Legal Charity and the Public Purse

Kate Rawcliffe

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Introduction

Encounters between charities and the tax state in contemporary New Zealand often become sagas. The language of battles and epics prompts reminiscence to a time when charities warded off societal ghosts: vagrancy, illegitimate children and other moral outrages of the educated classes. Consider the failed attempt of the Queenstown Lakes Community Housing Trust (QLCHT) to attain charitable status. Established in 2007, it provided housing for households that could "contribute to the social, cultural, economic and environmental well-being" of the Queenstown Lakes District.[1] A shared ownership program allowed prospective homeowners to acquire equity in Queenstown properties, facilitating an inclusive and balanced community, while aiding local employers.[2] The Charities Commission approved its charitable registration in early 2008.

Eighteen months later, the Commission reversed their assessment and proposed to deregister QLCHT, as the provision of housing for private individuals who did not live "in poverty" was deemed not charitable.[3] QLCHT appealed and in October 2010, the High Court issued an interim order to restore it to the charities register.[4] In the High Court, MacKenzie J dismissed QLCHT's appeal, finding that social housing imperatives could not form the basis of a contemporary charitable purpose.[5] His Honour acknowledged lurking in the shadows of these registration decisions were the tax advantages enjoyed by charities and the potential for fiscal considerations to influence the application of the common law test for charitable purpose.[6] MacKenzie J cautioned against the leakage of tax policy into a common law test that Parliament had imported to the Charities Act 2005, unchanged from its judicial origins. Despite this warning, QLCHT was deregistered.

The next move came from Treasury. Displeased with the decision, in 2014 the fifth National Government initiated a deliberate departure from broad-base, low-rate tax policy design: a

[1] *Queenstown Lakes Community Housing Trust Deed of Trust* (2007) at 3.1.1.
[2] Queenstown Lakes Community Housing Trust *Affordable Housing for Our Community: Annual Report 2009* (Queenstown, 2009) at 3.
[3] Charities Commission Decision No 2010-12, 18 August 2010.
[4] *Queenstown Lakes Community Housing Trust v Charities Commission* HC Wellington CIV-2010-485-1818, 4 October 2010.
[5] *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC) at [75].
[6] At [77].

specific income tax exemption for social housing providers.[7] The parameters of legal charity can and must adapt to changing social needs and circumstances.[8] Rather than reflecting pressing anxieties about housing affordability, a hyper-specific exemption and complex regulatory amendment was preferred. Commentators have deemed this result a second-best solution and one conflicting deeply with the facilitative purposes of the Charities Act 2005, which include to promote the effective use of charitable resources.[9] QLCHT reapplied for registration in 2015 and was denied on similar grounds.[10] This legal battle ensued despite the assessment of charitable purpose purportedly being a factual question of interpretation of the entity's constitutive documents.[11] The question becomes whether the experience of QLCHT can be isolated as one incident of rogue decision making, or instead indicative of a systemic issue about how the law allocates the label of registered charity.

This dissertation argues that the invasion into common law by the fiscal state aligns the registration of charities with the anxiety of the public purse. Legal history illuminates the border between doctrines, but not if the tendency to perceive the law of taxation as ahistorical policy, and the law of charity as arcane, persists. Actors in the charitable sector lament that discourse about how to regulate charities is hijacked by tax;[12] indeed, the tax consequences that form a quasi-element of the legal definition of charitable purpose have been extra-judicially branded "the elephant in the room."[13] A landmark history of the British tax system argued that "[i]f the eighteenth century was the age of enlightenment and the nineteenth the age of industrialisation, the twentieth may well go down in history as the age of taxation."[14] As for the twenty-first, the courts have recognised that it would be difficult to imagine that there will not be a need for more charitable entities as society evolves.[15]

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[7] Income Tax Act 2007, s CW 42B; Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014 (2014 No 39), section 32(1).
[8] *Family First New Zealand v Attorney General* [2020] NZCA 366 at [67].
[9] Charities Act 2005, s 3(b); Susan Barker and Grace Collett "Fiscal consequences" (2016) 3 NZLJ 102 at 106.
[10] Charities Registration Board Decision No 2015-3, 2 November 2015.
[11] *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [2004] 3 NZLR 157 at [29].
[12] Susan Barker "Guest Lecture" (lecture to LAWS 486 *Special topic: not-for-profit law* class at the University of Otago, online, January 2021).
[13] Susan Glazebrook "A Charity in all but law: The political purpose exception and the charitable sector" (2019) 42 MULR 632 at 633, as cited in Stephen Kós, President of the Court of Appeal of New Zealand "Murky Waters, Muddled Thinking: Charities and Politics" (Opening Address to the Charity Law Association of Australia and New Zealand Conference, online, November 2020).
[14] BEV Sabine *A Short History of Taxation* (Butterworths, London, 1980) at 132, as cited in Michael Littlewood "John Tiley and the Thunder of History" in Peter Harris and Dominic de Cogan (ed) *Studies in the History of Tax Law* (9th ed, Hart Publishing, Oxford, 2019) at 81.
[15] *Re Collier (Dec'd)* [1998] 1 NZLR 81 (HC) at [95].

The clash between charities and tax dogma benefits from contextualisation, with the rapidly expanding law of restitution an apt candidate to illuminate this unhappy union. Treating charities as another tax expenditure by Government could be dismissed as an inevitable symptom of the growing fiscal state and so confined to a political moment. However, the rich common law history of defining a charitable purpose and its previous collisions with the fiscal state must be remembered when studying the epithet of the "tax charity"[16] in contemporary New Zealand law.

[16] 'Tax charity' is the terminology used in ss CW41-43 of the Income Tax Act to describe a trustee, a society, or an institution, registered as a charitable entity under the Charities Act 2005.

I. Chapter One The charity law tradition

A. Beginnings of a charitable purpose definition

Legal charity is traceable to before the imposition of the modern tax state. In pre-Reformation England, legal charity was informed by the practices of the Roman Catholic Church.[17] Parishioners were encouraged to bequest to the Church for pious purposes like Church maintenance and poor relief.[18] The ecclesiastical courts granted privileges exclusive to charitable trusts, such as the ability of the charitable trust to last in perpetuity and its capability to be settled for charitable purposes, rather than for identified beneficiaries.[19] With the sociocultural upheaval of the English Reformation in the sixteenth century, jurisdiction over charitable trusts was transferred from the ecclesiastical courts to the secular Courts of the Chancery.[20] The Chancellor too extended legal privileges to charitable trusts, such as favourably modifying the terms of a trust *cy-près*, translated to "as near as possible", when its objects had become impossible or impractical to implement.[21]

Charity as a legal tool was active prior to any legislative recognition of charity nor any notion of their correct tax treatment. In 1601, the Statute of Elizabeth was passed to regulate charitable trusts.[22] It empowered the Lord Chancellor to appoint commissioners to investigate misappropriations of charitable funds[23] and encouraged private philanthropy as a means of reducing the burden of government in supplying goods of a public nature.[24] The legacy of the *Statute of Elizabeth* is its Preamble, which listed purposes of general public utility, including maintenance of sick and maimed soldiers and repair of bridges and highways.[25] The Preamble would become instrumental in defining legal charity in most common law countries, but it was not intended to comprise an exhaustive definition. Instead, it specified the jurisdiction of the

[17] Matthew Harding "Charity and Law: Past, Present and Future" (2020) 1 Sing JLS 564 at 565.
[18] Gareth Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge (UK), 1969) at 4.
[19] *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157; Adam Parachin "Legal Privilege as a Defining Characteristic of Charity" (2009) 48 C.B.L.J. 36 at 64.
[20] Donald Poirier *Charity Law in New Zealand* (Charities Services, Wellington, 2013) at 80.
[21] Rachael P. Mulheron *The Modern Cy-près Doctrine: Applications and Implications* (Cavendish Publishing, Coogee (NSW), 2006) at 1.
[22] The Charitable Uses Act of 1601 (Eng) 43 Eliz I 4.
[23] John Bassett "Charity is a general public use" (2011) 2 NZLJ 60 at 60.
[24] *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [70].
[25] The Charitable Uses Act, Preamble.

counter-fraud measures imposed by the *Statute of Elizabeth*.[26] The list of exemplary purposes captured existing donor behaviour that constituted early forms of charitable action, rather than establishing legal charity itself.[27] Thus, since the genesis of legal charity, there has been no agreement as to its core essence.

B. Charities and early income taxation

When the first formal income tax was levied in England by William Pitt the Younger in 1799 to fund the Napoleonic Wars,[28] charitable entities had been providing public goods and facilitating voluntary action for two centuries since the Preamble's inception. Early public finance schemes resembling modern tax, like tribute and feudal dues, always needed to take account of the charitable sector.[29] The Duties Upon Income Act 1799 included an exemption for a "corporation, fraternity, or society of persons established for charitable purposes."[30] Thus began a legislative tension between legal charity and the fiscal state. Implicit in the exemption's drafting is the multiplicity of legal forms available to charities, from a company to a charitable society, and so the intention for legal charity to constitute diverse "modes of social action."[31] However, no definition of charitable purpose was codified in the Act, entrusting the courts to interrogate the precise scope of legal charity.

The most instrumental statement of what constitutes a charitable purpose remains *Commissioners for Special Purposes of the Income Tax v Pemsel*.[32] The 1891 decision concerned whether the charitable purposes exemption applied to funds belonging to the Moravian Episcopal Church, that were used to advance missionary objects in developing nations. The Revenue sought to restrict the scope of charitability to its ordinary meaning, referring narrowly to poor relief. By a 4-2 majority, the House of Lords rejected the Revenue's contention, finding that reference to charity in income tax legislation meant charity in a legal,

[26] *Gilmour v Coats* [1949] AC (HL) 443, as cited in Poirier, above n 20, at 72.
[27] Harding "Charity and Law: Past, Present and Future", above n 17, at 566.
[28] Michael Gousmett "The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798-1981" (PhD, Thesis, University of Canterbury, 2009) at 124; Susan Barker, Michael Gousmett and Ken Lord *The Law and Practice of Charities in New Zealand* (LexisNexis, Wellington, 2013) at 8.
[29] Evelyn Brody "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption" (1998) 21 J.Corp.L 585 at 587.
[30] Duties Upon Income Act 1799 (GB) 39 Geo III 13, s 5.
[31] Harding "Charity and Law: Past, Present and Future", above n 17, at 564.
[32] [1891] AC 531 (HL).

technical sense. Lord Macnaghten condensed the various public purposes in the Preamble into four categories or 'heads' of charity: that for the relief of poverty, the advancement of education, the advancement of religion and any other analogous purpose beneficial to the community.[33] The majority acknowledged that the Preamble was not intended to define charitable purposes; rather, it was to reform financial abuses.[34] The decision clarified that not all public purposes are charitable and that legal charity has a special meaning developed in the Courts of Chancery. The extent of likeness to the Preamble was framed as requiring that a novel charitable purpose needed to fall within its "spirit and intendment", approving an earlier charity law case.[35] Arguably, reliance on the Preamble lent charity law jurisprudence to be taxonomically problematic from the beginning; as the Preamble is a list, it is necessarily non-exhaustive and gives no statement of essential charitable characteristics.[36]

The same year that *Pemsel* was decided in England, the first income tax legislation was passed in New Zealand.[37] It included an exemption for charitable institutions, which was construed, consistently with *Pemsel* as referring to charity in its legal sense.[38] That case, concerning the Dilworth Boys School, was heard by Denniston J, who noted that tax exemptions "add to the burdens of the public."[39] Thus, charity in New Zealand law had relevance in the charity law tradition and now in some connectedness to the tax statutes. This union was denied by Lord Macnaghten in *Pemsel,* as he emphatically declared "[w]ith the policy of taxing charities I have nothing to do."[40] This reluctance to entangle the common law conception of charitable purpose with fiscal considerations irked the minority, with Lord Bramwell citing fiscal policy to limit the scope of charitability:[41]

> It is to be remembered … that to exempt any subject of taxation from a tax is to add to the burden on taxpayers generally, and a very large exemption must be made … for the benefit of so-called charities, many of which are simply mischievous.

[33] At 583.
[34] At 582.
[35] *Morice v Bishop of Durham* [1805] Ch J80, [1803-13] All ER Rep 451 (Ch).
[36] Matthew Turnour and Myles McGregor-Lowndes "Wrong Way go Back – Rediscovering the Path for Charity Law Reform" (2012) 35 UNSWLJ 810 at 824.
[37] Land and Income Assessment Act 1891.
[38] *Re Dilworth* (1896) 14 NZLR 729 (CA).
[39] At 740.
[40] At 591.
[41] At 566.

This reveals two concerns: first that the exemption for charities erodes the tax base, and a second about the opportunities for "so-called charities" to exploit the tax privileges that flow from charitability. So, from the foundational judicial statements about identifying legal charity, decision makers wrestled with the separation of the common law from tax policy.[42] By returning to the characterisation of tax privileges being the "elephant in the room" in identifying a charity at law, the question thus becomes whether the elephant even belongs in the room, and if so, why it must place itself at the head of the table.

C. Charitable registration in 2021

The current legislation governing charity registration in New Zealand is the Charities Act 2005 ('the Act').[43] Prior to 2005 and owing to the multiplicity of legal forms available to charities, regulation was achieved peripherally through legislation governing incorporated societies,[44] companies,[45] and charitable trusts.[46] Inland Revenue managed the income tax consequences for charities.[47] Post-2005, entities instead applied to the newly established Charities Commission for their purposes to be reapproved.[48] The lack of regulatory oversight of charities had become a sore point in public discourse, as notable government reports identified the lack of public trust and confidence in the sector.[49] The Act was expected to be an antidote.

The Charities Bill 2004 was hotly debated, reflecting the difficulty in regulating the use of nonprofit resources, which although usually privately owned and managed, most visibly perform public services.[50] The Bill's excessive focus on fiscal policy at the expense of the voluntary sector's independence was criticised, with it being branded as "conceived, evidently, in Treasury, and designed by the Ministry of Economic Development."[51] The Bill was

[42] Michael Gousmett "The Charities Act – ten years on" (2015) 3 NZLJ 122 at 123.
[43] Charities Act.
[44] Incorporated Societies Act 1908.
[45] Companies Act 1993.
[46] Charitable Trusts Act 1957.
[47] Income Tax Act 1994.
[48] *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [7].
[49] New Zealand Working Party on Charities and Sporting Bodies *Report to the Minister of Finance and the Minister of Social Welfare by the Working Party on Charities and Sporting Bodies* (Treasury, Wellington, 1989) at 8.8; *Tax and charities; a government discussion document on taxation issues relating to charities and nonprofit bodies* (Policy Advice Division of the Inland Revenue Department, Wellington, 2001) at 2.12.
[50] Evelyn Brody "Whose Public – Parochialism and Paternalism in State Charity Law Enforcement" (2004) 79 Ind. L.J. 937 at 968.
[51] (12 April 2005) 625 NZPD 19940.

intensively rewritten at Select Committee stage. The prerequisite that charitable entities wishing to access income tax exemptions apply to join the charities register came into force on 1 July 2008.[52] The key purposes of the Act include to promote public trust and confidence in the sector, to encourage and promote effective use of charitable resources and to provide for registration of charitable entities.[53]

The Charities Act addressed the lack of a dedicated regulator. It established the Charities Commission, an independent Crown entity.[54] Its functions mirrored the above purposes of the Act, but also required it to educate and assist charities in relation to matters of good governance and management.[55] Commentators hoped that it could balance its regulatory and facilitative role, without chilling the sector's activities.[56] So there was disappointment when the National Government disestablished the Commission in 2012 and replaced it with Charities Services, overseen by the Department of Internal Affairs.[57] The operative Bill was controversially passed by one vote.[58] The mandate of Charities Services is to consider registration and deregistration decisions, with less broad oversight.[59] The Commission's disestablishment reflected bureaucratic reshuffling in the aftermath of the global financial crisis.[60] The reversion to a watered-down regulator tied to financial anxieties has increased the likelihood of decision makers importing fiscal concerns into their assessment of whether an entity qualifies as charitable.

D. The charitable purpose test

The legal requirements to become a registered charity now remain remarkably like the test for charitability in *Pemsel*, informed by the Elizabethan Preamble. Section 13 of the Act requires

[52] Inland Revenue Department "Operational Statement OS 06/02 Interaction of tax and charities rules" (2006) 18 *Tax Information Bulletin* 9 at 9.
[53] Charities Act, s 3.
[54] Charities Act, s 10.
[55] Inland Revenue Department, above n 52, at 9.
[56] David McLay "Charities Commission: the gestation continues" (2004) 2 NZLJ 73 at 75.
[57] Crown Entities Reform Bill 2011 (332-1), cl 47.
[58] Susan Barker "Charity Regulation in New Zealand: History and Where to Now" (2020) 26 Third Sector Review 28 at 38-39.
[59] Te Tari Taiwhenua Department of Internal Affairs "The role of Charities Services" www.charities.govt.nz/.
[60] Tony Ryall, Minister for State Services "Reduction in State agencies confirmed" (press release, 12 August 2011), as cited in Susan Barker and others "The Rise and Fall (?) of Two Charities Commissions: How Common Law Countries can learn from the experiences in New Zealand and Australia" (2017) 27 NZULR 1185 at 1201.

that an entity seeking charitable registration have charitable purposes.[61] There is no *sui generis* charity form, as the Act allows a charity to take the form of a trust, society or institution.[62] Where the entity seeking registration is a trust, it is sufficient that income derived by the trustee is applied exclusively for charitable purposes, which allows for apportioning of trust funds to respective charitable and non-charitable purposes.[63] This contrasts with the position for a society or institution, both of which must be established and maintained exclusively for charitable purposes and not carried on for private pecuniary profit.[64] This non-profit constraint reflects that a trustee is under an existing duty to apply the funds to benefit the trust.[65] The Act acknowledges that a charitable entity may pursue a non-charitable purpose, if this purpose is incidental or ancillary to the primary charitable purpose.[66] The crux of eligibility for registration thus depends upon identifying these charitable purposes.

The Act codifies the four heads of charity from *Pemsel* in section 5, reading as:[67]

> In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the *relief of poverty*, the *advancement of education* or *religion*, or *any other matter beneficial to the community* (emphasis added).

The Charities Act did not modify the common law approach to determining whether an entity has a charitable purpose.[68] The select committee considered updating the definition; however, the preservation of the common law approach was favoured, as it was feared that amending the definition would change interpretations of charitable purpose, which the bill was not intended to do.[69] This was despite a prominent report on the interaction between tax policy and the charitable sector released three years prior concluding that the legal definition of charitable purpose should mirror societal objectives in the 21st century.[70] Lawmakers thus resisted the impulse to align charitability with the reigning societal norms of the day, exemplifying that legal charity and purposes of perceived public benefit are not synonymous.[71]

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[61] Charities Act, s 13.
[62] Section 13(1).
[63] *Latimer v Commissioner of Inland Revenue* (PC), above n 11, at [30].
[64] Section 13(1)(b).
[65] *Latimer v Commissioner of Inland Revenue* (PC), above n 11, at [30].
[66] Section 5(3).
[67] Section 5(1).
[68] *Re Greenpeace of New Zealand Inc* (SC), above n 24, at [16].
[69] Charities Bill 2004 (108-2) (Select Committee Report) at 3.
[70] *Tax and charities*, above n 49, at 4.3.
[71] *Re Greenpeace of New Zealand* Inc (SC), above n 24, at [29].

Applying section 5 of the Act involves a two-step inquiry: the first being whether a purpose is for the public benefit and the second being whether the purpose falls within the "spirit and intendment" of the Elizabethan Preamble.[72] Within each limb, there are two further sub-limbs to consider.

1 Public Benefit

The public benefit test expands into a 'benefit' sub-limb and a 'public' sub-limb. The first limb asks whether the purpose is objectively beneficial to the community and the second asks whether the intended beneficiaries constitute the public or a sufficient section of it.[73] The public benefit test is not explicit in the Act, but is accepted as forming part of the common law definition of a charitable purpose.[74] For the first three heads of charity, being for the relief of poverty, advancement of religion and advancement of education, benefit to the public is assumed, though the decision maker still must form an assessment of public utility on the facts.[75] Contentious assessments of public benefit usually arise where a novel purpose is claimed under the fourth head of charity to be any other purpose beneficial to the community. When assessing whether the purpose provides a benefit, both direct and indirect benefits must be considered and the fact that private individuals derive advantage does not nullify public benefit if otherwise identified.[76]

Assessments of the public sub-limb apply the classic *Oppenheim-Compton* test, which requires the class of beneficiaries be numerous and not joined in nexus by a common characteristic.[77] The Act codifies the common law exception that the public can constitute a private class of persons for those related by blood and those belonging to a common kinship group like iwi.[78]

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[72] *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [32]; *Re Greenpeace of New Zealand Inc* (SC), above n 24, at [29].
[73] *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corpn* [1968] AC 138 (HL) at 218; *New Zealand Society of Accountants v Commissioner of Inland Revenue,* above n 19, at 152.
[74] Susan Barker "The Presumption of Charitability Post-Greenpeace" (2015) 3 NZLJ 116 at 117.
[75] *Re Foundation for Anti-Aging Research* [2016] NZHC 2328 at [63].
[76] *Independent Schools Council v Charity Commission for England and Wales; A-G v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [2012] Ch 214 at 163; *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA) at 318.
[77] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31 (HL), 306; *Re Compton* [1945] Ch 123, [1945] All ER 198 (CA).
[78] Section 5(2).

Later cases have emphasised that what constitutes 'the public' is a question of fact[79] and not a bright line test between public and private.[80]

2 Proximity to Preamble

A charity must secondly align its purposes with those in the Elizabethan Preamble, through one of the four heads of charity derived from it in *Pemsel.* In the common law, there are two options to demonstrate this. The first is by direct analogy and the second through presumption, whereby unless there are reasons for holding otherwise, a purpose operating for public benefit also satisfies the Preamble limb.[81] When reasoning by analogy, the level of likeness need not be found through *ejusdem generis* reasoning; instead, it is sufficient that the novel purpose is charitable in a similar sense to previously decided purposes.[82] This approach has been described as "analogy upon analogy-type reasoning",[83] with the flexibility of the novel fourth head ensuring that the law of charity necessarily remains a "moving subject."[84]

The analogy method and the presumption method are not mutually exclusive; rather, they coexist as means of finding the requisite likeness of the purpose in question to the Preamble.[85] However, the Supreme Court in *Greenpeace* recently doubted the presumption method, finding that adherence to reasoning by analogy was a safer policy choice, because of the "significant fiscal consequences" attached to charitable status.[86] In other words, the Court denied that the test for charitable purpose could comprise a single public benefit test, where likeness to the Preamble was disregarded as a defining characteristic of a charity, and so with it the developed jurisprudence.[87] This reasoning echoes previous judicial sentiment that both elements, comprising the public benefit test and proximity to the Preamble, are relevant in assigning the label of legal charity.[88] This focus on what distinguishes a charity from the other spheres that

[79] *Dingle v Turner* [1972] AC 601, [1972] 1 All ER 878 at 889.
[80] *Re Twigger* [1989] 3 NZLR 329 (HC).
[81] *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 88; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382 (SC) at 388.
[82] *Waitemata County v Commissioner of Inland Revenue* [1971] NZLR 151 (SC) at 155.
[83] *New Zealand Society of Accountants v Commissioner of Inland Revenue,* above n 19, at 157.
[84] *Re Greenpeace of New Zealand Inc* (SC), above n 24, at [23], citing *Scottish Burial Reform and Cremation Society Ltd v Glasgow City Corpn*, above n 73, at 154.
[85] Barker "The Presumption of Charitability Post-Greenpeace", above n 74, at 117.
[86] Above n 24, at [30].
[87] At [27].
[88] *Southwood v Attorney-General* [2000] EWCA Civ 204, [2000] WTLR 1199 at [14].

nonetheless provide public benefit is, at first glance, conceptually accurate with preserving the independence of charities and the sector's altruistic nature.

However, peculiarity in the Supreme Court's justification remains. The Court confirmed that the common law approach to finding a charitable purpose remained intact despite the advent of the Charities Act.[89] Simultaneously, the Court doubted the presumption of charitability, which clearly forms part of the common law approach to identifying a charitable purpose.[90] Losing recourse to the presumption method increases the administrative burden on organisations to navigate charity law jurisprudence. Increasing this onus on non-profit entities conflicts with the notion that the registration scheme should facilitate, not frustrate the management of charitable resources.[91] This suggests that if the judiciary modifies charity law, it should streamline the registration process and clarify ambiguous aspects of the legal test.

Why the Supreme Court in *Greenpeace* looked to modify charity law jurisprudence, while simultaneously suggesting its preservation, becomes clear when considering the primary reason given: "significant fiscal consequences." Like the QLCHT registration case, here is another interaction between legal charity and the fiscal state, where fiscal policy was relied upon to read down an accepted part of codified common law. This interaction becomes even more suspect considering Privy Council precedent confirming that interpretive and factual assessment, not deference to fiscal policy, establishes a charitable purpose.[92] The common law is celebrated for its flexibility in accepting new charitable purposes with close reference to changing societal values and institutions,[93] but appropriation of this flexibility for fear of fiscal consequences does not form part of established charity law jurisprudence. In fact, precedent suggests that the Charities Act represents "a cross-party commitment to creating a set of rules that would facilitate the registration and regulation of entities qualifying as charities."[94] Further, the House of Lords has found that where ambiguity arises in an entity's constitutive documents, a benign interpretation should be given where possible.[95]

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[89] At [16].
[90] *Re Foundation for Anti-Aging Research,* above n 75, at [94]; *Re Collier (Dec'd)*, above n 15, at [95]; Susan Barker "The presumption of charitability" (2012) 9 NZ L Rev 295 at 295.
[91] *National Council of Women of New Zealand Incorporated v Charities Registration Board* [2014] NZHC 3200, [2015] 3 NZLR 72 (HC) at [29].
[92] *Latimer v Commissioner of Inland Revenue* (PC), above n 11, at [29].
[93] *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC) at 348.
[94] *National Council of Women of New Zealand Incorporated v Charities Registration Board*, above n 91, at [40].
[95] *Inland Revenue Commissioners v McMullen* [1981] AC 1 (HL) at 4-5.

Proponents of a fiscal policy approach would identify the construction of the tax state as a cardinal societal value which must inevitably influence the scope of legal charity. However, when considering factors that should influence charitable sector common law, the tax state's influence must be accounted for with scrutiny and without assumption, and the merits of utilising judicial interpretation to, in effect, alter the incidence of the tax privileges accorded to charities assessed.[96] This second point prompts interrogation of whether judges do in fact participate in the tax policy process through the interpretation of taxing statutes, especially to the extent that it involves the reifying of "significant fiscal consequences."

E. Registration and Income Tax

Before 2007, income tax legislation defined charitable purpose, and this test was imported into the 2007 Act.[97] A qualifying entity is entered on the charities register and provided with a unique registration number.[98] Once registered, the entity qualifies as a "tax charity" for the purposes of the Income Tax Act 2007.[99] The references to charitable purpose contained in the Income Tax Act refer to the same test for charitable purpose from the Charities Act, meaning all registered charities meet the requirements for favourable tax treatment.[100] There is thus no discretion available for Inland Revenue to treat an entity registered as charitable under the Charities Act as not income tax exempt.[101]

The Income Tax Act contains two exemptions for the income of tax charities; an exemption for passive, non-business income and one for business income.[102] The latter exemption applies to income derived by a charity conducting a business or undertaking, exemplifying that charitable income is tax-exempt regardless of whether it is applied directly in furtherance of the entity's purpose.[103] This reflects the non-distribution constraints inherent in the charitable form, which require that profits from a business conducted by a charity nonetheless must be reinvested to further the identified charitable purpose. It further deconstructs what the High

[96] *New Zealand Society of Accountants v Commissioner of Inland Revenue,* above n 19, at 157.
[97] Income Tax Act 1994, s OB 1; *Re Greenpeace of New Zealand Inc* (CA)*,* above n 48, at [6].
[98] Charities Act, s 19(3).
[99] Income Tax Act 2007, s CW 41(5)(a).
[100] *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 691.
[101] *National Council of Women of New Zealand Incorporated v Charities Registration Board,* above n 91, at [80].
[102] Section CW 41- 42.
[103] *Latimer v Commissioner of Inland Revenue* (PC), above n11, at [20].

Court of Australia has notably termed the "false dichotomy" between a commercial entity and a charitable one, which ignores that charitable entities in the modern age must still make a profit to remain commercially viable over time.[104] An assessment of charitability that isolates profit as uncharitable and demonises the necessary commercial aspects of running a successful non-profit venture relies on a Victorian perception of charities as nobly facilitating poor relief and nothing more.[105]

F. Donee Status

The Income Tax Act establishes a donee status system, whereby entities who apply to Inland Revenue to be listed in Schedule 32 are recognised entities to which donations made by the public receive favourable tax treatment.[106] An entity does not need to be a registered charity to acquire donee status; rather, it is available to any non-profit entity whose funds are applied "wholly or mainly to charitable, benevolent, philanthropic or cultural purposes within New Zealand."[107] Thus, availability of donee status is wider in scope than charitable registration.[108] For companies, the tax advantage is a deduction for a gift made to a donee organisation.[109] For individuals, the advantage is a tax credit, whereby taxpayers receive credit for gifts to donee organisations at the same rate as the company deduction of 33%.[110] Large charities such as Amnesty International, the Red Cross and the Zonta Club are among those with donee status.

The Charities Bill 2004 proposed that the Charities Commission oversee the donee status regime. This was rejected by the select committee, as it was deemed inappropriate for the Charities Commission to be "responsible for making decisions that would impact on the revenue base."[111] The decision to remove administration of donee status from the charity regulator, while registration decisions would remain within its mandate, suggests an acceptance of a special expertise required to identify charitable purposes. This is despite registration decisions, as the determinant of whether an entity is a tax charity, indirectly allocating

[104] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55, (2008) 236 CLR 204 at [24].
[105] Susan Barker "Charities Law Reform – Why It Matters" (Hui E! webinar, March 2021).
[106] Section LD 3; Schedule 32.
[107] Section LD 3(2).
[108] Barker, Gousmett and Lord *The Law and Practice of Charities in New Zealand,* above n 28, at 145.
[109] Section DB 41.
[110] Section LD 1.
[111] Charities Bill 2004 (108-2) (Select Committee Report), above n 69, at 2.

government spending.[112] Donee status likely represents the more direct Government outlays of subsidising citizens to donate to specified organisations. This bureaucratic mechanism nonetheless indicates a value judgment preferring special expertise and decision making for the election of charitable entities to registered status.

G. Other registration consequences

There are various non-revenue related benefits of charitable status. Matthew Harding has provided a framework of three ways that the state preserves legal charity: via facilitative, incentive and expressive means.[113] Facilitative means involve the state conferring legal privileges on charitable entities, such as the ability for charitable trusts to last in perpetuity.[114] Incentive means are those by which the state encourages legal charity as a mode of achieving certain desirable outcomes. Income tax exemptions are the best-known means by which charitable purposes are encouraged, but direct government grants are also incentive means.[115] Expressive strategies comprise more diffuse state mechanisms to endorse organisations as charitable, which helps to generate public trust and confidence in the sector.[116] The label 'charity' connotes virtue and worthiness, encouraging private donations and volunteering.[117] Many private funders in New Zealand now restrict the entities they will fund to registered charities only, giving registration critical importance beyond tax implications.[118]

Although many charitable entities rely upon favourable tax treatment to raise funds, it has been argued that the benefit of the tax privilege is limited, because income tax is levied on net income. So, the deductible expenses that charities incur in pursuance of their charitable purposes would substantially reduce their income tax liability.[119] The non-profit constraints inherent in the charitable organisation model means that income tax, as being levied classically on individual profits, fits oddly into the charity law paradigm.[120] Although, charitable entities

[112] *Tax and charities,* above n 49, at 4.3.
[113] Matthew Harding "Charity Law in Overview" in Matthew Harding (ed) *Charity Law and the Liberal State* (Cambridge University Press, Cambridge (UK), 2014) 6 at 38.
[114] At 38.
[115] At 39.
[116] At 40.
[117] At 40.
[118] Barker and Collett "Fiscal Consequences", above n 9, at 102.
[119] Barker and Collett "Fiscal Consequences", above n 9, at 102.
[120] Myles McGregor-Lowndes, Matthew Turnour and Elizabeth Turnour, "Not for Profit Income Tax Exemption: Is There a Hole in the Bucket Dear Henry?" (2011) 26 ATF 601 at 608.

are still required to make some profit to remain viable, meaning that the effect of the income tax exemption is not negligible and its correct application is important for entities that risk operating at a loss. The rise of the delivery of social welfare by charities via contractual agreement with the state has increased the proportion of contracting charities' income received as direct government grants compared to tax concessions.[121] The funding model for charities providing social welfare is thus skewed away from tax concession reliance, when compared to charities providing goods independently of the state. This exemplifies the diversity of action and organisation across the charitable sector, making a uniform focus on tax advantage simplistic. Overall, excessive use of tax policy in determining which entities receive registered charitable status may obscure the other aspects of registration and miss the intricacies of charitable enterprise.

The charitable purpose test owes almost its entire body to the common law, developed in the ecclesiastical courts and the Courts of the Chancery over centuries. The advantage of preserving an historical legal test is the benefit of hindsight and the development of charitable jurisprudence that appears timeless in its application. What is at stake with this legal test is the challenge of applying it to changing social conditions and expectations for what charities will deliver. Even more critical is to consider how and why public finance anxieties from Treasury commonly influence the charity regulator. The relationship between the charitable sector and the tax state requires unravelling and interrogation, to avoid allowing the tax system to chill the independence of charitable entities.

[121] Matthew Harding "Independence and Accountability in the Charity Sector" in John Picton and Jennifer Sigafoos (ed) *Debates in Charity Law* (Hart Publishing, Oxford, 2020) 13 at 27; Myles McGregor-Lowndes and Christine Ryan "Reducing the Compliance Burden of Non-Profit Organisations: Cutting Red Tape" (2009) 68 AJPA 21 at 21.

II. Chapter Two Observing the fiscal impulse

A. Revisiting QLCHT

In its 2010 deregistration decision, the Charities Commission considered that QLCHT could either qualify as charitable under the first head of charity in relieving poverty or the fourth head, for a novel purpose beneficial to the community. For the first head, the Commission did not consider the people being provided with social housing as in financial need.[122] This ignores that indirect benefits that advantage groups beyond the primary beneficiaries of the charity, may still constitute public benefit.[123] Any utility associated with increased home ownership amongst median income earners and its alleviation of stressors on the rental market was downplayed. It appears that there may have been an unacknowledged moral intuition at play, informed by engrained beliefs about individual responsibility in the securing of housing. How poverty is recognised in twenty-first century New Zealand necessarily must shift as society refuses to accept that individuals should be priced out of entire towns and cities.

For the fourth head, the indirect benefits to the local economy in attracting employees to the hospitality and tourism industries was acknowledged but not accepted. The Commission followed precedent suggesting that for the provision of local services to satisfy the fourth head, the services must be essential or the area disadvantaged.[124] That precedent, which concerned an agricultural organisation from the prosperous Canterbury region, has been criticised for importing a requirement of need into the fourth head, according excessively with the popular meaning of charity rejected in *Pemsel* in favour of a technical, legal meaning.[125] That charities undertake innovative projects of a diverse nature is developed in both jurisprudence[126] and secondary commentary.[127] Narrowing the fourth head to require a locality be disadvantaged synonymises the first and fourth head of charity, limiting the scope for innovative purposes seeking to enhance local communities.[128] Especially in the realm of social housing, as a vexing

[122] Charities Commission Decision No 2010-12, above n 3, at [44].
[123] *Independent Schools Council v Charity Commission for England and Wales; A-G v Charity Commission for England and Wales*, above n 76; *Latimer v Commissioner of Inland Revenue* (PC), above n 11.
[124] *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) at [42].
[125] Bassett "Charity is a general public use", above n 23, at 61.
[126] *Re Collier (Dec'd)*, above n 15, at 95.
[127] Harding "Independence and Accountability in the Charity Sector", above n 121, at 14.
[128] Bassett "Charity is a general public use", above n 23, at 61.

contemporary policy issue, new schemes to increase housing ownership should have been seriously considered as meeting the fourth head's novel flavour.

The fiscal lens of the Commission's reasoning reveals itself when it considers a key argument of the Trust. It was that a similar entity providing social housing has been successfully registered.[129] The Commission noted that it considered each application for charitable status on a case by case basis, assessing the constitutive documents and other evidence about the entity.[130] It did not consider the features that likened or distinguished the other entity from QLCHT or seek to dispute an analogy between the two. This implies a caution by the Commission to have its decision writ large amongst all social housing providers in New Zealand, the number of which at the time was approximately 3,000.[131] An assessment of charitability excessively located in the individual circumstances of each applying entity fails to appreciate the role of analogy with previous cases in establishing a novel charitable purpose.

Despite the Commission's statement that the registering of previous purposes had no bearing on its decision about QLCHT, upon approval of the ruling in the High Court, Charities Services began a review of social housing providers, many of whom were registered charities.[132] It appears contradictory for the Commission to emphasise the lack of connection in reasoning between decided cases, whilst then commence a review in the wake of the decision about QLCHT. Understating the centrality of precedent in applying the common law test for charitable purpose suggests that the Commission may have used the Trust's deregistration as a social housing prototype to review the number of charities receiving income tax exemptions. The fallout of the QLCHT saga was felt by all social housing providers in New Zealand, as many entities ceased operating equitable housing schemes in case their charitable registration was compromised, reducing the support available for those in need of housing and regions facing critical worker shortages.[133]

[129] Charities Commission Decision No 2010-12, 18 August 2010 at [72].
[130] Charities Commission Decision No 2010-12, 18 August 2010 at [73].
[131] Barker and Collett "Fiscal Consequences", above n 9, at 106.
[132] Barker and Collett "Fiscal Consequences", above n 9, at 106.
[133] Susan Barker "New Zealand Law Foundation International Research Fellowship: What does a world-leading framework of charities law look like?" (Charities Law Reform, Wellington, 2020) at 3.

B. The Greenpeace Saga

Greenpeace was founded in 1974 and had been registered as an incorporated society since 1976.[134] It applied for registration and was declined by the Charities Commission in early 2009.[135] The Commission was bound by the political purpose doctrine established in the famous charity law case *Bowman v Secular Society*.[136] This doctrine barred an advocacy purpose, like seeking law reform or supporting a political party, from being charitable and had been accepted in New Zealand at appellate level.[137] The Commission found that one of Greenpeace's purposes, in promoting disarmament and peace, was a non-charitable political purpose.[138] Applying section 5(3) of the Charities Act, the Commission found that the political purposes of Greenpeace were more than incidental to its non-political purposes, making it ineligible for registration.[139]

In considering Greenpeace's registration, the Commission referenced the sole case that had assessed the interpretation of the Charities Act: *Travis Trust*.[140] That case concerned a trust settled for the development of thoroughbred horse racing in Cambridge. It cited excerpts that branded the definition of charitable purpose as unhelpful,[141] by requiring engagement in a "deft circumlocution of legal logic" through its reliance on analogical reasoning.[142] Joseph Williams J noted that registration was important to the Travis Trust because of the resulting income tax exemptions.[143] Travis Trust submitted no evidence indicating that its motivations for registration were tax-related. Thus, this first case interpreting the common law definition of charitable purpose post-2005 established a trend in assuming charities seek registration mainly for tax consequences.

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[134] Incorporated Societies Act, above n 44.
[135] Charities Commission Decision No 2010-7, 15 April 2010 at [4].
[136] *Bowman v Secular Society Ltd* [1915] 2 Ch 447, [1917] AC 406 (HL).
[137] *Re Wilkinson* [1941] NZLR (SC) 1065 at 1077; *Molloy v Commissioner of Inland Revenue,* above n 100, at 697.
[138] Charities Commission Decision No 2010-7, above n 135, at [72].
[139] Section 5(3).
[140] *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC).
[141] At [18].
[142] At 20].
[143] At [5].

1 Greenpeace on appeal

Greenpeace appealed to the High Court.[144] It too was bound by the political purposes doctrine and agreed with the Commission that Greenpeace had political purposes more than incidental to its charitable purposes.[145] The precedential issue was whether New Zealand should follow the High Court of Australia in repealing the political purposes doctrine.[146] Heath J also cited *Travis Trust* as precedent for interpretation of the Charities Act.[147] He identified the case as one of public importance and was 'reluctant' to apply the political purpose exemption, setting the scene for Greenpeace to enter higher courts.[148]

The Court of Appeal heard Greenpeace's appeal in late 2012.[149] Greenpeace had by then amended its constitutive documents so that its advocacy-type purposes related only to nuclear disarmament. The Court decided that nuclear disarmament was well-opposed in public discourse and so lacked the divisive, controversial flavour of a political purpose, which theoretically makes it difficult and inappropriate for a court to identify public benefit.[150] However, the Court still found that the political purposes doctrine remained a disqualifying element of the common law test. The Court of Appeal cited an Inland Revenue report, which suggested that registration and monitoring of charities was needed to "reflect their privileges, especially the tax exemption available to them."[151]

The Court noted the purposes of the Charities Commission "especially important" for Greenpeace's case related to monitoring registered entities,[152] inquiring into breaches of the Act or serious wrongdoing,[153] and monitoring compliance, with a view to prosecution.[154] These purposes were linked to overseeing the tax privileges accorded to charities.[155] Why the court emphasised the most punitive purposes in a case about charitable registration is strange, even

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[144] Charities Act, s 59.
[145] *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC).
[146] *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539.
[147] At [39].
[148] At [59].
[149] *Re Greenpeace of New Zealand Inc* (CA), above n 48.
[150] At [72].
[151] At [34]; *First Report by the Working Party on Registration Reporting and Monitoring of Charities* (Registrar of Charities, Wellington, 2002).
[152] Charities Act, s 3(h).
[153] Section 3(i).
[154] Section 3(j).
[155] At [38].

more so given there were no allegations of wrongdoing by Greenpeace. It is then stated that if registration is granted, Greenpeace would receive tax exemptions.[156] The relevance of these fiscal consequences is unelaborated, as if the existence of tax privileges for registered charities is an unequivocal reason for restraint.

The Court also considered the political purposes doctrine and whether it reflected modern charity. Repealing or modifying the doctrine would constitute a radical departure from the common law.[157] In ultimately deciding to reserve the question to the Supreme Court, a reason given was the fiscal consequences involved in amending the common law definition.[158] The Court cited authority from the Canadian Supreme Court, which grappled with whether to remove the Preamble limb of the charitable purpose definition and ask simply if an entity is generating public benefit.[159] That court deferred to Parliament, because radically departing from the common law would enlarge the number of entities eligible for charitable registration and so significantly alter the tax base. It is problematic that courts would defer to Parliament the issue concerning increasing the number of tax-exempt charities, while later taking the opportunity in the Supreme Court decision concerning *Greenpeace* to narrow the test for charitable purpose, through cautious doubt of the presumption of charitability.

The influence of negative fiscal consequences skewed the application of common law principles against charitable registration. The Supreme Court of Canada's reasoning, cited by the Court of Appeal with approval in *Greenpeace*, acknowledged the preservation of the common law tradition in identifying a charitable purpose in Canadian legislation.[160] However, this reasoning becomes circular, as the preservation of the common law's flexibility is used as justification for limiting its development. This disregards analogical reasoning, which was not displaced by the Charities Act.[161] Recourse to fiscal consequences also rejects "Parliament's deliberate decision to confer fiscal benefits on the basis of the common law method of defining

[156] At [52].
[157] At [56].
[158] At [58].
[159] *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 (CSC) at [197].
[160] *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, above n 159, at [200].
[161] *Re Greenpeace of New Zealand Inc* (SC), above n 24, at [16].

charity."[162] The common law method should not be tied to the same fiscal concerns that Government economists would inevitably resort to if a statutory definition was preferred over the *Pemsel* classification.[163] The notable *Broadbent Report* published by the Canadian Government in 1999 recommended the replacement of the common law tradition with an updated statutory definition, on the basis that modern charity should not be dictated by judges interpreting proximity to the Preamble and *Pemsel*.[164] Despite this, and alongside similar sentiment in New Zealand and Australia,[165] the definition has remained resolutely geared towards analogical, flexible reasoning inherent in the charitable purpose test. If the common law definition of charitable purpose is frozen through codification, the innovative aspects of charity law jurisprudence are compromised. If a statutory definition is preferred, this flexibility can be transparently considered in the drafting process, with clear mechanisms to ensure that the flexibility of the common law is honestly encompassed into the decision-making process.

In Canada, there is no specialist charity regulator, leaving the interpretation of the charitable purpose definition to the Revenue Agency.[166] This positions the assessment of charitable purpose within a statute concerned with revenue raising. This purpose is comparable to the Income Tax Act 2007's primary purpose of defining and imposing tax on net income.[167] Before 2005, the assessment of charitable purposes in New Zealand resided with the Commissioner of Inland Revenue, thus making a comparison with Canadian jurisprudence better placed. The transferal of the charitable purpose inquiry to the jurisdiction of the Charities Act is not insignificant, especially considering there is no purpose in the Act concerned with tax policy.[168] In contrast, it is the function of the Commissioner of Inland Revenue to collect the highest net revenue that is practicable within the law.[169] The inevitable tension that arises when the Commissioner of Inland Revenue challenges the tax exempt status of a charity has been the

[162] Adam Parachin "Common Misconceptions of the Common Law of Charity" (paper presented to the Conference on Defining, Taxing and Regulating Not-for-Profits in the 21st Century, Melbourne, July 2012) at 7, as cited in Barker "The presumption of charitability", above n 90, at 295.
[163] Blake Bromley "Answering the Broadbent Question: The Case for a Common Law Definition of Charity" (1999) 19 Est.TR. & Pensions J. 21 at 41.
[164] The Panel on Accountability and Governance in the Voluntary Sector *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (Voluntary Sector Initiative, 1999) at 53.
[165] *Tax and charities,* above n 49; *Second Report by the Working Party on Registration Reporting and Monitoring of Charities* (Registrar of Charities, Wellington, 2002); Commonwealth of Australia *Inquiry into the Definition of Charities and Related Organisations* (Canberra, 2001).
[166] Income Tax Act RSC 1985 c 1, s 149.1.
[167] Section AA 1(1).
[168] Charities Act, s 3.
[169] Tax Administration Act 1994, s 6A; *National Council of Women of New Zealand Incorporated v Charities Registration Board*, above n 91, at [75].

subject of judicial analysis, in that Inland Revenue cannot abuse its broad powers in collecting revenue to establish a discretionary tax treatment of charities, as charitable registration via statute is the defining gateway to tax exemptions.[170]

While finding that Greenpeace's advocacy purpose relating to nuclear disarmament was non-political, the Court of Appeal ultimately deemed Greenpeace's activities advocacy. This conflicts with the principle that an entity's stated purposes, rather than activities, are the focus of the registration inquiry.[171] The Court of Appeal referred Greenpeace's application back to the Charities Commission, which awaited the decision of the Supreme Court on political purposes.

2 The Supreme Court judgment

In the opening paragraph of the majority judgment of the split 3:2 decision, Elias CJ noted that the "principal advantage gained by registration as a charitable entity is tax relief."[172] Thus, the fiscal imperative loomed large. Unbound by precedent, the court repealed the political purposes exemption.[173] It found the Court of Appeal erred in placing decisive emphasis on whether nuclear disarmament was well accepted in public debate, as a test of public controversy could not form the basis of the political purpose exclusion.[174] The majority nonetheless found that establishing public benefit in a political purpose would prove difficult. This was because political purposes tended to involve the promotion of ideas, as opposed to the "matters of tangible public utility" that charitable purposes generally concern.[175] The ultimate determination was to remit the matter back to the Charities Registration Board, which had now succeeded the Charities Commission.[176] William Young J delivered the minority judgment, finding as a matter of policy and practicality, the political purposes exclusion was "reasonably defensible."[177] His Honour thought this consistent with the wording of the Preamble and the

[170] *National Council of Women of New Zealand Incorporated v Charities Registration Board*, above n 91, at [80].
[171] *Latimer v Commissioner of Inland Revenue* (PC), above n 11, at [29].
[172] At [1].
[173] At [3].
[174] At [75].
[175] At [114].
[176] At [117].
[177] At [127].

common law tradition, which focused on tangible benefit, rather than promotion of abstract views.[178]

The fiscal impulse was evident throughout the Supreme Court's judgment. The opening paragraph identified and approved a fiscal backstop in registration.[179] This mirrors the minority judgment in *Pemsel*, right at the beginning of charity law.[180] Michael Gousmett, a prominent charity law historian, has identified discussion of the tax consequences of registered charitable status in another case four years prior to *Pemsel*, in Scotland.[181] The *Tailors of Glasgow* case emphasised that finding the proper scope for the definition of charitable purpose was important because of its impact upon revenue generation, through its application in the charitable purpose tax exemption.[182] This sentiment is echoed, over one hundred and twenty years later, in similar terms in Elias CJ's majority judgment. This is despite *Pemsel* rejecting *Tailors of Glasgow* and severing the cognitive link between charitable purposes and tax exemptions.[183] Thus, rather than being symptomatic of a modern administrative state, the tendency to equate charitable registration with the incidental tax privileges that follow is not new. The preoccupation of decision makers with fiscal policy in charity law, despite there being no tax element in the test, predates the contemporary emergence of fiscal sociology.[184]

The Supreme Court in the *Greenpeace* litigation noted that revising the test for charitable purpose to a single test of public benefit was inappropriate, given "significant fiscal consequences."[185] This reasoning has been critiqued in this dissertation, for its reliance upon fiscal considerations to doubt the presumption of charitability.[186] However, the court cited two charity law cases to support the proposition: *New Zealand Society of Accountants*[187] and *Re Tennant.*[188] The former case concerned whether the New Zealand Society of Accountants and the New Zealand Law Society, which both operated professional fidelity funds, had charitable

[178] At [125].
[179] At [1].
[180] *Commissioners for Special Purposes of the Income Tax v Pemsel,* above n 32, at 566.
[181] Michael Gousmett "The History of Charitable Purpose Tax Concessions in New Zealand: Part 1" (2013) 19 NZJTLP 139 at 141.
[182] *The Incorporation of Tailors in Glasgow v The Commissioners of Inland Revenue* 1887 2 TC 297.
[183] At 591.
[184] Miranda Stewart "The Tax State, Benefit and Legitimacy" in Peter Harris and Dominic de Cogan (ed) *Studies in the History of Tax Law Volume 7* (Hart Publishing, Oxford, 2015) 483 at 487.
[185] At [30].
[186] Refer to 14-15.
[187] *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 19.
[188] *Re Tennant* [1996] 2 NZLR 633 (HC) at 637.

purposes. Richardson J referred to charity law jurisprudence as an "arcane field of law."[189] The hurdle for the societies was establishing public benefit, as the High Court had identified the fidelity funds as benefitting a private class of clients.[190] The societies advanced evidence of the wider benefit generated by the operation of the funds, being a public peace of mind knowing financial safeguards were operative.[191] However, Richardson J surmised that many purposes generate incidental benefits for a wider class than the immediate beneficiaries. Peace of mind was deemed "far too nebulous and remote" to constitute public benefit.[192]

Somers J concurred in finding that the wider benefits of the funds were too obscure and that the direct beneficiaries were a "transient and non-permanent number of individuals."[193] His Honour addressed the tradition of analogical reasoning in relation to the Preamble and whether the presumption of charitability correctly formed part of the law on charitable purpose. And, almost identically to the judgment delivered by Elias CJ almost three decades later, Somers J disproved of using the presumption method to satisfy the Preamble limb of the charitable purpose inquiry:[194]

> Tax advantages have been given upon the understanding of Parliament or its draftsmen of the nature of charity. If the courts are to alter that nature significantly they are in effect altering the incidence of tax.

This renders a false judicial function in making tax policy through the charitable registration assessment, rather than developing charitable jurisprudence through analogical reasoning and applying it to novel purposes. This rhetoric clearly influenced the Supreme Court in its doubting of the presumption of charitability.

The Supreme Court in *Greenpeace* followed the minority of the High Court of Australia in finding that although the political purpose doctrine was no longer necessary, an entity still needed to show the political ends advocated for delivered public benefit, which for controversial causes, would be very difficult.[195] This contrasts with the Australian majority

[189] At 152.
[190] At 152.
[191] At 153.
[192] At 153.
[193] At 156.
[194] At 157.
[195] *Aid/Watch Inc v Commissioner of Taxation*, above n 46, at [69], per Kiefel J dissenting.

judgment, which found that diversity of opinion and public debate itself benefitted a responsive and democratic society.[196] As with the plight of social housing providers, restraint of the classes of charitable entities due to fiscal consequences prevents the recognition of benefits like pluralism, a quality that many commentators note as essential to the independence and appeal of the charitable sector.[197] The Supreme Court remanded the case back to the Charities Registration Board. The Board, using the new jurisprudence on political purposes and undoubtedly considering the Supreme Court's fiscal rhetoric, again refused to register Greenpeace as a charity.

3 The saga continues

Greenpeace finally appealed to the High Court, seeking judicial review of the decline, in which Mallon J interpreted the constitutive documents of Greenpeace innovatively. Her Honour found that Greenpeace's primary advocacy purpose was for environmental protection, not nuclear disarmament.[198] Relying on precedent that environmental advocacy could be charitable, Mallon J found that the Board erred in rejecting Greenpeace's registration.[199] Her Honour also relied upon fiscal considerations in assessing the claim for judicial review, when she noted that Greenpeace "was seeking charitable status because of the fiscal and other advantages it would give them."[200] However, care was taken to contextualize the tax advantages, as Her Honour noted that charitable status would encourage the public to donate more liberally to Greenpeace, which is reminiscent of Harding's expressive strategies of charity law.[201] While acknowledging that tax exemptions would flow from the registration decision, Her Honour sought to locate these privileges as only one of a range of advantages.

Another judgment of Mallon J concerning the registration of an organisation teaching biblical finance expressly rejected the consideration of fiscal consequences in charitable registration.

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[196] *Aid/Watch Inc v Commissioner of Taxation,* above n 46, at [47].
[197] David Duff "Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform" (2004) 42 Osgoode Hall L.J. 47 at 68; Matthew Harding "What is the Point of Charity Law?" in Darryn Jensen and Kit Barker (ed) *Private Law: Key Encounters with Public Law* (Cambridge University Press, Cambridge (UK), 2013) at 163; Miranda Stewart "The boundaries of charity and tax" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge (UK), 2014) 232 at 242.
[198] *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999 at [85].
[199] *Re Family First New Zealand* [2018] NZHC 2273, [2019] 2 NZLR 673 at [16].
[200] At [167].
[201] Matthew Harding "Charity Law in Overview", above n 113, at 40.

Her Honour found that the presumption of charitability remained good law on charitable purpose and that: [202]

> [T]his assumption is not displaced merely because the Court may have a different view as to the social utility of the Liberty Trust scheme and whether it is an activity deserving of the fiscal advantages that charitable status brings.

The fiscal imperative in charity law clearly does not have unfettered judicial acceptance, which is evident when Her Honour's comments are read with those of Mackenzie J in the High Court on tax policy leakage in the QLCHT saga.[203] This reasoning was not considered by the Supreme Court when it doubted the presumption of charitability in Greenpeace.

C. Fiscal reasoning by the regulator

The fiscal impulse persisted into the successor of the Charities Commission, the Charities Registration Board. Before the Charities Act, when Inland Revenue administered the assessment of charitable purpose, commentators have identified two key registration decisions that 'went the way' of charities.[204] These were the Court of Appeal decisions concerning income derived by the New Zealand Medical Council, which maintained a register of medical practitioners, and the New Zealand Council of Law Reporting, which published reported judgments.[205] In both cases, the private benefits derived by a class of professional individuals in either being visible on the medical register or accessing reported judgments were contextualised with the wider public good derived from these services. The fallout of these decisions was reflected in the prominent *Tax and Charities* 2001 report, where Inland Revenue submitted that the common law "may have expanded the boundaries of what is charitable to such an extent that it is now too easy to become a charity."[206] In another discussion document concerning Māori entities and tax, it proposed a deeming power

[202] *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [101].
[203] *Re Queenstown Lakes Community Housing Trust*, above n 5, at [77].
[204] Barker "Charity Regulation in New Zealand: History and Where to Now", above n 58, at 29.
[205] *Commissioner of Inland Revenue v Medical Council of New Zealand,* above n 76; *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682 (CA).
[206] *Tax and charities,* above n 49, at 5.11.

for Government to override a charitable registration.[207] Neither of these proposals affected the Charities Act definition.

However, even a decade after the Act preserved the common law definition, the Charities Registration Board professed its role in "monitoring registered charitable entities and their activities to ensure appropriate use of their tax exemptions."[208] This is despite the regulator having no mandate in respect of tax policy.[209] Establishing an independent regulator to nonetheless become an arm of government in monitoring tax compliance defeats the purpose of having a specialist body conducting the registration process.[210] This position is also reflected in the Board's registration denial of conservative advocacy group, Family First.[211] The Board noted that an approach focused heavily on the group's activities, as opposed to its purposes as is the common law test, was justified considering "the fiscal consequences of registration."[212] On appeal, it was noted that "the common law should develop cautiously, given the significant tax implications of materially widening the qualifying class of cases."[213] The Court of Appeal cited the Supreme Court's reasoning in *Greenpeace*,[214] appealing once again to the contrived notion that the common law, when codified and thus approved by lawmakers, must lose flexibility due to tax implications.

D. Tax avoidance and charities

Disproportionate scrutiny of the charitable sector extends to the approach of Inland Revenue to tax avoidance cases concerning charities. In 2020, the Commissioner commenced proceedings against the Church of the Latter-Day Saints concerning its donation regime for overseas missionaries.[215] Donations to the Church Trust Board by people connected to the young missionaries were disputed by the Commissioner as non-taxable charitable gifts.[216] The

[207] *The taxation of Māori organisations; a Government discussion document* (Policy Advice Division of the Inland Revenue Department, Wellington, 2001).
[208] Charities Registration Board Decision No 2015-1, 8 April 2015 at [30].
[209] Charities Act, s 8.
[210] Charities Act, s 8(4).
[211] Charities Registration Board Decision No 2013-1, 15 April 2013.
[212] At [26].
[213] *Family First New Zealand v Attorney-General*, above n 8, at [66].
[214] Above n 24, at [30].
[215] *Church of Jesus Christ of Latter-Day Saints Trust Board v Commissioner of Inland Revenue (CIR)* [2020] NZCA 143; [2020] 2 NZLR 647.
[216] Income Tax Act 2007, s LD 1.

Commissioner refused to allow a tax credit for the donations, believing the donors derived material benefit from the gift, namely financial support of the missionaries. Hinton J, hearing the dispute in the High Court, upheld the Commissioner's assessment.[217] The approach taken by the Commissioner and High Court has been criticised as excessively redolent of "substance over form", whereby a tax avoidance analysis was triggered without justification.[218] This is inconsistent with the choice principle, in that taxpayers are entitled to arrange their tax affairs to achieve favourable outcomes.[219] This right, apparently, did not extend to Church members donating to their chosen charity. The Court of Appeal cited tax avoidance guidance from Richardson J that a transaction must be assessed on the legal arrangements actually entered into, unless the transaction is a sham or legislation requires an alternative approach.[220] The Commissioner conceded from the outset that neither of these circumstances applied to the donations.[221] So, the taxpayers were entitled to have their income tax liability assessed on the legal arrangements entered into, rather than any imputed intention to avoid tax gleaned from charitable status.[222]

E. International perspectives on fiscal consequences

Other common law jurisdictions have considered incorporating a fiscal consequences test into the definition of charitable purpose. The House of Lords considered the matter in *Dingle v Turner*.[223] Lord Cross of Chelsea noted that:[224]

> In answering the question whether any given trust is a charitable trust the courts – as I see it, cannot avoid having regard to the fiscal privileges accorded to charities.

[217] *Barron v Clutha District Council* [2019] NZHC 52.
[218] Susan Barker "Unresolved issues in New Zealand charity law" (2021) 2 NZLJ 49 at 53.
[219] *IRC v Duke of Westminster* [1936] AC 1; 19 TC 490 (HL) at 518; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115; [2009] 2 NZLR 289 at [111].
[220] *Mills v Dowdall* [1983] NZLR 154 (CA) at 160.
[221] At [27].
[222] At [53].
[223] *Dingle v Turner*, above n 79.
[224] At 889.

And:[225]

> Charities automatically enjoy fiscal privileges which with the *increased burden of taxation* have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial *annual subsidy at the expense of the taxpayer* (emphasis added).

Much like the original fiscal consequences test in the *Pemsel* minority, this perceives charities as a financial burden and assumes the value of charitable activity can be faithfully reduced to an income tax expenditure. Charity law thus assumes a role as a de facto tax regime.[226] Lord Cross's fiscal consequences test was unpopular with the other Law Lords, who rejected that the fiscal privileges of charities could be relevant to the common law test.[227]

The majority judgment was cited with approval in New Zealand in 1994 at High Court level, where Heron J noted that an unspoken aspect of the case against registered charitable status was income tax concerns.[228] His Honour approved the majority in *Dingle v Turner* and the importance of separating the consequences of charitable status from the primary application of the legal test.[229] Commentators support this functional separation.[230] Heron J's judgment is one of the most explicit rejections of a fiscal consequences test in New Zealand. However, these comments have not been echoed in recent times, despite the fiscal consequences of registration featuring heavily in appellate court reasoning since.

In Canada, a fiscal consequences test was applied by the Supreme Court to an entity promoting youth soccer leagues.[231] The majority considered that broadening the legal definition of charitable purpose to include promotion of amateur sport constituted significant change to the common law and so was best left to Parliament.[232] Rather than focusing on conceptual aspects of public benefit that make amateur sport difficult to define as charitable, the fiscal

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[225] At 889.
[226] Barker "Charity Regulation in New Zealand: History and Where to Now", above n 58, at 30.
[227] At 880, 881.
[228] *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue* [1994] 3 NZLR (HC) 363 at 377.
[229] At 377.
[230] Parachin "Legal Privilege as a Defining Characteristic of Charity", above n 19, at 37; Matthew Harding "Towards a Liberal Theory of Charity Law" in Matthew Harding (ed) *Charity Law and the Liberal State* (Cambridge University Press, Cambridge (UK), 2014) 43 at 67.
[231] *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)* 2007 CSC 42, [2007] 3 SCR 217.
[232] At [44].

consequences of expanding the definition were decisive. Criticism of this decision has emphasised the lack of analogical reasoning or philosophical analysis of why amateur sport should not have been included in the idea of 'charity.'[233] The true difficulty lies in that amateur sport has historically been reserved as leisure for the rich or professional competition and only in the last century or so has been commonly recognised as a public good.[234] The Canadian Supreme Court cited its own precedent that Parliament is the decision maker who should specify the parameters of legal charitability.[235] Among common law countries, Canadian jurisprudence is the most strongly in favour of a fiscal consequences test. However, the Canadian Revenue Agency has a direct role in assessing charitable purpose, with Canada the only common law country lacking a specialist charity regulator. The Canadian context is thus uncomfortably tied to fiscal considerations, in a way that a jurisdiction like New Zealand's, with an independent regulator and dedicated legislative scheme, need not be.

Australian courts have not explicitly adopted or rejected a fiscal consequences test. The High Court's landmark decision *Central Bayside* did obliquely address the tax exemptions accorded to charities.[236] Central Bayside was an organisation of general practitioners in Melbourne with the purpose of improving patient care. It was denied a payroll exemption under Victorian revenue legislation, on the basis that it was not a charitable body.[237] The Commissioner contended that Central Bayside was a private professional body and because over 90% of its income comprised government grants, it lacked the requisite independence for charitable status.[238] The High Court rejected this and allowed the exemption. The majority noted that the references to 'charity' in Victorian tax legislation clearly referred to the classic *Pemsel* formulation and the common law, which is the accepted position in all common law countries.[239]

[233] Parachin "Legal Privilege as a Defining Characteristic of Charity", above n 19, at 49.
[234] Charitable Trusts Act, s 61A; *Re Nottage* [1895] 2 Ch 649, [1895-9] All ER Rep 1203 (CA), as cited in Richard Pidgeon "Amateur Sport and the Charities Act" (2009) 2 NZLJ 65 at 65.
[235] *Vancouver Society of Immigrant and Visible Minority Women v Canada (Minister of National Revenue - MNR)*, above n 159.
[236] *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43, (2006) 228 CLR 168.
[237] Pay-roll Tax Act 1971 (Vic), s 10(1)(bb).
[238] At [17] and [23].
[239] At n 6.

Kirby J in dissent theorised that 'charity' in income tax legislation could have a novel and contextual scope, construed from the purposes of revenue legislation in the "raising of revenue for the general purposes of the government."[240] His Honour criticised the *Pemsel* formulation's reliance on "rigid categories derived from an English statute of the early 17th century."[241] That the parameters of charitability may flex depending on legislative context is an oblique fiscal consequences test, as the term may morph to achieve Government's budgetary outcomes. Ultimately, Kirby J agreed with the majority that the tax statute in question was referencing the *Pemsel* tradition.[242] His Honour's rationale was to ensure that the many charitable organisations which sat within the common law conception of charity remained so.[243] It appears His Honour was concerned that organisations with genuine, legal charitability might be excluded by a new definition tied to tax policy – a recognition of the deleterious effects of an arbitrary fiscal consequences test.

The contentious nature of the charitable income tax exemption lends itself to conflicting judicial opinions on the role, if any, of tax policy in registration decisions. In New Zealand, a string of decisions resorted to the fiscal impulse in justifying a narrower scope of the test than the common law prescribes. Judicial expansion or revision of the test was constrained by reference to Parliament's interest in the number of entities with tax exempt status. Others warned against this covert distortion of the legal definition. International jurisdictions have also considered a fiscal consequences test and come to differing conclusions, demonstrating the polarising nature of the subject matter. Again, there is an enduring image of the tax state being the unmentionable elephant in the charity law room. In the next chapter, I argue that tax and charity should not be in the same room at all.

[240] At [86], per Kirby J dissenting.
[241] At [90], per Kirby J dissenting.
[242] At [114], per Kirby J dissenting.
[243] At [114], per Kirby J dissenting.

III. Chapter Three Tax and charity: a misunderstood scholarship

A. What charities do

The scope of the charitable sector's influence and its relationship with greater society has changed with time. At the Elizabethan Preamble's inception, the charitable sector was the primary deliverer of social welfare.[244] Foundational moments like the Preamble's inception and the fundamental decision in *Pemsel* emphasised that charities conducted a wider range of activities conferring public benefit than only poor relief. That wider role evolved alongside the gradual emergence of the free market and the growing administrative state, establishing the charitable sector as a distinct sphere between the boundaries of the state and market.[245]

1 The failure of private business and public administration

Upon that tripartite division between elements of a liberal democratic society came the "three failure" analysis. It envisages each sector of society deriving character from its independence from other sectors – the three being the state, the market and charity.[246] In this economic theory, the sectors exist to provide goods and services to rational consumers at levels of allocative efficiency, being the precise quantum and price required to satisfy their desire for the good or service.[247] The market must take a margin of profits and sometimes fails the worst off.[248] The legislative non-profit constraints that charities must comply with ensure that donor funds are applied appropriately to the delivery of the good or service.[249] The charitable sector's altruistic foundations therefore allow it to supplement the free market's inadequacies.

[244] Fiona Martin "The History of the Taxation of Charities: How the Common Law Development of a Legal Definition of 'Charity' Has Affected the Taxation of Charities" in John Tiley (ed) *Studies in the History of Tax Law, Volume 4* (Hart Publishing, Oxford, 2010) 297 at 325.
[245] *Re Collier (Deceased)*, above n 15, at 95.
[246] Poirier, above n 20, at 68.
[247] Henry B. Hansmann "The Role of Nonprofit Enterprise" (1980) 89 Yale L.J. 835 at 835.
[248] Hansmann, above n 247, at 845.
[249] Charities Act, s 13(1)(a) and (b).

In contrast, Government uses coercive taxation to raise funds for public purposes. However, the state is politically constrained in its ability to cater to the preferences of minority voters.[250] Charities are predicated on voluntary action by private citizens, avoiding this problem. Three failures analysis depends upon two facts: first, that the character of the charitable sector derives from its ability to fill the void exposed by other sectors. Secondly, if the charitable sector functions in response to both market and government failure, charitable action defies systemic categorisation as public or private.[251] Citizens opt in to the provision of public goods, according to their individual preferences and at a rate that reflects their personal value of the service.[252]

2 Beyond economics

Economic accounts rely on theoretical assumptions about what respective sectors will or will not do, and the charitable sector's reaction to those. Such explanations also assume interchangeability between the sectors in the delivery of public goods, which disregards the means by which charitable action is sustained.[253] The shift towards charitable institutions contracting with Government to deliver public services disrupts the boundary between charitable activity and state-funded benevolence, confusing the separate models of delivery that three failures analysis depends upon.[254]

Non-economic theories focus on the inherent good in the association of private citizens conducting charitable action on an altruistic and voluntary basis.[255] Generation of altruism, being the doing of good for others with no expectation of return, constitutes a societal meta-benefit occurring exclusively in the charitable sector.[256] The encouragement of diverse and pluralistic enterprises secures a sphere of independence from Government.[257] This diversity of pursuits is reflected in the Elizabethan Preamble and the *Pemsel* classification, which

[250] Burton Weisbrod "Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy" in Burton Weisbrod (ed) *The Voluntary Nonprofit Sector* (Lexington Books, Massachusetts, 1977) 51 at 53.
[251] Brody "Whose Public", above n 50, at 968.
[252] Richard Steinberg "Economic Theories of Nonprofit Organizations" in Richard Steinberg and Walter Powell (ed) *The Nonprofit Sector: A Research Handbook* (2nd ed, Yale University Press, New Haven, 2006) 117 at 122.
[253] Matthew Harding and Daniel Halliday "Keeping Justice (Largely) out of Charity: Pluralism and the Division of Labor between Charitable Organizations and the State" (2020) 26 LEG 281 at 283.
[254] *Central Bayside General Practice Association Limited v Commissioner of State Revenue,* above n 236.
[255] Rob Atkinson "Altruism in Nonprofit Organizations" (1990) 31 B.C. L. Rev 501 at 616.
[256] Atkinson, above n 255, at 629.
[257] Harding "Independence and Accountability in the Charity Sector", above n 121, at 14.

acknowledges and encourages many possibilities for a charitable purpose in law.[258] Charitable activity also creates positive outcomes for the benefactor, characterised as the "warm glow" of altruism.[259] This perception of charitable activity as a positive externality can co-exist with economic analysis. A robust assessment of the charitable tax exemption acknowledges that there is a value judgment to be made between the integrity of the tax base and the social good generated by charities, suggesting the judgment depends upon, but also exceeds economic analysis.[260]

B. Conceptualising the charitable purpose income tax exemption

Fuelling public debate about the exemption is that there remains no clear, undisputed justification for the income tax exemption for charities. This continued debate is likely due to the diversity of legal forms and purposes through which charitable activity is performed and sustained.[261] Traditionally, the exemption is characterised as a Government subsidy. From this perspective, tax-exempt status is indirect funding to relieve Government of the burden of providing public goods and encouraging benevolent behaviour.[262] This perception positions public benefit at the crux of the charitable income tax exemption continuation debate.[263]

The Government subsidisation argument is predicated on deficit-based rhetoric and on 'filling the gaps' of an inadequate bureaucracy, both economically and socially. An Australian Government Working Group found no clear principle underlying the tax treatment of charities.[264] However, it suggested public benefit as the defining requirement of eligiblity for tax concessions. This is a palatable suggestion that appears consistent with the public conception of charities as 'doing good.' Although, synomising the point of charities with the delivery of public benefit that Government could, theoretically, deliver just as efficiently

[258] Harding "Independence and Accountability in the Charity Sector", above n 121, at 15.
[259] James Andreoni "Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence" (1989) 97 J.Pol.Econ 1447 at 1448.
[260] Kerrie Sadiq and Catherine Richardson "Tax Concessions for Charities: Competitive Neutrality, the Tax Base and Public Goods Choice" (2010) 25 Austl. TAX F. 597 at 611.
[261] *Re Greenpeace of New Zealand* Inc, above n 24, at [28].
[262] Miranda Perry Fleischer "Subsidising Charity Liberally" in Matthew Harding (ed) *Research Handbook on Not-For-Profit Law* (Edward Elgar Publishing, Northampton (MA), 2018) 418 at 419.
[263] *Re Greenpeace of New Zealand Inc,* above n 24, at [19]; *Tax and charities*, above n 49.
[264] Not-for-Profit Sector Tax Concession Working Group *Final Report: Fairer, simpler and more effective tax concessions for the not-for-profit sector* (Commonwealth of Australia, Canberra, 2013) at 14.

cannot explain why the test for charitable purpose is only public benefit. Further, an analysis with public benefit as the cornerstone ignores public good that business or social enterprise generates without receiving an exemption.

Subsidy theory relies on the assumption that the charitable purpose tax exemption can be given faithful expression as a tax expenditure. Tax expenditure analysis treats tax exemptions as economically equivalent to direct Government outlays, so as to quantify foregone revenue.[265] This analysis is strong in Government dialogue around charities, with the income tax exemption being labeled as "in effect, government expenditure."[266] The Tax Working Group also invoked tax expenditure analysis in its 2019 outgoing report, recommending the regular review of the sector's "use of what would otherwise be tax revenue."[267] Further, in Treasury's most recently available tax expenditure analysis, the charitable tax exemption was classed as a social tax expenditure.[268] Notably, the expenditure statement was restricted to a narrow subset of expenditures that would "bear a distinct fiscal cost and represent a clear policy-motivated exemption to current tax practice."[269] This analysis assumes that what charities are delivering and doing would otherwise fall to Government, ignoring contemporary notions of the sector's importance in facilitating action that extends past the traditional role of the state.

The application of tax expenditure analysis to the charitable sector's activity has been closely questioned. To be successful, tax expenditure analysis must identify the 'ideal' tax base, with tax expenditures representing economic compromise upon that optimum base.[270] It is difficult to imagine charities being included in the tax base as since the imposition of the modern state charities have always been exempt. Tax expenditure analysis relies heavily on the unit of the individual as the recipient of benefit in the form of reduced tax liability. In contrast, charities may lack clear beneficiaries and, by definition, are required to benefit those other than the individuals operating and financing them.[271] The beneficiaries of charitable pursuits may also

[265] Ole Gjems-Onstad "Tax Expenditure: A Criticism of the Concept as Applied to Nongovernmental Organizations" (1990) 19 Nonprofit and Voluntary Sector Quarterly 279 at 279.
[266] *Tax and charities,* above n 49, at 4.3
[267] *Future of Tax: Final Report Volume I – Recommendations* (The Tax Working Group, Wellington, 2019) at 13.
[268] Government of New Zealand *2021 Tax Expenditure Statement* (Treasury, Wellington, 2021) at 6.
[269] At 2.
[270] McGregor-Lowndes, Turnour and Turnour, above n 120, at 608.
[271] Richard Krever "Tax Deductions for Charitable Donations: A Tax Expenditure Analysis" in Richard Krever and Gretchen Kewley (ed) *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Comparative Public Policy Research Unit, Sydney, 1991) 1 at 4.

be low level earners, exempt from income tax anyway, or in such numbers, as is the case for intangible, public goods like subsidised internet, that tracing them would be logistically impossible.[272] This is further complicated by "warm glow economics", which notes that altruism benefits the benefactor through quasi-quantifiable personal satisfaction.[273] Certainly, the tax expenditure calculations required to attach value to the charitable exemption will be difficult and imprecise. This is not fatal to the theory; rather, it mandates a more discerning intellectual engagement with the nuances of charitable action.

The United States Supreme Court has grappled with the rationale for the income tax exemption for charities. *Bob Jones University* concerned an academic institution with racially discriminatory admissions policies.[274] The majority concluded that this violated public policy and precluded charitable registration.[275] It held that the charitable income tax exemption depended upon an organisation's purpose being "in harmony with the public interest" and the community conscience.[276] Justice Powell, although agreeing that the plaintiff did not have a charitable purpose, disagreed with the majority's rationale for the exemption. His Honour noted that a justification for the tax exemption based only on public benefit "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."[277] His Honour's opinion was that the charitable tax exemption was "one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life."[278] If this dictum has merit, the charitable tax exemption, although paradoxically being managed by the public revenue, serves as a means of limiting the tax state through the imposition of income tax rules.[279] While twenty-first century New Zealand may generally desire a greater role for the state in shaping citizen preferences, Justice Powell's dissent provides fruitful ground to consider the limitations of the tax state.

The tax state concept was developed in the early twentieth century by Joseph Schumpeter, to refer to a fiscal conception of Goverment, defined by and dependent on its unique power to

[272] McGregor-Lowndes, Turnour and Turnour "Not for Profit Income Tax Exemption: Is There a Hole in the Bucket Dear Henry?", above n 120, at 608.
[273] Andreoni, above n 259, at 1448.
[274] *Bob Jones University v United States,* 461 U.S. 574 (1983).
[275] At 577.
[276] At 591-592.
[277] At 609.
[278] At 609.
[279] Stewart "The Tax State, Benefit and Legitimacy", above n 184, at 483.

tax.[280] But although the state has a monopoly on legitimate coercion, it must also exercise restraint. This is due to what Margaret Levi calls the "stable fiscal bargain" between the state and interests like the charitable sector, in which a negotiation of norms, rules and expectations is conducted and implemented through tax base choices.[281] This bargain ensures the continued legitimacy of the state's power of taxation. Justice Powell's minority judgment in *Bob Jones University* tests the balance of the tax state; rather than the tax state offloading its burdens through allocation of income tax exemptions, the state reflexively acknowledges its weakness in being based solely on coercion, however legitimate. Relatedly, using charity law to punish diversions from public policy oversteps its defining and privileging aspects, whilst also ignoring the utility of doctrines such as anti-discrimination law, that squarely address purposes or actions that undermine public policy.

Tax state theory complements sovereignty theory. This historical perspective proposed by Evelyn Brody considers that in historical fact the charitable tax exemption was a bargain struck between the church and early government.[282] Brody's contention is that "[c]harities go untaxed because Caesar should not tax God" and so it is the historical legacy of the Church to the state that explains the exemption.[283] In contrast to subsidy theory, which perceives the charitable sector as subordinate to the state, sovereignty theory considers the sector beyond the reach of the fiscal state due to sociohistorical contingency. Charitable action thus remains a partner with the state in fostering diverse sites for citizens to develop a "communitarian ethos."[284] This is reflected in the United Kingdom's Civil Society Strategy, which envisaged the charitable sector as "a hallmark of a thriving democracy."[285]

Much like charitable activity is necessarily comprised of a variety of pursuits and purposes through diverse legal forms, so too are the justifications for its preservation in partnership with the tax state and private enterprise. Getting to the 'perfect' answer about which justification is correct is beyond the scope of this dissertation. The point is that there are competing theories which are in flux as society's preferences and priorities change.

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[280] Stewart "The Tax State, Benefit and Legitimacy", above n 184, at 487.
[281] Margaret Levi *Of Rule and Revenue* (University of California Press, California, 1989), as cited in Stewart "The Tax State, Benefit and Legitimacy", above n 184, at 504.
[282] Brody "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption", above n 29, at 586.
[283] At 588.
[284] Miranda Perry Fleischer "Subsidising Charity Liberally", above n 262, at 433.
[285] United Kingdom Office for Civil Society *Civil Society Strategy: building a future that works for everyone* (Cabinet Office, London, 2018) at 14.

C. *Is the fiscal impulse inevitable?*

Looking once more to history, consider the Mortmain Acts, passed from 1279 onwards. French for "dead hand", the Acts were aimed at countering a testamentary trend amongst the landed gentry to bequeath land to the Church.[286] The Acts voided testamentary bequests for charitable purposes. The Courts of the Chancery purposefully interpreted testamentary trusts to trigger the jurisdiction of the Mortmain Acts and guard the powerful interests of the land-owning classes.[287] This judicial manipulation of the scope of legal charity resulted in an artificially enlarged class of trusts being construed as charitable, including trusts for the repair of town church bells[288] and the establishment of a botanical garden.[289]

Morice v Bishop of Durham concerned a testamentary trust established for "purposes of liberality and benevolence."[291] Counsel for the Bishop, anxious to ensure the disposition was not charitable, submitted that the objects were too wide and encompassed much more than what constituted charity in ordinary parlance. If so, the gift was too broad to be voided by the Mortmain Act. Lord Eldon disagreed and established that the Elizabethan Preamble was the starting point for finding a charitable purpose and any novel purpose needed to be within its "spirit and intendment."[292] Thus, legal charity was not required to correlate neatly to donor preferences, skewed by related legislation.[293] The trust in question was therefore charitable and the gift to the Church avoided. The "spirit and intendment" principle would become instrumental in establishing analogical reasoning in charity law and determining the requisite proximity to the Preamble.

The statutory influence of the Mortmain Acts in skewing the concept of charity to trigger a corresponding statute is remarkably similar to the fiscal impulse this dissertation explores. Just as the Courts of the Chancery dramatically widened the scope of charitability to protect the financial interests of heirs, so too have contemporary judicaries relied on tax policy to narrow legal charity's scope. Although this historical contingency might suggest decision makers will

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[286] Mortmain Act of 1736 (UK) 9 Geo II 36.
[287] Harding "Charity and Law: Past, Present and Future", above n 17, at 566.
[288] *Turner v Ogden* (1787) 1 Cox 316 (Ch), as cited in Martin "The History of the Taxation of Charities", above n 244, at 306.
[289] *Townley v Bedwell* (1851) 51 ER 465 (Rolls Court), as cited in Martin "The History of the Taxation of Charities", above n 244, at 307.
[291] *Morice v Bishop of Durham,* above n 35.
[292] At 454.
[293] Parachin "Legal Privilege as a Defining Characteristic of Charity", above n 19, at 71-72.

always rely on some fiscal reasoning when considering an entity's registration, it also suggests that what constitutes a significant fiscal consequence worthy of altering legal charity is highly responsive to legislative context and sociocultural moments.

The final Mortmain Act was repealed in 1960 and so the incentive to dramatically enlarge legal charity became a cultural memory, replaced by the emerging conception of the tax state and its protection. This suggests that what society deems as a "fiscal consequence", whether it be the loss of inherited land to the Bishop or the perception of foregone tax revenue, is subjective. With an aging population and widening inequality contributing to the contemporary emergence of the 'working poor', perhaps the pendulum may swing once more to a conception of fiscal consequences that acknowledges the value inherent in a thriving charitable sector. It is undeniable that financial forces influence human behaviour and thus tax exemptions will routinely be scrutinised as a Government "hand out."[294] However, legal development should not so easily cave to the financial phenomenon of the day for the sake of "fiscal consequences", as this triggers a circular reasoning that returns inimically to the anxiety of the public purse.

D. An 'arcane field of law'

In 1986, Richardson J referred to charity law jurisprudence as an "arcane field of law."[295] His Honour was not the only judicial mind concerned with charity's Elizabethan origins. Others have deemed charity law an "area riddled with arcane and archaic learning, hair-splitting distinctions, irreconcilable authorities and anomalies for which nobody ever dares offer any explanation other than their history."[296] A Kirby J dissent too took aim at the historical basis of charity law in "rigid categories derived from an English statute of the early 17th century."[297] These comments exemplify a judicial tendency to historicise charity law and doubt its capacity to evolve.

[294] G E Dal Pont "Charity law: No magic in words?" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge (UK), 2014) 87 at 109.
[295] *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above 19, at 152.
[296] P C Hemphill "The Civil-Law Foundation as a Model for the Reform of Charitable Trusts Law" (1990) 64 ALJ 404 at 409, as cited in Parachin "Legal Privilege as a Defining Characteristic of Charity", above n 19, at 57.
[297] *Central Bayside General Practice Association Limited v Commissioner of State Revenue*, above n 236, per Kirby J dissenting.

Purposes that contemporaries of the Preamble would not have imagined have over time, since been accepted, due to the flexibility and timelessness of analogical reasoning. Modern causes like animal welfare[298] and environmental protection[299] have been re-characterised as charitable. If excessive emphasis is placed on charity law being "shackled" to the antiquity of the Preamble, charity law becomes distant from the latest values a liberal democratic society prizes. Emphasis is placed in regulatory contexts on ensuring the definition of charity is consonant with modern objectives.[300] This conception of charity law as flimsy, rather than flexible, and feeble, rather than responsive, pales in comparison when considering one of the colloquial certainties of the social contract: tax.

E. The inevitability of income tax

While tax has been at the forefront of key moments in the development of stable democracies, it has arguably become so ubiquitous that its construction upon social, cultural and historical contingency is forgotten. Chantal Stebbings argues that:[301]

> …tax is rarely viewed as a branch of law with historical depth or richness. It is widely perceived as lacking historical perspective or context, with little concern for its past development or tradition.

Stebbings also notes how tax administration is now largely invisible to us and distances us from its history.[302] The upheavals of previous centuries over tax mandated the need for tax to be levied clearly in statute and become, from popular perspective, a "mass of technical detail."[303] Therefore, the jurisprudential tradition around revenue has always feared overstepping the narrow interpretive function of taxation provisions and in this way, tax is rendered in law and policy as inevitable and stable.[304]

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[298] *National Anti-Vivisection Society v IRC* [1948] AC 31, [1947] 2 All ER 217 (HL).
[299] *Re Greenpeace of New Zealand Inc,* above n 24.
[300] *Tax and charities,* above n 49; Government of Australia *Report of the Inquiry into the Definition of Charities and Related Organisations* (Treasury, Canberra, 2001).
[301] Chantal Stebbings "The Value of Legal History: A Tax Law Perspective" (2021) 1 B.T.R. 66 at 68.
[302] At 73.
[303] Judith Freedman "Lord Hoffmann, tax law and principles" in PS Davies and J Pila (ed) *The Jurisprudence of Lord Hoffmann* (Hart Publishing, Oxford, 2015) at 2.
[304] Brian Arnold "A comparison of statutory general anti-avoidance rules and judicial general anti-avoidance doctrines as a means of controlling tax avoidance: Which is better? (What would John Tiley think?)" in J. Avery Jones, P. Harris, and D. Oliver (ed) *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge University Press, Cambridge (UK), 2008) 1 at 6.

That taxation must be levied through clear statutory authority, enshrined in the Magna Carta and the Bill of Rights, represented the gradual shift from absolutist monarchy to democracy.[305] Historical moments like Wat Tyler's Revolt in 1381, concerning disagreement over a poll tax, and the Glorious Revolution, sparked by baronial fiscal uproar, revolved around tax issues.[306] So, the controversy around the charitable purpose tax exemption should not be surprising. What is surprising is the tendency for historical amnesia in tax policy. The controversial nature of the poll tax and its centrality in Wat Tyler's Revolt in 1381 was overlooked by the Thatcher administration in 1989, when it imposed a remarkably similar tax that arguably led to Thatcher's resignation.[307] Further, when William Gladstone, the Chancellor of the Exchequer, introduced a bill in 1863 to abolish the charitable tax exemption, he was defeated in a public policy showdown.[308] Over a century later, New Zealand Minister of Finance, Roger Douglas, announced the Lange Labour Government's intention to remove the income tax exemption for charities and replace it with direct Government grants.[309] In response to accusations from the National Party of state paternalism, Prime Minister Lange hurriedly denounced Douglas' statement.[310] This criticism echoed response to Gladstone's 1863 proposal and demonstrates the inclination of tax law to repeat itself, at its peril.[311]

The "significant fiscal consequences" around charitable registration assessments contribute to the comfortable pillow of tax, that decision makers can rely upon in marginal cases. However, when the perceived stability and uniformity of fiscal consequences is questioned, a certain arbitrariness is exposed. The use of tax policy is a powerful tool to swing favour against the registration of a charity and, precisely because of its official air, an appeal to economics appears beyond reproach or legal critique.[312] Tax consequences can be relied upon as a 'buzzword' and useful in controversial decisions where something might 'not feel right' in registering an entity.

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[305] Littlewood "John Tiley and the Thunder of History", above n 14, at 60.
[306] Littlewood "John Tiley and the Thunder of History", above n 14, at 64-65; Jane Frecknall Hughes "Fiscal Grievances Underpinning the Magna Carta: Some First Thoughts" in John Tiley (ed) *Studies in the History of Tax Law, Volume 4* (Hart Publishing, Oxford, 2010) 89 at 104.
[307] Littlewood "John Tiley and the Thunder of History", above n 14, at 65.
[308] Ann O'Connell "Taxation and the not-for-profit sector globally: common issues, different solutions" in Matthew Harding (ed) *Research Handbook on Not-For-Profit Law* (Edward Elgar Publishing, Northampton (MA), 2018) 388 at 394.
[309] Michael Gousmett "1987: Roger Douglas' Failed Attempt to Tax Charities" (2013) 19 NZJTLP 279 at 280.
[310] (16 March 1988) 487 NZPD 276, as cited in Michael Gousmett "1987: Roger Douglas' Failed Attempt to Tax Charities", above n 309, at 281.
[311] Michael Gousmett "1987: Roger Douglas' Failed Attempt to Tax Charities", above n 309, at 279.
[312] Judith Freedman "Epilogue: Establishing the foundations of tax law in UK universities" in J. Avery Jones, P. Harris, and D. Oliver (ed), *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge University Press, Cambridge (UK), 2008) 288 at 292.

Much like the Canadian Supreme Court eschewed the burden of considering the philosophical difficulties inherent in defining amateur sport as charitable,[313] when borderlines cases emerge, as they must, tax concern is a convenient dogma to resort to.

The principle of "significant fiscal consequences" itself is misleading. All revenue choices impact the tax base. The effect and justifications for a given choice involves trading off reduced tax revenue with social outcomes, whilst also considering traditional tax policy design principles like "efficiency" and "coherence."[314] In tax avoidance jurisprudence, similar palatable concepts like 'artificiality' and 'contrivance' assume a meaning in law beyond their ordinary parlance and unravel the demystifying their formulation as neat indicators of tax avoidance should achieve. Attempts to extract principled concepts to indicate that a transaction is a sham ignores that recourse to 'commercial reality', vis-à-vis 'legal reality' requires construing the legislation according to subjective conceptions of what fiscal reality should indicate and produce.[315]

The same phenomenon impacts charitable registration. The 'commercial reality' that allows decision makers to 'look behind' an arrangement and identify tax avoidance functions in charity law as "significant fiscal consequences" which allow a registration to be denied based on an appeal to rationality. Could it be that this concept often veils an underlying intuition concerning moral desert? Adam Parachin argues that the resort to fiscal consequences as a limiting aspect of charity law conceals the intuition of the judiciary in whether registration feels fair.[316] This sustains the fiction that "significant fiscal consequences" are an ahistorical meter outside the context of the registration in question. Much like something as controversial as obscenity,[317] charity becomes something a decision maker knows when they encounter it, making it elusive to define.[318] This is consistent with judicial comment that legal charity is

[313] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, above n 231.
[314] *Future of Tax: Final Report,* above n 267, at 13; Sadiq and Richardson "Tax Concessions for Charities: Competitive Neutrality, the Tax Base and Public Goods Choice", above n 260, at 611.
[315] Judith Freedman "Lord Hoffmann, tax law and principles", above n 303, at 15-16.
[316] Adam Parachin "The role of fiscal considerations in the judicial interpretation of charity" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge (UK), 2014) 113 at 114.
[317] *Jacobellis v Ohio* 378 US 184 (1964) at 197.
[318] Joyce Chia "The history and future of the definition of charity in Australia" in Matthew Harding, Ann O'Connell and Miranda Stewart (ed) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge (UK), 2014) 179 at 184; Barker, above n 90, at 296.

"rather a matter of description than of definition."[319] In borderline cases, decision makers arguably cannot help but weigh up the immediacy of the fiscal state with the historical distance between the Preamble and an entity's purpose.

[319] *Perin v Carey* 24 How 465 (1860) at 494, as cited in Hubert Picarda *The Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 8.

IV. Chapter Four Theorising a restitutionary remedy

Thus far, the clash between tax and charity has been between two distinct doctrines with deeply conflicting philosophies. I now consider whether the law of restitution may provide a compromised resolution. Specifically, the availability of a restitutionary remedy whereby would-be charities denied charitable status later have tax monies returned will be considered.

Any costs of expensive litigation are a heavy burden for a charity, particularly given that the charitable form constrains expenditure too remote from the charitable purpose.[320] Further, the risk of protracted litigation raises issues of optics, as any appearance that charities are 'wasting money' litigating the common law test, something the general public might perceive as erudite or esoteric, could damage the public perception of charities. With these concerns in mind, this part seeks to uncover what remedy an entity denied charitable status because of "significant fiscal consequences" might have.

Graham Virgo defines the law of restitution as:[321]

> [T]hat body of law which is concerned with the award of a generic group of remedies which arise by operation of law to deprive the defendant of a gain rather than to compensate the claimant for loss suffered.

Restitution is triggered in response to different events. These include for vindication of property rights, in response to the commission of a wrong like a breach of contract or to correct an unjust enrichment. Restitution for unjust enrichment requires four elements be satisfied: the defendant receives an enrichment, which is at the expense of the claimant, that there is an unjust factor, and there is no defence available.[322] Unjust enrichment owes much to its pedigree as a private law remedy for quasi-contractual damages, giving it strained application to public bodies like Inland Revenue.[323] Therefore, the application of unjust enrichment and restitution to public bodies is a topic raising "fertile debate."[324] The judicial response in England has been

[320] Chia "The history and future of the definition of charity in Australia", above n 318, at 184.
[321] Graham Virgo "The law of taxation and unjust enrichment" in J. Avery Jones, P. Harris, and D. Oliver (ed), *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge University Press, Cambridge (UK), 2008) 132 at 133.
[322] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL).
[323] *Kingstreet Investments Ltd v Province of New Brunswick* 2007 CSC 1, [2007] 1 SCR 3 at [40].
[324] Daniel YM Tan "Public bodies, unjust enrichment and the rule of law" (2015) 15 OUCLJ 99 at 100.

to devise a novel category of unjust enrichment, with an unjust factor tailored to public bodies and called a '*Woolwich* claim'.[325]

A. Restitution from public bodies – the public versus private debate

Woolwich concerned the restitution of tax paid to the Revenue pursuant to ultra vires building regulations. No existing private law unjust factor, like duress or mistake, applied in the circumstances.[326] The House of Lords formulated a novel public law unjust factor that "money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right."[327] The claim focused on ensuring representative taxation and upholding the rule of law.[328] The claim has been questioned for finding unjust enrichment based upon general unconscionability and being "upwardlooking to the vague ideals of justice."[329] However, Australasian jurisprudence has disputed that unjust enrichment should not be grounded in unconscionability.[330] Consequently, there is confusion in Australia about the *Woolwich* claim's applicability.[331] The claim remains popular in the United Kingdom.[332] Critically, the House of Lords later disputed its previous holding that the *Woolwich* claim was the only remedy available for overpaid tax, by recognising a complimentary unjust enrichment claim based on mistake.[333]

Canadian law favours an exclusively public regime for restitution from public bodies. *Air Canada* concerned a gasoline tax, which was held to be ultra vires.[334] The issue was whether the airline had a common law right to restitution in recovering the payments. The majority rejected the claim, finding that any enrichment of the revenue was not at Air Canada's expense,

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[325] *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL).
[326] Rebecca Williams *Unjust Enrichment and Public Law: a comparative study of England, France and the EU* (Bloomsbury, London, 2010) at 27.
[327] At 177, per Lord Goff.
[328] Bill of Rights 1689 (Eng) 1 Will & Mar 2, art 4.
[329] Peter Birks *An Introduction to the Law of Restitution* (Claredon Press, New York, 1989) at 24, as cited in Graham Virgo "Restitution of Overpaid Tax—Justice at the Expense of Certainty" (1993) 52 C.L.J. 31 at 34.
[330] *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* [1998] HCA 17, (1988) 164 CLR 662; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 at 515.
[331] Kit Barker "Unjust Enrichment in Australia: What is(n't) it? Implications for Legal Reasoning and Practice" (2019) 43 MULR 903 at 903; Greg Weeks "The Public Law of Restitution" (2014) 38 MULR 198 at 198.
[332] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337; *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39, [2013] EWHC 3249.
[333] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558; Jessica Palmer "Restitution" (2013) 2 NZ L Rev 319 at 321.
[334] *Air Canada v British Columbia* [1989] 1 SCR 1161 (SCC).

as the funds had been expended on other taxpayers. Particularly trite were the policy reasons cautioning against expansion of the accepted grounds of restitution to cover public authorities, summarised as:[335]

> …the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government.

These concerns appear remarkably like the elusive concept of "significant fiscal consequences" that enter charitable registration assessments. The use of a "fiscal chaos"[336] argument frustrated Wilson J, who argued that if the court needed to adopt policy to insulate Government from its own mistakes, it should distribute the losses fairly across the public, rather than on individual taxpayers.[337] The availability of the claim, although rejected by the minority on the facts, was still theorised as a private law, individual remedy.

The private law approach in *Air Canada* was supplanted in 2007 by the Canadian Supreme Court in *Kingstreet Investments*.[338] The case considered recovery for user charges paid pursuant to ultra vires regulations. The taxpayer was awarded a public law restitutionary remedy.[339] Unjust enrichment principles, as a private law construct, were held to apply uncomfortably to the policy of tax recovery cases, requiring the exclusive use of the public law remedy as a distinct category of restitution.[341] The reasoning in *Kingstreet* has been criticised for rejecting the private law route, ignoring the principle that unconstitutionality alone cannot trigger a private law remedy from the state.[342]

B. The New Zealand position

There are few local cases concerning restitution from public authorities. There is a limited statutory right of recovery for overpaid income tax, but that appears constrained to technical

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[335] At [74].
[336] At [73].
[337] At [93], per Wilson J dissenting.
[338] *Kingstreet Investments Ltd v Province of New Brunswick,* above n 323.
[339] At [40].
[341] Niamh Cleary "Restitution and Public Law" (2012) 20 RLR 38 at 44.
[342] *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* 2007 SKCA 18 at [31]; Lionel Smith "Public Justice and Private Justice: Restitution after *Kingstreet*" (2008) 46 Can Bus LJ 11 at 26.

overpayments rather than overarching interpretive issues.[343] On appeal to the Privy Council, argument about the threat to public finance was deemed insufficient to bar a prima facie restitutionary claim.[344] The Supreme Court in *Stiassny,* which concerned GST owed by a forestry partnership, acknowledged the *Woolwich* claim's availability, though preferred to analyse the case as a mistaken payment by an agent of the taxpayer.[345] That decision also made use of *Deutsche Morgan,* the later House of Lords decision disputing the exclusivity of the *Woolwich* claim.[346] This suggests that both routes are available concurrently in New Zealand, like the English position.

Either formulation for restitution from public bodies condemns the use of tax policy as a "blunt instrument" of Government to retain funds to which it is not entitled.[347] Using the power of the modern tax state to deny correct application of tax provisions is a circular argument, exemplifying the tendency of tax lawyers and academics to treat tax as an "island", insulated from other bodies of law.[348] Subsequent commentary has stressed the importance of both the public law and private, unjust enrichment route, to balance the societal interest in representative taxation with the individual right to recovery.[349] Much like charity law engages the boundary between private and public action, so too does the law of restitution exceed its private pedigree and intersect significantly with public institutions.[350]

C. Application to the charity law context

In applying these restitutionary claims to charity law, two complexities arise. Firstly, charities that are denied tax-exempt status due to fiscal concerns have not overpaid per se, but have been

[343] Income Tax Act 2007, s RM 2(1A); Jack Alexander "The Grounds of Restitution from a Public Authority in New Zealand" (2019) NZBLQ 99 at 99.
[344] *Waikato Regional Airport Ltd v Attorney General* [2003] UKPC 50, [2004] 3 NZLR 4 at [82]; Eugen Trombitas "Restitution of Overpaid Taxes" (2016) 6 NZLJ 195 at 197.
[345] *Stiassny v Commissioner of Inland Revenue (CIR)* [2012] NZSC 106 at [67]; Peter Watts "Commercial Decisions in the Supreme Court of New Zealand" (paper presented to The New Zealand Supreme Court – the First 10 Years Conference, Auckland, November 2014) at 21.
[346] At [62].
[347] Peter Birks "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in P.D. Finn (ed) *Essays on Restitution* (The Law Book Company, Sydney, 1990) 164 at 201.
[348] Virgo "Restitution of Overpaid Tax—Justice at the Expense of Certainty", above n 329, at 34; Graham Virgo "The law of taxation is not an island - overpaid taxes and the law of restitution" (1993) 6 B.T.R. 442.
[349] Williams *Unjust Enrichment and Public Law*, above n 236, at 36-39, as cited in Cleary "Restitution and Public Law", above n 341, at 41.
[350] Weeks "The Public Law of Restitution", above n 331, at 198.

denied a tax consequence that the correct application of the charitable purpose test would deliver. While all taxpayers must be free from paying arbitrary tax, not all taxpayers are necessarily entitled as of right to access income tax exemptions. The Ontario Supreme Court used rights discourse to frame the 'right' of charities to favourable income tax treatment.[351] It struck down a funding rule that barred charities spending more than 10% of their income on political advocacy.[352] The rule was deemed unconstitutional because Government, if choosing to provide charities with a platform to express political views through charitable registration, needed to act consistently with the right to freedom of expression.[353]

The New Zealand Court of Appeal in the *Greenpeace* saga disagreed. It rejected that charities' right to freedom of expression could extend to "a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held."[354] New Zealand commentary has rejected that a charitable organization can be entitled to subsidised speech.[355] Therefore, the framing of a restitutionary claim should avoid argument that organisations seeking charitable status are owed income tax favours. A more effective contention is that the denial of charitable status for reason of fiscal consequences misapplies the common law test, which determines 'tax charity' status in the Income Tax Act.[356] Applying entities, although possessing no 'right' to favourable tax status, can expect registration decisions be made without reference to arbitrary fiscal considerations.

Secondly, the literature around restitution from public bodies advocates for a contextual analysis of the purpose of the payment in question.[357] A *Woolwich* claim centres the public law unjust factor around an ultra vires demand for payment of tax. The withholding of a tax exemption as the basis for this unlawful demand requires that a 'discount' on income tax payable and a demand to pay extra are two sides of the same coin. Much like tax expenditure analysis, this involves considering what the 'ideal' tax base is and whether denying an income tax privilege fairly provides the basis for an unjust factor. Whether it is opportunistic to seek restitution of income tax that the general non-exempt public pay, as opposed to being charged

[351] *Canada Without Poverty v. Attorney General of Canada* 2018 ONSC 4147; 142 OR (3d) 754.
[352] Income Tax Act RSC 1985 c 1, above n 166, s 149.1(6.2).
[353] At [48].
[354] *Re Greenpeace of New Zealand Inc* (CA), above n 48, at [67], citing *Human Life International in Canada Inc. v Minister of National Revenue* [1998] 3 FCR 202 (FC) at [18].
[355] Jane Calderwood Norton "Charities and freedom of expression" (2019) 5 NZLJ 174 at 175.
[356] Section YA 1.
[357] Trombitas "Restitution of Overpaid Taxes", above n 344, at 197.

an extra levy of some sort, is a critical question as to the availability of the *Woolwich* claim in the charitable context.

Moving to the availability of the concurrent claim for restitution for unjust enrichment based on mistake, the circumstances surrounding the mistake are critical. It is well established that the traditional bar preventing restitution for mistakes of law is now inoperative.[358] Further, the Supreme Court in *Stiassny* adopted Lord Blanchard's comment in *Deutsche Morgan* that a mistake is not rendered effectual if the taxpayer considered the legitimacy of the payment with reasonable suspicion.[359] However, the causative mistake of entities denied charitable status for fiscal reasons is located not in the legitimacy of the Income Tax Act's charitable exemption regime, but in the gateway to its application: the charitable purpose test.[360] Whether an entity is granted charitable status does not affect the legitimacy of the contingent taxing provisions that derive their applicability wholly from the charitable purpose assessment.[361] Whether or not the charitable purpose assessment was flawed due to fiscal rhetoric does not affect whether a legal obligation to pay is created. The applicability of the mistake factor to the charity context may thus involve constructing a legal fiction through deemed mistake, as Lord Hoffmann admitted in *Deutsche Morgan,*[362] and so raises questions about how intellectually robust that approach might be compared to *Woolwich*.

The contemporary expansion of restitutionary remedies has carved out space for tax-related claims. The constitutional concerns of entities that appear to satisfy the codified requirements for charitable status being incorrectly assessed and denied the tax exemption that is wholly contingent upon that assessment could be within the sights of the law of restitution. A restitutionary perspective in this space is helpful, because the recognition of a prima facie restitutionary claim to tax monies in a test case could serve as strong precedent to disincentive the arbitrary recourse to fiscal sensibilities. A restitutionary analysis thus aids this dissertation in answering the "so-what?" about the consequences that attach to a misapplication of the legal test for a charity.

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[358] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).
[359] *Stiassny v Commissioner of Inland Revenue (CIR)*, above n 345, at [62], citing *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*, above n 333, at [26].
[360] Charities Act, s 5.
[361] *Molloy v Commissioner of Inland Revenue*, above n 100, at 691; *National Council of Women of New Zealand Incorporated v Charities Registration Board*, above n 91, at [80].
[362] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*, above n 333, at [23], per Lord Hoffmann, as cited in Palmer "Restitution", above n 333, at 322.

Conclusion

This dissertation has traced the changing boundaries between three sectors in the modern nation – the state, the market and charity. Over time and across polities, these boundaries have shifted. The Elizabethan period saw the power of the church cede to secular administration. The twenty-first century saw the welfare state in the commonwealth expand to perform services that charity traditionally provided. Despite this, the charitable sector has grown and remains irreplaceable. Beneficiaries of charitable action can access services where the state or market might fail. Benefactors feel a warm glow in expressing altruism and charitable action contributes to a diverse, pluralistic society. However, with the boundaries between spheres necessarily fluid, there remains a persistent threat of disharmony.

This dissertation has identified tensions between the tax state and legal charity in New Zealand, where the legitimate interest of government treasurers in establishing the best ways to allocate public funding collides with the charitable registration process. This financial imperative is evident in regulatory and judicial decisions, with no consensus on whether tax policy should influence the identification of a novel charitable purpose. This uncertainty is due in part to the camouflage of the tax state, where registration decisions influenced by fiscal ideas beyond the common law definition of charitable purpose conceal intuition. Behind the rejection of social housing imperatives in the QLCHT litigation, it is moral sentiment about whether people deserve to have public funding allocated to securing their private dwelling that tests the frontiers of charity law. Underlying assumptions about the acceptable size of the sectors and the proper role for government or the market in achieving societal outcomes also impacts the space retained for charity.

But what is to be done about this tension? Legal minds have struggled to decide how to view legal charity since foundational charity law cases like *Pemsel* and *Bishop of Durham*. Innovative is a positive rendition,[365] while arcane has been used disparagingly.[366] An honest assessment of the elephant in the charity room – the tax state – remains inchoate and elusive. A review of the Charities Act 2005 was announced in 2018.[367] Yet tax was excluded from the

[365] *Re Collier (Dec'd)*, above n 15, at 95.
[366] *New Zealand Society of Accountants v Commissioner of Inland Revenue*, above n 19, at 152.
[367] Te Tari Taiwhenua Department of Internal Affairs "Modernising the Charities Act 2005" (6 September 2021) https://www.dia.govt.nz/charitiesact.

review's scope on the basis that "The Income Tax Act governs tax exemptions not the Charities Act."[368] While clearly aimed at eschewing the burden of negotiating with tax policy in the charity space, this reasoning unintendedly exposes that tax and charity indeed cannot be considered together without an evaluative and critical lens. An intellectually honest proposal that does not ignore the elephant in the room may be contained in the fruits of New Zealand's 2019 premier legal research award, the Law Foundation's International Research Fellowship Te Karahipi Rangahau ā Taiao.[369] This project, the final version of which is soon to be released, to craft a world-leading charity law framework includes a Draft Charities Bill with a provision rejecting the influence of potential fiscal consequences when assessing whether a purpose is charitable.[370] Emphasis on the need to distinguish between the method of defining charity and the means of funding is consistent with the need to grow and develop the charitable sector.

Legal charity has stood the test of time and withstood much scrutiny. The timelessness of analogical reasoning in the common law allows it to develop and meet changing societal circumstances in a compassionate and efficient way. But alongside this flexibility inevitably comes uncertainty, which feeds public opinion on charities. This dissertation considers restitutionary analysis a promising option for resolving the tax and charity tension. A large charity such as Greenpeace New Zealand might consider the utility of restitutionary theory in giving legal form to what this dissertation considers to be a visceral impulse in importing fiscal concerns to contentious registration assessments.

[368] Te Tari Taiwhenua Department of Internal Affairs "Modernising the Charities Act: Questions and Answers" (12 April 2021) www.dia.govt.nz/.
[369] New Zealand Law Society Te Kāhui Ture o Aotearoa "Susan Barker wins International Research Fellowship" (28 November 2019) www.lawsociety.org.nz.
[370] Susan Barker *Te Ture Tautoko i te Aroha - Charities Bill Draft* (Charities Law Reform, online, 2020) at 17.

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