The art and science of crying poor: public funding of charities and private education in Australia

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> 'The love of truth, when it predominates, produces inquisitive characters, the whole tribe of gossips, tale-bearers, harmless busybodies, your blunt honest creatures, who never conceal what they think, and who are the more sure to tell you the less you want to know it—and now and then a philosopher.'
>
> William Hazlitt, *'On Mind and Motive'*

1. Introduction[1]

Orthodox historical accounts of state aid to religion and religious schools in Australia emphasise the withdrawal of direct funding by colonial governments of churches and their schools in the second half of the nineteenth century[2] and the return of state aid to church schools in the second half of the twentieth century. Historical analyses have responded to catch cries from contending parties, to political noise from pressure groups, and to receive rhetoric dispensed from corridors of power in church and state. Received wisdom nowadays is that the 'state aid debate is dead'. It certainly appears to be buried as far as the academic world is concerned.

This paper is not about the old debate in terms of that old debate. This paper is about the law of charities and benefits which accrued thereby to those who learnt the 'art of crying poor' in Australian private sector education during the twentieth century.

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1 I would like to acknowledge the help received in the preparation of this paper from Richard Ely and Ray Nilsen. Discussions with Richard Ely in relation to research into the law of charities and Ray Nilsen's statistical research conducted over the last thirty years have proved invaluable in the preparation of this paper.

2 *Grants for Public Worship Prohibition Act 1862* (NSW) re-enacted as the *Grants for Public Worship Prohibition Act 1902* which is still in force; *State Aid to Religion Abolition Act 1871* (Vic.); *Abolition of Parliamentary Grants to Certain Religious Bodies Act 1875* (WA); *State Aid to Religion Abolition Act 1868* (Tas.); *Public Instruction Act 1880* (NSW); *Education Act 1872* (Vic.); *The State Education Act 1875* (Qld); *The Education Act 1875* (SA); *The Education Act 1885* (Tas.); *The Elementary Education Act 1871* (WA); *Amendment Act 1893*; *Abolition of Assisted Schools Act 1895*.

There are at least three stories that need to be told before the form and magnitude of public funding of private education in Australia can be properly assessed. Firstly, it must be understood that soon after the door closed on direct grants to private (usually church) schools in the late nineteenth century, another door fell ajar.[3] This was the door leading to tax-based subsidies and exemptions from State imposts and charges through the common law of charities, tax law and related statutes. A century later Australian treatment of private institutions dedicated to the 'advancement of education' is unique. Rules affecting these bodies are amongst the most generous in the world. Government supervision and regulation is minimal. The usual system for allocating public sector resources is by-passed—quietly. Once the Australian Taxation Office determines that a body satisfies the relevant definition of charitable purposes of 'public benevolence', tax benefits apply automatically. These include exemption from income tax; tax deductions for contributions to buildings for the advancement of education; exemption from payroll tax, sales tax, capital gains tax and land tax, municipal rates and other government charges and imposts. No public authority examines requirements, determines appropriate levels of support or evaluates effectiveness of assistance obtained. No one even knows the full level of subsidy.[4]

It seems that:

> In the name of 'charity' and 'public benevolence' we have reached an upside down situation in indirect tax expenditure in which the 'wealthy' benefit from blanket, automatic, no-strings attached, open ended aid.[5]

The 'art of crying poor' developed during the earlier decades of the twentieth century was applied to new green fields by astute church

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3 *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531 at 583. (Subject to the overarching requirement that a 'charity' should show public benefit, equitable doctrines of charitable trusts recognised four broad sub-categories of charitable purpose:
i relief of the aged, impotent and poor;
ii the advancement of education;
iii the advancement of religion;
iv other purposes beneficial to the community).
Robinson v. Stuart [1891] 12 LR (NSW) Eq 47; *Re Sutherland Queensland Trustees Ltd v. Attorney General (Qld)* [1954] QSR 99. (The status of a body as a charity is acquired because of the purpose pursued and is not lost or diminished because that purpose is well catered for already, or is substantially (or fully) served by state subvention).

4 Krever, R. and Kewley, G. (eds), 1991, *Charities and Philanthropic Organisations: Reforming the Tax Subsidy and Regulatory Regimes,* Australian Tax Research Foundation, xxi-xxii.

5 Surrey, S., 'Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditure with Direct Governmental Assistance' (1970) *Harvard Law Review* 385.

school administrators when direct State aid became available in large amounts after the introduction of the 'needs' policy by the federal government in 1973. Classification by 'need' has yielded another up-side down situation, but one of extraordinary magnitude, in which spoils in the funding race go to the wealthy, the centralised and the powerful. This is the second story.

There is nothing new or surprising about the development of this topsy turvy situation if we examine potent evidence of frequency of breaches throughout legal history. Reaction against breaches of charitable trusts or the spirit or intendment of charitable purposes are dotted throughout the centuries. The modern law of charities takes as its benchmark the law relating to charities in the Reformation period and in particular the Preamble to the Elizabethan *Statute of Charitable Uses* of 1601.[6] There had been secular reaction against the excesses of the medieval church, but by 1597 the 'extreme and miserable estate of the Godly and honest sort of the poor Subjects of this realm' had become desperate after years of bad harvests and the Spanish war. In the legislation which followed it was recognised that private philanthropy could materially contribute to the relief of poverty but that it had been inadequately supervised. There was concern that existing charitable funds

> have been and are still likely to be most unlawfully and uncharitably converted to the lucre and gayne of some fewe greedy and covetous persons, contrary to the true intente and meaning of the givers and disposers thereof.[7]

The ups and downs in the history of the law of charity is yet another story for those who wonder where education, public and private, stands in Australia.

2. Section one
Private schools and the law of charities

(i) Common law definitions of charitable trusts

The law of charities is closely related to and is a sub-category of the law of trusts. Both in turn are reflected in taxation law and cognate statutes. In Australia, the law of charities derives from English law,[8] commencing with the *Statute of Charitable Uses* of 1601.[9] The Preamble to this Act has influenced later developments, although it no

6 *Statute of Charitable Uses 1597,* 43 Elizabeth 1 c. 4, Preamble.
7 Id, c. 6.
8 For useful histories of the law of charity see Jones, G. 1969, *History of the Law of Charity 1532-1827*, Cambridge University Press; Chesterman, M. 1979, *Charities, Trusts and Social Welfare*, Law in Context Series.
9 *Statute of Charitable Uses 1601,* 43 Eliz.1 c 4.

longer sets the boundaries of charitable purposes in modern law.[10] This has been done by later judicial decisions, the most influential being the *Pemsel* case of 1891.[11]

The Preamble to the Elizabethan statute was very specific and limited in definitions of charitable purposes for education and churches. These were listed as follows:

> "the maintenance of sick and maimed soldiers and marriners, schooles of learning, free schooles and schollers in universities"

and,

> "education and preferment of orphans"

and,

> "repair of....churches".

This definition was extended by *Pemsel* to include trusts 'being within the spirit and intendment of the Statute' either directly or by analogy with decided cases.[12] Charitable trusts, however, are required to be for purposes, not persons, although expressions such as 'Charitable Institutions' are commonly employed.[13]

Before a trust can be categorised as 'charitable' it must pass a 'public benefit' test. It must be not only 'beneficial in itself'[14] but be

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10 *The Statute of Charitable Uses 1601,* 43 Eliz.1 c. 4, was itself based upon an earlier statute of 1597: *Statute of Charitable Uses 1597,* 39 Eliz. 1 c. 6. Both were part of the poor law legislation. In England the *Statute of Charitable Uses* was substantially repealed by the *Mortmain and Charitable Uses Act 1888* (UK). However, the preamble to the Elizabethan statute was retained by the *Mortmain and Charitable Uses Act* of 1888 by s. 13(2). The statute is now only regarded as being in use in the Australian context in Western Australia and Tasmania. See Bradshaw, F.M. 1983, *Charitable Trusts in Australia,* Butterworths, Sydney.

11 *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531.

12 Ibid; see also *Downing v. Federal Cmr of Taxation* (1971) 125 CLR 185 at 191 per Walsh J; 2 ATR 472; *Williams' Trustees v. Inland Revenue Cmrs* [1947] AC 447 at 455;1 All ER 513 at 518, per Lord Simonds (a trust is not charitable unless it is within the spirit of intendment of the preamble to the *Statute of Charitable Uses 1601,* 43 Eliz. 1 c. 4).

13 *In the Will of Scales (dec'd); Permanent Trustee Co. of New South Wales Ltd v. Freeman* [1972] 2 NSWLR 108; *Joyce v. Ashfield Municipal Council* [1959] 4 LGRA 195 at 196 (the rules relating to charities relate to trusts for purposes which are charitable; these rules have nothing to do with institutions, corporate or otherwise, except where an institution is controlled by trustees who hold its property subject to a trust for charitable purposes.)

14 *Royal National Agricultural and Industrial Association v. Chester* (1974) 3 ALR 486; *Oppenheim v. Tobacco Securities Trust Co. Ltd* [1951] 1 All ER 31.

directed to a sufficient section of the community.[15] 'Public benefit' can be judicially determined or declared by statute.[16] By the end of the nineteenth century, both educational and religious purposes were firmly established in case law as falling within the definition of charity. Provided they fulfilled the 'public benefit' requirement, they were safely categorised as two of the four permitted categories of charitable trusts laid down by Lord Halsbury in the *Pemsel* case,[17] namely:

1 the relief of poverty;
2 the advancement of education;
3 the advancement of religion; and
4 other purposes beneficial to the community, not falling into any of the preceding heads.

If activities of private religious schools could not be categorised under the second category—'the advancement of education'—they might conceivably fall under the third or fourth.

(ii) Definition of 'Advancement of Education'

Although in popular usage 'charitable' generally means 'benevolent' or 'eleemosynary', it can be seen from the above discussion that, given the technical meaning imported into the word 'charitable', the beneficiaries do not need to be the poor, impotent or indigent for 'public benefit' to occur. The inclusion of the categories of 'advancement of education' and 'advancement of religion' in the definition of charity can cut directly across the traditional meaning of the term. For example, churches which enjoy endowments, property, and investments can benefit further from 'charitable' gifts. Similarly, the advancement and propagation of education and learning are valid 'charitable' purposes[18] in trust law,

15 *Oppenheim v. Tobacco Securities Trust Co. Ltd Alc Citation* [1951] AC 297; [1951] 1 All ER 31, and *Thompson v. Federal Cmr of Taxation* (1959) 102 CLR 315.

16 See for example *Trusts Act 1973* (Qld) ss. 103(2), 103(3); *Charitable Trusts Act 1962* (WA) ss. 5, 6. For specific definition of 'public benevolent institution' in s. 78(1) of the *Income Tax Assessment Act 1936* (Cwlth) see later section on deductions on gifts to school building funds.

17 *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531.

18 *Whicker v. Hume* [1858] 7 HL Cas 124; [1843-60] All ER Rep 450; 11 ER 50; *United States President v. Drummond* [1838] at the Rolls, 12 May 1838, MS, cited in *Whicker v. Hume* [1858] 7 HL Cas 124; [1843-60] All ER Rep 450; ER 50 at 57.

irrespective of the financial position of the beneficiaries.[19] The requisite element of 'public benefit' however, must be present.[20]

The word 'educational' has been widely interpreted by courts. Private church schools have been well placed, this century, to have their activities deemed 'charitable' under the categorisation of the 1891 *Pemsel* case.[21] Gifts to schools of learning or for education, or in particular subjects, as well as gifts for the increase of knowledge, are generally held to be 'charitable' for taxation exemption purposes.[22] Even if members of the public are able to pay for their education or contribute towards its costs and are required to do so, this does not prevent the educational institution from being categorised as 'public'. The only condition is that any surplus realised is not directed to private or profit making purposes. Even then, the fact that those concerned in the establishment or management of the institution derive pecuniary benefit from an excess of receipts over expenditure does not necessarily mean that an educational institution does not have a public benefit.[23]

If beneficiaries of a 'charitable trust' for the 'advancement of education' are not, in law, found to be 'the community or a section of it for charitable purposes' the trust will be invalid. Children of employees of a company;[24] 'poor relations' of a benefactor;[25] children of freemasons[26] and trade unionists,[27] have been found to be members of

19 *R v. Income Tax Special Comrs; Ex parte University College of North Wales* [1909] 78 LJKB 576 at 578 per Cozens-Hardy MR (CA).

20 *Thompson v. Federal Cmr of Taxation* (1959) 102 CLR 315; [1960] ALR 184; 33 ALJR 384; *Oppenheim v. Tobacco Securities Trust Co. Ltd* [1951] AC 297 at 305; 1 All ER 31 at 33 per Lord Simonds ML.

21 *Commissioner for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531.

22 *Whicker v. Hume* [1958] 7 HL Cas 124; [1843-60] All ER Rep 450; 11 ER 50; *Permanent Trustee Co. of NSW Ltd v. Presbyterian Church (NSW) Property Trust* (1946) 64 WN (NSW) 8; *Taylor v. Taylor* (1911) 10 CLR 218; *Brighton College v. Marriott* [1926] AC 192; *Re Lopes* [1931] 2 Ch 130; *Australian Federal Tax Reporter, CCH Australia Limited* (1993) 7-850, 3,781.

23 *Girls' Public Day School Trust Ltd v. Ereaut* [1931] AC 12; 15 TC 529; *Cardinal Vaughan Memorial Trustees v. Ryall* [1920] 7 TC 611; *Blake v. Mayor of London* [1887] 2 TC 209; *Ackworth School v. Betts* [1915] 6 TC 642; *Bain v. Free Church of Scotland* [1897] 3 TC 537; *Brighton College v. Marriott* [1926] 10 TC 213.

24 *Oppenheim v. Tobacco Securities Trust Co. Ltd* [1951] AC 297; 1 All ER 31; *Dingle v. Turner* [1972] 1 All ER 878.

25 *Re Compton, Powell v. Compton* [1945] Ch 123; 1 All ER 198.

26 *In Re Chown* [1939] VLR 443; *In Re Income Tax Acts (No. 1)* [1930] VLR 211; *Thompson v. Federal Commissioner of Taxation* (1959) 102 CLR 315.

27 *Re Meads Trust Deed; Briginshaw v. National Society of Operative Printers and Assistants* [1961] 1 WLR 1244; 2 All ER 836.

'a fluctuating class of individuals' rather than 'a section of the public'. Charitable trusts for the education of persons of a particular religion however are valid.[28] For example, a trust for the education of daughters of missionaries has been held to be valid[29] and gifts for the establishment and support of schools,[30] scholarships, bursaries and prizes are generally held to be a means of giving effect to the 'advancement of education'.[31] So long as sporting activities form part of the activities of an educational institution, a trust for physical activities is 'charitable' in case law.[32]

Children attending private religious schools in Australia, then, in the eyes of the law, are 'the community or sections of it for charitable purposes'; private schools, for the purposes of trust and tax law, are 'public institutions'; and trusts for activities related to the educational purposes of these institutions can be categorised as 'charitable', thus attracting considerable financial benefits under taxation law.

3. Section two
Taxation exemptions and concessions for private schools

(i) Commonwealth

Exemption from Income Tax

Since the turn of the century the categories and concepts of the common law of charitable trusts have been transferred and, in part, modified by taxation and related statutes and case law.

State governments introduced a tax on income in an attempt to raise revenue during economic recessions in the nineteenth century. From the beginning they contained exemption for certain non-profit organisations. For example, Queensland exempted religious charitable,

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28 *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] AC 531; *Re Michels Trusts* [1860] 28 Beav 39; 54 ER 280 (Jews); *Dilworth v. Comr of Stamps* [1899] AC 99 (PC) (Church of England).

29 *German v. Chapman* [1877] 7 Ch D 271 (CA).

30 *Re Tyrie (dec'd)* [1970] VR 264; *McGrath v. Cohen* [1978] 1 NSWLR 621; *Smith v. Kerr* [1902] 1 Ch 774 at 778 per Collins MR (CA); *Re Hawkins; Walrond v. Newton* [1906] 22 TLR 521; *Brighton College v. Marriott* [1926] AC 192 at 204 per Lord Blanesburgh (HL); *The Abbey Malvern Wells Ltd v. Ministry of Local Government and Planning* [1951] Ch 728 at 737; 2 All ER 154 at 160 per Danckwerts J.

31 *Re Compton; Powell v. Compton* [1945] Ch 123 at 132; 1 All ER 198 at 203; *Re Leitch (dec'd)* [1965] VR 204 (scholarship for named school in Scotland); *Public Trustee v. Young* (1980) 23 SASR 239 (scholarship for named school); *Re Umpherston (dec'd)* (1990) 53 SASR 293 (scholarship to educational institute open only to Protestants); *Moir v. Angus County Council* [1962] 2 All ER 890; 1 WLR 880 (bequest to council to assist boys to continue education at secondary school).

32 *Inland Revenue Comrs v. McMullen* [1981] AC 1 at 15-17 per Lord Hailsham.

and educational institutions of a public character, trade unions, friendly societies and other societies and institutions not carrying on business for purposes of profit or gain.[33] When the Commonwealth levied income tax, these exemptions were largely copied into s. 23 of the *Income Tax Assessment Act 1936* (Cwlth) *(ITAA).*[34] All income from whatever source of these organisations is exempt from income tax. This means that fee-paying schools which are engaged in commercial operations pay no income tax providing their main purpose falls within the exemption specified in s. 23.[35]

By 1936, when the collection of income tax had become the responsibility of the Commonwealth government, exemptions for charitable institutions including educational institutions had been firmly established under s. 23 of the *ITAA*.

Administrators of a private school or system of schools would rely upon s. 23(e) or s. 23(j)(ii). If the educational institution is either an incorporated or unincorporated body it would need to be categorised as a charitable institution under s. 23(e). This section exempts the income of the following categories of institutions:

(i) religious institutions;
(ii) scientific institutions;
(iii) charitable institutions;
(iv) public educational institutions.

If the school is established by a testamentary trust or a trust deed exemption from income tax can be sought under s. 23(j)(ii). This section exempts funds for public charitable purposes established by will or trust deed provided the fund is actually being applied for those purposes.

A written application to the Commissioner setting out the school's character, purpose, activities and the nature and sources of its income is required.[36] Since many church schools are owned and administered by Church Property Trusts established by Statute, this application for exemption is generally an administrative formality only.

There is relevant case law respecting the meaning of a 'public educational institution'. In 1923, Justice Isaacs held that the phrase meant a public body providing either mental or bodily teaching or training.[37] In 1955, the majority of the High Court of Australia held

33 *Taxation Act 1884* (SA); *Income Tax Act 1902* (Qld), s. 12; *Income Tax (Management) Act 1912* (NSW), s. 10; *Taxation Act 1927* (SA), s. 18; *Land and Income Tax Assessment Act 1907* (WA), s. 18.

34 *Income Tax Assessment Act* No. 27 of 1936; No. 88 of 1936 (Cwlth).

35 For a summary of recent cases illustrating this issue refer, Gjems-Onstad, O., 1993, *'Money Pouring Out of its Ears—On the Taxation of Really Profitable Non-profit Organisations in Australia'*, Working Paper No. 23, Program on Non-profit Corporations, QUT .

36 *Australian Master Tax Guide 1993* CCH 7-010.

37 *Chesterman v. Federal Cmr of Taxation* (1923) 32 CLR 362.

that the concept of education covered more than mere book learning and any category of subjects which might be thought to comprise general education, as distinguished from education in specialised vocational subjects. [38]

The Taxation Commissioner has stated that universities, colleges and schools managed by public bodies are exempt from income tax, and there is case law to suggest that a private school is not necessarily non-public because it is religious, open to only a section of the community, or founded, owned and occupied by a corporate entity.[39]

Case law was settled earlier this century in Great Britain. There is little case law in Australia. This indicates little or no dispute in the area. The categories of 'public educational institutions' however are not closed. The boundaries have now been extended to include the local Pony Club.[40]

Most Australian private schools could also be categorised as 'charitable institutions' under s. 23(e) of the *ITAA*. Since the term 'charitable' has not been defined in the Act, the common law definition has been relied upon in tax law. Since schools fit neatly into the 'advancement of education' category since the *Pemsel* case,[41] and since, under case law they are 'public' institutions, they would be exempted from income tax.[42] Scholarships and other education grants could also be exempt from tax under s. 23 (ya)-(za) of the Act. Any organisation or bureaucracy established to administer grants to exempted private schools would itself be exempt. A foundation established as a conduit for the funding of other organisations however, must ensure that the beneficiary organisation is exempted from income tax.

Categorisation as a charity for income tax purposes assists private schools with exemption from income tax on interest earned from funds deposited in bank accounts, building societies, credit unions, finance companies, merchant banks, unit trusts, government bodies and solicitors. Tax file number legislation was introduced from July 1991 to force deduction of tax from interest bearing investment accounts. Exemptions are available for 'charitable organisations'. These

38 *Lloyd v. Federal Cmr of Taxation* (1955) 93 CLR 645 (the purposes of the Navy League Sea Cadets were found to be educational).

39 *Girls Public Day School Trust v. Ereaut* [1931] AC 12; 15 TC 529; *Cardinal Vaughan Memorial Trustees v. Ryall* [1920] 7 TC 611; *Blake v. Mayor of London* [1887] 2 TC 209; *Ackworth School v. Betts* [1915] 6 TC 642; *Bain v. Free Church of Scotland* [1897] 3 TC 537; *Brighton College v. Marriott* [1926] 10 TC 213; *Case W43* 89 ATC 417.

40 *Case W43* 89 ATC 417.

41 *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531.

42 *G. Thompson v. Federal Cmr of Taxation* [1959] 102 CLR 315 at 321 per Dixon CJ.

exemptions are also extended to financial institutions tax on debit and credit transactions.[43]

In practical terms income from scholarship trusts; funds to build and maintain school buildings; funds to provide computers; funds to provide books for school libraries; funds for parents and friends associations; and funds to found chairs of study at colleges and universities are exempted from income tax.

Apart from the Tax Office there is no regulatory body which monitors the activities of private schools categorised as 'public educational institutions' or 'charitable institutions'. Nor is there any known computation of tax revenue foregone by the public treasury.[44]

Deductions for donations

The Commonwealth *ITAA* also relieves a donor from tax liability on moneys or property given to or for charitable purposes. Genuine gifts of more than $2.00, made to a 'public benevolent institution' or any one of a list of 90 specified organisations or funds, are deductible.

Amendments were made to this and other legislation in the 1920s after the *Chesterman* case.[45] In this case the High Court considered a trust, which provided prizes for competitive tests of physical, moral and literary excellence, irrespective of means. The Court held that it did not qualify for exemption under the *Estate Duty Assessment Act 1914* (Cwlth). Justices Isaacs, Rich and Starke preferred the interpretation of charitable to mean 'relief of human suffering' rather than the technical legal meaning of 'charitable' in the *Pemsel* case[46] which included religious and educational institutions per se. In 1926 however, the Privy Council reversed the Australian High Court decision, insisting on the application of the strict legal meaning of the terms.[47] Parliament intervened. Revenue and related legislation was amended to substitute the term 'public benevolent institution' for that of 'charitable purpose'.

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43 *Bank Accounts Debits Tax Act 1982* (Cwlth), s. 3(1)(a)(iv)(A); *Financial Institutions Duty Act 1982* (Vic.), s. 25(12)(d) (accounts of 'charitable institutions' exempt from duty). From January 1991, the Commonwealth vacated the field of 'debits' taxation leaving it to the States to determine whether to continue the levy themselves. See *Debits Tax Act 1990* (Qld); *Debits Tax Act 1990* (NSW); *Debits Tax Act 1990* (Vic.); *Debits Tax Transfer Act 1990* (Tas.).

44 Verick, A. and Lamerton, J., 'Taxation Concessions for Charitable Bodies and Philanthropies: Administration of the Tests', in Krever, R. and Kewley, G. fn. 4 at 38-39.

45 *Chesterman v. Federal Court of Taxation* (1923) 32 CLR 362.

46 *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531.

47 *Chesterman v. Federal Cmr of Taxation* (1923) 32 CLR 362; *Chesterman v. Federal Cmr of Taxation* [1926] AC 128; (1926) 37 CLR 317.

Section 78(1)(a)(ii) of the *ITAA* refers to the term 'public benevolent institution' rather than 'charitable institution' thus restricting deductions under this section to institutions designed to alleviate human suffering and poverty. An organisation whose activities are 'charitable', for example, a private school whose purpose is the 'advancement of education', does not fulfil the requirements of a 'public benevolent institution' unless it has as its main or principal object the relief of poverty, sickness, suffering, distress, misfortune, destitution or helplessness; is carried on without purpose of private gain for particular persons; is established for the benefit of a section or class of the public; offers relief without discrimination to every member of that section of the public which it aims to benefit; and gives aid directly to those in need.[48]

Some private religious schools such as orphanages may fit the above requirements,[49] but under this section it is doubtful whether schools like Scots College or Riverview could apply. With the present lack of public information or regulation however, there is no way of knowing. Meanwhile, a useful deduction loophole has been provided for those who wish to give donations to these institutions.

The 'public benevolent institution' clause is only one of many. Section 78 of the *ITAA* lists 90 eligible organisations to which donors may give donations of more than $2.00 for income tax deduction purposes. One of these is a 'school building fund.'[50] Donors may obtain income tax deductions for gifts to a:

> public fund established and maintained exclusively for providing money for the acquisition, construction and maintenance of a building used, or to be used as a school or college.

In case law this has been limited to buildings used as part of a school complex. While retaining walls for sporting ovals do not comply, gymnasiums, swimming pools, and sporting facilities which form part of a comprehensive physical education program integral to the school curriculum, fall within the ambit of the Act.[51]

Section 78(5) however exempts gifts to public funds established and maintained for the purpose of providing money, property or other benefits to or for funds, authorities and institutions and for specified

48 *Taxation Determination TD 92/11*; *Perpetual Trustee Company Limited v. Federal Cmr of Taxation* (1931) 45 CLR 224; *Australian Council for Overseas Aid v. Federal Cmr of Taxation* (1980) 11 ATR 343; 80 ATC 4575; *Australian Council of Social Services Inc. and Anor v. Commissioner of Pay-Roll Tax (NSW)* (1985) 16 ATR 394; 85 ATC 4235.

49 *O'Farrell v. Bathurst Municipal Council* (1923) 40 WN (NSW) 78.

50 *Income Tax Assessment Act 1936* (Cwlth), s. 78(1)(a)(xv), Table 2.1.10.

51 *Cobb & Co. Ltd v. Federal Cmr of Taxation* (1959) 33 ALJR 174.

purposes. This could include funds under the control of the trustees or board of a non-profit private school.[52]

The Australian Tax Office has attempted to monitor deductions for donations to school building funds. The Taxation Commissioner has noticed that school fees have in fact been disguised as donations to a school building fund. Parents have been informed that unless a donation of a certain amount is made to the school building fund, then school fees will be increased. These have been ruled non-deductible.[53] The Taxation Commissioner only randomly audits the tax returns of parents and it is they, as taxpayers, who may receive penalties. The schools which establish these arrangements are not affected. The schools only hand out the receipts used by the taxpayer for tax returns.

There is no specific up to date figure available for the tax expenditure involved in s. 78 deductions for school building funds. Current statistics provided by the Australian Tax Office are bereft of useful breakdowns which are usually found in reports from taxation authorities in other nations. Accurate costings are therefore not available.

The tax deduction system however clearly illustrates how the tax system can benefit the wealthy and their 'charitable' choice. Sufficient research has been done to identify benefits accruing to patrons of private schools as a result of their tax deductible gifts. In 1983 it was estimated that about one-third of deductible gifts are made to private school building funds.[54] There is no evidence available that this figure has declined in the last decade. Commentators are noting that the nexus between the contribution of the taxpayer and the benefit which eventually returns to them or their children is sufficient to undermine the definition of their 'gift'.[55] To the layman it appears that the popular concepts of 'charity' and 'benevolence' have been turned upside-down.

Exemption from Sales Tax

Exemption from sales tax for goods is available under the Commonwealth *Sales Tax Act* for 'public benevolent institutions' and 'Universities or schools not conducted by organisations carried on for

52 *Australian Tax Practice Commentary:* Butterworths Service 186: 8/93 2600.102.

53 *Taxation Ruling IT 2438*; *Taxation Commissioner v. McPhail* (1968) 117 CLR 111 (a gift to a school building fund failed because it attracted a lower rate of fees in return.)

54 *Australia Treasury Budget Papers 1983/84:* Statement No. 4, Appendix 1, Taxation Expenditures (Canberra) AGPS (1983) at 288.

55 Verick, A. and Lamerton, J., 'Taxation Concessions for Charitable Bodies and Philanthropies: Administration of the Tests', in Krever, R. and Kewley, G., fn. 4 at 42.

the profit of individuals.'[56] It was introduced in 1952 by R G Menzies. Use rather than ownership of the goods is a requirement[57] and a restriction on the exemption is that the goods are not to be for sale by the non-profit organisation. This benefit extends to office requisites, motor vehicles and raffle tickets, as well as prizes, and badges. It also applies to goods donated by businesses or fixtures placed in a building.

Administrators of private schools obtain an exemption certificate and include it on a purchase order form. When a person has obtained goods at a tax inclusive price and sold or donated them to a private school, that person will also be entitled to claim a refund.

Once again, there is no quantifiable evidence available on the level of this tax subsidy available to the public.

Exemption from Fringe Benefits Tax

Since 1986 tax has been payable by employers on the value of 'fringe benefits' provided to employees or associates of employees. Such benefits include the use of a motor vehicle, low interest loans, free or cheap housing and payment of private school fees.

The law relating to fringe benefits tax exempts 'public institutions of a benevolent nature'.[58] Since such an institution is one 'organised for the relief of poverty suffering distress or misfortune and not conducted for the profit of individuals',[59] private schools do not usually obtain automatic exemption. Section 58 of the *Fringe Benefits Tax Act 1986* (Cwlth) exempts benefits to employees of a government body, a religious institution or a non-profit company which provides live-in care to the elderly, handicapped or those in necessitous circumstances. Some odd situations can develop. A priest in the presbytery of a church may be exempted for fringe benefits for his housekeeper and the administrators of the church school next door may qualify if there is a resident nurse in the school servicing 'disadvantaged' students from overseas, but there will be no exemption for the residence of a headmaster living on the premises.[60]

There has recently been lobbying by private school interests to gain exemption from this tax. This would enable private schools to attract and maintain staff without increasing costs and cash outflows. From the point of view of staff, their tax position could be enhanced by the inclusion of fringe benefits in their salary packages. These benefits

56 *Sales Tax (Exemption and Classification) Act 1935* (Cwlth), Division X of the First Schedule, Items 80 and 81.

57 *Federal Cmr of Taxation v. Stewart* (1984) 84 ATC 4146 (exemption is not limited to situations where ownership of the good is required.)

58 *Fringe Benefits Tax Assessment Act 1986* (Cwlth) ss. 57, 57A, 58.

59 *Taxation Commission Ruling MT 2021; Taxation Determination TD 93/11.*

60 *Australian Tax Practice Commentary:* Butterworths Service 182: 6/93,1258.

were enjoyed before the introduction of the tax in 1986. According to the Tax Office, private schools have not, to date, been successful in gaining exemption.

Other taxes
As 'charitable' institutions, private schools may also apply for exemption from tax on capital gains made through the sale of assets.[61]

(ii) State
Exemption from Payroll Tax
Payroll tax is imposed by States and Territories on 'wages' or 'cash payments' provided by employers to their employees.[62] Many States have extended the definition of taxable wages to include allowances, directors' fees, commissions, bonuses and other benefits. In Victoria 'benefits' could include an employee's private expenses such as private school fees. The value of the benefit is the amount paid by the employer.[63] In other States the benefits are those defined by the fringe benefits legislation.[64]

Most States provide exemptions for 'public benevolent institutions' and 'schools providing education at or below secondary level which are carried on by a body corporate, society or association', but not those 'carried on for the profit or gain of the individual members of those bodies.'[65] Most private church schools would thus be eligible for these exemptions.

Exemption from stamp duty
Stamp duty is a State tax imposed upon an instrument or deed rather than a conveyance or transaction.[66] Many private school bodies or their religious owners have created property trusts or incorporated bodies

61 *Income Tax Assessment Act 1936* (Cwlth), Part 111 A ss. 160AX-16022U.
62 *Payroll Tax Act 1971* (NSW); *Payroll Tax Act 1979* (NSW); *Payroll Tax Act 1971* (Vic.); *Payroll Tax (Amendment) Act 1979* (Vic.); *Payroll Tax Act 1971* (Qld); *Payroll Tax Act 1989* (Qld); *Payroll Tax Act 1971* (SA); *Payroll Tax Act 1971* (WA); *Payroll Tax Assessment Amendment Act 1981* (WA); *Payroll Tax Act 1971* (Tas.); *Payroll Tax Act 1987* (ACT); *Payroll Tax Act 1978* (NT); *Payroll Tax (Amendment) Act 1981* (NT).
63 Noakes, G. and Carrabs, A., 'Charities Philanthropies and Non-Profit Organisation: the Impact of Other Taxes,' in Krever, R. and Kewley, G. fn. 4 at 33.
64 New South Wales, South Australia, Tasmania and the Australian Capital Territory.
65 *Australian Master Tax Guide* 1993 CCH 1406.
66 *Stamp Duties Act 1920* (NSW), s. 4; *Stamps Act 1958* (Vic.), s. 17; *Stamps Act 1894* (Qld), s. 4; *Stamps Act 1921* (WA), s. 16; *Stamps Duties Act 1923* (SA), s. 5; *Stamp Duties Act 1931* (Tas.), s. 9; *Stamp Duties Act Taxation (Administration) Act 1987* (ACT), s. 99; *Stamp Duty Act 1978* (NT), ss. 4, 5, 6.

which purchase, sell or lease real estate. Exemption from stamp duty may be of substantial benefit. Most private schools would fall within exemption provisions because of their categorisation as 'charitable' institutions under common law. Benefit varies from State to State. Commissioners of Stamp Duty have discretion in determining the eligibility of organisations for exemption. In recent years financial institutions duties taxes have also been introduced on financial transactions. Private schools benefit under exemptions provisions in relevant legislation.[67]

Exemption from land tax

Land tax is a tax imposed in all states and territories apart from the Northern Territory, on the value of unimproved land. Land in the ACT is also subject to land tax, but since all land is owned by the Commonwealth the tax is struck on leasehold land.[68] In all jurisdictions land owned by charitable bodies and used for charitable purposes is exempt. Most private schools are eligible under the common law definition of 'charitable'. The State Tax Revenue Commissioner has discretion and examines the use of the land. If it is used for commercial purposes it may not be exempt.[69]

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67 *Stamp Duties (Financial Institutions Duty) Amendment Act 1982* (NSW); *Stamp Duties (Financial Institutions Duty—Charitable and Governmental Exemptions) Amendment Regulations 1983* (NSW), reg. 9; *Financial Institutions Duty Act 1982* (Vic.), ss. 25, 26, 27; *Financial Institutions Duty Regulations 1990* (ACT).

68 *Land Tax Act 1956* (NSW); *Land Tax Management Act 1956* (NSW); *Land Tax Act 1915* (Qld); *Land Tax Act 1935* (SA); *Land and Income Taxation Act 1910* (Tas.); *Land Tax Act 1990* (Tas.); *Land Tax Act 1958*; (Vic.); *Land Tax Assessment Act 1976* (WA); *Land Tax Act 1976* (WA); *Rates and Land Tax Act 1926* (ACT).

69 *Land Tax Management Act* 1956 (NSW), s. 10(1) *(land owned by or in trust for a charitable institution or religious society and land or proceeds devoted solely to religious, charitable or education purposes).*

Land Tax Act 1958 (Vic.), s. 9 *(land used exclusively for public worship, cemeteries, or charitable purposes, or, where land is vested in charitable trusts proceeds to be devoted solely to religious, charitable or educational purposes).*

Land Tax Act 1915 (Qld), s. 13 *(all land owned by or in trust for a religious society, proceeds being devoted solely to support of aged or infirm minister of society or member of their family, or to religious charitable or educational purposes...and a charitable or educational institution not carried on for pecuniary profit).*

Land Tax Act 1936 (SA), s. 12(1) *(the Commissioner, if satisfied that land owned is established for a charitable, benevolent, religious, educational or*

(iii) Municipal

Municipal Rates

Private schools are generally exempt from local council and water and sewerage rates. As with most other exemptions these benefits accrue from the application of common law principles underlying the Law of Charities. As institutions established for 'the advancement of education' they generally attract total exemption provided the land is used and occupied for charitable purposes.[70] Case law in this area deals with disputes about the rateability of land employed for playground purposes. If the playground is adjacent to the school it is exempted.[71] A piece of unimproved land a mile from a school but used for playing cricket and football has been held to be rateable.[72] It has also been held that exempt land must be used solely for 'charitable' purposes[73] and the word 'charitable' is to be understood in its strict legal sense.[74]

Local government revenue is manifestly less extensive than that enjoyed by State and Federal treasuries. Local government throughout Australia is also dependent upon State government. Loss of revenue from properties exempted from rates is monitored closely by many municipal councils and quantification of rates foregone sometimes gains media coverage.[75]

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philanthropic purpose and the whole of the net income from the land is applied to that purpose may partially exempt land from tax).

Land Tax and Income Taxation Act 1910 (Tas.), ss. 18A, 28.

Rates and Land Tax Act 1926 (ACT) (only public benevolent body is exempt).

70 *Local Government Act 1919* (NSW), s. 132(1)(d); *Local Government Act 1953* (Vic.), s. 251(1)(b) replaced by *Local Government Act 1989* (Vic.), s. 154(2)(c); *Local Government Act 1934* (SA), s. 168(2)(h)(ii); *Local Government Act 1985* (Qld), ss. 24(2), (3), (4); *Local Government Act 1962* (Tas.), s. 243(1)(a); *Local Government Act 1960* (WA), s. 532(3)(c).

71 *Halloway v. North Sydney Municipal Council* [1928] 9 LGR 14 (NSW Land and Valuation Court).

72 *Goulburn Municipal Council v. Barry* [1934] 12 LGR 77.

73 *Hall v. Municipality of Mittagong* (1911) 11 SR (NSW) 115; 28 WN 25; *Association* of *Franciscan Order of Friars Minor v. City of Kew* [1967] VR 732; LGRA 384.

74 *Salvation Army (Victoria) Property Trust v. Shire of Fern Tree Gully* [1952] ALR 85 (HC).

75 In the City of Melbourne in 1991, for example, it was claimed that local government remained out of pocket approximately $15 million for rate revenue foregone from all exempt properties. These included state owned properties, churches and charitable institutions: *Melbourne Times,* 20 February 1991.

(iv) Quantification of indirect grants to private schools

The above listed tax exemptions and deductions are by no means all of the indirect grants available to private schools throughout Australia. They are however, the most obvious grants related to their 'charitable' categorisation. It is very difficult to obtain accurate figures to quantify any of these exemptions, concessions and deductions. The Australian Tax Office does not calculate income tax exemptions under s. 23 but there has been some analysis in the 1980s on deductions for school building funds under s. 78 of the ITAA.[76] For example in the financial year 1986/87 tax expenditure from this source amounted to $76,812,000 for 357,983 taxpayers. In the 1987/88 the total tax expenditure was $75,385,000 for 366,531 taxpayers.[77] There are no further statistics available since 1988. Under the new taxation return system (TAXPAC) taxpayers are not required to itemise claims for deduction. Self regulation has meant the loss of even this meagre form of quantification. Costing of tax expenditures is no longer ascertainable because information is unavailable to officers of Revenue Analysis branch. The only possibility of estimating the magnitude of tax remission is that done through random auditing of taxation returns.

At the State level there is some evidence that quantification is done on Stamps Act and Land Tax Act exemptions in Victoria, but it is almost impossible to gain access to documentation unless the researcher is a member of the public service who has special access to the documents. Even if public servants from other departments make enquiries, they only have access to library sources. The library of the Victorian State Revenue Office has no such records. To date, enquiries from local members of Parliament have not borne fruit.

In 1985, the State Board of Education in Victoria produced an Information Paper on *Trends in Non-Government School Funding in Victoria* in which they attempted to list and quantify indirect funding as well as direct funding to these schools. It was noted that whereas government schools paid payroll tax in that State, private schools did not. The costing of this concession was estimated at between $16,800,000 and $20,200,000 per year. Payroll tax exemptions on ancillary, administrative and other support staff were not included in this estimation.[78]

At the municipal level, many Councils do in fact keep figures on rates foregone. The rateable value of exempt lands are also available in

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76 Discussions with R. Krever of Deakin University School of Law and officers of the Australian Tax Office in Melbourne and Canberra, November 1993.

77 *Taxation Statistics 1986/87,* Table 1.12 ,106; *Taxation Statistics 1987/88,* Table 1.12, 106.

78 State Board of Education (Victoria), *Information Paper: Non-Government Schools, Trends in Non-Government School Funding in Victoria,* Melbourne, February 1985.

some Council records. Quantification of local indirect grants would involve extensive research but could prove more informative than enquires at Federal or State level. Historical research may also unearth direct links between church school political pressure and rate exemption legislation over the last century.[79]

(v) Indirect funding of private schools: policy issues

Use of categorisation under the law of charities, and the transfer of this categorisation into trust and tax law, has enabled private schools to sustain indirect, and largely unquantifiable benefits for the last hundred years. Patrons of these institutions who tend to come from the more affluent sections of the Australian community, have also benefited from imaginative tax planning.

The existence of extensive, unquantifiable, unpredictable and largely unmonitored tax expenditures raises a number of public policy issues.

Indirect funding of private, 'charitable' institutions through unmanageable tax expenditures, concessions and exemptions, means that the extent of outlays of such funds by taxpayers is unpredictable. Nor can they be prioritised within an overall national educational funding policy .

Even when s. 78 deductions have been quantified, it has been done by revenue officers rather than members of an education bureaucracy. There has been no questioning to date of this situation. In fact, there has in recent years been a deafening silence from politicians, senior public administrators, churches and academics into the total funding of the non-government sector throughout Australia. The very existence of this indirect funding mine and minefield has been largely ignored. Professor Karmel listed indirect grants to private education in 1969,[80] and the Victorian State Board of Education has done extensive research into the total funding of the non-government education sector in 1985.[81] But

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79 Interview with R. Krever of Deakin University School of Law 16 November 1993; Roe, M., 'A.G. Ogilvie and the Blend of Van Diemen's Land with Tasmania', *Bulletin of the Centre for Tasmanian Historical Studies,* Vol. 1 No. 2, 1986, 54; *Mercury,* 27 October 1937.

80 *Committee of Enquiry into Education in South Australia 1969-70.*

81 State Board of Education (Victoria), *Information Paper: Non-Government Schools,* Melbourne, February 1985. These are listed as: interest subsidy scheme: $1,499,988 in 1983/84; scholarships and allowances: $600,288 in 1983/84; education allowances: $10,732,000 in 1983/84; transport allowances: $13,233,000 in 1983/84; use of Education Department facilities: costing unknown; state guarantee on repayments for loans taken out by non-government schools to build capital facilities: unknown; payroll tax concessions: between $16,800,000 and $20,200,000; exemption from land rates and taxes: unknown; cost of use of State Film Centre: unknown; income tax deductions: unknown; Commonwealth Loan

there has been little interest in recent years about the broader policy issues surrounding the indirect funding of a private sector which historically, derives its rationale from a 'charitable' view of education provision.

In the general area of social welfare policy some of the hard questions are being asked about the sources, extent and regulation of this funding. Charity fundraising has become very big business in Australia with a turnover estimated at about $3 billion dollars annually.[82] Exemptions for charitable purposes have become attractive to those in the taxpaying industry looking for loopholes.[83] And corporations have discovered that publicity benefits may accompany contributions for the benevolent institutions.[84]

The result has been a mismatch between revenue law and charity law; involuntary tax levies and private voluntary contribution; and direct grants for public services and indirect tax expenditure. The wealthy may, with the aid of skilful tax planning, benefit indirectly from contributions to their favourite 'charity'. In the field of education it is possible to identify the upside down situation where more affluent sectors of society are able to reap rewards for being charitable—in this world and the next.

(vi) Regulation

Not only is there minimal recognition or quantification of indirect funding of private sector schooling in Australia, there is little or no regulation. Apart from random Tax Office auditing of tax returns which claim blanket unspecified deductions, and discretionary enquires by State Commissioners of Taxation, there is virtually no accountability or monitoring of this form of public subsidy. There is not even a central administrative body to which the institutions may relate if they wish to engage in systematic self regulation.

Guarantee: unknown; Commonwealth short term emergency assistance: unknown. Total direct funding from public sources available through specific grants scheme to Victorian non-government schools in 1983 were costed at $348,087,000. It is now approximately $700,000,000.

82 'Charities Little Helpers,' *Australian Business,* 28 November 1990, p. 44; *Giving Australia: A Quantitative Exploration of the Philanthropic Sector of the Australian Economy for 1988/89,* Melbourne, Reark Research, February 1991, quoted in *Sydney Morning Herald,* 20 March 1991, p. 3; Lyons, M., 'Government and the Non Profit Sector in Australia: An Overview', paper delivered at Forum on Non Profit Sector in the United States and Abroad, Boston, March, 1990, pp. 1-4; Krever, R., 'Corporate Welfare and the ACTU', *Current Affairs Bulletin* 21, pp. 24-25; 'Charitable Organisations in Victoria' Draft Report of the Industry Commission, 27 October 1994, xxi-xxiii.

83 Hill, D., *Death and Gift Duties,* Canberra AGPS 1975, pp. 47-110.

84 Pratt, J., 'When Corporate Philanthropy is Not Charity', *Foundation News,* September/October 1986, p. 6.

This situation is symptomatic of the regulation of charitable funding throughout Australia generally. Such regulation as exists is piecemeal and inherited from reactions to economic depressions in the 1890's and 1930's. In those periods charitable institutions tried—and failed—to alleviate the financial collapse and resulting poverty of large sections of the Australian population.[85] State Acts which were introduced were designed to prevent, or at least reduce mismanagement of charitable enterprises and monitor their operation. These Acts were regulatory in character[86] and existing Acts which still operate are the last vestiges of earlier attempts to regulate charitable provision of services.[87]

In practice such legislative frameworks as exist have served as a classification mechanism for charities seeking tax benefits.[88] Under the *Victorian Fundraising Appeals Act 1984*, for example, there is dispensation from giving notice of or reporting the results of fundraising conducted by registered charities. Nor is there any mandatory reporting for gifts within s. 78 of the Commonwealth *Income Tax Assessment Act* of 1936.[89] Approval as a 'benevolent' society or charity has been generally regarded by authorities as a sufficient but not a necessary basis for according exemptions.

In the Anglo-American context, Australia is peculiar in its lack of regulation of charities.[90] There are similarities. In England, America, Canada and Australia, Attorneys-General are charged with a duty to protect charitable trusts. Whereas in both England and North America mechanisms or administrative machinery for monitoring of charities have been established, in Australia there is no such central body. In England the monitoring role is performed by a Charity Commission set up by the *Charities Act* of 1960.[91] English Commissioners have power to promote the effective use of charitable resources by encouraging the

85 See Carney, T. and Hanks, P., 'Taxation Treatment of Charities: Distributional Consequences for the Welfare State', in Krever, R. and Kewley, G. fn. 4 at 49.

86 *Hospital and Charities Act 1922* (Vic.), Parlt. Debates, Vol. 162, 14 November 1922, 2615 ('Control is necessary in the interest of the public, so that the benevolent ideas and sentiments of the people may be given full expression, and so that their sympathetic impulses shall not be checked through the money being devoted to wasteful and inefficient expenditure.')

87 *Charitable Collections Act 1934* (NSW); *Charities Act 1978* (Vic.); *Hospitals and Charities Act 1958* (Vic.); *Fundraising Appeals Act 1984* (Vic.).

88 *Health Care Agencies and Charities*, 1987, Melbourne, Department of Health, Discussion Paper 8, p. 14.

89 *Fundraising Appeals Act 1984* (Vic.), ss. 6(1)(b) and (i).

90 Luxton, P. 1990, Charity *Fund Raising v. the Public Interest*, Aldershot, Avebury, and 'The Regulation of Charities: Alternative Regulation Models', in Krever, R. and Kewley, G., fn. 4 at 91 ff.

91 *Charities Act 1960* (UK), s. 1(3).

development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity, and by investigating and checking abuses. In practice, they register charities, monitor income and expenditure of charitable trustees; administer cy-pres schemes or schemes of administration, give advice, and investigate breaches of trust and maladministration. Concerns have been expressed about effective policing of charities by the Commission. They are under pressure to investigate effective use of charitable funds from police, public and the Department of Inland Revenue.[92]

An American example of regulation is that of New York State. The Charities Bureau is a division of the Attorney-General's Office. It is entrusted with administration and enforcement of the New York 'Not-For-Profit Corporation Law' and with enforcement of charitable solicitation laws as well as the estate, probate and trust law. The Attorney-General registers all trustees through this body and requires regular reports and accountability.[93]

There is no equivalent regulation in Australia. The emergence of piecemeal legislative regulation of charities by a few State governments pre-dates the 'welfare state' view of citizens' rights to income and services in time of financial hardship.[94] Similarly, the private school practice of helping the deserving and able poor through 'scholarships' predates the public school ideology of educational opportunity for all citizens.

In both areas, it is impossible to come to terms with how the substantially hidden, unquantified and unregulated transfer of private resources, together with the allocative policies which they implicitly promote, impact upon modern policies and practices in a liberal, democratic state.

4. Section three
Direct aid to private schools: the federal needs policy

It was generally believed that private church schools were not funded by the state until the reintroduction of State aid in 1963 by R.G. Menzies.[95] Church schools in some States had received direct subsidies

92 'Monitoring and Control of Charities in England and Wales,' (1988) *Sixteenth Report from the Committee of Public Accounts; Report of the Charity Commissioners for England and Wales* (1990) para. 76.

93 Chesterman, M., 'Regulation of Charities: Models Here and Abroad' in Krever, R. and Kewley, G., fn. 4 at 88.

94 Marshall, T., 1973, 'Citizenship and Social Class' in *Sociology at the Crossroads and Other Essays*, London, Heineman.

95 Menzies, R.G., 1963, Campaign Opening Speech, 30 November 1963, reported *Age*, 31 November; Smart, D., 1975, 'Federal Aid to Australian Schools: Origins and Aspects of the Implementation of Commonwealth Science Laboratories and Libraries Scheme,' unpublished PhD thesis, ANU.

from scholarship and bursary systems since as early as 1899.[96] When direct aid was finally granted in substantial quantities under the Whitlam Government in 1973 it was to the rhetoric-song of 'equality of educational opportunity' and 'needs'. Direct aid granted under the federal Liberal Governments from 1963/64 to 1972 had been for interest on loans, science blocks, library grants and per capita expenditure. Such assistance had been labelled elitist.[97]

The rhetoric of 'needs' gained momentum during the 1960s under the auspices of the federal Labor Opposition. It was in part, fuelled by funding activists in state education bureaucracies[98] and underlined by researchers exposing glaring inequalities in the inner suburbs of Australian cities.[99]

The federal Liberal Party introduced legislation for direct per capita grants to private schools in December 1969, but when the Labor Party took over the treasury benches in 1972 with the blessing of the State school lobby, it was the rhetoric of 'needs' administered by the Schools Commission which was used to blunt and finally neutralise this lobby's traditional opposition to state aid to private schools for the next decade.

Members of the interim schools commission were carefully chosen. No supporter of State schools who might oppose grants to private schools was included.[100] Legitimation of direct grants to a 'needy' private sector was mooted in the Report of the Interim Schools Commission[101] and implemented by its successor, the Schools Commission during the next decade.

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96 Ely, M.J., 1967, 'History of the Development of the Curriculum in Queensland's State Secondary Schools', MEd, University of Queensland.

97 In the years 1969 to 1972 State school candidates stood in Federal and State elections, protesting the reintroduction of state aid to private schools and government neglect of State education.

98 *Nation Wide Survey of Educational Needs,* Australian Education Council, Sydney, 1970.

99 Roper, T. 1970, *The Myth of Equality,* NUAUS, Melbourne; *The $130 Million problem: A Guide to Melbourne's Inner Suburban Schools,* Victorian Teachers Union, 1971; *The Nation-Wide Survey of Needs: A Report Prepared by the Australian Teachers Federation,* 1972.

100 Mortensen, K.G. 1985, *Politics and Sociology of Funding Australian Schools, 1962-1984,* Melbourne, p. 16 ("When nominating members of the Committee, the Minister for Education, the Hon. Kim E. Beazley chose persons who were 'middle of the road' academics or government/non-government school executives. He omitted those who were hostile to the Catholic cause, parents who opposed the principle of 'state aid' or who appeared to emphasise 'across the board' per pupil grants; also, teacher organisations who might argue for government schools and sectional interests only."); Hill, B., 'Education Gets a Realistic Idealist', *Age,* 10 January 1973.

101 *Schools in Australia,* Report of the Interim Committee for the Australian Schools Commission, 1973.

(i) Obtaining 'needy' categorisation 1973-1983

From the beginning the private school lobby indicated its inclination and determination to obtain 'needy' classifications and the attendant fiduciary benefits for private schools. There are parallels to the way they had obtained the benefits of 'charitable' classification during the long funding drought of earlier years of the twentieth century.

The Interim Committee attempted to classify more than 9000 public and private schools throughout Australia on the basis of their 'needs'. Although the reliability of data from many Roman Catholic parochial schools was low, they were all placed in the lowest category deserving the highest funding.[102] They have tended to remain there ever since.

The Committee did attempt to categorise non-systemic schools on the basis of information supplied by the schools themselves. Early categorisation led to a cry of anguish from schools which hitherto prided themselves on being well endowed. One of their champions in Parliament, the member for Petrie, Nelson Cooke, complained that:

> An independent school in my electorate which depends entirely on the support of the parents of its pupils, and which has no endowments at all is classified in the same category as the most wealthy school in Queensland.

Kim Beazley, the education minister, replied:

> They are all subject to appeal. Some of them have put in wrong returns.[103]

However, it should be noted that the Interim Committee operated in a milieu which tended to inhibit full investigation of quantifiable aspects of educational resources in a large number of private schools throughout Australia.

The first nail in the coffin of a genuine 'needs' policy came in federal parliamentary debate late in 1973. The Interim Committee proposed cutting all direct federal aid to schools they had placed in the lowest payment 'A' category. A compromise forged between the governing Labor Party and the National Party resulted in the passing of legislation to create the Schools Commission in return for retention of aid to such schools.[104]

By 1976-78 the Schools Commission was protecting Class A schools even further. Under the Fraser Government the commission recommended that such schools should receive subsidies from the federal government sufficient to bring the total funds which they received from state and federal governments up to an amount equal to

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102 Id at 57, para. 5.7.

103 House of Representatives, *Debates,* 11 October 1973, 2004.

104 Weller, P., 'The Establishment of the Schools Commission, A Case Study in the Politics of Education,' in Birch, I.K.F. and Smart, D. (eds), *The Commonwealth Government and Education 1964-76, Political Initiatives and Developments,* p. 67.

30% of standard private school costs. This meant an estimated cut of $5.23 million to state schools and an estimated increase of $8.74 million to private schools.

From the earliest days of the Schools Commission however, the majority of private schools, systemic and non-systemic were always considered more 'needy' than state schools, and 'systemic' schools 'more needy' than 'non-systemic' schools. In 1973 the Interim Schools Commission recommended that state schools receive 72.0% of the specific funds available for a proportional enrolment of 78.3%; while church schools were considered needy enough for 28.0% of the funds for their proportional enrolment of 21.5%. By July 1976 their 'neediness' coefficient was even higher. The Schools Commission recommended that State schools receive 64.3% of specific funds; while church schools were to receive 36.7%. Geelong Grammar, in 1973 the most celebrated of the category A schools was in category two by 1977, considered to have needs worth $169.00 per pupil. The average Victorian state secondary school, also considered equal to category 2, was regarded as having 'needs' in recurrent expenditure worth $125.4 per pupil.[105]

The high profile given to 'wealthy' private schools has sometimes masked the really big winners in the 'needy' classification game.[106] These were the 'systemic' schools. In the period 1974 to 1983 there was a reclassification 'downward' to more 'need' and more money of a sizeable number of schools in the Roman Catholic sector. This sector led the downward trend, but other 'Christian' schools were eventually to follow. The following table, drawn up from official documentation of the period illustrates how changes were made to classifications of schools in this period.

105 *Schools Commission: Report for the Rolling Triennium 1977-79,* pp. 37, 51, 92, 94.

106 'Neediness' classification has changed over the last two decades from alphabetical classification A-H to 1-8, then to 1-6, then to 1-3, and now to 1-12 . The principle of greater number, greater need, greater funding, has not altered.

Table 1
Non-systemic private school changes: in classification and numbers Australia wide (six states) 1974 & 1983

Category	Roman Catholic		Other Private		Total	
	1974	1983	1974	1983	1974	1983
Class 1	33	5	224	213	257	218
Class 2	107	1	47	122	154	123
Class 3	316	214	8	123	324	337
Total	456	220	279	458	735	678

*There was a change in the classification system during the first decade of the 'needs' policy. Categories A to G instituted in 1974 became 1 to 3 in 1983.

An examination of this table reveals that in 1974 there were 140 Roman Catholic non-systemic schools outside the most 'needy' highest subsidy category. In 1983 there were only 6.[107] Taking into account the result of closures and amalgamations, the majority of these schools ended up in the 'most needy poor parish schools' category as systemic schools. This shift had great financial advantages, not necessarily to the schools themselves, but to the system involved. By 1984 drop from Class 3 (Class lB by 1984) to Class 6 (Class 3 in 1984) was worth an extra $381.00 per primary pupil and $606.00 per secondary pupil. The movement from non-systemic to systemic classification within the Roman Catholic school system is illustrated by the following table.

Table 2
Variation in systemic and non-systemic Roman Catholic Schools Australia: (six states)

Category	1974	% of Total	1983	% of Total	Difference
Systemic	1252	73.3%	1422	86.6%	+ 170
Non-Systematic	456	26.7%	220	13.4%	- 236
Total	1708	100%	1642	100%	- 66

107 Table 1 was compiled from the *Australian Government Gazette* No. 14, 12 February 1974; and the *Commonwealth of Australia Government Gazette,* No. S 233, 5 October 1983. The six non-systemic Roman Catholic schools were:
i Kincoppal Convent—Rose Bay, NSW;
ii St Ignatius College—Lane Cove, NSW;
iii Loreto Convent—Kirribilli, NSW;
iv Loreto Convent—Normanhurst, NSW;
v Sacre Coeur—Glen Iris, Victoria;
vi Xavier College—Kew, Victoria.

Most of the schools which disappeared from the 'non-systemic' listing appeared later under the 'systemic' classification. Schools such as Genezzano Convent, Toorak, for instance, disappeared from the non-systemic list and reappeared under the 'systemic' and 'most needy' classification. Once such Victorian schools became systemic however, they came under the funding administration of the increasingly centralised church bureaucracy of Victoria.[108] Their federal subsidies were received by the bureaucracy which acted as a conduit for government grants. This meant that schools classified as 'most needy' did not always receive the funding allocation calculated by the Commonwealth Schools Commission. In relation to recurrent funding for 1981, for instance, the Catholic Education Office of the Melbourne Archdiocese received $520,017 in recurrent grants for Genezzano but only paid $390,996 to the school. For Loreto Convent $544,716 was similarly paid to the central bureaucracy from Canberra, but only $365,052 was passed on to the school. The central administration was engaged on a program of expansion in developing areas. Funds attracted by established schools were, in part, routed to these new schools. With one or two exceptions, all new Roman Catholic schools were classified as 'systemic' and therefore 'most needy.'[109]

It became apparent that Roman Catholic bureaucracies were engaged in a program of expansion, largely at public expense, rather than a redress of 'neediness' in, for instance, the poor parish schools of inner city suburbs. It became increasingly difficult however, to calculate from the annual School Commission reports alone, what direct grant payments were being made to each school. For instance, for 1979, according to the *State Grants Act*, the Class six primary recurrent per capita payment was set at $329.00. The table below presents a sample of actual and listed payments made to Roman Catholic parish primary schools in Victoria in 1979.

108 This Table was compiled from information in the *Australian Government Gazette* No. 14, 12 February 1974; *Report: Financial Assistance Granted to Each State in 1974,* Schools Commission, July 1975; and *Commonwealth of Australia Government Gazette* No. S 233, 5 October 1983.

109 *Council for the Defence of Government Schools: Submission to the Schools Commission with Respect to Various Reports by the Schools Commission: Call to Reject State Aid,* ch. 2, 1984.

Table 3

Variation of actual payments from statutory listed 1979 Federal recurrent per capita rates for some Roman Catholic Parish primary schools

Victoria 1979

	Payment		Variation			
Suburb/Town	**Actual**	**Listed**	**Above Amnt (%)**		**Below Amnt (%)**	
Inglewood	$1065.5	$329.0	+$735.5	+224%		
Bungaree	$ 695.5	$329.0	+$366.5	+111%		
Murtoa	$ 653.5	$329.0	+$324.5	+99%		
Penshurst	$ 587.0	$329.0	+$258.0	+78%		
Donvale	$ 490.9	$329.0	+$161.9	+49%		
Sunbury	$ 460.4	$329.0	+$131.4	+40%		
West						
Collingwood	$ 370.7	$329.0	+$ 41.3	+13%		
North Melb.	$ 309.7	$329.0			-$19.3	-6%
Flemington	$ 277.1	$329.0			-$51.9	-16%
Fitzroy	$ 259.0	$329.0			-$70.0	-31%
Footscray	$ 227.5	$329.0			-$101.5	-31%
West						

An examination of the Class 6 schools in Table 3 reveals a large variation from the primary recurrent Statutory rate of $329.00 per pupil. The two extremes in the above table indicate a high actual payment of $1065.50 at Inglewood, a country town, developing suburbs, and a low of $227.50 in the inner city working class suburb of Footscray West.[110]

By 1980 it was becoming apparent to some observers that the 'needs' policy had been turned on its head. The stated purpose of the policy had been to assist schools in the poorer areas of Australia. The rhetoric had emphasised the plight of inner suburban 'poor' parish schools and the need for subsidisation to lift their resources to a level equal to that in 'better off' areas.[111]

In practice, the schools in the 'better off' suburbs received a higher average recurrent subsidy than those in the 'poorer off' suburbs. In 1979

110 The information for Table 3 was compiled from *States Grants (Schools Assistance) Act 1979* No. 184 of 1979, p. 47; *Commonwealth of Australia Gazette* No. G15, 17 April 1979; *Report of Financial Assistance Granted to Each State in 1979, Schools Commission; Computer Run of 1979 Pupil Numbers in Each Non-Government School,* provided by the Schools Commission.

111 'Selection of Disadvantaged Schools', in *Schools in Australia: Report of the Interim Committee for the Australian Schools Commission,* May 1973, p. 97.

Roman Catholic primary schools in such Melbourne suburbs as Ivanhoe, Beaumaris, Brighton, and Black Rock received, on average, more than $110.00 per pupil more than schools in areas such as Brunswick, Flemington-Kensington, Footscray and Fitzroy.[112] At the secondary level St Kevin's Junior School at Toorak and De La Salle College Malvern received over $100.00 per pupil more than those in the inner suburbs areas.[113]

(ii) Doubts in high places 1980-1984

The Whitlam Government had fallen in 1975 and by 1979 there was an undercurrent of unrest in the ranks of supporters about Commonwealth funding of 'needy' private schools. The Schools Commission was also unpopular with some other Commonwealth Government Departments. The Auditor General questioned their accountability procedures in his 1980 Report.[114]

In 1981 there was a joint minority report attached to the Schools Commission Report submitted by Alan Marriage and Joan Brown.[115] On 13 January 1983 Prime Minister Fraser refused to endorse the re-appointment of Dr. Ken McKinnon, the foundation chairman of the Commission since 14 January 1974. McKinnon was replaced by Dr. Peter Tannock, a prominent and devout Roman Catholic layman who was chairman until 1985 when he left to take up a post with the Western Australian Catholic Education Commission.

In 1982 the whistle was blown on the 'needs' policy in the media. Even Dr. Ken McKinnon was quoted as lamenting:

> It (the 'needs' policy) is not illegal, just slippery ... It expected everybody to play the game by the declared rules ... It's like income tax—everybody manoeuvres themselves to benefit in the best possible way.[116]

Similarly Joan Kirner, representative of the Australian Council of State School Organisations from 1974 to 1978 was quoted as saying in 1983 after she had entered politics:

> It isn't sufficient to say that we will give aid according to need. We know that the needs policy can be bastardised by even a group as honest as the Schools Commission.[117]

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112 *Report of Financial Assistance Granted to each State in 1979*, School's Commission, November 1980, pp. 55-53.

113 Id, pp. 50-53; 60-61.

114 *Report of the Auditor-General (Commonwealth)*, 30 June 1980, p. 52.

115 *Commonwealth Schools Commission: Minority Statement on Report for 1982*, August 1981.

116 *The National Times*, 29 August-4 September 1982.

117 Carswell, P., 'It's time for the curriculum issues' *Victorian Teacher*, No. 2, April 1983, 12 at 13.

Joan Kirner had entered the Victorian parliament and was an aspirant Minister for Education when she exercised the benefit of hindsight to reminisce on her Schools Commission days. It should be noted however that she did not produce a minority report during those years.

(iii) State School reaction

Post-Kirner, adverse state school reaction firmed up. Two dissenting reports were produced by State School representatives. One came from Joan Brown, from the Australian Council of State School Organisations and the other from Van Davy, from the Australian Teachers Federation.

It seemed that the 'state aid' debate had not yet laid down and died, but was alive, if not startlingly well, and out of the control of the Schools Commission.[118]

The Labor party ascended to the Treasury benches in 1983 and the Labor Minister for Education, Susan Ryan, attempted to initiate an educational policy based on 'needs' which recommended phasing out of grants to non-government schools which reached required resource levels. These proposals were met with concerted opposition from the non-government education sector. The government was then presented with a report from the Schools Commission which contained recommendations for increased funding of the private sector for the period 1984 to 1988, based on a scale of 'needs' involving twelve categories. Van Davy, the Australian Teachers Federation representative dissented:

> As can be seen from ... the Majority Report, government schools have been treated comparatively poorly by all Commonwealth Governments since 1973. (Karmel) The 'primary obligation' of the Commonwealth Government to government schools has been progressively reduced to the point where it has now been effectively abandoned.
>
> Government school students receive an average of $135.00 per child per year from the Commonwealth Government, while each student in a subsidised private school received between $342 and $1,055 per year.
>
> A private level 3 secondary school with 1,000 students will receive in 1984 a general recurrent grant of $1,055,000 from the Commonwealth Government.

After noting the increasing level of State government subsidisation of private schools he concluded that governments in Australia were subsidising private schooling well in excess of $1 billion per year. He

118 Connors, L., 'Schools Commission was Fated to Become a Political Albatross', *Canberra Times*, 3 May 1988.

attempted to transpose the rhetoric of 'needs' from the private to the public sector.[119]

Van Davy's minority report did not substantially change the developing monopoly on 'needs' by the private sector. But it may have shortened the life of the Schools Commission.[120] This interpretation of the demise of the Schools Commission was canvassed in the media some years later.[121] Lyndsay Connors, a member of the Commission in 1984 and acting chairwoman from 21 January 1985 to 20 May 1985, took the view that the Schools Commission was fated to become a political albatross once it could no longer deliver the support of State School organisations. [122]

Van Davy's response is of interest since it places the 'needs' policy in the broader public policy and historical context:

> No doubt a credible history of the Schools Commission will be written following consultation with, but not by, the central characters themselves. Additional points worth considering by future historians should include:
> 1 The majority report's purpose was to lock in the Government to huge support for a rapidly multiplying system of poor church schools, socially separatist and ethnic-based schools, and increasingly wealthy private schools.
> 2 As a consequence the special-purpose programs for disadvantaged groups, which attracted support for the commission from government schools, were exposed as vulnerable to the onslaught of deficit-cutting money-ministers who proceeded to cut a swathe through them.
> 3 The commission's commitment to government schools was too small, and lacking in purpose, to attract offsetting political or bureaucratic support.
> 4 It was the majority report which was overwhelmingly condemned by most of those associated with the 75 per cent of students in government schools. The commission was doomed the moment the majority report was made public.
> 5 The main architects of the majority report (Peter Tannock, who now heads the Western Australian Catholic Education Commission, and Jim McMorrow, now a senior officer of the National Catholic Education Commission) needed the support of the central political figure appointed from the government-school sector in order to make the plan stick enough to gain government approval. That crucial alliance with Lindsay Connors was established early in the processes leading to the majority report.

119 Commonwealth Schools Commission, *Funding Policies for Australian Schools,* Canberra, April 1984, pp. 121 ff.

120 Connors, L., fn. 118.

121 Maslen, G., *Education Age,* 24 May 1988.

122 Connors, L., fn. 118.

6 The claims of the Brown/Davy minority reports subsequently proved correct as events unfolded to the great disadvantage of government schools.

... Finally, I will not pine for the Schools Commission. It had two major flaws.

First, its role was never connected to the pursuit of national economic and social objectives. Its attention was directed to the resource needs of schools, not the needs of the nation and the common good. Thus the issue of state aid dominated the agenda, rather than being a sub-item consequential to the resolution of curriculum policies linking national education objectives to national social and economic policy.

Second, the commission would always need reconstructing as soon as the forces for social unity and democracy insisted on the 'primary objective to government schools' as strongly as the forces for social separatism and exclusiveness had insisted on the 'prior right of parents'. The Schools Commission set the scene for this medieval dogfight, unhappily diverting many of us away from the focus of our life's work.[123]

5. Section four
More of the same: 1983 to 1993

Schools Commissioners and dissenters have come and gone. There has been no real change in the pattern of 'needs' funding of the private education sector during the last decade. The decline in the number of non-systemic schools in the Roman Catholic school sector has continued. There has been a decline of one third—or 73 non-systemic schools—from the non-systemic classification, and an increase of 68 systemic schools since 1983. Tables 4 and 5[124] illustrate this development. A similar pattern has also developed in this period for non-Catholic private schools. Although non-systemic schools have increased by 121, of these 109 are in the lower range of the 'needy' category.

123 This is the text from a letter to the Editor, *Canberra Times,* 8 August 1988, by Van Davy.

124 Figures for Tables Four and Five were compiled from the *Commonwealth of Australia Gazette,* No. S 233, 5 October 1983 and the *Commonwealth of Australia Gazette* No. P 29 of 18 October 1993.

Table 4
Private school changes in numbers and classification
Australia (six states)
Non-systemic

1983 &1993

	Roman Catholic		Other Private		Total	
	1983	**1993**	**1983**	**1993**	**1983**	**1993**
Class 1	5	3	213	196	218	199
Class 2	1	7	122	141	123	148
Class 3	214	137	123	232	337	369
Total	220	147	458	579	678	716

*For comparison purposes the categories have been reduced to 3. This was the number in 1983 but it changed to 1-12 in 1985.

Table 5
Variation in systemic and non-systemic
Roman Catholic schools
Australia (six states)
1983 & 1993

Category	**1983**	**% of Total**	**1993**	**% of Total**	**Difference**
Systemic	1422	86.6%	1490	91.0%	+ 68
Non-Systematic	220	13.4%	147	9.0%	- 73
Total	1642	100%	1637	100%	- 5

The increase of systemic schools in the Non-Catholic private sector is illustrated in Table 6.[125] Most systemic schools are found in the Lutheran and Seventh Day Adventist sector. Anglican schools are new arrivals in this category.

125 Figures for Table 6 were compiled from *Australian Government Gazette* No. G 28, 13 July 1976 and *Commonwealth of Australia Gazette* No. P 29 of 18 October 1993.

Table 6
Changes in types of schools: 1976 & 1993
Non-systemic to systemic

	1976			1993		
	Systemic	**Non-Systemic**	**Total**	**Systemic**	**Non-Systemic**	**Total**
Roman Catholic	1399	256	1655	1490	147	1637
Non-Roman Catholic	35	291	326	123	579	709
Total	1434	547	1981	1613	726	2339

The most graphic description of funding benefits accruing to the private sector from the federal treasury in the last decade has been provided in the 1993-1994 Budget Paper.[126] The statistical basis for this graph was provided upon request from the Federal Treasurer's office. It should be noted that these represent the most obvious and quantifiable forms of public funding of private education. They include recurrent funding from the federal treasury only. They do not include federal capital grants or state recurrent grants. Nor do they include the quantifiable and unquantifiable forms of indirect subsidies. They do however, fulfil the predictions of the Van Davy dissenting report.

Another method of illustrating statistically what has happened to public funding of the private education sector in the last two decades is to calculate recurrent funding provided by state and federal governments to individual schools. In Table 7, the first group of schools are those which are generally regarded as 'wealthier'. Their funding, as noted, was the subject of debate in both 1973 and 1983. In those years the 'needs' of such schools were scrutinised by the Interim Schools Commission and the Minister for Education, Susan Ryan respectively. The second group of schools have generally fitted into the 'more needy' category. The total funding amounts listed are for per capita recurrent funding only. [127]

126 Budget Paper No. 1, 1993-1994, *Budget Statements 1993-1994,* p. 3.59.

127 The figures for both State and Federal governments for both 1970 and 1993 are obtained by multiplying the published per capita rates for each school by the number of pupils. Both the Federal and State governments published per capita funding rates for each school in the years covered by the table. The pupil numbers for each school were obtained from the following sources:

1. For 1970 see the *Parliament of the Commonwealth of Australia 1971,* Parliamentary Paper No. 104, p. 1.

Bald and inadequate as the figures are, they illustrate benefits accruing to educational institutions in Australia which have gained the moral, political, and financial initiative in the 'art of crying poor'.

Table 7
Increases in per capita recurrent funding
Selected Victorian private schools
1970 & 1993

		1970			1993		
		State	Federal	Total	State	Federal	Total
Geelong Grammar	Corio	26,680	33,350	60,030	352,933	575,183	928,116
M.L.C.	Kew	79,180	102,545	181,725	1,448,668	2,026,984	3,475,652
Scotch	Hawthorn	56,320	73,840	130,160	675,887	1,086,841	1,762,728
Wesley	Prahran	42,440	54,850	97,290	1,011,028	1,625,438	2,636,466
Xavier	Kew	28,560	35,700	64,260	624,750	873,250	1,498,000
Aquinas	Ringwood	37,600	47,000	84,600	1,301,194	2,890,790	4,191,984
De La Salle	Malvern	30,920	39,910	70,830	1,148,509	2,421,490	3,569,999
Kilbreda	Mentone	33,920	45,020	78,940	1,009,050	2,241,750	3,250,800
Mt Lilydale	Lilydale	12,960	17,180	30,140	1,300,233	2,888,655	4,188,888
Parade College	Bundoora	30,280	37,850	68,130	1,424,202	3,164,070	4,588,272
St. Bede	Mentone	44,040	55,970	100,010	1,271,634	2,671,890	3,943,534
St. Bernard	Essendon	31,920	39,900	71,820	1,061,905	2,359,175	3,421,080
St. John	Dandenong	17,840	22,950	40,140	1,392,484	3,093,615	4,486,104
St. Monica	Epping	18,360	22,300	41,310	964,844	2,143,540	3,108,384

It can be noted that in 1970, the first year of federal per capita funding, all private schools in the six states of Australia received a total of $24,272,010. This is less than the projected amount received in 1993 for the fourteen schools listed above. It is estimated that, on present projections, federal and state per capita funding of private education in Australia will be approximately three billion dollars by the turn of the century.

6. Section five
Something old and something new

It was not necessary to be a prophet or the son of a prophet to predict the future of the 'needs' policy in 1973.[128] And, without adhering to a

2. For 1993, figures are based on the 1992 School populations provided by DEET (Department of Employment and Training) in computer format as requested.

128 Advertisement in *Age*, 12 July 1973 by the Council for the Defence of Government Schools; also see similar advertisements in *Age*, 24 February 1983; 22 June 1977; and 2 December 1977.

cyclic view of history, there is nothing new in the use and abuse of 'charitable' trusts and institutions by the powerful and wealthy while the poor go begging.

In the Middle Ages Gregory lX issued a Papal Decretal urging the faithful to seek their salvation by bequeathing part of their wealth to the support of pious causes:

> [The day of harvest should be anticipated] with works of great mercy, and, for the sake of thing eternal, to sow on earth what we should gather in Heaven, the Lord returning it with increased fruit.[129]

An impious testator who ignored this exhortation might be denied absolution and interred in unconsecrated ground.[130] A similar fate might await a man who died intestate. To ensure his salvation the Church obtained the right to administer his estate and distribute a portion 'ad pias causas'.[131] By the reign of Henry III English ecclesiastical courts had secured an exclusive jurisdiction over the testament of personality.[132] Considerable property was devoted to the endowment of chantries in England but by the beginning of the fifteenth century the testamentary jurisdiction of the ecclesiastical courts had become unpopular with the laity.[133] Later, Reformation statutes reflected concern with the wordily need of the poor rather than the fate of their souls. By 1545 there were many complaints that the 'chantries' had often been allowed to lapse through maladministration, or that their endowments had been appropriated by priests. Many were suppressed and appropriated by the Royal Treasury. The poor however, did not go away.

By the 1590s, poverty was recognised as a pressing social problem. One of the major objectives of several Elizabethan statutes, and in particular the preamble to the Statute of 1601, was to improve the management of existing charitable trusts. Apart from the repair of churches, religious objects were not included in the Statute.

> ...Religion being variable, according to the pleasure of succeeding Princes, that which at one time is held for Orthodox, may at

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129 *Letter of Authorisation for Collectors and for Charitable Institutions,* approved by the 4th Lateran Council (1215) and included in the decretals of Gregory IX; quoted by Tierney, B., *Medieval Poor Law*, University of California Press, Berkeley and Los Angeles, 1959, p. 46.

130 Pollock, F. and Maitland, F.W. 1978, *The History of English Law,* Vol. 2, 2nd edn, Cambridge University Press, 356.

131 Id at 334.

132 Maitland, F.W. 1989, *Roman Canon Law in the Church of England,* London, 130; Pollock, F. and Maitland, F.W., fn. 130 at 361-2.

133 Jones, G. 1969, *History of the Law of Charity, 1532-1827,* Cambridge University Press, Cambridge, pp. 10-11.

> another be accounted superstitious, and then such lands are confiscate...[134]

By 1640 however, orthodox religious charities were considered to be within 'the equity of the statute'.[135] And, as noted in the Introduction, the status as charities of 'schooles of learning, free schooles, schollers in universities and the education and preferment of orphans has never been seriously questioned.

By the eighteenth century what some have termed anti-clericalism and others laicism flourished in England. Concern about the abuse of 'charitable' trusts was reflected in the *Mortmain Act* of 1736. This Act was designed to prevent devises of land to charity, and was strictly imposed by the judiciary.[136] To aid an heir at law, as distinct from the charity in question, judges contrived to define charity as literally as possible and included trusts excluded by the original Elizabethan statutes. When the *Mortmain Acts* were repealed, however, cases with broadly based interpretations intended to exclude beneficiaries because they were 'charitable' remained as precedents for recognising as legitimate an ever expanding body of charitable trusts and institutions.[137] By 1891 those in search of a comprehensive definition of charity seized upon the remarks of Lord Macnaghten in the *Pemsel* case. [138] This landmark in legal history was applied in Australia and forced open the door for indirect aid to private church schools in Australia.

Attempts have been made in this country to redefine, constrain, regularise and monitor the funding of 'charities' in times of economic downturn when governments look to charitable sources for alleviation of poverty and note discrepancies between the purpose and actual implementation of such trusts. Attempts have been made to redefine charitable institutions as 'public benevolent institutions' in statute. Legislation has been passed in several states attempting to monitor and register relevant institutions; and there has been questioning of some taxation schemes.

The turbulence of the 1990s depression may produce another landmark in this history of 'charitable' institutions. Already there are signs of discontent. 'Privatisation' policies of the 'New Right' are placing expectations on private charitable relief beyond their capacity to cope with the growing numbers of the poor. There is increasing awareness and rethinking of the law of charities. Charitable institutions are being redefined as 'non-profit organisations', and there is concern

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134 Sir Francis Moore quoted in Jones, G., id at 32.

135 *Pember v. Knighton Inhabitants* [1639] Duke 82; Ford, H.A.J. and Lee, H.A. 1990, *Principles of the Law of Trusts,* Sydney, p. 824.

136 Jones, G., fn. 133, Chapter VII.

137 *Thornton v. Houle* [1862] 31 Beav 14; 54 ER 1042.

138 Ibid.

that the registration, and monitoring of such organisations is inadequate in this country. There is growing awareness even from those who wish to 'privatise' public welfare that the 'third' sector of 'non-profit corporations' must undergo scrutiny before they can be permitted to accept responsibility for 'charitable' programs.[139]

Meanwhile, those in the education sector are confronted with an extraordinary scenario. As Australian governments embrace privatisation policies, defund State systems, and forcefully close public schools, bewildered parents are raising their heads from the trenches of battle for survival of local schools to see, in the private sector, 'charitable' institutions established for the 'advancement of education' enjoying taxation benefits and increases in public funding on the basis of 'need' beyond their wildest dreams. Some are even questioning the view that education for the poor is a 'charity'.

Others returning to the rhetoric of the Enlightenment are asserting that public education is a right, not a privilege.

This story, about the art and, increasingly, the science, of crying poor has merely been an attempt to illumine present day problems and tasks by drawing attention to a time-honoured British tradition of turning the meaning and practice of words like 'charitable' and 'needs' on their heads, through application of legal fictions and political rhetoric. Perhaps have-nots will be helped to become a little more literate in the 'great games' they did not know they were playing. But it is not the historian's job, or capacity as such, to look into the entrails of strange fictional animals of British legal history, or political and administrative manoeuvres in the corridors of power, in order, thereby, to predict the future. All one can do is note the ancient Chinese curse about living in 'interesting times'.

139 See *Queensland University of Technology: Program on Non-profit Corporations, Papers and work in progress on Australian and New Zealand Third Sector Research;* Luxton, P. 1990, *Charity Fund-Raising and the Public Interest*, Aldershot; *Charitable Organisations in Australia*, Draft Report of the Industry Commission, 27 October 1994, p. 177.