Book Reviews

Justice, Ethics and New Zealand Society, (eds) G Oddie and R Perrett, Oxford University Press, Auckland, 1992, xvi and 233 pp.

Reviewed by Ian Macduff*

This book of essays represents an ambitious project. On the one hand, it is recognised that there are perennial issues of philosophy, going to the core of justice, meaning, reason and so on. On the other, it is seen that these perennial questions will necessarily have a parochial flavour. The nature of this enterprise is to try to address both aspects of philosophy and ethics, both in general terms and - more specifically - with a focus on New Zealand. This second part is clearly more than a mere exercise in "applied" philosophy, in which the conventions of philosophy are applied to regional questions, thus subsuming the particular under the general and indicating the comprehensiveness of the philosophical umbrella. Rather, it is suggested that any philosophical programme (x) needs to reflect not only the substantive concerns of its location but also to be addressed in a voice which is distinctive for that location. The problem here, of course, is that political and moral philosophy could descend into a kind of regional relativism. Hence the implicit task of a project such as this is to maintain the balance between the universal and the particular without necessarily privileging one over the other. It is on that score that an enterprise such as this seems especially ambitious; and it is on that score that the collection - perhaps precisely because it is a collection - does not quite make it. Nevertheless, for reasons I hope to set out, this book represents an important direction in political and moral philosophy, not only because the essays address important issues of substance for New Zealand (the Treaty of Waitangi, the nature of sovereignty, the sources of obligation under and in relation to the Treaty), but also because they begin to alert us to the imperatives of a new kind of political discourse in New Zealand.

One matter needs to be set aside at the start. This does not presume to be a collection of papers in jurisprudence or in legal philosophy. It would be quite possible for the debate to continue as to whether anything said in the book, or in this review, has anything to do with jurisprudence, narrowly defined. What matters more than that debate, more than the carving of intellectual boundaries, is the recognition of fundamental questions which are not only philosophical but which also shape or are shaped by the law. The pervasiveness of law means that philosophers, historians, anthropologists and others can barely escape some kind of commentary on its impact. The immediacy of the issues centred on the Treaty and on Maori-Pakeha relations means that these are bound to shape both the substance and the methods of our political and legal discussion. It is a collection of essays in philosophy; but it is also a collection which speaks clearly to the concerns of jurisprudence.

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* Senior Lecturer, Law Faculty, Victoria University of Wellington.

The range of papers is significant. Some of the papers deal directly with cultural or epistemological issues concerning the construction of an appropriate political philosophy for New Zealand/Aotearoa, or with the way in which culture shapes perceptions of the political self and responsibility.[1] Some deal with the structural implications of a Treaty-based, or Treaty-oriented political philosophy.[2] Two papers deal in more general terms with issues raised in the conventions of political and moral philosophy.[3] Two deal with issues of property rights and environmental philosophy.[4] And the remainder[5] can be said to be papers concerned with the implications of the Treaty for the conventions of political philosophy and jurisprudence - issues of social contract, sovereignty and legal reasoning.

Two criticisms arise from this range, and let me with this, get my criticisms out of the way. First, despite the intentions stated by the editors, the papers are not all obviously oriented towards New Zealand. Some, indeed, manage to avoid mentioning New Zealand entirely. It is an eclectic mix. Such eclecticism is, of course, likely also to be the source and mark of a lively debate. But where, as here, the range is built partly on papers written for quite different purposes and audiences and reproduced here, it is unlikely that the distinctive New Zealand "voice" will emerge merely from the presentation of a collection.

The second and related criticism is that the papers do not address each other. In part, this is likely to be a consequence of the fact that these papers do not represent the product of a congress or debate but are, at least in some cases, simply reproduced for this volume. It is, of course, most often the case that collected essays are linked only by a common theme and not by any interaction between authors. The problem here is that it may be precisely this kind of dialogue and interaction which any distinctive philosophy needs to be based on, all the more so if, as the editors suggest, what is important is the creation of recognition of a "philosophical community" (ix). Equally, the opening and important essay by Moana Jackson points to just such an opportunity. If, as he suggests, issues of importance to the Maori have typically been identified and addressed within the framework of an "alien" philosophy, then the new philosophy is going to have to be a product and process of discourse between the alien and the indigenous. With some exceptions in this collection, Moana Jackson might well be excused for thinking that, again, the issues of the Maori voice and tradition of philosophy had been ignored, while philosophy struggles to address issues of substance within the conventions of a familiar methodology.

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1 See papers by Jackson, Patterson and Perrett.

2 See papers by Davis & Ewin, Bishop.

3 See Waldron, and Pettitt.

4 Papers by Goodin, and Sylvan. I have linked these papers primarily because of the environmental implications and objectives of the first of the two: Goodin's discussion of property rights and preservationist duties clearly carried implications for the environmentally-driven imposition of limitations on private property rights.

5 Papers by Ewin, Tichy & Oddie, McHugh, Campbell. The paper by Davies and Ewin also fits this category.

It is, however, important to recognise that no one collection can cover the territory and that this is only part of an exercise already well under way. For that reason, I think that it is useful to consider a couple of ways of reading these papers because, despite the criticism, I am also persuaded that it is an important collection.

First, consider this simply as a collection of contemporary papers identifying both perennial and current issues in political philosophy. From this perspective, each of the papers has considerable provocative and intellectual value: they are, I think, the kinds of papers that in turn might serve as sources of further debate. This role for the collection is, I imagine, reasonably assured, as the kind of source book that those interested in both the wider and specific issues will want to refer to.

Leave that role aside for now. A second way of reading these essays is to consider them as a partial expression of the shifting agenda of epistemology, jurisprudence and political philosophy. In this respect, the papers can and need to be read not only for the immediate contribution to philosophy but also for the recognition of the ways in which political theory and, in due course, political practice, are shaped.

Take this second perspective. There are immediate advantages of writing this review at a distance from the location to which these essays are predominantly addressed. An early reading of the papers, in New Zealand, confirmed the familiarity of the issues of sovereignty, cession of power, the sources of legitimacy and rights and so on. But reading more, at this distance, confirms that not only can the essays be read as papers on those substantive concerns; they also ought to be read as indications of the way in which, as the editors would wish to show, political and legal philosophy are shaped by context. And shaped not only in terms of the pressing substantive concerns but also in terms of the epistemological, moral world in which these issues arise, are recognised as issues, and understood. The distinctive voice of a New Zealand political, moral, or legal philosophy will articulate not only what the agenda items are that are seen to be important, but also the methodology by which they are given priority and shaped.

Jurisprudence is, for text book and classroom purposes, often built around the dramatic cases: the status of post-revolutionary governments; the moral imperatives of extreme human circumstances; the implications of the apparent absence of law or the failure of human decency; and the process and legitimacy of the deliberate creation of a new social order. Writing in Europe, it is as though all of a jurist's dreams were to come true in terms of the creation of problem cases. For example: what are the moral, medical and legal implications of the decision taken to maintain the body of a dead woman on a respirator, for a matter of months, until such time as the foetus she is carring is delivered;[6] are there any "rights" of asylum for those oppressed or threatened

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6 The ironies of philosophy and politics become all the more pressing when, on the one hand, part of the justification for keeping the mother ticking over - "alive" would not be an appropriate term - concerns the right of the foetus to the medical technology that would give it the chance of life, and, on the other, caution is expressed about the political propriety of military (another kind of technology) intervention in Bosnia to save lives, or, yet again, resources are not so readily

by their own home regimes; how liberal and tolerant will the modern state remain in the face of the threat of a strong and increasingly well-organised right-wing movement; what is the status of a legal system in transition where old courses, selected aspects of the old law, persist alongside the extension of another state's (West Germany's) law to the "new states";[7] how do domestic politics and international policies respond in the face of the problems of civil war on the doorstep; what happens to sovereignty in the face of the process (not entirely enthusiastically faced) of European integration? And so on.

The implications of such problems cases? First, and again typically for textbook purposes, they serve to test, extend and exemplify the power of particular theories or models to resolve the familiar and the new problems of a complex society. Second - and this is where the challenge of these essays ought to lie - they indicate the ways in which the old moral and political tools don't always work. And they don't work precisely because of the novelty of the problems, or because of their significance, or because what is required is not an extension of existing solutions but rather a more significant epistemological shift. New problems, and new articulations of some of the familiar problems, can no longer be stuffed into the old categories.[8] The solutions require to be paradigmatic rather than pragmatic.

The essays in this collection indicate that the Treaty - and all the surrounding debate - can be considered in these two ways. Either the Treaty can be understood in terms of, and may modify, prevailing jurisprudence about sovereignty, the Hobbesian social contract, and so on. Or, as Jackson's essay especially indicates and as the preface promises, what might emerge is a "new voice", a different kind of political and moral discourse. This is where this collection is disappointing because the opportunity seems to have been missed.

One possibility occurs on re-reading: that the more general papers could be read first. This is especially so of the elegant and articulate paper by Waldron ("Historic Injustice: Its Remembrance and Supercession") on justice and rectification and the paper by Pettitt ("Liberty in the Republic") on libertarianism and republicanism. The value of first of these papers lies in the recognition of general principles of historical injustice and tasks of rectification; in the recognition of the contingency of history (that things *might* have happened otherwise); and in the importance of "historical remembrance" (that is, that rectification has as much to do with identity as it has to do with the refinements of

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available for the children (these ones already alive, but barely) of Somalia, who tend to appear in the same news hour. This case, from the daily news broadcasts, becomes a touch more gruesome when it is revealed that, in order to simulate life in the womb of a living mother, medical staff will regularly move the libs and body of the dead mother. But squeamishness, or course, does not answer any of the moral problems.

7 See, for the a first hand comment at the time of transition, I Markowitz "Last Days" (1992) 80 California LR 55.

8 See, eg K Bosselman *In Namen der Nature: der Weg zun Ökologischen Rechtsstaat* Scherz Verlag, Bern, München, Wien, 1992; P Taylor *The Greenhouse Effect. Danger or Opportunity* London, 1992.

moral philosophy). There is also an examination of the different ways of changing the past (either acting to alter the consequences of what would otherwise flow from the past; or preventing its repetition or perpetuation (145)). The important theme in this - and it is a theme that occurs through critical jurisprudence - the recognition of "contingency" of contemporary law and social life. In critical jurisprudence, this idea forms part of the discussion of the indeterminacy of rules, and the problems of formalism and legalism. In this case of this essay, it is an awareness of the contingency of any action we might take to alter the effects of historic injustice: we do not really know what might have otherwise happened. If there is a broad theme that can be drawn from the papers by Waldron and Pettit, it may revolve around such an idea of contingency, and reinforce the sense that the dialogue about new directions and methods is only just beginning.

The value of Pettitt's paper seems to me to be this: though it was not specifically written for this collection, nor oriented in the least towards New Zealand, the examination of the nature of liberty, from libertarian and republican perspectives does make it clear that legitimacy is shaped by our maps and models. Both of these are models within the broadly liberal tradition (thus illustrating, indirectly, precisely the kind of problems that Jackson may allude to, that is, that liberal tolerance and philosophical catholicism allow a considerable degree of accommodation of competing views - advantages of liberal pluralism). In effect, that debate about legitimacy can continue in the wings while everyday political life goes on. And the distance between political philosophy and political pragmatics grows greater.

What is important and needs to be read into this paper, is the sense that *having* a philosophy is important. The examples used by Pettitt - punishment, provision of legal aid, welfare services, as well as comment on the general principles of legitimacy - illustrate importance of having a coherent framework for responding to the political and moral world around us, and for political criticism.

This, of course, is where the paradox arises for this collection: on the one hand, there may be the pursuit of that coherence, of *the* political voice, of morally comprehensive methodologies; on the other, the recognition, through feminist theory, theory by and of minorities and indigenous peoples, that such a single political theme and voice will still - because of its univocality - exclude those who have previously been excluded and silenced.

Hence, reading these two papers first (which I didn't) might set the scene for the discourse which we can read into the other papers. What may also be read into Pettitt's paper is that the ongoing debate between competing philosophies of the state, of the relations of individual and collective, of the sources of obligation, legitimacy, justice and rights, can continue without the sky falling in. That debate, of course, is, as it were, between philosophies of the same colour: libertarianism, utilitarianism, republicanism can debate the finer issues from a perspective of a common heritage. Yet is not impossible to imagine that the same discourse can fruitfully continue, and shape the political state, if voices in a different colour and gender are added.

Again, what is valuable, in the collection as a whole and in these two papers in particular is the articulation of the importance of having a philosophy, in the face of the

low status of political philosophy in New Zealand, and the tendency towards the pragmatic, premetric no.8 fencing wire solution. The implications of not having a philosophy are that contingency and uncertainty are reinforced in contemporary society by rapid changes; the lack remains of an articulate basic for criticism and inquiry (hence, perhaps, significant "don't know" proportions in polls on just about anything); a tendency towards political, moral intuitionism prevails; and we lack the basis for development or direction in policy and practice. It is, of course, not entirely true that we don't have a philosophy - politicians and public alike are able to refer to broad principles of "western, liberal democracy". But problems remain precisely in the eclecticism and relativism of such a tradition and its capacity to accommodate of wide range of substantive options.

The implications, then, of this collection of essays seem to include:

(i) The significance of challenges to ruling myths of the liberal, democratic state and, especially, of its intellectual and philosophical methodology.

(ii) The recognition of cultural base of perceptions, and of our philosophical responses. Liberal philosophy is not neutral nor, as it were, context-free.

(iii) The possibility of parallel models of:

  (a) the moral actor, reflecting parallel emphases on the individual and the collective;

  (b) political society and its fundamental legitimacy;

  (c) sanctions, reflecting parallel models of responsibility and response;

  (d) sovereignty, whether shared, divided or, as seems more likely, completely reconstructed from its nineteenth century Austinian basis;

(iv) The possibility that rights, status and human worth precede the state, thus challenging the conventional Rechtsstaat assumptions.

(v) The recognition of new circumstances of political society and that the application of existing methods and models will not necessarily do (precisely because such methods are, at core, part of the problem as much as they are part of the solution).

(vi) A recognition that political philosophy and jurisprudence are less a matter of substance than of process, which process is especially invited by the opening essay of this collection. It may follow from this that what we now face is the possibility of a negotiated justice, that is, a shift from a philosophy and method of the overarching state and legal system within which there is some scope for bargaining about outcomes, to a philosophy and method in which it is recognised that there will also be bargaining about the substance and form of the law, and certainly will be bargaining about interests.

But this goes beyond the review. The simple and single point here is that a wider reading of essays indicates provocative possibilities of reconstruction of political and moral theory. The collection is a wide and interesting one. The only regret here is that, in this collection, there has not been the debate *between* the essayists, as model of a "new philosophy" for New Zealand.

Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts, (ed) William Renwick, Victoria University Press, Wellington, 1991, 248 pp.

Reviewed by Bryan Gilling*

This book is an attempt to take the New Zealand debate over the Treaty of Waitangi, which tends to focus solely on its background, meaning and application within this country, and to enrich that debate by placing it in a broader international context. The fifteen articles which comprise it were originally aired as papers given at the 1990 Stout Conference, held at the Stout Research Centre, Victoria University, in keeping with that year's activities recognising the sesquicentennial of the signing of the Treaty in 1840. The editor states the theme of the book as "the justifications by which rights are claimed, whether they are rights to sovereignty, to rights as an indigenous people or, as in New Zealand now, to some accommodation between these two very different kinds of rights" (8).

MPK Sorrenson writes generally about imperial treaties prior to Waitangi, pointing out that much of the form and wording of Waitangi is virtually identical with several British treaties in Gambia after 1825. He notes the United States inclusion of their treaties with indigenous inhabitants under the Article IV of their Constitution and how some Waitangi concepts, especially Crown pre-emption, were embodied there in the 1763 Royal Proclamation. The Australian doctrine of *terra nullius* and the resulting abuse of Aborigines led, he thinks, to extra care being taken by Hobson and Busby. The Maori text he sees as Waitangi's most distinctive feature and one with which historians and lawyers have yet to grapple fully.

Most succeeding authors take various Pacific situations more or less analogous to the Treaty. Sometimes they tie them to some extent to the Treaty, sometimes they do not, or the linkage is at best cursory. This is perhaps one of the greatest weaknesses for the non-specialist New Zealand reader; in a book ostensibly putting the Treaty of Waitangi "in international contexts", all too frequently the reader is left to do that for herself. Perhaps this is satisfactory for experts who can make those links, but others will be left grasping at straws. The international contexts, too, have been closely limited, drawn from countries where an imperial power of Anglo Saxon origin exerted its power in the last couple of centuries - preferably in the Pacific region - and tried to regularise its relationship with the indigenous people by means of treaties. So South

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* Post Doctoral Fellow, Law Faculty, Victoria University of Wellington.

America, Asia and even Africa go virtually unmentioned. There is no sense of how colonies of, say, France, Germany and Spain fared under regimes with substantially different constitutional and legal heritages. Another disappointment is the unevenness in length and depth of the contributions, presumably reflecting their symposium origins as either substantive papers or responses. Those by Durie and Williams are amongst those which have suffered most and deserved more space to develop.

Two articles deal with North America. Donald Brown gives a historical survey of the loss and reacquisition of tribal sovereignty and the right to self-government of groups of American Indians, often through reliance upon treaties. In what will resonate for New Zealanders he cites social problems which have resulted from the failure of historical education to portray the cultural and social complexity of Indian life. Robin Fisher writes of Indian land claims in western Canada and elucidates both the differences and similarities compared with New Zealand - Governor Douglas explicitly copied New Zealand Company purchases when making treaties in the 1840s. Canadian prairie treaties recognised Indians as owners of the soil, but the familiar question is raised of their understanding what they signed. In subsequent legal challenges they have been greatly hindered as recently as 1991 by courts' refusal to recognise traditional oral evidence.

The next eight articles are about the Pacific. IC Campbell surveys British treaties with Polynesians. He contrasts the roles of residents like Busby, who was supposed to 'exercise a benign influence on British subjects' to moderate their impact on Maori, with those of consuls elsewhere whose job was to represent their country's interests assertively. The treaties negotiated elsewhere have been limited either in lifespan or application: 'only the Treaty of Waitangi continues to have as ambiguous and confused an identity and meaning as it did at the beginning'. (81) Sione Latukefu studies Tonga specifically and its history of treaties with the British. The Tongan king was never removed and the monarchy endured, but its authority was undermined especially in a 1900 'Treaty of Friendship' and its 1905 supplement and not regained until independence. William EH Tagupa makes two contributions. The first compares Hawaii, American Samoa and the Northern Mariana Islands. American Samoa received a relatively favourable treaty, because it lacked commercial appeal, and now its exact status *vis-a-vis* the United States is uncertain. The Northern Marianas, acquired after World War II, negotiated commonwealth status and their independent sovereignty was confirmed in a 1990 Federal Appeals Court decision. Hawaii achieved full state status 61 years after annexation, but native Hawaiians have had to reconstruct a legal identity. They have been unsuccessful in gaining reparations but some customary rights have been recognised, although these often must be shared with the general public. His second article explores the differences between the Fijian situation and many others. In that it was a commercial colony rather than settler one it was left to retain many aspects of traditional social organisation, such as the Council of Chiefs - which of recent times has retained sufficient influence to resist successfully the onset of democracy. Alison Quentin-Baxter tries to apply Tagupa's themes to New Zealand and the problems of traditional customary culture in modern Western-oriented economies and societies. She concludes that some modification in Maori social structures will be necessary to enable present-day managment of economic assets.

Pat O'Shane argues that a treaty such as Waitangi would be of little benefit or relevance to Australian Aborigines, being really only "the property of an elite group composed largely of lawyers and politicians... on both sides". (150) What is of deep concern to 'grass-roots' Aborigines are issues of health, education, housing and land rights.

Alan Ward looks to the fostering of national community advanced by emphasis on shared experience. He argues that treaties ultimately derive from power struggles and so are ineffective as the bases for fundamental law, therefore they are inappropriate set in concrete in constitutional documents such as the Bill of Rights. Historically law needs balancing with different world views, there should be less appeal to ideology or fundamental law and more honest horse trading. "The Treaty is a charter for such transactions, in the joint development of a creative modern Pacific society. The Tribunal can seek out and identify the items to be transacted; the horse-traders can get on with their trading. The role of the historians is to help keep them honest" (129). Malama Meleisea argues that such an approach overlooks historical inequities and the difficulties of trading from a position of weakness.

The remaining authors deal specifically with the New Zealand context. The approach and insight of ETJ Durie, Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal, is rooted in praxis as he deals with the Treaty in Maori History. For Maori, he rejects O'Shane's view of Aboriginal sovereignty as a legal fiction. He notes parallels with statements of principle such as the Universal Declaration of the Rights of Indigenous Peoples and highlights the Maori view of the Treaty as an alliance rather than a cession of sovereignty, with the Queen managing unruly settlers and Maori continuing their self-government. His survey of Maori struggles to keep the Treaty in the European mind should be noted by those who perceive recent developments as jumping on a contemporary bandwagon, but will be tantalisingly brief for those unfamiliar with the events and people to whom he refers. Durie makes clear what is often a mutual frustration to participants in the Tribunal process: historians derive patterns and meanings from analysis of discrete facts, lawyers interpret those facts in the light of the pre-existing corpus of legal principles and rules. Such differences may lead to diametrically varying assessments. He observes that lawyers and Maori are close in their concentration on the Treaty's broad principles and objectives, whether as fundamental constitutional document or sacred covenant, and that hence in the Tribunal context the task is to recapture the spirit of the Treaty. With regard specifically to the sovereignty issue, Durie says, to pit kawanatanga against rangatiratanga somewhat misses the point, as the long-standing Maori view has been that both should exist and operate together, each "on their piece".

Paul McHugh writes a characteristically detailed study of the historical development and application of standard legal concepts of sovereignty, intending to expose the historical dynamics of the development of British constitutional theory. The Treaty was drafted in a European milieu which regarded civil and political rights as property, hence the Treaty provisions were couched in such language. Sovereignty has been regarded as indivisible and located solely in the Crown, now Parliament, hence statute has been pre-eminent. The Whig understanding, so effectively frozen by Dicey into legal thought that it became a "conceptual iceberg", has in the second half of the twentieth century

come under numerous challenges worldwide with the decline of the empires and the resurgence of indigenous conceptual frameworks. McHugh identifies a 'new view' in which a distinction is made between the "manner and form" in which sovereignty is expressed, which may be altered, and the "substance", the actual subject matter which remains unchanged. This challenge to the doctrine of indivisible parliamentary sovereignty has led to recent Court of Appeal decisions reviewing the actions of the Crown in light of the Treaty's principles.

In a lively piece, Joe Williams responds to McHugh by pointing out that the Whig view rests on government by consent, and that Maori were almost entirely excluded from governmental processes, hence Diceyan theories of sovereignty are inapplicable. Also, given the Treaty's reservation of tino rangatiratanga and thus tribal self-government to Maori chiefs, he asks how could an unfettered legislature have been envisaged? In a typically memorable phrase, Williams asserts that in a British settlement process the justification of an unreviewable legislature was 'not so much the need to protect the political sensibilities of the Whigs as the necessity to suppress the political aspirations of the Wogs' (192). He points out that the document was not the *Proclamation* of Waitangi, but the *Treaty*, by its existence recognising the need to reconcile two cultures rather than imposing one over the other, with one culture accepting the other on certain specified conditions, and with the Treaty acting as the conduit by which certain Governmental powers were transferred to the Crown. Frequently he questions the applicability, even the logic, of both the Whig view of sovereignty and its implications away from its English origins.

Renwick's epilogue evaluates the theme of the Treaty as the Maori Magna Carta, which focuses on what Pakeha gave and Maori "gained", but not on the Maori rights also guaranteed or the undivided sovereignty subsequently claimed by the Crown. He reviews the preceding articles and tries to tie them back to the New Zealand situation in either a compare or contrast frame. He notes the uniqueness of the Treaty in that it was for the British a matter of deliberate policy and an expression of good faith, while it has remained the cornerstone of Maoris' subsequent relations with the Crown. He notes how, too, largely through the work of the Waitangi Tribunal, the realisation that Godzone's history is in reality heavily scarred with institutional racism is reawakening, however slowly and unevenly, a Pakeha conscience that wrongs need to be righted, redefining the New Zealand political community.

Renwick concludes the book by asking whether there is any other country in which a similar historical process is being worked through and on the evidence presented here the answer must be no. As already mentioned, this is the book's great weakness for the non-specialist reader. The international contexts discussed are seldom related at any length to New Zealand's Treaty of Waitangi and readers are usually left to draw their own parallels, leaving paramount the feeling of the uniqueness of Waitangi and giving scant assistance to those seeking to ease this country's travail by calling on the experiences of others.

Butterworths Commercial Law in New Zealand, (2nd Edition) by J Farrar and A Borrowdale (eds, Butterworths, Wellington, 1992 pp civ + 1008 (including index)

Reviewed by Teresa Shreves*

Nearly 40 years have passed since the first publication of *Commercial Law in New Zealand* by Leys and Northey. That book drew upon the earlier work of Harle's *Mercantile Law in New Zealand.* This book is the 2nd edition of the successor to those works.

Since 1956 the scope of commercial law has dramatically broadened. It prompts one to ponder the question: what is "commercial law" and a "commercial lawyer"? The first edition's authors were of the view that the commercial lawyer's practice consisted mainly of advising persons in commerce on matters having to do with the areas of law listed - contract, bankruptcy, insurance, arbitration and the Chattels Transfer Act 1924. Some areas of the law (notably taxation and company law) never have been considered part of general commercial law; even in 1956 these were viewed as specialist areas. Can we confidently say today that there is such an animal as a "general" commercial lawyer? Perhaps we can, although the increasing complexity and scope of commercial law clearly makes such an animal an endangered species. It is more likely today that we will encounter a commercial lawyer who "specialises" in some aspect of commercial law. Competition law, consumer law, banking law and other specialist fields require indepth knowledge gained from study (usually multidisciplinary) and practice. The risk then of a book of this type is that its coverage will be considered too broad and it will be dispatched by more specialised texts able to offer a more indepth analysis of each topic.

However, it is probably correct to say that New Zealand still has a large segment of lawyers who regard themselves as having a "general" commercial practice. This book will provide them with a sound discussion on a wide range of topics. Whilst the coverage is broad, quality and depth of analysis have not been sacrificed. It also offers a tool to help the lawyer think laterally about a legal problem. Its sections on the inter-relationship of areas of law, for example, the relationship between the Fair Trading Act 1986 and other areas of law, are most helpful in this regard.

This edition contains new chapters on the Fair Trading Act and the Motor Vehicle Securities Act 1989. The treatment of the Motor Vehicle Securities Act 1989 is very good, although slightly repetitious. The discussion of the submissions made to the parliamentary select committee on the Act helps to put the legislation in perspective for the reader and, given the increasing willingness of the courts to look at the legislative history of an Act as an aid to its interpretation,[1] may prove to be very useful to practitioners coming to trips with the provisions of the Act. Fair trading and competition law are given separate treatments; both are very helpful. The reader might perhaps want a general discussion of the role and administration of the Commerce

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* Assistant Lecturer, Law Faculty, Victoria University of Wellington.

1 *See Marac Life Assurance Ltd* v *Commissioner of Inland Revenue* [1986] 1 NZLR 694.

Commission under both Acts, which could easily have been accomplished with a combined treatment of the two. A cross reference to the discussion of the Commission under the Commerce Act would have worked also. Books covering such a range of increasingly complex areas of the law would benefit from a glossary of terms, as found in the new edition of *Gower's Principles of Modern Company Law.*[2]

The law is stated as at September 1991. Given the rapid change of commercial law, there will be more developments, perhaps for a later edition, including changes to the Sale of Goods Act 1908, already being discussed by the Law Commission, unfair contracts (mentioned in the book as the subject of review) and consumer guarantees. In anticipation of the introduction of personal property securities legislation to replace the Chattel Transfer Act 1924 and eventually, it is hoped, Part IV of the Companies Act 1955, the editors have included a short chapter on the proposed personal property regime.

The book should be the ideal desk reference of all general commercial lawyers and an ideal first reference for those seeking or requiring more specialist knowledge.

Understanding Commercial Law, (2nd edition) by P Gerbic and M Lawrence, Butterworths, Wellington, 1991. pp xxxiii + 497 (including index).

Reviewed by Teresa Shreves*

This book is intended for use by students who need to know about the principles and application of commercial law, but who are not planning to become lawyers. It is designed to cover the introduction to commercial law module of the national certificate in business studies - now able to be cross credited towards a bachelor of business through a number of the polytechnic institutions. Its title is a slight misnomer in that the book is much more an introduction to understanding law generally than to understanding commercial law. However, as an introduction to the law, students will find the book useful. It contains a good discussion of the organisation of government in New Zealand and the sources of New Zealand law. In particular, the process by which a statute is enacted is of great service. The limited knowledge that many people including lawyers, have about the processes of government and the enactment of legislation is not sufficient in today's commercial environment. With growing privatisation of state enterprises and increasing involvement of private individuals in the legislative and parliamentary select committee process, this knowledge is essential.

As the book is aimed at people who do not intend to become lawyers, the extensive discussion and citation of cases must be of questionable utility. It is more important to have an up-to-date treatment of the current state of the law in relevant areas. In this regard, the book falls down slightly. For example, in the treatment of the pre-existing

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2 (5 ed, Sweet & Maxwell, London, 1992).

* Assistant Lecturer, Law Faculty, Victoria University of Wellington.

duty rule, originally laid down in the case of *Stilk* v *Myrick*,[1] the book only discusses the principles as laid down by that case; there is no discussion of the trend in modern commercial cases towards replacing the defence of lack of consideration for the second agreement with economic duress.[2] The question of what constitutes economic duress (as opposed to legitimate business pressure) can arise in the context of everyday supply or service contracts and may well be encountered by the student later. Although the book discusses duress, it would have been worth mentioning it in connection with the examples of past consideration.

For the commerce student the full import of the law will be felt through transactions. In this regard, the book's use of examples is most helpful. A hope for later editions perhaps is an even greater use of a lateral approach to analysing the legal problems in the examples. In practice, a legal matter will rarely involve only one aspect of the law. Access and usefulness to general readers of a book of this type will be achieved through its index. Care must be taken that these are complete and correct. This reviewer found that the index contained a number of incorrect references, which may be very irritating to readers.

Overall, the test is well presented with liberal use of subheadings and a very complete table of contents. It is a good first look at the Law.

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1 (1809) 2 Camp 317; 6 ER 129.

2 *Williams* v *Roffey Bros Ltd* [1991] 1 QB 1, 21 *per Purchas,LJ.*

Errata

VUWLR, **23,** 1, 21 - 23.

In the book reviews by Teresa Shreves of *Butterworths Commercial Law in New Zealand,* and *Understanding Commercial Law,*

"dispatched" should read "displaced",
"trips" should read "grips" and
"test" should read "text".

The VUWLR Editorial Committee apologises for these transcription errors.