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ENVIRONMENT: A COMPROMISED PORTFOLIO?

Environment: A Compromised Portfolio?

Many will recall the anti-fluoridation campaigns of the late fifties and early sixties. The Lower Hutt City Council commenced adding fluoride to its water supply in 1959 yet it was not until 1963 that its action was challenged in the Courts in *Attorney-General Ex rel Lewis v Lower Hutt City* [1964] NZLR 438. In view of the height at which feelings were running the delay may seem surprising – but not when one realises that through that period the various Attorneys-General, whose consent was required, had also held the Health Portfolio.

With Ministers holding more than one portfolio some degree of conflict may be expected and there may well be occasions, as over the decision to allow the fluoride proceedings to go ahead, when dual personality is an advantage. However the degree of schizophrenia demanded of those holding the major environmental portfolios borders on lunacy and it could well be that both the Government and Opposition parties should review their present arrangements. At the moment the two Ministers reponsible for environment and town planning are also responsible for the main operating ministries affected by them – Forestry and Works respectively.

Over the past three years Mr Venn Young, who has been reappointed as Minister of Forests and Minister of Environment has been in a most invidious position over the West Coast and West Taupo indigenous forest controversies. Whether their attitude is justified by his performance or not it is a sad fact that the major environmental organisations dealing with him on this topic see him as Minister of Forests and not as Minister of the Environment and unfortunately this has led to a noticeable erosion of confidence in him as Minister of the Environment. The two portfolios are just not compatible.

Environmental considerations bear increasingly and often unexpectedly on Government decisions. To give an example the last Budget made grants available to farmers for bush clearance. According to newspaper reports one consequence has been the removal of bush from sensative and erosion prone catchments. The ad hoc and rather hit and miss nature of the approach to environment currently operating is illustrated by asking who should have foreseen and countered this use of development funds. Is it Lands who operate the scheme, or Works who are responsible for water and soil, or Agriculture or Environment? Environment needs what Energy got – a thorough shakeup under the exclusive eye of a senior Minister. Anything less is just playing with the problem.

The conflicts within the Ministry of Works are direct and justify the cynical regard with which many view it. For example when the boundaries of Levin borough were being set by the Local Government Commission the Ministry of Works and Development, wearing its roading hat, effectively prevented one boundary extension as it would interfere with roading proposals. The Borough therefore extended in other directions, but when it sought to rezone that land for housing the Ministry, wearing its planning hat, objected on the ground that the land was of agricultural importance (see *Ministry of Works and Development v Levin Borough* [1978] 6 NZTPA 429.

When the Town Planning Bill was introduced in 1977 it was constantly reiterated by the Minister of Works and others that it would bind the Crown. Doubters were met with impatience. Unfortunately the doubters have been proved right by the Ministry of Works itself. A water right was granted to enable the use of the Clutha River for hydro generation. An appeal was lodged and has not yet been heard. The Ministry of Works continued with site preparation works. Section 172 of the Town and Country Planning Act 1977 makes it an offence to do work that is the subject of an appeal. The appellants sought a declaration that the work

was unlawful. They were met by the submission that s 172 did not bind the Crown. Mr Justice Somers upheld that submission in *McGregor v Attorney-General* (Supreme Court, Dunedin. 20 November 1978). This blowing hot and cold within the Ministry is taken out on the planning department which tends to be regarded as tied to the apronstrings of the operating side of the Ministry rather than as an independent entity with an independence of judgment. However independently it may in fact act, where its policies bear on the Crown in general and the Ministry of Works in particular it will remain compromised so long as it remains as a department within the Ministry of Works. Planning is too important to be comprised like that.

The above examples are given not by way of criticism but rather to give substance to the opinion that no matter how independently or diligently the respective Ministers may attend to their responsibilities in environment and planning they will not be seen or accepted to be so acting as long as they also have responsibility for Forestry and Works. Up until now environmental matters have been handled on an ad hoc and departmentally fragmented basis. It now needs to be recognised that the topic is too big and too important for that sort of approach.

Tony Black

CASE AND COMMENT

The non-New Zealand Commonwealth citizen and the Immigration Act – A further note on *Movick's* case

It will be recalled that in *Movick v Attorney-General* (Supreme Court, Wellington, 15 March 1978, Davison CJ: Court of Appeal, Wellington, 17 March 1978; Woodhouse, Richardson and Quilliam JJ) the plaintiff whose student's permit under s 14 of the Immigration Act 1964 had expired at the end of 1977, failed in his application for an interim order under s 8 of the Judicature Amendment Act 1972 (newly substituted by s 12 of the Judicature Amendment Act 1977). The interim order sought would have preserved his right to remain in the country pending the outcome of his substantive application under s 4 for review of the decision of the Minister of Immigration refusing an extension of his permit and requiring him to leave by 9 March 1978. Though not having to dispose of the substantive application, Davison CJ expressed the opinion that the Minister had no obligation to observe "any principles of natural justice" (such as counsel had suggested) in relation to the plaintiff. The three members of the Court of Appeal, on the other hand, expressly reserved their position on that. The question then remains to be answered: Was the Minister's discretion absolute so that he could exercise his power unfairly and his decision yet be entirely exempt from judicial review?

Movick has already been noted [1978] NZLJ 271 (JFN)). However, one element of constitutional importance in the case invites further comment, namely, the effect of the classification (alien or Commonwealth citizen) of a non-New Zealander on the outstanding substantive issue.

In the judgments the plaintiff's national status is nowhere stated precisely. Davison CJ in the Supreme Court clearly implied that he was an alien, though in contexts which showed that no distinction between aliens and Commonwealth citizens was present to his mind. Woodhouse J described him as "ordinarily resident in Fiji" and mentioned as one of the matters that would arise as part of the substantive issue "the prerogative powers of the State to accept or exclude aliens within the territory. In the present context the question arises as to whether a *Commonwealth visitor* who has lawfully entered the country would have the standing or right to be heard by the Minister before a decision had been made against him that he may remain no longer". Emphasis added)

No doubt Movick's exact national status would be established in any further proceedings. The present note, however, may properly proceed on the assumption that he was a citizen of Fiji. (If he was not, the hypothetical question is still indicated by the judgments in *Movick's* case and may usefully be considered.) If so, he was not an alien under the Aliens Act 1948 (now repealed) but a Commonwealth citizen. The definition of "alien" in s 2 of the Citizenship Act 1977, with other statutory provisions, shows that the distinction is still legally important:

> " 'Alien' means a person who does not have the status of a New Zealand citizen, a Commonwealth citizen (British subject), a British protected person, or an Irish citizen."

There is, of course, no doubt that, as the definition rather briefly indicates, the terms "Commonwealth citizen" and "British subject" are still synonymous, as they were under the now repealed

British Nationality and New Zealand Citizenship Act 1948. Although changes in the law over recent years have tended to remove the legal differences of status, between the non-New Zealander who is a Commonwealth citizen or British subject and non-New Zealander who is an alien, some important such differences remain. (See, for example, s 3 of the Passports Act 1946 and s 35 E of the Land Settlement Promotion and Land Acquisition Act 1952). Further, the effect of s 3 of the Commonwealth Countries Act 1977 is to retain the application of all relevant common law and statute law to Commonwealth citizens who are citizens of a Commonwealth country of which the Queen is not Head of State. The continued application must be a fortiori for citizens of, for example, Fiji, which is a Commonwealth country (s 2 and First Schedule of the last-mentioned Act) owning the Queen as Head of State.

The Immigration Act 1964 in its terms draws no distinction relevant here between aliens and non-New Zealand Commonwealth citizens. Both classes are in need of entry permits and are subject to the Act. Nevertheless, it may well be that (at least after lawful entry) the discretionary powers of the Minister are qualified by minimal requirements of natural justice or of fairness in favour of the Commonwealth citizen where they may not be in the case of an alien.

Further, it would not be possible in the case of a Fijian as a Commonwealth citizen, to use the dicta of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170 about the position of alien immigrants who "have no right to be here except by licence of the Crown" and whose representations the Minister is not therefore bound to hear. As Lord Denning shows clearly (at p 168), he is interpreting the position of the alien in the light of the common law which gave the alien no right of entry. The British subject, on the other hand, had in imperial days rights to enter and remain in any part of the dominions of the Crown except where legislation such as the Immigration Act or similar legislation took away that right. While the effect of the Immigration Act may be, as is often tacitly assumed, to assimilate the position of non-New Zealand Commonwealth citizens in relation to immigration and residence generally to that of aliens, it is at least possible that this is not quite so and that certain residual benefits of status still attach to the former –as persons who but for the Act were entitled at common law to enter and to remain in New Zealand in contrast to aliens who were not so entitled. Such benefits could only be that the Minister of Immigration and other officers with discretionary powers under the Immigration Act must exercise them fairly (if only to the extent of receiving representations) in the case of those who at common law could so freely come and freely remain and who even to-day are still legally eligible for the grant of New Zealand passports under the Passports Act 1946.

It is true that some authority may suggest otherwise. Thus it appears from the decision of the High Court of Australia in *R v Minister for Immigration and Ethnic Affairs* ex parte *Ratu* (1977) 14 ALR 317 that an immigrant's status as British subject (or Commonwealth citizen in the non-Australian sense) is not a relevant consideration in deportation cases in Australia, Barwick CJ expressly dismissing it as such (at 320). It is also true that Lord Denning MR refers in *Schmidt v Secretary of State for Home Affairs* (supra, at 170) to an unreported English Court of Appeal decision of 1967 in which the discretion of an immigration officer to refuse entry to a Commonwealth citizen was held to be absolute and subject to no duty that the applicant's representations be considered. However, Lord Denning's own statement of the common law basis of an alien's position suggests that that of a Commonwealth citizen may be different and better at least to some extent. And, in a different but comparable matter, in habeas corpus proceedings, the position of the Commonwealth citizen has in effect been held better than that of an alien, in that, in contrast with the position of the former, the onus of proving the facts to justify the detention lies on the Crown: *R v Governor of Brixton Prison* ex parte *Ahsan* [1969] 2 QB 222.

New Zealand authority remains uncertain. In *Pagliara v Attorney-General* [1974] 1 NZLR 86 Quilliam J used Lord Denning's statement of the common law position of the alien on which to hold that the Minister could deport an alien under s 14 of the Aliens Act 1948 without giving him an opportunity to be heard. In *Tobias v May* [1976] 1 NZLR 509 that learned judge applied the same ratio decidendi (though differing from certain other observations of Lord Denning) in refusing an application for review of a ministerial revocation of a temporary permit under s 14 (6) of the Immigration Act 1964. (The applicant, described as "a member of . . . the Ananda Marga organisation" was assumed to be an alien).

The reservations of the Court of Appeal in *Movick* suggest that *Pagliara* and *Tobias* may have to be re-considered. Alternatively, they may be distinguished when the applicant, claiming the right to be heard before the Ministerial discretion is exercised in respect of him, is a Commonwealth citizen, in whose favour, as has been suggested in this note, some residual common law protection may still be pleaded as accruing to his status.

F M Brookfield

TAXATION

FUNDAMENTALS OF ESTATE PLANNING

The fundamental objective of estate planning is to reduce the death duties payable on the estate of one's client. The only way that this can be achieved is to reduce the client's dutiable estate. Essentially, that involves disposing of the client's property to his family before he dies.

Duties on modest estates were eased considerably following the 1976 Budget. Nevertheless, the rates remain such that some measure of planning is often desirable even for the moderately well off. Inflation also, causes the nominal value of property to go up, further enhancing the need for estate planning. It may be expected that rates will be modified from time to time in the future, but one cannot rely on changes keeping pace with inflation or with what, on a long term view, appears to be a fairly steady increase in the real wealth of people who own property. In wealthier estates, the desirability of planning is, of course, immediately obvious.

The rates found in the First Schedule of the Estate and Gift Duties Act 1968 are deceptive, since the true duty payable will usually be modified by various exemptions and reliefs provided in the Act. The burden of estate duties is best illustrated by some examples. The following cases have been calculated taking into account the available reliefs and exemptions. Take a man who dies owing a matrimonial home and leaving everything to his widow. The estate thus qualifies for the greatest possible exemption in respect of the matrimonial home allowance under s 17A of the Estate and Gift Duties Act and the widow's relief under s 36.

Estate	*Equity in Home*	*Duty*
$	$	$
140,000	35,000	7,717
250,000	55,000	33,992
400,000	50,000	110,670
850,000	100,000	248,584
2,100,000	100,000	747,094

Duty is, of course, higher when the deceased dies not leaving a surviving spouse to whom property is left in his or her will.

By JOHN PREBBLE, *an Auckland practitioner.* *This article is developed from lectures by the author in Auckland, Whangarei and Tauranga as part of the Continuing Legal Education Programme of the Auckland District Law Society. With the practitioner who is not familiar with this area of practice in mind, Dr Prebble sets out the major reasons for and objectives of estate planning. Subsequent articles taken from the same lectures will cover the questions of the practitioner's preparedness to undertake estate planning, and a suggested scheme for adoption in particular cases.*

Estate	*Duty*
$	$
105,000	18,000
155,000	34,500
255,000	72,200
500,000	170,200
750,000	270,200
2,000,000	770,200

These examples make the point that estate planning becomes increasingly desirable in estates of married people greater than about $200,000, and in respect of single and widowed people at much lower levels. But it is instructive to take a more particular hypothetical case, to see just how duties are worked out. Mr X, the subject of the example, is the governing director of a successful private company. He also owns considerable investments outside the company. His house is registered as a joint family home, and consequently his share of the equity therein passes to his wife free of duty pursuant to s 22 of the Joint Family Homes Act 1964, as amended. Assuming the whole of the estate is left to the widow, duty is calculated as shown on p 21.

When the widow dies, assuming she has succeeded to the whole of Mr X's estate, a further $133,207 in duty is payable. This leaves, net, for the family, $274,310 out of an original estate of $575,000, and this figure ignores property owned by the widow in her separate estate. Assuming there is such property, and were it taken into consideration, the rate of duty in her estate would be higher. However, if the widow dies within five years of Mr X, the duty in her estate is reduced by a varying amount, depend-

ing on how closely her death follows his. Generally speaking, the duty in the widow's estate is unlikely to be as severe as in this example because of the common use of the life estate. The practice of leaving widows merely a life interest in the estates of their wealthy husbands grew up long before death duties reached their present levels. However, death duties have ensured that the practice has continued. In this way, the widow can enjoy the income of her husband's property without having the capital come into her own estate for a second slice of duty.

As stated earlier, the objective of estate planning is to minimise the duties payable in one's client's estate. It is important to appreciate that there is no legislative provision calculated specifically to frustrate this objective. There is no section in the Estate and Gift Duties Act 1968 corresponding to s 99 of the Income Tax Act 1976, which renders void for Income Tax purposes arrangements whose purpose or effect is tax avoidance. On the contrary, it is implicit in the Estate and Gift Duties Act that people will take steps to avoid death duties. The Act encourages the citizen to give away his property during his lifetime and pay gift duty, rather than wait for death and pay estate duty: generally speaking, gift duty is cheaper than estate duty. Moreover, it is generally acknowledged that one of the policies of the estate duty legislation is to break down concentrations of wealth. To some extent, this policy is achieved by almost any estate plan. Even if a man shares his wealth simply with his only son, there is of course some dilution of ownership.

			$
Shares in private company			200,000
Shares in public listed companies			200,000
Life insurance (value at death)			90,000
Furniture			30,000
Car			10,000
Boat and Marina		+	65,000
	Total		595,000
Deduct debts & furniture left to wife (pursuant to Estate and Gift Duties Amendment Act 1978)	20,000 30,000	–	50,000
			545,000
Duty is 72,200 on 255,000 plus 40% on the balance, therefore deduct		–	255,000
			290,000
Duty on 290,000 at 40%			116,000
Plus duty on 255,000		+	72,200
Gross duty			188,200
less widow's relief on 60,000			
$\frac{60,000}{545,000} \times \frac{188,200}{1}$		–	20,719
Net duty			167,481
Net estate left to widow			545,000
		–	167,481
			377,518
plus furniture		+	30,000
			$407,000

Major problems

The difficulties of estate planning, then, do not stem from any particular government or legislative policy against actions that are calculated to minimise death duties. Rather, the problems tend to arise where clients on the one hand purport to dispose of their property while on the other continue to enjoy the benefits of owning that property. Sections 11 and 12 of the Estate and Gift Duties Act are couched in terms that, broadly speaking, bring property back into the client's dutiable estate where a disposition of that property has been followed by the client's continued use and enjoyment of the property, notwithstanding that legally and even beneficially it now belongs to someone else. Of course, the whole affair is not quite so simple. By the use of trusts, companies, partnerships, leases, and so on it is possible to arrange for the client to get some benefit from the property he has disposed of without falling foul of s 11 or s 12.

A second difficulty is that the needs of estate planning are in some measure opposed to the requirement that the client and his wife should remain comfortably off for the rest of their lives. There is no great joy in denuding a client of his assets so that he pays little or no death duties, at the expense of living the last few years of his life as a pauper. The material well-being and peace of mind of the client must always be uppermost in the mind of his professional advisors.

It is from the two major problems of estate planning set out in the immediately preceding paragraphs that one can deduce two further objectives of estate planning that are equally fundamental:

- The estate of a client should not be reduced to the extent that he is no longer comfortably off.
- In removing assets from a client's estate, it is desirable to retain for the client such indirect benefit in those assets as the law allows him to enjoy.

Secondary objectives and means of estate planning

Once it has been decided that a client will transfer particular items of property out of his estate to his family, the question arises as to how the disposal should be effected: by gift or sale. Almost invariably, the better decision is to sell the property, whether the disponee is to be a family trust or company, or a natural person. In the nature of things, it is unlikely that the disponee will be able to afford to pay the sale price. Moreover, it is generally speaking undesirable that he should in fact do so; the objective is to take assets out of the estate of the client, not to replace items of property with cash. A sale where the price is not to be paid is, of course, a gift for the purposes of the Estate and Gift Duties Act. See the definitions of "disposition" and "gift" in s 2 of the Act. Gift duty would thus be payable on the value of the assets sold. To avoid this result, the usual technique is for the full value of the asset transferred to be left owing to the transferor as a debt payable on demand and without interest. A promise to pay a certain sum is equivalent to that sum in cash. If the sum is not to be due until a stated time, or may be demanded only with a certain period of notice, then the debt should carry interest. If it does not, then there is a gift of the interest that might have been demanded. See *Rossiter v CIR* [1977] 1 NZLR 195. For this reason, debts resulting from estate planning transactions are usually made payable on demand and without interest.

Selling rather than giving assets away has several advantages for the client. The first relates to s 11 and s 12 of the Estate and Gift Duties Act. As mentioned earlier, the effect of these sections is to bring within the dutiable estate of a deceased person property in respect of which he has maintained an interest after having disposed of it. Section 11 applies to property that has been given away, and s 12 to property that has been settled or otherwise disposed of by the deceased prior to his death. "Disposed of" includes "sold".

Significantly in the present context, s 11 has considerably more teeth than s 12. To take one common example, there is the question of a lease by the donee of property back to the donor. Even where the donor pays rent for the property, it will still be vulnerable to be brought into the notional estate under s 11 (1) (b), as the possession and enjoyment of the property will not have been retained to the entire exclusion of the deceased donor. True, s 11 (1) does not apply where, pursuant to s 11 (2), a full market rent has been paid or incurred by the donor. But the necessity remains to ensure that the rent is in fact properly assessed.

Where the donor sells the property, however, s 11 cannot apply, and the transaction is caught, if at all, by s 12 only. Broadly speaking s 12 does not apply where dealings with property subsequent to its original disposition allow the deceased once again to enjoy that property. There must be some arrangement, prior to or contemporaneous with the original disposition, for s 12 to apply. The result is that where pursuant to an estate plan the client sells his property rather than gives it away he is left with considerably greater flexibility in the way the property may subsequently be dealt with. This is an important advantage, particularly where the client's income comes from farming or business property rather than investments. Usually the client will want to continue to run the farm or business. Where he has given away such assets, s 11 would make it inadvisable for him to do so.

A more detailed discussion of the operation of the two sections may be found in Prebble, "Estate Planning: Holiday Houses" [1977] NZLJ 92. While that article refers specifically to only one particular type of property, the holiday house, the principles discussed are applicable generally.

The second benefit from selling rather than giving property away is that the client is enabled to adopt a programme of making gifts spread at annual intervals. The gifts are simply a series of forgivenesses of a portion of the debt. Since gift duty is charged at a progressive rate depending upon the value of gifts in any one year, rather than on the total gifts made by any particular individual in his lifetime, liability to gift duty can be considerably minimised by spreading gifts over a number of years. As an example, one might consider a farmer owning a farm worth $240,000 that he wished to transfer to his son. He could simply give the farm to his son, and thereby incur duty of $55,280. On the other hand, he may sell the farm to the son in the manner suggested above, and progressively forgive the price. If the giving programme lasts six years, at $40,000 a year, the total duty will be $31,680. If the programme is twelve years at $20,000 a year, the duty will total $16,560. The real savings will be even greater than appears from the nominal sums involved, since gift duty is payable only when gifts are actually made, and thus duty incurred at any stage after the beginning of the programme will be paid in decreasingly valuable dollars. Naturally, the appropriate period over which a giving programme should be spread will depend upon the age and health of the client, and the total value of gifts to be made. It is no good planning on a lengthy and cheap giving

programme when the client is likely to die half way through so that the remainder of the debt comes into his estate. (Indeed, it will not just be the remainder of the debt but also the value of any gifts made within three years of death, pursuant to s 10 of the Estate and Gift Duties Act).

In the example set out above, it was suggested that the farmer should sell his farm rather than give it away in order to avoid paying death duty at high marginal rates all at once. Theoretically, it might be possible for the farmer to give the farm away to his son bit by bit, and thus obtain the same advantage of spreading the liability for gift duty. However, merely to state the possibility illustrates its impracticability. Apart from conveyancing difficulties, there would also be the need to re-value the farm every year when a gift was made in order to determine the correct value of whatever fractional interest in the property was subject to that year's gift. The problem is avoided by selling the farm en bloc at the beginning.

The final advantage of using a sale rather than a gift to dispose of property in an estate plan has already been alluded to indirectly in the preceding discussion. This is that a sale on the terms set out above immediately transforms an appreciating asset into a debt owing to the client of a fixed nominal value. Even if the client takes no further steps, an appreciable saving in death duties is very likely. The asset transferred out of the estate will probably continue to appreciate, but its substitute in the estate will remain static. In many estates, the problem is not simply to reduce an existing liability, but to prevent that liability going even higher as a result of increasing property values. The sale technique effectively achieves that objective.

Income splitting

Up to this point, this article has been concerned with minimising death duties. However, the implementation of an estate plan is very often an opportunity for the client to reduce the total income tax liability of himself and his family. It is of course well appreciated that, because of New Zealand's progressive rate of taxation, if a given amount of income is spread among several people the total tax payable will be considerably less than if the same income is all derived by one individual. Tax savings will be further enhanced where the individuals among whom the income is spread are able to take advantage of their personal special exemptions, for example in respect of life insurance premiums. These principles may be illustrated by taking the case of the same Mr X whose estate was discussed above. If Mr X earns $22,000 a year from his private company, and derives $20,000 in dividends from his shares in public companies, then, taking into account his special exemption for life insurance premiums, his total tax for the year ended 31 March 1978 would be approximately $21,000. However, if Mr X transfers his public company shares to Mrs X, so that he now earns $22,000 a year and his wife receives $20,000 in dividends, their respective tax rates will be approximately $9,100 and $7,900. This represents an annual saving of about $4,000. Of course, the saving would be considerably greater were the investment income spread among several children as well as Mrs X.

Avoiding income tax in the manner outlined above is not quite as simple as avoiding estate duty, because of the presence of s 99 of the Income Tax Act 1976. This section avoids for the purposes of income tax arrangements having the purpose or effect of tax avoidance. However, generally speaking, it does appear that s 99 will not operate against transactions entered into pursuant to an estate plan whereby an individual transfers an absolute interest in an income-producing asset to members of his family or to a family trust or company. In fact, if the particular disposition can be described as an ordinary estate planning transaction rather than an arrangement to avoid tax, it seems that it will be safe from challenge under s 99. See, eg, *McKay v CIR* (1972) 3 ATR 379, 387, per Turner P, and cases cited and discussed in A P Molloy, *Income Tax* para 1907 (1976).

Liquidity of estate

In planning an estate, it is all too easy to work out a lengthy programme of asset-stripping and forgiveness of debts, but to overlook the difficulties that may arise should the client die before his duty liability has been reduced to an acceptable level. For example, Mr X's duty has been calculated at $167,481. The only liquid asset in his estate available to meet this liability is his life insurance policy, which will produce $90,000 at his death. This leaves a shortfall of $77,481, without even taking into consideration administration and other expenses consequent upon death. Thus, it appears that a sum in excess of $80,000 would need to be realised by the sale of assets in the estate were Mr X to die before an estate plan could be effected. Moreover, it must be recalled that, apart from pegging assets in the estate at their current value, measures taken under an estate plan must almost always be delayed in the effect by three years. This is because the value of any gift made by the deceased within three years of the death is brought back into the estate. Consequently, the liquidity shortfall in Mr X's estate will remain at at least $80,000 for three years, and thereafter decline at no more than a reasonably steady pace even if a comprehensive plan is put into effect for his estate without delay.

The simplest way of coping with a possible

liquidity shortfall is to purchase more life insurance. However, before recommending this step, the professional adviser should study his client's estate to determine whether there are assets which could reasonably readily be sold without serious damage to the estate as a whole in order to meet the duty. This scrutiny will be even more important where the client is unable because of age or health to qualify for further insurance, or where his income is insufficient to cope with the premiums. In the case of Mr X, one might very well conclude that, if necessary, the boat and marina and some of the public company shares could well be sold to pay duty if necessary. Other estates will not be so happily placed. Farmers, in particular, tend to have most of their capital tied up in fixed assets that would be difficult to sell advantageously at short notice. In some cases there will be no really acceptable solution: life insurance is either unobtainable or out of reach, and no asset is easily saleable, at least without damage to the rest of the estate. Nevertheless, even in these circumstances it must be appreciated that, if the client dies before the plan has been put into effect, something will have to go. It is as well to examine the estate and decide just what asset must be regarded as at risk over the initial years of the plan. Knowing of the possible problems faced by his estate, the client can then be advised not to deal with that asset in any way that is inconsistent with a possible need to sell it on his death.

Summary

The fundamental objectives of estate planning are:

- Avoidance of estate duty by reducing the dutiable estate.
- To ensure that the client and his wife retain their peace of mind concerning their material wellbeing and in fact remain comfortably off.
- Where desirable, and within safe limits, to ensure that the client retains some influence over and indirect benefit from the assets that have been transferred out of his estate.
- To peg the value of at least some parts of the client's estate.
- To lay the foundation for a programme of gifts, usually in the form of forgiveness of debt.
- Minimisation of income tax by spreading income.
- Provision of a contingency plan to cope with liquidity problems should the client die before his death duty liability has been sufficiently reduced.

ADMINISTRATIVE LAW

REASONS FOR DECISIONS: THE AUSTRALIAN EXPERIENCE

By DR GEOFFREY A FLICK, *Faculty of Law, University of Sydney.*

The decision of the Australian Administrative Appeals Tribunal in *Palmer v Minister for Capital Territory* (Unreported, 9 August 1978) contains a discussion of three important provisions of the Administrative Appeals Tribunal Act 1975 (Cth): the right of a person to request an administrator to provide a written statement of the findings on material questions of fact and the reason for the decision (s 28); the obligation upon the administrator to file a similar statement with the Tribunal (s 37); and the power of the Tribunal to order the administrator to file further and better particulars if the statement originally filed is, in the opinion of the Tribunal, inadequate (s 38).

By way of background, the way in which these issues arose was as follows. Palmer and his wife were the joint lessees of land in the Australian Capital Territory and the rates imposed on that land were stated by the City Area Leases Ordinance 1936 to be a specified percentage of the land's unimproved value. This value was initially assessed at $17,000 and, being of the opinion that that figure was incorrect, the Palmers sought a review of the assessment. In their view the figure should have been $6,000 and they offered four reasons in support of their opinion. Section 29 (2) of the Ordinance in these circumstances imposed an obligation on the Minister to reconsider the assessment and either confirm it or substitute an appropriate lower figure. The assessment in the present case was confirmed and from that decision the Palmers appealed to the Administrative Appeals Tribunal. On the same day as they applied to the Tribunal, the Palmers also sought from the Minister a statement of the findings on material questions of fact and the reasons for the confirmation. The Minister was obliged to furnish such a statement pursuant to the provisions of section 28 of the 1975 Act and in purported compliance with this duty a photocopy of a letter dated 5th January, 1978 was forwarded to the Palmers from the

Chief Valuer of the Australian Taxation Office. That letter briefly reflected the unimproved value of three other blocks of land in the same area. To comply with the provisions of s 37 of the 1975 Act the Minister's delegate then filed with the Tribunal a recital of the confirmation of the assessment together with a further copy of the letter dated 5th January and other correspondence. On 9th May the Palmers contended that the reasons and findings already filed were inadequate and they requested the Tribunal to order further and better particulars to be furnished by the Minister. And it was that last request that gave rise to the present decision and a number of important points worthy of note.

First, the Tribunal recognized that although the Minister was authorised by statute to delegate the exercise of his decision-making powers, the decision being reviewed by the Tribunal remained that of the Minister. Of necessity he would rely upon the opinions of such people as the Chief Valuer and s 37 recognized this. That section states that the Minister must file with the Tribunal a statement "setting out *the* findings on material questions of fact . . . and giving the reasons for *its* decision"; the section does not refer in subjective terms to *his* findings and *his* reasons. Consistent with this analysis, the Tribunal stated that if the decision-maker sought the advice of an expert the s 37 statement should incorporate any findings on questions of fact (and a reference to the evidence or other material on which the findings were based) which were made by the expert in arriving at his opinion or recommendations. Furthermore, the reasons which actuated the mind of the expert in making his recommendation, if material to the decision of the decision-maker, should be included. If such information could be withheld the purposes of the Act could be frustrated.

Second, the Tribunal recognized that the obligations imposed by sections 28 and 37 are more stringent than those demanded by s 12 of the Tribunals and Inquiries Act 1971 (UK). The last mentioned section imposes a duty "to furnish a statement . . . of the reasons for the decision if requested." The obvious purpose of this section is to inform persons whose interests are affected by an administrative decision of the reasons for the action and it has therefore been said that the reasons must be proper and adequate: *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 477-78. Whilst both the common law concerning the duty to give reasons and the case law arising under the various statutory provisions calling for reasons (see, Flick, Administrative Adjudications And The Duty To Give Reasons – A Search For Criteria, [1978] Public Law 16) are relevant when interpreting sections 28 and 37, a significant distinction in the wording of the two Australian sections is that they call for "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision." It will be noted that those sections call not only for reasons but also for findings of fact. Moreover, as a result of the 1977 amendments to the Administration Appeals Tribunal Act 1975, the obligation is made even more stringent by requiring a reference to the evidence – the evidence itself need not be set out, but it must be referred to.

These distinctions were referred to by the Tribunal which concluded that the Australian Commonwealth Parliament certainly intended that the citizen should be fully informed. The Tribunal also made the important point that the citizen's entitlement to be fully informed was not merely an incident arising in the course of and for the purpose of a review by the Tribunal. It was a right which arose consequent upon a decision being made which is capable of review by the Tribunal; the reasons when properly given ensure that the citizen is sufficiently informed to determine whether he wishes to take the matter further, and if so whether to make representations to the decision-maker, proceed in the appropriate court of law or to seek a review by the Tribunal. Accordingly, the statement provided to the citizen must be intelligible to the layman.

When tested against the background of these considerations, the Tribunal had little hesitation in concluding that the statements provided by the Minister were inadequate. Such was the case because: it was unclear what information was relied upon at the time of confirming the assessment and it was unclear how the unimproved value was arrived at; only one of the four reasons put forward by the Palmers to support their assessment of $6,000 was dealt with, and no reference was made to their other three reasons; and, finally, the Chief Valuer could not rely upon the comparable sales in the area unless he also disclosed such information as the comparability of the land involved, the market price and the quality and value of the improvements in each instance.

Accordingly, the Tribunal required further elucidation on the following issues: (a) the rejection of the substituted value put forward by the owners; (b) the rejection of the reasons stated in the owners' implication; (c) the conclusion that the amount of the unimproved value specified in the notice of redetermination is not too high; and (d) the recommendation of the Chief Valuer of 5 January 1978 in respect of the following matters: (i) evaluation of the subject land; (ii) full details of the analysed sales; (iii) manner of arriving at deduced unimproved value for each sale; and (iv) manner of arriving at the unimproved value of the subject land.

CRIMINAL LAW

TRADE PROMOTIONS AND THE GAMING AND LOTTERIES ACT 1977 – ANOTHER VIEW

By FRANK X QUIN, *a Legal Adviser to the New Zealand Police. The views expressed though are his own.*

Introduction

David Jones's article titled "Trade Promotions and the Gaming and Lotteries Act 1977" *(a)* contains a number of observations which in this writer's view ought not to be allowed to stand unchallenged. At the same time its appearance is to be welcomed for the attention which it draws to a somewhat anonymous and little understood aspect of the law relating to trade practices. Historically the law on trade promotions involving the distribution of prizes by chance has developed as a largely unpublicised but nevertheless keenly fought battle of wits between the purveyors of consumer goods (and services) and their legal advisers on the one hand and the Police on the other. The Courts have arbitrated and the legislature has watched from the sidelines. The public as a rule has not been allowed admission.

Now there is the Gaming and Lotteries Act 1977 and it is the thrust of Mr Jones's article that its effect differs markedly from that promised by the Gaming and Lotteries Bill as introduced into Parliament. He suggests, albeit obliquely, either conspiracy or negligence on the part of the draftsmen between introduction and enactment, with the result that exemption of trade promotions in toto under the Bill became re-statement of the existing law under the Act. It will be this writer's contention, however, that the intention always was to preserve the position developed under the Gaming Act 1908, which the new legislation replaced, and that there was nothing sinister or neglectful about the alterations made to the Bill after its introduction.

Issue must firstly be taken with the device whereby Mr Jones seeks to establish his subject. He concerns himself with "one aspect of the new act, namely, trade promotions" and proceeds to define them for his purpose as

> "any scheme or competition promoted by the manufacturer or retailer of any goods or services for the purpose of promoting the sale of those goods or services and in respect of which the right to enter is independent on the purchase at a price not exceeding the usual retail price of any such goods or services."

The origins of this definition are not disclosed and it will be observed that it could be applied as much to a painting competition promoted by a manufacturer or retailer to stimulate sales as it could to a lottery promoted for the same purpose. That is to say it is a definition which says nothing as to why certain trade promotions had been the subject of prosecutions under the Gaming Legislation. Mr Jones's approach is not unlike that of a writer on theft, defined for his purpose as "borrowing without returning", bemoaning the fact that theft so called attracts a penalty under the criminal law.

What has made certain trade promotions unlawful in the past has of course been the presence of those ingredients which historically have rendered gaming for whatever motive unlawful. These are firstly, the distribution of prizes *by chance* and secondly, payment for the right to participate. Before dealing with Mr Jones's treatment of the new legislation it would be as well to comment on the treatment given these aspects under the 1908 Act.

The element of payment

Dealing firstly with the matter of payment. Admittedly the draftsmen of the original Gamings Statutes are unlikely to have had in mind a form of payment represented by the purchase of a packet of biscuits or such like. Their concern was primarily with the profit to be reaped by unscrupulous rogues by the extraction of "great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families . . ." *(b)*. As Mr Jones points out the Gaming Act 1908 and similarly its predecessors drew no distinction between gaming as trade promotions and gaming for any other motives. Rather, the application of gaming laws designed to protect the citizenry from self-induced impoverishment to the sphere of trade practices has been, in New Zealand at any rate, exclusively the function of the Courts.

(a) [1978] NZLJ 289.

(b) From the preamble to 10 & 11 Will, 3c, 23 (c. 17 ruff) : Forerunner to all subsequent gaming enactments.

The readiness of the Courts to find in the purchase of some product a payment to participate in a lottery has been the subject of criticism over the years *(c)*. This same criticism is implicit in Mr Jones's article and he strenuously objects to the limitations thereby imposed upon trade promotions which involve distribution of prizes by chance. The criticism has generally been that when Mrs Housewife buys a packet of biscuits she is getting value for her money and any right thereby obtained to participate in a random distribution of prizes is no more than a gratuitous bonus. Mrs Housewife has thus not paid to participate in the lottery.

Thankfully in this writer's view that argument has curried little favour with the Courts which have shown a remarkable tenacity in adhering to a doctrine formulated in the so-called "tea-cases" of the last century *(d)*. That approach is succinctly stated in Halsbury as follows:

> "A scheme whereby gifts are offered to purchasers of commodities may be a lottery notwithstanding that the commodities are in fact worth the money paid for them. In such a case nothing is added to the price of the article for the chance; but the chance by offering an inducement to others to purchase so increases the sale of the article that it becomes possible to provide the prizes out of the profits. It is only in this indirect way that the purchasers contribute to the prizes; but this contribution is sufficient to make the scheme a lottery" *(e)*.

Whether or not this doctrine would have been necessary when the first Gaming statutes were enacted may be debatable, but there is little doubt, in this writer's view that it has become a valuable means of consumer protection over the years since its development. Moreover the fact that it has stood the test of time and judicial scrutiny bears witness to its fundamental soundness and foundation in common sense. It recognises that it is somewhat spurious for the promoter of a scheme designed to stimulate sales to claim that there is not the pre-requisite of purchase any element of payment to participate or to a fund or pool of money out of which the prizes are provided.

While there may be little in the doctrine of the historical reasons for gaming control its real worth in this writer's view has been to protect the consumer from some particularly obnoxious means of sales stimulation. The effect of these schemes (and indeed the intent) is to induce the purchase of a particular product not because of the merits of that product but because it is the means to participate in a lottery or a game of chance.

At the same time it must be acknowledged that there is a good deal that might be said in support of opposing views. It is considered however that little would be gained by traversing the various sides to the argument. For present purposes it must suffice to state that under the 1908 Act the position was that a trade promotion involving the random distribution of prizes would be rendered unlawful by virtue of the payment aspect if either the purchase of the product was in effect mandatory or if at least some of the participants would purchase the product in order to compete. To avoid liability the promoter needed to strictly comply with the words of Darling J in *Willis v Young and Stembridge (f)*:

> "I wish it to be clearly understood that I am not prepared to hold that an absolutely free and gratuitous distribution of chances, none of which have been paid for, would be a lottery."

Contrary to Mr Jones's suggestion the reported cases indicate that compliance with this requirement has not proved impossible. In *Metropolitan Theatre Company Limited v Police (g)*, the proprietor of a new cinema randomly selected people to whom he gave free tickets to attend a session. The distribution was in no way limited to (or even connected with) people who had already become paying patrons of the cinema. Although the case was decided on other grounds it is clear from Shorland J's judgment that the appeal against conviction would also have succeeded because of the absence of any payment by participants.

And in *John Wagstaff Limited v Police (h)*, numbered leaflets were issued to householders inviting each to visit the appellant's electrical appliance store to see if the number on their particular leaflet was displayed in the shop window. If so, and if the participant could then identify a certain brand of product on display he would receive a prize. The appeal against conviction was allowed on the grounds that

> ". . . the appellant . . . asked for and received nothing from the persons to whom the leaflets were distributed. Their receipt of the leaflets and their right to become participants in this scheme for the distribution of prizes

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(c) See eg R A Moodie : "Some Aspects of Section 41 (a) of the Gaming Act 1908 and the Sales Promotion Competition" (1972) 6 VUW LR an excellent analysis of the case law under the 1908 Act.

(d) Cf *Taylor v Smetton* (1883) 11 QBD 207.

(e) *18 Halsbury's Laws of England* (3rd ed), p 239 (footnote (m)).

(f) [1907] 1 KB 488.

(g) [1956] NZLR 54.

(h) [1965] NZLR 973.

were in no way dependent upon their being customers of the appellant" *(i)*.

John Wagstaff Ltd was a case in which the promotor aimed to get "the public" to his shop window. In *Police v Hayes Wright Stephenson Ltd (j)* the public was induced to come inside since the entry forms for the scheme in question were to be found at various points around the store. Again however it was not necessary for a participant to purchase anything before entering this scheme so that the prosecution failed on the issue of payment.

Thus under the 1908 Act it was possible to conduct a trade promotion which constituted a distribution of prizes by chance but which fell entirely outside the Act because the right to participate was wholly gratuitous. The dilemma for the would be promoter was however to balance the prospect of increased sales as an indirect (but nevertheless intended) consequence against the risk that the public would play his game and accept his prizes without buying any of his wares. Inevitably perhaps some means was sought whereby participation would be contingent upon the purchase of goods but the scheme would not constitute a distribution of prizes solely by chance. Hence the development of the "skill" factor.

The element of skill

In dealing with this aspect of trade promotion Mr Jones turns his attention to the "doctrine of severance" and concludes that "skill, dexterity or exertion" had to be exercised by participants and had to be exercised before or at the time of the chance element if it was to be effective. It is suggested however that Mr Jones has overlooked the real effect of the "doctrine of severance" so that his conclusions are incorrect.

A common form of sales promotion scheme has in the past been the distribution of chances by medium of the promoter's product, so that the chance is acquired when the product is purchased. As we have seen, such a scheme immediately ran foul of the Gaming Act 1908 because the Courts invariably found that there was payment to participate. Thus developed the introduction of an element to such schemes whereby participants had to involve themselves in some activity before they could claim their prize.

Thus in *Scott v DPP (k)*, it was held that a scheme would not be unlawful ". . . if merit or skill plays any part in determining the distribution (of prizes)." A refinement was added in the case of *Moore v Elphic (l)* wherein Humphries J held that there

> ". . . must be more than a scintilla of skill, so that it can be fairly certain that the distribution of the prize . . . was due to two causes . . . one being skill and the other being chance" *(m)*.

Thereafter a number of cases were concerned with the questions firstly of what amounted to "skill" and secondly just how big a part did it have to play in the overall distribution of the prize. A useful approach to these questions was provided by the Court of Queen's Bench in *DPP v Bradfute and Associates Ltd (n)*, an approach which thereafter came to be known as the "doctrine of severance".

The scheme in *Bradfute* was the promotion of a certain brand of cat food. Purchasers found on the label an entry form for a variation of bingo. Success in terms of the rules for this device was admittedly a matter of pure chance. However a successful participant was then invited to complete a puzzle whereby a number of triangles in an illustrated "geometrical figure" was to be ascertained. If the correct number was provided the participant became entitled to the prize indicated on the form. The information charging publication of an advertisement of a lottery was dismissed at first instance, the Magistrate finding that there was a sufficient exercise of skill involved, and the prosecutor appealed.

In upholding the appeal Lord Parker CJ seized upon the fact that the right to complete the puzzle was acquired on the basis of random selection. That is to say it was a matter of pure chance whether or not a particular purchaser found that he had a winning bingo form on his tin of cat food. His Lordship then considered the nature of the right thereby required and asked whether or not it might itself constitute a prize. He stated:

> "In my judgment, it is quite clear that a prize need not be a sum of money; it can of course be an article, a commodity, and, in my judgment, can be anything which can be sold, or indeed anything which can be said to be of value."

His conclusion was expressed in the following terms:

> "For my part I feel on the facts of this case that it is quite impossible to contend that this is one entire scheme. It seems to me that the right obtained by getting the winning label constituted a prize in itself . . ." *(o)*.

Here then is the "doctrine of severance":

If provision is made in a trade promotion for a degree of skill to be exercised the scheme will still be unlawful if (a) the right to exercise that skill is

(i) Ibid, p 978.
(j) (1970) 13 MCD 178.
(k) [1914] 2 KB 868.
(l) [1945] 2 All ER 155.
(m) Ibid, at p 156.
(n) [1967] 1 All ER 112.
(o) Ibid, at p 114.

obtained by chance and (b) the right itself "can be said to be of value". The Courts would sever the chance aspect from the skill aspect and would found liability on the basis that the latter itself constituted a prize arising out of the former.

These requirements were invariably established where the skill factor was in effect no more than a condition precedent to the claiming of the "real" prize and also where there was no element of competition. That is to say that if the particular participant did not get the puzzle (or whatever) right, and no one else was striving for that same prize. As will be apparent such was the case in *Bradfute* as Lord Parker CJ pointed out.

But it is erroneous in this writer's view to assert that skill must *in fact* have been exercised or that it had to be exercised prior to or at the time of the operation of the chance element. As to the first proposition this overlooks the fact that in a great many cases a participant is invited to exercise some skill, dexterity or whatever and provision is made for him to do so but he chooses instead to rely on pure chance. Thus in a scheme which for example requires participants to specify how far a car will travel on one gallon of petrol certain information will be provided (eg, type of car, number of passengers, route to be travelled etc) which would undoubtedly allow a participant to exercise some skill if he chose to do so. But it cannot be doubted that a great many participants in such a scheme would opt instead for "pot luck". In the writer's experience this alone would not provide the basis for a prosecution even if the right to submit an entry was itself obtained by chance. It is submitted that the test has never been whether skill was *in fact* exercised but rather whether it *could have been* had a participant so chosen. This follows from the judgment of the Court of Appeal in *Steve Christensen Co Ltd v Byers (p)* wherein it was held, inter alia, that the legality or otherwise of a scheme must be tested at the time the scheme was established without regard to subsequent events. This judgment has recently been followed in *Police v Tresson Interiors Ltd (q)* which concerned a scheme, admittedly unlawful at its inception, in which the rules were changed during its currency so as to make it lawful. The ruling of the Magistrate that the scheme must be looked at at the time the prizes are awarded was overruled on appeal by the prosecutor. On the contrary it was held that a scheme unlawful at its inception could not be saved by a subsequent change in the rules.

It follows therefore, that whether or not skill is actually exercised by participants is immaterial, it being a matter subsequent to the establishment of the scheme. If, looking at the scheme at that starting point, it is possible to say that skill could be exercised, in this writer's view that will suffice.

The second of Mr Jones's observations was that the skill factor had to operate prior to or at the time of the chance factor. That is to say if it arose out of the chance factor the scheme would be severed on the basis of *Bradfute*. The fallacy here, it is suggested, lies in overlooking the basis for Lord Parker CJ's judgment in that case. As we have seen he "severed" the skill aspect from the chance aspect because, on the facts, he found that the right to participate in the former itself constituted a prize. It was such because in the particular case it was undoubtedly a thing of value to the recipients. Although he would not be drawn on this specific point, it is reasonably clear that Lord Parker CJ had in mind that the right which the participant had, ie, to complete the puzzle, was something which she could have sold if she herself had not chosen to complete it. Certainly there is nothing in the report of the case to suggest that the forms and the rights they conferred were not negotiable in this way.

In the writer's experience there have been many schemes in which the right to participate in the skill aspect could not be said to be a "prize". A typical example is where the participants selected by chance are invited to participate in a quiz. The quiz format involves *competition* which, it will be recalled, was absent in *Bradfute*. It is unlikely in the writer's view that the Courts would say that the right to participate in the quiz itself constituted a prize. And the determination of the ultimate winner by recourse to a quiz, the participants in which have been selected by chance, has hitherto been accepted as a scheme in which the outcome is not dependent wholly on chance and in which the element of skill or knowledge or whatever plays a material part.

In conclusion it is submitted that it has not been necessary for the element of skill or dexterity to come first or to coincide with the operation of chance. What is necessary is a prospect of bringing skill to bear at some stage in the scheme which would, if exercised, materially affect the outcome.

The new regime

Turning then to the Gaming and Lotteries Act 1977. Let it firstly be said that in this writer's view Mr Jones is correct in concluding that the "sales promotion scheme" provisions have the effect of re-stating the judge-made law developed under the 1908 Act. The effect of the legislation, briefly stated, is:

(1) to classify gaming into "games of chance", "lotteries" and "prize competitions";

(p) [1967] NZLR 416.

(q) Unreported judgment of Roper J, Nelson SC, 30 March 1977.

(2) to define "sales promotion schemes" as prize competitions only;
(3) to exempt sales promotion schemes as *defined* from the controls imposed by the Act.

Where Mr Jones goes astray, at least in this writer's view, is in his supposition that the Introductory Copy of the Bill evidenced an intention to exempt all sales promotion schemes of a gaming nature from the ambit of the Act. He supports this by reference to the explanatory note to the Bill which stated that "genuine promotion schemes are excluded from the ambit of this legislation". It is Mr Jones's contention that by reference to "genuine" sales promotions is meant any such promotions in which the right to participate involved no more than the purchase of goods at the usual price. The effect would be to allow any sales promotion to operate whether or not it involved the distribution of prizes purely by chance.

It is suggested however (the writer can do no more) that the intention always was to allow only such schemes as amounted to "prize competitions". In the Bill these were distinguished from games of chance and lotteries in that the outcome was determined partly by a "considerable element of chance" and partly by the "performance of some activity by the contestants". The means whereby sales promotions would be excluded was to expressly exclude them from the definition of prize competitions and hence from the controls placed on prize competitions under the Act. The defects with this device, so far as statutory interpretation is concerned, were that (a) the exemption of sales promotions was inferential rather than express, and (b) it was unclear, in the absence of an express statement, whether sales promotions which constituted games of chance or lotteries were also to be excluded.

In as much as the policy never was to allow games of chance or lotteries to be operated in the guise of trade promotions, it became apparent after the Bill was introduced that some reconstruction was necessary. The objective was strived for by commencing the definition of sales promotion schemes with the words "means any prize competition". Additionally, a section was inserted in the Act itself to declare that prize competitions which constituted sales promotion schemes were excluded from the operation of that part of the Act controlling prize competitions *(r)*. But it is rather unfair of Mr Jones to describe these changes as "a sloppy attempt" to rectify "a failure to implement policy at the Bill stage". Such criticism suggests little understanding of the legislative process and, taken to a logical conclusion, implies that a Bill once introduced should not be susceptible to alteration. That would make the provision for three readings and scrutiny by a select committee rather pointless.

The definition of prize competitions under the Bill did not sufficiently capture the essence of this type of scheme as it has been developed under the 1908 Act. The expression "prize competition" is taken from the English legislation *(s)* and is used to designate those schemes developed as an alternative to "pure" gambling. That is, schemes in which the participants could assert some influence on the outcome by their own endeavours. The construction of the Bill as indicated above did not make it sufficiently clear that this was to be the case in terms of the new legislation and for this reason a form of words was chosen which admittedly is rather formidable at first sight. The essential ingredient of a prize competition is thus that the outcome should be determined

> ". . . partly by a considerable element of chance . . . and partly by the performance by the contestants of some activity of a kind that may be performed more readily by contestants possessing or exercising some knowledge or skill, whether or not it may also be performed successfully by chance."

Certain points may be observed:

(1) there must be provisions in the scheme for some activity by participants;
(2) the activity must allow a participant to exercise "skill or knowledge" if he so chooses;
(3) the activity must play a material part in the outcome of the scheme or competition.

Thus the definition recognises that a participant may in any event choose to rely purely on chance when undertaking the "activity" and declares it to be immaterial at which point the "activity" comes into play so long as it is material in determining the outcome. This, it will be observed, closely follows the position established by the cases under the 1908 Act.

A trade promotion meeting the foregoing requirements will be a "sales promotion scheme" and thus exempt from the controls imposed by the Act if (and only if)

- it is promoted for the purpose (a question of fact) of stimulating sales; and
- the right to participate is dependent on the purchase of goods or services at no more than "the usual retail price"; and
- no *other* consideration is required.

As earlier indicated, the writer's view is that the limitations thereby imposed on the use of

(r) Section 18.

(s) The Betting, Gaming and Lotteries Act 1963 (UK) – now largely replaced by the Gaming Act 1968 and associated legislation.

types of gaming to stimulate sales is soundly based. The effect is to prohibit those schemes, the outcome of which is purely a matter of chance. In particular it prohibits those especially objectionable schemes which take the form of a lottery or ballot and in which it is made apparent to a participant that the greater quantity of the produce purchased, the greater the chance of winning. That is to say, schemes in which each unit of the product affords one chance in the draw.

What the statute does allow, if the scheme is to be dependent on the purchase of the promoter's product, is a mixture, in effect, of luck and skill so long as provision for the latter to be exercised is real and not mere "dressing" and so long as a participant in exercising that skill thereby improves his chances of success.

It is suggested that, were the position otherwise, we would see in this country the establishment of housie games, instant lotteries, roulette and the like on an assortment of commercial premises, and all requiring the purchase of stock as the price to participate. The consumer would rapidly become inundated with such dubious incentives to purchase, as competing business concerns sought to maintain their sales margin by offering ever bigger and brighter games and prizes.

That there has not been the development of such sales stimulants in the past has, it is submitted, been due to the inability of the promoters to require purchase of stock. What, after all, is the point of giving away prizes if the profit is not to be assured? By and large therefore, the manufacturer or retailer is obliged to resort to the rather more mundane device of selling his stock on its merits.

The tenor of Mr Jones's article is that the limitations placed on trade promotions of a gaming nature are both unnecessary and unreasonable. The writer can only comment that, if his views enjoyed widespread support, it was not apparent during the public deliberations on the legislation. On the contrary, the only submission directly on point came from a manufacturing concern which pressed for the total prohibition of such schemes. Its concern was that it would be forced to follow its competitors into this type of sales stimulation; a move which would undoubtedly tarnish its image as a generous patron of sport and the arts.

Conclusion

It may seem curious that statutory provisions which have the effect of restricting trade practices should be included in legislation designed to prevent the enrichment of gaming promoters at the expense of luckless gamblers. Then again, that may be seen to be perfectly logical.

Similarly it may seem strange that the enforcement of provisions controlling trade practices should be a function of the Police. That, it is suggested, has its foundation in the fact that in the past, and perhaps even now, there has been no other government agency with the resources to carry out the function.

In any event we now have, in the Gaming and Lotteries Act 1977, an attempt to replace the case-law which has developed the law on sales promotions with statute law. If nothing else, the new Act should do much to overcome the despairing cries of manufacturers and retailers, lawyers and advertising agencies, that the law has been nigh impossible to ascertain. The aim has been to provide a set of rules which will obviate the need to wade through a pile of law reports. Whether that aim has been achieved, so that the books can be left on their shelves, only time will tell. The writer ventures to suggest, however, that a careful and common-sense application of the plain language of the new Act to any proposed promotional scheme will provide a clear indication as to whether the promotion will involve a breach of the Act. As will be apparent from the foregoing, the first question must be whether there is "direct or indirect payment" to participate. If so, then the scheme will only be exempt from the controls imposed by the Act if it is a "prize competition". The essence of this further question is, as we have seen, whether there will be provision for a participant to engage in an activity in which he can bring skill or knowledge to bear, if he so chooses, so as to materially affect the outcome.

If this approach is adopted then it is to be hoped that even the layman will know where he stands. An understanding of the case-law under the 1908 Act will hopefully be required only by those academics interested in learning why the Gaming and Lotteries Act 1977 deals with trade promotion in the manner outlined.

Antipodean accents – The evidence in a recent trial was recorded with the assistance of a tape recorder. However, when the evidence on the tapes was being transcribed the following sentence did not make immediate sense:

"There was a lot of action going on, and I can find spice."

Then it was recalled that counsel was from "down under" and the sentence was immediately recognised as:

"There was a lot of action going on in a confined space."

Counsel's name has not yet been revealed so we are unable to decide whether he or she was an Australian or a New Zealander although we have our suspicions . . . From *Obiter Dicta*, the newsletter of the Hong Kong Magistrates' Association.

SOCIAL WELFARE

DOMESTIC PURPOSES BENEFIT: LESSONS FROM THE FURMAGE CASE

By JOHN HUGHES, *Lecturer in law, University of Canterbury.*

Section 17 of the Social Security Amendment Act (No 2) 1978 repeals s 63 of the Social Security Act 1964 which relates to conjugal status for benefit purposes, and substitutes a new section. The new section removes the present requirement that a couple must be living together on a domestic basis as husband and wife before they can be regarded as husband and wife. Instead, the section provides that the Social Security Commission may regard as husband and wife any man and woman who, not being legally married, have entered into a relationship in the nature of marriage.

In addition, the section provides that the Commission may determine a date on which a married couple shall be regarded as having commenced to live apart or on which a couple shall be regarded as having entered into a relationship in the nature of marriage, as the case may be, and may then grant a benefit, refuse to grant a benefit, or terminate, reduce, or increase any benefit already granted, from that date.

The new section, whilst embodied in the Social Security Amendment Bill (No 2), attracted criticism from the Opposition (whose move to have the Bill referred to Parliament's Social Services Committee failed) and from the New Zealand Association of Social Workers. According to both groups, the section downplays the economic aspects of the marriage relationship by the removal of the "domestic basis" concept and raises the spectre of a new category of "undeserving" beneficiaries based on a "moral" assessment of the relationship in question. The purpose of this article is to suggest that this analysis does not accord with Barker J's judgment in *Furmage v Social Security Commission* (unrep Supreme Court Wellington M 500/77), upon which the change was based. Instead, I will argue that, on the information available, the underlying issues and their treatment by the Social Welfare Department are likely to remain the same under the new section as those raised by the previous concept of living together on a domestic basis as husband and wife. As I hope to show, the economic aspects of the marriage relationship have never been tied to the "domestic basis" wording, nor have those aspects been given the prominence which arguably they merit in the cases under the section: indeed, the latter factor seems to have played a large part in raising the "morals" issue in administration under the repealed s 63(b) and this course may be preserved rather than changed by the new section.

The Furmage case

The facts of the case have been given wide publicity. The essential facts, as found by the Social Security Appeal Authority and recorded by Barker J are as follows. At the time when the Commission decided to withhold Ms Furmage's benefit she was a married woman, separated from her husband in February 1975, and living in the former matrimonial home which they had been buying on mortgage. A maintenance order had been made in her favour against her husband and she had custody of the three children of the marriage. In September 1975 she met a man referred to throughout the proceedings as "Mr X", although subsequently identified in the press. At that time her youngest son, who was already epileptic, became seriously ill with a heart lesion. Mr X assisted her with transport and offered her emotional support through the crisis. Mr X was a married man with three children and living with his wife. His own marriage being unhappy, he left his home some six weeks after meeting Ms Furmage and went to live in a rented flat with one bedroom. Ms Furmage acknowledged that, after September 1975, a relationship had developed between herself and Mr X different from that she enjoyed with other men friends. They would shop on a co-operative basis, with Ms Furmage paying Mr X a sum of money for her share of groceries; Mr X would accept that sum in satisfaction of whatever sum was properly payable. As a gesture in return, Ms Furmage made gifts to him of clothing and records. They shared mutual interests and mutual friends but they also pursued separate individual interests. Mr X stayed overnight at Ms Furmage's home on several occasions during the week and also had meals with her; on other occasions, sometimes accompanied by her children, Ms Furmage stayed at his flat overnight and had meals there. Sexual intercourse took place at least two or three times a week in the early stages of their relationship but less frequently after January 1977. Ms Furmage

acknowledged that she was basically a monogamous woman and Mr X acknowledged that he would not have a similar relationship with another woman while he had a relationship with Ms Furmage. Both places of residence were used by both parties for the purpose of continuing their relationship.

Mr X's wife displayed a hostile attitude to Ms Furmage. It was said that she eventually formed an attachment with another man; although her harassment was an annoyance to Ms Furmage, as was Mr X's "emotional attachment" to his wife, the association between Mr X and her continued. There was some publicity in their home city of Hamilton as a result of which Mr X chose to say publicly that he was the man involved. Despite further strains, caused eg by a severe "personality clash" between Mr X's son and Ms Furmage's youngest daughter, their association continued.

Ms Furmage looked after Mr X on two occasions when he was ill. They attended a conference held in connection with his employment, staying in the same hotel room. They also spent six days together in Sydney after Ms Furmage had attended a conference in Adelaide for the Epilepsy Association, with which she was concerned. They took holidays together in May 1976 and after Christmas 1976. Joint purchases of groceries and gifts ceased after Mr X learned that such actions might be prejudicial to Ms Furmage's receipt of the benefit. The Social Security Appeal Authority saw and heard both parties; after considering the evidence and submissions of counsel, it upheld the Commission's original decision that Ms Furmage and Mr X were "living together on a domestic basis as husband and wife" within the meaning of s 63 (b). Accordingly, the cancellation of Ms Furmage's domestic purposes benefit was upheld. Ms Furmage appealed to the Administrative Division of the Supreme Court against this decision, by way of case stated under s 12Q of the 1964 Act. In the Supreme Court Barker J held that the "clear wording of the section" and, in particular, the words "on a domestic basis" restricted de facto relationships, for the purposes of that section only, to those de facto relationships where the parties lived under the same roof. The reasons will be examined briefly later in the article. The effect of the judgment was to direct the Social Security Appeal Authority to reconsider the matter. The Appeal Authority did so and Ms Furmage's benefit was reinstated with arrears although notional benefit payments for an eight month period she had spent in Tokanui Psychiatric Hospital were deducted, as were sums she received from a trust fund established to support her by other solo parents: these deductions are currently under appeal.

Section 63(b)

The problem faced by claimants such as Ms Furmage may be readily understood on a more detailed examination of s 63 of the Social Security Act the relevant part of which, until the recent change, read:

> "For the purpose of determining any application for any benefit or of reviewing any benefit already granted . . . the Commission may in its discretion . . . (b) regard as husband and wife any man and woman who, not being legally married, are in the opinion of the Commission living together on a domestic basis as husband and wife and may in its discretion . . . refuse to grant . . . terminate or reduce any benefit already granted accordingly."

Basically the original s 63(b) revoked the famous s 74(b) – the so-called "morals" clause – deleting that section's reference to situations where the applicant was not of "good moral character or sober habits". The Royal Commission on Social Security and the Domestic Purposes Benefit Review Committee examined s 63. The latter, in their report last year, stated that "one is forced to doubt whether any section of the Act is more difficult to administer". From the claimant's point of view it might equally be said that perhaps no section of the Act presents more difficulty to claimants in terms both of making the original claim *(a)* and the subsequent ordering of the claimant's life to retain proper payment of the benefit whilst enjoying a normal emotional relationship with a member of the opposite sex.

It is common knowledge that the difficulty arises when the Department comes to determining dependency where women who claim the benefit may be living with a man in circumstances which suggest that he, and not she, is responsible for her support; the reasoning behind the determination being that if such a relationship is stable and can be equated with a legal marriage, in terms of sharing the economies and advantages enjoyed by a legally married couple, then it should have no advantage over a legal marriage insofar as the payment of benefit is concerned. This reasoning remains the basis of the new section.

The scant attention paid to the words "on a domestic basis" prior to *Furmage* serves to accentuate their presence in the section. The interpretation placed on the subsection by the Social Secruity Commission, however, revolved around "a particular kind of relationship that is for practical purposes a marriage even though the parties have not entered into a legal commitment" *(b)*. As the

(a) The procedure is notoriously trying. See especially From Mn 19.

(b) The Minister of Justice. Hansard, First Session, 38th Parliament, 1976, No 27, p 3392.

Domestic Purposes Benefit Review Committee summed up the situation – ". . . subsection (b) of this section means in effect that if any solo parent applicant or beneficiary is or becomes involved in a de facto *marriage* relationship, the Social Security Commission is virtually obliged to refuse or terminate the benefit, as the case may be" *(c)*.

As stated Ms Furmage succeeded in the Supreme Court because Barker J took the view that the use of the words "on a domestic basis" restricted de facto relationships, for the purposes of that section only, to those de facto relationships where the parties lived under the same roof, on a basis of "some permanence". He reached his conclusion by stating that the words "on a domestic basis" had to be taken in their "ordinary" meaning; he considered dictionary definitions of the word "domestic", where it was variously defined as "having the character or position of an inmate of a house", "intimate, familiar, at home", or "of belonging to the home, house or household", "pertaining to one's place of residence" or "concerning or relating to home or family". In the light of this, and on the facts as found, it was held that there was no justification in law for the Commission to hold that Ms Furmage and Mr X were living together "on a domestic basis". It was added that "there may have grounds for holding that they were living as husband and wife" in the light of cases cited to the court by the Department *(d)*; but that was not enough to satisfy the requirements of the original s 63(b).

The Minister of Social Welfare's immediate comment on the decision was that, as an interpretation of the law, it would be of considerable assistance to the Department of Social Welfare and to the public. It did not mean a change in policy: "it will just mean that the facts of each case will be looked at, in future, in the light of this interpretation". However, he went on to state that "[i]f some people structure their lives deliberately so that they can now qualify for a benefit and still enjoy most of the advantages of marriage, the Government may have to consider looking at s 63 (b) . . . with a view to preventing this" *(e)*. Clause 16 of the Social Security Amendment Bill (No 2) 1978 with its new definition of the de facto relationship revealed that, whether or not the Government suspected that such subterfuge on the part of beneficiaries has already been prompted by the Furmage decision, they have looked at s 62 (b) again in the light of the Supreme Court's ruling.

The potential effect of the new definition

In the course of his judgment in the *Furmage* case, Barker J referred to s 27C(1) of the 1964 Act which defines "marriage" (for the purposes only of initial eligibility for the benefit and *not* for its refusal or cancellation) as including "a relationship in the nature of marriage although the two parties to the relationship are not legally married". Had s 63(b) contained a similar reference, His Honour said, then the Commission's view that Ms Furmage's benefit should be cancelled "could well have been justified in law". It was predictable perhaps that any statutory re-definition of the de facto relationship would take account of this judicial interpretation of the existing section and suggestion of an alternative wording. It is therefore hardly surprising to find the new s 63(b) providing that the Social Security Commission may in its discretion "regard as husband and wife any man and woman who, not being married, have entered into a relationship in the nature of marriage".

In assessing the potential effect of the new definition it is important to bear in mind Barker J's remark that if there had been such a reference in s 63(b) as it then was, this could well have justified the Commission's opinion of Ms Furmage's alleged de facto relationship.

The Commission's opinion, as recorded in the case stated before the Court, was summarised thus:

(a) That the section provided for the Commission to determine whether there was a functioning state of marriage between two persons if it concluded that they were living on a domestic basis as husband and wife;

(b) That the wording of the section implied that the Commission was required to look at the manner of living of the parties on a domestic basis rather than on a sexual basis.

(c) That in looking at such a relationship regard should be had to certain elements; one subjective element in the nature of some form of commitment between the parties, and two objective elements, these being (i) the sharing of interests, time and resources, and (ii) the sexual element.

(d) That all the various elements of consortium as between husband and wife did not need to be present in their fullest extent before a relationship resembling that of marriage could be inferred.

This approach failed in Ms Furmage's case because

(c) Report of the Domestic Purposes Benefit Review Committee E 28 1977. Wellington, Government Printer.

(d) *Santos v Santos* [1972] Fam 247, *Sullivan v Sullivan* [1958] NZLR 912, *R v Creamer* [1919] 1 KB 564, *Tulk v Tulk* [1907] VLR 64, *Millett v Millett* [1924] NZLR 381.

(e) *The Press*, 15 May 1978.

the then s 63(b) stressed one element of consortium – living under the same roof – by the words "on a domestic basis". Now that a new definition which does not stress "living under the same roof" is enacted it appears that the Commission's approach as summarised above may well be validated by the amendment, in its broader aspect. Moreover this is so even though the words "on a domestic basis", which were the basis of s 63(b) and formed part of the Department's submissions, have been removed. The crucial paragraphs are (c) and (d) which cover the "husband and wife" element in the provision and may, therefore, carry over into the Department's approach to the new subsection.

The Commission's opinion suggests that the "domestic basis" concept was directed to an approach, in policy at least, whereby the de facto relationship under the original s 63(b) should not be seen in arising merely from a sexual relationship. This approach was implicit in the Social Security Appeal Authority's general view of s 63(b) as it then was; it seems unlikely that their reported decisions under that section would differ given the new section as a basis from which to work. For example, in Decision No 256 (1977) 1 NZAR 210 counsel appearing for the Commission "conceded that the Commission considered that the relationship between the parties was not that which existed in the case of a married couple, but . . . drew attention to the duration of the association and submitted that the relationship was more than a temporary one, that therefore the appellant was not entitled to benefit further". The Appeal Authority took this concession into account as a determining factor in deciding that the relationship in question did not fall within the provisions of the original s 63(b).

In Decision No 284 (1977) 1 NZAR 218 the Appeal Authority heard more detailed submissions from counsel for the Commission on policy regarding s 63(b) as it then stood. This was Ms Furmage's original appeal to the Authority and it was here that the elements raised in the case stated were first set out. In his submissions, counsel for the Commission stated that:

> ". . . the Authority was faced with a difficult task, not because of complications within the law but because of the many and varied circumstances of life into (sic) which persons of the opposite sex could find themselves. References were made to . . . s 63 (b) . . . and . . . the certain thing which that section envisaged was that the persons involved were not married *but they might be viewed by the Authority and the Commission as if they were married*" (emphasis added).

It becomes apparent then that – at least by the time of the *Furmage* case – the Commission's approach closely approximated that envisaged under the new definition, in policy if not in practice; furthermore this reflected the approach of the Royal Commission and the Domestic Purposes Benefit Review Committee. The relative importance attached to the words "as husband and wife" by the Appeal Authority under the original s 63(b) cannot be stated with any certainty because their reported decisions in the field contain no legal analysis, consisting of detailed summaries of the facts and submissions, followed by a short paragraph containing their determination. however the cases outlined suggest that some weight was attached to de facto "marriage" by the Appeal Authority; this approach is unlikely to change and the new definition, based as it is on "marriage", is almost certain to retain the "domestic basis" concept as *one* operative element in determining the extent of a de facto relationship in some cases. Far from altering the Department's practice prior to the Furmage decision, the change in the section seems to have been designed to enable that practice to continue unchanged. In this context it is essential to realise that, in practice, eligibility is determined according to unpublished guidelines containing the Department's interpretation of the section.

The departmental guidelines

Although the Commission's approach as summarised in *Furmage* is very generally stated it is important. There are few sources for ascertaining the guidelines which the Commission, as a matter of administration, lays down for its district officers who have delegated authority to exercise the discretion under section 63(b). Supposedly, uniform policies and procedures throughout the district offices are ensured by reference to departmental manuals which incorporate instructions of the Commission and rules of guidance. It has been pointed out that "the nine of these manuals which concern benefit payments are a vital aspect of the exercise of discretion . . . [they] cover details of criteria to be applied in relation to questions of eligibility, amounts payable, periods of payment, dates of commencement and special cases. These 'rules' are regarded by officers of the department as the key to their function in relation to handling benefit claims, *supplanting direct recourse to the Act and regulations" (f).* No one other than an authorised officer of the Department may have access to these manuals; their consistency with the law is therefore not open to challenge. Nor have they been aired at the reported Appeal Authority hearings. Internal rules as provided in the manual are supplemented

(f) Von Tunzelmann: Administration of Social Welfare Benefits *The Welfare State Today*, ed Palmer, Chapter 7 Fourth Estate Books Ltd (emphasis added)

by memoranda which, once again, are considered to be strictly confidential. On 23 July 1976 *The Week* disclosed the contents of a circular memorandum (1974/21) which outlined certain factors regarded by the Department as constituting prima facie evidence of a de facto relationship. The factors listed were not clearcut and bear quoting at length, if only because a similar set of guidelines may be operating at present, unchanged by the amendment. Matters raised included:

> "Does the man reside continuously with the woman or is he just an occasional visitor – just how often does he stay? Some beneficiaries have claimed their man only stays weekends, or only every second weekend, etc, and that there is, therefore, no de facto relationship. But many legally married men, because of their employment spend only the weekend or other periods at home.
>
> "Does the man exercise 'parental' control over the children of the beneficiary – in what light do they regard him?
>
> "In many cases the parties deny sleeping together and thus maintain there is no de facto relationship. However, it is not necessary that they sleep together before there is cohabitation . . . .. Many legally married couples do not . . . [the department] should be satisfied that they have so merged their lives that they are living together as a legally married husband and wife do, and that the man can reasonably be regarded as having assumed a status of responsibility for the woman.
>
> "What is the extent of the financial support by the man? In cases where the woman is on benefit, she does not need financial support and frequently denies receiving any support whatsoever – or says he buys food, meat etc. The absence of financial support does not necessarily affect the essential nature of a de facto relationship . . . .
>
> "It must be accepted that 'mixed flatting' is a way of life for some. It is a very difficult area for investigation and decision . . . .
>
> "A difficulty does arise, however, when two persons of opposite sex 'pair off' and live together on a domestic basis within a mixed flatting general accomodation. A decision . . . in these cases it is difficult when de facto relationship is denied although evidence points to the sharing of the same room, or even of the same bed."

Reiterating the Review Committee's statement that "the officers concerned are still required to make value judgments in doubtful cases". The memorandum went on to comment that "the decision on whether or not cohabitation exists is in the last resort a personal judgment".

Exercise of the discretion under S 63 (b)

How has the discretion under the section been exercised? The Department does not publicise its precise guidelines nor any indication of their general effect. In view of this, some may consider that it has only itself to blame if prominently reported cases point to the conclusion that the discretion is being exercised arbitrarily. The Domestic Purposes Benefit Review Committee expressed the hope in their Report that the guidelines could be refined on the basis of a continuous process of "case law" being built up by the Social Security Appeal Authority; they went on to state that the important requirement was to keep all district officers up to date with any modifications and to ensure consistency. Ms Furmage has stated that her benefit was cancelled after she refused the Department's request that she sign a declaration undertaking not to sleep with her friend more than once a fortnight, or have meals with him more than three times a week. In another reported decision by the Social Security Appeal Authority in this area *(g)* the applicant was allegedly told by one officer of the Department that the man in question could come only to the gate to talk to her to take her out, that he could not come into the house and that she could not have sexual intercourse with him. On the other hand, another officer of the Department allegedly told her that it would be "all right" if the man stayed overnight, but that if he stayed more than four nights a week the Department would investigate her. These instances of guidance to beneficiaries under the section would be comical if they were not concerned with an area so often involving personal tragedy. Small wonder that one professional social worker has written of "the misery occasioned by the Department prying into important but still unstable emotional relationships, and instances where fear and insecurity over possible benefit loss have caused further tension in families who have only recently begun to cope with the aftermath of marriage break-up" *(h)*. The alleged threat to investigate in the last case raises the conduct of the Department in investigating suspected de facto relationships; this has been criticised. In particular, the involvement of some social workers in the investigation process is seen as placing those workers in an invidious position insofar as the worker/client relationship is concerned. To quote a past president of the New Zealand Association of Social Workers:

(g) Decision 256 above.

(h) Leadbeater: Solo Parents and the Domestic Purposes Benefit "New Zealand Social Work", December 1977, page 19.

> "The [social worker's] success depends on the social worker being able to build up a relationship of trust and confidence with the client. This will not happen if the social worker is also being expected to investigate whether the caring parent is living in a de facto relationship" *(i)*.

It is instructive to compare the Social Welfare Department's reported practice in investigation with that of their Australian counterpart. Sections 59 and 83AAA (1) (b) of the Australian Social Services Act, which deal with eligibility for widow's pensions and supporting mother's benefits, make reference to a woman "who is living with a man as his wife on a bona fide domestic basis although not legally married to him". A remarkably similar definition to the original s 63 (b). In marked contrast to New Zealand practice, the Australian Department of Social Security publishes the detailed administrative guidelines by which the eligibility provisions are applied *(j)*. They also publish the *Instructions* issued to their field officers. Paragraph 22 of these Instructions contains general directions concerning the sensitive area of investigation: it states

> "As a general rule inquiries should not be pursued to undue lengths in an attempt to prove the existence of a de facto marriage relationship. It is preferable to determine a claim on incomplete information and allow the claimant the benefit of the doubt rather than risk the possibility of offending the parties concerned and creating embarrassing situations. Inquiries should not take on an inquisitorial or intrusive nature."

Publication of any similar guideline within the New Zealand system, if such a guideline exists, might well allay the fears of organisations such as the National Organisation of Women. In 1976 they reported Departmental practices including the questioning of neighbours, male friends and flat mates and the noting of any signs about the house of male clothing etc *(k)*. This is a consistent with the circular memorandum 1974/21 which remarked that "[c]asual observations are important and officers conducting enquiries should take particular note of anything which would be helpful in forming a total picture. A request to see the sleeping accommodation and arrangements may not be unreasonable and would probably not be refused if the beneficiary has nothing to fear from the enquiry".

The Social Security Appeal Authority

However whilst the sexual element involved in determining the nature of a de facto relationship has been accorded the greatest publicity, it would be mistaken to regard this as the primary criterion. Under both the original s 67(b) and under the section as it now stands the Minister of Social Welfare has offered the ultimate test as being "whether the couple have so merged their lives that to all intents and purposes they are no different from a legally married couple". This echoes almost precisely the test laid down in the above mentioned Australian guidelines, perhaps accentuating their usefulness for claimants and advisers under the New Zealand system, in the absence of any detailed official guidance being released by the Department of Social Welfare. It was also the test offered by the Royal Commission.

Assuming that the new s 63(b) will not change departmental policy, it becomes relevant to examine the way in which the elements of the "de facto" relationship have been examined by the Social Security Appeal Authority; as stated, that Authority was to "refine" the guidelines by case law and, under the original s 63(b), was taking the concept of "marriage" into account as a determining factor under that section.

It is not obvious from the case stated in *Furmage* how the "subjective" element of commitment and the "objective" elements of the sexual relationship and the sharing of time, interests and resources were to be applied in practice. The comments of the Minister of Social Welfare and the reported cases under the original s 63(b) suggest that the two "objective" elements were viewed as outward and visible signs of the "subjective" commitment, and that the "commitment" envisaged was commitment to a de facto marriage relationship. On this view, when the Horn Committee stated that "a social worker, in the course of regular contact with a beneficiary, will often sense the development of such a relationship" the "sense" presumably entailed an inference from indications that the objective elements were present. The danger implicit in this approach is that misleading inferences will be drawn; in Decision 256 of the Appeal Authority, for example, termination of the appellant's benefit "came as a result of [a] visit by the former husband of the appellant who alleged that [the appellant and a male friend] lived together most of the time. [A] reference to the two cars owned by [the friend] was enough, in the Department's opinion, to tip the balance against continuance of the benefit." It

(i) Report of the National Organisation of Women Emergency Committee on Solo Parents, Chapter 5. Published by the Christchurch Branch of the N. O.W.

(j) "De Facto Marriage Relationships (Cohabitation)", Department of Social Security, Canberra. Discussed in "The Baxter Case: De facto Marriage and Social Welfare Policy", Mossman, AULSA Paper, 1976.

(k) N.O.W. Report, note (i) above. At least one complaint about the Department's conduct has been upheld by the Ombudsman: Ref 11458, 5 August 1977.

transpired before the Appeal Authority that the cars were stored at the appellant's as a matter of convenience; they were unregistered and without warrants of fitness, the friend having another car for his own personal transport.

The Appeal Authority takes a broader view and it is useful to look at the reported cases to see the range of circumstances which have satisfied the three elements in the sense of establishing a "de facto" relationship under the original s 63(b). The three elements have been described as "constant variables" appearing in marriages within the terms of the Marriage Act 1955 or the "de facto" relationship *(l)*; in their treatment by the Department of Social Welfare, the Commission and the Appeal Authority they appear not to be separable. The clearest example is the way in which the "objective" sexual element between the parties is taken to imply the "subjective" commitment when it is on a monogamous basis; conversely, freedom of sexual association appears to militate against such a finding. In Decision 256 it was clear that both the appellant and her friend had other sexual relationships and that although their own relationship had a sexual aspect, "that aspect was not conclusive"; the appeal succeeded. In contrast, Ms Furmage stated in evidence that there was a distinction between her relationship with other men friends and that she was "basically . . . monogamous": counsel for the Commission inferred, from this "commitment" "to treat each other in a different way from what [sic] [they] would treat other friends and acquaintances", a de facto relationship in the terms of s 63(b). Commitment in this sense was defined for the Commission as "some form of mutual agreement express or implied from the relationship, which held the parties together but not for all time or any particular period of time". The Appeal Authority held that the relationship fell within the provisions of the original s 63(b). Whilst it has been stated that the sexual element is not an essential ingredient for the de facto relationship to fall within that section nevertheless that element has been present in the reported cases before the Appeal Authority, and has appeared to be a major determining factor; it will be a rare case in which that element is absent totally.

One class of the "objective" element of sharing resources, financial support, is often misunderstood. The Horn Committee, whilst unable to "quantify" the abuse of domestic purposes benefit which it guessed was occurring, indicated that the highest proportion of this abuse arose from failure to inform the Department that beneficiaries were *receiving support* from the de facto husband. The Royal Commission, rejecting the proposition that the Department should treat a man and woman as a married couple "merely because they share premises and domestic expenses" expressed the view that:

> "It should be satisfied that they have so merged their lives that they are living together as a legally married husband and wife do, *and that the man can reasonably be regarded as having assumed a status of responsibility for the woman"(m)*.

This view was expressed more bluntly earlier in the report, in the statement that "[where] a family relationship exists in fact, *the man must be assumed to have the primary responsibility of supporting it" (n)*. It is not within the scope of this article to raise the question of whether this assumption can be justified in a society which at least pays lip service to the idea of sexual equality; has been well canvassed elsewhere. The assumption; however, seems in part to underlie the Department's attitude that the existence of *actual* financial responsibility is not necessary for a finding that a de facto relationship exists so as to disqualify the woman from domestic purposes benefit; the fact of such support, however, is interpreted as a prima facie indication of the existence of that relationship.

In the reported decisions of the Appeal Authority so far, the question of pooling financial resources has played little part. Indeed in the *Furmage* case, where there was a conscious attempt to retain receipt of domestic purposes benefit by avoiding any financial "pooling" between Ms Furmage and Mr X, this was regarded simply as an attempt to "influence the external appearances" and met with the answer that "while the appellant received her benefit there was no necessity for him to be concerned". Two criticisms can be levelled at this approach given that under the original s 63(b) the operative concept was arguably one of de facto "marriage" and that this is now written into the new section. First, at its most extreme, the approach taken in *Furmage* results in a catch 22 for beneficiaries. It they pool resources to any degree this is prima facie evidence of the existence of a de facto relationship; if they consciously avoid pooling resources they may be regarded as merely attempting to "influence external appearances". Secondly, the case for a statutory domestic purposes benefit is based on primarily economic grounds; the solo parent is deprived of the help that a partner might give in the home (thus being limited in ability to earn an income outside the home) and is also deprived, in whole or in part, of

(l) (1977) 1 NZAR 218, 230.

(m) Social Security in New Zealand: Report of the Royal Commission of Enquiry (1972), para 23 on page 352. Emphasis added.

(n) Ibid para 41 on page 248. Emphasis added.

the partner's financial contribution to the family. The consequences of this type of benefit have been recognised in Canada *(o)*, where the Ontario High Court was faced with ineligibility provisions relating to welfare benefits based on a person who, while not legally married to another, "lives with that person as if they were husband and wife". The Court took the view that the language should be construed in the light of the purposes of the Act, namely, to make provision for persons in need, and thus the definition was held to refer to the economic relationship of persons who live together and not to their sexual or social relationship; absence of financial responsibility precluded the existence of a relationship within the meaning of the definition. A similar approach has been adopted under UK legislation *(p)*. The emphasis is present in the Royal Commission's discussion on conjugal status under s 63 and the now repealed s 74(b). Ironically this emphasis on the economic relationship led the Crown Law Office to suggest, in their evidence to the Royal Commission, amendment of s 63(b) to retain the words "on a domestic basis" but amend the phrase "as husband and wife"; their concern was to apply the provision also to associations where a man and a woman, though living in the same domestic establishment, could not be said to be living as husband and wife. Conversely, the Department proposed to the Royal Commission that it should be given authority to refuse or cancel benefit where the parties were not living together but the circumstances were such that the applicant was being supported by the other party, or could reasonably be expected to look to that party for support.

Under the new s 63(b), how is the appellant best to approach the question of financial support? In Decision 158 (1976) 1 NZAR 1 the Appeal Authority rejected the suggestion that if, in such cases, it was shown several incidents of consortium were absent then it was not reasonable to suggest that the parties were living together as husband and wife; the Authority adopted White J's approach in *Mitchell v Mitchell* [1975] 2 NZLR 127 that exercise of the discretion is "a question of fact in each case". The Commission's attitude, as shown in *Furmage*, is that in many marriages all such incidents are not fulfilled, for one reason or another. However, the one constant in the legal marriage is maintenance liability. In the de facto relationship liability to the wife arises only indirectly under s 53(2) (b) of the Domestic Proceedings Act, so long as there is a child of the union under five years of age. Given the seemingly infinite variety of alleged de facto situations and a definition centred on "a relationship in the nature of marriage", a desirable element of certainty could be introduced under the section at a minimal level by looking at this relationship in economic terms alone. On the Commission's own analysis this would accord with the realtity of a de jure marriage at its barest, stripped of other recognised incidents of consortium which may or may not be present, and would also meet the policy requirements of the section as set out by the Minister. It seems that, despite the hopes of the Horn Committee, the Social Security Appeal Authority have not introduced certainty in this area through the cases decided so far. In *Simonsen v Social Security Appeal Authority* (unrep, Supreme Court, Wellington A 202/77) it was held that the Authority is not required to do more than record its view that, having considered the reasons set out in the Commission's report, it agrees with their decision and the reason for it; the Authority is not obliged to give a reasoned decision dealing with all the substantial points raised. Given this limited obligation it is difficult to see how the expected certainty is to be introduced, particularly since the Authority has shown no inclination to step beyond it in cases concerning the benefit.

The approach suggested would be minimal since it has been argued congently in the UK by the Finer Committee on One-Parent Families that, for at least the first three months, such benefit should not be adjusted or withdrawn for any change of circumstances (except marriage); such a step would remove from lone parents the need to decide for themselves within that period whether a particular relationship had become one "in the nature of marriage" and would add to the prospect of a stable partnership, and consequent withdrawal from the benefit, resulting from it. It has been argued ([1978] NZLJ 345) that the provision in the new section for the Commission to determine a date on which a couple may be regarded as having entered into a relationship in the nature of marriage might be used to this effect. Whether this will be so remains to be seen; arguably the discretion under the repealed section could have been exercised in this way, had the Departmental wished so to exercise it. However, whilst such an approach might do much to alleviate the problems associated with domestic purposes benefit, the political will for its implementation seems to be lacking and likely to remain so; it appears that the tension and confusion resulting from the section will continue.

(o) *Re Proc and the Minister of Community and Social Services* 1975 53 DLR (3d) 512: 6 OR (2d) 624. Discussed at length in Mossman's paper, note *(j)* supra.

(p) "Living together as husband and wife" SBA Paper No 5 HMSO 1976.

NZLSA CONFERENCE REPORT

Recently in August saw the Annual Conference of the New Zealand Law Students Association (an Educational Charitable Trust) held at Canterbury University: with traditional offerings of the National Mooting Competitions, Seminars and Socialising. But by far the most interesting material for NZLJ readers would have that presented at the three Conference Seminars on Accident Compensation, Rape and the Ensuing Legal Process, and Law Reform in New Zealand. The first two topics being memorable for the extreme dichotomy of perspectives revealed by the invited speakers. The Accident Compensation Discussion/Seminar illustrated this well, with the ACC Director of Research and Planning DA Rennie bearing the brunt of sharp criticism of the Commission's work from a most unholy trinity of a Union Leader, Employer's Representative and a noted Christchurch Barrister. All were strangely united in their desire (inter alia) for scrapping lump sum payments under the Accident Compensation Act, and returning to the open slather of the common law action: doubtless an engaging thought for many practitioners.

As suggested above, the Seminar on Rape and the ensuing legal process was not without its moments. Papers were presented by a representative of the Christchurch Rape Crisis Centre, a Police Detective, a Crown Prosecutor and a Defence Lawyer, Quite an explosive mix, as the topic definitely proved not susceptable to dispassionate scrutiny. The frustrations involved in prosecuting the offence of rape with the correlative difficulty of obtaining convictions under existing law, was perhaps best summed up in the title of the Rape Crisis Centre speaker – Ms Jenny Hamilton's paper "stripped of all dignity".

The Seminar thought to have been most controversial but conducted with the most decorum was that held on Law Reform in New Zealand. Papers were presented by Professor Farrar of the University of Canterbury Law Faculty, and B J Cameron, the Deputy Secretary for Justice. Professor Farrar took a comparative approach examining the English and Canadian developing approach to reform. Mr Cameron on the other hand critiqued the New Zealand experience, pointing to our legislative ethos of over legislating to regulate new behaviour, and in recent years continual "mopping up" amending statutes needed, because of the haste and lack of detailed consideration given to major statutory reforms.

Copies of the bound Proceedings are still available and further inquiries about the papers presented should be directed to:

Ms Mardi Lewis
NZLSA Inc Secretary
157 Huxley Street
CHRISTCHURCH.

The good Magistrate –The good magistrate, one might say, must be a good man. And possibly a contented one. He ought not to be too highly-strung; a man with a Dostoevsky view of life would wear himself to a frazzle in six months. (Dickens of course would have done splendidly, in his youth at least.) As a barrister put it, "Oh, a happily married chap, you know; garden, kind heart, good health and not too much out for himself." Another magistrate named the qualities, in that order: "Humanity; common sense; humility; a little law, a very clever chap would be wasted; a sense of humour." To which one might add, imagination, some experience of life and an ability to absorb the unexpected.

The not-so-good magistrate is a man who talks with his head down, who seldom takes his nose out of the ledger. He does not look at the people who speak to him. He hurries them along with hnhn's and well's. He interrupts witnesses and when there is counsel he takes the examination out of his mouth. He browbeats your barristers. He gives everybody a sense of the scarcity of his time. He does not appear to listen. He pretends to be unable to understand what people say to him. He is sarcastic when it is too easy. He makes up his mind, or appears to have made up his mind, at the beginning of a case. He loses his temper not because it might be necessary, but because he loses it. He loses it, not because he has been tried beyond endurance, but becuase it is a cherished exercise. He shows contempt for his customers and his place of work, and he betrays his sense that he is made of different clay. (From *The Faces of Justice* by Sybille Bedford, 1961).