TAKEOVERS, INSTITUTIONAL INVESTORS AND MODERNIZATION OF CORPORATE LAWS, ed John H. Farrar, Auckland, OUP, 1993 viii and 420pp including index. Price $99.95.

To regulate or not to regulate, this is the question on takeovers. Adopting a yes or no approach our government, while deciding to regulate, also has left it to the market to prescribe its own rules. Accordingly, the Panel set up by the Takeovers Act 1993 comprises market representatives, vested with powers to prescribe and administer a takeover code. Treasury and business pressures opposing regulation, however, have convinced the government to suspend the operation of the Act for the time being.

In December 1991, shortly after the introduction in Parliament of the Takeovers Bill, the Institute of Policy Studies called a conference to discuss various aspects of takeovers. *Takeovers* contains papers presented at that conference, some updated to 1993, plus papers specially commissioned. Various aspects of takeover law and regulation are discussed, some from overseas perspectives. As well, two chapters deal with the additional topics mentioned in the title.

The takeover papers examine regimes in New Zealand, the United Kingdom and Australia. The New Zealand experience is discussed, respectively, by Peter McKenzie, the Securities Commission's chairman, and David Jones, a partner in Phillips Fox, Auckland, with special expertise in this field.

Another group of papers deal with specific aspects of takeover activities – "Purchase of Own Shares and Financial Assistance in Takeovers" (Dugan); "The Application of Competition Law to Business Acquisition in New Zealand" (Berry); "Business Judgement and Defensive Tactics in Hostile Takeover Bids" (Farrar); "Taxation Aspects" (McLay) and "Accounting Aspects" (Laswad). The Editor, Professor Farrar, has contributed two further papers, analysing aspects of company law bearing on takeover regulation: "Fuzzy Law, the Modernization of Company Law, and the Privatization of Takeover Regulation" and "The Duties of Controlling Shareholders".

Economic analysis is provided by Amnon Mendelbaum, head of research in the Bank of New Zealand and a former Treasury official, in a paper titled "Economic Aspects of Takeover Regulation with particular references to New Zealand". Professor J. Coffee's paper – "Institutional Investors as Corporate Monitors" provides valuable data and analysis on the roll of Institutional investors in control of publicly held corporations. Coffee, a distinguished United States scholar, provides comparative examination between the role of the institutional investor in the United States, Japan and Germany. This important topic is still to be adequately researched in New Zealand.

Of particular interest is McKenzie's "Takeovers, the New Zealand Experience" (Chapter 3). It notes that current legal regulation of takeover activity in New Zealand – The Companies Amendment Act 1963 – is rudimentary and easily avoided. The Securities Commission has vigorously advocated a tighter regime (1983 and 1988 Reports) while Treasury, as

vigorously, has opposed it. Meanwhile, the New Zealand market for corporate control has seen well publicised takeovers, which had clearly prejudiced minority shareholders. "In each of these cases," says McKenzie, "minority shareholders would not have been prejudiced had the mandatory bid-equal price procedure advocated by the Securities Commission been in place" (p120).

The main recommendations of the Securities Commission were: providing for pauses and publicity in the bid process; payment of equal price to the holders of all securities of the same kind as those which were the subject of the bid, with the floor price being determined on the basis of the higher price during the prescribed period preceding the bid; rejection of partial bids and creeping acquisitions while opting for a mandatory bid once a 30% threshold had been crossed by a bidder, with the bidder required to pay not less than the higher price bid for the securities during the preceding 12 months. As noted by the Chairman in an update Postscript (pp410-411), the Draft Takeover Code, released for public debate in April 1993 by the Takeover Panel Advisory Group goes a long way towards meeting the Commission's concerns. However, the Draft Code (which indicates the shape of the statutory rules to come) differs from the Commission's recommendations in three major respects: Mandatory bid at 20%; a partial bid may be made; and no equal price rule.

David Jones' "Development in Takeover Law in New Zealand" outlines and updates the legislative history (partly duplicating McKenzie's account) and describes the considerations underlying the Panel's work in devising the Draft Code.

The Australian experience is thoroughly reviewed by R P Austin in chapter 4. Austin, a partner in a leading Australian corporate law form and a visiting professor at the University of Sydney, gives a comprehensive account of the history and contents of the Australian legislation. His aim — "to provide background information about the Australian experience so that those responsible for developing the New Zealand Panel can make comparisons on specific issues, and an overall assessment" — is well achieved.

Peter Lee is eminently qualified to speak of the United Kingdom Experience (chapter 4) — he is the long serving executive director of the City of London Takeover Panel. The unique 20 years old system is entirely voluntary. Five thousand United Kingdom public companies accept the jurisdiction of the panel to lay down and administer the Takeover Code because of professional and public opinion pressure. They are also indirectly represented on the Panel through representative organizations. The system has no direct statutory basis, and is designed to avoid a ponderous bureaucracy and cumbersome litigation. It is speedy and flexible, is financed by its users and has been working successfully.

Of particular interest is Lee's advocacy of a mandatory bid for all the shares in the company once 30% of the shares has been acquired by the bidder. He justifies this (currently a controversial issue in New Zealand — a similar measure has been recommended by the Securities Commission but rejected by the Interim Panel) by the fact that the acquisition

of such a parcel of shares means change of control. Individual shareholders should be entitled to the same price for their shares as that paid for the controlling block, and should not be forced to stay in the company with a new controller of whom they may disapprove. Partial bids (on a pro rata basis) (allowed in Australia and adopted by the Draft Code) are rejected in principle but might be approved at the Panel's discretion subject to safeguards.

Takeovers regulation in New Zealand recreates an old Russian fable. The Emperor decided he needed a pair of special boots. The very Eminent Counsellor advised – make them of pure gold, to shine and be admired by all. Next day he was summoned again. "Walking in pure gold boots," said the Emperor, "won't they be soiled, and lose their shine?" "Then, have them wrapped in straw, to protect them from the dirt." The Emperor was still unsatisfied: "If I wrap them in straw, how would anyone know they are made of gold?" "Well then," said the Counsellor, "punch holes in the straw." "But what about the dirt, again?" insisted the Emperor. "Have the holes plugged with rags." And so on. The New Zealand government vacillation on takeovers is as ridiculous. We have an Act providing a statutory framework for the market to regulate itself, and a Panel has been appointed. But whether anything will come out of it is doubtful. The Minister of Justice, who has to recommend implementation, has said he was not going to do so in the foreseeable future (waiting for the effect of the Companies Act 1993 on takeovers). Watch this space.

It is precisely because we are at this cross-roads that *Takeovers* is timely. All the papers are valuable, though the ranging from the very broad to the specific makes for some lack of focus. Yet, it is an important contribution to the relatively sparse Commonwealth literature on this topic. Practitioners and theorists will find useful information and analysis. As the contributions to Takeovers show, there is no universal model for takeover regulations.

Parties to the debate will find in the book ample ammunition both for and against regulation. It will be appropriate to finish this review with Peter Lee's conclusion (at p202):

"It is sometimes asked why we need any of the kind of regulations I have just been describing. My brief answer would be that, unless a market is perceived to be fair, many people will not invest in it, and that will be to the detriment of the economy and the nation. The world is now an incredibly small place, and those financial centres that aspire to international recognition must have at least a modicum of regulation (and also, of course, demonstrate that it works) if they are to achieve an active, competitive and healthy market."

– Giora Shapira