The Estate and Gift Duties Amendment Act 1979: the demise of wealth transfer taxation

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In this article the authors examine the Estate and Gift Duties Amendment Act 1979 and the views expressed on it during its passage through the legislative process. They conclude that the enactment of the Bill was not necessary to solve the problems it was allegedly introduced to solve and that other more acceptable alternatives were available, alternatives that would not entail the virtual abolition of wealth transfer taxation in New Zealand. The authors also suggest that the conception, gestation and birth of the Amendment Act reveal a seriously defective approach to tax policy formulation and implementation in this country.

I. INTRODUCTION

> It has been decided to increase the exemption level for all estates on which [estate] duty is payable from $25,000 to $250,000 in stages over the next four years. The first stage, raising the level at which duty commences to $100,000, will apply to the estates of persons dying on or after today. The remaining stages will raise the level to $150,000 on 1 April, 1980, to $200,000 on 1 April, 1981, and to $250,000 on 1 April, 1982.
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> The gift duty scale has been reviewed also. For gifts made after tonight the value which will be exempt from duty has been increased from $8,000 to $15,000 in any one year, and the rates have been [lowered] for gifts above this figure.[1]

In these terms the 1979 Budget foreshadowed the Estate and Gift Duties Amendment Act 1979 and the most fundamental changes to the estate duty in its entire history.[2] When fully implemented on 1 April 1982 they will effect a reduction of at least 85%[3] in the revenue formerly raised by the estate and gift

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1 *Financial Statement to the House of Representatives.* (Wellington, 21 June 1979) 33.
2 The history of the estate duty is summarised and analysed in McKay "Historical Aspects of the Estate Tax" (1978) 8 N.Z.U.L.R. 1.
3 The budget predicts a loss of $44 million in revenue on 1979/80 values upon the full implementation of its proposals: see *Financial Statement* op. cit. 33. It may well be higher if taxpayer response to the extended nil rate for inter vivos gifts is greater than anticipated.

duty levies. One result will be that by 1982 the yield from those levies as a proportion of total government revenue will be lower than in any other year in history in which an estate tax has operated.[4] Another is that after adjusting for inflation the post-1982 yield from the estate duty will be lower in real terms than that in respect of any of the preceding 52 years, a dramatic increase in national wealth in the intervening period notwithstanding.[5]

"Fundamental" too the changes will be in terms of the proportion of estates to which the duty will in future apply. While the estate duty has never extracted a tax from every estate nor ever imposed a particularly significant levy on the smaller estate the pre-Amendment duty took some levy from the large majority of estates and a significant one from a substantial proportion. For the period 1960-1975[6] for instance some estate duty was paid by between 65% and 80% of estates passed for duty and estates of moderate size[7] paid between 16% and 18% of their aggregate value in duty.[8]

The 1979 Amendment will bring about a dramatic alteration in both respects. Upon its full implementation estate duty will cease to be of concern to the overwhelming majority of estates. While the vagaries of inflation in the period 1979-1982 make it impossible to calculate with any precision how many estates will be subject to the duty after that date, it is nevertheless certain that that number will be very small indeed. In the latest year for which statistics are presently available 156 persons left estates of over $200,000[9] and, judging from the average duty assessed on those estates[10] many, perhaps most of them, were of a lower value than the post-1982 threshold. Even allowing for asset inflation of (say) 50% from these price levels to those in 1982,[11] therefore, the number of estates subject to the duty as at the latter date is unlikely to number more than 250 in any year, or about 1.7% of all estates. The percentage may even be lower. The increased exemption for, and lower rates in respect of, inter vivos gifts introduced in the Amendment[12] will unquestionably serve to reduce the value of property remaining in a decedent's estate at a considerably faster pace

4 The probable yield from the levies after 1982 is in the region of 0.2% of total revenue. See McKay op. cit., 21, Table I, for statistics in respect of earlier years.

5 Calculated from *New Zealand Yearbook* cost of living analyses.

6 1975 represents the latest year for which fully reliable breakdowns of estates passed for duty are available: see *1978 New Zealand Yearbook* (Wellington, 1978) 682-684.

7 Taken as a net value of $20,000 in 1960 rising to a net value of $100,000 in 1975.

8 Calculated from the *New Zealand Yearbooks* 1962-1978.

9 The *Yearbook* statistics provide no breakdown of estate value beyond this figure.

10 Supra n.6, 682.

11 This allowance is perhaps unnecesary. It was indicated in the Second Reading Debate on the Estate and Gift Duties Amendment Bill that the rates of duty and/or exemptions introduced by it would be adjusted in future years to preserve existing real levels: see New Zealand Parliamentary debates 1979: Part 22, 2817. If such adjustments are made then the post-1982 impact of the duty suggested in the text will be even lower in both absolute and percentage terms.

12 Section 10. The "increased exemption" is strictly, of course, an extension in the amount which is zero-rated in the rate schedule.

than was formerly possible.[13] That, coupled with the fact that estate plans are now far more common than at any earlier time, will almost certainly serve to reduce even further the proportion of estates subject to the post-1982 duty. Even assuming the 1.7% to stand, however, the Amendment obviously brings about a drastic reduction in the impact of the duty. To all intents and purposes it amounts to its virtual abolition.

The virtual abolition of wealth transfer taxation has important tax policy implications quite apart from the substantial loss of revenue it involves.[14] In the first section of this paper we examine the role of wealth transfer taxes in a tax system in an attempt to see whether their effective abolition is defensible in policy terms. We conclude that such abolition is only defensible on evidence of the most compelling necessity. In the second section we examine the reasons put forward in support of the Amendment in an attempt to determine whether those reasons meet that standard. In the final section we state our conclusions and suggest alternatives falling far short of the virtual abolition of the duty, which would both meet the problems intended to be resolved by the Amendment yet preserve the estate duty as a meaningful component of our tax structure.

II. THE THEORETICAL AND POLICY JUSTIFICATIONS FOR WEALTH TRANSFER TAXATION

Louis Eisenstein, one of the most perceptive commentators on matters of taxation, has pointed out that[15]

> Death taxes are ancient taxes. They were known to the Egyptians as well as the Romans and Greeks. Even the complaints against them have a venerable pedigree. Pliny the Younger provides as good an example as any. He is among the earliest critics who have left us summaries of their complaints. Pliny eloquently argued that a tax on the shares of direct heirs was an 'unnatural' tax augmenting the grief and sorrow of the bereaved.

Eisenstein proceeded to suggest that the estate tax of the United States had been imposed primarily to raise revenue[16] but that because of gaps, loopholes and other deficiencies (most of which were capable of being remedied) the tax had proved to be seriously deficient both in raising revenue and in any function that it might have had as a "leveller of hereditary wealth". Nevertheless, the author conclude his article by stating:[17]

13 Prior to the Amendment the nil rate on gifts extended to $8,000. As a result of the Amendment it is increased to $15,000. Of equal significance are the decreases in rates brought about by the Amendment for gifts above that figure. A gift of $20,000 now incurs a tax liability of $250. A gift of $30,000 now incurs a tax liability of $1250. Prior to the Amendment the liabilities were $1380 and $3080 respectively. A fund of $160,000 — about the average value of farming properties sold in New Zealand in 1978 (see infra. n.94 and the text to which it relates) — could now be disposed of by four annual gifts of $40,000 at a total tax cost of $13,000. Prior to the Amendment the tax cost was over $21,000.

14 See supra n.3.

15 Eisenstein "The Rise and Decline of the Estate Tax" (1956) 11 Tax Law Rev. 223. In effect the article by Eisenstein was the unveiling of another ideology of taxation. For the other ideologies see Eisenstein *The Ideologies of Taxation* (New York, 1961).

16 For a similar claim in the New Zealand context see McKay, op. cit.

17 Eisenstein "The Rise and Fall of the Estate Tax" op. cit. 256.

> Yet apart from its limited base it is hard to devise a better tax than a death tax. Estates represent ability to pay. And as they are mere windfalls to the beneficiaries they should be taxed more heavily than any other kind of acquisition . . . The income tax brings to light another role for the estate tax. It is no secret that the income tax base is riddled with loopholes which I need not catalogue . . . In these circumstances perhaps the only practical solution is a vigorously effective estate tax . . . If the income tax fails to do its job only the estate tax can assure an eventual day of reckoning.

The issue that must be examined in this paper is whether the perceived need for a wealth transfer tax in a tax system which has as one component an imperfect income tax is equally perceived given a system in which there is a more perfect income tax or similar "mainstay" tax. If that latter need is seen to be extant then the need will be manifest in countries such as New Zealand where the income tax is acknowledged to be imperfect. Eisenstein's conclusions, put forward as they were in the context of an imperfect income tax system, nevertheless appear to represent the almost universally accepted view of tax theorists. That view is that a wealth transfer tax is an essential element in the "tax mix" of a society and performs a vital function.[18] Perhaps the best sources of views of the

18 A catalogue of support for this proposition would require an article in itself. Many political economists of the nineteenth century were in favour of taxing transfers of wealth, particularly wealth acquired through inheritance. Statements by such people as J. S. Mill and Bentham have been used in debates in New Zealand on wealth transfer taxation. See McKay, op. cit. 7-8.

Vickery, in his treatise on progressive taxation, commented as follows on the basis for the separate taxation of gifts

> Fundamentally, the additional taxation of gifts and bequests rests on something quite other than the notion that they produce income rather than merely transfer it. Succession taxes are justified primarily on the ground that they promote equality of opportunity and that they obtain revenue in a manner that has little effect on incentives. The activities of an individual are likely to be less affected by a tax which will be levied only after his own immediate interest in his property has ceased than by a tax which will affect his own economic power. It is also argued that to the extent that the receipt of large incomes is indicative of socially useful skills in the management of capital, retention of a large capital by such a person will tend to increase productivity, while there is no such presumption in the case of the heirs of such an individual, and their capital can be appropriated by the state with less danger of impairing productivity. (Vickery *Agenda For Progressive Taxation* (New York, 1947) 202).

For other recent statements outlining the justification for wealth transfer taxation see: Shoup *Federal Estate and Gift Taxes* (Washington D.C., 1966) 100-101; Goode *The Individual Income Tax* (Revised Ed., Washington D.C., 1976) 296; and, in the New Zealand context, Richardson and Congreve *Adams and Richardson's Law of Estate and Gift Duty* (5th ed., Wellington, 1978) 1. See too the formulation of the issues in The Institute for Fiscal Studies *The Structure and Reform of Direct Taxation* (London, 1978) (the "Meade Report").

Eisenstein's observations on the imperfections of the United States estate tax itself are almost universally applicable today in respect of equivalent taxes in many countries. For example, few people would claim that the New Zealand Estate and Gift Duties Act 1968 represents a perfect wealth transfer tax. It is not within the scope of this paper, however, to evaluate reforms which are needed in respect of the present system, nor to evaluate alternative types of wealth transfer taxation. Our assumption is that it is possible, given the necessity or desire for a wealth transfer tax, to design an acceptable structure.

need for a wealth transfer tax in a tax system are the various reports on tax systems. Generally speaking, the bodies responsible for those reports have examined a tax system as an integrated whole and in the context of perfecting the various component taxes — once those component taxes have been chosen. The best way to gain an appreciation of the various views on the theoretical and policy underpinnings of wealth transfer taxation as a component of a tax system is through the words of the reports themselves. In the following paragraphs the most recent reports on the tax systems of Canada, New Zealand, Australia, the United States and the United Kingdom are referred to.

Nevertheless, it is desirable to make reference to a selection of writing on reforms and alternatives.

Probably the best analysis of reforms to an estate and gift duty system which has relevance in the New Zealand context is to be found in *Taxation Review Committee: Full Report* (Canberra, 1975) (the "Asprey Report") Ch. 24, and see Hill "Death and Gift Duties", Study No. 3 in *Taxation Review Committee: Studies* (Canberra, 1975). Two examples of how ineffective an estate tax can be serve to highlight the potential need for reform. These examples are taken one from the United States and one from the United Kingdom. There is every reason to believe that analogous examples exist in New Zealand and existed even before the Amendment presently under discussion.

> When William du Pont, Jr., great-grandson of the founder of E.I. du Pont de Nemours & Company, died in 1965, each of his five children received an inheritance of more than fifty million dollars. Each will receive an additional sum, worth more than forty million dollars at 1966 values, on the death of his or her aunt, Marion du Pont Scott, who is now 82 years old. Thus these five individuals are the sole inheritors of an aggregate family fortune worth almost a half billion dollars in 1966. Barely a handful of fortunes this large exist in the United States. Yet the total of all estate and gift taxes paid on this aggregation of wealth, from its origins in nineteenth century Du Pont company profits until its receipt by the present generation, including taxes payable on the aunts death, will be less than $25 million.
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> This wealth has passed through two generations that died while estate taxes were in effect, meaning that the combined effective tax rate for two generations will be only 5%. (Cooper "A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance" (1977) 77 Col. Law Rev. 161, 162).
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> It is possible for individuals who are obviously far from being paupers to die leaving estates for tax purposes which bear little relation to their real wealth. It is generally believed that the largest sum ever paid in death duties, by a considerable margin, was the £11 m. paid on an estate estimated at between £40 and £60 m. on the death of the third Duke of Westminster in 1953. When the fourth Duke died in 1967, his estate amounted to a little over £4 m. (duty paid not disclosed). It is not thought that this change resulted entirely from dissipation of the ducal assets, since the family was still understood to possess some 300 acres of central London, including a large part of Mayfair, as well as substantial estates elsewhere . . . (Kay and King *The British Tax System* (London, 1978) 161).

Even where a wealth transfer taxation system has been overhauled and changed, as in the United Kingdom with the introduction of the capital transfer tax, there remains the possibility that there will be defects. Kay and King comment on defects in the capital transfer tax in Ch. 10.

For a convenient list of alternative wealth transfer taxes see the Asprey Report op. cit. 441. For a more detailed analysis see the Meade Report op. cit. Ch. 15 and the Green Paper on *Taxation of Capital on Death* (London, 1972, Cmnd. 4930). In the New Zealand context see McKay "The Estate and Gift Duties Act 1968 — Time For a Change of Concept" [1977] N.Z.L.J. 97.

A. Canada: The Carter Report, 1966

In what is generally recognised as the most comprehensive analysis of a tax system ever undertaken, the Royal Commission on Taxation[19] concluded as follows as to the desirability of the taxation of transfers of wealth[20]:

> It is our considered opinion that an equitable and effective tax system can only be achieved by abolishing the estate tax and gift tax and by treating gifts as income of the recipients. In this way the tax liability of each person will be determined by his ability to pay and all receipts will be taxed in a neutral and equitable manner.

The essence of the reform advocated by Carter was an income tax system founded upon a comprehensive income tax base. The reform owed much to the writings of Henry Simons and his definition of income in terms of consumption plus the increase in the net worth of property rights.[21] As gifts and legacies are accretions to economic power they "are equally as taxable as recurring income such as wages and salaries". Obviously, the mechanics of the Carter proposals went beyond the simplistic addition of items to the tax base. The proposals were an integrated and fascinating construct.[22] What is significant for our purposes is not the suggestion that estate tax and gift tax should be abolished, nor the advocacy of the inclusion of gifts and legacies as income, but rather the fact that in the interests of efficiency, equity, and neutrality, wealth transfers must be the subject of taxation. Under the Carter proposals the taxation of transfers of wealth would not have been abolished but would have been taxed under the income tax rather than under a separate wealth transfer tax.[23]

19 *Report of the Royal Commission on Taxation* (Ottawa, 1966). Reference could also be made to two studies prepared for the Royal Commission: Smith, Fields and Mockler *Death Taxes,* Study No. 11; and Mockler and Fields *Gift Tax* Study No. 13.

20 Ibid. vol. 3, 473.

21 Simons *Personal Income Taxation* (Chicago, 1938). Carter has acknowledged the debt owed by the Canadian Royal Commission to the writings of Simons. See Carter "Canadian Tax Reform and Henry Simons" (1968) 11 Journal of Law and Economics 231.

22 A selection of comment on the Carter model is: Bittker "The Report of the Royal Commission on Taxation" (1968) 35 U. Ch. L.R. 637; Canadian Tax Foundation *1967 Conference Report* (Toronto, 1968); Musgrave "The Carter Commission Report" (1968) 1 Canadian Journal of Economics 159; and the Meade Report op. cit. Ch. 7. It could be observed that the 1979 Budget exemplified a lack of overall policy analysis, in Carter terms, when the measures introduced included the taxation of unemployment benefits, an increase in the tax free family benefit to all, and the virtual demise of all taxation of wealth transfers.

23 See Simons op. cit. Ch. VI and for a recent exposition Dodge "Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income" (1978) 91 Harv. Law Rev. 1177. In Smith *Tax Expenditures: An Examination of Tax Incentives and Tax Preferences in the Canadian Federal Income Tax System* (Toronto, 1979) 69 the author sees the exclusion of gifts and inheritances from the income tax base as a tax expenditure. An attempt was made to assess how much income tax was forgone by virtue of that exclusion and the "ball-park" estimate was $1,027 million forgone on a base of $4,000 million.

The contrary view, that gifts and inheritances should not be included in the income tax base, is held by the originator of the tax expenditure budget Stanley Surrey. See Surrey *Pathways to Tax Reform* (Cambridge Mass., 1973) 18 and 286 n.6 where he suggests that many see a separate wealth transfer tax as being the best approach. Gifts

B. New Zealand: The Ross Report, 1967

The Ross Committee was charged with carrying out a "comprehensive review of the rates, structure, and incidence of the whole field of central government taxation in New Zealand including both direct and indirect taxes".[24] The Committee made many recommendations. Under those recommendations the focus of the New Zealand taxation system was to remain the income tax but a shift from direct to indirect tax was proposed.[25] Since the publication of the Ross Committee Report a strong penchant for indirect taxes has been expressed in many countries.[26] Similar sentiments have also been expressed in New Zealand.[27] The impact of this trend on wealth transfer taxation is discussed below.

At the outset of the report the Committee established its criteria for tax reform as being equity, economic incidence and administrative practicability.[28] In connection with equity the Committee said:[29]

> In any assessment of ability to pay it is not sufficient to judge the position in relation to one particular tax. This ability or 'taxable capacity' must be measured in relation to the tax system as a whole embracing taxation on all the tax bases — income, expenditure and wealth.

and inheritances were excluded from the income base under the income tax model put forward in the United States Treasury "Blueprints" referred in infra. n.44.

In our view it is highly regrettable that in a country such as New Zealand where the Income Tax Act is bedevilled by concessions, incentives and preferences, there is no tax expenditure budget prepared. We believe that even more distressing is the fact that, as far as we know, the proper statistics are not available, nor at the present time are they capable of being gathered, so that a tax expenditure budget can be prepared. In our opinion it is essential that the government be aware of how much it is spending through the tax system and is in effect hiding from public and parliamentary scrutiny. The same reasoning applies to the estate and gift duty structure. Surrey, op. cit. 29, suggests that " . . . a tax expenditure analysis could be developed for the estate and gift taxes, as an adjunct of the consideration of their 'proper structure'." While the projected cost for the "tax expenditure" incurred by the 1979 amendment to the Estate and Gift Duties Act 1968 has been calculated (see supra. n.3) the annual cost of the higher "exemptions" should appear in an annual tax expenditure budget along with a calculation of the cost in tax foregone of the numerous "gaps' 'in the Estate and Gifts Duties Act. For an analysis of some of these gaps see McKay "Retained Controls of a Non-Pecuniary Character — Some Suggestions for Reform" (1975) 7 V.U.W.L.R. 426 and Green (Ed.) *Estate Planning: Selected Aspects and Developments* (Wellington, 1978).

24 *Taxation in New Zealand. Report of the Taxation Review Committee* (The "Ross Report") (Wellington, 1967) 8.

25 Ibid. Ch. 11.

26 See for example the United States Treasury "Blueprints" referred to infra and the Meade Report op. cit.

27 See the statements in the 1978 Budget speech at 40. The chairman of the Ross Committee has recently stated that he is still in favour of a move to indirect taxes: Ross "Update on Aspects of Ross Committee Report: Principles and Incidence of Taxation" a paper presented to the 1979 Summer Convention of the New Zealand Society of Accountants, Wellington and Wairarapa Branch. Further examples are the various papers prepared under the auspices of the New Zealand Planning Council referred to infra.

28 The Ross Report op. cit. 14.

29 Ibid. 15. The Committee rejected the introduction of a net wealth tax.

Later in the report, when discussing suggestions which had been made to the Committee that estate duty should be abolished,[30] the Committee said:[31]

> Elsewhere in the report we have stressed the need for a proper balance in the levying of tax on the three bases of income, expenditure and wealth . . . In New Zealand there is no annual net worth tax and no capital gains tax, which are other forms of tax on wealth . . . estate and gift duty will, until such time as a capital gains tax is introduced, be the sole tax on wealth — assuming that our recommendations are adopted.
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> 949. Our opinion is therefore that estate duty should not be abolished. It should still not be abolished if a capital gains tax is introduced as the two taxes will be complementary and the combined yield therefrom will still be small in relation to total government revenues.

Having suggested that estate duty is essential as being either the only tax on wealth or a significant component of taxes on wealth, the Committee also advocated the retention of gift duty for, if "gift duty were abolished there would be still more imbalance between taxes on income, expenditure and wealth than there is now."[32] Thus while acknowledging the need to keep both the rates of estate and gift duty and the exemptions and allowances relating to those duties constantly under review[33] the most recent New Zealand Committee did not for one moment accept that the abolition of wealth transfer taxation was desirable. Moreover, and equally important, the Committee recommended the retention of the wealth transfer taxes even if some of the loopholes in the income tax[34] were closed. It could be said that the Committee was reasserting, in a slightly broader context, the views on wealth distribution which were expounded in the New Zealand Parliament in the early part of this century when changes were being made to the Death Duties Acts.[35]

30 Most of the suggestions came from farmers and farming organisations. Ibid. 388.

31 Ibid. 389. One of the important "gaps" in the New Zealand income tax base is the exclusion of most capital gains. The Committee recommended that a capital gains tax be introduced: Ibid. Ch. 72. It is of great significance that the Committee was of the view that even if a capital gains tax were to be introduced the estate duty should remain. See n.68 infra.

The Committee's comment on the small revenue yield is one which has caused some people to argue that because the revenue produced by estate and gift duties is small those duties are inefficient and should be abolished. Again, Eisenstein has dealt with this criticism:

> . . . it makes little sense to compare the yield of the estate tax with the yield of the income taxes. The estate tax must always suffer by the comparison, and the suffering is always undeserved. We should no more expect the estate tax to perform like an income tax than chickens to perform like ducks . . . " (Eisenstein "The Rise and Fall of the Estate Tax" op. cit. 240).

See too McKay "Historical Aspects of the Estate Tax" op. cit. 28 where it is suggested that the decline in importance of the estate tax as a revenue raiser led to a change in the character and content of parliamentary debates on the tax.

32 The Ross Report op. cit. 398.

33 Ibid. 392 and 398.

34 It should be noted that the Committee saw the capital gains tax as a wealth tax: "In New Zealand there is no annual net worth tax and no capital gains tax which are the other forms of tax on wealth." Ibid. 389.

35 See generally McKay "Historical Aspects of the Estate Tax" op. cit.

C. Australia: Asprey Report, 1975

The Asprey Committee, too, recommended the retention of an income tax as the main component of the Australian tax system and rejected its substitution by an expenditure tax.[36] In relation to this recommendation the Committee commented:[37]

> As a supplement to income tax — or even to a consumption tax — an estate duty ranks high for equity. It taxes those assets, the income from which could with difficulty be 'imputed' for income tax purposes. It can also bear specifically upon inherited wealth if equity is believed to require a special levy upon it.

Later in its report the Committee stated that it believed that:[38]

> . . . though death taxes can never be simple taxes and though revenue from them will never be great compared with that from some other taxes they have an essential role to play in the tax structure as a whole.

and concluded:[39]

> Even in the case of an illiquid asset such as a house, a business or a farm, it can be argued that death duty is an occasion when beneficiaries ought to take stock to determine whether they can or should hold the assets bequeathed to them.

So, the Australian Committee also saw a wealth transfer tax as an essential component in a tax system even if a consumption tax were to be the main component or "mainstay" tax of that system. The Committee apparently accepted the assessment of the Australian Treasury, put forward in one of the Taxation Papers the Treasury submitted to the Committee, that it is widely accepted that "some account must be taken of assets as well as income if proper regard is to be had to capacity to pay".[40] The Treasury saw a tax of one kind or another on assets as being "an essential component of the tax system to recognise the advantages which accrue from the ownership of wealth",[41] and saw estate duties as "important and basic in the tax system".[42]

D. United States: The Treasury Blueprints Report, 1977

Over the years various House and Senate committees in the United States have considered reforms of the U.S. tax system. Some of the hearings of the House

36 The Asprey Report op. cit. para. 3.17.

37 Ibid. para. 3.37. The Committee rejected a net wealth tax although it did see certain advantages of such a tax in terms of equity: Ibid. para. 3.39. As noted above the Ross Committee also rejected a net wealth tax. There does appear to be some resistance to a net wealth tax. In the United Kingdom a Select Committee which was appointed to consider the Green Paper on proposals for a *Wealth Tax* (London, 1974, Cmnd. 5704) could not agree on a report.

38 Ibid. para. 24.3 and see the comments at supra. n. 31.

39 Ibid. para 24.6. The Committee then proceeded to recommend substantial changes to the estate and gift duty structure in Australia. The Ross Commiteee did not do this and merely suggested minor changes. The Carter Report did not need to contain comment on such changes because gifts and inheritance were to be subsumed within the income tax structure.

40 Treasury Taxation Paper No. 11 *Estate and Gift Duty: Purpose and Rationale* (Canberra, 1974) 3. After referring to other countries the paper went on to suggest that if Australia had no death duties and did not have any other form of capital tax it would be "the only advanced western country levying no other direct tax apart from income tax." For subsequent developments see supra n.68.

41 Idem.

42 Ibid. 4.

Committee on Ways and Means have produced significant tax policy documents.[43] In 1977 the Department of the Treasury published its "Blueprints for Basic Tax Reform"[44] which the Secretary for the Treasury, William Simon, said, in his foreword "was the start of the design of an entirely new tax system for the United States. In the field of tax reform 'tinkering is no longer the answer'." The report put forward two alternative models as the "mainstay" tax — a broad base income tax along the lines of the Carter proposals in Canada and a consumption based tax or cash-flow tax.

Under the comprehensive income tax model gifts and inheritances were not to be included in the tax base of the recipient.[45] However, under the consumption or cash-flow tax they would be included in the tax base.[46] It is assumed in the report that[47] "in both systems there would continue to be a separate tax on transfers of assets by gift or bequest, such as the present estate and gift tax."

In connection with the cash-flow tax proposal the authors conclude that the simplest approach to the problem of accumulation of wealth under such a cash-flow tax[48]

> . . . would be to retain the estate and gift tax as the principle instrument for altering the distribution of wealth. Such a tax, which is levied according to the situation of the donor, would be a logical complement to the model cash-flow tax.

Again then, the significant fact is that under both models the taxation of transfers of wealth was seen as being essential.

E. United Kingdom: The Meade Report, 1978

The Meade Report was not commissioned by a government. It was the report of a committee set up by the Institute of Fiscal Studies.[49] The aim of the report was to present the results of "a radical review of the tax structure as a whole",[50] an aim occasioned by the numerous changes, or "tinkering" to use United States' Treasury Secretary Simons's term, that had been made to the United Kingdom tax structure in the immediately preceding years.

The Meade Committee, after an extensive analysis of many complex issues of tax policy, expressed a preference for a move to an expenditure tax rather than to a comprehensive income tax. If a comprehensive income tax were to be adopted however, gifts and legacies would be included in the income base as under the Carter proposals.[51] Were an expenditure tax to be adopted the

43 See, for example, House Committee on Ways and Means, 86th Cong. 1st Sess. *Tax Revision Compendium of Papers on Broadening the Tax Base* Comm. Print 1959; House Committee on Ways and Means and Senate Committee on Finance, 91st Cong., 1st Sess. *Tax Reform Studies and Proposals of the U.S. Treasury Department* Comm. Print 1969.
44 Department of the Treasury *Blueprints for Basic Tax Reform* (Washington, 1977).
45 Ibid. 12.
46 Ibid. 136-137 for how the model would work in this regard.
47 Ibid. 12.
48 Ibid. 139.
49 The Meade Report op. cit. The earlier Royal Commission Report on the Taxation of Profits and Income did not refer to wealth transfer taxes.
50 Ibid. 3.
51 Ibid. 137 and 146.

Committee saw two possible ways of treating gifts and legacies. They could be excluded from the expenditure base and be subject to a separate transfer tax or, alternatively, the gifts and inheritances could be included in the expenditure base.[52] However, in the end result, having outlined the reasons for taxation on wealth,[53] the majority of the Committee favoured a separate wealth transfer tax rather than including gifts received in the income or expenditure base.[54] The Committee concluded[55]

> We favour some form of tax on wealth which discriminates against inherited wealth and we suggest ways of designing such taxes so as to encourage dispersion of wealth . . . We believe that the combination of a new Beveridge scheme (to be an acceptable floor to the standard of living of all citizens), of a progressive expenditure tax regime (to combine encouragement to enterprise with the taxation of high levels of personal consumption) and of a system of progressive taxation on wealth with some discrimination against inherited wealth, presents a set of final objectives for the structure of direct taxation in the United Kingdom that might command a wide consensus of political approval and which could be approached by a series of piecemeal tax changes over the coming decade.

F. General

The foregoing survey of the most important reports on taxation published over the past decade or so reveals that despite the diversity of total tax structures discussed or recommended all of the reports have as one component a wealth transfer tax of one sort or another.

The above survey of views expressed in those reports on the tax systems of countries with tax structures most like that of New Zealand also demonstrate an interesting trend. That trend is the move to a change of emphasis from an income tax to an expenditure tax as the "mainstay" tax in a tax system. The suggestion that the emphasis of tax systems should shift from the income tax to the expenditure tax has not been limited to comprehensive reports on the

52 Ibid. 183.

53 Ibid. 512. The reasons were:

"1. Income from property may be more permanent than income from work. Under an income tax regime this may be held to justify some form of surcharge on investment income or of relief on earned income. Under an expenditure tax, however, this argument for discrimination disappears.

2. The use and enjoyment of inherited wealth may be considered a fit object for special taxation, since the luck of inheritance differs from the fruits of a man's own skill, enterprise and effort. These considerations justify the imposition of taxes on the transfer of wealth by gift or bequest to another owner.

3. The mere ownership of wealth — and particularly of large amounts of wealth — may itself, quite apart from any income which the wealth may yield, confer security, independence, influence and power on the owner. This argument justifies a tax on the holding of wealth (an annual wealth tax) or a surcharge on investment income as a rough and ready proxy for an annual wealth tax.

4. It may be desired to tax wealth in such a way as to redistribute ownership so as to avoid great inequalities and high concentration of large fortunes. Capital taxes on the transfer of wealth and/or the holding of wealth, employed for reasons 2 and 3 above, may be designed and applied for the promotion of such a redistribution of ownership."

54 Ibid. 513. The Committee favoured such an approach for reasons connected with other functions of a wealth transfer tax. For a similar view see Surrey, supra n.23.

55 Ibid. 518.

total tax structures of countries. Similarly, the encouragement of the vital role to be played by wealth transfer taxes, even in a tax system the main component of which is an expenditure tax, has not been the sole preserve of the broad perspective analyses.

The "high-priest" of the expenditure tax is Kaldor who, in his seminal work,[56] advocated such a tax yet saw a need for a wealth transfer tax as well as an expenditure tax. The function of such a tax according to Kaldor would be to counteract "the tendency towards the creation of new layers of *rentiers* through the accumulation of fortunes of earlier generations . . . ".[57] Andrews, in a thought-provoking article[58] which, it turned out, foreshadowed some of the views expressed in the United States' Treasury Blueprints, turned the theories of Henry Simons into a justification for a consumption or cash-flow tax. Andrews did not neglect wealth taxation and suggested that a wealth or estate tax would be essential to redress the inefficiencies of a consumption tax.[59] Thus Kaldor and Andrews, like the authors of the reports referred to earlier, also saw the wealth transfer tax as a pivotal component of a tax system in which the "mainstay" tax is an expenditure tax.

New Zealand has not escaped the move towards a consumption tax. In the vanguard of the movement we find the New Zealand Planning Council and its forebears. In its two last reports the New Zealand Monetary and Economic Council suggested that greater emphasis be placed on direct expenditure taxes.[60] However, there was no suggestion that this change would entail the abolition of the wealth transfer taxes. The same approach was adopted by the Monetary and Economic Council's direct successor, the Economic Monitoring Group to the New Zealand Planning Council.[61]

In its first publication[62] the New Zealand Planning Council recognised the economic significance of wealth and its suitability as a tax base by advocating a net wealth tax as an addition to existing taxes — presumably including estate and gift duties. In the first of two reports on taxation prepared under the auspices of the New Zealand Planning Council, the view is expressed that over-reliance on one main source of tax such as income tax is undesirable and a "tax system which involves a wide spread of taxation is to be preferred on efficiency grounds."[63]

56 Kaldor *An Expenditure Tax* (London, 1955).
57 Ibid. 100. For a basic discussion of wealth and wealth distribution see Atkinson *The Economics of Inequality* (Oxford, 1975). See too Kay and King op. cit.
58 Andrews "A Consumption-Type or Cash Flow Personal Income Tax" (1974) 87 Harv. L. Rev. 1113.
59 Ibid. 1169-1173. See also Warren "Fairness and a Consumption-Type or Cash Flow Personal Income Tax" (1975) 88 Harv. L. Rev. 931, 941-944 and Andrews "Fairness and the Personal Income Tax: A Reply to Professor Warren" (1975) 88 Harv. L. Rev. 947, 956-958.
60 New Zealand Monetary and Economic Council Report No. 32 *Economic Trends and Policies* (Wellington, May 1977) 39 and New Zealand Monetary and Economic Council Report No. 33 *Inflation* (Wellington, December 1977) 68.
61 Economic Monitoring Group to the New Zealand Planning Council *New Zealand's Economic Trends and Policies* (Wellington, September 1978) 47.
62 New Zealand Planning Council *Planning Perspectives 1978-1983* (Wellington, 1978) 73.
63 Brash and Thompson *Taxation Reform* (Wellington, May 1978) 3.

The same report also recommends the consideration of a net worth tax as a supplement to estate and gift duties.[64] In the second of the reports concerned directly with taxation, a direct expenditure tax is advocated and it is also suggested in the report that it would be desirable to link the expenditure tax to a form of wealth tax or to an expanded estate and gift tax.[65]

In our view even our somewhat cursory reference to the most important literature on the theory and policy of wealth transfer taxation irrefutably establishes the need for such taxation as a component of a tax system. That is seen to be so where that system is founded on a finely-tuned broad based income tax or on an expenditure tax. The need for a wealth transfer tax is that much greater when that system is founded upon a sluggish sieve as is the New Zealand tax system.[66] The justifications for wealth transfer taxes, the most important being the need to deplete inherited wealth and to add to the overall progressivity of the total tax system,[67] are in our view totally compelling. Where wealth transfer taxes have been severely curtailed it has been in federal systems where States or Provinces have also been in the wealth transfer tax field.[68] Where a vacuum in the tax system has been created it clearly has been for political reasons and not on the basis of any rational assessment of the overall tax system in question. As New Zealand prepares to create a vacuum in its own tax system we must ask whether that move is part of a rational development in our tax policy or whether it is but an example of the type of tinkering which in other countries has created

64 Ibid. 7.

65 Bevin, Jack and Jensen *Income Maintenance and Taxation: Some Options For Reform* (Wellington, June 1978).

66 And in particular the absence of a general tax on capital gains. See supra n.31.

67 Cf. Kay and King op. cit. 236. "We conclude that the definition of the tax base . . . is more important in determining the effective progressivity of taxation, especially at high income and expenditure levels, than the shape of the rate structure. The difficulty in constructing rate schedules is that substantial progressivity requires that average rates should be much higher at high-income levels than at lower ones; but this requires high *marginal* rates on those in between." We agree with the authors' conclusion and with their recognition of the rate setting dilemma. For a discussion of the philosophy of progressive taxation see Blum and Kalven *The Uneasy Case for Progressive Taxation* (Chicago, 1963).

68 In Canada the Federal Government vacated the wealth transfer tax field in 1971 as part of the major Federal tax reform of that year. The Federal estate and gift duties were discontinued as a quid pro quo for the inclusion in the income tax base of a proportion of capital gains which were deemed to arise on death — see E. J. Benson, Minister of Finance *Summary of 1971 Tax Reform Legislation* (Ottawa, 1971) 33. At that time most of the Provinces remained in the wealth transfer tax field but many have since abolished their wealth transfer taxes, largely on account of the maturing capital gains tax. For a suggestion that this move is undesirable see Smith op. cit. 69 n.166 and cp. Surrey op cit. n.31. Note also in this regard the Ross Report supra n.31.

In Australia too the Commonwealth (Federal) Government has vacated the wealth transfer tax field. Most states had finely tuned wealth transfer taxes, for example Victoria, although Queensland had abolished its tax before the Commonwealth Government's announcement. Insofar as the Australian Government's move can be seen as political in nature — a move to placate its supporters and in particular those in the coalition Country Party (the farmers) — the abolition is, in our view, insupportable. Indeed, in policy terms the move sits strangely with the plethora of anti-avoidance legislation introduced by the same Government in the income tax field.

such uncertainty, inequity and illogicality as to force them to stop, sit back and think — aloud.

III. THE JUSTIFICATIONS GIVEN FOR THE AMENDMENT ACT

A. Justifications Outlined

It is helpful at the outset to outline the principal explanations forwarded by way of justification for the changes brought about by the Amendment. Comment on and analysis of those explanations is reserved to the following section.

The first explanation was provided in the 1979 Budget. As the Parliamentary Debates established that explanation as being seen by the Government to be the principal justification for the Amendment it is worth setting it out in full. The Budget suggests:[69]

> A review of medium-sized estates shows that a high proportion are the estates of farmers and that as a result of land price escalation, inadequate provision has been made for estate duties. As a result it has been necessary to raise substantial sums, and the repayment has severely curtailed the farming effort over subsequent years. In the light of this and in line with the Government's commitment to review estate and gift duties, it has been decided to increase the exemption level for all estates on which duty is payable from $25,000 to $250,000 in stages over the next four years.

This explanation was taken up and developed by government speakers in the second reading debates on the Amendment Bill. The minister in charge of the Bill elaborated upon the plight of the beneficiaries of farming estates in these words:[70]

> This lack of sufficient funds to pay the duty in many cases was not from lack of foresight by the persons concerned, but was often the result of the huge escalation in farm values that took place in the early 1970s . . . This led to a situation where beneficiaries who wished to carry on the family farm were forced to raise additional moneys to an extent that made the operation uneconomic or only marginally profitable. The financial crisis that arose was compounded in those cases where non-farming beneficiaries needed to be paid out in the terms of the will.

The two themes introduced by the minister — the implicit unfairness to beneficiaries of the existing law and the prejudicial effect on production of forcing beneficiaries to raise mortgage monies to meet the estate duty burden — were stressed by most government speakers. The first theme was most explicitly sounded by one government backbencher in these terms:[71]

> I have met young farmers whose fathers have died. It was always the intention of those fathers that their sons would carry on with the farm, with that trust in the land that the father had given. Those farmers no doubt took advice in the 1960s from solicitors such as the member who is now interjecting, and set out a simple estate plan, which with the normal escalation in values would have allowed for the estate duty to be paid. However, because of the escalation in values that we saw in the early 1970s sufficient funds were not provided in many instances to cover 20 percent of the estate duties. The farms had to be sold and that left young farmers off the land. Those were the people who had learned about farming at their gum-booted father's knee. However, because of what happened those sons were left with a small amount of cash in hand and no farm.

69 *Financial Statement* supra n.1, 33.
70 New Zealand Parliamentary debates 1979: Part 22, 2756.
71 Ibid. 2766 per M. E. Cox.

The second of the minister's themes — the production disincentive of forcing beneficiaries to borrow to pay the levy — was equally prevalent. In the opinion of another government member:[72]

> When one is trying to build up and improve a farm asset, or a business asset and one has to suddenly pay out money, right in the middle of a development programme, because of a family loss, and because of the way family operations are structured, and there may be trusts or partnerships. The people who really escape death duties are those who are in the bigger businesses, and those who have big assets. They are able to escape them by buying other assets, and so on. But the middle man, the person on the middle-sized operation, is the one who has always been caught. Let me give an example. Earlier this year a chap came to see me in Dannevirke and said that he had formed a partnership a few years ago. It was not a very big property. When his wife died he had to pay $16,000 in death duties, and there was no way that the property could afford to do that . . .

Closely related to this argument were those that suggested other production disincentives arising from the existing estate duty. One alleged that any fund created to meet a future estate tax liability necessarily had a prejudicial impact on production for the reason that the fund could only be created and maintained out of capital which would otherwise be used to promote the farming enterprise. The minister himself was of this opinion, branding as "unproductive"[73] resources put aside for making provision for the duty. Similar too was the argument that removal of the threat of death duty liability was essential if young farmers were to be given an incentive to make the various sacrifices said to be necessary to enter into or remain in farming. The incentive argued for here was seen to operate in two different ways. On the one hand the young farmer was seen as requiring freedom from any debt attributable to his father's estate tax liability in order to encourage him to take over the family farm — "We [must] let the young farmer come in as owner without the millstone of death duties or the borrowings that accompany death duty payments hanging around his neck"[74] — and on the other he was perceived as being more likely to enter the occupation if the spectre of his capital asset being depleted on his death by estate duty was removed.[75] In short, "young farmers are our future",[76] "the spearhead of our farming policies"[77] and must be given every incentive to "increase the productivity of our farms".[78]

Upon these points most if not all government speakers agreed. Some, however, went even wider in their defence of and praise for the measure. Several saw it as defensible on the basis that the existing law frustrated the intention of farmers, the argument "He [doesn't] want [his] son to lose his inheritance through crippling estate duties"[79] being supported on this ground altogether apart from that of the alleged disincentive effects of those duties. One argued that any

72 Ibid. 2818 per J. H. Falloon.
73 Ibid. 2757.
74 Ibid. 2767 per M. E. Cox.
75 Ibid. 2762 per P. I. Wilkinson.
76 Ibid. 2766 per M. E. Cox.
77 Ibid. 2761 per P. I. Wilkinson.
78 Ibid. 2771 per D. L. Kidd.
79 Ibid. 2762 per P. I. Wilkinson.

system of estate duty which determined liability in accordance with strict notions of legal title rather than recognising "family" title was inequitable and defended the Amendment (which made no change to the former law in this respect) on the ground that by virtually abolishing the levy it virtually abolished the inequity.[80] Several went even further and suggested that the need for estate duties had passed and looked forward to the day when the charge would be totally abolished.[81]

The Opposition accepted many of these explanations and rationalisations. Indeed, they could do little else, having resolved at an earlier point to vote in favour of the Bill. What criticisms there were from the Opposition were principally directed at what it described as the government's "piecemeal" approach to tax reform[82] or what it saw as the government's failings in other areas of tax policy.[83] There was on the part of the Opposition, however, little direct questioning of the merits of the Bill itself or of the legitimacy of the defences forwarded on behalf of the Bill by government speakers.

B. *The Justifications Analysed*

1. *The explanation in the Budget*

(a) A "high proportion" of farming estates.

The explanation in the Budget commences with the proposition that "a high proportion of [medium sized estates] are the estates of farmers . . . "[84] While correct as a statement of fact, it is necessary for the sake of the subsequent analysis to point out that "a high proportion" nevertheless falls short of anything like a majority. The latest reliable statistics available are those in respect of estates passed for duty in 1974-75. If we define "medium sized estates" as those in the upper quartile of all estates for that year the estates of farmers probably constitute about 800 out of 2,600.[85] If we define them as those where the value of the gross estate is in excess of $100,000, they probably constitute 290 out of 677.[86] The qualification "probably" is necessarily inserted, for the *Year Book* breakdowns include a significant category of estates under the heading "Labourers or Occupations Not Stated or Not in Employment" and it is possible that the estates of a number of retired or semi-retired farmers are included in that category. However, even if a rough allowance is made to reflect both that possibility and the further possibility that inflation in farm values has pushed more farmers into these higher categories in the intervening three years, the proportion of farming estates in the two categories above is unlikely to be more than one-third. While that is unquestionably enough to substantiate the Budget's allegation of "a high proportion" it nevertheless poses a question in terms of whether it justifies the extreme measures taken in the Amendment. Given that (even taking the broader definition of "medium" given above) the exclusive focus of the

80 Ibid. 2771 per D. L. Kidd.
81 Ibid. 2816 per J. H. Falloon.
82 Ibid. 2757 per R. O. Douglas.
83 Ibid. 2757-2758.
84 *Financial Statement* supra n.1, 33.
85 Based on tables in 1978 *New Zealand Yearbook* supra n.6, 682-84.
86 Ibid. 684.

Budget and the debates is upon 800 estates out of a total of around 15,000, the problem perceived by the government was distinctly a minor or local one. The question that arises is whether a similarly local solution to the problem might not have been available. We consider that question at a later point.[87]

(b) Inadequate provision for estate duty.

The second step in the Budget's explanation — that escalation in land prices has led to inadequate provision for estate duties — must in part be accepted. The available evidence reveals both a substantial rise over the last few years in land and stock values and a rise that is considerably higher than the general rate of inflation.[88] In these circumstances it is highly probable that any provision made for estate duty in less inflationary times has ceased to be fully sufficient. A number of observations or qualifications are, however, necessary lest the argument of inadequate provision be given excessive weight. First, neither on its own nor in concert with the earlier step in the argument does this argument serve to make any less pertinent the question posed in the previous section: it does not in other words widen the problem seen as being posed by the pre-Amendment law beyond the purely local. Secondly, one is entitled to be somewhat sceptical of the implication in the Budget that land-value inflation is the only cause of any inadequate provision for duties that government studies might have revealed. Other causes suggest themselves as at least equally probable causes of the phenomenon. One is likely to be the traditional reluctance on the part of any asset-holder to forego even that limited degree of control and dominion over those assets necessary to take them out of his estate for duty purposes. Another cause may well be ignorance of the availability and desirability of entering into such arrangements at the outset. A third is likely to be the supreme assurance which most individuals evidence in their assessments of their prospects of defying average life expectations. A fourth is typified by those individuals who refuse to forego present personal consumption — or present personal benefit — in favour of the provision of a reserve for estate duty — which is necessarily for the benefit of others. All four considerations apply, of course, to asset holders generally and not only to farmers. The experience of those with any degree of expertise in the estate planning field would, however, suggest those considerations to be major obstacles to the securing of adequate provision for duty even in non-inflationary times. It must therefore be fair to assert that the shortfall suggested in the Budget is likely, at least in part, to be attributable to personal or individual considerations quite unrelated to inflation.

There are other considerations of particular relevance to farmers which also operate to the same end. It is, for instance, almost certain that the structure of the income tax system within which the farming industry operates acts as a direct disincentive to the provision of a fund to meet future estate tax liability. Such a fund, whether created by way of insurance or by way of the holding of easily realisable securities, must almost always be financed out of tax-paid

87 Infra 253 et seq.

88 See *Report of the Valuation Department* for the year ending 31 March 1978, in *Appendix to the Journals of the House of Representatives.*

income. The absence of a capital gains tax and the existence of numerous legitimate opportunities in the farming context to transform into non-taxable capital investments what would, to other taxpayers, be assessable income, must necessarily militate against the provision of an estate tax fund. To allege the existence of this phenomenon is in no way to criticise those farmers who choose to live income-poor in order to become asset-rich, nor is it to attribute blame to those successive governments which have provided both the opportunities and the positive encouragement to take advantage of them. It is simply to point out that one of the causes of the estate tax shortfall, the existence of which has led to the virtual abolition of the estate tax, is likely to be the conscious pursuit by the farming industry of preferences in other parts of the tax system.[89]

(c) Effect of duty on production.

The final step in the Budget's explanation is to argue that because of the considerations already noted "substantial sums have had to be raised" to pay estate tax liability, the repayment of which "has severely curtailed the farming effort over subsequent years".[90] Like the preceding steps in the explanation this cannot be accepted without qualification. In relation to many, and probably most, farming estates no such difficulty exists in the slightest degree, even if no provision whatsoever has been made for estate duty. These are, of course, those cases where the farm is sold either upon or soon after the decedent's death and in respect of which the duty is paid out of the sale price. In such cases the duty poses no threat to production at all. Exactly how many of the "medium sized" farming estates fit into this category it is impossible to say.[91] Common knowledge and experience, however, suggest that the number is significant. In respect of each and every such estate the Budget's "anti-production" charge is inapplicable and, moreover, the withdrawal of the duty from them represents a free ride for their beneficiaries. Prior to the Amendment the sum available for distribution to the beneficiaries of such estates was of course reduced by the duty: after, with no gain in terms of increased production and for no reason made explicit in the Budget, that sum is free of duty. We have pointed out earlier that the number of "medium sized" farming estates which are said to provide the impetus for the Amendment are a minority of medium-sized estates and a very small proportion of estates overall. The consideration immediately above reduces still further the number of estates which face the problems that are said to justify the almost total abolition of the duty.

2. *General observations on the Budget*

The analysis to this point has focused upon specific aspects of the explanation advanced in the Budget. Observations of a more general character are also invited by it. First among them is that the argument reveals a substantial change in the legislature's perception of the social or non-revenue objectives of the estate tax.

89 The same phenomenon has caused problems in the formulation of wealth transfer taxation policy in Australia. See Treasury Taxation Paper No. 11, *Estate Duty and Gift Duty* (Canberra 1974), 11-12. See too supra n.23.

90 *Financial Statement* supra n. 1, 33.

91 The *Report of the Valuation Department* op. cit. covers all market sales of farming land but provides no basis for calculating the proportion of sales by estates.

The estate tax in its modern form was seen by its architects as being primarily intended to fulfil a range of policy objectives, looming large among them the prevention of excessive aggregation of wealth and the obviation of what was perceived to be the deleterious impact on beneficiaries of the receipt of large sums of inherited wealth.[92] While more recent debates had seen a lessening of the rhetorical fervour with which these issues were addressed the issues had never totally disappeared from view nor had they lacked a considerable number of parliamentary adherents of all political persuasions.[93] The Budget's explanation for the near-abolition it presages evidences a complete reversal of these notions. Implicitly it supports the ambition of a parent to pass a debt-free or substantially debt-free farm to his or her children. That ambition is not one which earlier legislators would have regarded as particularly meritorious. The idea that their successors should view it otherwise — to the extent of reducing the estate duty to a hollow shell in order to facilitate it — would have evoked from them howls of protest. The average value of farms sold in New Zealand in 1977 was in the region of $170,000.[94] Conferral of an asset of that value is, even assuming a debt loading of around 25%, sufficient to make the beneficiary a wealthy man. It also provides him with the asset-backing to become wealthier still. Honest men may not be transferred into sybarites by this process, as earlier legislators feared,[95] but the spectacle of a Budget proposal to facilitate the untaxed transfer of wealth from the rich to those likely to become richer still makes manifest a complete reversal of the social philosophies to which we formerly made obeisance.

A second general question raised by the Budget relates to the basis upon which the limited class of beneficiaries with which it is concerned is said to need the benefits conferred upon them by the withdrawal of the duty. The Budget suggests that repayment of loans taken out to pay estate duty has limited the farming effort over subsequent years. In some cases that may be so. If, for example, the farm has a heavy debt loading before its inheritance it is possible that the additional burden of financing the estate duty loan may leave insufficient surplus income to maintain the farming enterprise at current production levels. One is entitled to question however whether many farms would be in that position, or, more generally, whether the imposition of duties would often otherwise impose such a decisive burden. With the current average sale price for farms (land, stock, machinery and dwelling house) in the order of $170,000,[96] were that sum to be the basis of the calculation of estate duty under pre-Amendment rates a burden of around $43,000 would be imposed — heavy by any standards. But that sum is not of course the basis of the calculation of the duty. Under the regime laid down in the 1968 Act duty is calculated only after a number of significant deductions have been made, including:

92 See McKay "Historical Aspects of the Estate Tax" op. cit. 5-6.

93 Ibid. 17-18.

94 *Report of the Valuation Department* supra n.88, 5-6.

95 McKay "Historical Aspects of the Estate Tax" op. cit. 9. The phrase is that of the Attorney General, speaking during the second reading debate of the Death Duties Act 1909.

96 Supra n.94.

(i) The quantum of any lifetime gifts to the child or children. Some farmers — though not all —[97] who propose to leave the property to their children will have embarked upon inter-vivos gifting programmes. (Others may have gifted substantial sums, or interests in the property, to their spouses which brings about an identical result for present purposes);

(ii) The amount of debts with which the farm stands charged at the time of death. One is in the realm of conjecture here. Estimates provided to the writers of the debt-ratio of the "average" farm vary widely. A one-third debt-asset ratio would not however be unusual.

(iii) The value of the reliefs applicable to the successions of spouse and children. That in respect of the spouse is potentially of considerable value.

The impact of these and other considerations upon the amount of duty payable in any particular case is of course conjectural. Conservatively, however, we will assume that:

(i) reduces the value of the estate by $20,000;

(ii) reduces the value of the estate by $50,000; and

(iii) reduces the amount of duty otherwise payable ($16,500) by 40%, (valuing the wife's succession at $40,000 out of a final balance of £100,000).

This leaves an estate tax liability of £10,000 under the pre-Amendment law. Against that is to be offset the provision for estate duty which the Budget suggests has been made — say $4,000 — leaving a shortfall of $6,000. It is quite true that that is a reasonably significant cash sum to find. But it is hardly one that is calculated to curtail, severely or otherwise, the farming enterprise, given that the sum will be raised on mortgage and will cost only between $600-$1,000 a year to service.

The above calculation does not take account of the matrimonial home allowance, introduced in 1976 " . . . to overcome the present inequity arising out of the fact that the relief from (sic) registered joint family homes is not always available in respect of farm homesteads, and certain other matrimonial dwellings . . . "[98]. On the assumptions that the allowance is available in the above example, that the farm homestead represented $20,000 of the $170,000, and that the surviving spouse was the wife, was 60 years of age and was left a life interest in the homestead — none of which is an unreasonable assumption — the value of the allowance would be about $11,900. That would of course have the result that no duty would be payable in the example in question. Such would not, in our submission, be an unusual consequence of its application.

Many farming estates will of course depart significantly from the model. Some will incur substantially lower duty. They will be those where a gifting programme was entered into between the spouses from an earlier point and between the spouses and the child at a later point, where the value of the farming enterprise was lower than that taken above or where the debt-ratio is considerably higher.

97 See the discussion supra p. 243 et seq.
98 *Financial Statement to the House of Representatives* (Wellington, 29 July 1976) 39.

In relation to those, the burden of duty will be even lower than that in the example above. Other cases will involve a higher burden of duty. An estate free of encumbrances will, other considerations being equal, result in a heavier burden of duty. A refusal or inability to confer a sizeable succession on a wife will have a similar effect. So too will the absence of an inter-vivos gifting programme to the intended beneficiary. As noted above, in the extreme case of a farm valued at $170,000 having none of these deductions or reliefs available and where no provision whatsoever has been made for estate duty, the beneficiary of the estate, in order to retain the farm, will be forced to raise around £43,000 to meet the estate duty liability involving him and his inherited assets with a $4,500-odd servicing charge each year. Such an encumbrance would unquestionably curtail production. It is, however, an extreme case on every point assumed. Few if any farming estates would fall within it. Perhaps surprisingly, how many farming estates come close to it is not revealed either in the Budget or in the Debates — "surprisingly" because as is illustrated by the earlier analysis it is only in respect of this limited class of estate that the Budget's arguments can have any real weight or relevance. It is suggested, however, that the assumptions necessary to bring an estate even close to this position are so extreme that we are almost certainly dealing with a very limited number indeed.

The consequence of the above is a further tightening of the definition of those classes of estates on which the Budget's case rests. We have previously limited it to: (a) moderate-sized farming estates; (b) in which property is passed to children; (c) in respect of which the children wish to continue to carry on the farming business; (d) in respect of which inadequate provision has been made for duty. We have already suggested that these restrictions alone serve to narrow the base on which the Budgetary measure is founded to what is probably a small proportion of farming estates and to what is certainly a minute proportion of estates overall.[99] The analysis conducted in the preceding paragraphs serves to reduce that proportion still further. A further reduction still is required if we are prepared to make an additional discount in respect of those cases where the burden of the payment of duty is substantial and where a curtailment of production is indeed likely but where that is the result of circumstances exclusively or principally within the control of the decedent. If, for example, the decedent has deliberately refrained from an inter-vivos gifting programme for no reason other than an outright refusal to part with total control over "his" assets, the burden of duty that results, substantial though it might be, hardly warrants a great deal of legislative sympathy. How many of the "seriously affected" cases are in that category because of considerations such as these is again impossible to say. There must be some. This, and the broader consideration upon which it is based, force us to ask yet again whether the problems faced by the very small residual class of estates were sufficient to justify the near abolition of the tax itself?

It will be obvious from the foregoing analysis that there is much we find unsatisfactory in the Budget's reasoning. It is convenient however to defer the drawing of final conclusions in respect of that reasoning until the conclusion of

99 Supra p. 244.

our analysis of the arguments in support of the Amendment put forward in the Parliamentary Debates.

3. The justifications in the parliamentary debates analysed

As earlier indicated[100] most Government speakers addressed, for the most part without elaboration, similar arguments to those made in the Budget. To that extent most speeches re-invite rather than resolve the same general question that we suggest is the outcome of our analysis of the Budget itself. In this section it is therefore more profitable to emphasise those rationalisations and explanations that differ from or go beyond those analysed in the preceding section.

The first, it will be recalled,[101] was that of the unfairness to young farmers in having to sell off their inheritance to pay the duty. This argument is difficult to take seriously. The number of cases where the impact of the duty will have such an effect must be very few indeed. As indicated in the earlier analysis, the cases in which the duty will "seriously curtail the farming effort" and thus sustain the Budget's allegation must be few in number; those where its impact is even greater in that it forces the sale of the property must necessarily be fewer still. In the ordinary course it would require a highly unusual combination of circumstances to put even the chance of a forced sale in contemplation: no inter-vivos gifting programme; non-utilisation of the spouse's exemption and/or matrimonial home allowance; few if any deductions from gross value in respect of encumbrances on the property; and, particularly unlikely in view of the last-mentioned point, the non-availability of mortgage finance to permit the duty to be met. The reality, we suggest, is that the charge of "unfairness to sons" is a mere makeweight which, the generality of its presentation notwithstanding, would be capable of being sustained in only a handful of cases. Even if we therefore assume — as the argument requires us to do — some general societal acceptance of a "right" to keep farms in the family[102] this argument fails to persuade as to the propriety of the Amendment.

The next argument forwarded in debate was to the effect that resources put aside to make provision for payment of a future estate tax liability were "unproductive" and that the Amendment serves the beneficial purpose of freeing up those resources for more "productive" operations. This too is a makeweight. Funds put aside for estate duty purposes are usually held either in the form of insurance or in easily realisable securities. Neither justifies the description "unproductive". Far from it. They are both forms of saving or investment, the direct encouragement of which the Government urges upon us every day, and the "productive" capacity of which is recognised — by the Government again — in an array of tax exemptions and reliefs. Nor is the implication that freed of the responsibility to make provision for estate duty these funds will be invested in "productive" enterprises (by which is presumably meant, "back to the farm") necessarily well founded. Putting to one side the fact that whether X dollars

100 Supra p. 240.
101 Supra p. 241.
102 Any protracted discussion of this issue would obviously be inappropriate in a paper of this character. For some short observations upon it however see infra p. 252.

is more "productively" invested in a farm or in an alternative investment will depend upon the efficiency of the farming operation as compared with that of the institution in which the funds might otherwise be held, it by no means follows that funds released from the payment of future duty liability will be reinvested in anything. They may of course be employed for private consumption, a far from unlikely possibility given their windfall character. This "productive" argument is presumably not intended to be taken seriously.

A further defence of the measure was, it will be recalled,[103] to the effect that young farmers must be assured freedom from any debt attributable to their parent's estate tax in order to give them an incentive to take over the family farm. That defence was typically prefaced or concluded by the cry "young farmers are our future". Because even in the New Zealand Parliament it has never been argued that old farmers merely fade away the latter, general, observation is necessarily correct. It by no means follows from it however that the sons of established and existing farmers must be given their fathers' farms debt free, or, at least, estate tax free. In recent years market forces have pushed up the price of farms considerably in excess of the rate of inflation.[104] In part that is a product of the capitalisation of the increasing range of tax preferences conferred upon farmers by successive governments[105] and the subsidising of interest rates by formal or indirect devices. In part too, it is the result of a high and growing demand for land itself.[106] The extent of that demand is of course quite unaffected by the size, or even the existence of, the estate duty levy. There is therefore no prospect whatsoever that farms will go a-begging or productive capacity unrealised unless the estate duty is abolished.

The argument in question also invites a further response. Even if we are prepared to assume, as some government speakers implicitly invite us to do, that there is greater virtue in a farming enterprise being carried on by the son of a deceased farmer than by a purchaser from his estate — though it defies imagination as to what that virtue might be — there is no evidence provided in any of the debates to substantiate the claim that that supposed benefit can only be realised by the virtual abolition of the estate duty. Of course, the beneficiaries of all estates, farming or otherwise, would prefer to receive their beneficial entitlements debt-free or as debt-free as possible. It strains credulity, however, to accept any argument that the receipt of a valuable asset subject to an encumbrance, usually a small percentage of its overall value,[107] would be declined on a widespread basis on account of the existence of the encumbrance alone. While there may well be some cases where the existence of an unusually heavy debt burden prior to death, the absence of any life-time gifting programme,

103 Supra p. 248.
104 Supra n.88.
105 The phenomenon of tax capitalisation is referred to by the Minister in charge of the Estate and Gift Duties Amendment Bill 1979: see New Zealand Parliamentary debates 1979: Part 22, 2756. For a fuller discussion see Kay and King op. cit. 10-13.
106 See *Report of the Valuation Department* supra n.88 5-6.
107 See our earlier discussion of the probable impact of the levy on a medium-sized farming estate supra p. 246.

the necessity of paying off other beneficiaries out of the estate and a heavy estate burden, render it impossible for the son to take over the farm, they are not likely to be great in number, will not be referable to the duty alone, and further will often be situations where legislative relief is hardly deserved. It might well be asked whether we should necessarily have sympathy with a decedent who fails to gift his property inter vivos or who seeks to pass his farm to his children while requiring the farm to stand charged with hefty payments to others. Perhaps, if in the interests of primary production the farm would otherwise be unproductive — but that is of course inconceivable; perhaps, if the parent were unable, for good reasons, to gift inter vivos or if the demands of non-farming beneficiaries were irresistible — but such cases are likely to be so few in number that it is impossible to accept that the virtual abolition of the duty is necessary to meet them.

An argument closely related to that immediately above held that, given again that "our future lies with the young", young farmers need the incentive produced by an assurance that their estate will not be depleted upon their deaths by the estate duty. This argument cannot be accepted. There is not the slightest shred of evidence either in New Zealand or in overseas jurisdictions operating an estate duty of the New Zealand character to substantiate the argument in relation to farmers or to any other occupation group. The prevailing view among tax theorists is "that no conclusion as to the effects [incentive] of estate and gift taxes can be more than a guess".[108] Of course, that leaves open the possibility that the 1979 New Zealand Parliament has guessed correctly. It should be noted, however, that other New Zealand Parliaments have at other times hunched the opposite conclusion.[109] So have many, perhaps most, tax commentators.[110] Any hunch — particularly one against those opinions — would be a decidedly insecure foundation on which to justify the virtual abolition of the duty.

The remaining arguments in favour of the Amendment can be dealt with more briefly. That which holds that (the alleged disincentive effects aside) the estate tax is "unfair" in that it frustrates the wishes and intentions of those farmers who wish to leave their property to children undiminished by the tax is of course inherently personal and subjective. Many would agree. Many would not.[111] It can hardly in any event be a secure basis on which to argue a change in tax policy. All taxes, at all times, have diminished the value of property capable of being left to the taxpayer's kin. If the estate tax is unfair in that it brings about that result then it is difficult to see how any taxation can be immune from similar criticism. Allegations of unfairness against the pre-Amendment tax

108 Bittker *Federal Income Estate and Gift Taxation* (4th Ed., Boston, 1972) 987.

109 See McKay, "Historical Aspects of the Estate Tax", op. cit. 6. See in particular the speech of Ward, the Prime Minister of the day, in opening the second reading debate on the Death Duties Bill 1909 reported in New Zealand Parliamentary debates Vol. 148, p.442.

110 See the discussion and summary of opinion in Bittker op. cit. 986-88.

111 In addition to those cited in our earlier conceptual discussion of wealth transfer taxation the negative proposition might well be denied by O. W. Holmes who in *Compania de Tobacos* v. *Collector of Inland Revenue* 275 U.S. 87, 100 opined, "Taxes are what we pay for a civilised society".

and claims of greater fairness resulting from its abolition must therefore involve a highly selective and subjective interpretation of "fairness" in tax matters. That interpretation would not have been accepted by earlier New Zealand Parliaments, some of which saw the estate tax as the "fairest tax of all".[112] It is apparently not acceptable to virtually any of those many related overseas jurisdictions which have preserved the tax, usually at significantly higher levels than that existing in New Zealand even prior to the Amendment. It is not approved of by most tax commentators who, as we have seen, regard the inclusion of a wealth transfer tax as desirable in any equitable tax mix and as essential in one failing to impose a tax on realised lifetime capital gains. Finally, it is not espoused by those who might see the gratuitous transfer of a £250,000 capital asset as a more reasonable and proper occasion for the exercise of the taxing power than the purchase of 20 cigarettes and ponder, perhaps, the sense of the definition of "taxable event" which not only adopts a different view but exacts more from the latter than the former.

The final argument in support of the Amendment, to the effect that it serves to reduce the inequities resulting from an Act which determined liability in accordance with strict notions of legal title[113] is more substantial. That determination of liability on legal title rather than a wider "family" basis is both inequitable and contrary to the approach increasingly taken by Parliament in other areas of the law cannot be denied. As a justification for the Estate and Gift Duties Amendment Act 1979, however, it too is a makeweight. Many and varied are the devices available to counter it directly if it is perceived to be a failing of the existing estate and gift duty regime.[114] It is not necessary, indeed it is highly surprising, to support the virtual abolition of the duty as a means to that end. That is akin to resolving the problems of the division of matrimonial property on divorce by abolishing marriage itself.

C. *The Explanations Concluded*

The analysis concluded above illustrates that however generally the arguments in its favour have been forwarded the Estate and Gift Duties Amendment Act 1979 effects a virtual repeal of the estate duty for the purposes of overcoming a particular difficulty faced by a small proportion of beneficiaries and a minute proportion of beneficiaries generally. Arguments that imply difficulties suffered by a broader class of beneficiary have been shown to be incapable of being sustained. Arguments that allege unrelated justifications have been shown to be unsubstantiated or makeweights. The case for abolition of the duty must rest on the narrow basis described above.

Earlier in this paper we submitted that the estate tax is such a significant element in an equitable tax structure as to place the heaviest of burdens to prove some compelling need to abolish the tax on those who would do so. It is our view that neither the case presented in the Budget nor that presented in the Parliamentary Debates on the Budget meets that standard. Indeed, both fall far short of it. We turn to the grounds of our objection below.

112 The phrase is that of Ward. See supra n.109. See too Eisenstein supra n.17.
113 Supra p. 242.
114 See supra n.18.

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IV. THE JUSTIFICATIONS CRITICISED

A. *General*

To some, the spectacle of the provision of parliamentary assistance to facilitate the unencumbered inheritance by sons of their fathers' farms would be in itself a ground for condemnation of the measure. To others the failure of Parliament to debate or even recognise the equity and other policy implications of the measure would be sufficient basis for challenge. The first we cannot ourselves take, if only because it raises questions both of political judgment and of personal preference the protracted discussion of which would be inappropriate in a paper of this character. It is however legitimate to repeat our earlier observation to the effect that earlier legislatures would have felt no such inhibition — and would have queried in the strongest terms the propriety of our present Parliament's action — and to suggest that that alone might have been expected to have necessitated a far fuller conceptual and policy analysis than the measure in fact received. The fact that the measure failed to receive such analysis — the second criticism which we suggest above as being open — is a criticism which we would take. In the first section of this paper the importance of wealth transfer taxation to the tax-mix, particularly in the absence of any form of capital gains tax, was stressed. Without pretending that the pre-Amendment estate duty was notable for either its logicality or its equity[115] it nevertheless represented a reasonably significant commitment to wealth taxation which, with proper amendment, contained the potential for making a worthwhile contribution to our tax structure. To reduce the ambit of the levy to a small proportion of its former coverage without analysis of the tax policy implications of so doing is regrettable. It leaves ignored and unanswered vital questions the resolution of which ought to be seen as prerequisites to any intelligent tax regime: what are the implications of the measure on capital taxation; what forms of capital or wealth or transfer tax will replace the estate duty; what implications does the curtailment of the duty have for the increasingly unprogressive income tax, for existing patterns of inter-vivos giving, for the existing pattern of testamentary dispositions? What existing patterns of taxpayer behaviour will be altered by it; what are the tax capitalisation implications for the price of farms and other assets? We have already illustrated one result in which an apparent failure to appreciate the significance of broader policy inquiries such as these has led to inconsistencies in a respect vital to the subject matter of this paper.[116] Such is to be expected when taxation reform is the subject of cursory and purely pragmatic analysis.

It may be that superficial analysis which is responsible for the most obvious and serious criticism to which the Amendment is subject. It was pointed out in the conclusion to the previous section of this paper that the difficulties the Amendment is presented as overcoming are, on analysis, narrow in scope and extent. At earlier stages of the paper they were described as "local" and the question was posed whether they were capable of an equally local solution thereby avoiding the serious problems arising from the severity of the response in fact

115 See the papers referred to supra at the conclusion of n.23.
116 Supra p. 243 et seq.

adopted. In our view an affirmative answer to that question is clearly possible. We turn to that question now.

B. Alternatives to the Amendment

The first and most obvious solution to the problem addressed in the Budget was that of indexation coupled with a reduction in rates (or an increase in exemptions) to restore them to the same real level as those prevailing at the time those rates were last amended.[117] That would, we suggest, have provided a complete answer to the problems in issue which were, it should be re-emphasised, explicitly and exclusively grounded on the effects of inflation since the rates were set at their previous levels. If it be argued that indexation is too controversial a political issue to reasonably expect its use by the government in this context in that adoption here might have provided the unwelcome (to it, at least) opportunity for the exertion of pressure for the introduction of indexation elsewhere in the tax system, a related alternative, more cumbersome but equally effective, is readily apparent. That would be to restore the rates of duty to their former (real) level and by annual amendments preserve the impact of those rates at that level. Either option would in substance achieve the very end the Amendment is said to promote in a manner falling short of the virtual abolition of the tax.

So too would other options. One suggested in the debates themselves was that of the creation of a preference for the medium-sized farming estates that were seen to be faced with special difficulties, such preference presumably taking the form of an exemption from duty of estates within that class. This possibility was dismissed by the minister in charge of the Bill on the basis "that to legislate for favourable treatment for farming estates alone would have created an area of sectional privilege, in fairness hard to justify".[118] There are two responses to this basis for dismissal. The first is that while preferences for particular sectional interests should indeed be "hard to justify" it by no means follows that they are impossible to justify. Everything must depend upon the relative weight of two competing interests. One is the consideration implicity adopted by the minister, namely, that preferences contain an inherent capacity for distorting the equity of the tax system and are on that account to be avoided other than for compelling reasons. The other relates to the consequences of withholding the preference, which may be so great in a given case as to necessitate the overriding of the first imperative. Which consideration is to prevail in a given case is a complicated issue the resolution of which necessarily involves a large component of personal and political judgment. In terms of the particular choice in the estate duty context however the case in favour of the adoption of the second was in our view considerably stronger than that suggested by the minister. The consequence of refusing to grant the preference in issue involved the near-total abolition of a vital structural underpinning of the taxation system. It further involved the annual sacrifice of fifty million dollars in revenue and the reduction to a hollow shell of our only meaningful wealth tax. Indeed, on one view, the course followed in the Amendment involved the conferral of an even greater

117 By s.3(1) Estate and Gift Duties Amendment Act 1976.
118 New Zealand Parliamentary debates 1979: Part 22, 2756.

preference than that "on principle" withheld. To those sectional groups which have the capacity to channel what would otherwise be taxable income into the creation or enhancement of capital assets the refusal to save the estate tax by the creation of a preference is in and of itself a major concession of considerable value. A greater sectional privilege is created by that refusal than is avoided by it.

A further observation in relation to the minister's dismissal of the preference option is also justified. Most taxation commentators would agree as a general matter with his reluctance to see preferences introduced for sectional interests. We would do so ourselves, and would not regard the creation of a preference as being as satisfactory a means of resolving the difficulties in question as other options we have already referred to or will discuss below. It is, however, somewhat difficult to treat the minister as serious in his reasoning in support of his rejection of the preference alternative. At the very least it is highly selective in character. Much of the Income Tax Act 1976 is given over to the creation of preferences of various descriptions in respect of a range of sectional interests. Many of those are given to the farming community. Most of the latter represent tax expenditures of considerably greater proportions than would be necessary to create an exemption from the estate duty in favour of the small numbers of medium-sized farming estates we have identified as being worthy subjects of relief. Some, at least in our personal view, are incapable of justification on any ground. Others, again in our personal view, secure far less significant and meaningful benefits than would be secured by an estate duty preference for the limited range of estates in issue. The reality is that successive governments have used the tax preference mechanism with such frequency and in such debatable circumstances as to make the minister's "equity" or "fairness" refusal to use it once again if not hollow then at least highly selective. In our view precedents aplenty exist to make the preference alternative a far more realistic one than was suggested.

There are in addition other alternatives not referred to in the debates. If we assume that the only estates which experienced difficulties under the pre-Amendment duty were medium-sized farming estates (and no others are of course referred to) and if we further assume that the only difficulties in question are those of paying the duty while maintaining previous levels of production (and no others are addressed) then the introduction of deferred or instalment payment of duty would seem to be capable of overcoming these minor difficulties. The Estate and Gift Duties Act 1968 already permits a deferral of payment in limited circumstances. Section 43A provides that in relation to any interest in mining ventures comprising part of the decedent's estate the Commissioner may defer payment of duty if:

(i) the mining venture has not become income-producing before the date of death of the deceased; and

(ii) the interest in the mining venture has a value which is significant in relation to the total value of the dutiable estate.

These provisions do of course constitute a preference in respect of a certain class of property (and therefore in favour of decedents who hold property of that character). They do, however, make good sense and are arguably justifiable

in terms of the particular difficulties which holders of this class of property face. Certainly, the provision of the preference to resolve this minor problem would seem preferable to the wholesale abandonment of the duty generally. Sensible too, for the same reasons, seems the legislature's provision for payment of duty, which is at such time as the Commissioner is satisfied that "sufficient income has been derived from that interest, to pay the . . . estate duty".[119]

Other jurisdictions have made far more extensive use of tax deferral, or the payment of estate tax by instalments, than has New Zealand. The United Kingdom, for instance, confers a right to spread payments over an eight-year period in respect of, inter alia:

(i) land;

(ii) shares or securities of a company of such value as to give the decedent control of the company immediately prior to his death;

(iii) shares not listed on an exchange if "the tax attributable to their value cannot be paid in one sum without undue hardship".[120]

The United States Internal Revenue Code 1954 provides even more generous provisions for deferral and/or payments by instalments. In addition to a wide range of specific powers in respect of particular classes of property[121] S.6161(2) provides generally with reference to Federal estate tax:

> The Secretary may for reasonable cause extend the time for payment of [estate tax] . . . for a reasonable period not in excess of ten years from the date [the tax would otherwise be payable].

The advantage of provisions such as these to an estate are obvious, first in relation to assets held by the decedent which are not easily realisable and secondly in situations where a shortage of loan finance would otherwise force the sale of the asset to pay the duty. Particularly given New Zealand's apparent abandonment of the notion that one of the purposes of the estate duty is to break up large estates[122] (a continuing commitment to which would presumably involve a rejection of deferral) there is much to be said for the adoption of similar provisions in this jurisdiction. Certainly, they would go a considerable distance to obviating some of the more dramatic of the difficulties said to be faced by some farming estates. Take for instance the situation (which we have argued above as being one of the very few in which a genuine difficulty might arise under the pre-Amendment law) where a heavy mortgage encumbers the farm with the result that further mortgage finance is not forthcoming to permit the payment of estate duty. In such a case the right to defer payment of duty would clearly be of considerable benefit to those beneficiaries wishing to carry on the farming enterprise. While interest would be payable on unpaid estate duty the principal difficulty faced by the beneficiaries — the unavailability of a lump sum to pay the duty — would clearly be overcome.

119 Section 43A(3)(a) Estate and Gift Duties Act 1968.
120 See Finance Act 1975 Sch.4 para. 13(1) (U.K.).
121 See Internal Revenue Code (1954) S.6166-S.6167.
122 See the discussion in McKay "Historical Aspects of the Estate Tax" op. cit. 19-20.

In respect of some farming beneficiaries on whom the pre-Amendment law imposed liquidity difficulties this alternative would not of course provide a total solution. Those whose difficulty was not in finding mortgage finance to meet the levy but in servicing the loan would fare little better under it, at least if the interest charged on unpaid duty was more or less equivalent to the rate of interest on the mortgage and the period over which instalments of duty were to be paid was of the same duration as that of then available mortgage finance. Even in such cases, however, the proposal in issue would clearly be capable of implementation in such a manner as to confer considerable advantages which would go a substantial distance to meeting the difficulties of the limited class of beneficiaries in issue. New Zealand's current venture into deferred payment, section 43A, confers wide discretionary powers on the Commissioner in respect of time for any quantum of repayment. That, coupled perhaps with a further power of interest deferment, would almost certainly give greater flexibility *vis a vis* repayment than would be possible in respect of mortgage finance. At the very least one is justified in asserting that taken in tandem with the other alternatives earlier discussed provision for deferral of duty would be capable of providing a component of a complete answer to the problem areas identified in the Budget and debates.

V. CONCLUSIONS

We have stressed throughout this paper that the Amendment Act is presented on the basis that it is required to solve a local difficulty faced by a small — if government spokesmen are correct — or minute — if we are correct — proportion of estates. As we have illustrated those difficulties are both minor in character and capable of being resolved in ways other than by the virtual repeal of the duty itself. It is accordingly our conclusion that the case in favour of that repeal falls manifestly short of the standard required to justify such a vital and central withdrawal of the tax power.

In one sense, however, that is the best of the Amendment's features. In our view the analysis above throws up aspects of our approach to tax policy generally which are even more disturbing than the particular weaknesses, grave though they are, of the individual product of that process. Chief among them is the apparent failure on the part of both the Government and the Opposition to address the broader implications of the Amendment from a policy standpoint. Tax law is for many purposes an inter-related package, tax equity — which few if any deny is the first and paramount prerequisite of any tax structure based on voluntary compliance — a total judgment. The implications of tampering with any one part of that structure go far beyond the part itself, particularly if that part represents the only significant wealth transfer or capital tax in the whole. Those implications are, first, on the forms, volume and character of taxpayer conduct that will be promoted or discouraged by the change and secondly on the perceptions of taxpayers generally as to the impact of the particular measure on the fairness of the tax structure generally. We have earlier suggested some of the particular implications of the 1979 Amendment from both standpoints. It is regrettable that neither the Budget nor the Parliamentary Debates give evidence of their consideration.

Of general concern too is the declining commitment to wealth taxation evidenced by those same sources. That decline is of course most apparent on the face of the Amendment itself, but it also appears from other sources. One is the mood of impatience on the part of a fair proportion of government speakers with the retention of any form of estate tax whatsoever.[123] Another, of greater significance, is the failure on the part of the government to bolster the vestige of the tax preserved by the Amendment to overcome its manifest deficiencies. As one member pointed out in the second reading debate the pre-Amendment tax was an optional or voluntary levy to the wealthiest taxpayers,[124] the degree of optionality rising in direct proportion to wealth. That characteristic is preserved in relation to the post-Amendment levy through a presumably deliberate failure on the part of the government to build into it a transfer tax component, by a lowering of gift tax rates, a doubling of the gift tax exemption and an omission to provide improved counter-avoidance machinery.[125]

The result is that by a deliberate policy of hostility to wealth or capital taxation what remains of the estate tax is a hollow shell. That must be the subject of concern. In the context of the income tax that policy has narrowed the definition of assessable income to exclude many capital-type items which are unquestionably "income" on any economic definition.[126] In the estate duty context it has now further excluded the bulk of such items from the prospect of taxation on death. It throws an increasing tax burden on those who have no option but to derive their gains as income and prefers those who can clothe those gains with a capital character. It fails to recognise that wealth *per se* confers benefits and that the enjoyment of those benefits are as capable of taxation as the derivation of income that its holder chooses to generate from it.[127] It is purely and simply a policy of preference. It is difficult to view the measure as anything other than a dictation of "policy" by the farming sector rather than an application of policy to the farming sector. A comprehensive re-evaluation, rather than a wake, is required.

123 Supra p. 242.

124 New Zealand Parliamentary debates 1979: Part 22, 2769.

125 Some of the weaknesses of the existing legislation in this respect are noted in the articles by the present writers referred to supra n.23. An interesting and unresolved aspect of the virtual abolition brought about by the Amendment of relevance to avoidance issues is the extent to which the "it's for estate planning purposes" argument in the context of income tax avoidance will still be available. For a discussion of that argument before the Amendment see Bassett "Estate Plans and Arrangements to Avoid Income Tax" (1978) 9 V.U.W.L.R. 217.

126 For a sample of such definitions see the Meade Report op. cit. 31-33. See too the authorities referred to supra n.21.

127 E.g. the Meade Report op. cit. 40 and Kay and King op. cit. 73-4, 164-69.

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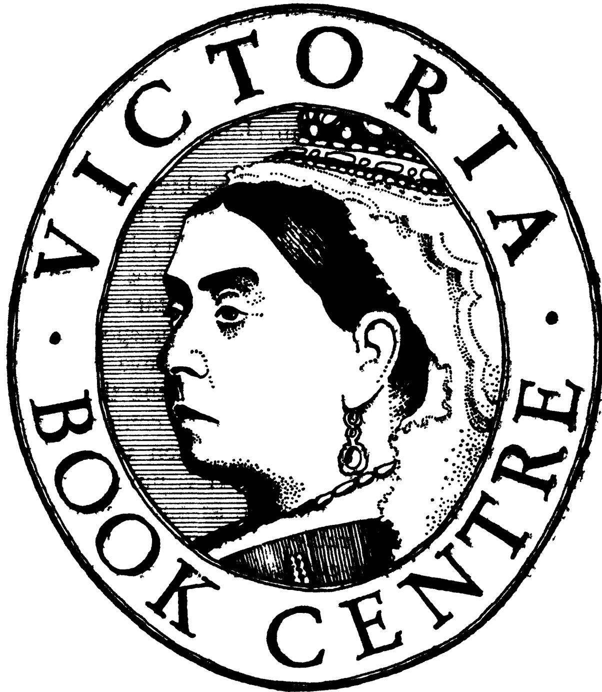

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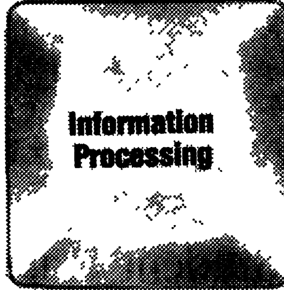

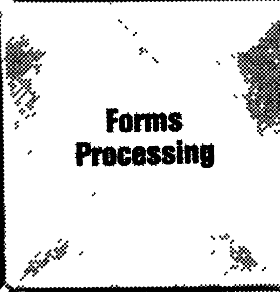

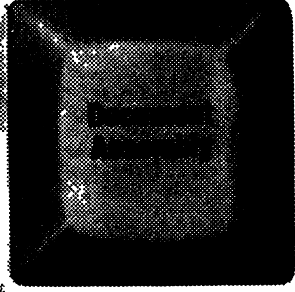

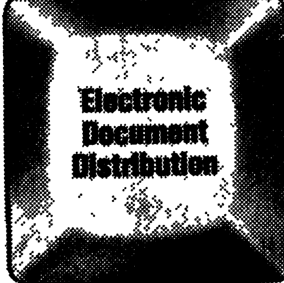

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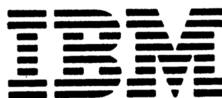

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