Bright lines do not satisfactorily demarcate charitable and entrepreneurial operational domains.\(^1\) In New Zealand, for example, Sanitarium,\(^2\) the non-spiritual arm of the Seventh Day Adventist church, directly competes with multinational corporations,\(^3\) such as Kellogg’s,\(^4\) and domestic firms, notably Hubbard’s,\(^5\) in the field of breakfast cereals.\(^6\)


\(^2\) The Sanitarium brand is used in New Zealand by the New Zealand Health Association Ltd which is owned by The New Zealand Conference Association, itself part of the Seventh Day Adventist Church in New Zealand 1 group; the latter two organisations are registered charities. For convenience sake, Sanitarium will be referred to as if it were a trading company.

\(^3\) It may be noted that Sanitarium manifests the kinds of behaviour expected of multinational corporations particularly in defending its intellectual property. See, for example, Garry Williams, ‘Marmite® v Ma’amite: Why did Sanitarium® freak?’ NZLawyer (Online), 9 November 2012 <http://www.nzlawyermagazine.co.nz/NZLawyerextraarchive/Bulletin62/extra62F1/tabid/4820/Default.aspx>.


\(^6\) The comparison between Sanitarium and Kellogg’s is particularly apposite since both companies were founded by the Kellogg brothers. See Christopher Adams, ‘Lifting the lid on Sanitarium’ The New Zealand Herald (online), 30 June 2012.
Sanitarium is exempt from income tax;\(^7\) its competitors are not. In contrast with what might be characterised as a long-term creep towards trade on the part of traditional charities, more recently, social enterprises have emerged that seek to achieve public benefits through corporate structures and entrepreneurial behaviours.\(^8\) Skylight, a registered charity,\(^9\) describes itself as operating ‘as a social enterprise, balancing our social mission with the need to generate income to ensure we contribute to our own sustainability’.\(^10\) Overseas legislatures have recognised the increasing hybridisation of charity and enterprise to establish vehicles that ‘blur the line between non-profits and for-profits by allowing for some profit, although directed at a charitable or altruistic purpose’.\(^11\)

The charity/enterprise distinction drawn by the law fails to reflect the practice of convergence and its potential social benefits.\(^12\) Despite hard and fast legal categorisation, in practice, a continuum runs from pure charity to Friedmanite shareholder value-maximising firm.\(^13\) Points between these poles include: charities that engage in trade;\(^14\) charities that employ corporate disciplines;\(^15\) overseas hybrids that have surplus distribution caps or specific community interests;\(^16\) and entrepreneurial firms that have some social or environmental goals.\(^17\) Since charitable firms are commonly thought to enjoy significant

\(^7\) Charities registered in terms of the Charities Act 2004 (NZ) do not pay income tax on their business income to the extent that it is applied for charitable purposes within New Zealand: Income Tax Act 2007 (NZ) s CW 42.


\(^9\) Skylight is registered as The Children’s Grief Centre Charitable Trust CC27206.

\(^10\) Skylight, Skylight’s beginnings <http://www.skylight.org.nz/About+Skylight%27s+Beginnings>. We are grateful to Nazir Awan for discussing his research into Skylight’s ethos and practices with us.


\(^13\) See, for example, the Salvation Army running opportunity shops.

\(^14\) See, for example, Skylight.

\(^15\) Hybrids are discussed at II B 2 below.

\(^16\) See, for example, Hubbard’s pursuit of triple bottom line.
advantages over for-profit firms,\textsuperscript{18} notwithstanding plausible arguments to the contrary,\textsuperscript{19} the different manifestations of the social enterprise phenomenon make the formulation of tax policy for the third sector more problematic.

In this paper, using New Zealand as a jurisdictional focus but drawing on overseas research, we discuss third sector enterprises and tax concessions.\textsuperscript{20} Referencing, in particular, the work of Henry Hansmann, and Anup Malani and Eric Posner, we consider the radical proposition that tax concessions should be based on institutional function rather than institutional status. First, to provide jurisdictional context, we sketch the legal position of charities in New Zealand. Second, to demonstrate the convergence of charity and enterprise, we introduce the concept of social enterprise and different forms of hybrid corporate structures. Third, we discuss the potential for neutral tax treatment of entities that pursue socially beneficial goals, and draw conclusions.

\section*{II The Legal Position of Charities in New Zealand}

The common law conception of charity is derived from the Preamble to the \textit{Charitable Uses Act 1601}.\textsuperscript{21} In \textit{Commissioner of Income Tax v Pemsel},\textsuperscript{22} it was held that that a charity must be for the public benefit and have the purpose of relieving poverty, advancing education, advancing religion or benefiting the community. Charitable purposes not contemplated in

\begin{footnotesize}
\begin{enumerate}
\item See, for example, \textit{Taxation in New Zealand: Report of the Taxation Review Committee} (Government Printer, 1967) (‘Ross Report’) 308-313; Policy Advice Division, \textit{Tax and Charities: A General Discussion Document on Taxation Issues relating to Charities and Non-Profit Bodies} (Inland Revenue Department, 2001) 43.


\item Because of the numerous definitions of ‘social enterprise’ in use (see François Brouard and Sophie Larivet, ‘Essay of Clarification and Definitions of the Related Concepts of Social Enterprise, Social Entrepreneur and Social Enterprise’ in Alain Fayolle and Harry Matlay (eds), \textit{Handbook of Research on Social Entrepreneurship} (Edward Elgar Publishing, 2011) 29, 33-39), we use the non-specific ‘third sector enterprise’ to identify activities which incorporate business and social purpose.

\item 43 Eliz I e 4, also known as the \textit{Statute of Charitable Uses} or the \textit{Statute of Elizabeth}.

\item \textit{Commissioner of Income Tax v Pemsel} [1891] AC 531.
\end{enumerate}
\end{footnotesize}
Elizabethan times could be accommodated, if consistent with the Preamble’s ‘spirit and intendment’.23 Charities may conduct a business provided it is ‘not carried on for the private pecuniary profit of any individual’.24 As noted, registered charities qualify for tax concessions.

New Zealand’s current position on charitable enterprise is, we submit, in line with the High Court of Australia’s majority decision in *Word Investments*,25 which ‘unequivocally confirms that there is no strict dichotomy between a charitable purpose and the carrying out of ‘commercial’ activities; or potentially, between a charitable purpose and other activities that indirectly aid that charitable purpose’.26 This fudging of purposes means, for example, that wealthy *iwi* (tribes) appear to pay no tax on their business profits.27 (The issue of income feeder companies is met in the United States by an unrelated business income tax.28) Conversely, an organisation which has an ostensible public benefit but whose activities do not exclusively meet the *Pemsel* test are denied tax free status. Thus in *Canterbury Development Corporation*,29 despite having been treated as a charity by the Inland Revenue Department for more than 20 years, the Canterbury Development Corporation (CDC) was denied registration as a charity, and thereby lost its tax privileges.

In Susan Barker’s view, registration ‘was intended as a means by which government could measure the level of its support given to the charitable sector through the charitable income tax exemptions. Surely, CDC is precisely the type of entity the government would

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23 See, for example, *Re Greenpeace New Zealand Inc* [2012] NZCA 533 [43].
24 *Charities Act* s 13(3).
28 The best known example of an income feeder company is that of Mueller’s Macaroni, then the United States’ largest manufacturer of macaroni, which was bought by alumni of the New York University Law School to fund their alma mater. See Michael A Knoll, ‘The UBIT: Leveling an Uneven Playing Field or Tilting a Level One’ (2007) 76(2) *Fordham Law Review* 857, 862. The UBIT (IRC § 511 (1982)) essentially taxes a not-for-profit corporation’s income which is not related to the principal purpose for which it was formed. For a discussion, see Henry B Hansmann, ‘Unfair Competition and the Unrelated Business Income Tax’ (1989) 75(3) *Virginia Law Review* 605, 605-635.
wish to support, particularly in the current economic times.’ Michael Gousmett concurs and argues more broadly:

… the problem for the charity sector lies in the failure of the courts to look beyond charity law to other disciplines for inspiration, concerning the contribution entities such as CDC make to the economy, society, and commerce, in New Zealand. Economics as a discipline emerged in the 18th century as the study of political economy, nearly two hundred years after the Statute of Elizabeth of 1601. Yet the courts insist on testing concepts that were not known in the 17th century against legislation that was relevant to those times, but not to the 21st century. It is time to move forward in our thinking about the relationship between charity and economic development.

Following the Australian Treasury’s reaction to *Word Investments*, there has been some discussion of New Zealand introducing an unrelated business income tax (UBIT), but that possibility seems remote at present.

### III Third Sector Enterprise

32 For an analysis, see Matthew Dwight Turnour and Myles McGregor-Lowndes, ‘Taxing Charities: Reform without Reason?’ (2012) 47(2) *Taxation in Australia* 74, 74-77, noting, in particular, arguments against the need for a UBIT. As Micah Burch, ‘Australia’s Proposed Unrelated Commercial Activities Tax: Lessons from the U.S. UBIT’ (2012) 7(1) *Journal of the Australasian Tax Teachers Association* 21, 25 observes, the proposed unrelated commercial activities tax (UCAT) would only apply to retained unrelated profits whereas UBIT applies to all unrelated profits. Presumably New Zealand would be interested in a UCAT rather than a UBIT.
33 See Rob O’Neill, ‘Unfair tax rules go against the grain’ *Sunday Star-Times* 31 July 2011, p. D12. Since a company’s donations to registered charities are fully deductible in New Zealand (*Income Tax Act s DB 41*), the function of UCAT would be to tax any surplus retained in the company. A particular consideration is that Sanitarium has reportedly been using surplus funds to invest offshore. Ibid. It should be noted that Seventh Day Adventist teachings promote health and wellbeing and so Sanitarium products may be seen as a natural extension of the church’s doctrine. Similar considerations might apply to, say, Hare Krishna restaurants.
34 It seems unlikely that government will introduce radical changes to the way charities are taxed without a first principles review of the charities regime. This has been ruled out on the grounds that there may be fiscal implications of such a review. See Jo Goodhew (Community and Voluntary Sector Minister), ‘No review of the Charities Act at this time’ (Media release) 16 November, 2012.
In the preceding part, we sketched the legal position of charities in New Zealand and identified the issue of income from feeder businesses being sheltered from income tax. In this part we consider a more recent issue – that of social enterprise and its problematising of the legal distinctions between charities and trade.

A What Is Social Enterprise?

According to Jacques Defourny:

In almost all industrialised countries, we are witnessing today a remarkable growth in the ‘third sector’, i.e. in socio-economic initiatives that belong neither to the traditional private for-profit sector nor to the public sector. These initiatives generally derive their impetus from voluntary organisations and operate under a variety of legal structures. In many ways they represent the new or renewed expression of civil society against a background of economic crisis, the weakening of social bonds and the difficulties of the welfare state.

Despite, their apparent ubiquity, identifying what precisely constitutes a social enterprise is difficult. Carlo Borzaga and Jacques Defourny observe the lack of a widely accepted definition of ‘social enterprise’ or ‘any precise set of specific characteristics’. Similarly, Rory Ridley-Duff and Mike Bull avoid offering a definition, and rather note that the term ‘is used in an increasing number of contexts, cultures and national settings. Social enterprise may be characterised as a subgroup of organisation in the ‘social economy’ or a new

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35 Jacques Defourny, ‘Introduction: From Third Sector to Social Enterprise’ in Carlo Borzaga and Jacques Defourny (eds), The Emergence of Social Enterprise (Routledge, 2001) 1, 1.

36 For graphics illustrating different conceptions of social enterprise, see Matthew F Doeringer, ‘Fostering Social Enterprise: A Historical and International Analysis’ (2010) 20 Duke Journal of Comparative and International Law 291, 325-329

37 Carlo Borzaga and Jacques Dufourny, ‘Foreword’ in Carlo Borzaga and Jacques Defourny (eds), The Emergence of Social Enterprise (Routledge, 2001) i, i.
economic engine’. In the particular context of the United States, Shirley Sagawa and Eli Segal identify:

… a new paradigm for business and the social sector, one that eliminates barriers between the sectors while preserving their core mission. This new paradigm pairs visionary companies that see how the social context in which they operate affects their bottom lines with a new breed of social entrepreneurs who understand how business principles can enable them to fulfil their social missions more effectively. Together they are reshaping how communities tackle some of their most intractable social challenges.

For current purposes, it is sufficient to note, firstly, that social enterprise is not synonymous with a particular institutional form – traditional charities, organisations whose constitutions restrict surplus distribution and certain for-profit firms may each claim to be social enterprises. Secondly, social enterprises may have social goals which may or may not fall within the spirit and intendment of the Preamble.

B Hybrid Entities

Among other jurisdictions, the United Kingdom has introduced a community interest company (CIC) regime. Likewise, many of the United States have legislated for low-profit

39 Shirley Sagawa and Eli Segal, *Common Interest, Common Good: Creating Value through Business and Social Sector Partnerships* (Harvard Business School Press, 1999) 3. It is pertinent to note that in their discussion of second sector-third sectors alliances, the first sector (government) is mostly absent or an implicit hindrance to effective delivery. See ibid, 79.
40 The Preamble is a culturally specific consideration but presumably certain social enterprises fall outside the parameters of civilian law definitions of charity.
41 According to Doeringer, above n 36, 308-309, the first social enterprise hybrid was Belgium’s société à finalité sociale which was legislated for in 1995.
limited liability companies (L3Cs) or benefit corporations. The common feature of these hybrid bodies corporate is that they have an explicit purpose of social benefit and distribution of surpluses to investors is limited. Charities seeking ways to reduce their reliance on donations and philanthropic grants are increasingly developing programs that resemble businesses, and for them, the hybrid structure allows them to stress their social mission, continue to attract philanthropic grants but also to access capital markets.

CICs do not attract special tax benefits. Although L3Cs themselves are taxed in the same way as for-profit firms, L3Cs may enable private foundations to meet their program-related investment (PRI) distribution requirements. They do therefore have an ostensible tax planning element but ordinary limited liability companies (LLCs) may equally perform that function. Nevertheless, Stephanie Strom reports on ‘a quiet push to get preferential tax treatment for’ hybrids. The most likely concession would be for automatic PRI approval for registered L3Cs or benefit corporations, since decisions are currently made on a case by case

46 Community Investment Tax Relief (CITR) gives tax benefits to investors who back businesses in less advantaged areas through Community Development Finance Institutions (CDFIs). CITR provides tax relief of 5% per annum to investors who invest in an accredited CDFI, which then in turn lends to or invests in a qualifying profit-distributing enterprise or community project. Accredited CDFIs may invest in qualifying CICs. See http://www.cdfa.org.uk/wp-content/.../02/CITR-investors-guide-final.pdf
47 An L3C does not qualify for tax-exempt entity status under IRC § 501(c)(iii).
50 Strom, above n 45.
basis.\(^{51}\) An assessment of hybrids lies beyond the scope of this paper.\(^{52}\) The pertinent point is to recognise the convergence both in institutional forms and organisational functions and goals. We submit that this sectoral crossover indicates the need for a reassessment of charities’ tax privileges even in New Zealand where new forms of hybrid bodies corporate have not been legislated.\(^{53}\)

IV TOWARDS A TELEOLOGICAL APPROACH TO CHARITABLE TAX CONCESSIONS

The discussion so far leads us to conclude that, on the one hand, tax treatment of charitable income feeder companies may not be optimal, and, on the other hand, the practical convergence of the beneficial activities of social enterprises may not attract appropriate legal and tax recognition. In this part, we consider those ideas further and consider solutions to make taxation fairer and arguably more efficient.

A Why Distinguish between Taxpayers?

51 See William Callison, ‘L3Cs: Useless Gadgets?’ (2009) 19(2) Business Law Today <http://apps.americanbar.org/buslaw/blt/2009-11-12/nonbindingopinions.shtml>. Daniel Kleinberger and J William Callison, ‘When the Law is Understood-L3C No’ Community Dividend (2009, November) <http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4490> note the failure of L3C lobbyists to convince the federal government to view L3C investments as automatically qualifying as PRIs. Unless and until Congress, the IRS, and Treasury create a rebuttable presumption that L3C investments are PRIs, private foundations will not be more attracted to L3Cs than they are to investments in ordinary LLCs. L3Cs are in no better of a position to receive PRI treatment than the LLC form to which they may default.

52 For a critique of L3Cs, see Carter G Bishop, ‘The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?’ (2010) 63(2) Arkansas Law Review 243, 243-267. It is notable that certain regulators also oppose hybrids: see, for example, David Edward Spenard, ‘Panacea or Problem: A State Regulator’s Perspective on the L3C Model’ (2010) 65(2) Exempt Organization Tax Review 36, 36-41.

53 An examination of company law considerations lies beyond the scope of this paper. Nevertheless, it is tentatively submitted that the director’s fundamental duty to the company under Companies Act 1993 (NZ) s 131(2) could be honoured if the company has an unequivocally charitable aim enshrined in an appropriately crafted constitution. At the time of writing, one Australasian company – Melbourne-based Small Giants – has been certified at a B Corp by B Lab. See Michelle Hammond, Meet Australia’s first “B Corporation”: Investment firm Small Giants (2012) <http://www.startupsmart.com.au/innovation/meet-australias-first-b-corporation-investment-firm-small-giants/201208017106.html>.
1 **Horizontal and Vertical Equity**

In accordance with basic principles of distributive justice and income taxation, similarly situated taxpayers should be taxed similarly (horizontal equity), whereas differently situated taxpayers may be treated differently (vertical equity).\(^5^4\) However, no two taxpayers are similarly situated in all ways, and so social judgment determines similarity and difference.\(^5^5\) Thus the profits of a cigarette manufacturer and those of a maker of lung cancer treatments are taxable in the same way because they are similarly engaged in trade. In contrast, two drug manufacturers may be taxed differently because one is owned by a charity. Conversely, society might decide that these firms should be taxed in the same way because they compete in the same field of business. Returning to the first example, society might extend tax concessions to the drug manufacturer because it is providing goods that society especially approves.

2 **Preferential Treatment of Merit Goods**

Tax policymakers may be generally disinterested in the nature of a firm’s business activities,\(^5^6\) but, from an ethical perspective, it may seem odd that the profits of a cigarette manufacturer should be taxed in the same way as those of the drug manufacturer. This disinterest extends to the business of charities: unlikely as it might be in practice,\(^5^7\) a charitable business might engage in socially damaging – albeit legal – activities with impunity.\(^5^8\) However, any suggestion that the tax system cannot accommodate ethical


\(^{56}\) Indeed, the proceeds of crime are taxable in New Zealand: *Income Tax Act 2007* (NZ) s CB32.

\(^{57}\) Benedictine monks at Buckfast Abbey in Devon, England produce a tonic wine which has been linked to a disproportionate level of intoxicated violence in urban Scotland. See ‘Buckfast crime link revealed’ (2010) <http://news.bbc.co.uk/2/hi/uk_news/scotland/8465957.stm>.

\(^{58}\) Compare with the United States UBIT regime outlined above n 27. The admixture of public goods and bads is seen in the ‘pokie’ machine set up whereby charities commonly benefit from the proceeds gambling which has significant, negative social consequences. See Problem Gambling Association of New Zealand, ‘Pokie Machines, Sponsorship and Alternative Funding in New Zealand’ (2009) <http://www.pgfnz.org.nz/Uploads/PDFDocs/Pokie_machies_sponsorship_and_alternative_funding_2009.pdf>. 
sensibilities is disproved by differential treatment of merit and demerit goods under value added tax (GST) systems\(^{59}\) and, of course, the exemption privileges extended to charities under tax laws. In short, non-neutral treatment of different forms of income is both plausible and practicable. The pertinent question is this: on which organisations or activities should society confer preferential, non-neutral treatment?

### 3 Preferring Activities that Correct Market Failure

If all breakfast cereal manufacturers were to meet – perhaps, create – market demand for energy-dense, low nutrition foods that may contribute to childhood obesity, it might be socially valuable to encourage consumption of healthy breakfast cereals by extending tax concessions to firms that seek to correct the market failure to provide healthy breakfast foods.\(^{60}\)

It may be assumed that traditional charities (and government) correct market failures to supply certain socially desirable goods and services, but the convergence of motives and areas of operation exemplified by the emergence of social enterprise, indicates that other organisations may also perform this function. If so, differential tax treatment of charities and hybrids could be misplaced since hybrids or even fully for-profit firms might better meet social needs than the charitable sector. These possibilities are considered further below. The issue of neutral tax treatment of for-profit and not-for-profit firms operating in the area of community benefit is raised, among others, by Evelyn Brody\(^{61}\) on fairness grounds and strongly argued for on efficiency grounds by Malani and Posner. We submit that equal treatment considerations outlined above are most plausible in justifying neutral treatment of

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59. The *Goods and Services Tax Act 1985 (NZ)* does not distinguish between merit and demerit goods but compare with *A New Tax System (Goods And Services Tax) Act 1999 (Cth)* sub-div 38–A-P.

60. The provision of healthy breakfast food appears to have been the motive for both the Kellogg brothers. Once Kellogg’s established itself as a purveyor of similar foods to Sanitarium, no market failure existed to be corrected. Arguments for privileging Sanitarium then appear weak. For example, it may not be able to offer shares to the public but, unlike a listed company, can draw on congregation donations or tithes.

socially beneficial organisations, but, because of the attention they have attracted, the economic arguments need to be aired.

B Neutrality on Efficiency Grounds?

Having considered and dismissed to their satisfaction the major economic arguments for coupling tax concessions with the particular charitable organisational form, Malani and Posner conclude that current law leads to two principal inefficiencies. ‘First, coupling encourages inefficient production by rewarding non-altruistic entrepreneurs who take non-profit status.’ ‘Second, current non-profit law discourages talented altruists from establishing charitable enterprises, causing them at the margin to throw in their lot with commercial firms.’ Generally, the authors argue ‘nonprofit firms are less efficient than for-profit firms and that if the law permitted for-profit firms to compete in charitable markets, charitable activity would become more efficient’. They conclude:

The relevant consideration for the law is not whether the entrepreneur is altruistic but whether the effect of the entrepreneur’s action is socially beneficial. If it is socially beneficial, and if ordinary market forces do not provide sufficient incentive for people to engage in that action, then a subsidy may be appropriate. Because the effect of the entrepreneur’s behaviour is unrelated to her incentives to choose between the non-profit or for-profit form, the choice of form does not provide grounds for a tax subsidy.

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63 These are: public good theory, agency theory, altruism theory, a theory of imperfect consumers and administration overload. See Malani and Posner, above n 12, 2029-53.

64 Ibid, 2054.

65 Ibid, 2054.

66 Ibid, 2055.

67 Ibid.

68 Ibid, 2067.
James Hines and his co-authors, analogously noting that consumers place very specific orders for the goods and services they require and do not hand over their money to a retailer and then wait to see what the retailer might provide, ask:  

Why shouldn’t the government behave this way when it buys charitable goods? Decide it wants something specific – buy it, evaluate it, and repeat. Rather, the government throws tax exemptions at something akin to a charity store and hopes it gets what it needs. Many observers find this approach puzzling, and – at least on the surface – it is.

Hines et al argue that Malani and Posner’s arguments ‘are founded on an economic analysis that is too limited’ but do not prove that the analysis is wrong. Nevertheless, for Hines et al, the most important argument against neutral treatment is that it ‘would create new avenues for tax avoidance’. This may be so, but only craven policymaking rejects measures that would promote fairness and, possibly, efficiencies for the tax system because some risk of abuse exists. Hines et al conclude:

Properly encouraging and rewarding charitable activity does not entail making explicit tax benefits available to everyone, but instead involves identifying cases in which recipients of donated funds pursue clearly identified charitable ends without the potential conflict for interest that inevitably accompanies the profit motive.

We agree that tax concessions should not be available to everyone and yet the current system extends tax concessions to any entity that qualifies as a charity notwithstanding the true benefit their activities bring to contemporary society.

C A Teleological Approach

The Statute of Elizabeth sought to solve particular social problems of England in the early seventeenth century. Contemporary New Zealand faces different problems, and, indeed, in

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69 Hines et al, above n 62, 1218.
70 Ibid, 1219. As noted, we believe that equity grounds (plus subsequently discussed teleological arguments) are sufficiently plausible. Consequently any inadequacy in the scope of Malani and Posner’s study is not fatal for neutral treatment arguments.
71 Ibid.
72 Ibid, 1219-20.
the nineteenth century, William Gladstone recognised the folly of granting tax concessions based on anachronistic considerations.\textsuperscript{73} However, the generalising ratio of \textit{Pemsel}, to a great extent, relieved charitable tax privilege of its direct historical contingency but also obfuscated the idea of public benefit and left it to judges to ultimately set important elements of charities policy.\textsuperscript{74} We submit that the Preamble, rather than \textit{Pemsel}, was the better policy approach.\textsuperscript{75} Elizabethan lawmakers had no expectation of prescribing which activities should be considered charitable several hundred years into the future; their interest lay in identifying and privileging activities that might solve the temporally and spatially specific problems of their particular society. We might fruitfully follow the Elizabethan precedent in looking to our own here and now needs and legislating accordingly.\textsuperscript{76} Instead, we continue to rely on the ‘spirit and intendment’ implied by a court almost three centuries after the Preamble was enacted.\textsuperscript{77} We might, for example, substitute seawall building with the provision of affordable housing, but the critical point is that whatever might be decided would be one of a limited number of democratically determined goals to meet \textit{our} temporally and spatially specific needs.\textsuperscript{78}

Each generation might usefully construct its own version of the Preamble setting out its particular social goals.\textsuperscript{79} Tax privileges would then be awarded teleologically in order to achieve those goals. It is likely that the work of many charities, such as poverty relief, would always feature in such a list. It would also be open to government to provide direct grants to


\textsuperscript{74} See, for example, \textit{Re Greenpeace New Zealand Inc} [2012] NZCA 533.

\textsuperscript{75} It may be inferred if the court in \textit{Pemsel} had found that the charitable motive did not accord with the Preamble, Parliament would have needed to reconsider the \textit{Statute of Elizabeth} and its Preamble.

\textsuperscript{76} See Barker, above n 30 and Gousmett, above n 31 on the exclusion from charitable status of the CDC.

\textsuperscript{77} But see Hines et al, above n 62, 1219, who argue that ‘the reasons for not adhering to this 400-year-old tradition are not compelling’ (emphasis added).

\textsuperscript{78} Compare with the acceptable purposes of benefit corporations discussed by Brakman Reiser, above n 44, 597-598.

\textsuperscript{79} Compare with the Jeffersonian suggestion of Roberto Mangabeira Unger, \textit{The Critical Studies Movement} (Harvard University Press, 1986) 35 for a rotating capital fund that would change hands every twenty years.

Updating William Beveridge’s Five Great Social Evils of the mid-twentieth century, David Utting (ed), \textit{Contemporary Social Evils} (Policy Press, 2009) examines the types of social evils whose elimination might be pursued in contemporary society and might therefore attract tax privileges.
unpopular causes and, of course, no one would be prevented from donating to any social cause but they would not necessarily gain tax privileges from doing so. In a mostly secular New Zealand, it seems unlikely that the promotion of religious belief would make today’s Preamble of social goals. Once more, this does not mean that the socially valuable work of many church-affiliated organisations would not be tax-privileged; rather, that work would need to be separated from religious activity. In our view, the profession of faith or its denial is an intensely private concern for which the State should have no interest either in proscribing or conferring benefits. Indeed, we believe that the privileging of propagation of religious belief is a fundamental breach of human rights in the liberal conception.

V CONCLUSION

To attract tax privileges, a common law charity must meet two basic requirements: first, its purpose must be reconcilable with those set down in the Statute of Elizabeth and, second, its constitution must prohibit distribution of surpluses to interest holders. We have argued that the social goals recorded in the Statute were specific to a particular time and place. Notwithstanding the principles approach established in Pemsel, reliance on a 400 year old statute is anachronistic – each generation needs to deliberate and construct its own version of the Preamble. Furthermore, using the example of firms competing in the same market, we have indicated the ostensible unfairness of one of those firms enjoying special tax privileges simply because of the charitable nature of its shareholder. The emergence of different forms of social enterprise has accentuated the irrationality of a simple charity/enterprise distinction.


81 In certain cases, this proposal might reverse the current set up whereby unrelated activities of feeder companies can enjoy tax exemption because they finance the propagation of religious faith. As proposed, the trading company might enjoy tax concessions because it is engaged in socially approved activities.

82 For an extensive and sympathetic discussion of the privileging of religion, see Brian Lucas and Anne Robinson, ‘Religion as a Head of Charity’ in Myles McGregor-Lowndes and Kerry O’Halloran (eds), Modernising Charity Law: Recent Developments and Future Directions (Edward Elgar Publishing, 2010) 187, 187-203.

83 Put simply, the State accords ethical atheist belief a lesser value than religious belief because propagation of religious faith is presumed to be of public benefit: see Kerry O’Halloran, Charity Law & Social Policy: National and International Perspectives on the Functions of the Law (Springer, 2008) 299.
in law and taxation. Building on the notion of market failure, we have argued that a teleological approach to tax concessions should be adopted so that achievement of socially agreed goals – not institutional form or conformity with historically contingent norms – should determine qualification.