BOOK REVIEWS

THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI, by Paul McHugh. Oxford University Press, Auckland, 1991. xii and 392pp.

Paul McHugh states that he "did not set out to write a controversial text".[1] However given the nature of his work, to provide a "comprehensive account of the legal character of Maori interests associated with the Treaty of Waitangi",[2] it might be somewhat difficult to defuse debate. It is beyond the scope of this review to analyse McHugh's assessment of Maori rights.[3] The focus here concerns his appraisal of issues of sovereignty.

The Maori Magna Carta seeks to tread a middle road by adopting an "evolutionary" paradigm – namely McHugh's contention that orthodox legal theory is capable of evolution and development in response to Maori claims.[4] As a consequence, the author is able to suggest that the current *grundnorm* of our system, that of parliamentary sovereignty, is capable of limitation and, perhaps, division.[5] McHugh thus adopts a stance which considers not only what the law *is* but what the law *ought to be.*

McHugh accepts that (desirable or not), under New Zealand's present constitutional legal arrangements, there can be no legal sovereignty residing in iwi:[6]

> The general introduction of English Law to New Zealand by royal charter was a clear breach of the promise of te tino rangatiratanga in the Treaty of Waitangi. Unfortunately, this breach of the Treaty of Waitangi was lawful.

However the author does not consider that because Maori have no residual *legal* sovereignty, they do not possess sovereignty of a type:[7]

> [I]f any concept of 'Maori sovereignty' is to emerge from orthodox constitutional theory it can only be in the form of a separate 'political sovereignty' vested in the Maori tribes ... the Treaty of Waitangi may be seen as a reservation of the political sovereignty in return for the chiefs' cession of the legal.

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1 *Northern Law News,* 11 October 1991, No 37, 1.

2 At xii.

3 McHugh covers such issues as land tenure, the influence of the Waitangi Tribunal, Treaty rights and international law, and common law principles of aboriginal title. See for example, Jamieson [1992] NZLJ 101.

4 "Neither human society nor its law is static and that, in the end, is what the conservatives and the radicals in the Treaty discourse resent most bitterly." McHugh, "Constitutional myths and the Treaty of Waitangi" [1991] NZLJ 316, 319.

5 "It is possible to envisage legal theory eventually reaching the stage of recognizing a legal sovereign in New Zealand besides the Crown. This possibility does not, however, square with prevalent constitutional theory": at 48.

6 At 91.

7 At 45. " 'Political sovereignty'... describes the relation between the Crown and its subjects. It especially embraces the idea that the relation is consensual in a dynamic, ongoing sense. 'Political sovereignty' thus legitimates the Crown's exercise of its 'legal sovereignty' ": at 16.

For McHugh, the value of this Diceyan distinction between political and legal sovereignty "lies in its accommodation of the two competing views of sovereignty within the technical framework of our constitutional monarchy".[8]

Thus political sovereignty helps define how Parliament ought to act by imposing substantive limitations on its exercise of power. However, these limits are non-legal and unenforceable, holding only "a purely moral force". McHugh does suggest that:[9]

> ... there are certain rules, cognizable and on occasion enforceable in the courts [such as constitutional conventions], which emanate from the political sovereignty of the Crown's subjects irrespective of their incorporation into an Act of Parliament.

McHugh believes that there currently exists a constitutional convention derived from the Treaty that could restrain Parliament from legislating on Maori affairs without consultation and (possibly) without Maori consent:[10]

> There is at least one outstanding feature of New Zealand political life which might suggest a constitutional convention: over recent years major legislation affecting Maori matters has been preceded by some process of consultation with tribal representatives ... [T]here seems an unmistakable feeling amongst Members of Parliament that a substantial degree of Maori consent to major legislation affecting their interests is necessary.

Conversely, the Court of Appeal has seen such a duty of consultation as being too vague and open-ended.[11] Furthermore, any Treaty rights based upon constitutional convention are open to the Diceyan accusation that they are not, properly speaking, law.

For McHugh, the best source of protection for Maori rights would lie in entrenchment, such as the Bill of Rights in its 1985 White Paper form:[12]

> [T]he likelihood of a judicially-nourished (and hence piecemeal) 'Charter of Rights' is anorexically slim. If Maori rights are to be protected from legislative curtailment and given overriding status, some entrenchment will be necessary.

However, McHugh's proposals are open to criticism from Maori who maintain that such protection perpetuates Maori as "subordinate to the supreme authority of the Crown, and reliant upon the continuing paternalist benevolence and goodwill of an enlightened government and judiciary".[13] The notion of entrenchment is itself problematic (as McHugh recognises), for within orthodox legal theory there exist competing schools of thought as to its validity:[14]

> The 'continuing' view sees the power of Parliament as unabridgable, or legally limitless ... The 'self-embracing' view sees the notional omnipotence of Parliament as momentary ... Parliament is able to redefine itself for the future.

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8 At 16.

9 Ibid.

10 At 19.

11 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665 per Cooke P; 682-683 per Richardson J.

12 At 60.

13 Kelsey, *Rogernomics and the Treaty of Waitangi* (1991), PhD Thesis, University of Auckland, 848.

14 At 55.

It is of fundamental importance to recognise that the author's discourse is based upon the assumption that sovereignty was ceded:[15]

> Had [McHugh] approached the Treaty in terms of tino rangatiratanga, in the way advocated by significant elements of Maori society since 1840, the equation would have been reversed – the position of the *Crown* would need to be viewed in the light of the fundamental constitutional principle of *Maori* economic and political sovereign independence. This would have produced a very different proposition: through the Treaty, the Iwi and Hapu had expressly recognised the incorporation of the *Crown* into the fabric of *Maori* society .... Surely if the outcome of Maori perceptions was untenable to the colonial state, the same reasoning might equally consider Maori were justified in rejecting as untenable the product of English constitutional doctrine?

McHugh concedes that "[o]rthodox constitutional theory offers a weak and imperfect response to te tino rangatiratanga, or 'Maori sovereignty' ".[16] However, he maintains that Pakeha and their laws can be "(even partially and incompletely) an agency of Treaty justice".[17] He takes solace in the belief that:[18]

> The general thrust of claims to te tino rangatiratanga under the Maori versions of the Treaty of Waitangi has tended towards a delegation of power from the legal sovereign. This is a much less radical option than a claim to a share of legal sovereignty.

Thus, he submits that an approach seeking to limit rather than divide Parliament's sovereignty accords greater Maori support as well as finding approval from the Bench and Waitangi Tribunal.[19] Furthermore, it seems the only realistic approach: "One can, of course, reject this orthodox paradigm of legal sovereignty altogether, but doing so hardly provides a response to the present situation."[20]

However, McHugh's view is opposed by Kelsey, who suggests:[21]

> It is possible that ... McHugh was unaware of the debate on tino rangatiratanga which had prevailed throughout the 1980s, and the level of support for it outside the Pakeha academic and legal arena. Or he may have relied on the public position of Maori participants in litigation, negotiations and public forums as representative of Maori thinking.

In conclusion, regardless of the view of the Treaty debate adopted by the reader, McHugh must be commended for his willingness to "[attempt] a critical assessment of the responsiveness of Anglo-Commonwealth constitutionalism and structures of governance to Maori claims".[22] To McHugh's cautionary observation it may be added, however, that "any meaningful realization of and debate over the shortcomings of the system must be founded upon an informed awareness of its strengths as well as weaknesses".[23] To attain this objective, the reader must consider alternative approaches beyond the purview of the "Pakeha legal paradigm" presented by McHugh in his book.

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15 Supra at note 13, at 849-850.
16 At 45.
17 At 383.
18 At 49.
19 At 40.
20 At 49.
21 Supra at note 13, at 850.
22 At xii.
23 At xiii.

The Maori Magna Carta adopts intelligible language that is comprehensible to the academic and layperson alike. McHugh opts for plain English wherever possible to elucidate his views, observing that "the legalese of orthodox scholars may at time [sic] obfuscate realistic options and goals for Maori".[24] As a result, this work is recommended to a general readership.

Robert Enright and Cherie Phillips

JUDICIAL REVIEW: A New Zealand Perspective, by Dr Graham Taylor. Butterworths, Wellington 1991. xviii and 387pp.

Judicial review scholarship is an enterprise beset with difficulty and controversy. Writers must overcome the problems of trying to extrapolate rules and principles from cases that turn on their own facts and statutory provisions, while at the same time avoiding platitudes. Quite apart from the difficulty of formulating a body of doctrine, some question the utility of even embarking on the task, contending that other matters deserve greater attention.[1] Against this background one must assess the efforts of Dr Taylor in producing a book that is visually very impressive and encyclopaedic in its citation of relevant Australasian case law.

The structure of the book is generally logical and includes helpful cross-referencing and a comprehensive table of contents and index. Part I deals with judicial review fundamentals such as the scope of review and justiciability (chapters one and three). Chapter two on mechanisms of review might have been better accommodated in Part II (chapters four to six), which concerns procedure and evidence. There is reference to an impressive array of unreported decisions. Part III (chapters seven to ten) on Official Information is a valuable guide to the Acts of 1982 and 1987 which can be so important in judicial review proceedings. The coverage devoted to the regimes of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 goes well beyond that required for judicial review.[2] Part IV covers the substantive grounds of review and naturally is the largest section of the book.

However, this reviewer has several misgivings about the style and substance of Dr Taylor's book. The preface states that the book is aimed primarily at practitioners and thus it is not surprising that the text is set out in paragraph style. Arguably,

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[24] At 385.

[1] It is beyond the scope of this review to enter into this debate. Interested readers are referred to Galligan, "Judicial Review and the Textbook Writers" (1982) 2 OJLS 257; Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 MLR 293 and "Mice Under the Chair: Democracy, Courts and the Administrative State" (1990) 40 UTLJ 374; Bouchard, "Administrative Law Scholarship" (1985) 23 Osgoode Hall LJ 411.

[2] Having said that, those seeking an exhaustive survey in this area should see Eagles, Taggart & Liddell, *Freedom of Information in New Zealand* (1992), noted infra at p245.

however, the capsule-like gems of "instant legal philosophy"[3] set out in each paragraph obscure the true nature of the principles that govern judicial review. It is the reviewer's opinion that this style of presentation does not lend itself to a book on judicial review, the principles of which cannot be condensed to several sentences without consequent injury to the essentially open-ended nature of those very principles.

Without seeking to attach too much weight to the choice of style in the book, it coincides well with the author's purpose of advocating separate and well-defined grounds for review. In doing so, the form echoes and reinforces the content since it would appear that Dr Taylor favours the exercise of judicial review in accordance with discrete rules rather than broad and imprecise principles. In many ways the foreword by Sir Robin Cooke, in which the President once again postulates his belief in review according to fairness, reasonableness, and legality, is a "straw man" which the author spends the remainder of the book attempting to debunk.

The mere fact that Dr Taylor disagrees with the President is not the crucial point. The importance lies in the way in which the author has shaped his argument, and the reviewer would argue that the fragmented presentation lacks an appreciation of the overlapping nature of the grounds for review.

There are also some matters of detail that merit attention. Firstly, it is unfortunate that the Canadian solution to privative clauses was not examined.[4] In light of the vigorous attack waged on the current New Zealand law on this subject, an analysis of the Canadian cases would have been valuable. Secondly, greater elaboration on the possible effects of s 27(1) of the New Zealand Bill of Rights Act 1990 would have been useful, as the section will substantially strengthen arguments based on procedural unfairness.

Within the limits set by its author, *Judicial Review: A New Zealand Perspective* is a useful work. However, one cannot help feeling that Dr Taylor's energies could have been better channelled towards areas of administrative law (using the term in its broad sense) that are not as well settled as judicial review and which urgently need critical exegesis. For instance, with one notable exception,[5] lawyers have been silent about the legal implications of privatisation of public enterprises and other related policies. A book which dealt with broader administrative law issues, rather than the judicial review periphery, might have been of more value.

Perhaps it is unfair to criticise a book for not being something that the author did not intend it to be, but the reviewer suggests that the following words are worth heeding:[6]

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3 At vi.

4 The leading case is *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227.

5 Taggart, *Corporatisation, Privatisation and Public Law* (1990).

6 Rubin, "The Concept of Law and the New Public Law Scholarship" (1991) 89 Mich L Rev 792.

> Our legal system is dominated by legislatures and administrative agencies and consists primarily of the huge volume of statutes and regulations they produce. It is difficult to gaze on this vast, recent, rapidly developing, disorganised sprawl. One is tempted to be a legal tourist, wandering among the historic, well-documented edifices at the centre and ignoring the formless suburbs that comprise the major portion of the new metropolis. This is the choice that legal scholarship has made thus far.

Unfortunately, Dr Taylor has made that choice too.

David Simpson

COMPETITION LAW AND POLICY IN NEW ZEALAND, by Rex J. Ahdar. Law Book Company, Sydney, 1991. xvi and 321pp.

Reviewed in the context of recent developments in competition law arising from the Court of Appeal decision, Telecom Corporation of New Zealand Ltd v Commerce Commission.[1]

This set of fourteen essays provides a welcome New Zealand perspective on competition law. The text does not follow the "overview" format of a textbook, but instead focuses in depth on interesting issues. This format is well suited to competition law, given the wide ambit of the statutory words and the difficulties involved in their interpretation in the commercial environment. The format is flexible enough to accommodate some useful analysis of the interface between competition law and economics. The contributors are leading participants in the field, not only in New Zealand but also in Australia (Professor Maureen Brunt and Dr Warren Pengilley) and the United States (Professor Benjamin Klein).

While the text focuses largely on New Zealand's Commerce Act 1986, it also analyses the fundamental concepts of competition law which are relevant to all jurisdictions. Furthermore, there are frequent references to the Australian Trade Practices Act 1974 and related case law.

Economic Perspectives

The text is particularly valuable for the contributions relating to the role of economics in competition law. The essay by Dr Alan Bollard and Douglas White QC entitled "The Interface between Law and Economics in the Context of the Commerce Act 1986"[2] provides an introduction, while Professor Benjamin Klein takes a bolder stance in "Perfect Competition as a Criterion for Antitrust Policy: Brand Names, Entry Barriers and Exclusive Dealing in the *Fisher & Paykel* Case".[3] Strong criticism is directed at those economists who mislead the judiciary with "extremely unrealistic" economic models which are inappropriate for appli-

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1 Court of Appeal, 23 June 1992, CA 34/92 (Cooke P, Richardson, Casey, Hardie Boys and McKay JJ). At the time of going to print, this case was to be reported in (1992) 4 NZBLC.

2 At 44.

3 At 65.

cation to competition law.[4] Professor Klein advocates that exclusive dealing arrangements will only be anti-competitive if there are no substitutes available for the product or service which is subject to exclusive dealing. Where such substitutes are available, exclusive dealing "is employed only in the quest of efficiencies".[5] The writer dismisses the possibility of barriers to entry in the whitegoods market, considered in the case of *Fisher & Paykel Ltd v Commerce Commission*[6] involving exclusive dealing arrangements, on the basis that "good products attract good dealers".[7]

One criticism which could be directed at the text is that, from an economic perspective, it focuses almost exclusively on the efficiency objective. The alternative objective of creating an environment that is conducive to vigorous rivalry (and so may in turn result in efficiency and progressiveness) is not acknowledged. However, the object of the Commerce Act is the promotion of competition (and not just efficiency) in markets within New Zealand. Further, in its 1989 review of the Commerce Act, the Government reaffirmed the promotion of competition objective.[8] Arguably, the Commerce Act seeks to foster all types of competition, price and non-price, inter-brand and intra-brand,[9] and this also draws into question the appropriateness of the efficiency objective. In the words of Professor Fox:[10]

> The isolation of efficiency as the sole goal of antitrust requires a conscious rejection of equally dominant values that underlie the antitrust statutes.

Similarly, it was stated in the recent Court of Appeal decision, *Telecom Corporation of New Zealand Ltd v Commerce Commission* that:[11]

> [The object of the Commerce Act] does not imply that unlimited competition is to be pursued at all costs, however wasteful of resources.

Nevertheless, in support of the stance taken by the authors, it is also arguable that the approach adopted by the courts has often been closer to the efficiency end of the spectrum.[12] While the factors taken into account (other than efficiency) must depend upon the facts of a particular case, it would appear that the courts have been reluctant to support a market environment which bends over backwards to accom-

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4 At 66-68.

5 At 70.

6 [1990] 2 NZLR 731.

7 At 76.

8 Ministry of Commerce, *Review of the Commerce Act 1986: Reports and Decisions* (1989) paras 11-19; see also *Union Shipping New Zealand Ltd v Port Nelson Ltd* [1990] 2 NZLR 662, 702; *Re NZ Kiwifruit Exporters Association Ltd* (1989) 2 NZBLC (Com) 104,485, 104,501: "It is thus not correct to say that the purpose of the Act is efficiency alone and that the Commission should dispense with considerations of competition and go directly to efficiency."

9 Supra at note 6, at 741.

10 "The Modernisation of Antitrust: A New Equilibrium" (1981) 66 Cornell L Rev 1140, 1146; see also Fox & Sullivan, "Antitrust – Retrospective and Prospective" (1987) 62 NYUL Rev 936, 959.

11 Supra at note 1, at p17 per Cooke P.

12 See for example supra at note 6, where it was held that exclusive dealing in the whitegoods industry did not have the effect of substantially lessening competition.

modate new entrants. Carried to its logical conclusion, the accommodation of such vague and far-reaching "equally dominant values" as "justice" and preserving lower barriers to entry[13] could result in a return to the old-style United States antitrust law. In effect, that approach promulgated the fragmentation of business, based on the adage that big business leads to monopoly profits and the wielding of political power (and is therefore anti-democratic).[14]

Recent Developments

Following the recent decision of *Telecom Corporation of New Zealand Ltd v Commerce Commission* (the "*Telecom* case")[15] delivered by five judges in the Court of Appeal, it is now necessary to reconsider the use of economic principles as an aid to interpretation of the Commerce Act. This is because the Court of Appeal, somewhat disconcertingly, chose to ignore the economic and commercial context against which the Commerce Act has previously been construed. The significant body of New Zealand case law outlined in *Competition Law and Policy in New Zealand* has effectively been swept away.

The case involved an appeal under the merger and takeover provisions contained in (the former) s 66 of the Commerce Act. That section has since been amended by the Commerce Amendment Act 1990 (although the amendment is one of form, rather than substance). Telecom tendered for the management rights for three bands in the radio spectrum relating to cellular telecommunications. It was the successful tenderer for two of the radio frequencies, and was required to obtain approval from the Commerce Commission for the acquisitions. Under the former s 66, a clearance would not be available under subs (7) if the proposal would result in Telecom acquiring or strengthening a dominant position in a market. Alternatively, authorisation would be available under s 66(8) if the benefit to the public arising from the proposal would outweigh any detriment to the public resulting from the strengthening of Telecom's dominant position.

The Commerce Commission refused to grant clearance for Telecom to acquire the AMPS-A frequency. Telecom appealed to the High Court, which upheld the finding of the Commerce Commission that the acquisition would lead to a strengthening of Telecom's dominant position in the market for voice telephony. Telecom subsequently appealed to the Court of Appeal, which overturned the decision of the High Court.

The basis of the Court of Appeal's decision was that, in considering whether Telecom had a "dominant position" in the relevant markets, the words of the Commerce Act should be interpreted in accordance with their "plain and ordinary meaning". The Court of Appeal acknowledged the generally accepted approach to

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[13] Fox, supra at note 10, at 1178 citing Schwartz, "Justice and other Non-Economic Goals of Antitrust" (1979) 127 U Pa L Rev 1077, 1078.

[14] Fox, ibid, 1149-1151.

[15] Supra at note 1.

the assessment of dominance, whereby:[16]

> ... one must first have an understanding of markets and how they operate, and an understanding of the particular market in question. These are proper areas for expert evidence.

The Court of Appeal also acknowledged the accepted interpretation, whereby:[17]

> Dominance exists when a person is in a position of economic or other strength, such that it can behave to a large extent independently of that person's competitors.

Previous case law has established that this test is concerned with market power, to be measured in terms of "commercial or economic likelihoods".[18]

However, having accepted that competition law is a proper area in which to admit economic evidence, the Court of Appeal then interpreted "dominant position" in accordance with its "plain and ordinary meaning":[19]

> It is not sufficient that the influence be advantageous or powerful. It must be dominant. The word comes from the Latin *dominus* meaning master.... Not surprisingly standard dictionaries give meanings such as "ruling", "governing", "commanding", "reigning", "ascendant", "prevailing" and "paramount".

This is despite the fact that the High Court has approved and applied the standard definition of dominance on several occasions in the past.[20]

In support of its approach, the Court of Appeal relied on a Privy Council decision, *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd*: [21]

> [W]hen an issue is wholly governed by statute, its resolution must be purely a matter of interpretation.

However, it is submitted that the application of the *Apple Fields* line of reasoning by analogy to the substantive provisions of the Commerce Act is totally inappropriate. The *Apple Fields* case involved an interpretation of a particular technical provision contained in s 43 of the Commerce Act.[22] That section provides that any act or matter *specifically authorised* by any Act or Order in Council will not be subject to the restrictive trade practices provisions of the Act.[23] It is crucial to recognise that the Privy Council adopted this approach to statutory interpretation *only* in relation to that specific authorisation which was to be found in a statute other than the Commerce Act, and not in relation to the Commerce Act itself.

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16 Ibid, p2 per McKay J.

17 Ibid, p5 per Richardson J citing *Proposal by Broadcast Communications Ltd* (1990) 8 NZAR 433, 448; p2 per Hardie Boys J.

18 *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 3 NZBLC 102,340, 102,371 (HC) citing *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481, 511.

19 Supra at note 1, at p5 per Richardson J.

20 See for example *Lion Corporation Ltd v Commerce Commission* [1987] 2 NZLR 682.

21 Supra at note 1, at p4 per Richardson J citing *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257.

22 *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd*, ibid, 262.

23 In the *Apple Fields* case, the specific authority referred to was s 31 of the Apple and Pear Marketing Act 1971.

The Court of Appeal stated that economic evidence is required in relation to a consideration of "markets and how they operate", but did not refer to this evidence when considering dominance. Unlike the comprehensive analysis of the High Court, the decision of the Court of Appeal is notable for its lack of market analysis and for its instinctive impressions.

As a result of adopting the plain, ordinary meaning of the word dominant, the Court of Appeal held that the description of dominant as "high market power" by the High Court was too low a threshold.[24] The Court of Appeal went so far as to assert that:[25]

> Only one person can be dominant in a particular aspect of a market at any one time.

It is submitted that the Court of Appeal has taken the words of the High Court out of context. The High Court did not contemplate "high market power" as comprising a static threshold involving any particular percentage. The term was applied in relation to a dynamic concept of dominance involving a lack of constraint from other competitors. Unfortunately the Court of Appeal appears to have confused "market share" with "market power" – the term "threshold" being more appropriate to measuring market share than market power. This gives rise to problems in ascertaining the existence of dominance, as market share is not in itself sufficient to constitute dominance. Even the statutory definition of dominance contained in the Commerce Act lists market share as merely one of several factors to be considered in determining whether a person is in a dominant position.[26]

The Court of Appeal also claimed that s 36 could be relied on to operate as a constraint on the exercise of Telecom's power in the future.[27] That section prohibits any person with a dominant position in a market from using that position for certain prohibited anti-competitive purposes. However, such an assertion ignores the fact that s 36 is concerned with the conduct of a person in a dominant position, while the merger and takeover provisions are concerned with market structure and with preventing a person from acquiring a dominant position in the first instance via an acquisition. The Court of Appeal's approach would suggest that the provisions relating to the exercise of monopoly power are sufficient to promote competition, without consideration being given to changes in market structure. On this basis, the merger and takeover provisions would be rendered redundant.

The general assertion of Richardson J that only one person can be dominant in a market,[28] juxtaposed with a list of standard dictionary meanings of the word "dominant", suggests that the Court is no longer willing to examine and acknowl-

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[24] Supra at note 1, at pp9-10 per Cooke P; p5 per Richardson J; p3 per McKay J.
[25] Ibid, p5 per Richardson J.
[26] Section 3(8) and (9).
[27] Supra at note 1, at p10 per Richardson J.
[28] Supra at note 25.

edge the realities of the relevant market.[29] Such an approach can only be described as a retrograde step, given that it ignores the wealth of economic principles and case law which have been developed both in New Zealand and in other jurisdictions in relation to the crucial components of competition law.

It is submitted that the emphasis placed on the valuable role of economics, and the careful analysis of the case law by the authors of *Competition Law and Policy in New Zealand* represents the correct approach to interpretation of the Commerce Act. However, the task of balancing the goal of efficiency against other factors contributing to the promotion of competition has been made even more difficult as a result of the *Telecom* decision. This is because an interpretation based on the plain, ordinary meaning of the words bears no relationship whatsoever to efficiency and the allocation of resources,[30] or indeed to many other market considerations.

Market Definition

The highlight of *Competition Law and Policy in New Zealand* is the essay by Professor Maureen Brunt, which deals with one of the most crucial concepts in competition law: market definition.[31] Professor Brunt was a lay member of the Tribunal in the leading Australian case of *Re Queensland Co-operative Milling Association Ltd,*[32] and was also a lay member of the High Court in the *Telecom* case.[33] It is disappointing to note that the thorough and authoritative analysis of market definition and market power contained in the latter judgment was completely disregarded in the recent Court of Appeal decision.

Professor Brunt's essay is one of the finest contributions to writing on New Zealand competition law to date, with a thorough and illuminating analysis of the New Zealand case law pertaining to market definition (enhanced by comparisons with Australian case law). The author also tackles some difficult issues which have not yet been dealt with by the courts in any depth (or, more appropriately, by the legislature). For example, she highlights the inadequacy of the restricted statutory definition of "market" in the context of trans-Tasman trade, the Closer Economic Relations Trade Agreement with Australia, and (potential) imports from foreign jurisdictions other than Australia.

A review of the Commerce Act is currently being undertaken by the Ministry of Commerce and, in this regard, the essay by D A R Williams QC (now Williams

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29 The issue of "collective dominance" is not so impossible that it may be dismissed in one sentence. The European Commission has held that three Italian producers of flat glass abused a collective dominant position: see *Italian Flat Glass* OJ 1989 L33/44. It is also arguable that the Commerce Act contemplates collective dominance, through the definition of "person" contained in s 2.

30 *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 358 (CA).

31 At 115.

32 Supra at note 18.

33 Ibid.

J) is relevant.[34] It provides a useful summary of the 1990 amendments to the Commerce Act relating to mergers and takeovers, highlighting the unfortunate effect of the "sting in the tail" of s 69. This provision subjects *unauthorised* mergers and takeovers to a more stringent test than other mergers and takeovers, namely, those for which authorisation is sought from the Commerce Commission in advance. Williams J adds his voice to those who have already called for a remedy of this anomaly.[35]

Conclusions

It is submitted that competition law should never be limited to strict parameters, or to an interpretation based on the plain, ordinary meaning of the words. It is for this very reason that a collection of essays of this calibre is so valuable – it can assist to clarify and influence the interpretation of the Commerce Act and related case law (and, where appropriate, the equivalent statutory provisions and case law of other jurisdictions).

However, the uncertainty which has since arisen in New Zealand competition law as a result of the *Telecom* case suggests that the text must be treated with some caution. While the consequences of the *Telecom* case are difficult to predict, the procedures embodied in the Commerce Act prevent an appeal to the Privy Council from this decision. The simplified and rigid approach adopted by the Court of Appeal would, if taken to its logical conclusion, render large volumes of existing case law obsolete, given its inconsistency with the established mode of interpretation of the Act.

It is to be hoped that, where appropriate, the contentious issues raised in this valuable text will be carefully considered by the Ministry of Commerce in the course of its current review of the Commerce Act. The text does highlight some glaring anomalies and deficiencies which are capable of remedy by legislative amendment. When considered alongside the recent developments brought about by the *Telecom* case, the problems raised have the potential to wreak havoc in a dynamic market, particularly a deregulated market such as that in New Zealand.

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[34] At 280.

[35] See also Berry & Riley, "Beware the New Business Acquisitions Provisions in the Commerce Amendment Act 1990" (1991) 21 VUWLR 91, 118-121, 126.

CONTRACT LAW IN NEW ZEALAND, by Chris Nicol and Colin Perkin. Commerce Clearing House, Auckland, 1991. 1 and 268pp.

To the uninitiated, the study of contract law seems something of a Herculean task. *Contract Law in New Zealand* is aimed at easing this exercise. The foreword indicates that the book is designed as an introductory text. Thus the book will be of most interest to those grappling with the law of contract for the first time. A practitioner in search of a detailed exposition of the law must accept the need to look elsewhere.

In light of this basic premise, the authors achieve their aims admirably. Both authors' writing is characterised by the use of simple case examples to illustrate the type of conduct they are seeking to explain. While this practice tends to lead to extensive citations from judgments, such lengthy quotations have largely been avoided. The effect of this is to allow the authors to present the cases to the reader in more straightforward language than that used by some judges, which will benefit those being introduced to contract law.

The maintenance of simplicity does not come at the cost of completeness. The authors attempt to cover a large slice of contract law, and while they are not always able to explore an issue in depth, it will at least be considered. A good example of this is the vexing distinction between variation and waiver. In the discussion of this question[1] the distinction is raised and two tests proprounded, but there is no suggestion of which the author would prefer, or any historical justification for either.

However, some detail of the historical origins of promissory estoppel is given in the discussion of Lord Cairns' judgment in *Hughes v Metropolitan Railways*.[2] The discussion of promissory estoppel is typical of both authors' approach to the explanation of the law. Typically, a brief history of the concept is given, followed by an explanation of the elements of the particular concept. With respect to promissory estoppel, analysis is given to the fact that it is "a shield and not a sword", that there must be pre-existing contractual relations in New Zealand, that a representation is required, and the fact that the representation must be acted on by the representee. However, as with other topics, a critical examination of the future of the doctrine is avoided. For example, the vital case of *Walton Stores (Interstate) Ltd v Maher*[3] is given only a fleeting mention in relation to the fact that promissory estoppel does not create a cause of action. Thus the possibility of a move towards a new form of equitable estoppel, based on the line of cases derived from *Crabb v Arun District Council*,[4] is ignored.

Another example of this shortcoming is in the discussion of misrepresentation.

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1 At para 480.
2 (1877) 2 App Cas 439 (HL).
3 (1988) 62 ALJR 110.
4 [1976] Ch 179 (CA).

While the Contractual Remedies Act 1979 and its elements are more than adequately covered, the possible intrusion of the Fair Trading Act into this area of the law is tacked on as an apparent afterthought. A short discussion ensues, the brevity of which in no way befits legislation which the authors state has effects far outweighing the principles of the law of contractual misrepresentation.

As would be expected in a text attempting to maintain simplicity and brevity there are omissions. For example there is no discussion of conditions subsequent and precedent, an issue which any first year law student will find confusing. Thus the whole area of contingent conditions is ignored.

However, these criticisms do not, in general, undermine the quality of the text. Within the parameters set by the authors this text must be regarded as a success. *Contract Law in New Zealand* will serve well as an introductory text for students and those in business.

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