# AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

## Press Release 743
## CHARITABLE EXEMPTIONS
## FIONA PATTEN'S PRIVATE MEMBER'S BILL

A private member's bill has been tabled in Parliament by Fiona Patten, the member for Victoria's Reason Party. The purpose of this bill is to amend the Charities Act. If passed, the bill would exclude the *'advancement of religion*' as a charitable purpose and remove tax exemptions available to religious institutions in Victoria. This would threaten not only churches and religious groups but all religious charities and any commercial enterprises owned by religious groups. Such a bill could also have implications for educational institutions run by religious groups.

As might be expected, the religious lobby groups have revved up. They claimed that religious activities had been recognised for 400 years one of the heads of charity. But is this correct?

The Elizabethan Charitable Uses Act of 1601 did not list '*the advancement of religion'* as one of the uses of charity. This act only referred to the upkeep of church towers – almost certainly because the bell in such towers had a public purpose – it warned the local communities of fires.

The billions of Australian tax expenditures (ie taxes foregone through exemptions) for religious charitable institutions amount to billions of dollars a year.

Not unsurprisingly, Victorian religious lobby groups turned up in force in Spring Street on March 22, 2018 to attend a Parliamentary Update for Faith Communities, and discussed the implications of the private member's bill. The Media and Communications Office of the Catholic Church, Melbourne issued the following Media Release:

**This afternoon, members of all religious traditions gathered in the Legislative Council Chamber of the Parliament of Victoria to attend a Parliamentary Update for Faith Communities. The aim of the session was to discuss the implications of the private member's bill tabled by Victoria's Reason Party MP Fiona Patten to amend the Charities Act.**

**Present at the gathering were members from the Catholic Archdiocese, the Islamic Council, the Baptist church, the Greek Orthodox church, the Coptic Orthodox church, the Buddhist community, the Hindu community, the Jewish community and the Church of the Latter-day Saints.**
**The update was hosted by Inga Peulich MLC, Shadow Minister for Multicultural Affairs and Co-Chair of the Parliamentary Friends of Faith Communities, and was supported by the Hon. Bruce Atkinson MLC, President of the Legislative Council.**
**Francis Moore, Executive Director of the Catholic Archdiocese of Melbourne, addressed the chamber and outlined his opposition to the bill. 'Supporting the retention of "advancement of religion" among charitable purposes presumed to have public benefit has legislative precedents,' he said.**
**'For over 400 years there has been a presumption that "public benefit" includes the relief of poverty, the advancement of education, and the advancement of religion. In Australia, the United Kingdom and New Zealand, advancement of religion is recognised as a charitable purpose. To argue for exclusion of advancement of religion in Victoria from the concept of public benefit represents an attempt to overthrow a major underpinning of society as we know it,' said Mr Moore.**
**He outlined number of wide-reaching ramifications, including an increase in regulatory burdens.**
**'It is my hope that the major parties will quickly recognise that proceeding with this bill is a folly and that it should not be allowed to pass the Parliament,' said Mr Moore.**
**Dan Flynn, Victorian Director of the Australian Christian Lobby, pointed out that places used exclusively as places of worship would be exempt from land tax, yet this was problematic given the range of charitable activities conducted on the premises of faith communities. 'What Ms Patten is doing with this bill is to strike at the very heart of charity,' he said.**
**'Strike out at churches and the charitable activity will dry up.'**
**Mark Sneddon, former Crown Council to the Attorney General of Victoria and Adjunct Professor of Law at Monash University, delineated the complex legal ramifications of the bill.**
**'This bill seems to not be thought through. It will create a profound mess in the law of charity and to some extent the law of taxation,' said Mr Sneddon.**
**He described a range of provisions outlined in the bill that restrict or limit tax exemptions for religious bodies. He noted that under the new legislation, being for or against a particular political party or candidate would disqualify an organisation from having a charitable purpose.**
**'To say this bill is half baked is a compliment,' said Mr Sneddon. 'It will create a profound inconsistency in charities law in Australia.'**
**Mr Sneddon referred to the Federal Charities Act 2013, which 'retains advancement of religion**

**as a charitable purpose, as does every other state.'**
**'Under the proposed legislation, if you're operating in Victoria and under the federal act, you will be deemed"charitable" for some purposes, laws and exemptions but not for others,' he said.**
**This bill is expected to be debated in Parliament over the next few weeks. The Victorian Government has previously said it has no plans to make any changes to the current system.**
**'We do need to recognise that without the effort the churches play in providing for an improved and civil society, this community would be all the poorer,' said Victorian Treasurer Tim Pallas in December 2017.**

DOGS note that real but diminishing strength of the religious lobby in Australian politics. Fiona Patten may not be successful this time round. But the fact that she is in Parliament and able to put a private member's bill on this issue means that separation of religion from the State and the basic problems of freedom of and from religion are gaining traction in Australian political debate.

Meanwhile, the history of the extraordinary level of taxation expenditures (exemptions) enjoyed by religious groups in Australia has been the subject of a book entitled *The Purple Economy* by Max Wallace. The current situation, in common law, depends upon an 1891 case, the *Pemsel* case in the House of Lords.

Perhaps the time has come to question this case.

The following is an academic article entitled 'Pemsel Revisited', published in *Australian and New Zealand Law and History E- Journal*

**PEMSEL REVISITED**
**THE LEGAL DEFINITIION OF CHARITABLE: A CASE STUDY OF A MOVEABLE FEAST**

'Well, we might need to revisit that and tell their Lordships they were wrong.' Justice Michael Kirby[1]

Jean Ely *

**Overview:**

According to the *Business Review Weekly* of March 24-30 2005 [2] 'charities' constitute a $70 billion third sector of the Australian economy. The use of the common law rather than statutory definition of

[1] *Central Bayside General Practice Association v Commissioner of State Revenue* [2006] HCAT 238 ( 17 May 2006,10 of 50).

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'charitable' in taxation legislation is considered a problem by various Law Reform Commissions and some members of the judiciary such as Justice Kirby. The 'legal' definition of 'charitable' is a 'transplanted category,' a concept imported into taxation law from trust law. This paper looks backwards into the development of the definition of charitable in trust law and raises the policy question whether the common law 'legal' definition of charity has passed its 'used by' date in taxation law.

## *INTRODUCTION*

Taxation exemptions provided through adaptation of Lord Machnaghten's common law definition of 'charitable' in the 1891 House of Lords *Pemsel* case have highlighted growing strain between the not-for profit and for-profit sector in the economy. In the last two decades official and academic reports have discussed both the definition and regulation of charities,[3] and judges and commentators have expressed unease at tensions between legal and eleemosynary meanings of the word. [4]

Criticism has surfaced in Australia in the *Business Review Weekly* and in some newspaper reports.[5] Commercial interests complain about the uneven playing field on which they are expected to compete with tax exempt charitable enterprises. The 'charitable sector' has been presented as subjected to minimal public accountability. The esoteric' technical' interpretation of the concept of 'charitable' often tends to divert attention from the economic realities behind indirect subsidization of various enterprises.

A recent, if muted, expression of this concern occurred in the High Court decision in the '*Bayside*' case in which Justice Kirby agreed with the majority. His reasoning however, 'took a different course'.[6] This case dealt with the definition of 'charitable' for tax exemption purposes. The High Court decided that

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[2] *Business Review Weekly* , March 24-30, 2005; 'Inside Charities Inc.,' *Business Review Weekly*, June 20-July 5, 2006;

[3]Law Reform Commission of Tasmania 1984; *Report on Variations of Charitable Trusts*, Report No. 38, Legal and Constitutional Committee, Victoria, May 1989; Industry Commission, *Charitable Organisations in Australia*, Report no. 45, AGPS, Melbourne, 16 June 1995; *Inquiry into the Definition of Charities and Related Organisations,* 2001, established by the Prime Minister 18 September 2000; *Report of the Committee on the Law and Practice Relating to Charitable Trusts,* December 1952; HMSO, London, Cmd 8710 (The Nathan Report); *Tax and Charities,* June 2001; Inland Revenue Department, New Zealand; *Charity Scotland* May 2001, The Report of the Scottish Charity Law Review Commission; *Charities and Philanthropic Organisations*, Eds R. Krever, Gretchen Kewley, Comparative Public Policy Research Unit, Monash University and the Australian Tax Research Foundation, 1991*;* Susan Woodward and Shelley Marshall, *A Better Framework : Reforming Not-For-Profit Regulation,* 2004 , Centre for Corporate Law and Securities Regulation, University of Melbourne; *Concessions Available to Religious and other Non-Profit Organisations in Australia*, Victoria University, Melbourne 2006.

[4] P.C. Hemphill, 'The Civil-law Foundation as a Model for the Reform of Charitable Trusts Law' (1990) 64 *Australian Law Journal,* 404; Gino Dal Pont, *Charity Law in Australia and New Zealand*, 1999 Oxford University Press ch..15. *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891]AC 531, 542 per Lord Halsbury, 564-565 per Lord Bramwell.

[5] *Inquiry into the Definition of Charities and Related Organisations*, 2001. This Report stated that the Australian Nonprofit Data Project estimated that in June 1996 nearly 32,000 nonprofit entities employed staff, and nearly 19,000 of those were charities and institutions serving households that contributed $15 billion to gross value added in Australia in 1998-99. Adele Ferguson, 'Not –for –Profit organizations are a big part of the economy yet they are virtually Unaccountable,' *Business Review Weekly* , March 24-30, 2005; 'Inside Charities Inc.' *Business Review Weekly*, June 20-July 5, 2006; Adele Ferguson, 'The Business of Giving', ' God's Business', ' Costly Compassion'; Kristen Le Mesurier and James Thomson, 'Good Givers'; Kristen Le Mesurier, ' A Game of Give and Take; David Petre, 'Give Something Back' David Gonski,'Giving with Interest' and Mark Lyons ' The Invisible Sector', *Business Review Weekly,* July 29-August 5, 2006; 'Churches reap the Benefits of Belief: $500 million in tax exemptions', *The Age*, April 29, 2006; 'Good Cause to be Concerned over Fate of Donations', *The Sunday Age*, June 2006 ; 'Charity Begins at Church' *Herald Sun*, June 29, 2006.

[6] Central *Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2006] HCA 43 31 August 2006

the Central Bayside General Practice Association, which received 92.6% of its funding from the Federal Government, was a charitable institution for the purposes of the *Payroll Tax Act* 1971(Vic).

Justice Kirby referring to current acceptance of the 'technical' meaning of 'charitable' by all levels of the Australian judiciary[7] noting that this 'technical meaning' is derived by analogy from a list in the preamble to the 1601 Statute of Elizabeth [8] categorised into a fourfold classification by Lord Macnaghten in the 1891 House of Lords *Pemsel* case.[9]

Kirby said,

> ...into the exotic consideration of a statute enacted by the Parliament of England in the reign of the first Queen Elizabeth, must now intrude the practical realities of the statute applicable to this appeal, enacted by the Parliament of Victoria in the reign of the second Queen Elizabeth.

Justice Kirby suggested he might find on the 'statutory primary issue' as well as the 'meaning of charity issue' in the *Bayside* Hearing itself. He questioned whether words said in a will in 1891 were relevant a hundred years later, to the meaning of 1992 Victorian legislation, in a context of tax and relief from tax. Counsel for Bayside, Mr Shaw QC, remarked that while the Australian High Court in *Chesterman's* case[10] had decided that a reference to 'charity' meant 'charity' in the 'popular' or 'eleemosynary'[11] sense, the Privy Council, on appeal, had reinstated the broader, 'judicial' meaning. Justice Kirby responded: 'Well, we might need to revisit that and tell their Lordships they were wrong.'[12]

In the event, Justice Kirby followed the majority judgment but indicated concern that Parliament itself had not provided a specific definition to authorise what he considered the artificial definition of charitable. He continued :

> the result is odd and the consequential meaning of 'charitable' is derived in such a very strange way that I venture to suggest that few citizens know of it and most lay persons, when told, would find it astonishing.

This comment is timely. The lack of specific definitions of 'charitable' in Australian taxation statutes has led to a moveable feast in the extension of the meaning of the concept for taxation purposes. It has also issued in uncertainty, lack of regulation when the propriety of this is counter-intuitive, and prolix litigation.

It is the purpose of this paper to revisit both the Preamble to the *Statute of Charitable Uses* (1601) and *Pemsel*. Historical analysis shows how extensively the eleemosynary meaning of the word 'charitable' in the Elizabeth Statute has changed in the intervening centuries. The House of Lords *Pemsel* decision moreover, was an appeal from lower court decisions and was a narrow 3/2 majority with Lord Halsbury and Lord Bramwell in dissent. Lord Herschell, in the majority, also provided an alternative 'eleemosynary' or what could be described as an 'unseverable poverty test' to the definition of 'charitable'. Lord Macnaghten's definition of 'charitable' on the other hand allowed for charities

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[7] *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2006] HCA 43 31 August 2006; per Callinan, Heydon and Crennan JJ Decision of the Victorian Civil and Administrative Tribunal Taxation Division-+, G. Gibson, Member, 22 November 2002; Central *Bayside Division of General Practice Ltd v Commissioner of State Revenue* (2003) 53 ATR 473 per Nettle J.; *Central Bayside Divsiion of General Practice Ltd. v Commissioner of State Revenue* (2005) 60 ATR 151 per Chernov, J.A. and Byrne and Osborn A.JJ.

[8] The *Charitable Uses Act* 1601 (UK).

[9] *Commissioners for Special Purpose of the Income Tax v Pemsel* [1891] AC 531 at 581.

[10] *Chesterman and Others v The Federal Commissioner of Taxation* (1923) CLR 362; *Chesterman and Others v The Federal Commissioner of Taxation* (1925) 37 CLR 317.

[11] 'Eleemosynary 'comes from the mediaeval Latin derived from the Greek: supported by or dependent on charity as, 'the eleemosynary poor'.
Dictionary.com http://dictionary.reference.com/wordoftheday/archive/2003/05/14.html

[12] *Central Bayside General Practice Association v Commissioner of State Revenue* [2006] HCAT 238 ( 17 May 2006 12 and 10 of 50)

exclusively for the rich. An examination of all the judgments in the case indicates that Lord Macnaghten's 'technical' definition of 'charitable' for the purpose of taxation exemptions was in the minority of two to seven.

Although in Australia the High Court favoured Lord Herschell's definition in the early years of the twentieth century, the Privy Council overturned this in the *Chesterman* case in 1925[13], following instead Lord Macnaghten's definition. Since that time Australian courts have generally followed the Privy Council's finding without question. Charities can be for the rich as distinct from the poor. In *Bayside* however, Justice Kirby referred to both Lord Herschell's definition in *Pemsell* and the High Court decision in *Chesterman* .

The 'technical' meaning of 'charitable' has reached a level of legal fiction which is remote from the common language. There is also a question whether it has become counterproductive in the administration of an Australian taxation exemption regime.

## 1. STATUTE OF CHARITABLE USES: 1601 - 2006

the Preamble to the Elizabethan *Statute of Charitable Uses* 1601 has often been referred to in cases dealing with 'charitable exemptions' in taxation statutes since the introduction of permanent Income Tax Acts in the UK in 1842. It was enshrined in Lord Macnaghten's fourfold classification in 1891, and accepted without question by the majority in the Australian High Court in the *Bayside* case.

The *Statute of Charitable Uses* 1601 was repealed in the UK 1888[14] and, although the Preamble was preserved[15]. The Preamble, was later repealed in 1960. [16]

### i. The Tudor Revolution and The Rule of Law

Histories of what has been termed the tudor revolution have generally emphasized religious and economic issues.[17] But it had many aspects. It was commenced and consolidated in the rule of law in relation to 'mortmain' and 'charitable uses'. In 1532 Henry VIII seized power from the church by strengthening mortmain prohibitions against making bequests of land for chantries and other ecclesiastical institutions through the employment of uses. [18] The property of existing chantry foundations was appropriated to the Crown in 1545. [19]After the death of Henry VIII, Edward VI revived confiscation of the property of existing chantries in 1547. [20] The justification of Edward's statute

[13] *Chesterman and Others v The Federal Commissioner of Taxation* (1923) 32 CLR 362. The High Court decision was overruled in favour of the Mcnaghten definition when Chesterman reached the Privy Council [13] *Chesterman and Others v The Federal Commissioner of Taxation* (1925) 37 CLR 317[1926] A.C. 128.

[14] *Mortmain and Charitable Uses Act* 1888 (UK) 51 and 52 Vict c 42, s. 13(1).

[15] *Ibid.* s 13(2).

[16] *Charities Act* 1960 (UK) s. 38.

[17] Christopher Hill*, Society and Puritanism in Pre-Revolutionary England*, London,1964; Robert E. Rodes, *Lay Authority and Reformation in the English Church, Edward I to the Civil War*, 1982, University of Notre Dame Press; M. Levine, *Tudor England 1485-1603,* London, 1968*;* G Redworth, *In Defence of the Church Catholic: The Life of Stephen Gardiner*, Oxford, 1990; Thomas Betteridge, *Tudor Histories of the English Reformation*, 1530-1583, Aldershot, 1999; F.J. Levy, *Tudor Historical Thought*, Toronto, 2004.

[18] , Hen. VIII c 10. all feoffments made 'to the uses and intents to have obittes perpetuall, or a continuall service of a Priste for ever' were declared to be void, being much prejudicial to the King our Sovereign Lord, and to other Lords and Subjects; and land so conveyes was to escheat to the mesne lord.' G. Jones, *Ibid.* Chapter II.

[19] 37 Hen. VIII c 4.

[20] 1 Edward VI c.14.

reflected a theological as well as economic change. It articulated the need to suppress what were called superstitious uses as well as maladministration of the chantries. The Preamble to the *Charitable Uses Act* (1601) promised to convert the endowments

> to good and godlie uses, as in erecting of Gramer Scoles to the educacion of Youthe in virtewe and godlinesse, the further augmenting of the Universities and better provision for the poore and nedye.[21]

After the 1547 Edwardian chantry Statute, a clear line was drawn in common law between 'superstitious' and the 'charitable' uses. Given that religion was as variable as the preference of princes, piety was not longer synonymous with charity. [22]

### ii. Poverty the principal and essential circumstance to bring the gift within the compass of the statute.[23]

Given the original purpose of the *Statute of Charitable Uses* (1601), it could be argued that the 'eleemosynary' or 'popular' meaning later referred to by Lord Halsbury and Lord Bramwell in the 1891 *Pemsell* case[24] was also the original meaning of 'charitable' in the Elizabethan statute.

The Act was passed at the end of what has been called the 'secular' Tudor Revolution and was inextricably related to the poor laws of that time. The 'secular' revolution was 'secular' in the sense that the physical welfare of those 'in the world' took priority over those preparing for or already in the afterlife. It was not 'secular' in the sense that it was anti-religious or against the new erastian settlement of the Church of England. [25]

However, dissolution of English monastic foundations in the reign of Henry VIII meant that financial responsibility for both the deserving and undeserving 'poor,' was no longer the responsibility of the mediaeval church foundations. The poor, the maimed, the aged, the impotent, as well as wandering, rebellious, unemployed 'vagabonds' became a problem for the Tudor administration and Parliament. Private, philanthropic trusts remained but they were unregulated and insufficient.

In 1572 economic problems led to a statute whereby parishes could levy 'poor rates' to pay for the upkeep of parish workhouses and houses of correction for the undeserving poor, and parish almshouses for the deserving poor.[26] This introduction of local taxation for provision of subsistence for the poor, can be related to statutory controls over wages, the price of corn and conversion of agricultural land to

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[21] Quoted by G. Jones, *Ibid.* 14.

[22] G. Jones, *Ibid*. 14-15.

[23] Francis Moore, 'Reading on the Statute of Charitable Uses', in G. Duke, *The Law of Charitable Uses*; *Revised and Much Enlarged with Many Cases in Law Both Antient and Modern Whereunto is Now added the Learned Reading of Sir Francis Moor, K. Sergeant at Law, 4 Jacobi in The Middle Temple Hall*, (1676), Twyford. This is available in the law Library, Melbourne University.

[24] See Section 4.

[25] Christopher Hill*, Society and Puritanism in Pre-Revolutionary England*, London 1964; Robert E. Rodes, *Lay Authority and Reformation in the English Church, Edward I to the Civil War*, 1982, University of Notre Dame Press; M. Levine, *Tudor England 1485-1603,* London, 1968. G Redworth, *In Defence of the Church Catholic: The Life of Stephen Gardiner*, Oxford, 1990; Thomas Betteridge, *Tudor Histories of the English Reformation*, 1530-1583, Aldershot, 1999; F.J. Levy, *Tudor Historical Thought*, Toronto, 2004; D.M. Loades, *Tudor Government :Structures of Authority in the Sixteenth Century,* VHPS 1997

[26] M. Chesterman,, *Charities, Trusts, and Social Welfare*, Weidenfeld and Nicolson, London 1979, 19.

pasture. The use of local taxation for provision of subsistence for the poor, however, was intended to replenish rather than replace private philanthropy.[27]

As part of a poor law code, the 1601 *Statute of Charitable Uses* was a statute for the regulation and supervision of private philanthropy in the form of charitable trusts. It was closely related to the *Poor Law Act* of 1601,[28] which introduced a form of taxation and required local parishes to provide relief for their own poor. In the words of the *Statute of Charitable Uses* Act itself, it was first and foremost

> An Act to redress the mis-imployment of Lands, Goods, and Stocks of Money, heretofore given to charitable uses.

Emphasis placed upon the *Preamble* to the *Charitable Uses Act* in the definition of 'charitable' in trust law over the intervening centuries has masked the 'poor law' context of the Elizabethan Statute itself. The close connection between the two statutes however, led a distinguished Chancery lawyer of the time, Francis Moore,[29] to take the view that, whatever the literal wording of the *Preamble* to the *Statute of Charitable Uses*, it was intended operate to the benefit of public, as represented by the parish ratepayer – by reducing the taxation burden of the poor rates through the alleviation of poverty. In 1607 he further insisted that 'poverty is the principal and essential circumstance to bring the gift within the compass of this statute.'[30]

### iii. The *Preamble,* 'Public Benefit', and Charity for 'The Rich'

Ambiguities which implied that 'charity' might benefit the rich as well as the poor were inherent in the *Preamble* to the *Charitable Uses Act* 1601. This *Preamble* was not intended as a definitive description of the objects of uses or trusts which were charitable in law. It was a list of uses or trusts deemed to be within the equity of the statute that could materially contribute to the relief of poverty in that time and place. It was never intended as an exclusive list of the objects of charity.

It mirrors the list contained in Langland's *Piers the Ploughman* – with Langland's pious uses left out,[31] and highlights the secular nature of 'charitable purposes' for the Elizabethan administration, the only reference to religion being the repair of churches.[32] The statute's *Preamble* reads as follows:

> Whereas lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money and Stock of Money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most Excellent Majesty and her most notable Progenitors, as by sundry other well-disposed persons, some for relief of aged, impotent and poorp, some for maintenance of sick and maimed soldiers and mariners; schools of learning,

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[27] *Ibid.*

[28] 43 Eliz. 1, c.2.

[29] There is a question whether Francis Moore was the 'penner' of the *Statute of Charitable Uses* 1601 itself, See C. Duke, *Ibid*. Preface: ' And I must not conceal that the most worthy and learned Sir Francis Moor, Sergeant at Law, being a member of that Parliament of 43 Elizabeth, was particularly then Order'd by the House to draw up that Law for Charitable Uses; which was no small reason why the said learned gentleman, afterwards spent so much of his precious studies in Reading upon that Statute, in the Middle Temple Hall; an Exact Copy where of, you have here also published by the very original, under his own Hand.' G. Duke quoted by G. Jones, *Ibid*, Appendix F and G

[30] Francis Moore, 'Reading on the Statute of Charitable Uses', in G. Duke, *The Law of Charitable Uses*; *Revised and Much Enlarged with Many Cases in Law Both Antient and Modern Whereunto is Now added the Learned Reading of Sir Francis Moor, K. Sergeant at Law, 4 Jacobi in The Middle Temple Hall*, (1676) Twyford. This is available in the law Library, Melbourne University.

[31] Langland, *Vision of Piers Ploughman* , in ' Illustrations of the Origin of Cy-Pres ', *Harvard Law Review*, VIII (1894), 69,70. Joseph Willard commented upon the similarity between the catalogue of charitable uses set out in the preamble and that contained in Langland's *Vision of Piers Plowman.*

[32] S. Petrow, 'The History of Charity Law,' in Gina Dal Pont, *Charity Law in Australian and New Zealand*, Oxford University Press, 2000, 47.

free schools, and scholars of universities; some for repair of bridges, posts, havens, causeways, churches, sea banks, and high-ways; some for education and preferement of orphans; some for or towards the relief, stock or maintenance for houses of correction; some for marriages of poor maids; some for supportations, aid and help of young tradesmen, handycrafts-men, and persons decayed and others for relief, or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers; and other taxes which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money; nevertheless, have not been imployed according to the charitable interest of the givers and founders thereof, by reason of frauds, breaches of trust and negligence in those that should pay, deliver, and imploy the same for redress and remedy thereof.

It could be argued that the above includes trusts for 'public works' as well as the poor. [33]

### iv. Francis Moore's 'Unseverable Poverty Test'

In his 1607 *Reading* on the statute to his peers in the London Inns of Court, Francis Moore argued that charitable uses were principally for the poor, but did not exclude the rich. Although a use was within the equity of the statute as long as it benefited the poor, he also urged that the preamble should be construed to protect those uses whose endowments could be applied for the public benefit.

Moore illustrated this point with a trust; for the provision of bows and arrows for children between the ages of seven and seventeen. [34]He said:

> … if the poor cannot be relieved without also benefiting the rich, ***the rich also in this unseverable case will benefit by being counted with the poor***.[35] And the construction of the statute in this situation is reasonable, because the statute is beneficial and seeks to redress a wrong and a fraud against the charitable gifts and wills of the people. Also the commissioners in their decree can order the employment solely to the poor if they think fit, without any violation, and thereby rectify the intent of the gift and the statute. [36]

Exemptions to oversight by the Commissioners[37] appointed by the 1601 Statute included some well endowed grammar schools and university colleges attended by sons of the gentry as well as City merchants. As long as such schools admitted poor scholars, they fulfilled Moore's 'poverty' test.

Under Francis Moore's definition, 'charitable' benefits for the poor might entail benefits for the rich as part of the public benefit but 'charitable' benefits for the rich could not be severed from those for the poor. It could be argued that Moore's 'unseverable poverty test' survived the seventeenth century but came under pressure from the application of the *Mortmain Act* of 1736.[38]

### v. The *Charitable Uses Act* (1601) and Relief from Taxation

[33] In *Fisher v Hill* (1612) Duke *Ibid* 82, and in Chancery it was held that 'where no use is mentioned or directed in a deed, it shall be decreed to the use of the poor.'

[34] This was a duty imposed on parents by *Acte for Mayntenance of Artyllarie and debarringe of unlawful Games*
33 Hen. VIII c.9.

[35] Emphasis added.

[36] Translated and quoted by G. Jones, *Ibid.* 30.

[37] There were four or more Commissioners, which included 'a Bishop and Chancellor of the Dioces.' No commissioner was to have any part of the land etc. in question; and they were assisted by twelve or more jurors. G. Duke, *Ibid*. 4-5

[38] G. Duke, *The Law of Charitable Uses*; *Revised and Much Enlarged with Many Cases in Law Both Antient and Modern Whereunto is Now added the Learned Reading of Sir Francis Moor, K. Sergeant at Law, 4 Jacobi in The Middle Temple Hall* , (1676) Twyford .

Moore's view on taxes and subsidies emphasizes the relationship between charitable uses and the poor. With taxes for the 'public benefit', however, he implies possible taxation concessions to the rich:

> Taxes, subsidies are not within the meaning of this word (charitable) because poor men pay them not, and see no ease to discharge them of that taxe. But all Taxes, wherewith the poor as well as rich, are chargeable, are within the intent of this law: as keeping the watches, pursuing of hue-and-cries &c. But fines for Escapes, for Robberies are not within this Act. [39]

### vi. Seventeenth Century Interpretations of the *Charitable Uses A*ct (1601)

After the civil war, petitioners seeking to enforce charitable trusts preferred a relator action through the Attorney General to the Commission and Chancery court appeal procedure. Nevertheless Francis Moore's interpretation of 'charitable purposes' under the Elizabethan Act was still influential in 1700[40].

After the Restoration however, the attitude of the English ruling classes became more repressive than paternalistic.[41] Under the *Poor Relief Act* 1662,[42] relief was only available to the poor in their parish of origin.

The judiciary were generally more stringent in interpreting legal privileges accorded charities by their predecessors.[43] Above all, actions of both parliament and the courts reflected the suspicion of charity by the landed classes together with their resentment of death-bed wills which alienated land from the heir at law.

## 2. THE EFFECT OF THE MORTMAIN ACT 1736

Distrust of charitable bequests on the part of many eighteenth century landowners[44] is reflected in the *Mortmain and Charitable Uses Act* 1736. [45] This statute avoided devises of land to charity,[46] and vested the real property in the testator's heir at law or next of kin.

Where land was an issue in testamentary dispositions, the technicalities of the *Mortmain and Charitable Uses Act* 1736 generated a considerable amount of litigation from claimant next of kin. The terms of the Act enabled the judiciary to protect family interests by characterizing the object of a testator's gift as charitable, thus avoiding the gift. This had wide ranging effects on the definition of the legal concept of 'charitable.'

There are eighteenth and nineteenth century cases where classification of a bequest as charitable merely requires fulfillment of a 'public benefit' test. Thus a bequest from the sale of land for bringing spring water to the town of Chepstow for the use of the inhabitants for ever, was charitable, and therefore

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[39] Francis Moore, 'Reading on the Statute of Charitable Uses', in G. Duke, *Ibid*.

[40] *Attorney-General, at the relation of the Inhabitants of Clapham, versus Hewer & Al'* Nov. 13, 1700, 2 Vern, 387. Also See 'General Abridgment of Cases in Equity, Argued and Adjudged in the High Court of Chancery, etc.' Vol. 1, [1667-1774] *English Reports* Vol. 27, 905.

[41] M. Chesterman, *Ibid*, Chapter 3.

[42] 14 Ch. II, c 12.

[43] G. Jones, 105-107. For example, exemption from technical conveyancing defects and generous application of the doctrine of cy pres.

[44] G. Jones, *Ibid,* Chapter VII; Jones notes that William Cobbett in his *Parliamentary History of England* IX 1811 London, 1110 wrote that the Mortmain Bill arose because of several incidents by which heirs had suffered considerably by charitable gifts. A.H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27 *University of Toronto Law Journal*, 257, at 277-88.

[45] 9 Geo. II, c.36.

[46] But not personalty.

within the mischief of the Mortmain Act.[47] Similarly a botanical garden[48] and a museum[49] were found to be charitable. In the Museum case, it was held that 'every gift for a public purpose whether local or general' was within the Mortmain Act, although not a charitable use within the common and narrow sense of these words. In a religious case, the 'foolish' works of Johanna Southcote, a self-styled mother of the second Messiah was also found to be 'charitable. [50]

The classification of 'charitable purposes' in what later became a landmark case, *Morice v Bishop of Durham*, in 1805,[51] entrenched a version of the 1601 *Preamb*le as a definitional authority for charitable trusts. In his judgment Lord Eldon described the various classes of activity contained in the preamble in a disjunctive form.[52] This was the now widely accepted four fold classification adopted by Lord McNaghten in the *Pemsel* case. [53]

> First, relief of the indigent; in various way: money: provisions: education: medical assistance: etc; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility. [54]

Charitable purposes for the 'poor' and 'indigent' were thus effectively severed from the general charitable purpose of 'advancement of education';[55]the 'advancement of religion' and 'objects of general public utility'.

In this precedent, the 'repair of churches' in the 1601 Preamble was elevated, against the findings of seventeenth century case law [56] to the 'advancement of religion' generally.

Francis Moore's 'unseverable poverty test' or what might be described as the underlying 'popular' or 'eleemosynary' meaning of 'charitable,' had been quietly abandoned. It was replaced by four distinct tests: a poverty test; 'an advancement of learning'; a 'religious', and an elastic 'general public utility' or 'public interest' test

By 1805, the original, regulatory, purpose of the Elizabethan statute, together with its link to a Poor Law Code had been lost in the mists of time and creation of legal fictions related to the 1736 Mortmain Act. The legal definition of 'charitable' was extended, through a flexible 'general public utility' test, to trusts for the benefit of the rich without any reference to the poor.

This 'disjunctive' definition of 'charitable' in trust law was to be transferred by Lord Macnaghten eighty six years later into the realm of interpretation in tax law and has remained there to the present day.

## 3. TAX EXEMPTIONS

During the early nineteenth century, charities enjoyed exemptions from income and other taxes introduced during that period. On April 16, 1863, however, these exemptions were questioned by the then Chancellor of the Exchequer,as but distinguished from donations made during the donor's lifetime. What is surprising is, not that he withdrew the clauses after an outcry from the charities themselves, but that he did not meet opposition from cabinet colleagues prior to presenting his budget. He felt strongly

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[47] *Jones v Williams*, (1767) Ambl. 651, referred to in G. Jones, *Ibid*, 122,128.

[48] *Townley v Bedwell*, (1801), 6 Ves. 194.

[49] *British Museum Trustees v White*, (1826) 2 Sim & St 594 at 596, 57 English Reports, 473.

[50] *Thornton v Howe*, (1862) 31 Beav. 14.

[51] *Morice v Bishop of Durham* (1805) 10 Ves.522,533; 32 English Reports 947.

[52] M. Chesterman, *Ibid,* 58-62.

[53] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583 per Lord McNaghten.

[54] *Morice v Bishop of Durham* (1805) 10 Ves.522, at 532; 32 English Reports 947 at 951.

[55] For the extension of the boundaries of this charitable category see M. Chesterman, *Ibid*, 147-148.

[56] *Pember v Inhabitants of Kington*, G. Duke, *Ibid*, 82; *Hardinge and Edge* (1675), Selden Society, LXXIII, case 346, referred to in G. Jones, *Ibid,* 35-36.

enough about the issue to ensure that his proposals were on the record, and defiantly tacked his speech to the Parliament on to his published collection of *Financial Statements* later in the year.[57]

Gladstone pointed out that about fifteen million pounds of 'hard money' had been levied in the last financial year by direct taxation of various kinds: income tax; probate duty; legacy duty; succession duty and house tax. He continued, passionately arguing:

> Every shilling of this great sum is taken out of the pockets of individuals. Property, held in mortmain, held in the hands of corporate bodies, under trust for charitable purposes, contributes, as I shall be prepared to show, nothing whatever to this great sum ….This state of things is unjust. It is not fair that the taxpayers of the country, to a very large proportion of whom taxation is, and must be, a serious burden - that the fathers of family men labouring to support their wives and children, should be taxed at an augmented rate in order to afford the luxury of exemption to bequests, for what we term charitable purposes; for in the main the property which enjoys this exemption is property which has been devoted to its present purposes, not during the life-time of the donor, but on his death-bed, or by his will, and when it was no longer his to enjoy.

He stated that at the time when taxation exemption for charities was first granted in the income tax statute, the State made no educational provision or expenditure for the poor apart from local taxation. In his budget however, a grant of £1,111,000 was provided for education; £227,000 for the Poor Law Board, and £35,000 for the universities. A further amount of £18,000 was provided for administration of the charities themselves. He was concerned that the public were not only called upon to maintain and improve the property of the charities through their general taxes, without their making any contribution themselves, but to provide expenses for investigation and management of charitable affairs.[58]

## 4. PEMSEL REVISITED:

The Board of Inland Revenue were not unsympathetic to Gladstone's concerns. In the late 1880s they set an administrative precedent, then tested the legal waters. The *Pemsel* case came to the courts because the tax administration, following a finding of the Scottish Court of Session in *Baird's Trustees v Lord Advocate*[59] considered that the meaning of the legislature was not ascertained from the 'legal' definition of the expression, but from the popular use of the word 'charity'. The amount of taxation involved was not great, but the principle was fundamental.

Pemsel, the treasurer of the church of the United Brethren, commonly called the Moravians, had applied for payment of an income tax allowance of £73 .8s.3d from the Commissioners of Income Tax. The 'charitable' trust in contention was established

> for the purpose of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of Unitas Fratrum, or United Brethren.

### i Earlier Hearings of the Pemsel Case

Altogether, there were three hearings of this test case: one in the Divisional Court; one in the Appeal court, and the final hearing in the House of Lords.

#### *a) Divisional Court : Chief Justice Lord Coleridge and Lord Justice Grantham*

[57] R. Shannon, *Gladstone*, Volume 1, 1809-1865, Hamish Hamilton, London,1982, 483-84. It should be noted that Gladstone himself had given donations to purposes of charity and religion totally £18,577 between 1831 and 1860 and a further £12,427 between 1861 and 1870.

[58] House of Commons , *Hansard*, April 16, 1863, 224*d*-224*g.*

[59] 15 Sess. Cas. 4th Series, 682.

The first hearing was in the Divisional Court, on 27 October 1888.[60]

Chief Justice, Lord Coleridge argued that the word 'charitable' as it occurred in exemptions under the 1842 *Income Tax Act*[61] was used in a popular sense and one applicable to all the three kingdoms.

He quoted from *Morice v Bishop of Durham*[62]and claimed that in that case the Master of the Rolls, Sir William Grant meant that the word 'charitable' was to be taken to bear its ordinary and common meaning. He considered that 'ordinarily speaking the word charity' denotes something in the nature of eleemosynary relief. [63]

Following the Scottish Court of Session, in *Baird Trustees v Inland Revenue*, [64] he concluded :

> Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity' as it occurs in this statute. [65]

Since the technical meaning of 'Charitable' derived from the Elizabethan Statute originally applied in England only, and the 1842 Income Tax Act applied to the whole of the United Kingdom, he said that the ordinary or eleemosynary meaning of the word should apply.

Justice Grantham disagreed. He believed that 'charitable' exemptions could and did apply to the rich as well as the poor. He noted that in the public schools, commonly so called, very few of the poorer classes receive their education and even Eton College which was almost exclusively for the sons of the wealthy, was treated as exempt. Since the court was equally divided, however, he withdrew his judgment.

The Moravian trustees appealed.

### *b) Court of Appeal: Lord Esher, Master of the Rolls, Lord Justice Lopes and Lord Justice Fry,*

The majority in the Appeal Court found in favour of the Moravians on the tax matter. Nevertheless they considered that the eleemosynary meaning of the word applied in the taxing Act. [66]The Masters of the Rolls, Lord Justice Esher together with Lord Justice Lopes said that the words 'charitable purposes' must be taken in their ordinary meaning, and not as technical legal terms. They found that the words meant a benefit to persons who, by reason of poverty, would not otherwise obtain such benefit.

Unlike Lord Coleridge however, they considered that the religious instruction would be for 'poor' rather than 'rich' heathen who, but for that would not get such instruction. On this basis they considered the trust to be charitable.

Lord Justice Fry found that the word 'charitable' had a technical 'legal' meaning. He said that he felt bound to refer to the Elizabethan Statute, because it was a declaration, by the legislature, not by the Court of Chancery, of the sense in which 'charitable intents' was used. In his opinion, that meaning had not changed in the intervening centuries, and the expression 'trust for charitable purposes' had a distinct legal meaning which should be applied to an exemption in a Taxing Act. [67]

The Commissioner appealed to the Privy Council.

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[60] *The Queen on the Prosecution of J.F. Pemsel v the Commissioners of Income Tax,* Queens Bench Division, October 27, 1888, Vol XXII, 296.

[61] Vict. C.35, s 61, 5 & 6.

[62] 9 Ves.399 quoted by Lord Coleridge*, Ibid*. 300.

[63] *Morice v Bishop of Durham* 9 Ves.Jun.403, per Sir William Grant, Master of the Rolls.

[64] 15 Sc. Sess. Cas. 4th Ser. 682.

[65] Lord Coleridge, C.J. Ibid 302.

[66] *The Queen on the Prosecution of J.F. Pemsel v the Commissioners of Income Tax,* Queens Bench Division, December 21*,* 1888 *Vol* XXII.

[67] *Ibid.* 309-315.

## ii. Privy Council Appeal ; Chief Justice Lord Halsbury, Lord Bramwell, Lord Macnaghten, Lord Herschell, and Lord Watson

### a) The Majority Judgement in the House of Lords Case

The majority found in favour of the Moravian trustees in a 3/2 decision. However, only Lord Macnaghten opted for the 'technical' or 'legal' meaning of 'charitable'. The remaining judges presented various views on the 'eleemosynary' or 'popular' meaning of 'charitable' for taxation exemption purposes.

#### *Lord Macnaghten and the Fourfold Test*

In a famous and often quoted judgment, Lord Macnaghten commenced with the Income Tax statute and ended with the strict 'legal', trust law definition of 'charitable'.

He noted that UK Income Tax Acts had been introduced at the close of the eighteenth century and had been in force without any interruption since 1842.[68] Although every Act had contained an exemption in favour of property dedicated to 'charitable purposes,' the meaning of these words had not been defined within the Acts themselves.

> From the very first it was assumed, as a matter not open to controversy, that the exemption applied to all trusts known to the law of England as charitable uses or trusts for charitable purposes.[69]

Lord Macnaghten, followed Lord Eldon's four - fold, disjunctive definition in the 1805 *Morice v Bishop of Durham*[70] case. He included an extended 'public benefit' test inherited from the eighteenth century Mortmain Act cases together with reference to uses derived from the 1601 Preamble to the Elizabethan *Statute of Charitable Uses.* Macnaghten's definition has since reached the status of received doctrine in many courts through the British Commonwealth. He stated:

> Charity in its legal sense comprises four principal divisions; 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. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly and indirectly.[71]

Since the meaning of 'charitable purposes' within the taxing act had nowhere been defined. Lord McNaghten imposed the common trust law definition of 'charitable' upon the taxation statute. The primacy of the statute was potentially subordinated to common law. According to the Australian High Court, this remains the position in Australian taxation law in 2006. Against his better judgment, and in despite of his concern at potential astonishment from the laity, even Justice Kirby felt obliged to follow the Lord Macnaghten's precedent as received doctrine.

For some years after 1891, Lord Macnaghten's decision lacked its later status. His was simply the finding of one of five judges in a 3/2 decision.

Lord Macnaghten himself placed his judgement in its broader legal context. He noted that the Board of Inland Revenue, the Scottish Court of Session, [72] Lord Coleridge in the Divisional Court; and the

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[68] By Schedule A of the *Income Tax Act* 1842 ( 5 & 6 Vict.c 35) allowances were made in respect of the duties in that schedule on the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees for charitable purposes, so far as the same were applied to charitable purposes.

[69] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891]AC 531 583 at 574.

[70] *Morice v Bishop of Durham* (1805) 10 Ves.522,533; 32 English Reports 947.

[71] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891]AC 531 583. In his judgement Lord McNaghten followed *Morice v Bishop of Durham* (1805) 10 Ves. 522, 32 ER 947.

[72] *Baird's Trustees v Lord Advocate* 15 Sess. Cas. 4th Series, 682.

majority of the Court of Appeal held that the legal meaning of 'charitable purposes' should be rejected in favour of the eleemosynary, or 'popular signification.' In *Baird's* case the Scottish Court had held that in ordinary familiar and popular use, charity had only one sense, the relief of poverty. For this reason the exemption related only to funds given as alms, or as a provision for the relief of persons from physical privations or suffering arising from poverty. The concept of charity went no further than this 'eleemosynary' meaning.

Lord McNaghten disagreed with Lord Coleridge's judgment in the earlier hearing. He opted for the technical 'legal' meaning of the word 'charitable' arguing that 'charitable uses or trusts formed a distinct head of equity'. He claimed that the object of the Elizabethan Statute was merely to provide new machinery for the reformation of abuses in regard to charities and the objects enumerated in the Preamble were only instances of charitable uses.

He traced the history of the development of the 'technical' meaning of 'charitable' as follows:

> Courts of Law had nothing to do with the administration of trusts. Originally, therefore, they were not concerned with charities at all. But after the passing of the Act 9 Geo.2, commonly known as the Statute of Mortmain, which avoided in certain cases gifts to 'uses called charitable uses,' alienations and dispositions to charitable uses sometimes came under the cognizance of Courts of Law, and those Courts, as they were bound to do, construed the words 'charitable uses' in the sense recognized in the Court of Chancery, and in the Statute of Elizabeth, as their proper meaning…of all words in the English language bearing a popular as well as a legal signification, I am not sure that there is one which more unmistakably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word.[73]

Lord McNaghten's historical view of the legal definition of 'charitable' limited the only basis for his definition of 'charity' to common law precedents laid down by the courts dealing with charitable trusts since 1736.

He ignored Francis Moore's 'unseverable poverty test' and the administration of trusts in the seventeenth century by both the Commission and the Chancery court. He pointed out that although the popular meaning of the words 'charity' and 'charitable' did not coincide with their legal meaning, it was difficult to fix the point of divergence.

For him, the legal meaning of charity comprised four principle, distinct, divisions and it included, of necessity, benefit to the rich as well as the poor. Whereas Francis Moore's 'unseverable poverty test' might possibly include benefits for the rich, for Lord Macnaghten, this was necessarily so.

He asserted that he had nothing to do with the policy of taxing charities, yet indicated that he was reluctant to permit the administrators of the Inland Revenue to upset established practice.

> …for myself, I am not sorry to be compelled to give my voice for the respondent. To my mind it is rather startling to find the established practice of so many years suddenly set aside by an administrative department of their own motion, and after something like an assurance given to Parliament that no change would be made within the interposition of the Legislature.

It is suggested that Lord McNaghten had firm policy views on taxation of charities and his judgement can be analysed in its political and economic as well as its legal context.

### *Lord Herschell's definition of The 'Popular' Meaning of Charity*

Lord Herschell was in the majority with Lord Mcnaghten in granting taxation exemption to the Treasurer of the Moravians for 'missions to the heathen'. But he finished with an extended definition of the 'popular' meaning of 'charitable purposes' :

[73] *Commissioners for Special Purpose of the Income Tax v Pemsel* [1891] AC 531 at 581-582.

> The main and indeed the only question, arising on this appeal is…what is the scope of the term 'charitable purposes' in this enactment?

His definition of 'charitable' differed markedly from that of Lord Macnaghten. He agreed with the Scottish Court of Session [74]and the Board of Inland Revenue that the 'popular' meaning of the word was used in the taxation statute. He was unable to agree with their restriction of the meaning of 'charities' and 'charitable uses.'

The Lord President of the Court of Session had limited the meaning to the relief of poverty in the *Baird* case, while his fellow judge, Lord Shand had limited it to the relief of physical necessity or want, to funds given as alms or as a provision for the relief of persons from physical privations or suffering arising from poverty.

Lord Herschell re-defined and extended the 'popular' or 'eleemosynary 'meaning of 'charity' or 'charitable.' His definition is of interest in the Australian context because it was referred to by the majority [75]in the Australian High Court in the 1925 *Chesterman* case.[76] He did not limit the concept to relief of wants occasioned by lack of pecuniary means. He pointed to endowments for the relief of human necessities which would be generally termed charities such as hospitals and almshouses, where 'helplessness' rather than or as well as 'poverty' appealed to the 'benevolent feelings of mankind.' He cited as examples an institution for saving the lives of shipwrecked mariners or a society founded for the protection of children of tender years from cruelty.

His definition of the 'popular' conception of a charitable purpose covered:

> … 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.
>
> Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. [77]

### *Lord Watson's Definition of 'Charitable'*

Lord Watson was also in the majority. He did not discuss the meaning of the term 'charitable' in the taxation statute but spent most of his judgment arguing against the findings of the Court of Session in the *Baird* case. He was particularly concerned that Lord Adam had claimed that it was impossible to extend the term 'charitable purposes' to cover religious purposes. [78]

His definition of 'charitable' differed from both that of Lord Macnaghten and Lord Herschell. It could be argued that he was facing both ways: on the one side toward Lord Herschell's definition of the 'popular' meaning; on the other towards the 'legal' meaning of Lord Macnaghten. His definition was not however, 'disjunctive'. It did not separate charity for the rich from that for the poor with a 'public interest' test. He argued that 'charitable'

> …is a relative term, and takes its colour from the specific objects to which it is applied. Whilst it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence. [79]

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[74] *Baird' Trustees v Lord Advocate*, 15 Sess. Cas. 4th Series. 682.

[75] Isaacs, Rich and Starke JJ.

[76] *Chesterman and Others v The Federal Commissioner of Taxation* (1923) 32 CLR 362. The High Court decision was, as noted above, overruled in favour of the Mcnaghten definition when *Chesterman* reached the Privy Council [76] *Chesterman and Others v The Federal Commissioner of Taxation* (1925) 37 CLR 317[1926] A.C. 128.

[77] *Commissioners for Special Purposes of the Income Tax v Pemsel, Ibid*, 572.

[78] *Ibid*, 556.

[79] *Ibid,* 558.

Lords Herschell and Watson did not follow the Court of Session, or Lord Coleridge in the Divisional court with a definition of 'charitable' confined exclusively to the relief of poverty. Nor did they follow the 'disjunctive' 'legal' definition of 'charitable' as expounded by Lord Macnaghten. They each favoured an extended eleemosynary meaning with a benevolent or altruistic test.

Yet, since 1891, the Macnaghten definition has permanently separated Francis Moore's 'poverty test' from trusts for education or the advancement of religion, as well as trusts that are 'beneficial to the community'

### b) Dissenting Judgments in the Pemsel Case

Lord Halsbury and Lord Bramwell were in dissent on both the taxation exemption and the definition of 'charitable issues.

***The Dissenting Judgment of Lord Chancellor Halsbury***

Lord Chancellor Halsbury commenced with the 1842 Income Taxation Act, quoting the relevant Sections at length[80], He said:

> …to quote from the language of Tindal C.J. when delivering the opinion of the judges in the Sussex Peerage Case the only rule for the construction of acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act.

He consequently argued that it was material to consider the intent of Parliament in passing the Elizabethan Statute in 1601 and noted that it was: 'An Act to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses.' It also enumerated a number of charitable objects in the preamble.[81]

Then he dealt with the meaning of the term 'charitable.' His account of the meaning of the term was closer to that of Lords Herschell and Watson, than to that of the Scottish Lords in the Court of Session. Unlike Lord Macnaghten he did not commence with the law after the *Mortmain Act*, taking it for granted that this accorded with the Elizabethan statute. He analysed the history of the extension of the meaning of 'charitable' by the Court of Chancery since 1601 through analogy of purposes 'within the spirit and intendment' of the Preamble. He then pointed to problems posed by the 'public interest' test.

He said:

> … the distinction between what is charitable in any reasonable sense, and that to which trustees for any lawful and public purpose may be compelled to apply funds committed to their care, has been - I will not say confused - but so mixed that where it becomes necessary to define what is in its ordinary and natural sense 'charitable' what is merely public or useful is lost sight of. …**if all public purposes whatsoever which the law would support and the Court of Chancery enforce are in all statutes to be comprehended within the phrase 'charitable,' then the question is easily solved; but I do not think any statute or any decision has ever countenanced such a proposition.**[82]

In effect, Lord Halsbury returned to the Francis Moore 'unseverable poverty test'. He said that the ordinary use of the word 'charitable' distinguished from any technicalities, always involved the relief of poverty.[83] Because the trust under appeal was a mission to convert heathens without regard to their poverty at all, he found that it was not 'charitable.'

***The Dissenting Judgment of Lord Bramwell.***

Lord Bramwell went even further than Lord Halsbury. He returned to the secular 'spirit and intendment' as well as the 'poverty test' of the Elizabethan Act and Preamble. [84] He considered that the conversion

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[80] *Ibid,* 539-40.

[81] *Ibid*, 543.

[82] Ibid, 544, emphasis added .

[83] Ibid, 552.

[84] Ibid, 564-568

of heathens and heathen nations to Christianity or any other religion was benevolent, but not 'charitable'. He reasoned that :

> The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the faggots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent is what makes the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours….What of a trust for the conversion of the Jews? Is that a charitable purpose? If so, what of a trust for the reconversion? It seems to me, that the extended meaning of 'charitable purposes' would include every case of amusement and pleasure that could be thought of.

He followed Lord Coleridge in defining 'charitable' as follows:

> …a charitable purpose is where assistance is given to the bringing up, feeding, clothing, lodging and education of those who from poverty, or comparative poverty, stand in need of such assistance.

Lord Bramwell's dissenting judgment left the common law behind and linked his 'popular' definition of charitable to the taxation system

> …when the gift is of such a character as I have suggested in my definition, to tax the charity is to tax the poor, or take from the poor who would otherwise get the amount of the tax.

and

> …to exempt any subject of taxation from a tax is to add to the burthen on taxpayers generally. [85]

### iii. Summary of the Pemsel Case

At the end of the day, the total field of judges was unevenly divided on the definition of 'charitable' for the purpose of the *Income Tax Act* 1842 (UK). Of the members of the judiciary who considered the *Pemsel* matter in the period 1888 to 1891, seven : Lord Justices Coleridge, Esher, Lopes, Bramwell, Herschell, Watson and Lord Chancellor Halsbury argued for the popular, eleemosynary meaning of charitable, while two, Lord Justices Fry, and McNaghten, opted for the technical meaning of the words. Justice Grantham preferred the 'technical' meaning, but withdrew his judgment.

It should be noted that the 'definition' of charity issue in *Pemsel* by the seven judges opting for the "popular" meaning of chariable, was not presented as a difference between the original Elizabethan 'unseverable poverty test' of Francis Moore and the disjunctive, post-Mortmain Act 'poverty for the rich' or 'public interest' test of Lord Eldon in *Morice v Bishop of Durham*. It was presented as the 'popular' or 'eleemosynary' as opposed to the 'legal' or 'technical' meaning of the word. It could be argued however, that the underlying differences are not dissimilar. In fact, Lord Chancellor Halsbury presented his own version of the 'unseverable poverty' test.

When it is remembered that the final appeal, the 1891 House of Lords case was a 3-2 decision with Lord Chancellor Halsbury in dissent, and only Lord Macnaghten opting for the 'legal ' or 'technical' meaning of 'charitable, it is, on the surface, surprising, that his four part 'disjunctive' definition of 'charity' and 'charitable' remains largely unquestioned in Australia in 2007.

It has not always been so.

## 5. The *Chesterman* Case.

[85] Ibid, 566.

Lord Macnaghten's *Pemsel* definition of 'charitable' for either trust or taxation purposes did not gain immediate acceptance in the United Kingdom. It was not imposed upon the Australian Courts by the Privy Council until 1925.

As early as 1892, Lord Herschell, together with Lord Justices Lindley and Kay, in the *The Commissioners of Inland Revenue v Scott* [86] found that the term 'charitable' purpose had a less extended meaning than under the general law. This was a taxation case dealing with the definition of 'charitable purpose' in the *Customs and Inland Revenue Act* 1885,[87] They said that the only safe course to take was to follow the ordinary and natural meaning of the words that are used, and not the 'wide'or 'technical' sense.

By 1908 however, Halsbury's Laws of England under the Heading "the Legal Meaning of Charity" said that the term is probably incapable of definition. A distinction was made between the 'popular' and 'legal' or 'technical' meaning of the terms 'charity' and charitable' and a distinction made between the practice of the courts in England and Scotland. Finally, the four principal divisions of the Lord McNaghten judgement were listed with the comment that 'Within one of these divisions all charity to be administered by the court must fall, though every object which might be brought within one of them is not necessarily a charity.'[88]

The Australian High Court followed the Lord Herschell rather than Lord Macnaghten definition of 'charitable' in the 1920 *Swinburne*[89] and 1923 *Chesterman*[90] cases but they were overruled by the Privy Council in 1925.[91] Since that date the Australian courts have not questioned the Privy Council definition – until Justice Kirby's expressions of concern in the *Bayside* case. [92]

The *Swinburne* case dealt with a gift made by a taxpayer to the Swinburne Technical College, an institution which was publicly funded and charged fees for entry. Justices Isaacs, Duffy, Rich and Starke, with Chief Justice Knox in doubt, disallowed an exemption. They held that the term 'public charitable institution' as it occurred in the *Income Tax Assessment Act* 1915-1918 should be construed as meaning a public institution which affords relief to persons in necessitous or helpless circumstances. [93]

In the *Chesterman* case a majority of the High Court (Issacs, Rich and Starke JJ with Knox C J and Higgins J in dissent), rejected the Macnaghten disjunctive' or 'technical' definition of 'charitable' which included benefits for the rich as distinct from the poor.

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[86] QBD, (1892) Vol. 61, 432.

[87] 48 & 49 Vict. C. 51, s.11, sub-ss 2 and 3.

[88] *Halsbury's Laws of England* 1908, Vol. 4, 105-107.

[89] *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR 377 at 384; also see *Trustees of Queen's College v Mayor &c of Melbourne* [1905] VLR 247 at 255, noted in *Ashfield Municipal Council v Joyce* [1978] AC 122 at 139

[90] *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362, citing *Commissioner of Inland Revenue v Scott*, (1892) 2 QB 152 at 165.

[91] *Chesterman v Federal Commissioner of Taxation* (1925), 37 CLR 317 at 319; [1926] AC 128 at 131; Also see the Privy Council finding in *Salvation Army ( Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174-175.

[92] *Central Bayside General Practice Association v Commissioner of State Revenue* [2006] HCAT 238 ( 17 May 2006 12 and 10 of 50).

[93] *Swinburne v Federal Commissioner of Taxation* (1920) 27 CLR, 377-386.

The Trust in question, the Peter Mitchell Trust specifically excluded the poor and helpless. The objects of the trust in contention were:

> …to encourage and help the capable healthy and strong to develop and bring to fruition their natural advantages and which will act…as an incentive to all sane normal and healthy persons of both sexes to improve so far as possible their natural moral and physical conditions and will enable the worthiest among them by a process of selection and by competitions whereby they shall earn the benefits hereby intended to still further better those conditions, develop themselves, broaden their outlook as citizens of the Empire, and so provide a leaven of strong, well balanced and self reliant individualities who, mixing in daily intercourse with their fellows will tend by their example and by the magnetism of their bright and healthful personalities to benefit and assist those with whom they may so daily mix and will also in the natural course of events reproduce in future generations those qualities which they themselves possess. [94]

Justice Isaacs referred to Lord Herschell in both the *Pemsel* and the *Scott* cases.[95] He started with the exemption in Section 8 (5) of the *Estate Duty Assessment Act* 1914 and quoted excerpts from Lord Herschell's extended 'eleemosynary' or 'popular' meaning of 'charitable.' He included benevolent assistance in aid of physical, mental and even spiritual progress for the benefit of those whose means are otherwise insufficient for the purpose, but excluded the idea involved in Macnaghten's 'technical' meaning of 'charitable', that, the distinction between rich and poor had no relevance, except in trusts directly for the relief of poverty

Justice Starke[96] referred to a New Zealand case, *Attorney General for New Zealand v Brown*,[97] agreeing with both Lord Buckmaster in that case and Lord Herschell in *Pemsel*, that 'each statute must be looked to by itself for the purpose of ascertaining its meaning.' He also quoted the Lord Herschell extended 'eleemosynary' test, and refused a taxation exemption to the trust.

In his *Bayside* judgment Justice Kirby noted that the Privy Council supervision of the Australian High Court had ceased[98] and stated that the Australian court could, if it chose, return to its own earlier authority in *Chesterman*.

## 6. Legislative or Common Law Definition of 'Charitable'

### i. Canadian Developments : *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue 1999.*

Justice Kirby's concerns for the 'primacy of the taxation statute' and what he regarded as the wrong turning in the 'definition of charity' after the *Chesterman* case, were not shared by his fellow High Court judges.

But he is not alone in lamenting what he saw as the wrong turning. Judges on the Canadian Supreme Court articulated similar concerns in the 1999 *Vancouver Society of Immigrant and Visible Minority Women* case.[99]

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[94] *Chesterman v Federal Commissioner of Taxation*, Ibid, 370.

[95], Ibid,365.

[96] Ibid, 399.

[97] (1917) A.C. 395.

[98] *Central Bayside General Practice Association Limited v Commissioner of State Revenue* HCA, *Ibid* 21; *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975; *Australia Act* 1986 (Cth), s 11(1).

[99] *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, Canada Supreme Court Reports, Volume 1, 10-140.

The Society applied to the Minister of National Revenue for registration as a charitable organization under the Canadian *Income Tax Act*.[100] Revenue Canada rejected the application mainly because it was not convinced that the organization was constituted exclusively for charitable purposes as required for registration under the Act. The Canadian Federal Court dismissed the Society's appeal.

Justice Iacobucci was in the majority and Justice Gonthier in dissent. Justice Iacobucci affirmed the primacy of the statute and articulated similar definitional concerns to those expressed by Justice Kirby in *Bayside.* Justice Gonthier opted for continuation of the common law tradition.

Justice Iacobucci said that the guidance provided by the common law in the application of the fourth head of charity lacks clarity. The requirement that the purposes benefit the community

> in a way the law regards as charitable' is circular and the various examples enumerated in the preamble to the Statute of Elizabeth lack a common character or thread on which to base any coherent argument from analogy.'[101]

Although the *Pemsel* approach has also been applied by Canadian courts, applying it to the myriad of modern organizations vying to be identified as charitable had often proved a daunting task. He considered that the definition of charity was 'an area crying out for clarification through Canadian legislation for the guidance of taxpayers, administrators, and the courts.' [102]

The Vancouver Society of Immigrant and Visible Minority Women had urged the Court to consider extending the public benefit test to include a 'contextual public benefit test.' [103]

In response, Jacobucci suggested limits to the degree of change that the common law can accommodate. There were also limits to judicial law reform. He believed that it is one thing to alter existing jurisprudence by a fundamental turning in direction, and another to change the law by legislative amendment.[104] He preferred the latter. It was the responsibility of Parliament to decide on any new conception of charity.[105]

Justice Gonthier considered the existing categorization of charitable purposes set out in *Pemsel* sufficiently flexible to comprehend the Society's claim for registration as a charity. He also considered that the courts were not precluded from recognizing new charitable purposes or from revisiting the *Pemsel* classification in an appropriate case. He said:

> The task of modernizing the definition of charity has always fallen to the courts. There is no indication that Parliament has expressed dissatisfaction with this state of affairs, and it is plain that had Parliament wanted to develop a statutory definition of charity, it could have done so. It has not. This leads me to the conclusion that Parliament continues to favour judicial development of the law of charity.

Justice Gonthier nevertheless agreed with Justice Jacobucci that that, in relation to the definition of "charitable", legislative intervention with adequate flexibility in the application of the law to respond to changing social needs, would be desirable[106]

### ii. The United Kingdom

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[100] Ss 149.1 (1) and 248 (1). Canada differs from Australia in having a statutory regime for the registration and regulation of charities.

[101] *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue,* Ibid, 122, Iacobucci J.

[102] Ibid 107. Iacobucci J. quoting from *Human Life International in Canada Inc. v M.N.R*. [1998] 3 F.C. 202 (C.A. para 8 per Strayer J.A.

[103] Ibid 133.

[104] Ibid, 122, 135. Iacobucci noted the conceptual approach taken by the Ontario Law Reform Commission, in its 1996 *Report on the Law of Charities.*

[105] Ibid, 107,135.

[106] *Ibid* ,90,91.

The United Kingdom has provided both the Inland Revenue and taxpayers with a legislative definition of Charities for taxation purposes. A new United Kingdom *Charities Act* received royal assent on 8 November 2006 and will be administered by the UK Charities Commission. All Charities with an income of £5000 or more will be required to register with this body.

The Act defines a charity as a body or trust which:

- is for a charitable purpose, and
- is for the public benefit

Like the 1601 preamble to the *Statute of Charitable Uses* it enumerates the main purposes which in 2006 are considered 'charitable.' The 'unseverable poverty' test of Francis Moore has been reduced to only one of a list of thirteen. It has been replaced by a 'public benefit' test. The new 2006 list of 'charitable purposes' includes:

- the prevention or relief of poverty
- the advancement of education
- the advancement of religion
- the advancement of health or the saving of lives
- the advancement of citizenship or community development
- the advancement of the arts, culture, heritage or science
- the advancement of amateur sport
- the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
- the advancement of environmental protection or improvement
- the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage
- the advancement of animal welfare
- the promotion of the efficiency of the armed forces of the Crown; or the efficiency of the police, fire and rescue services or ambulance services, and;
- any other purposes charitable in law

This list covers the majority of purposes which are already charitable. The final category means that everything which is currently charitable is included in the list. Some of the specific charitable purposes in the above list are defined further. 'Religion' for example includes a belief in one or more Gods or a belief in no God at all.

The Act requires that all charities must exist for 'the public benefit'. The Commission has a new objective to promote understanding and awareness of this public benefit requirement.

Provision for judicial review of registration for taxation exemption purposes forms occasion for future litigation but this will arise from statutory interpretation rather than common law precedent. Any addition or deletion in the 'list' will rest in the hands of the Parliament.

The definition of any reference to 'charitable' for taxation exemption purposes will remain referential within the taxation legislation itself, and this reference will be to a legislative definition within another statute rather than common law precedent.

Since the definition of a charitable trust is now encapsulated within a separate statute the definition of 'charitable purposes' in a taxation statute will still be referential - to a definition in another statute as opposed to a common law definition.

**iii. The Australian Situation**

Reluctance on the part of Canadian legislators to develop a statutory definition of 'charity' or 'charitable purposes' is not confined to that country. The 2001 Australian Federal *Report of the Inquiry into the Definition of Charities and Related Organisations* in Australia recommended legislative definition of charities. The impact of the Report to date has been minimal. The Inquiry concluded that the preamble to the Statute of Elizabeth had been valuable but was ambiguous, could lead to inconsistencies, and had 'outlived its usefulness.'[107]

The Committee recommended a definition of charity built on the principles developed from the common law, but with greater clarity and certainty. They recommended that a charity be

- A not-for-profit entity;
- That has a dominant purpose or dominant purposes that are
    - charitable;
    - altruistic; and
    - for the public benefit

They also recommended a strengthened public benefit test.

The Committee also suggested a definition of 'benevolent charity' as a subset of charity together with a broader definitional framework which included altruistic community organizations. The Committee was also of the view that entities whose purposes were religious, scientific, and educational but neither altruistic nor for the public benefit should not be included in the definitional framework.

The Committee recommended that an independent administrative body be established to determine the status of charities and related entities. This has not occurred.

The above recommendations had wide potential implications for Australian revenue law.

Unlike the UK, Canada and New Zealand, Australia has not established a Charities Commission, or a similar, independent regulatory and/or registration body. Given the High Court ruling in the *Bayside* case it is clear that for the definition of 'charitable' Australia still relies upon nineteenth century categories and common law precedents translated into taxation law from trust law.

However, after a process of consultation undertaken by the Board of Taxation, an Act [108] effected specific amendments to the denotation of "charitable purposes". These included child care services on a non-profit basis; open self-help groups; and closed and contemplative religious orders that regularly undertake 'prayerful intervention' at the request of members of the public.[109] It may be noted that, if the requests for prayerful intervention from members of the public involve 'prayers for the souls of the dead' this latter provision, would involving displacing the 'secular' intent of the Elizabethan Act by restoring something resembling what would then have been described as the 'pious' or 'superstitious uses' and chantries of the English pre-Reformation era.

**7. Perennial Problems:**

[107] *Op.cit*,6.

[108] *Extension of Charitable Purpose Act* 2004 (Cth).

[109] *Ibid* s 4(1); s 5(1)(a); s 5(1)(b).

In the UK the 1601 preamble to the *Statute of Charitable Uses* appears to have passed its 'used by' date. It has been updated by another Statute with a 'list'. Like the original Elizabethan statute it has a regulatory regime and judicial appeal process. One is left wondering about the similarities as well as the differences between 1601 and present predicaments.

***Continuation***

The poor are still with us and some of the wealthy are still philanthropic. The secular Elizabethan attempt to address social welfare problems through State intervention and taxation alongside encouragement of private philanthropy is still with us. The Elizabethan attempt to 'redress the mis-imployment of Lands, Goods, and Stocks of Money, heretofore given to charitable uses' by the setting up of a regulatory commission, has been sustained in the UK and Commonwealth countries. Australian history differs in this respect.

***Change***

Whereas the Elizabethans and Jacobeans had an 'unseverable poverty test' in their legal concept of 'charitable', the Hanoverians developed a 'disjunctive' test and effectively severed charities for the benefit of the poor from benefits for the rich with separate 'religious' 'educational' and 'public benefit' tests.

The transplantation of the 'disjunctive' definition of 'charitable' from trust law into taxation law has enabled the rich to gain taxation exemptions for exclusive, elite institutions which have little relevance to the poor. It has also extended the meaning of 'charitable' into the area of animal welfare, recreation, and pre-school education. The pressure on the legislature and courts is to further extend the meaning of 'charitable' into public/private economic enterprises with substantial public funding.

## 8. Recent Australian Developments;

The distinction between 'public' subsidization and 'private' philanthropy becomes increasingly blurred when public/private partnerships enter the 'charitable' exemption area.

Since 2000 an organization which receives more than 90% of its funding from the public treasury and enables local medical practitioners to obtain benefits and fees for their services has been given taxation exemption status because it is labeled 'charitable' under the fourth Macnaghten category [110] Similarly an organization sponsored by the Federal, Victorian and Queensland Governments for 'the promotion of a culture of innovation and entrepreneurship in Australia by visibly assisting innovators to commercialize their ideas' also fits under the fourth category and is labeled 'charitable' for taxation exemption purposes. [111]

The 2005 *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation case* [112] illustrates the extension of the meaning of charitable' for taxation exemption purposes. Tasmanian Electronic Commerce Centre Pty Ltd (TECC ) was a regional telecommunications infrastructure fund established by the Federal Government as a result of the first partial sale of Telstra. It was provided with $58 million by the Federal government and administered by the Tasmanian Government and the University of Tasmania to assist local industry and commerce with electronic commerce techniques. Tasmanian Business Online was established and funded to develop a single electronic gateway or portal for Tasmanian business and industry.

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[110] *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* Ibid.

[111] *The Commissioner of Taxation v The Triton Foundation, Federal Court of Australia*, 16 September 2005, Kenny J.

[112] *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation,* Federal Court of Australia 14 April 2005, (TECC case) Heerey J.

Justice Heerey's reasoning is of interest.

> It seems to me self-evident that benefits to Tasmania's economy resulting in long-term economic advantage to Tasmania will be a benefit to the Tasmanian public, and indeed to the wider national public. In a capitalist economy like Australia's a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services.[113]

On this basis, the federal judge found that TECC was 'charitable' and entitled to taxation exemptions.

## 8. Conclusion

This paper commenced with Justice Kirby. It is not inappropriate that his assessment of the current situation forms part of the conclusion.

> Government funding for public benefit through private sector organisations has expanded greatly in recent years in many countries, including in Australia… From the standpoint of legal policy, it would be undesirable for the law to needlessly expand the disqualification of such bodies from the advantages that they enjoy as 'charities' under revenue law where their purposes otherwise qualify. If, because of a particular governmental association, and for inter-governmental, political, or other reasons, governments wish to remove exemptions from bodies that otherwise meet the requirements of being 'charitable' within the general law as it has been expounded by the courts, they can easily do so by securing the amendment of the legislation. In the matter of exemptions for charities and in defining exempted charities, Australian legislatures have a record of enacting very particular provisions when they deem it to be necessary. There is no need for the courts to descend to such particularity. [114]

Justice Kirby is correct when he says that Australian legislatures enact very particular taxation provisions when they deem it necessary. Already, in response to concerns about donations to charitable institutions, federal taxation legislation includes a registration regime for gift deductible recipients.[115] Taxation administrators, along with 'charitable' institutions themselves are seeking, and gradually obtaining, certainty with legislative particularity.

Whether Australia will follow the UK with a legislative definition of "charitable" and a Charities Commission or continue with an expanding common law definition of "charitable" for taxation purposes and minimal regulation of charitable activities remains a question for the future.



[113] Ibid, 19 of 20. Heerey J. also referred to *Attorney-General v McCathy* (1886) 12 VLR 535 as a precedent for arguing that an institution established very largely from funds voted by Parliament was, essentially for that reason, an 'institution of public utility'.

[114] *Central Bayside General Practice Association v Commissioner of State Revenue* [2006] HCA 43 (31 August 2006 Kirby J. p. 26 of 46).

[115] http://www.ato.gov.au/nonprofit/default.asp?menu=28547

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