

## *Book Reviews*

**FAIRNESS AND INCENTIVES: ECONOMICS AND LAW REFORM**  
by R Dugan and P Gorringer. Victoria University Press for The Institute of Policy Studies, Wellington, New Zealand 1989. 100 pp. \$29.00.

Reviewed by D L Holborow\*

"Economists have much to offer, and they should be involved with lawyers and other specialists in an inter-disciplinary approach to law reform."<sup>1</sup>

This passage, the conclusion of the first chapter of *Fairness and Incentives*, is the embarkation point for Dugan and Gorringer's economic analysis of seven topical issues in New Zealand law reform. It succinctly captures the purpose of the book: to demonstrate the usefulness of economic analysis in conducting law reform. The passage also exposes a genuine strength of the book: it avoids over-emphasis of the value of the economic approach. In the past there has been a tendency among some analysts to blinker the law reform process and lead it along arbitrary lines of economic doctrine (the "economics as law reform" approach). This is an approach often identified with the Chicago school,<sup>2</sup> which in the 70s and 80s was, arguably, the leading standard bearer in the field of law and economics.

The appearance of this book is timely, as the existence of the "economics as law reform" approach has discouraged many lawyers from taking economic analysis of law seriously. The problems can begin when a law reformer sees how easily many basic principles of contract law fit, like a glove, to Adam Smith's "invisible hand". The law reformer may then begin to view economics as the overriding consideration in fine tuning the legal system. Law reform may then be seen to be about economics, rather than an inter-disciplinary process.

Yet the "economics as law reform" approach involves classic errors in dealing with economics. As a social science, economics is in a constant state of development. Being able to point at empirical studies that "prove" economic principles does not necessarily mean that the principles can be confidently adopted as articles of faith. As the general consensus of economists changes law reform based on "economic principle" can become quickly outdated. This suggests that economic analysis, whilst it is a useful tool in deciding between reform options, should not be treated as infallible.

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\* A barrister and solicitor of the High Court of New Zealand.

1 R Dugan and P Gorringer *Fairness and Incentives: Economics and Law Reform* (Institute of Policy Studies, Wellington, 1989) 9.

2 For the magnum opus of this school see RA Posner *Economic Analysis of Law* (3 ed, Little Brown & Co, Toronto, 1986).

This misunderstanding of economics is exacerbated when lawyers, clutching to principles of micro-economics which most economists would learn in their first year, begin drawing conclusions regarding the "economic efficiency" of law. Lawyers can be excused for a lack of knowledge of economics, but only insofar as that knowledge is disclaimed. The problem in many cases becomes not so much any inherent weakness in economics, but lack of competence among those practising economic analysis of law.

Perhaps a more fundamental error with the "economics as law reform" approach is that it leads to an imbalance of emphasis. The approach involves a concentration on economics as a cause of and reason for law. This can lead to an emphasis in law reform on the task of ensuring that law conforms to economic theory. As a result the law reformer is blinded to other relevant policy considerations - all the areas of policy that do not rely on economics.

The fundamental strength of *Fairness and Incentives* is that it avoids these errors. Disagreements between economists on matters of principle are admitted, and attempts are made to reconcile different economic arguments and find consensus positions which can be useful to law reformers. The possibility of a changing consensus between economists on given issues is made apparent. In addition the conclusions drawn by Dugan and Gorrige are always worded in a manner which admit of other considerations that should influence the law reform process. The trap of dogmatic faith in economic principle is avoided.

These are not the only qualities which make *Fairness and Incentives* so important: it is the accessibility of the work that gives it a vital role. The work contains simple and succinct explanations of the law applicable and the reform proposals in the areas analysed. It also contains simple definitions of economic jargon. The result is a high degree of accessibility which will mean that policy-makers and members of the community without economic training will be able to glean from the book useful insights into the importance of an economic approach to law reform. This provides an opportunity for informed debate on the economic aspects of the law reform proposals discussed in the work.

Particular highlights for this reader were the useful studies of purchase by a company of its own shares, chattels security law and the regulation of financial disclosure. With the passage of the New Zealand Companies Bill now firmly fixed on the horizon it would be hoped that practitioners and law reformers peruse the relevant chapters of this work before proceeding with discussions relating to the reforms. This will provide a starting point for debate on economic issues associated with the reforms. This is, perhaps, where the true value of the work lies - in the introduction that it provides to the debate regarding the economic consequences of the law.

**THE FOURTH LABOUR GOVERNMENT: POLITICS AND POLICY IN NEW ZEALAND** edited by Martin Holland and Jonathan Boston. Oxford University Press, Auckland, 1990, 296 pp. Reviewed by EM McLeay.\*

Is there any significance to be attached to the alteration of title in this updated monitoring of the activities of the fourth Labour Government? The sub-title of the first edition was "Radical Politics in New Zealand". The same editors commented in the first paragraph of the introductory chapter of the 1987 edition that the 1984 election of the Labour Party "marked a crucial turning point in the style, character and content of the politics of the post-war era". Indeed, the introduction itself was entitled "Transforming the Political Agenda"(at 1). This theme was pursued throughout the various contributions in the first edition; the tone of comment and the emphases were upon the nature and scope of the political changes that took place in our polity; the verdict was overwhelmingly that the reforms introduced by the fourth Labour Government "effectively ended the old politico-economic order" (at 6).

Whatever the criticisms made by the contributors to the 1987 edition of the actual changes pushed through, they generally endorsed the argument so forcefully put by the top political decision-makers that the role of the state in New Zealand was well due for reconsideration. This "state crisis" thesis, not unique to New Zealand, was commonly held by critics of the ways in which New Zealand had been governed. And the criticisms emanated from both political parties as well as from a wide range of positions within the political spectrum. There was little need for Treasury to fight for its own agenda, for there existed potential converts in the new party of government who were searching for solutions to New Zealand's economic woes; the monetarist and managerial vision was seized upon as the new Holy Grail. As has been explained in another book on the fourth Labour Government, the absence of consensus within the Labour Party on economic issues left a vacuum waiting to be filled.<sup>1</sup>

Understandably, to a large extent what the contributors to the first edition wrote about in 1986-1987 was affected by the public agenda of the 1984-1986 years. The events dealt with in the 1987 book included the policy perspective/ideology of the Labour Party, the positions of the opposition parties, the Bill of Rights, parliamentary reform, cabinet ministers and the public servants, the reorganisation of the public sector (mainly the establishment of the State-Owned Enterprises), Labour's economic strategy, wages policy, the 1985 tax reform package, Anzus and the nuclear issue, the Defence Committee of Enquiry, and Labour's policies on Africa. At that stage neither the State Sector Act 1988 nor the Public Finance Act 1989 had been passed. The post-1987 sale of assets programme had not begun, the leadership changes that punctuated the second three years of Labour's term had not occurred, the Bill of Rights had not subsided into near ineffectualness, and education had not been restructured. (The Picot Report was published in April 1988.) The election of 1987, analyzed in a lively contribution by Martin Holland in the 1990 edition of *The Fourth Labour Government*, returned Labour

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\* Senior Lecturer in Politics, Victoria University of Wellington.

<sup>1</sup> See W H Oliver, in *The Making of Rogernomics* (ed Brian Easton) (Auckland UP, Auckland, 1989) at 11-52.

to power. But after that there was the stockmarket crash of October 1987, steady economic decline, and decreasing support for Labour in the opinion polls.

So when the authors came to put together a second edition, really a new version, of their appraisal of the actions of the fourth Labour Government, given the extreme pace of change of that Government's activities it is hardly surprising that the agenda which they came to address was different. Even the personnel had changed: the Palmer cabinet of January 1990 included only nine members of the original Lange cabinet (at 1).

This time the editors subtitled the book: "Politics and Policy in New Zealand". Perhaps the label signals that rapid change in New Zealand politics has become the norm. Perhaps, and this is more likely an interpretation, the editors were signalling that at the time of publication of the second volume, policy change was becoming politically more difficult to implement. Thus, the different subtitle indicates that the 1990 version is not so much a new edition but a different book altogether. For the only characteristic the two books have in common is that they are analyses of the one government. It transpires that the editors do not wish to dissociate themselves from their earlier judgement about the dramatic nature of the changes, for they concur (at 2) with their earlier judgement that the fourth Labour Government was indeed a radical one.

The editors in 1990 rebuilt the overall structure of the previous book and replaced most of their former contributors. The second edition has chapters on the changing electoral mandate, the Bill of Rights, electoral reform and voting behaviour under the fourth Labour Government, the cabinet and policy-making, the role of the state in the New Zealand economy, the Rogernomics monetarist experiment, remaking the state services, the political economy of privatization, educational policy, biculturalism and education, social policy, local government, Maori affairs, and a comparison of social democracy in New Zealand, Britain, and Sweden.

The contents of the second volume are, therefore, complementary to those of its predecessor; they are not revisions of it. The editors say that the second edition limits itself to two themes: "First, the political consequences of Labour's six years of government; and, second, the substantive policy areas emphasized by the fourth Labour Government" (at 3). The policy areas are primarily those of significance in the 1987-1990 period. The editors say that some areas have had to be omitted (environment, resource management, health and justice). The contributions are multidisciplinary: two economists; one sociologist; one sociolinguist; one educationalist; and eight political scientists from varying types of specialisms. (A lawyer's view on some of the changes might have added a different perspective.) One of the weaknesses of the collection is its general failure to integrate structural and constitutional analysis with policy issues; it is in general, the product of a multi-disciplinary group rather than a cross-disciplinary team. It is difficult to imagine, however, in the time available to the editors and authors how a more integrated approach could have been achieved. A few authors, however, manage to integrate substantive policy analysis with political and structural material. For example the last chapter, by David Denemark, compares New Zealand with other social democratic states, looking at the varying ways in which they faced similar economic and state crises.

I have emphasised the differences between the "Mark I" and "Mark II" versions of the political events of the last six years in order to make two main points. On the one hand, the production of a totally different second volume has meant an increase in the range of analysis of our understanding of the politics of the Labour Government. On the other hand, the opportunity was lost to follow through the policy initiatives of the early years and supplement those with ones which developed later. (What happened to foreign affairs after 1987, for example?) It should be noted, though, that the 1990 contributions do not confine themselves to the 1987-1990 period. The second strategy, if the original writers could have been persuaded again, would have meant that the policy actions and political processes of this fascinating period in New Zealand history would have been more thoroughly examined; range of coverage, however, the strength of the content of the two volumes, would have had to be sacrificed for a longitudinal study. But the reader might have gained a better appreciation of the difficulties and achievements of Labour's radical political programme.

My next point is closely associated with the previous one. It is a little frustrating from a teacher's point of view (or indeed those of us who cannot bear to put down a detective story) to ask a student to look at a particular policy issue (the politics of the Bill of Rights, for example) and still not know what had happened to the Bill by the end of Labour's period in power. (And this issue is an exception in that it is discussed in both editions, by different contributors, and receiving rather different treatments.) Perhaps this is not so much a criticism of the two collections as the reviewer's orthodox plea for more research, another book on the fourth Labour Government, one which steps back from events and puts them in some sort of perspective - not the aim of these two volumes - and one which assesses Labour's record by the end of 1990.

The collection is too extensive for each contribution to be separately reviewed here. There are, however, distinct continuities of theme. Richard Mulgan, in a thought-provoking piece, castigates the government for abandoning its election manifesto and links this with ideas about democratic contracts between governors and governed. Jonathan Boston presents new material to produce concerns about the coherence of cabinet decision-making and the quality of advice to cabinet. The authors of the chapters on the role of the state in the economy (Chris Rudd), Maori Affairs (Andrew Sharp), on educational policy-making (Gerald Grace and Richard Benton in two separate chapters), privatization (Mike Williams), monetarism (Jan Whitwell), the state services (John Martin) and social policy (Peggy Koopman-Boyden) are all properly analytical and, moreover, lively. Their collective impact is to highlight Labour's failure to formulate priorities in its policy-making, especially when social goals and economic theories were in conflict with one another, as occurred with Maori, social welfare and educational issues.

A second major concern which surfaces throughout is the problem of uncontested ideas, an elaboration of Boston's concern with policy advice. The contributors, overtly and implicitly, worry about the nature of the advice given to our political decision-makers. This is a two-fold problem. First, the newly-elected cabinet came in in 1984 determined to govern; as the elected government, it was argued, the ministers must put the public good above private interests - the farmers, the teachers, the unions, the extra-

parliamentary Labour Party, for example. Even election promises were less important than the overall public good. Hence the denial of the legitimacy of electoral mandate. Hence, too, the reputation of an arrogant government which had stopped listening to anybody beyond certain closed circles.

Furthermore, the New Zealand Treasury of the 1980s had become "captured" by a particular set of ideas, primarily from the Chicago school of economics. Jan Whitwell and Michael Williams put forward good analyses of the extent of this "capture" in economic policy; Gerald Grace interestingly shows how the "New Right" Treasury, aided by the Business Roundtable and the media and encouraged by National's educational policy, attacked the basic principles of the New Zealand educational system. Market principles were to be the dominating guidelines.

Part of Treasury's doctrine was that advice and information from pressure groups and public agencies (apart from Treasury itself) was suspect because each was working in its own - selfish - interest. Thus, aiding and abetting one another, Treasury and a small group within the Labour Government together pursued their version of the public interest. Now, when things are going well, that might well be a successful strategy to adopt. Certainly, as Graham Bush demonstrates in his very full analysis, this approach worked well when reforming local government. But when the going is difficult, and the solutions are not so clear-cut, then, as every political scientist and lawyer knows, it is sensible to seek a wide range of views. Some will be better informed than others. But even the most self-centred participant in the policy game has views and information that it is unwise to disregard completely, particularly if they are important players (to employ the fashionable jargon) in the implementation process. That is why the Law Society is consulted and listened to when changes are being made to our legal system. Teachers need to be able to say how their students and schools will be affected by changes in the educational system. Of course, in representative democracy, we elect politicians to make decisions. The lesson of the fourth Labour Government, however, and this comes through very clearly in this volume, is that the more radical the changes being proposed, the more necessary is a sensible consultative process and a healthy exchange of ideas. It is not only the health of our democracy that is at risk when political argument is constricted; the effectiveness of policy formulation and implementation is also diminished. The lack of strong prime ministerial leadership, added to the poor planning and indeed vision in areas such as welfare - Peggy Koopman-Boyden rightly questions whether a social policy actually existed - clearly exacerbated the difficulties.

But despite poor leadership performance, particularly in Labour's second term, and the all too apparent lack of policy coherence, the battle played out within caucus and cabinet about the way in which our society should be shaped should not be regarded as altogether counterproductive. This battle took place in the zones of constitutional change (electoral reform, the Bill of Rights), welfare, Maori affairs and education. The contributions of the various writers in this book highlight the complexity of some of the intra-party arguments. These debates, because of the ways in which policy positions too often became bitterly embroiled in personality clashes, helped lose Labour the 1990 general election. Yet at least there was the vigour within the Party generally, within cabinet and between cabinet and caucus, to debate different perspectives. Market

principles were not - at that time - always allowed to dominate, as Gerald Grace demonstrates in his discussion of the schools settlement, and as Richard Benton explains in his assessment of biculturalism in educational policy. Debate and argument characterized the rethinking of the position of Maori in our political and policy formulation system. Whatever the failings of Labour's "solutions" in this last area, as Andrew Sharp argues, at least the Government's direct confronting of the issues, if it did not depoliticise them, placed the Maori view of the world as of equal validity to the individual pursuit of self-interest.

As the editors comment, the New Zealand political system showed its inherent stability by withstanding the enormous changes that were imposed upon the public sector and the economy. John Martin's critical analysis of the changes made to the core public service show how revolutionary those changes were and how aspects of them threaten the constitutional order of our government in ways that have not been fully understood or anticipated. But what happened under Labour also illustrated the weakness of a political system that allows almost unfettered power to its political executive. Perhaps we might pause and reflect a little how much more dangerous for our democratic health might be a party in power which did not exhibit tensions and strains in its perspectives and goals.

It is my view that the 1990 general election will appear to be in some senses an artificial break in New Zealand's political history and that the actions of the Bolger government will have to be placed alongside those of the Lange/Palmer/Moore governments: the continuities (in economic policy?) and the contrasts (in social policy, gender and ethnic issues?) will then become apparent; the failures and successes of each set of politicians and the weaknesses of the policies pursued will then be able to be judged more accurately.

In general, however, the editors must be congratulated on their achievements; first, on their fortitude in getting a successor to the first volume published (and it is no simple task to publish books on New Zealand politics); and, second, for the evenness of quality of the contributions. It is not easy to live close to events and yet demonstrate clarity of analysis and professional distancing from what happens. When this is achieved, we gain the benefits of scholarship along with the benefits of immediacy. Moreover, this book shows that the New Zealand academic community can produce constructive, theoretically informed criticisms of what governments do, and suggest viable alternatives to be considered.

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