

**PHILISTINES V ELITISTS? A COMPARISON OF AUSTRALIA'S AND NEW ZEALAND'S TAX-BENEFIT  
TREATMENT OF COLLECTORS OF ARTWORKS**

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**ABSTRACT**

After a review of tax concessions granted to collectors of artworks in mature markets, this article considers the tax and benefit treatment of collectors in Australia and New Zealand. Relevant policy considerations are identified and applied to current tax and benefit provisions for Australasian collectors. The question of whether differential treatment of collectors (relative to other investors) can be justified on grounds such as promoting art markets and preserving cultural heritage is discussed. Recommendations are made, and conclusions are then drawn.

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## I INTRODUCTION

The nature of art is highly contested,<sup>1</sup> but the general public is likely to consider the things that constitute artistic works under copyright law — paintings, sculptures, drawings, engravings, photographs, and artisanal works with artistic quality<sup>2</sup> — to be artworks. Provided Indigenous creations, which might be excluded from a traditional Western definition of fine art, such as batiks and weavings,<sup>3</sup> are included, this copyright definition of artistic works adequately identifies artworks for the purposes of this article.

France, the UK and the US have mature art markets.<sup>4</sup> ‘Maturity’, as used here, does not simply connote size. Although the US and the UK currently host the first and second largest art markets,<sup>5</sup> China’s rapidly expanding art market is much larger than that of France,<sup>6</sup> but the French market can be considered more mature. The buying and selling of artworks, particularly in Paris, takes place within the context of an art social system,<sup>7</sup> or art ecosystem,<sup>8</sup> that comprises well-established schools, ateliers, galleries and museums, auction houses, and clusters of specialisation.<sup>9</sup> Principal nodes of the global art market, notably London, New York and Paris, have relevant infrastructure and concentrations of expertise; they also have the ‘status, branding, cachet, celebrity, and aesthetics’ that help to ensure optimal pricing of works in that market.<sup>10</sup> In mature markets, collectors are also typically knowledgeable and active participants in the processes of creating, exhibiting

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<sup>1</sup> See, for example, Arthur C Danto, *What Art Is* (Yale University Press, 2013).

<sup>2</sup> See *Copyright Act 1968* (Cth) s 10, definition of ‘artistic work’; *Copyright Act 1994* (NZ) s 2, definition of ‘artistic work’. Artisanal works are problematic under copyright law: see *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1975] RPC 31. Nevertheless, people are likely to consider, say, an Eames lounge chair to be a work of artistic craftsmanship.

<sup>3</sup> Compare *Resale Royalty Right for Visual Artists Act 2009* (Cth) s 7, definition of ‘artwork’.

<sup>4</sup> Relative to financial markets, it is arguable that all art markets are immature. Olav Velthuis and Erica Coslor observe ‘the financialization of art has been incomplete — or is at least far from finished, especially when compared to other financial markets’. See Olav Velthuis and Erica Coslor, ‘The Financialization of Art’ in Karin Knorr Cetina and Alex Preda (eds), *The Oxford Handbook of the Sociology of Finance* (Oxford University Press, 2013) 471, 480.

<sup>5</sup> In 2017, the US accounted for 40 per cent of the global art market, and the UK 21 per cent. See Arts Economics, *The British Art Market 2017* (survey prepared for the British Art Market Federation, 2017) <<http://tbamf.org.uk/wp-content/uploads/2014/08/The-British-Art-Market-2017.pdf>>.

<sup>6</sup> Ibid. In 2017, China’s share of the global art market was 20 per cent, while France’s was 7 per cent. See also Darius A Spieth, ‘Art Markets’, *Oxford Art Online* (Web Page, 2019) <<http://www.oxfordartonline.com/page/Art-Markets#>>. Given its population and massive increase in wealth, China will most likely become the dominant player in the art market in the future. In the past 150 years, the centre of the art market has shifted from France to the UK, then to the US, and, perhaps in the future, to China.

<sup>7</sup> See Niklas Luhmann, *Art as a Social System* (Stanford University Press, 2000).

<sup>8</sup> See Nathalie Moureau, Dominique Sagot-Duvaurox and Marion Vidal, *Contemporary Art Collectors: The Unsung Influences on the Art Scenes* (Département des études, de la prospective et des statistiques, 2015) 18 <<https://books.openedition.org/deps/935?lang=en>>.

<sup>9</sup> For example, New York has a strong market for contemporary art, London for ‘Old Masters’, Geneva for watches, and Amsterdam for furniture. See Joerg Wuenschel, ‘Article 95 EC Revisited: Is the Artist’s Resale Right Directive a Community Act beyond EC Competence?’ (2009) 4(2) *Journal of Intellectual Property Law & Practice* 130, 132, n 25.

<sup>10</sup> United States Copyright Office, *Resale Royalties: An Updated Analysis* (December 2013) 57 <<https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>>.

and marketing artworks. Jurisdictions with such sophisticated art milieus may grant significant tax concessions to private collectors.<sup>11</sup>

Net wealth taxes,<sup>12</sup> and capital transfer taxes, in particular, often include concessions for collectors.<sup>13</sup> In order to ‘enlarge public collections and prevent exports of art works’,<sup>14</sup> both France (*dation en paiement*) and the UK (acceptance in lieu) permit a taxpayer to settle their estate tax debt by transferring a culturally important artefact to the state. The Arts Council England operates the ‘acceptance in lieu’ scheme, with a panel of experts determining whether an object is sufficiently ‘pre-eminent’ to be accepted in lieu of monetary settlement of inheritance tax.<sup>15</sup>

Artworks may be exempted from capital gains tax (‘CGT’).<sup>16</sup> This concession typically relates to private assets, rather than artworks as such. In France, however, gains from the sale of an artwork or other collectable item are exempted from CGT if the sale price does not exceed €5000 (about AUD8,000).<sup>17</sup> In the US, although collectables are subject to a higher than normal rate of tax,<sup>18</sup> sales of artworks used to qualify for CGT roll-over relief.<sup>19</sup> While that concession has been recently abolished, CGT liability on the proceeds from sales of artworks can be deferred if the proceeds are invested in qualifying Opportunity

<sup>11</sup> According to Moureau, Sagot-Duvaurox and Vidal (n 8) 18, ‘[i]n academic literature, there are two different ways of defining a collector. The first takes a non-utilitarian, quantitative approach and determines that one becomes a collector “when one has run out of walls for one’s works” (ie, “one becomes a collector when one no longer views a work as a decorative object”). The second takes a more qualitative approach, emphasising the importance of the selection process. “The collector is guided by a certain taste”.’

<sup>12</sup> The number of OECD countries that levy net wealth taxes fell from 11 in 1990 to four in 2017: see OECD, *The Role and Design of Net Wealth Taxes in the OECD* (Tax Policy Studies No 26, OECD Publishing, 2018) <<https://doi.org/10.1787/9789264290303-en>>. In the face of the *gilets jaunes* (yellow vests) protests, the Macron administration in France, has reportedly considered reinstating its *impôt de solidarité sur la fortune* (wealth tax): see Harriet Agnew, ‘French Government Opens Door to Wealth Tax Concession’, *Financial Times* (online at 6 December 2018) <<https://www.ft.com/content/79d9c18c-f87b-11e8-af46-2022a0b02a6c>>.

<sup>13</sup> See Ernst & Young, *Worldwide Estate and Inheritance Tax Guide 2017* (EY Private Client Services, 2017) <<https://www.ey.com/ch/en/Publications/20170929-Worldwide-Estate-and-Inheritance-Tax-Guide-2017/download>>.

<sup>14</sup> Annabelle Gauberti, ‘Art Tax Law: A Double-Hedged Sword’, *Legal NewsRoom* (Blog Post, 17 January 2013) <<https://www.lexisnexis.com/legalnewsroom/tax-law/b/stateandlocaltaxation/posts/art-tax-law-a-double-hedged-sword>>.

<sup>15</sup> ‘Acceptance in Lieu’, *Arts Council England* (Web Page) <<https://www.artscouncil.org.uk/tax-incentives/acceptance-lieu>>.

<sup>16</sup> On Austria, Belgium, Germany, Italy, Switzerland, and the UK, see Deloitte, *Fine Art — Direct and Indirect Taxation Aspects, A Masterwork of Complexity* (2016) <<https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artfinance-taxmatrix-16092013.pdf>>.

<sup>17</sup> Annabelle Gauberti, ‘Taxation of Acquisition and Sale of Art Works: Auctions and Private Sales’, *Crefovi* (Web Page, 5 November 2015) <<http://crefovi.com/articles/taxation-of-acquisition-and-sale-of-art-works-auctions-and-private-sales-art-tax-law>>.

<sup>18</sup> Gains on the disposal of collectables are taxed at a maximum rate of 28 per cent — significantly higher than the usual 15 per cent rate applicable to assets held long term. For a discussion, see Andrew Maples and Stewart Karlinsky, ‘The United States Capital Gains Tax Regime and the Proposed New Zealand CGT: Through Adam Smith’s Lens’ (2014) 16(2) *Journal of Australian Taxation* 156.

<sup>19</sup> Georgina Adam reports: ‘The *Tax Cuts and Jobs Act* signed by President Trump in December 2017 saw the elimination of 1031s, or “like-kind exchanges”, a tax vehicle that has been a powerful driver of the US art market in recent years.’ See Georgina Adam, ‘Trump’s Tax Act Offers Potential Tax Havens for Art’, *The Art Newspaper* (online at 3 January 2019) <<https://www.theartnewspaper.com>>.

Zones.<sup>20</sup> Under UK law, artworks may attract the favourable CGT treatment accorded to plant with wasting value.<sup>21</sup>

Under the French General Tax Code (*Code général des impôts*), businesses that buy original works of living artists and allocate them to an immobilised asset account can deduct from their income in the year of purchase and the four following years an amount equal to 20 per cent of the purchase price. To obtain this deduction, the business must exhibit the work in a place readily accessible by the public throughout the deduction period.<sup>22</sup> Furthermore, according to Nathalie Moureau and her co-authors:<sup>23</sup>

The donation of works to a museum either as a gift from hand to hand or through an officially recorded procedure, may confer certain tax benefits. A sum equivalent to 66% of the value of the donation ... may be deducted from income tax, up to a value of 20% of taxable income. Where donations exceed 20% of the collector's taxable income, any remaining balance may be carried over the next five years.

Other tax incentives to promote artists include a TVA (GST) concession,<sup>24</sup> which allows registered artists to charge only 5.5 per cent TVA on direct sales of their artworks to collectors.<sup>25</sup>

In the UK, goods and services that are exempted from value added tax ('VAT') include: admission charges by public authorities or eligible cultural bodies to certain cultural events, such as visits to museums and art exhibitions; and antiques, works of art or similar (as assets of historic houses) sold by private treaty to public collections or used to settle a tax or estate duty debt.<sup>26</sup> Furthermore, imported works of art are taxed at an effective rate of 5 per cent,<sup>27</sup> rather than the standard rate of 20 per cent. Imported works of art are therefore preferentially taxed, along with perhaps more obviously deserving items, such as children's car seats, but are not exempt, as, for example, children's clothes are. A European Union directive curtailed more favourable treatment of artworks.<sup>28</sup> Consequently, jurisdictions outside the European Union may provide more favourable VAT treatment of artworks.<sup>29</sup>

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<sup>20</sup> See Act of 22 December 2017, Pub L No 115-97 <<https://www.congress.gov/bill/115th-congress/house-bill/1>>.

<sup>21</sup> In *HMRC v The Executors of Lord Howard of Henderskelfe* [2014] EWCA 278, the Court of Appeal held that Sir Joshua Reynolds' *Portrait of Omai* (1776) was plant and was therefore deemed by s 44 of the *Taxation of Chargeable Gains Act 1992* (UK) to be a 'wasting asset with a predictable life not exceeding 50 years'. While it may seem unusual that a 240-year-old painting should be considered a wasting asset, it was used to enhance Castle Howard, a commercial venture.

<sup>22</sup> *Code général des impôts* (France) art 238 bis AB.

<sup>23</sup> Moureau, Sagot-Duvaurox and Vidal (n 8) 9.

<sup>24</sup> *Taxe sur la Valeur Ajoutée*.

<sup>25</sup> Gauberti, 'Art Tax Law' (n 14).

<sup>26</sup> *Value Added Tax Act 1994* (UK) s 31(1) sch 9, Groups 11 and 13.

<sup>27</sup> In terms of s 21(4) of the *Value Added Tax Act 1994* (UK), only 25 per cent of the value is taxable. The term 'work of art' is extensively defined in s 21(6). Compare with the definition of 'artwork' given in *Income Tax Assessment Act 1997* (Cth), s 995.1.

<sup>28</sup> See European Commission, 'European Commission Adopts Report on VAT and the Art Market' (Press Release IP/99/274, 28 April 1999) <[europa.eu/rapid/press-release\\_IP-99-274\\_en.pdf](http://europa.eu/rapid/press-release_IP-99-274_en.pdf)>.

<sup>29</sup> Elizabeth R Lash, 'The European VAT: Good for Tax Revenue, Bad for the Commercial Art Market?', *Center for Art Law* (Blog Post, 4 March 2015) <[https://itsartlaw.com/2015/03/04/el\\_vat](https://itsartlaw.com/2015/03/04/el_vat)>.

According to Annabelle Gauberti, in jurisdictions with mature art markets, 'tax law has ... become instrumental in promoting the creation, consolidation and expansion of private collections and patronage'.<sup>30</sup> Why? Gauberti boldly states: 'All Western countries have come to the conclusion that, no matter how much the state intervenes to keep art works, artefacts and antiques on its soil and in its museums, *the first and irreplaceable preserver of the national estate is the private owner*.'<sup>31</sup>

The tax-benefit systems of Australia and New Zealand include differential treatment of collectors. Since Australia provides no specific concessions to collectors, its approach might be caricatured as an exercise in philistinism.<sup>32</sup> Conversely, New Zealand's preferences for collectors might be considered elitist. In fact, both manifestations of differentiation lack sophisticated policy consideration, and indicate jurisdictions with immature art markets.<sup>33</sup> Annette van den Bosch explains:<sup>34</sup>

Australians only became serious art collectors in the 1960s. Initially, most collectors, even those who traveled widely, only collected Australian art ... Private collectors collect different works to art museums — they collect more decorative pictures. Private collectors are often surprised when a gift they propose to a state or national gallery is declined ... Inexperienced collectors lacking serious knowledge of art and museum collections can often be misled by an unscrupulous dealer or a belief in the supremacy of their own taste. Public policy and education in the arts varies from state to state and has frequently been the target of budget cuts or a 'back to basics' movement that emphasises literacy and numeracy skills over creative content. *Research on audiences for public galleries in Australia, and public attitudes to the arts, show that there is very restricted understanding of the work and role of an artist in contemporary society.*

The relatively unsophisticated nature of art investment in Australia was reflected in the recommendation of the government's *Super System Review Final Report* ('Cooper Review') that collectables should not be permitted as investments for self-managed

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<sup>30</sup> Gauberti, 'Art Tax Law' (n 14).

<sup>31</sup> Ibid (emphasis added). See also Gilbert Paul Verbit, 'France Tries a Wealth Tax' (1991) 12(2) *University of Pennsylvania Journal of International Business Law* 181, 184, n 13, on the expectation that exempting artworks from the wealth tax would keep artworks in France, and encourage French contemporary art.

<sup>32</sup> The Cultural Gifts Program permits tax incentives for cultural gift to Australia's public collections. See Australian Government, *Cultural Gifts Program Guide: Tax Incentives for Cultural Gifts to Australia's Public Collections* (2013). Because the programme is not restricted to artworks and essentially covers any property that a public collection is prepared to accept, it will not be considered further in this article.

Australia also operates a resale royalty right scheme for artists (see *Resale Royalty Right for Visual Artists Act 2009* (Cth) and *Tax Laws Amendment (Resale Royalty for Visual Artists) Act 2009* (Cth)), and provides income tax concessions for artists (see 'Income Averaging for Special Professionals 2018', *Australian Taxation Office, Australian Government* (Web Page, 2018) <<https://www.ato.gov.au/Forms/Income-averaging-for-special-professionals-2018>>).

<sup>33</sup> To reiterate, the size of a country's art market does not in itself determine maturity, nevertheless, '[r]elative to the global market for visual art, the Australian market is small. In 2011, Australian auction sales represented 0.6% of the total global auction market.' See 'Global Art Market', *artfacts*: (Web Page) <<http://artfacts.australiacouncil.gov.au/visual-arts/global-10/fact-10-the-global-art-market-is-150-times-bigger-than-the-australian-art-market>>. The New Zealand market is too small to be measured in global comparisons.

<sup>34</sup> Annette van den Bosch, 'The Arts End of Superannuation', *The Conversation* (Web Page, 12 April 2011) <<https://theconversation.com/the-arts-end-of-superannuation-495>> (emphasis added).



superannuation funds ('SMSFs').<sup>35</sup> Nevertheless, the tax and benefit concessions that are granted merit analysis.

This article is structured as follows: after this Introduction, differential tax and benefit treatment of collectors in Australia and New Zealand is outlined in Section II. In Section III, relevant tax policy considerations are sketched and applied to the differential tax and benefit provisions. Section IV discusses whether differential treatment of collectors (relative to other investors) can be justified on other grounds, such as promoting art markets and preserving cultural heritage. Recommendations are made, and conclusions are then drawn.

## II DIFFERENTIAL TAX AND BENEFIT TREATMENT OF COLLECTORS

Since neither Australia nor New Zealand levies net wealth taxes or capital transfer taxes, the significant preferences conferred by some countries through those taxes do not merit further consideration currently. Chapter 3 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) establishes the tax-preferred goods and services under the Australian GST system. These do not include artworks.<sup>36</sup> The *Goods and Services Tax Act 1985* (NZ) seeks to tax all goods and services unless it is impracticable to do so.<sup>37</sup> Nevertheless, differential treatment of collectors is present in Australasian tax-benefit systems. This section of the article identifies this differential treatment.

### A CGT

New Zealand does not levy a general CGT,<sup>38</sup> and is unlikely to introduce such a tax in the foreseeable future.<sup>39</sup> Nevertheless, the Tax Working Group ('TWG'), which reported in 2019, in making recommendations that were quite different from Australian law, provided useful points of comparison.

#### 1 Australia

Under Australian law, personal use assets acquired for less than AUD10,000 are disregarded for CGT purposes. Personal use assets include boats, furniture, electrical goods and household items, but exclude collectables. Collectables include paintings,

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<sup>35</sup> Treasury, Australian Government, *Super System Review Final Report: Part Two Recommendation Packages* (2010) 247 <[https://static.treasury.gov.au/uploads/sites/1/2017/06/R2009-001\\_Final\\_Report\\_Part\\_2\\_Consolidated.pdf](https://static.treasury.gov.au/uploads/sites/1/2017/06/R2009-001_Final_Report_Part_2_Consolidated.pdf)> ('Cooper Review'). On the impact of the regulatory changes following the Cooper Review, see Duncan Hughes, 'Art Lovers Selling Down Collections as SMSF Rule Changes Near', *Financial Review* (online at 18 September 2015) <<https://www.afr.com/personal-finance/superannuation-and-smsfs/art-lovers-selling-down-collections-as-smsf-rule-changes-near-20150915-gjn2r7>>.

<sup>36</sup> For a discussion of preferences under the Australian GST system, see Graeme S Cooper and Richard J Vann, 'Implementing the Goods and Services Tax' (1999) 21 *Sydney Law Review* 337.

<sup>37</sup> For a discussion of New Zealand's broad-based GST, see Matt Benge, Marie Pallot, and Hamish Slack, 'Possible Lessons for the United States from New Zealand's GST' (2013) 66(2) *National Tax Journal* 479.

<sup>38</sup> Certain receipts, which would be treated as capital gains under a CGT, are currently taxable as income under ss CB 3, CB 4 and CB 5 of the *Income Tax Act 2007* (NZ). For a discussion, see John Prebble and Grant Pearson, *Fundamentals of Income Tax* (Thomson Reuters, 2018) 128–9.

<sup>39</sup> See, for example, Stacey Kirk, 'Ardern Pushes CGT off the Table', *The Dominion Post* (Wellington, 18 April 2019) 1.

sculptures, drawings, engravings or photographs.<sup>40</sup> Gains on collectables acquired for less than AUD500 are excluded. Presumably, policymakers consider personal assets to be wasting assets, whereas collectables are not.

## 2 New Zealand

The TWG not only recommended a CGT but also proposed a blanket personal use asset exemption, including 'jewellery, fine art, taonga [treasures] and other collectables (rare coins, vintage cars etc)'.<sup>41</sup>

### **B Benefit means-testing**

Welfare benefits can be broadly distinguished between universal and means-tested versions.<sup>42</sup> For example, the New Zealand Superannuation is a universal benefit, whereas Australia's Age Pension is means-tested, albeit with a significant asset exemption.<sup>43</sup> This section outlines the position of collectors under Australasian means-tests.

## 1 Australia

The asset means-test for the Age Pension is comprehensive, and includes motor vehicles, boats, personal items, and trading, hobby or investment collections.<sup>44</sup> The same rules apply to aged care applications.<sup>45</sup> In short, policymakers draw no distinctions between different types of assets in applying means-testing.

## 2 New Zealand

For the purposes of ascertaining eligibility for the residential care subsidy ('RCS'), 'exempt assets' include 'personal collectables or family treasures or taonga such as artworks, books, stamps, and antiques'.<sup>46</sup> Although regulations may prescribe value limits for types of exempt property,<sup>47</sup> none currently apply to personal collectables, and so forth.

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<sup>40</sup> See *Income Tax Assessment Act 1997* (Cth) sub-divs 108-B and 108-C; 'CGT Assets and Exemptions', *Australian Taxation Office, Australian Government* (Web Page, 16 March 2018) <[https://www.ato.gov.au/general/capital-gains-tax/cgt-assets-and-exemptions/#Personal\\_use\\_assets](https://www.ato.gov.au/general/capital-gains-tax/cgt-assets-and-exemptions/#Personal_use_assets)>.

See also sub-div 30-A on deductions for gifts you can deduct.

<sup>41</sup> Tax Working Group, New Zealand Government, *Future of Tax: Final Report Volume II — Design Details of the Proposed Extension of Capital Gains Taxation* (21 February 2019) 14 <<https://taxworkinggroup.govt.nz/resources/future-tax-final-report-vol-ii-html>> ('TWG II').

<sup>42</sup> See, for example, Timothy Besley, 'Means Testing versus Universal Provision in Poverty Alleviation Programmes' (1990) 57(225) *Economica* 119.

<sup>43</sup> 'Assets', *Department of Human Services, Australian Government* (Web Page, 25 September 2019) <<https://www.humanservices.gov.au/individuals/enablers/assets/30621#a1>>.

<sup>44</sup> 'Aged Care Means Test for Residential Care', *Department of Human Services, Australian Government* (Web Page, 2018) <<https://www.humanservices.gov.au/individuals/services/aged-care-means-tests>>.

<sup>45</sup> *Ibid.*

<sup>46</sup> See the *Residential Care and Disability Support Services Act 2018* (NZ) s 4 definition of 'exempt assets', read with Residential Care and Disability Support Services Regulations 2018, cl 16 and sch 3, pt 1. Neither legislation nor legislative instruments define 'personal collectables'. Presumably, 'personal' is used to exclude the stock of a professional dealer.

<sup>47</sup> *Residential Care and Disability Support Services Act 2018* (NZ) s 74(1)(g).

Furthermore, no relation-back provisions appear to prevent converting non-exempt assets into exempt assets, such as artworks.<sup>48</sup>

### III TAX-BENEFIT POLICY CONSIDERATIONS

This section of the article considers whether tax and benefit preferences may be justified when measured against usual criteria, in particular, equity and efficiency.

#### *A Usual tax criteria*

Tax commentators broadly agree that taxes should be fair and efficient.<sup>49</sup> Other desirable characteristics include simplicity,<sup>50</sup> convenience,<sup>51</sup> and neutrality,<sup>52</sup> sustainability,<sup>53</sup> and policy consistency.<sup>54</sup> The TWG sought to marry New Zealand's developing Living Standards Framework with *Te Ao Māori* (the Māori worldview),<sup>55</sup> and to situate tax criteria within that specific bicultural context. This was an ambitious goal that sought to extend analysis beyond usual tax criteria. Nevertheless, its analysis of tax policy relied on traditional criteria.<sup>56</sup>

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<sup>48</sup> Under the deprivation of income or property provision, in conducting a means assessment, the Ministry of Social Development can ignore any disposal of property: *Residential Care and Disability Support Services Act 2018* (NZ) s 39(1) and (2). Section 39(3) specifically excludes exempt assets from property. Guidelines issued by the relevant ministries do not clarify the issue. See 'Income and Asset Testing', *Ministry of Health, New Zealand Government* (Web Page, 15 June 2018) <<https://www.health.govt.nz/our-work/life-stages/health-older-people/long-term-residential-care/income-and-asset-testing>>; 'Residential Care Subsidy', *Work and Income, New Zealand Government* (Web Page) <<https://www.workandincome.govt.nz/products/a-z-benefits/residential-care-subsidy.html#null>>.

<sup>49</sup> Adam Smith's four maxims of taxation included equity and administrative efficiency: Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica, 1952) 361.

<sup>50</sup> Australian Government, *Reform of the Australian Tax System: Draft White Paper* (1985) included simplicity along with equity and efficiency as the essential criteria for assessing a tax system. John Ralph, Review of Business Taxation, *A Strong Foundation: Establishing Objectives, Principles and Processes* (Discussion Paper, Treasury, Australian Government, 1998) included 'facilitating simplification', with 'optimising economic growth' and 'ensuring equity', as 'national objectives'. Extracts provided in G Cooper, R Krever and R Vann, *Income Taxation: Commentary and Materials* (Australian Tax Practice, 4<sup>th</sup> ed, 2002).

<sup>51</sup> Smith (n 49) 362.

<sup>52</sup> Carl S Shoup, *Public Finance* (Aldine, 1969) 21.

<sup>53</sup> Sustainability of the revenue base was a particular concern of the 2010 Tax Working Group. See, Tax Working Group, 'A Tax System for New Zealand Future: Report of the Victoria University of Wellington Tax Working Group' (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, January 2010) <<https://www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/pdf/tax-report-website.pdf>>.

<sup>54</sup> Treasury, Australian Government, *Australia's Future Tax System: Consultation Paper* (10 December 2008) ch 2

<[http://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/publications/Papers/Consultation\\_Paper\\_Summary/Chapter\\_2.htm](http://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/publications/Papers/Consultation_Paper_Summary/Chapter_2.htm)>.

<sup>55</sup> Tax Working Group, New Zealand Government, *Future of Tax: Final Report Volume I — Recommendations* (21 February 2019) 25 <<https://taxworkinggroup.govt.nz/resources/future-tax-final-report-vol-i-html>>.

<sup>56</sup> Ibid 28.



### ***B Application of usual tax criteria***

This section of the article applies the criteria of equity, efficiency, and other relevant considerations to CGT and means-tested benefits.

#### **1 CGT**

To reiterate, Australia allows a AUD10,000 exemption for personal use assets, excluding collectables, and a AUD500 exemption for collectables. Conversely, the TWG recommended including collectables in a complete exemption of personal use assets.

##### ***(a) Equity***

According to the TWG, collectables 'are distinguishable from other types of personal use assets because they are often purchased as investments and are usually *expected* to increase in value'.<sup>57</sup> Perceptions about investments in art are distorted by the sensational prices artworks created by a select group of artists fetch in a duopoly of auction houses in London and New York. Artworks commonly do not appreciate in value. Indeed, even the works of global 'superstars', such as Damien Hirst, may lose value.<sup>58</sup> To reiterate, in the sophisticated Parisian contemporary art ecosystem that Moureau and her co-authors studied, collectors do not acquire works with an expectation of making a profit.<sup>59</sup>

It seems likely that genuine collectors gain pleasure from their collections, beyond their potential investment value: for example, no one is likely to collect Star Wars figurines, unless they have a passion for Star Wars movies. The same consideration applies to collectors of artworks, the possibility of speculation in the high end of global markets, notwithstanding. It is then an example of simplistic policy reasoning to assume that collectors intend to and are able to purchase artworks that will necessarily increase in value. It should also be borne in mind that artworks are often fragile and easily destroyed,<sup>60</sup> and, if tainted as fakes,<sup>61</sup> lose significant, if not all, value.

In the absence of a social judgement that certain types of investments are meritorious and therefore deserve special tax treatment,<sup>62</sup> it is reasonable to expect government to treat different types of assets with an even hand.<sup>63</sup> It would, therefore, be equitable to treat private collectables for CGT purposes in the same way as personal use assets.

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<sup>57</sup> TWG II (n 41) 14 (emphasis added).

<sup>58</sup> See Tim Schneider, 'A Decade after Damien Hirst's Historic 'Beautiful Inside My Head Forever' Auction, Resale Prices Are Looking Ugly', *Artnet News* (Web Page, 12 September 2018) <<https://news.artnet.com/market/damien-hirst-beautiful-resales-1346528>>.

<sup>59</sup> Moureau, Sagot-Duvauroux and Vidal (n 8) 15.

<sup>60</sup> See above n 21 on the apparent paradox of a 240-year-old painting being treated as a wasting asset. But paintings do typically waste. In one estimation, 95–99 per cent of 17<sup>th</sup> century Dutch paintings no longer exist: see Paul Taylor, *Condition: The Ageing of Art* (Paul Holberton, 2015) 68.

<sup>61</sup> According to van den Bosch (n 34), '[i]n Australia, at any one time there are at least 400 people producing fakes of Aboriginal, historic and contemporary art'.

<sup>62</sup> On merit wants and goods, see Richard A Musgrave, *The Theory of Public Finance: A Study in Public Economy* (McGraw Hill, 1959) 9–14. It is submitted that a persuasive argument can be raised that artworks constitute merit goods and should, therefore, be taxed preferentially relative to personal use assets. Space does not permit examination of that argument here.

<sup>63</sup> See, generally, Richard A Epstein, 'Taxation in a Lockean World' (1986) 4(9) *Social Philosophy and Law* 49.

*(b) Efficiency*

The TWG noted that '[e]xcluding these types of assets from an extension of the taxation of capital gains may incentivise investment in such assets over more productive assets'.<sup>64</sup> The proposed CGT would have been levied at marginal income tax rates (33 per cent maximum). Consequently, it is plausible that wealthy individuals might have been incentivised to invest in the global art market in search of tax-free gains. Such an incentive would have been perverse. The risks of investing in the global art market would be significant for individual investors,<sup>65</sup> and such investments may do nothing to develop the domestic art ecosystem. The Cooper Review recognised that tax concessions should not benefit investors in risky, unregulated forms of investment. The final report stated: 'The principal concern is that the cumulative regulatory and compliance complexities outweigh the potential benefits of allowing such a liberal investment menu to a sector that is not directly prudentially regulated.'<sup>66</sup>

The art market is, indeed, generally recognised as the last unregulated mainstream market,<sup>67</sup> and, perhaps, the Australian market is in particular need of coherent regulation. In *McBride v Christie's Australia Pty Ltd*,<sup>68</sup> it was alleged that perhaps as many as one-third of artworks for sale in the Australian market are fakes.<sup>69</sup> According to Sasha Grishin, in addition to 'nine conflicting federal, state and territorial jurisdictions, lack of a proper catalogue raisonné for the work of most artists as well as a lack of a comprehensive register of fakes creates a fertile playground for crooks, forgers and ignorant collectors'.<sup>70</sup> (See Section IV.C below on speculation.)

Not only would a full exemption for artworks be economically inefficient, if a sufficient number of investors took advantage of the concession, the sustainability of the revenue base could be affected.

*(c) Simplicity*

Once policymakers draw distinctions between types of assets for CGT purposes, anomalies and absurdities inevitably arise. The UK distinguishes between personal assets deemed to have a lifespan shorter or longer than 50 years.<sup>71</sup> Stamps, for example, are deemed to have a lifespan of more than 50 years and therefore potentially attract CGT on disposal, whereas antique clocks or watches are deemed to last fewer than 50 years and relevant capital gains are not taxed. Australian policymakers may not have engaged in this

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<sup>64</sup> TWG II (n 41) 14.

<sup>65</sup> As van den Bosch (n 34) observes: 'The global art market is not a safe place for the average SMSF trustee or fund holder.'

<sup>66</sup> Cooper Review (n 35) 246.

<sup>67</sup> See Velthuis and Coslor (n 4) 480.

<sup>68</sup> [2014] NSWSC 1729.

<sup>69</sup> See Anne Davies, 'Supreme Court Fraud Case Reveals Corruption in Art Market', *Sydney Morning Herald* (online at 22 July 2014) <<https://www.smh.com.au/entertainment/art-and-design/supreme-court-fraud-case-reveals-corruption-in-art-market-20140721-zvdkz.html>>.

<sup>70</sup> Sasha Grishin, 'Is That a Whiteley? Why Collectors Buy Lousy Fakes as Masterpieces', *The Conversation* (Web Page, 19 March 2015) <<https://theconversation.com/is-that-a-whiteley-why-collectors-buy-lousy-fakes-as-masterpieces-38832>>.

<sup>71</sup> 'Capital Gains Tax on Personal Possessions', *Gov.UK* (Web Page) <<https://www.gov.uk/capital-gains-tax-personal-posessions>>.

degree of pettifoggery but the line between personal use assets and collectables is not clear. Furniture, for example, can be both utilitarian and collectable.

The TWG's proposal 'to exclude these assets for reasons of simplicity and compliance cost reduction' was ill-advised, and the Group appears to have recognised this when it qualified its recommendation, saying '[t]his concession should be monitored and, if necessary, revisited in the future, either entirely or by tax applying over a certain threshold'.<sup>72</sup> A proportionate simplicity recommendation would be to apply the same cap to personal use assets and collectables.

## 2 *Benefits*

Unlike Australia, New Zealand only means-tests the RCS.

### *(a) Equity*

In New Zealand, at least, it is arguably unfair that older people must pay for residential care, when healthcare is otherwise funded from general revenue. But, having noted this possibility, equity concerns lie with the class of people who might claim the RCS. If applicant A holds their wealth in shares, and applicant B holds their wealth in collectables, A's wealth will be used to fund their care, whereas B's wealth will be left untouched. It is plausible that having to sell a tangible artwork, rather than, say, intangible shares to fund residential care,<sup>73</sup> might cause more disutility to the applicant.<sup>74</sup> However, it seems unlikely that means-testing policy can accommodate such subjective possibilities. The Australian approach that permits an allowance for all personal property appears more equitable.

### *(b) Efficiency*

Ample evidence exists to demonstrate that New Zealanders use trusts to divest themselves of real property with an eye to avoiding RCS contributions.<sup>75</sup> No case law or other publicly available documentary evidence exists to indicate that potential RCS applicants are similarly 'abusing' the collectable exemption. Nevertheless, it would be surprising if the elder advisory industry does not take note of this extraordinary concession. Even so, it seems unlikely that the concession has a significant effect on people's economic decision-making — more likely, it may provide an unplanned benefit for a small number of long-term collectors. In practice, however, because they often have a sense of curatorial duty, serious collectors may dispose of their collections as they reach old age from concerns about not being able to properly preserve and protect their

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<sup>72</sup> TWG II (n 41) 14.

<sup>73</sup> The shares might, however, be in a company the applicant has spent their working life building, whereas the artwork was purchased a month previously.

<sup>74</sup> On the concept of personhood property, see Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.

<sup>75</sup> See Jonathan Barrett and Lisa Marriott, 'Income Deprivation and Benefits: The Role of Trusts in New Zealand' (2020) *New Zealand Journal of Taxation Law and Policy* (forthcoming).

artworks.<sup>76</sup> In short, unlike the TWG's proposed collectables exemption, the RCS concession is likely to be practically trivial, but that does not justify it.

### ***C Concluding comments***

CGT is an inherently complex tax, and, once politically necessary exemptions are introduced, its complexity is exacerbated. Every deviation from a fundamental principle that all receipts should be taxed diminishes equity.<sup>77</sup> Equity is not, however, the only generally accepted tax principle. Efficiency, sustainability and simplicity, among other criteria, should also be considered.

In its recommendations on CGT and personal assets, the TWG elevated simplicity above other more pertinent considerations. Consequently, wealthy people might continue to receive tax-free capital gains by investing in their principal residence and collectables. This possibility would be unfair, inefficient, and potentially unsustainable.

## **IV DISCUSSION: BROADER POLICY CONSIDERATIONS**

This section of the article presents broader policy considerations, in particular, whether grounds beyond traditional tax criteria might justify concessions for collectors. Why do governments in mature art markets privilege collectors?<sup>78</sup> They recognise, first, that art is socially valuable and, therefore, it is appropriate for the state to take measures to encourage the creation of art; second, they believe that aiding collectors is critical to achieving national cultural goals, such as retaining significant works within domestic collections.

### ***A The social value of art***

Art fundamentally contributes to the constitution of a national culture.<sup>79</sup> Specifically contemplating New Zealand, but expressing an idea that applies to all countries, Hamish Keith says:

The art made here or influenced by this place is the only art that speaks to us directly about our experience. That does not make it better, or worse, than the art of some other place — it just makes it different.<sup>80</sup>

In their research on behalf of the Arts Council England, Andrew Mowlah and his co-authors sorted the social value of the arts and culture they observed into the categories of

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<sup>76</sup> For example, Les and Milly Paris amassed the finest private collection of contemporary New Zealand art but, when Les died, Milly could no longer care for the collection and put it up for auction: see Sophie Speer, 'Artistic Vision Builds Something Special', *The Dominion Post* (online at 30 August 2012) <<http://www.stuff.co.nz/dominion-post/culture/7576393/Artistic-vision-builds-something-special>>.

<sup>77</sup> See Charles R Hulten and Robert M Schwab, 'A Haig-Simons-Tiebout Comprehensive Income Tax' (1991) 44(1) *National Tax Journal* 67.

<sup>78</sup> The possibility of policy capture by an elite is noted, but will not be considered further.

<sup>79</sup> See, generally, Francis Pound, *The Invention of New Zealand: Art & National Identity, 1930–1970* (Auckland University Press, 2009).

<sup>80</sup> Hamish Keith, *The Big Picture: A History of New Zealand Art from 1642* (Godwit, 2007) 269.

economy, health and well-being, society, and education.<sup>81</sup> These categories are briefly outlined below.

### 1 *Economy*

The arts contribute directly to the national economy through gross value added, and the multiplier effects of artists and other arts industry workers' spent earnings.<sup>82</sup> While it is difficult to accurately attribute earnings from tourism to the arts, particularly in mature art ecosystems, art collections do attract tourists.<sup>83</sup> At a sub-national level, local governments commonly expect the arts to attract visitors, create jobs and develop skills, attract and retain businesses, revitalise places, and develop talent.<sup>84</sup> Many cities seek to emulate 'the Bilbao effect' of Frank Gehry's Guggenheim Museum and to have the 'pulling power' of a destination gallery.<sup>85</sup> In Australasia, destination galleries away from the main metropolitan areas, include the Museum of Old and New Art ('MONA') in Hobart, and the Len Lye Centre at the Govett-Brewster Art Gallery in New Plymouth.

### 2 *Health and well-being*

A considerable body of literature exists on the health benefits of exposure to the arts.<sup>86</sup> For example, a comprehensive survey by the Scottish government demonstrated a positive link between engaging in cultural activities, and health and life satisfaction.<sup>87</sup>

### 3 *Society*

According to Mowlah et al, 'children and young people's engagement with the arts and culture has a knock-on impact on their wider social and civic participation.'<sup>88</sup>

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<sup>81</sup> Andrew Mowlah et al, *The Value of Arts and Culture to People and Society: An Evidence Review* (Arts Council England, 2<sup>nd</sup> ed, 2014).

<sup>82</sup> Centre for Economics and Business Research, *The Contribution of the Arts and Culture to the National Economy: An Analysis of the Macroeconomic Contribution of the Arts and Culture and of Some of Their Indirect Contributions through Spillover Effects Felt in the Wider Economy* (Report for Arts Council England and the National Museums Directors' Council, May 2013) <[https://www.cebr.com/wp-content/uploads/2013/05/CEBR\\_economic\\_report\\_web\\_version\\_0513.pdf](https://www.cebr.com/wp-content/uploads/2013/05/CEBR_economic_report_web_version_0513.pdf)>.

<sup>83</sup> The Museum of Contemporary Art, the Sydney Opera House, and street art in Melbourne may be attractions for overseas tourists in their own right.

<sup>84</sup> Local Government Association, *Driving Growth through Local Government Investment in the Arts* (March 2013) <<https://www.local.gov.uk/sites/default/files/documents/driving-growth-through-lo-334.pdf>>.

<sup>85</sup> See Rowan Moore, 'The Bilbao Effect: How Frank Gehry's Guggenheim Started a Global Craze', *The Guardian* (online at 1 October 2017) <<https://www.theguardian.com/artanddesign/2017/oct/01/bilbao-effect-frank-gehry-guggenheim-global-craze>>.

<sup>86</sup> On the Arts in Health movement, see Jane Macnaughton, Mike White and Rosie Stacy, 'Researching the Benefits of Arts in Health' (2005) 105(5) *Health Education* 332.

<sup>87</sup> Clare Leadbetter and Niamh O'Connor, *Healthy Attendance? The Impact of Cultural Engagement and Sports Participation on Health and Satisfaction with Life in Scotland* (Scottish Government Social Research, 2013) <<https://www.webarchive.org.uk/wayback/archive/20170118130801/http://www.gov.scot/Publications/2013/08/9956/downloads>>.

<sup>88</sup> Mowlah et al (n 81) 32. Some evidence exists to indicate that art-related interventions may reduce crime: at 33.



#### 4 Education

Various reports indicate ‘that learning through the arts and culture improves attainment across many other aspects of the school curriculum and has a wealth of other beneficial impacts on young people’.<sup>89</sup>

#### **B Why do people collect artworks?**

Various reasons can be adduced to explain why people collect art. Erin Thompson identifies: ‘an ostentatious desire to seem persons of superior taste’;<sup>90</sup> creating and developing social bonds; establishing perceived associations with notable people; but, she claims, ‘most collectors have little regard for profit’.<sup>91</sup> Whether or not her observations are empirically supported, these reasons for collecting could not plausibly provide grounds for extending tax concessions to collectors — indeed, a sumptuary tax might be indicated. Tax preferences could only be justified if private collecting had identifiable social benefits. Even then, policymakers might feel unease about promoting private ownership of artworks for public benefit. Gauberti argues that, while policymakers in the UK and the US use art tax incentives liberally because they grasp the ‘big picture’, even in France, conflict exists ‘about the social impact of explicitly promoting ownership of art works, to implement a coherent set of incentivising art tax rules’.<sup>92</sup>

Having researched the behaviour motivations of collectors of contemporary art in Paris, Moureau and her co-authors observe:

Collectors of contemporary art are not merely buyers. They operate on both sides of the market, not only creating demand, but also supply through their involvement in artistic life. Thus, over three quarters of collectors act in a variety of different ways to support those involved in the art ecosystem: the investor may invest in production (orders, financing of catalogues, etc), dissemination (loans for exhibitions, presenting to other collectors, etc), or assistance (financial, material or other support). Collectors’ actions may involve various other parties, eg artists, galleries or indeed institutions.<sup>93</sup>

#### **C Speculation**

In the increasingly globalised art market, a distinction may be drawn between traditional collectors, who often demonstrate public-spiritedness,<sup>94</sup> and speculators for whom artworks are essentially a tradable commodity or a quasi-currency.<sup>95</sup> A speculator who, say, keeps an ‘Old Master’ in a bank vault provides no obvious benefit for living artists or the public,<sup>96</sup> and should not experience any tax encouragement to behave in that way.

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<sup>89</sup> Ibid 35.

<sup>90</sup> Compare Thorstein Veblen, *Conspicuous Consumption* (Penguin Books, 2006).

<sup>91</sup> Erin Thompson, ‘Why People Collect Art’, *Aeon* (Web Page, 23 August 2016) <<https://aeon.co/essays/what-drives-art-collectors-to-buy-and-display-their-finds>>.

<sup>92</sup> Gauberti, ‘Art Tax Law’ (n 14).

<sup>93</sup> Moureau, Sagot-Duvauroux and Vidal (n 8) 5.

<sup>94</sup> According to Thompson (n 91), J Paul Getty, being London-based and phobic of air travel, never saw the full collection of works he had accumulated for the Getty Museum in Los Angeles.

<sup>95</sup> See, for example, *The Price of Everything* (HBO Documentary Films, 2018).

<sup>96</sup> In order to maintain an artwork’s market value, the collector may ensure its preservation. Future generations might eventually enjoy access to the preserved artwork. Conversely, concentrated storage of

The emergence of free ports for artworks has facilitated speculation. According to Ron Corver:

Free ports are warehouses in free zones, which were — originally — intended as spaces to store merchandise in transit. They have since become popular for the storage of substitute assets, including art, precious stones, antique, gold and wine collections — often on a permanent basis. Apart from secure storage, sales arguments in the free port business include the deferral of import duties and indirect taxes such as VAT or user tax as well as a high degree of secrecy.<sup>97</sup>

In 2012, *The Economist* reported that '[t]he world's largest free ports, in Geneva and Zurich, are each filled with wooden crates believed to hold well over \$10 billion-worth of paintings, sculpture, jewels, gold, carpets and other items'.<sup>98</sup> Since then, free ports have proliferated.<sup>99</sup> As John Zarobell observes:

It is difficult to imagine a reason to keep art works in a freeport unless there is speculation going on. If you are a collector of fine art, you want to see and appreciate what you own. But if you are a speculator, all you need is private and secure storage, since you are betting that the work is going to increase in value.<sup>100</sup>

#### **D Collective action through charities**

Australasian policymakers — in relation to both tax and culture — should be wary of models from countries with mature art markets that emphasise and privilege the role of individual collectors. This does not mean that tax policies should forego opportunities to promote the arts, but should rather develop existing policy. As British-heritage jurisdictions, Australia and New Zealand have long-established and broadly trusted traditions of collective action through charities, and both countries extend significant concessions to charities and their donors.<sup>101</sup>

Section 12(1)(e) of the *Charities Act 2013* (Cth) includes 'the purpose of advancing culture' as a 'charitable purpose'. New Zealand legislation does not define 'charitable purpose'.

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artworks in free ports may lead to an increased risk of catastrophic destruction. See 'Paint Threshold', *The Economist* (online at 1 September 2012) <<https://www.economist.com/finance-and-economics/2012/09/01/paint-threshold>>.

<sup>97</sup> Ron Korver, Ex-post Evaluation Unit, European Parliament, *Money Laundering and Tax Evasion Risks in Free Ports* (Study at the request of the Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance, European Parliament, October 2018) 5 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627114/EPRS\\_STU\(2018\)627114\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627114/EPRS_STU(2018)627114_EN.pdf)>.

<sup>98</sup> 'Paint Threshold' (n 96).

<sup>99</sup> See, for example, Graham Bowley and Doreen Carvajal, 'One of the World's Greatest Art Collections Hides behind This Fence', *The New York Times* (online at 28 May 2016) <<https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html>>.

<sup>100</sup> John Zarobell, *Art and the Global Economy* (University of California Press, 2017) 235–6.

<sup>101</sup> See, for example, *Income Tax Act 2007* (NZ) ss CW 41, CW 42, CW 43. Section CW 41 exempts the non-business income of charities. Section CW 42 exempts the business income of charities, but only to the extent that income is applied for charitable purposes within New Zealand. Subject to a minimum donation of NZD5, individuals may claim a tax credit of 33½ per cent of their aggregate annual donations. See *Income Tax Act 2007* (NZ) ss LD 1–LD 3. The total gifts that qualify for the tax credit may not exceed the individual's taxable income: *Tax Administration Act 1994* (NZ) s 41A(3).

Under the common law,<sup>102</sup> a charity must be for the public benefit and have the purpose of relieving poverty, advancing education, advancing religion, or benefitting the community. Promotion of the arts has been found to satisfy that essential criterion. In *Royal Choral Society v Inland Revenue Commissioners*,<sup>103</sup> Lord Greene MR observed 'the education of artistic taste is one of the most important things in the development of a civilised human being'.<sup>104</sup> Furthering the arts in this way is included in the well-established category of education, but the general promotion of art has also been deemed to be a charitable purpose,<sup>105</sup> and gifts to art galleries have been found to be charitable in nature.<sup>106</sup>

### **E Recommendations**

It seems likely that promoting the arts in the public sphere and improving the economic well-being of artists are goals most effectively pursued through direct grants and subsidies.<sup>107</sup> A CGT exemption might also assist in achieving these objectives, but could be disproportionate. For example, while roll-over relief in the US generally benefitted the art market, it may have been a disproportionate way of promoting public access to the arts or helping those artists most in need, and is likely to have encouraged speculation.

In immature art markets, such as those of Australia and New Zealand, removing barriers to collecting works of local artists may be a more appropriate policy goal than seeking to provide incentives to collectors. To this end, no distinction should be drawn, as Australia does, between personal use and collectable assets, because a nudge towards personal use assets may discourage investment in artworks. Conversely, a cap on exempted personal use assets, if applied equally to collectables, might encourage purchases of less expensive artworks created by emerging local artists. While the New Zealand government has not taken up the TWG's recommendation for a CGT, the Group's proposed exemptions for collectables illuminate the unnecessary discrimination between personal use assets and collectables under Australian law. Finally, for more valuable artworks, a rebate might apply for public display. For example, if an owner lends an artwork to a public gallery for half the period they own it, a 50 per cent rebate could apply to any gain on disposal.

If Australasian art ecosystems were to develop to the sophisticated level exemplified by the Parisian collectors studied by Moureau and her co-authors, should we expect similar tax privileges? The answer must be resoundingly negative. The UK's VAT privileging of entrance fees to museums and galleries might present an example to be followed. But 'corrupting' its pure GST would be unthinkable in New Zealand, and introducing further complexity to the Australian GST system would be counter-productive. Besides, in Australasia, entrance to general exhibitions hosted by public museums and galleries is

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<sup>102</sup> See *Commissioner of Income Tax v Pemsel* [1891] AC 531.

<sup>103</sup> [1943] 2 All ER 101.

<sup>104</sup> Ibid 105.

<sup>105</sup> *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132.

<sup>106</sup> Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, New Zealand Government, 2013) 221.

<sup>107</sup> See, for example, Daniel Reid, 'An American Vision of Federal Arts Subsidies: Why and How the US Government Should Support Artistic Expression' (2009) 21 *Yale Journal of Law & the Humanities* 361.

usually free.<sup>108</sup> Focused grants and subsidies, revisited in annual budgets, are more effective than tax privileges that may become entrenched and therefore politically difficult to remove. Individual collectors do contribute to the constitution of national culture, but collective action through regulated and tax-privileged charities seems a more preferable option for Australia and New Zealand. Furthermore, as the European Union has discovered, extending tax concessions to collectors can facilitate abuse by speculators and criminals.<sup>109</sup>

## V CONCLUSION

This article has surveyed the types of tax concessions collectors enjoy in the mature art markets of France, the UK and the US, and compared these privileges with the tax-benefit treatment of collectors in Australia and New Zealand, countries with relatively immature art ecosystems.

Australia's inclusion of all types of assets in its superannuation and residential care means-test, coupled with a significant allowance, is preferable to New Zealand's blanket exemption of personal collectables. On the one hand, policies should encourage investment in domestic art because that promotes national culture, but, on the other hand, investment in the general economy should not be discouraged. The TWG's proposal of excluding all collectables from a putative CGT net on simplicity grounds was disproportionate and, unlike the RCS exemption, could have led to significant and undesirable economic distortions. Conversely, Australia's CGT approach to collectables sends odd signals to taxpayers. Surely, buying, say, a boat should not be privileged over buying an artwork? An appropriate approach would lie with allowing a AUD10,000 for all personal assets, including collectables. Australian tax-benefit policy in relation to the arts is not a manifestation of philistinism, and New Zealand has not opted for elitism, but relevant policy in both countries merits further consideration.

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<sup>108</sup> Despite being a private museum, MONA provides free access to Tasmanians and people under the age of 18.

<sup>109</sup> European Parliament, *P8\_TA-PROV(2019)0240: Report on Financial Crimes, Tax Evasion and Tax Avoidance — European Parliament Resolution of 26 March 2019 on Financial Crimes, Tax Evasion and Tax Avoidance (2018/2121(INI))* (2019) <[http://www.europarl.europa.eu/cmsdata/162244/P8\\_TA-PROV\(2019\)0240.pdf](http://www.europarl.europa.eu/cmsdata/162244/P8_TA-PROV(2019)0240.pdf)>.

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