benevolent institution and includes a public fund established and maintained for the purpose of providing money for such institutions or for the relief of persons in necessitous circumstances’.

¹¹² (1920) 27 CLR 377 (‘*Swinburne*’).

¹¹³ Ibid 384.

¹¹⁴ Ibid 384–6.

¹¹⁵ [1891] AC 531, 583 (Lord McNaghten) (‘*Pemsel’s Case*’).

¹¹⁶ (1920) 28 CLR 203.

¹¹⁷ Ibid, 207–8.

The question of the definition of ‘charitable’ and ‘charitable purpose’ in the context of a different type of tax, estate duty, again came before the High Court in 1923 in the case of *Chesterman v Federal Commissioner of Taxation*.¹¹⁸ The *Estate Duty Assessment Act 1914* (Cth) contained an exemption from estate duty for organisations with a ‘charitable purpose’.¹¹⁹ This is the earliest federal legislation to refer to charitable purpose, as it was enacted a year earlier than the federal income tax legislation, which also contained an exemption from income tax for ‘charitable institutions’.¹²⁰ The Court held that the term ‘charitable’ was limited to ‘the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief’.¹²¹ A similar conclusion to that reached in *Swinburne*.¹²² At this stage, Australian law was strong in the view that ‘charity’ attracted its popular meaning. In other words, relief of poverty, and not the extended meaning that the House of Lords had given it in *Pemsel’s Case*.

IV THE MODERN LEGAL DEFINITION OF CHARITABLE PURPOSE AND THE RISE OF THE PUBLIC BENEVOLENT INSTITUTION

A Charitable Purpose

The development of the law of charity in Australia did not, however, end with the High Court in *Chesterman*. In 1926, *Chesterman* was appealed to the Privy Council,¹²³ which held that ‘charitable’ had a wider technical legal definition than its ordinary meaning.¹²⁴ The Privy Council specifically adopted the four categories of charity suggested by Lord Macnaghten in *Pemsel’s Case*.¹²⁵ These are the relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community, not falling under any of the preceding heads.¹²⁶ The result of the appeal was that the estate duty exemption became available to a broad group of publicly beneficial organisations that fell within this wider legal meaning of charity.¹²⁷

¹¹⁸ (1923) 32 CLR 362 (*‘Chesterman’*).

¹¹⁹ *Estate Duty Assessment Act 1914* (Cth) s 8(5).

¹²⁰ *Income Tax Assessment Act 1915* (Cth) s 11.

¹²¹ *Chesterman* (1923) 32 CLR 362, 384, (Isaacs J), citing *Pemsel’s Case* [1891] AC 531, 572 (Lord Herschell).

¹²² (1920) 27 CLR 377.

¹²³ *Chesterman v Federal Commissioner of Taxation* [1926] AC 128.

¹²⁴ *Ibid*, 130–2.

¹²⁵ [1891] AC 531.

¹²⁶ *Ibid* 583. In 2004 the federal government enacted the *Extension of Charitable Purpose Act 2004* (Cth) which provides for certain specified purposes to be charitable. These are not-for-profit child care and rental accommodation under the national rental affordability scheme, *Extension of Charitable Purpose Act 2004* (Cth) ss 4–4A, as repealed by *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) s 43.

¹²⁷ [1926] AC 128.

The classification of charitable purpose into the four areas set out by Lord Macnaghten in *Pemsel's Case*¹²⁸ has been consistently used as a guideline in Australian judicial considerations.¹²⁹ Since 1 January 2014, Australia has had a federal statutory definition of charitable purposes;¹³⁰ however, the common law purposes continue to apply.¹³¹ Furthermore, this statutory definition only applies at the federal level; while the common law, unless modified by statute, applies to all state and territory legislation.¹³² In addition, in order for a NFP to be eligible for income tax exemption as a charity under ss 50-1 and 50-5 of the *Income Tax Assessment Act 1997* (Cth), it must be registered with the Australian Charities and Not-for-profits Commission¹³³ and also be endorsed by the Australian Taxation Office.¹³⁴

The current legal definition of charity in Australia can be summarised as follows. First, it must have a charitable purpose, and this purpose must (i) satisfy the common law test as set out in *Pemsel's Case*¹³⁵ and subsequent case law; or, (ii) for federal purposes, fall within the statutory definition of charitable purpose. Under the common law there are other requirements for an organisation to attain charitable status. It must be not-for-profit.¹³⁶ In other words, no payment can be made to a charity's members other than for wages or allowances to employees, reimbursement of expenses, or payment for services.¹³⁷ This requirement also means that on a winding up any excess funds must be transferred to an entity with similar purposes.¹³⁸

As well as requiring a charitable purpose, NFP entities that aim to qualify as charities must also be of public benefit.¹³⁹ In one sense, this means that the purpose(s) must

¹²⁸ [1891] AC 531, 583.

¹²⁹ See *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455; *Commissioner of Taxation v Triton Foundation* (2005) 147 FCR 362, 368 (Kenny J).

¹³⁰ *Charities Act 2013* (Cth) s 12.

¹³¹ *Ibid*; *Charities (Consequential Amendments and Transitional Provisions) Act 2013* (Cth) sch 2, pt 4, item 7.

¹³² John Vaughan-Williams, 'The Future of Charity Regulation in Australia: The Complexities of Change' (2016) 37 *Adelaide Law Review* 219, 223–4.

¹³³ *Income Tax Assessment Act 1997* (Cth) s 50-47.

¹³⁴ *Ibid* ss 50–100–10.

¹³⁵ [1891] AC 531.

¹³⁶ *Re Smith's Wills Trusts; Barclays Bank Ltd v Mercantile Bank Ltd* [1962] 1 WLR 763; O'Connell, 'The Tax Position of Charities in Australia', above n 1, 24.

¹³⁷ O'Connell, 'The Tax Position of Charities in Australia', above n 1, 24; Gino Evan Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [3.24]–[3.25].

¹³⁸ Australian Taxation Office, 'Income Tax and Fringe Benefits Tax: Charities', (Research Report TR 2011/4, 12 October 2011), [235].

¹³⁹ *Pemsel's Case* [1891] AC 531; *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159.

benefit society generally;¹⁴⁰ in another sense, this means that benefits it provides must be for the public or a section of the public, as opposed to only benefitting family members or a group defined through a contractual relationship.¹⁴¹ In respect of public benefit in the first sense, there must be some actual public benefit resulting from the entity's objectives. This benefit can, however, extend beyond material benefit to other forms including social, mental and spiritual.¹⁴² In *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation*,¹⁴³ the High Court held that the production of law reports was a matter that was beneficial to the community in a charitable sense.¹⁴⁴

With respect to charitable public benefit in the second sense, as early as the late 18th century the English courts considered that for a gift to be charitable it must be of general public benefit.¹⁴⁵ Lord Simonds in *Williams' Trustees v Inland Revenue Commissioners*¹⁴⁶ said that 'a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals'.¹⁴⁷ In *Re Compton*,¹⁴⁸ Lord Greene decided that a trust for the education of descendants of a named person was really a family trust and not charitable because it was not for the benefit of the community.¹⁴⁹

The case law has, however, accepted that a NFP does not have to benefit the entire public and that a 'sufficient section of the public' will suffice.¹⁵⁰ The rationale is that not all charities are for the benefit of the entire community. Charitable purposes are often motivated by the need to assist a section of the community with special needs or disadvantages.¹⁵¹ Finally, a NFP is not a charity if its aims are contrary to

¹⁴⁰ Dal Pont, above n 137, [3.3].

¹⁴¹ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

¹⁴² Dal Pont, above n 137, [3.37].

¹⁴³ (1971) 125 CLR 659.

¹⁴⁴ *Ibid* 669.

¹⁴⁵ *Jones v Williams* (1767) 2 Amb 651, 652; 27 ER 422, 423.

¹⁴⁶ [1947] AC 447.

¹⁴⁷ *Ibid* 457.

¹⁴⁸ *Re Compton; Powell v Compton* [1945] Ch 123.

¹⁴⁹ *Ibid* 136.

¹⁵⁰ *Dingle v Turner* [1972] AC 601, 623–4 (Lord Cross); *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

¹⁵¹ *Hall v The Urban Sanitary Authority of the Borough of Derby* (1885) 16 QBD 163, 171; Dal Pont, above n 137, [3.5]–[3.6]; Debra Morris 'The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or "Is Your Journey Really Necessary?"' in Kerry O'Halloran and Myles McGregor-Lowndes (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar Publishing, 2010) 103, 107–8.

public policy,¹⁵² unlawful or for a lawful purpose that is to be carried out by unlawful means.¹⁵³

In 2013, the federal government enacted the *Charities Act 2013* (Cth) ('*Charities Act*'), which took effect from 1 January 2014 and applies to all federal legislation. Under the *Charities Act*, an entity is 'charitable' if it is a 'charity' within this defined term.¹⁵⁴ This means it must satisfy four requirements: first, it is a NFP entity; second, all of the entity's purposes are *charitable* and for the *public benefit* (or are ancillary or incidental to *and* in furtherance or in aid of such purposes); third, none of the entity's purposes are disqualifying purposes (such as illegal, or against public policy); finally, the entity is not an individual, political party or government entity.¹⁵⁵

In general terms the *Charities Act* follows the approach of the common law in that it preserves the NFP requirement,¹⁵⁶ preserves the charitable purpose and public benefit requirements,¹⁵⁷ and determines an entity's purpose from its governing rules, activities and other relevant matters.¹⁵⁸ Charitable purposes are defined in s 12, and expanded upon in ss 14, 15, 16 and 17 of the *Charities Act*. These purposes include the *Pemsel's Case*¹⁵⁹ categories.

B 1926–Present: *The Emergence of the Public Benevolent Institution*

In 1926, Isaacs J expressed criticism of the Privy Council's interpretation of the word 'charitable':

It is obvious to me that in the interests of all concerned the meaning of Parliament should be legislatively declared beyond doubt ... Parliament by a few words declares whether by 'charitable' it means to use that word in its ordinary modern sense, or in the technical Elizabethan sense that some quaint Chancery decisions in connection with trusts have affixed to it as its primary legal meaning, extending

¹⁵² *Perpetual Trustee Co (Ltd) v Robins* (1967) 85 WN (Pt 1) (NSW) 403, 411; see also *Thrupp v Collett (No.1)* (1858) 26 Beav 125, 53 ER 844; *Re MacDuff*; *MacDuff v MacDuff* (1896) 2 Ch 451, 459–60; *Re Pieper (deceased)*; *Trustees Executors & Agency Co Ltd v A-G (Vic)* [1951] VLR 42.

¹⁵³ *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382, 395.

¹⁵⁴ *Charities Act* s 5 (definition of 'charity').

¹⁵⁵ *Ibid* ss 5 (definition of 'charity'), 6, 11, 12 (definition of 'charitable purpose'); see also Australian Charities and Not-for-profits Commission, *Who Can Apply To Be Registered?*, Australian Charities and Not-for-profits Commission Website <<http://www.acnc.gov.au/>>.

¹⁵⁶ *Charities Act* s 5 (definition of 'charity').

¹⁵⁷ *Ibid* ss 5 (definition of 'charity'), 12 (definition of 'charitable purpose').

¹⁵⁸ *Ibid* s 5 (definition of 'charity').

¹⁵⁹ [1891] AC 531.

to objects which include, as I have said, purposes quite outside what any ordinary person would understand by charitable.¹⁶⁰

In 1927, the federal income tax legislation was amended to alter the range of eligible donees to include ‘public charitable institutions’ in Australia, public universities in Australia or to affiliated colleges, and public funds to establish and maintain funds for public memorials relating to WWI.¹⁶¹ The Act defined ‘public charitable institution’ to mean a public hospital, a public benevolent institution and a public fund established and maintained for the purpose of providing money for such institutions or for the relief of persons in necessitous circumstances.¹⁶² The legislature also deleted the word ‘charitable’ from the *Estate Duty Act Assessment Act 1914* (Cth) and included ‘Public Benevolent Institution’.¹⁶³ The response of the federal legislature to *Chesterman*¹⁶⁴ was therefore to introduce the PBI, a more limited category of exempt entity that was more akin to the ordinary meaning of charitable rather than its broader legal meaning.¹⁶⁵

The term PBI is unique to Australian law. In 1927, at the time of its introduction into the income tax legislation, the Treasurer, Dr Earle Page, asserted into the House of Representatives that the term “charitable institution” is being defined in order to remove any possible difficulty which might arise in litigation through what is apparently regarded by the court as a somewhat obscure provision’.¹⁶⁶ It seems that he was implicitly referring to *Chesterman*.¹⁶⁷

The tax deduction provision generated some debate in the House of Representatives in 1927 about where to draw the line in allowing deductions for donations. Arthur Rodgers argued that there should be an upper limit to donations.¹⁶⁸ Matthew Charlton made the argument that donations should only be allowed to organisations that the ordinary community would recognise as being for the relief of poverty when he said ‘[i]t never enters the mind of any man or woman in the community, desirous of making a donation to any educational or similar institution, that he or she will escape tax by such an action’.¹⁶⁹ He also pointed out that there needed to be a limit to the definition of eligible donee ‘[i]f we gave the exemption to donations

¹⁶⁰ *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351, 359.

¹⁶¹ *Income Tax Assessment Act 1927* (Cth) s 14(c).

¹⁶² *Ibid.*

¹⁶³ *Estate Duty Assessment Act 1928* (Cth) s 5(b).

¹⁶⁴ [1926] AC 128.

¹⁶⁵ Dal Pont, above n 137, [2.28]; see also Michael Chesterman, ‘Foundations of Charity Law in the New Welfare State’ (1999) 62 *Modern Law Review* 333, 340–1.

¹⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1927, 1395.

¹⁶⁷ [1926] AC 128.

¹⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 1927, 2164.

¹⁶⁹ *Ibid* 2169.

to schools the principle would go on extending and extending'.¹⁷⁰ The result was that the concession for public universities and their colleges remained but was not extended to other educational institutions, and the term PBI also remained (it was not specifically debated). Clearly the parliamentarians were concerned with protecting the revenue, either through limiting the total amount a donor could deduct or the types of entities that were eligible for deductions. They also acknowledged that most people considered relief of poverty or assistance to those in necessitous circumstances as the core requirement of a charity.

C Judicial Consideration of the Meaning of Public Benevolent Institution

Now that the legislature had included a new term, PBI, but without a statutory definition of this term, it became critical for the sake of clarity and certainty in the law that this phrase was considered by the Australian judiciary. It did not take long. In 1931, in the leading case *Perpetual Trustee Co Ltd v Commissioner of Taxation*¹⁷¹ the High Court concluded that a NFP is 'benevolent' if it is organised, promoted or conducted for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness).¹⁷² It also stated that a PBI must have benevolent relief as its main purpose, and that the relief a PBI provides must be provided to people in need.¹⁷³ In other words, the entity's benevolence must be directed to people in need and not the broader general community, although subsequent case law has determined that this relief does not have to be 'direct'.¹⁷⁴

In the later case of *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax*,¹⁷⁵ Priestly JA said:

To me, the word 'benevolent' in the composite phrase 'public benevolent institution' carries with it the idea of benevolence exercised towards persons in need of benevolence, however manifested. Benevolence in this sense seems to me to be quite a different concept from benevolence exercised at large and for the benefit of the community as a whole even if such benevolence results in relief of or reduction in poverty and distress. Thus it seems to me that 'public benevolent institution' includes an institution which in a public way conducts itself benevolently towards those who are recognisably in need of benevolence but excludes an institution, which although concerned, in an abstract sense, with the relief of

¹⁷⁰ Ibid.

¹⁷¹ (1931) 45 CLR 224.

¹⁷² Ibid 232–4, 236.

¹⁷³ Ibid 241–2.

¹⁷⁴ *Commissioner of Taxation v Hunger Project Australia* (2014) 221 FCR 302; Fiona Martin and Ian Murray, 'The "Direct" Requirement for a Public Benevolent Institution: Does the Hunger Project Case Confirm it Never Applied?' (2013) 15 *Journal of Australian Taxation* 161; Ian Murray and Fiona Martin, 'The Blossoming of Public Benevolent Institutions: From "Direct" Providers to Global Networks' (2015) *Alternative Law Journal* 36.

¹⁷⁵ (1985) 1 NSWLR 567.

poverty and distress, manifests that concern by promotion of social welfare in the community generally.¹⁷⁶

The courts have held that PBI is a composite phrase and takes its ordinary meaning¹⁷⁷ but, when doing this, have also considered the meaning of each of the words. As Priestley JA points out, benevolence is an integral aspect of a PBI and a PBI's work must be towards persons in need of benevolence.

A PBI must also meet the legal requirements of being an 'institution'. There is no technical legal definition of the term 'institution' and it also takes its ordinary meaning. A mere trust or a fund is not an institution.¹⁷⁸ Therefore where an entity merely manages trust property that is applied for a charitable purpose, it is not an institution. It must also be 'public' and the main requirement is the extensiveness of the class of individuals that the entity benefits.¹⁷⁹

Nearly 20 years ago, Michael Chesterman pointed out that, through the introduction of the PBI, the Australian legislature enshrined the idea that charitable status should not be the sole way of gaining tax privileges for philanthropic organisations.¹⁸⁰ He argued that the PBI category is more closely aligned to the popular meaning of 'charitable' and also the minority view of the House of Lords in *Pemsel's Case* where two out of the six Law Lords dissented from the majority view and stated that charitable should essentially be confined to relief of poverty and those in necessitous circumstances.¹⁸¹ For example, Lord Halsbury LC in his dissenting judgment said that 'the real ordinary use of the word "charitable" as distinguished from any technicalities whatsoever, always does involve the relief of poverty.'¹⁸²

Lord Bramwell, the other dissenting judge in *Pemsel's Case*, also commented on the fiscal issues behind granting an exemption from income tax to charities and this particular relevance to the poor when he said:

What was the intention, and why the exemption is made in the Act, is of course very much guesswork. But something like a reasonable ground may be suggested in this ... to tax the charity is to tax the poor, or take from the poor who would otherwise get the amount of the tax ... It is to be remembered ... that to exempt any subject of taxation from a tax is to add to the burthen on taxpayers generally, and a very large exemption must be made ... for the benefit of so-called charities, many of which are simply mischievous.¹⁸³

¹⁷⁶ Ibid 575.

¹⁷⁷ *Public Trustee (NSW) v Federal Commissioner of Taxation* (1934) 51 CLR 75, 103.

¹⁷⁸ *Stratton v Simpson* (1970) 125 CLR 138, 158.

¹⁷⁹ *Maughan v Federal Commissioner of Taxation* (1942) 66 CLR 388, 397–8.

¹⁸⁰ Chesterman, above n 165, 342.

¹⁸¹ [1891] AC 531, 552 (Lord Halsbury LC), 564–6 (Lord Bramwell).

¹⁸² Ibid 552.

¹⁸³ Ibid 565–6.

Lord Bramwell is pointing out that if a concession is granted to one group of taxpayers then it has to be made up by another. This theme has also been demonstrated through some of the political debates around exempting provisions that occurred in Australia at a similar time.

The PBI therefore follows from the common or popular meaning of charity by focussing on the needs of the poor and disadvantaged¹⁸⁴ whilst also being a means of reducing fiscal concessions. In fact, the Privy Council in *The Council of the Municipality of Ashfield v Joyce*¹⁸⁵ confirmed the first point when it said ‘it is also hard to resist the conclusion that “public charity” in its popular sense would be almost, if not wholly, contained in the adjoining expression “public benevolent institution”.’¹⁸⁶

V FUTURE DIRECTIONS AND REFORMS

Not all charities are eligible for ‘Deductible Gift Recipient’ (‘DGR’) status. In fact, only about 38 per cent of charities are currently DGRs.¹⁸⁷ PBIs are the largest group of charities that are eligible for DGR status.¹⁸⁸ We have seen that the PBI was developed by the legislature to ensure that the tax concession of deductibility of donations was not available to all charities. There are several explanations for this, although the paramount one seems to be the protection of the revenue. The donation tax concession is estimated by Treasury to cost the Federal revenue over \$1.2 billion per year.¹⁸⁹ An additional reason that flows from some of the parliamentary debates and judicial statements is that PBIs are closely aligned to the traditional view that charities are for the relief of poverty and therefore should have special privileges.

The modern approach of government is, however, arguably different. As O’Connell points out, it seems unlikely that the federal government intends to limit the amount of the tax deductible donation to PBIs and other eligible NFPs: ‘Over the last 10 years, the federal government has been making it easier for taxpayers to undertake philanthropy, in particular by encouraging the growth of private funds (now called private ancillary funds) that can make distributions to endorsed entities.’¹⁹⁰

¹⁸⁴ Chesterman, above n 165, 342.

¹⁸⁵ [1978] AC 122.

¹⁸⁶ *Ibid* 137.

¹⁸⁷ Natasha Cortis et al, ‘Australian Charities Report 2015’ (Report, Centre for Social Impact and Social Policy Research Centre, University of New South Wales, Australia) 49–50.

¹⁸⁸ *Ibid*.

¹⁸⁹ The Treasury, ‘Tax Expenditures Statement 2015’, above n 2, 26–7. No amount is estimated for revenue foregone in respect of the income tax exemption.

¹⁹⁰ Ann O’Connell, ‘Charitable Giving and Tax Reform: the Challenges in Regulating the Not-For-Profit Sector’, *The Conversation* (online), 7 May 2012 <<https://theconversation.com/charitable-giving-and-tax-reform-the-challenges-in-regulating-the-not-for-profit-sector-6500>>.

At times there have been calls for the restriction of the income tax exemption for charities.¹⁹¹ Some argue that this concession should be granted more sparingly, and in some jurisdictions, the income from business activities of charities that is not connected with their main charitable purposes is taxed.¹⁹² However, others argue that the concession is a subsidy to finance the production of public and quasi-public goods that would otherwise have been produced by the government.¹⁹³ An alternative, but still strong argument is that the income tax exemption makes up for the fact that charities have substantial difficulties in raising capital.¹⁹⁴ Although the previous Labor federal government did recommend a modified form of unrelated business income tax in 2011,¹⁹⁵ the current government subsequently rejected this proposal.¹⁹⁶

VI CONCLUSION

The historical development of the income tax deduction for gifts to certain types of charitable organisations arose out of the exemption from income and land tax of charitable institutions, which had begun in England and was adopted in the Australian colonies. However, as can be seen from the outline of the parliamentary debates in Part II of this article, no real discussion of the policy behind these exemptions was made by the early colonial legislature.

An examination of the early historical legislation demonstrates that exempting organisations from income tax and enabling a deduction for donations were often influenced by economic factors. When colonies could no longer sell Crown land

¹⁹¹ The Treasury, 'Better Targeting of Not-for-Profit Tax Concessions', (Consultation Paper, The Treasury, 27 May 2011).

¹⁹² For example in the United States there is a federal government tax on the unrelated business income of charities, the unrelated business income tax ('UBIT'), IRC §§ 511–3.

¹⁹³ Australia's Future Tax System Review Panel, 'Australia's Future Tax System: Report to the Treasurer, Final Report' (pt 2 vol 1, The Treasury, 2010) 206; Estelle James and Susan Rose-Ackerman, *The Nonprofit Enterprise in Market Economics* (Routledge, 2011) 20, 29–31, 84–9; Nina J Crimm, 'An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation' (1998) 50 *Florida Law Review* 419, 436–9.

¹⁹⁴ Henry Hansmann, 'The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation' (1981) 91 (1) *Yale Law Journal* 54, 71–5; Cf Michael Fricke, 'The Case Against Income Tax Exemption for Nonprofits' (2016) 89 *St John's Law Review* 1129.

¹⁹⁵ Commonwealth, '2011–2012 Australian Government Budget — Budget Paper No. 2' (Budget Measures, Paper No. 2, Department of Finance and Deregulation (Cth), 10 May 2011) 36; Bill Shorten, 'Making it Easier for Charities to Help Those Who Need It' (Media Release no.77/2011, 10 May 2011).

¹⁹⁶ Anna Lewis and Bill d'Apice, 'The Unrelated Business Income Tax is (Finally!) Dead' on Makinson d'Apice Lawyers, *Charities and Not-For-Profits Law in Australia* (29 May 2014) <<http://www.charitiesnfplaw.com.au/2014/05/29/the-unrelated-business-income-tax-is-finally-dead/>>.

or were under economic pressure due to depression or impending war they turned to alternative forms of revenue, even though these were politically unpalatable. However, as part of this tax reform they considered that charities or forms of NFPs should generally be exempted from land tax and income tax even though this might mean that revenue was lost. The influence of Britain on the colonies was strong and it is likely that the general exemption in the earliest English income tax legislation of the income of charities was felt to be something that colonial governments should follow.

The exemption from taxes for charities was not, however, always adopted as comprehensively by the colonies, as is seen by the South Australian legislation of 1884,¹⁹⁷ which exempted from income tax only specific types of NFPs and not all charities.

With regard to the deduction for gifts, the private philanthropic beliefs of influential politicians — that allowing a deduction would motivate donations — comes across strongly as a factor in favour of the deduction, even though the Royal Commission on Taxation did not agree with this. It also seems from the parliamentary debates that the public good undertaken by charities was valued and that it should be encouraged. The discussion in this article, particularly around the development of the PBI, demonstrates that revenue considerations were extremely important. Many politicians talked about the need to ensure that the revenue was protected, and that revenue foregone needed to be balanced against the good that giving to charities might cause.

Although the exemption from income tax has been applied to charitable organisations, which after *Chesterman* is a broad group, this article demonstrates that protection of the revenue clearly came out on top when it came to allowing a tax deduction. The PBI is a narrower version of the concept of charity than the technical legal version; even today, not all charities are eligible for tax deductibility of donations, whilst all PBIs are.

¹⁹⁷ *Taxation Act 1884 (SA)*.

