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“More Bang for your Buck”? A State by State Review of duty, land tax and payroll tax exemptions available to Charities

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1 BACKGROUND

- 1.1 The charitable sector has an income that far exceeds many other industries in the Australian economy. In 2014 alone, charities had an estimated income of \$103 billion. Of this amount, it is estimated that charities spent \$95 billion pursuing their charitable purposes¹.
- 1.2 Charities have been able to utilise the majority of their income (including income that would otherwise be remitted for payment of tax) directly for their charitable purposes largely due to the various tax and duty exemptions and concessions that are available to them. Charities should be taking advantage of the full range of extensive exemptions and concessions available to them, so as to maximise the funds and resources available to improving Australian society.
- 1.3 Many of the exemptions and concessions available to charities are available from State and Territory² governments, which differ on a State by State basis.
- 1.4 As 85% of charities operate within only one State in Australia³, it is important that they are aware of the tax exemptions available to them in that particular State, as well as understanding the particular requirements and nuances of the law in that State.
- 1.5 This paper will examine the definitions of the term “charity” and how that definition varies between Commonwealth and State governments. It will examine the recent state legislative developments which have narrowed the exemptions and concessions available to charities. It will go on to examine the particular State tax concessions currently available to charities (namely on transfer duty, land tax and payroll tax); some recent judicial decisions on how State tax concessions are being applied; and what scope there may be to see concession or refunds applied that are not yet being taken full advantage of by charities.
- 1.6 The title to this paper has been changed to a question, as legislative changes in 2015 in WA, NT, ACT and SA have narrowed exemptions available. Could this be the sign of a possible narrowing in other States?

¹Australian Charities and Not-for-Profits Commissioner, *Australian Charities Report 2014 – Summary of Key Findings*, Australian Government: Australian Charities and Not-for-profits Commission <<http://australiancharities.acnc.gov.au/download/summary/>>.

² Subsequent references to “States” in the paper refer to all States and Territories in Australia, being Queensland, New South Wales, Australian Capital Territory, Victoria, Tasmania, South Australia, Western Australia and the Northern Territory.

³ Australian Charities and Not-for-Profits Commissioner, *Australian Charities Report 2014 – Summary of Key Findings*, Australian Government: Australian Charities and Not-for-profits Commission <<http://australiancharities.acnc.gov.au/download/summary/>>.



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2 THE MEANING OF “CHARITY” AT A STATE LEVEL – DIFFERENT TO THE COMMONWEALTH

- 2.1 Until the passing of the *Charities Act 2013* (Cth) (“**Charities Act**”), there was no statutory definition of the word “charity”, at either Commonwealth or State level. The definition of this term was historically determined by the courts in accordance with common law.
- 2.2 One of the earliest legislative definitions of the word “charity” is the Preamble to the Statute of *Charitable Uses 1601*⁴ (also referred to as the Statute of Elizabeth), which has been widely acknowledged as the starting point for charity law. The Preamble defines charitable purposes by listing express examples, many of which have found their way into the language of modern-day legislation. The examples listed in the Preamble assisted in shaping the four well known “heads of charity”, namely:
- 2.2.1 Relief of poverty;
 - 2.2.2 Advancement of education;
 - 2.2.3 Advancement of religion; and
 - 2.2.4 Other purposes beneficial to the community.
- 2.3 The introduction of the Charities Act adopted a statutory definition at Commonwealth level. Under the Charities Act, a charity is defined as an entity:
- 2.3.1 That is not-for profit; and
 - 2.3.2 All of the purposes of which are:
 - a **charitable purposes** that are for the public benefit; or
 - b Purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (a) above⁵.
- 2.4 The charitable purposes described in this definition⁶ encompass the familiar terms coined in the four heads of charity derived from the Statute of Elizabeth, as well as expanding those categories.

⁴ 43 Eliz 1, c 4.

⁵ *Charities Act 2013* (Cth) section 5.

⁶ *Charities Act 2013* (Cth) section 12.



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2.5 Since the introduction of the Charities Act, none of the States have amended their legislation, or enacted new legislation, to reflect the Commonwealth statutory definition of charity set out in the Charities Act.

2.6 Therefore, non-uniform State legislation and the common law meaning of “charity” has continued to be the basis for assessing whether an entity or its purposes are considered to be “charitable” at State level.

2.7 This means that the respective definitions of “charity” in respect of the various tax concessions available to charities from the State governments will be determined by reference to the legislation providing the tax concession (which will be different for each type of concession), together with the informing common law. These definitions will be discussed below in respect of each type of tax concession.

2.8 The common law starting position is that:

- the entity’s purposes must fit within one of the four heads of charity; and
- that the entity must be for the public benefit (unless it is for the relief of poverty).

2.9 It is the first limb of that requirement that has proven to be fertile ground for debate, some recent judicial decisions and some state response to expressly narrow the common law meaning.

3 STATE LEGISLATIVE DEVELOPMENTS IN 2015

3.1 Following the 2008 High Court decision in *Word Investments*⁷, the common law concept of “charity” has been expanding as the scope of entities seeking (often successfully) to claim charitable status for the purposes of state tax concessions has widened.

3.2 As stated above, the States have not enacted or amended legislation to mirror the imposition of the definition of “charity” in the Charities Act. Until recently, they had also done little to seek to narrow the widening common law scope of what was considered to be a “charity”. However, there has been significant activity in recent times as State Governments have responded to what they considered as a widening of state tax concessions due to the development (widening) of the common law understanding of charity.

3.3 Western Australia, the Northern Territory and the Australian Capital Territory have all enacted recent amending legislation which removes some “charities” from being able to obtain State tax

⁷ [2008] HCA S5



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concessions⁸ largely in response to the common law extending State concessions too generously.

- 3.4 On 9 March 2015, **Western Australia** enacted the *Taxation Legislation Amendment Act (No 2) 2015 (WA)*. It amends the respective Duties Act, Land Tax Act, Payroll Tax Act and Taxation Administration Act of Western Australia to remove exemptions for some classes of charities.
- 3.5 The introduction of the WA legislation paved the way for other States. The **Northern Territory** was next, enacting the *Revenue and Other Legislation Amendment Act 2015 (NT)*. This is further reaching than the WA act⁹, and imposes amendments on the provisions providing exemptions under the NT Stamp Duty Act, Payroll Tax Act and the Taxation Administration Act. It predominantly has the effect of restricting charitable payroll tax exemptions.
- 3.6 Shortly after this, the **ACT** enacted similar reforms¹⁰.
- 3.7 **South Australia** followed¹¹, however their restrictions were much narrower, limited to prohibiting commercial activities for conveyance duty concessions¹².
- 3.8 We will discuss their reforms in greater detail as we unpack the concession on a State by State basis.

Take homes:

- Charities will need to keep an eye on potential further statutory narrowing, particularly in the States that have not yet acted to amend their legislation.
- “Pushing of the envelope”, about whether an entity is a charity may mean some refunds of back taxes but may then lead to legislative tightening.
- Even if the States move to adopt the Commonwealth statutory definition of “charity”, some ‘carve outs’ may remain.

⁸ I am indebted to a recent paper by Assistant Professor the Ian Murray, “*The taming of the charitable shrew: State roll back of charity tax concessions*” (2016) 27 PLR 60.

⁹ Ian Murray, “The taming of the charitable shrew: State roll back of charity tax concessions” (2016) 27 PLR 54.

¹⁰ *Revenue (Charitable Organisations) Legislation Amendment Act 2015 (ACT)*.

¹¹ *Statutes Amendment and Repeal (Budget 2015) Act 2015 (SA)*

¹² Ian Murray, “The taming of the charitable shrew: State roll back of charity tax concessions” (2016) 27 PLR 54.

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4 STATE TAX EXEMPTIONS AVAILABLE TO CHARITIES CONSIDERED IN THIS PAPER

4.1 The three State-based tax concessions and exemptions available to charities considered in this paper are in respect of transfer duty, land tax and payroll tax¹³. These exemptions are very generally based upon firstly the purposes or objects of the entity, and secondly the actual activities of the entity.

5 TRANSFER DUTY EXEMPTION

The various duties legislations in Australia provide exemptions from, or concessions on, transfer duty where the property acquired will be used by a charity or put to its charitable purposes.

In order to qualify for an exemption or concession from transfer duty, the common requirement across all State duties legislations is that the entity must be a not-for-profit entity, and it must be established exclusively for “charitable purposes”.¹⁴ The term “charitable purposes” is defined differently in each State jurisdiction, and is discussed below on a State-by-State basis.

5.1 QUEENSLAND – DUTY EXEMPTION

5.1.1 In Queensland, transfer duty is not imposed on:

- a A dutiable transaction under which a charitable institution acquires dutiable property;
- b A dutiable transaction that is the creation or termination of a trust of dutiable property for the benefit of a charitable institution;
- c A dutiable transaction that is a trust acquisition or trust surrender by a charitable institution;
- d A premium for general insurance for property or undertaking of a charitable institution; or
- e An application to register or transfer a vehicle in the name of a charitable institution.¹⁵

¹³ This paper will not consider after concessions for example in respect of insurance premiums.

¹⁴

<https://www.lexisnexis.com/au/legal/results/pubTreeViewDoc.do?nodeId=TAAUAABAABAAE&refPt=TAAE&pubTreeWidth=23%25>

¹⁵ *Duties Act 2001* (Qld) section 414.
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- 5.1.2 A “dutiable transaction” includes most general dealings with property, including a transfer, agreement to transfer or surrender of dutiable property. It also includes the vesting of dutiable property, a foreclosure of a mortgagee over dutiable property, an acquisition of a new right on the creation, grant or issue of dutiable property, a partnership acquisition of dutiable property, the creation or termination of a trust of dutiable property and a trust acquisition or trust surrender.¹⁶
- 5.1.3 To claim an exemption, an entity must satisfy two criteria. It must firstly be owned by or on trust for “charitable institution” (entity condition). However, simply being a charitable institution does not in itself secure a blanket exemption over all dealings that the entity chooses to undertake. It must also use the property in question for a “qualifying exempt purpose” (use condition). (Both of these tests arise from s415(1) of the *Duties Act 2001*).

Entity Condition

- 5.1.4 The *Duties Act 2001* (Qld) refers the reader to¹⁷ the *Taxation Administration Act 2001* (Qld)¹⁸ for the definition of a charitable institution, which includes:

- f Religious bodies;
- g Public benevolent institutions;
- h Universities/colleges;
- i Primary/secondary schools;
- j Kindergartens;
- k Institutions whose principal object or pursuit is the care of the sick, aged, infirm, afflicted or incorrigible people;
- l Institutions whose principal object or pursuit is the relief of poverty; and
- m Institutions whose principal object or pursuit is the care of children by being responsible for them on a full-time basis, providing them with all necessary food, clothing and shelter and providing for their general wellbeing and protection.

- 5.1.5 The institution must also contain the usual specific not-for-profit provisions in its governing documents, including:

¹⁶ *Duties Act 2001* (Qld) section 9.

¹⁷ *Duties Act 2001* (Qld) Schedule 6.

¹⁸ Part 11A, section 149C(2).



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- n that the income and property of the entity must be used solely for promoting its objects;
- o that no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and
- p on its dissolution, the assets remaining after satisfaction or debts and liabilities must be applied to a charitable institution as that term is defined in the *Taxation Administration Act 2001* (Qld), or an institution otherwise approved by the Commissioner¹⁹.

Use Condition

5.1.6 The acquired property must be “*used solely or almost solely by the charitable institution for 1 or more*”, *qualifying exempt purposes*²⁰ for at least 1 year (or such longer period fixed by the Commissioner), beginning within 6 months after the liability for transfer duty would arise (or such later date as fixed by the Commissioner).²¹

5.1.7 A qualifying exempt purpose is defined in section 415 of the *Duties Act 2001* (Qld) as:

- q activities of a religious nature;
- r public benevolent purposes;
- s educational purposes;
- t conducting a kindergarten or preschool;
- u the care of the sick, aged, infirm, afflicted or incorrigible persons;
- v the relief of poverty;
- w the care of children under the Administration Act, section 149C(2)(h);
- x another charitable purpose or promotion of the public good;
- y providing a residence to a minister, or members of a religious order who are engaged in an object or pursuit of a kind mentioned in paragraphs (a) to (h).

¹⁹ *Taxation Administration Act 2001* (Qld) section 149C(5).

²⁰ *Duties Act 2001* (Qld) section 415.

²¹ *Duties Act 2001* (Qld) section 41

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- 5.1.8 For a premium of general insurance to be exempt from transfer duty, the charitable institution must commence using it for a qualifying exempt purpose immediately after the premium is paid for a period of at least 1 year (s416).
- 5.1.9 For an application to register or transfer a vehicle to a charitable institution to be exempt from transfer duty, the charitable institution must commence using it for a qualifying exempt purpose immediately after the application is made for a period of at least 9 months (s416).
- 5.1.10 The use conditions are being interpreted expansively by the Office of State Revenue (OSR) in Queensland bound on the Word Investments decision. That is, if a “religious institution” purchases a “leased up shopping centre” and is able to show that it intends to apply the net income of the “leased up shopping centre” to its religious purposes, an exemption will usually be forthcoming.
- 5.1.11 There is a lead time to obtain exemption in Queensland, after 4-6 weeks which may mean that in order to meet settlement timeframes, charities need to pay duty based on no exemption and later seek a refund. In Queensland this routinely follows.

Take homes:

- Has your charity paid duty on a recent dutiable transaction that it should seek a refund of?
- Allow 60 days between Contract and Settlement, to allow time for duty exemption to be sought.
- Vacant land (or ‘land banking’ of vacant land) is still problematic as “use” cannot be demonstrated.

5.2 NEW SOUTH WALES – DUTY EXEMPTION

5.2.1 In summary, New South Wales is similar to Queensland but excludes religious institutions.

5.2.2 In New South Wales, “exempt charitable or benevolent bodies” are exempt from transfer duty on certain transactions²². The definition of exempt charitable or benevolent body is set out in the *Duties Act 1997* (NSW)²³ and includes:

- a Section 275(3)(a): Any body corporate, society, institution or other institution approved by the Chief Commissioner whose resources are, in accordance with

²² *Duties Act 1997* (NSW) section 275.

²³ Section 275(3).

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its governing documents, used wholly or predominantly for the relief of poverty in Australia or the promotion of education in Australia; or

- b Section 275(3)(b): Any body corporate, society, institution or other institution approved by the Chief Commissioner which (in the opinion of the Chief Commissioner):
 - i is of a charitable or benevolent nature or has as its primary object the promotion of Aborigines; and
 - ii the dutiable transaction or instrument is for purposes as the Chief Commissioner may approve in accordance with the guidelines approved by the Treasurer or the land is being used for purposes as the Chief Commissioner may approved in accordance with guidelines approved by the Treasurer; or
- c Section 275(3)(c): any person acting as trustee for a body corporate, society, institution or other institution approved by the Chief Commissioner.

5.2.3 Section 275(3)(a) is arguably more 'light touch' on the *use condition*, as practically the duties office in NSW requires entities to demonstrate two aspects:

- d That their governing documents include the objects of either the promotion of education in Australia or the relief of poverty in Australia; and
- e That the resources of that entity are used wholly or predominantly for either the promotion of education in Australia or the relief of poverty in Australia²⁴.

5.2.4 In respect of 275(3)(b) and (c), the charitable institution must satisfy two requirements:

- f *Entity condition* - The first is that it must be, in the opinion of the Chief Commissioner, of a charitable or benevolent nature **or** have as its primary object the promotion of the interests of Aborigines. Current NSW Revenue Ruling DUT 034 states that the NSW Office of State Revenue will generally follow the analysis of TR 2005/21 when determining the charitable or benevolent nature of an institution. However, we note that that Taxation Ruling has now been withdrawn and replaced by TR 2011/4 (which is significantly out of date). Historically, the following are purposes which may be approved by the Chief Commissioner in accordance with guidelines approved by the Treasurer:
 - i the relief of poverty
 - ii the relief and prevention of sickness and disability

²⁴ Tony Newbury, Chief Commissioner of State Revenue, *Revenue Ruling No. DUT 034* (9 March 2007) Office of State Revenue <<http://www.osr.nsw.gov.au/info/legislation/rulings/duties/dut034>>.



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- iii the relief of suffering and distress caused by old age
- iv the promotion of education
- v the establishment of organisations to assist sections of the community with special needs
- vi the relief of distress caused by natural disasters or sudden catastrophes.

[NOTE: Religious Institutions are not included].

- g *Use condition* - The second requirement is that the transaction for which the exemption is claimed must be for purposes approved by the Chief Commissioner or, if the subject of the transaction is land, the use of the land must be for purposes approved by the Chief Commissioner. This generally requires demonstrating a charitable use of the property being acquired, in accordance with the principles outlined in the paragraph above.

5.2.5 The NSW Duties legislation contemplates the following transactions as exempt from transfer duty²⁵:

- h a transfer, or an agreement for the sale or transfer, of dutiable property to an exempt charitable or benevolent body;
- i a declaration of trust over dutiable property held or to be held on trust for an exempt charitable or benevolent body;
- j a surrender of an interest in land in New South Wales to an exempt charitable or benevolent body;
- k a vesting of dutiable property in an exempt charitable or benevolent body;
- l a lease of dutiable property to an exempt charitable or benevolent body; and
- m a mortgage given by or on behalf of an exempt charitable or benevolent body.

5.2.6 “Dutiable property” is a key term in determining whether a transaction is subject to transfer duty in NSW. This term is defined in section 11 of the NSW duties legislation²⁶, and includes land, shares, business assets, a statutory licence or a partnership interest. All dutiable property must be located in New South Wales to come within the ambit of this legislation.

²⁵ s275(1)

²⁶ *Duties Act 1997* (NSW) section 11.



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5.3 VICTORIA – DUTY EXEMPTION

5.3.1 In comparison with other States, the Victorian duties legislation is more 'light touch' but likely to be as broad as Qld in the transfer duty exemptions that it extends to charitable institutions.

5.3.2 In Victoria, there is an exemption from transfer duty under the *Duties Act 2000* (Vic) for:

- a Declarations of trust over dutiable or non-dutiable property, if the property is to be held on trust for religious, charitable or educational purposes²⁷; and
- b Transfer of dutiable property for religious, charitable or educational purposes²⁸.

5.3.3 There is also a limited exemption in for vehicles registered in the name of a charitable, benevolent or religious institution used in association with certain types of disability or incapacity²⁹.

5.3.4 The term "religious, charitable or educational purpose" is not defined in the Victorian duties legislation and so takes its common law meaning³⁰. The Victorian Office of State Revenue will generally seek to be satisfied of two elements, being:

- c That the purpose of the entity falls within one of the four heads of charity; and
- d The purpose of the entity must be for the benefit of the public in general or an appreciable section of the public³¹.

5.3.5 This will require a demonstration of charitable purposes, the requisite not-for-profit clauses in its governing documents, and demonstrating that its resources are practically applied to charitable purposes (as tested by its activities).

²⁷ *Duties Act 2000* (Vic) sections 38(3) and 45.

²⁸ *Duties Act 2000* (Vic) section 45.

²⁹ *Duties Act 2000* (Vic) section 233D.

³⁰ State Revenue Office Victoria, *Charities and Friendly Societies Duty Exemption* (16 June 2015) State Government of Victoria <<http://www.sro.vic.gov.au/charities-and-friendly-societies-duty-exemption>>.

³¹ State Revenue Office Victoria, *Charities and Friendly Societies Duty Exemption* (16 June 2015) State Government of Victoria <<http://www.sro.vic.gov.au/charities-and-friendly-societies-duty-exemption>>.



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5.4 TASMANIA – DUTY EXEMPTION

5.4.1 In summary, exemptions are far more restrictive and only available for **gifts** of property.

5.4.2 The *Duties Act 2001* (Tas) extends a simple, limited exemption for dutiable transactions that are for no consideration and that are solely in furtherance of a charitable, religious or educational purpose, or to or in favour of any corporation or association that is incorporated or associated for any such purpose³².

5.4.3 We note the requirement that the transaction must be for no consideration. Practically, this exemption would therefore apply only to transfers gifted to the charity by a donor. For assets that the charitable institution pays to acquire, this provision would mean that charitable institutions could not rely on this transfer duty exemption and would be subject to full transfer duty on such a transaction, notwithstanding that the assets may be being put to charitable use.

5.4.4 Again, the term “charitable, religious or educational purpose” is not defined in Tasmanian duties legislation. The Tasmanian Revenue Office has not published any indication of the criterion it applies when determining whether a transaction is considered to be charitable, religious or educational or whether a recipient corporation or association is charitable, religious or educational. We would therefore turn to the common law meaning.

5.4.5 A dutiable transaction under this legislation is considered to be:

- a a transfer of dutiable property;
- b declaration of trust;
- c a grant or surrender of an interest in land in Tasmania;
- d a foreclosure of a mortgage over dutiable property;
- e an application for the amendment of a strata plan;
- f any other transaction that results in a change of beneficial ownership of dutiable property; and
- g the vesting of dutiable property.

5.4.6 Dutiable property is specifically defined in section 9³³, and includes land, mineral tenements, fixtures to land or mineral tenements, a land use entitlement, a partnership interest and options to purchase dutiable property.

³² *Duties Act 2001* (Tas) section 53(n).

³³ *Duties Act 2001* (Tas) section 9.



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5.5 SOUTH AUSTRALIA – DUTY EXEMPTION

5.5.1 In summary, exemptions are Qld like, but “commercial properties” are excluded.

5.5.2 The *Stamp Duties Act 1923* (SA) section 71(5)(j) effectively provides that a transfer of property:

- a to a body established wholly for charitable or religious purposes [*entity condition*]; **and**
- b [*use condition*] where the Commissioner is satisfied that the property will not be used (wholly or predominantly) for commercial or business purposes (including on the basis that this paragraph will not apply even if any revenue, income or other benefit arising from the use of the property for commercial or business purposes will be applied towards the charitable or religious purposes of the body)

shall be deemed not to be a disposition of property which attracts transfer duty.

5.5.3 Paragraph b above is the result of the recent 2015 amendments, in response to narrowing the exemptions available for charities. This amendment expressly excludes the *Word Investments* “use condition” argument.

5.5.4 This legislation does not define “charitable or religious purpose”. Again, we would need to look to the common law definition of this phrase.

5.6 WESTERN AUSTRALIA – DUTY EXEMPTION

5.6.1 In summary, exemptions are Qld like, and *Word Investments use* is ok, **but for** professional, trade or industry associations.

5.6.2 Section 95 of the *Duties Act 2008* (WA) provides a general exemption from transfer duty on a dutiable transaction that has been entered into or occurred for charitable or similar public purposes **provided that [the 2015 amendments]:**

- the body is not a “*relevant body*”; or
- if a “*relevant body*”, the body has been brought back ‘into the fold’ by being declared a “*beneficial body*” by determination by the Finance Minister with the concurrence of the Treasurer.

5.6.3 The definition of the phrase “charitable or similar public purposes” is not defined in the WA duties act. It is discussed in *University of Western Australia v Cmr of State Taxation* (WA) (1987) 19 ATR 728 (which pre-dated *Word Investments*). In that case, a university appealed against assessments for stamp duty totalling \$1,831,855.00 relating to the purchase of **commercial**

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properties, on the basis that the conveyance was made for the purpose of a university or for charitable or similar public purposes. Relevantly, the definition of charitable or similar public purpose was discussed. It was held that a purpose is charitable if:

- a It is a purpose beneficial to the community; and
- b It is a purpose that is within the intendment of the preamble to the Statute of Elizabeth.

That is, the common law meaning was adopted and the University allowed a refund of its duty.

5.6.4 *The University of Western Australia* case decided that the words “charitable or similar public purposes” included by necessary implication the acquisition of property for revenue producing purposes for use in carrying out the activities of charitable purposes. This case foreshadows the principles in the Word Investments case, considered below.

5.6.5 2012 saw another judicial decision in WA that went against the state revenue. *The Chamber of Commerce and Industry of Western Australia* case³⁴ found that the Chamber of Commerce was a charity and so entitled to payroll tax exemption. This was a ‘bridge too far’ for the WA government which led to the 2015 amendments to the exemption regime in WA, to exclude “relevant bodies” (assuming they were not specifically let back in by being declared a “beneficial body”).

5.6.6 “Relevant body” is defined in the 2015 amendments to mean:

- a a political party;
- b an industrial association;
- c a professional association;
- d a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty; advancement of education and advancement of religion) identified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time;
- e a body that is a member of a class of bodies prescribed for the purposes of this paragraph; and

³⁴ This case is discussed in the Common law developments section of this paper.



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- f a body that [is a member of a pay-roll tax group, related body corporate, or that has a sole or dominant purpose of conferring a benefit on another relevant body].

5.6.7 We know of no determination of “beneficial body”.

5.6.8 A dutiable transaction includes a transfer or agreement for transfer of dutiable property, a declaration of trust over dutiable property, a vesting of dutiable property, a foreclosure of mortgage over dutiable property and a trust acquisition³⁵. It also helpfully expressly states transactions which are not dutiable transactions, include a transfer or lease if no consideration is paid for the transfer.

5.6.9 Dutiable property is a smaller class than other duties acts, and is simply land in Western Australia, a right, a chattel in Western Australia or a Western Australian business asset.

5.7 NORTHERN TERRITORY – DUTY EXEMPTION

5.7.1.1 In summary the exemptions are Qld like but, 2015 amendments effectively knock out the Word Investments arguments.

5.7.2 Schedule 2 of the *Stamp Duty Act* (NT) states that exemptions from transfer duty are available for exempt entities (entity condition), if the property is to be used solely by the entity for an exempt use (use condition)³⁶.

5.7.3 The term “exempt entity” is defined in section 4F(1) of that Act, and includes PBIs, religious institutions, public educational institutions and the catch-all category of “a non-profit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose”. Again, the term “charitable” should be considered in light of its common law meaning.

5.7.4 The term “exempt use” is defined very broadly in section 4F(2), being a use for purposes other than the carrying on of a commercial activity by or on behalf of the entity [2015 amendments].

³⁵ *Duties Act 2008* (WA) section 11.

³⁶ *Stamp Duty Act* (NT) Schedule 2, item 14 for dutiable property, item 18 for transfer for leases.

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5.8 AUSTRALIAN CAPITAL TERRITORY – DUTY EXEMPTION

5.8.1 In summary, the exemptions available to charities in the ACT are very limited and of little benefit to most charities that are not schools or hospitals.

5.8.2 The 2015 amendments followed the WA lead which for the purposes of transfer duty exemptions has little practical effect given how narrow the exemptions already were.

5.8.3 Schools and hospitals (or trustees for schools or hospitals) are subject to a concessional rate of transfer duty, being the small amount of \$20.00³⁷.

5.8.4 In respect of an exemption for charities, only a very limited exemption is available. Section 73B exempts from duty a dutiable transaction that is a transfer or grant of a residential lease if:

- a the transfer or grant is to a special disability trust; and
- b the Commissioner is satisfied that the property the subject of the transfer or grant is to be used as the principal place of residence of the beneficiary of the trust.

5.8.5 A full exemption is afforded to hospitals and schools (or trustees for schools or hospitals) in respect of insurance duty³⁸ and motor vehicle registration duty³⁹.

6 LAND TAX EXEMPTION

Land tax is a state-levied tax payable annually on owners of land. The amount of land tax payable is determined by reference to the total unimproved value of taxable property owned by a person or entity⁴⁰.

It is well known that a person's principal place of residence is generally exempt from land tax. All States (except for the Northern Territory) also offer exemptions from land tax for charities.

A land tax exemption generally requires that an owning or using entity be characterised as a charity in the eyes of the relevant Revenue Office (*entity condition*), as well as that entity using the land in question for charitable purposes (*use condition*).

³⁷ *Duties Act 1999* (ACT) section 64.

³⁸ *Duties Act 1999* (ACT) section 201(1)(f).

³⁹ *Duties Act 1999* (ACT) section 210 and 210A.

⁴⁰ Australian Government, *Land Tax* <<http://www.business.gov.au/business-topics/tax-finance-insurance/taxation/Pages/land-tax.aspx>>.



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6.1 QUEENSLAND – LAND TAX EXEMPTION

6.1.1 Section 10 of the *Land Tax Act 2010* (Qld) states that land is exempt land:

- a For land that is built-on, if it is used predominantly by the charitable institution for 1 or more exempt purposes;
- b For vacant land, if the charitable institution intends to use it predominantly for 1 or more exempt purposes within 3 years after the date of acquisition of the land, or such later date fixed by the Commissioner.

6.1.2 The first prerequisite to exemption is that the land be used by a charitable institution. The term “charitable institution” is defined as “an institution registered under the Administration Act, part 11A”⁴¹. See paragraph 5.1.4 of this paper for a comprehensive definition of that term.

6.1.3 The purposes for which the charitable institution may use the land are restricted. “Exempt purpose” is clearly defined⁴² and includes most ordinary charitable objectives, being:

- c activities of a religious nature;
- d a public benevolent purpose;
- e an educational purpose;
- f conducting a kindergarten;
- g the care of sick, aged, infirm, afflicted or incorrigible people;
- h the relief of poverty;
- i the care of children by—
 - i being responsible for them on a full-time basis; and
 - ii providing them with all necessary food, clothing and shelter; and
 - iii providing for their general wellbeing and protection;
- j another charitable purpose or promotion of the public good;

⁴¹ *Land Tax Act 2010* (Qld) Schedule 4 under definition of “charitable institution”.

⁴² *Land Tax Act 2010* (Qld) section 46.



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- k providing a residence to a minister, or members of a religious order, who is or are engaged in an object or pursuit of a kind mentioned in any of paragraphs (a) to (h).

Take homes:

- Has your charity paid land tax on properties that it should seek a refund of based on the *Word Investments* argument?
- Vacant land is still problematic as “use” cannot be demonstrated.

6.2 NEW SOUTH WALES – LAND TAX EXEMPTION

6.2.1 In New South Wales, an exemption from land tax is available for:

- a land owned by or in trust for a charitable body⁴³; and
- b land owned by or in trust for a religious society if the society is carried on solely for religious, charitable or education purposes and not for pecuniary profit⁴⁴; and
- c land owned by or in trust for a person or society and used or occupied by that person or society solely as a site for:
 - i A place of worship for a religious society, or a place of residence for any clergy or ministers or order of a religious society;
 - ii A school registered under the *Education Act 1990*;
 - iii A building (not being a building of which any part is used for the purpose of a commercial activity open to members of the public) owned and solely occupied by a society, club or association not carried on for pecuniary profit; or
 - iv A charitable body⁴⁵.

6.2.2 The definition of “person” above includes a company⁴⁶.

⁴³ *Land Tax Management Act 1956* (NSW) section 10(1)(d).

⁴⁴ *Land Tax Management Act 1956* (NSW) section 10(1)(e).

⁴⁵ *Land Tax Management Act 1956* (NSW) section 10(1)(g).

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- 6.2.3 In contrast with Queensland a *use condition* does not always apply.
- 6.2.4 The definition of “charitable body” is set out in the same section as the exemption, and means “a body corporate, society, institution or other body carried on solely for charitable or educational purposes and not for a pecuniary profit”⁴⁷.
- 6.2.5 Section 10P of the same Act goes on to confirm that exemption is only available for not for profits.
- 6.2.6 However, as to the definition of what “charitable or educational purposes” are (which is a prerequisite for an entity being able to satisfy the definition of being a charitable body, it appears that we must look to common law to obtain a sense of the ambit of what those purposes are.

6.3 VICTORIA – LAND TAX EXEMPTION

- 6.3.1 Charitable institutions in Victoria enjoy an exemption from land tax on land in Victoria that is:
- a For land that is built-on, used by the charitable institution exclusively for charitable purposes; or
 - b For vacant land, owned by the charitable institution and declared by the owner to be held for future use for charitable purposes⁴⁸.
- 6.3.2 We note for land that is built on, it merely needs to be used, not owned, by the charitable institution to gain a land tax exemption. This will be convenient for non-charitable companies that own land that they lease to charitable institutions.
- 6.3.3 Section 71 also provides a discrete exemption for land that is leased for outdoor sporting, recreational, cultural or similar outdoor activities if the proceeds from the leasing are applied exclusively by the owner of the land for charitable purposes.
- 6.3.4 Again, the terms “charitable institution” or “charitable purposes” are not defined in this legislation and we should look to common law for these meanings.

⁴⁶ *Land Tax Management Act 1956* (NSW) section 3.

⁴⁷ *Land Tax Management Act 1956* (NSW) section 10(5).

⁴⁸ *Land Tax Act 2005* (Vic) section 74.



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6.4 TASMANIA – LAND TAX EXEMPTION

6.4.1 Land tax is not payable in Tasmania in respect of:

- a land owned by, or in trust for or vested in, a religious denomination or religious society and used solely:
 - i For religious, charitable or educational purposes;
 - ii For the support of aged or infirm clergy or ministers of the religious denomination/society or their spouses, widows, widowers or dependent children;
 - iii As a place of worship for members of the religious denomination/society/order;
 - iv As a place of residence for clergy or ministers of the religious denomination/society or for members of the religious order.
- b land owned by, or in trust for or vested in a religious denomination or religious society, the proceeds of which are applied to a purpose listed above;
- c land owned by, or in trust for or vested in a charitable institution **and** that is
 - i exempt from the payment of income tax under the *Income Tax Assessment Act 1997* (Cth) (“**ITAA**”); and
 - ii Used solely for charitable purposes;
- d Land used solely for non-profit educational purposes and that is owned by, or in trust for or vested in, a person/body having ownership, management or control of an educational institution.

6.4.2 Therefore, the exemption is afforded to religious denominations/societies for land that is used for their religious (or religious ancillary) purposes, to non-profits with educational purposes, and to the catch-all category of charities who use the land for their charitable purposes provided that they are exempt from income tax under the ITAA.

6.4.3 The terms “charitable institution” and “charitable purposes” are not defined in this Act, and we therefore look to common law to attain the definition.

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6.5 SOUTH AUSTRALIA – LAND TAX EXEMPTION

6.5.1 An exemption from land tax may be granted for:

- a Land used solely for religious purposes⁴⁹;
- b Land owned by an association whose objects include supplying to necessitous or helpless persons of living accommodation, food, clothing, medical treatment⁵⁰;
- c Land that is occupied without payment by any persons or association carrying on an educational institution otherwise than for pecuniary profit⁵¹;
- d land that is owned by an association that is established for a charitable, educational, benevolent, religious or philanthropic purpose (whether or not the purpose is charitable within the meaning of any rule of law) and is declared by the Commissioner to be exempt from land tax on the ground⁵²:
 - i that the land is/is intended to be used wholly or mainly for that purpose; or
 - ii that the whole of the net income from the land is or will be used in furtherance of that purpose.

6.5.2 Many of these key terms are not defined in the *Land Tax Act 1936* (SA).

6.5.3 The Revenue Office of South Australia has specific forms to be filled out to claim the exemption, based upon the specific exemption sought. All of the above examples are pursuant to an “Application for exemption pursuant to Section 4 of the Land Tax Act Form”⁵³.

6.5.4 Again, the definition of “charitable purposes” is to be based upon the common law definition of that term.

⁴⁹ *Land Tax Act 1936* (SA) section 4(1)(c).

⁵⁰ *Land Tax Act 1936* (SA) section 4(1)(d)(i).

⁵¹ *Land Tax Act 1936* (SA) section 4(1)(h).

⁵² *Land Tax Act 1936* (SA) section 4(1)(j).

⁵³ Government of South Australia, *Exemption from Land Tax* (5 August 2015) Revenue SA <<https://www.revenuesa.sa.gov.au/taxes-and-duties/land-tax/exemption-from-land-tax>>.

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6.6 WESTERN AUSTRALIA – LAND TAX EXEMPTION

- 6.6.1 Western Australia provides some comprehensive exemptions in their land tax legislation⁵⁴.
- 6.6.2 Section 32 provides an exemption on a religious basis, stating that land is exempt from land tax if it is in good faith reserved or used as a site for religious purposes (including for educational purposes or as a manse);
- 6.6.3 Section 33 relates to educational institutions, extending an exemption for land that is owned by, vested in or held in trust for an educational institution and used for the purposes of providing facilities for or conducive to the attainment of the objects of the educational institution. “Educational institution” includes the main Western Australian Universities, as well as a catch-all provision of “any bona fide educational institution not carried on for the purpose of private profit or gain”⁵⁵ or a college, hostel or hall of residence affiliated with those entities and not carried on for private profit or gain⁵⁶.
- 6.6.4 Section 37 covers public charitable or benevolent institutions, providing an exemption for land owned by or held in trust for those institutions, provided that the land in question is used solely by the entity for its public charitable or benevolent purposes. The same section helps to define the term “public charitable or benevolent institution” by exclusion, that is, that it does *not* include an institution that is a relevant body (political party, industrial association, a body promoting trade, industry or commerce etc⁵⁷), unless a beneficial body determination is in force in respect of the relevant body.
- 6.6.5 Section 38 provides an exemption for land owned by, vested in or held in trust for non-profit associations if the land in question is used to promote the objects of that association.
- 6.6.6 Revenue Ruling DA/PTA/LT 18.0 provides some valuable guidance as to the interpretation of public charitable or benevolent institutions⁵⁸. It states that a body will be a “public charitable institution” when it has a *charitable purpose*. The determination of charitable purpose is derived from common law, pointing back to the Statute of Elizabeth⁵⁹.

⁵⁴ *Land Tax Assessment Act 2002* (WA).

⁵⁵ *Land Tax Assessment Act 2002* (WA) section 33(4)(e).

⁵⁶ *Land Tax Assessment Act 2002* (WA) section 33(4)(f).

⁵⁷ *Land Tax Assessment Act 2002* (WA) section 38AA.

⁵⁸ Office of State Revenue, *Revenue Ruling DA/PT/LT 18.0: Charitable Exemptions* (3 June 2015) Government of Western Australia Department of Finance
<http://www.finance.wa.gov.au/cms/uploadedFiles/State_Revenue/Duties/Forms/DA_PT_LT_18_Charitable_Exemptions.pdf>.

⁵⁹ Office of State Revenue, *Revenue Ruling DA/PT/LT 18.0: Charitable Exemptions* (3 June 2015) Government of Western Australia Department of Finance
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6.6.7 The same Revenue Ruling also defines “public benevolent institution” to mean the ordinary subset of a charity.

6.7 NORTHERN TERRITORY – LAND TAX EXEMPTION

6.7.1 Land tax is not levied in the Northern Territory.

6.8 AUSTRALIAN CAPITAL TERRITORY – LAND TAX EXEMPTION

6.8.1 In the ACT, Land Tax generally applies to all residential properties that are rented, regardless of the owner or tenant. The exemptions available are very limited.

6.8.2 Exemptions from this rule include land leased by a religious institution or order to provide accommodation to a member of the institution or order⁶⁰, and residential land owned by a not-for-profit housing corporation⁶¹. There is no general exemption extended to charitable institutions.

6.8.3 Commercial properties have not been subject to land tax in the ACT since 1 July 2012.

7 PAYROLL TAX

Charities across Australia employ over 1 million staff⁶². Therefore, the payroll tax exemption available to charities may save them significant amounts of tax that would otherwise be payable by them. Payroll tax is a State tax levied in respect of wages paid or payable to employees by an employer, where the total wage bill of the employer exceeds a certain threshold. These thresholds and rates payable vary per State⁶³.

<http://www.finance.wa.gov.au/cms/uploadedFiles/State_Revenue/Duties/Forms/DA_PT_LT_18_Charitable_Exemptions.pdf>
paragraph 18.

⁶⁰ *Land Tax Act 2004 (ACT)* Section 10(1)(h).

⁶¹ *Land Tax Act 2004 (ACT)* Section 11(1)(b).

⁶² Australian Charities and Not-for-Profits Commissioner, *Australian Charities Report 2014 – Summary of Key Findings*, Australian Government: Australian Charities and Not-for-profits Commission <<http://australiancharities.acnc.gov.au/download/summary/>>.

⁶³ Australian Revenue Offices for the States and Territories of Australia, <<http://www.payrolltax.gov.au/>>.



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7.1 QUEENSLAND – PAYROLL TAX

- 7.1.1 Payroll tax applies in Queensland if the employer's wages payment exceeds \$1.1 million per annum. The current tax rate is 4.75%⁶⁴.
- 7.1.2 Payroll tax is not payable by a charitable institution during a period where a person is engaged exclusively in the work of the charitable institution for a qualifying exempt purpose⁶⁵.
- 7.1.3 Section 14 of the Queensland payroll tax legislation states that the term "charitable institution" takes its meaning from that term in section 11A *Taxation Administration Act 2001* (Qld), however expressly excludes universities and university colleges⁶⁶. As discussed above, to be a charitable institution under that Act an entity must specifically fit into a category outlined in section 149C(2), which includes religious bodies, PBIs, schools, and kindergartens.
- 7.1.4 The work of the charitable institution must be undertaken by an employee for a qualifying exempt purpose. Section 14 of the Queensland payroll tax legislation outlines the definition of "qualifying exempt purpose"⁶⁷, which is:
- a religious activities;
 - b educational purposes (including running a kindergarten, but excluding a university or university college);
 - c public benevolent purposes;
 - d caring for sick, aged, infirm, afflicted or incorrigible people;
 - e relief of poverty;
 - f caring full-time for children by providing for their general wellbeing and providing them with food, clothing and shelter;
 - g another charitable purpose or promotion of the public good; and

⁶⁴The State of Queensland 1995 – 2015, *Payroll Tax Thresholds* (8 September 2015) Queensland Government <<https://www.business.qld.gov.au/business/employing/payroll-tax/calculating/thresholds>>.

⁶⁵ *Payroll Tax Act 1971* (Qld) section 14(2)(c)(i).

⁶⁶ The State of Queensland 1995 – 2015, *Payroll Tax Exemptions for Charities* (24 February 2016) Queensland Government <<https://www.business.qld.gov.au/business/employing/payroll-tax/exemptions/charities>>.

⁶⁷ The State of Queensland 1995 – 2015, *Payroll Tax Exemptions for Charities* (24 February 2016) Queensland Government <<https://www.business.qld.gov.au/business/employing/payroll-tax/exemptions/charities>>.

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- h providing a residence to a minister or member(s) of a religious order conducting a previously listed activity.

7.2 NEW SOUTH WALES – PAYROLL TAX

- 7.2.1 Payroll tax applies in New South Wales if the employer's wages payment exceeds \$750,000.00 per annum. The payroll tax rate is 5.45%⁶⁸.
- 7.2.2 The *Payroll Tax Act 2007* (NSW), rather than defining the term "charitable institution", specifically states the kinds of institutions that can claim an exemption from the payment of payroll tax.
- 7.2.3 Wages are considered to be exempt from payroll tax in they are paid or payable by:
 - a A religious institution;
 - b A PBI;
 - c non-profit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose (but not including a school, an educational institution, an educational company or an instrumentality of the State)⁶⁹.
- 7.2.4 "Educational company" and "educational institution" are separately defined in sections 48(3) – (5).
- 7.2.5 The section then goes on to place restraints around the specific wages that must be paid or payable in order to claim an exemption on them. The wages must be paid or payable:
 - d for work of a kind ordinarily performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purposes of the institution or body, and
 - e to a person engaged exclusively in that kind of work⁷⁰.
- 7.2.6 Administrative or management jobs in these organisations, although not being directly engaged in the charitable activity, enable the charitable activities and would satisfy the requirements of that section⁷¹.

⁶⁸ Office of State Revenue, *Payroll Tax* (24 March 2016) NSW Government: Office of State Revenue <<http://www.osr.nsw.gov.au/taxes/payroll>>.

⁶⁹ *Payroll Tax Act 2007* (NSW) section 48.

⁷⁰ *Payroll Tax Act 2007* (NSW) section 48.

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7.2.7 The employer's status will be reviewed every three years to ensure that their exemption remains valid⁷².

7.3 VICTORIA – PAYROLL TAX

7.3.1 Payroll tax applies in Victoria if the employer's wages payment exceeds \$45,833.00 per month (\$550,000.00 annual threshold). The current payroll tax rate is 4.85%⁷³.

7.3.2 The following organisations are exempt from paying payroll tax under the *Payroll Tax Act 2007* (Vic):

- a A religious institution;
- b A PBI;
- c non-profit organisation having as its sole or dominant purpose a charitable, benevolent, philanthropic or patriotic purpose (but not including a school, an educational institution, an educational company or an instrumentality of the State)⁷⁴,

provided that the wages are paid or payable to a person engaged exclusively in work of a religious, charitable, benevolent, philanthropic or patriotic nature for the institution or non-profit organisation.

7.3.3 The term "educational institution" is defined in section 48(3) – (5).

7.3.4 In most respects, the Victorian payroll tax exemptions for charitable institutions mirrors that of New South Wales.

⁷¹ Office of State Revenue, *Exempt Wages* (22 March 2016) NSW Government: Office of State Revenue <<http://www.osr.nsw.gov.au/taxes/payroll/wages/exempt>>.

⁷² Office of State Revenue, *Exempt Wages* (22 March 2016) NSW Government: Office of State Revenue <<http://www.osr.nsw.gov.au/taxes/payroll/wages/exempt>>.

⁷³ State Revenue Office Victoria, *Payroll Tax* <<http://www.sro.vic.gov.au/payroll-tax>>.

⁷⁴ *Payroll Tax Act 2007* (Vic) section 48(1)(a).

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7.4 TASMANIA – PAYROLL TAX

- 7.4.1 The Tasmanian payroll tax annual threshold is \$1.25 million per annum. The payroll tax rate is 6.1%⁷⁵.
- 7.4.2 The provisions relating to exemptions under the *Payroll Tax Act 2008* (Tas) are very similar to the New South Wales and Victorian legislation.
- 7.4.3 The same organisations as New South Wales and Victoria, albeit their Tasmanian equivalents, are exempt from paying payroll tax⁷⁶.
- 7.4.4 To claim the exemption, the wages must be paid or payable
- a for work of a kind ordinarily performed in connection with the religious, charitable, benevolent, philanthropic or patriotic purposes of the institution or body; and
 - b to a person engaged exclusively in that kind of work.
- 7.4.5 Again, the payroll tax exemptions extended to charities in Tasmania are the same as in New South Wales and Victoria.

7.5 SOUTH AUSTRALIA – PAYROLL TAX

- 7.5.1 Employers in South Australia are liable to pay payroll tax if their wages bill exceeds \$600,000.00 per annum. The current payroll tax rate is 4.95%⁷⁷.
- 7.5.2 The payroll tax exemption under section 48 of the *Payroll Tax Act 2009* (SA) is the same as that under the Tasmanian legislation.

⁷⁵ The Department of Treasury and Finance, Tasmania, *Rates and Thresholds 2014/2015 and 2015/2016 Financial Years*, Tasmanian Government (16 June 2015) <<http://www.sro.tas.gov.au/domino/df/SROWebsite.nsf/0/9C229965D02EBC2ECA257599002229E?OpenDocument&menuitem=Payroll%20Tax>>.

⁷⁶ *Payroll Tax Act 2008* (Tas) section 48.

⁷⁷ Government of South Australia, *Payroll Tax* (28 January 2016) Revenue SA <<https://www.revenuesa.sa.gov.au/taxes-and-duties/payroll-tax>>.



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7.6 WESTERN AUSTRALIA – PAYROLL TAX

- 7.6.1 In Western Australia, employers that pay or expect to pay over \$800,000.00 in wages per annum and liable to pay payroll tax in the amount of 5.5%⁷⁸.
- 7.6.2 Section 41 of the *Pay-Roll Tax Assessment Act 2002 (WA)* provides exemptions from the payment of payroll tax to charitable bodies or organisations, if:
- a An exemption is given by the Commissioner to the body; or
 - b It is a relevant body in respect of which a beneficial body determination is in force.
- 7.6.3 In order to gain an exemption, the entity must apply to the Commissioner for an exemption from liability to pay payroll tax⁷⁹. The Commissioner may grant this exemption by way of notice to the entity⁸⁰, unless is it a relevant body⁸¹.
- 7.6.4 The term “relevant body” is defined in section 42A of the legislation, and includes political parties, industrial associations, professional associations and bodies that promote trade, industry or commerce unless its purposes are charitable.
- 7.6.5 The definition of charitable body or organisation in the Glossary of that Act is a body or organisation established or carried on for charitable purposes except —
- c a body or organisation whose sole or principal purpose is the provision of tertiary education; or
 - d a college or other vocational education and training institution under the *Vocational Education and Training Act 1996*.
- 7.6.6 Unfortunately, what constitutes charitable purposes of an entity is not expanded upon in the legislation. Revenue Ruling DA PT LT 18⁸² provides commentary on the position that the Western

⁷⁸ Government of Western Australia, *Payroll Tax*, Department of Finance
<https://www.finance.wa.gov.au/cms/State_Revenue/Payroll_Tax.aspx>.

⁷⁹ *Pay-Roll Tax Assessment Act 2002 (WA)* section 41(1).

⁸⁰ *Pay-Roll Tax Assessment Act 2002 (WA)* section 41(2).

⁸¹ *Pay-Roll Tax Assessment Act 2002 (WA)* section 41(3A).

⁸² Office of State Revenue, *Revenue Ruling DA/PT/LT 18.0: Charitable Exemptions* (3 June 2015) Government of Western Australia Department of Finance
<http://www.finance.wa.gov.au/cms/uploadedFiles/State_Revenue/Duties/Forms/DA_PT_LT_18_Charitable_Exemptions.pdf>.



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Australian Office of State Revenue will take when assessing payroll tax exemptions, which includes the definition of charitable purpose, which will take its common law meaning.

7.7 NORTHERN TERRITORY – PAYROLL TAX

- 7.7.1 In the Northern Territory, employers must pay a payroll tax rate of 5.5% if the wages paid or payable by them annually exceeds \$1.5 million⁸³.
- 7.7.2 Under section 48C of the *Payroll Tax Act* (NT), wages are exempt wages if:
- a the wages are payable by a non-profit entity that carries on charitable activities; and
 - b the wages are paid or payable to a person who is engaged predominantly in the performance of services in connection with the carrying on by the entity of charitable activities and is not engaged in the performance of services in connection with any commercial or competitive activity carried on by the entity.
- 7.7.3 This section goes on to define the keys terms. “Non-profit entity” is defined in section 48A and includes religious institutions, PBIs, entities that are non-profit provided that their sole or predominant purpose is a religious, charitable, benevolent, philanthropic or patriotic purpose (and provided further that it is not an “excluded entity”, which includes schools, educational institutions and political parties).
- 7.7.4 We note the express exclusion of schools from the payroll tax exemption, which is different to that of the other States.
- 7.7.5 A non-profit entity must carry on charitable activities in order to be able to claim a payroll tax exemption. The term “charitable activities” is defined in section 48C. A non-profit entity carries on charitable activities if the entity directly carries out work that is predominantly of a religious, charitable, benevolent, philanthropic or patriotic nature.
- 7.7.6 We note that the Payroll Tax Guide issued by the Northern Territory Government⁸⁴ further clarifies their definition of the legislation. It states that should an entity be engaged in commercial or business activities, even if the proceeds of which are put towards the charitable purposes of the entity, the wages paid or payable by the entity are not exempt from payroll tax.

⁸³ Northern Territory Government of Australia 2011, *Payroll Tax*, Department of Treasury and Finance <<http://www.treasury.nt.gov.au/TaxesRoyaltiesAndGrants/PayrollTax/Pages/default.aspx>>.

⁸⁴ Department of Treasury and Finance, *Payroll Tax Guide* (March 2016) Northern Territory Government <<http://www.treasury.nt.gov.au/PMS/Publications/TaxesRoyaltiesGrants/PayrollTax/I-PRT-001.pdf>>.



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7.8 AUSTRALIAN CAPITAL TERRITORY – PAYROLL TAX

- 7.8.1 Schedule 2 of the *Payroll Tax Act 2011* (ACT) provides an exemption from payroll tax for charitable organisations. It states that wages are exempt wages if they are paid or payable:
- a by a charitable organisation (other than a charitable organisation carried on for an educational purpose); or
 - b by a charitable organisation that is a school or college (other than a technical school or college) carried on by a body corporate, society or association and providing education at or below, but not above, the secondary level of education⁸⁵.
- 7.8.2 A charitable organisation is defined in the same item. We are directed to section 18B of the *Taxation Administration Act 1999* (ACT) to find its meaning. It includes an organisation carried on or a religious, educational, benevolent or charitable purpose, but expressly excludes an organisation carried on for securing pecuniary benefits to its members (i.e. a for-profit company) and “excluded organisation” which includes political parties, industrial organisation and professional associations.
- 7.8.3 In contrast to the other States’ payroll tax exemptions, the ACT payroll tax exemption is not contingent upon the work of the employee, but rather solely upon the categorisation of the employer as a charitable organisation.

8 COMMON LAW DEVELOPMENTS

Word Investments Case⁸⁶ (High Court - December 2008)

- 8.1 Word Investments Ltd (“**Word**”) was a company limited by guarantee, which was set up for the purposes of raising funds for Wycliffe Bible Translators Australia (“**Wycliffe**”). Wycliffe is an endorsed charitable institution which primarily undertakes overseas missionary and bible translating activities. Word, however, conducted commercial business activities including a funeral business. It derived funds from that business activity to gift to Wycliffe. It also engaged in investment activities and distributed the surplus to Wycliffe.
- 8.2 Word’s objects as set out in its Memorandum of Association include:
- 8.2.1 To proclaim the Christian religion in Victoria and throughout the world;

⁸⁵ *Payroll Tax Act 2011* (ACT) Schedule 2, item 2.13.

⁸⁶ *Federal Commission of Taxation v Word Investments Ltd* (2008) 236 CLR 204.



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- 8.2.2 Carrying on any business or activity which may seem to the Company to be conveniently carried on in connection with the objects for which the Company is established;
- 8.2.3 To subscribe and make payment to any fund for religious charitable or benevolent objects of any description.
- 8.3 Word applied for endorsement by the ATO as an exempt charitable institution under the *Income Tax Assessment Act 1997* (Cth) (“ITAA 97”). Endorsement was refused on the basis that the entity’s commercial business activities were not charitable.
- 8.4 The majority of the High Court (Gummow, Hayne, Heydon and Crennan JJ, with Kirby J dissenting) found that **Word was a charitable institution**, as its objects were for the *purpose* of advancing charitable religious purposes, and that it undertook commercial *activities* only to aid its charitable purposes. They were employing indirect means to achieving their charitable purposes.
- 8.5 At paragraph 26, the majority judgment states that focus should be on whether activities are carried on in furtherance of a charitable object, rather than whether the activities in themselves are intrinsically charitable.
- 8.6 Therefore, even though the commercial fundraising activities of Word were not in themselves charitable, they were in fact charitable in character because they were carried out in furtherance of a charitable purpose⁸⁷.
- 8.7 Provided that state legislation does not expressly exclude commercial activities which are not in themselves charitable in furtherance of the charitable objects of the entity, it is our view that charities may seek to rely on the common law developments in this area.

Northern NSW Football Ltd v Chief Commissioner of State Revenue⁸⁸ (NSW Court of Appeal March 2011)

- 8.8 Northern NSW Football Ltd was a soccer club just over the border from Queensland. It engaged in activities of educating football players through seminars, club coaching sessions, and on park coaching sessions.
- 8.9 In 2009 Northern NSW Football Ltd claimed that a portion of its wages were exempt under the *Payroll Tax Act 2007* s 48 as the club met the statutory requirements of having a charitable purpose. This was either under s 48(b) as a “benevolent institution” or under s48(c) as a non-profit organisation having as its sole or dominant purpose a charitable or benevolent purpose.
- 8.10 The Administrative Decisions Tribunal Appeal panel rejected this claim and the case proceeded to the New South Wales Court of Appeal.

⁸⁷ *Federal Commission of Taxation v Word Investments Ltd* (2008) 236 CLR 204 para 26.

⁸⁸ [2011] NSWCA 51



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- 8.11 The issue in the Court of Appeal case was if Northern NSW Football Ltd's promotion of a healthy sport was beneficial to society for the purposes of the fourth limb of *Pelsem*.
- 8.12 Northern NSW Football argued that in coming to a conclusion on the issues, the club's dominant purpose should only be "ascertained by reference only to its constitutional objects and without any significant reference to its activities." This was because "the relevant inquiry is limited to the purpose of the organisation and not its actions".⁸⁹
- 8.13 The Court of Appeal rejected this test, instead applying *Word Investments*. His honour Gzell J stated that to follow the Northern NSW Football Ltd's instructions would be inconsistent with the majority in *Word Investments*, a High Court authority. The correct test requires an examination of a charitable institution's objects, and the purported effectuation of those objects in the activities. His Honour also cited *Word Investments* to note that "it would not be enough that the purpose or main purpose of an institution were charitable if in fact it ceased to carry out that purpose."⁹⁰
- 8.14 The Court of Appeal also held that no distinction could be made between the meaning of "charitable" in *Word Investments* (in the context of a "charitable institution") and "charitable" within the meaning of s 48(1)(c) and therefore the whole test in *Word* should be applied to examine not only the club's objects and constitution, but also the activities. To not do so would allow an employer to claim wages "simply because it stated charitable objects in its constitution" and "would allow an organisation to maintain its exempt status after it had ceased to carry out its charitable business."⁹¹
- 8.15 By studying the club's objects and activities, the Court of Appeal agreed with the Tribunal in finding that the dominant purpose of the club was to promote and manage football in Northern NSW, and the benefit to the community was ancillary to this. This meant that while the result of the purpose might effect some benefit on society, the club's main purpose was promotion and management of football and not charitable.⁹²
- 8.16 The club's purpose was also not "benevolent" for the purposes of s 48(b) as benevolent connotes the provision of need and aid. His Honour held that this was not a characteristic of the Northern NSW Football Ltd as the club "promotes the game of football generally and the recipients of its largesse are not in need in any sense that would characterise its activities as benevolent."⁹³

⁸⁹ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51 Para 7

⁹⁰ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51 Para 8

⁹¹ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51 Para 10-11.

⁹² *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC para 25.

⁹³ *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC Para 56



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Chamber of Commerce and Industry of WA case⁹⁴ (State Administrative Tribunal July 2012)

- 8.17 Chamber of Commerce and Industry of Western Australia (“CCI”) applied for payroll tax exemptions under *Payroll Tax Assessment Act 2002 (WA)* (“PTAA”) either as a public benevolent institution or a charitable institution. These submissions were both rejected by the Commissioner. CCI brought an appeal to the State Administrative Tribunal which had to decide whether the CCI was a “charitable body or organisation” within the meaning of s 41 of the PTAA, and therefore entitled to payroll tax exemptions.
- 8.18 In coming to a conclusion, the Tribunal applied *Word Investments* to determine that the Western Australian Chamber of Commerce was a “charitable body or organisation” for the purposes of s41 of the *PTAA* because its main or dominant purpose was charitable. This was despite the Commissioner’s contention that activities carried out were for the benefit of private members and not the public at large.
- 8.19 In deciding whether CCI operated primarily for charitable purposes, the Tribunal followed and applied *Word Investments*, stating that “it is necessary to have regard to the main or dominant purpose (or to use the expression of the trial judge in *Word Investments*, the ‘institution’s essential object’) for which CCI is established and carried on. That involves an examination of its constitution, and of activities which it carries out under the constitution.”⁹⁵
- 8.20 In its submissions, CCI described that its “central and dominant purpose” was “to ‘make it easier to do business’ through pursuing a competitive and responsible free enterprise economy” and “the charitable purpose of promotion of industry and commerce in Western Australia and Australia”.
- 8.21 The Tribunal found that the objects of CCI’s constitution, amended in 2001, supported this proposition.
- 8.22 In assessing CCI’s activities, it was shown that CCI engaged in ‘policy forums’ (such as problems employers faced with labour shortages), maintained specialist committees which advised and advocated the business industry, and provided a wide range of services for members on a fee-for-service basis. Amongst numerous others these services included running courses and events, publications and an online system to link buyer and suppliers for major Australian projects. From 2009 – 2011 the annual service fee income accrued approximately \$80 million.
- 8.23 It was held that although the institution engaged in providing commercial services (with significant revenue), this was CCI’s *means* by which to achieve the end of pursuing and promotion a free enterprise and a strong business community in Western Australia. While the end did not fall under the first three limbs of *Pemsel* – for the relief of poverty, advancement of education or

⁹⁴ *CCIWA v Commissioner of State Revenue (WA)* 2012 WASAT 146 .

⁹⁵ *CCIWA v Commissioner of State Revenue (WA)* 2012 WASAT 146 at 22.



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advancement of religion – CCI did fall under the fourth limb of the *Pemsel* as a “purpose beneficial to the community”.

- 8.24 The subsidiary issues of payroll tax on all wages were referred back to the Commissioner in light of the finding that *CC/WA* was a charitable institution. The refund was to act retrospectively to cover the whole period for which the tax exemptions were sought.
- 8.25 Amending legislation in Western Australia has now been passed removing charities that “promote trade, industry or commerce” however the case operates to illustrate the application of *Word Investments*.

PG Dukes Pty Ltd ATF Patricia Dukes Foundation v Chief Commissioner of State Revenue (Administrative Decisions Tribunal NSW – November 2012)

- 8.26 The NSW case of *PG Dukes* also illustrates the broadened definition of “charitable institutions”, particularly in relation to those organisations encompassed by the fourth limb of *Pemsel*. Here the NSW Administrative Decisions Tribunal applied *Word Investments* in deciding whether a trust should be eligible for a land tax exemption pursuant to s 10(1)(d) of the *Land Tax Management Act 1956* (NSW).
- 8.27 The facts of this case are as follows. By instrument of a will Patricia Dukes instructed that after her death the residual of her estate was to be turned into the ‘Patricia Dukes Foundation’. When she passed away in 2010, her instructions were followed. Ms Duke had **16 properties** which were to be transferred to nominated trustees to be held on **charitable trust**. The income from the trust was to be distributed to a selection of charities of Ms Duke’s choosing. However, out of the 16 properties, only one property was considered by the Commissioner to be eligible land tax exemption under s 10(1)(d) of the *Land Tax Management Act*.
- 8.28 The Foundation appealed to the Tribunal to determine that the trust was a “charitable institution” and therefore entitled to the land tax exemptions on the property. The relevant section provided that an exemption was available for land owned by a “charitable or educational institution” or owned in trust for a “charitable or educational institution”.
- 8.29 The Tribunal found that the Patricia Dukes Foundation was “charitable” and operated under the fourth limb.⁹⁶
- 8.30 The relevant test to decide whether an institution is “charitable”, , was determined by applying *Word Investments*. In applying *Word Investments* the NSW Tribunal examined the objects of the will as well as the activities of the institution in question, namely the provision of finances to a number of other charities. Block J confirmed that a dominant charitable purpose can be implemented by providing financial support to other charitable institutions, and that this was circumstances of the case.⁹⁷

⁹⁶ *PG Dukes Pty Ltd ATF Patricia Dukes Foundation v Chief Commissioner of State Revenue* [2012] NSWADT 238 para 12.

⁹⁷ *PG Dukes Pty Ltd ATF Patricia Dukes Foundation v Chief Commissioner of State Revenue* [2012] NSWADT 238 para 12.

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Grain Growers Ltd Case (Supreme Court of NSW – September 2015)

- 8.31 Grain Growers Ltd applied for an exemption from payroll tax under section 48 of the *Payroll Tax Act 2007* (NSW) on the basis that it had charitable purposes. It also sought a refund of the payroll tax paid in the previous five (5) years on the same basis.
- 8.32 The application was refused by the Chief Commissioner, and legal proceedings were commenced.
- 8.33 Grain Growers asserted that a non-profit organisation working to produce a more productive and efficient grain industry, such as themselves, was for the benefit of the Australian public. It submitted that the promotion of Australian agriculture was vital to the community's welfare.
- 8.34 Grain Growers Ltd was held to be a non-profit entity on the basis that its Constitution contained the requisite clauses that:
- 8.34.1 required its income and property to be applied solely towards its objects;
 - 8.34.2 prevented distribution to members, including on the winding up of the entity.
- 8.35 The court cited *Word Investments*, that in order to determine whether an entity's purpose is charitable, it is necessary to examine its objects **and** the manner in which those objects are effected by its activities, and to determine whether its "main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable".
- 8.36 It was held at paragraph 75 that: "...Grain Growers' purpose in conducting its affairs, and the businesses ..., is that of advancing at least the Australian grain industry, and the Australian agricultural industry so far as the grains industry forms a subset of that industry, and **has a charitable character**. The requirements of s 48(1)...are therefore satisfied...".
- 8.37 The Court concluded that the promotion of industry and commerce can be a charitable object, and that agricultural activities benefit the Australian public.
- 8.38 Grain Growers Ltd had also acquired two commercial companies, together with its staff and assets.
- 8.39 The Court observed that the test in section 48 is assessed on whether the work undertaken by the employees is of a kind "ordinarily performed" (that is commonly, customarily or regularly) in connection with the charitable purpose of a particular type of body. Grain Growers Ltd could not establish that the commercial work undertaken by employees of the acquired companies was ordinarily performed by bodies that had a charitable purpose .
- 8.40 Therefore, the exemption from payroll tax was not available in respect of the acquired employees.

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Law Institute of Victoria v Commissioner of State Revenue (supreme Court of Victoria – October 2015)

- 8.41 Here the Court had to determine whether the “charitable purpose” of a law institute justified the commercial means employed to forward and achieve that purpose. Similar to *Northern NSW Football* the key in this case was determining whether the institute had a charitable purpose in the first place by studying the organisation’s objects and activities. If it did not it could not fall under the fourth limb of *Pemsel*.
- 8.42 In 2012 the Law Institute of Victoria (“LIV”) wrote to the Commissioner to claim that wages over two periods (2008 – 2012 and 2012 -2013) should have been subject to the payroll tax exemption under s48 of the *Payroll Tax Act 2007*. Pursuant to s19 of the same act, the LIV claimed a total of **\$2, 514, 414. 48** in overpaid tax.
- 8.43 To qualify for s 48 of the Act the LIV had to have a “whole or dominant purpose” that was a “charitable” or “benevolent” purpose.
- 8.44 By applying *Word Investments* the Court had to determine if there was a nexus between the objects in the LIV’s constitution (which was for a charitable purpose) and the activities which LIV carried out. LIV contended that its dominant purpose was to promote the development of the law and the legal profession for the benefit of the public, and that it undertook activities in pursuance of the purpose. These included:
- 8.44.1 Advocacy-related activities (such as advocating for law reform and promoting appropriate dispute resolution);
 - 8.44.2 Referral Services (including a pro bono referral service);
 - 8.44.3 Education and professional development;
 - 8.44.4 Publications;
 - 8.44.5 Delegated Functions;
 - 8.44.6 Information and practice resources (including the operation of a specialist law book shop);
 - 8.44.7 Marketing.
- 8.45 LIV argued that any benefit to private members was incidental and that any commercial activities engaged in by employees was in the furtherance of the charitable purpose.
- 8.46 The issue before the court was whether LIV’s non-charitable purposes were ancillary to the dominant purpose. This is because an organisation with both charitable and non-charitable purposes is treated in law as non-charitable.⁹⁸ The Court referred to *Word Investments* where the

⁹⁸*Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC Para 90.



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High Court referred to *Stratton* saying that the determination of this dominant purpose can be found within the main objects of the institution's constitution. These main objects have to be distinct from concomitant or incidental or ancillary objects (of a non-charitable nature) and have to be charitable.⁹⁹

- 8.47 The Supreme Court held that, pursuant to *Word Investments*, LIV should be assessed holistically, having regard to its objects, the history of its formation and the activities it has undertake since its formation.
- 8.48 In light of this, the Supreme Court identified only 3 charitable objects. The 6 which were designed to promote member's interests, in conjunction with the services provided to members, was held to the dominant purpose of the LIV.¹⁰⁰

9 CONCLUSION

- 9.1 The area of State tax concessions and exemptions is one that has been subject to significant criticism, analysis and subsequent development over recent years.
- 9.2 Being a common law dominated area, charities are well within their rights to seek to take advantage of the clarification of the benefits made available to them by virtue of recent case law (particularly *Word Investments*).
- 9.3 Due to the discussed changes in some State legislations, it will not be surprising if the remaining States follow suit. It is an area that should be carefully monitored by charities, should the landscape and requirements suddenly change.

Questions?

⁹⁹ *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC Para 94.

¹⁰⁰ *Law Institute of Victoria v Commissioner of State Revenue* [2015] VSC Para 355 -356.