FACILITATING AND REGULATING COMMERCE

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I INTRODUCTION

To recognise that the theme of the conference is roles and perspectives in the law, especially in the light of the career of Sir Ivor Richardson, my paper adopts some boundaries for what would otherwise be a textbook topic. To mark Sir Ivor's judicial career, the temporal boundary is 25 years, 1977 – 2002. The geographical boundary is New Zealand, with passing references across the Tasman under CER and to London for the Privy Council. The institutional boundary is the New Zealand Court of Appeal of which Sir Ivor has been such an influential member throughout the 25 years. And, with the agreement of my co-presenters, Alan Galbraith QC and Bob Dugan, the topic boundaries are competition and securities law.

Having now narrowed the scope of my paper in these ways, the sub-title which emerges in the form of a question is perhaps – how has the New Zealand Court of Appeal, and Sir Ivor in particular, approached the facilitation and regulation of commerce in the areas of competition and securities law over the past 25 years? Once the question is thus formulated, it will be appreciated that the starting point should be a brief survey of the economic and legislative policies and enactments which have set the scene for commerce in New Zealand since 1977.

Following this survey, perforce panoramic, I propose to touch on the roles of the two relevant Commissions, Securities and Commerce, as seen by the Court of Appeal, before examining a number of specific Court of Appeal decisions in such diverse areas as the record industry, primary production, telecommunications and electricity transmission. After reference to Sir Ivor's approach to the Securities Act and his contribution to the emergence of the underlying discipline of law and economics, a conclusion will be reached.

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II 1977 AND ALL THAT

25 years ago, when the 46 year-old Ivor Richardson was appointed to the Supreme Court and then seven months later quickly promoted to the Court of Appeal, New Zealand was a heavily regulated and closely governed country. Policies and legislation enacted to insulate the New Zealand economy from external influence and to establish the welfare state remained in place. Tariff barriers, import licensing and exchange controls, price and wage controls, and the control of the marketing of agricultural products and industrial development were entrenched. The Government intervened in the economy through far-reaching regulation and licensing regimes. Many public utilities, including the railways, airways, telecommunications and electricity generation and transmission plants, were owned by the State. High rates of personal and income tax were required to support the Government's activities. In the 1970s Government policies directed at controlling an increasing rate of inflation included regulations which subjected most goods and services to prescribed maximum prices. Encouragement of competitive markets was not a feature of Government policy in this period. The Government, with its "think big" policy, was directly involved in encouraging several major industrial developments.

The Government's economic policies were implemented through regulations and orders made under legislation such as the Control of Prices Act 1947, the Economic Stabilisation Act 1948 and the National Development Act 1979. The introduction of the Commerce Act 1975, which amalgamated the Trade Practices Act 1958 and the Control of Prices Act 1947,[1] did not follow the example of the Australian Trade Practices Act 1974 which had adopted a US-style anti-trust law designed to promote competition.[2] Nor did the creation of the Securities Commission by the Securities Act 1978 suggest a lessening of commercial regulation.

The heavy-handed legislative and regulatory environment of the late 1970s and early 1980s was not designed to facilitate commerce. Instead it encouraged compliance, complaints and collusion rather than competition. Trade associations, with minimum pricing and market sharing arrangements which would now be considered anti-competitive, flourished. The few commercial regulatory issues which reached the Court of Appeal at that time tended to involve administrative law questions. Challenges to the validity of the carless days regulations[3] and procedures followed under the National

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1 *The Laws of New Zealand* (Butterworths, Wellington) Competition, para 5.

2 See "Cross Tasman Trade in Competition Law: Convergence or Divergence?" in Frances Hanks and Philip Williams (eds) *Trade Practices Act A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 54.

3 *Brader v Minister of Transport* [1981] 1 NZLR 73 (CA).

Development Act 1979 relating to the Aramoana aluminium smelter[4] and the Motonui synthetic petroleum plant[5] all failed in the Court of Appeal. An attempt to review a decision of the Secretary of Energy as to the price of natural gas under the Positive List of Controlled Goods and Services Order 1981[6] issued under the Commerce Act 1975 was unsuccessful.[7] The Price Freeze Regulations 1982[8] were held to prevent Tasman Pulp & Paper Co Ltd from passing on an agreed increase in the price of newsprint.[9] Sir Ivor was a member of the Court in the National Development Act cases, but only delivered a separate judgment in one.[10] The opportunity for greater involvement in cases involving the facilitation of commerce was yet to come.

III THE WINDS OF CHANGE IN THE 1980s

The Australia and New Zealand Closer Economic Relations Trade Agreement, known as ANZCERTA or CER, of 1 January 1983 was perhaps the first sign of impending change for New Zealand. The agreement promised the gradual but progressive elimination of trade barriers between the two countries and a general improvement in productive efficiency resulting from integrated markets. The succeeding years were to see the blossoming of the trade relationship between Australia and New Zealand and a commitment to "harmonisation" of business law and regulation between the two countries.[11] For the Court of Appeal perhaps the closest it got to the effects of CER in those days was the arrival of Fosters lager and the resultant anti-dumping case.[12]

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4 *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA); *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 530 (CA).

5 *North Taranaki Environment Protection Association v Governor-General* [1982] 1 NZLR 312 (CA).

6 Positive List of Controlled Goods and Services Order 1981 (SR 1981/37).

7 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

8 Price Freeze Regulations 1982 (SR 1982/142).

9 *Tasman Pulp & Paper Co Ltd v Newspaper Publishers Association of New Zealand Inc* [1983] NZLR 600 (CA).

10 *CREEDNZ Inc v Governor-General* [1981] NZLR 172, 186 (CA) Richardson J.

11 Memorandum of Understanding on the Harmonisation of Business Law (1 July 1988); see Douglas White QC "Cross Tasman Trade in Competition Law: Convergence or Divergence?" in Frances Hanks and Philip Williams (eds) *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 63.

12 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA). For an economic analysis of the background issues, see Des O'Dea "Import Liberalisation, Strong Beers and Light Cans" in Allan Bollard and Brian Easton (eds) *Markets, Regulation and Pricing Research Paper 31*, (NZIER, Wellington, 1985).

It was, however, the election of a new Government in mid-1984 which led to a fundamental shift in New Zealand's commercial and regulatory environment. The reforms of the 1980s and 1990s affected practically every sector of the economy as the various controls and licensing regimes were dismantled and policies of deregulation, corporatisation and privatisation were implemented.[13]

The legislation which had underpinned the regulated economy was repealed and replaced by new legislation which reformed business law comprehensively. The new Commerce Act 1986, which governed mergers and trade practices, and the new Fair Trading Act 1986, which governed consumer rights, were modelled largely, but not entirely on the Australian Trade Practices Act 1974. The Securities Amendment Act 1988, which introduced insider trading sanctions and obligations relating to the disclosure of interests of substantial security holders in public issuers,[14] and the Companies Act 1994, which reformed company law, completed the relevant legislative changes. The Commerce Act, designed to promote competition in markets in New Zealand and to deter anti-competitive conduct by market participants, relied heavily on economic concepts which were to prove relatively novel for lawyers and the courts. The Act increased the role of the Commerce Commission as a tribunal and as an independent enforcement agency and introduced appeal rights to the High Court and private rights of action. It set the scene for the courts in the following period.

IV THE COMMISSIONS

Initial responsibility for the administration of securities and competition law in New Zealand rests with the respective Commissions, the Securities Commission and the Commerce Commission. They are in their respective spheres responsible for facilitating and regulating significant aspects of commercial activity in New Zealand on a day-to-day basis.[15] The courts have a number of different roles to fulfil in relation to the Commissions. In addition to appellate functions,[16] the courts determine cases in which the Commissions act as enforcement agencies.[17] The Court of Appeal has also been required to review the nature and scope of the activities of the two Commissions.

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13 See Brian Silverstone, Allan Bollard, and Ralph Lattimore (eds) *A Study of Economic Reform: The Case of New Zealand*, (Elsevier, Amsterdam, 1996) 24-28.

14 Part IX, Securities Law below.

15 The published Annual Reports of the two Commissions provide detailed descriptions and statistics of their activities.

16 Securities Act 1978, s 26; Commerce Act 1986, s 91.

17 For example *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC); *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA).

The Securities Commission, established by the Securities Act 1978, is responsible for a range of functions including the supervision and enforcement of restrictions on the offer and allotment of securities to the public and keeping under review securities law and practices. In considering the role and functions of the Securities Commission, the Court of Appeal has held that the Commission had power to investigate in depth a particular company take-over or attempted take-over while the attempt was in progress[18] and that the Commission owed no duty of care to members of the public in respect of the publication of newspaper advertisements not complying with the securities legislation.[19] In rejecting the argument for the imposition of a duty of care owed by the Securities Commission, Richardson J analysed the statutory functions and powers of the Commission and concluded:[20]

> In the end the question of whether the Commission owed the plaintiffs a duty of care once it was aware of a breach of the Act must be determined having regard to the practicalities of the situation and the role of the Commission as determined by the Act. It may be that to follow up individual complaints would not significantly tax the Commission's resources. However the Act clearly envisages that the Commission must exercise its discretion as to how it goes about its numerous functions. To place a duty of care on the Commission in this context would be to interfere with that discretion. ... A distinction must be made however between what the Commission is empowered to do, and what it must owe a duty of care to investors to do. I am not persuaded that it was contemplated by the Act that such a duty of care be owed, nor that in any event the individual investors can be said to place such reliance on the Commission that they are in a relationship of proximity justifying such a duty.

These decisions indicate a reluctance on the part of the Court to interfere in the exercise, or non-exercise, by the Securities Commission of its regulatory functions. The Court accepted that Parliament had decided that these were matters for the Commission to determine.

The Court of Appeal adopted a similar approach to the role and functions of the Commerce Commission, at least initially, accepting that Commission confidentiality orders should normally be respected in subsequent Court proceedings[21] and that the question whether divestment undertakings would meet the requirements of the Commerce Act in a

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18 *City Realties Ltd v Securities Commission* [1982] 1 NZLR 74 (CA).

19 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA); and Sir Ivor Richardson "Law and Economics – and Why New Zealand Needs It" (Paper presented to New Zealand Law Society Conference, Wellington, 2001) 20-21.

20 *Fleming*, 530 – 531, Richardson J.

21 *Brierley Investments Ltd v Lion Corporation Ltd* [1987] 1 NZLR 600 (CA).

contested merger case should be considered in the first instance by the Commission rather than by the Court.[22] More recently, however, the absence of an adequate functions provision in the Commerce Act led the Court of Appeal to decide that the Commission's powers did not extend to the conduct of its own inquiry and the publication of a report on the development of competition in the telecommunications industry.[23]

V THE RECORD INDUSTRY

It was perhaps not a total surprise that in the decade marked by consumerism the first case to reach the Court of Appeal under sections 27 and 36 of the Commerce Act should involve the top 50 popular musical recordings: *Tru Tone Ltd v Festival Records Retail Marketing Ltd.*[24] Tru Tone and other Auckland retailers challenged Festival Records' maximum retail prices for its records, cassettes and discs, alleging breach of section 27, which prohibits contracts, arrangements and understandings containing provisions having the purpose or effect of substantially lessening competition in a market, and section 36, which prohibited the use of a dominant position in a market place for a proscribed anti-competitive purpose,[25] and claiming damages and injunctive relief. The challenge was rejected by both the High Court and the Court of Appeal. In what, with the benefit of hindsight, may now be described as a landmark judgment, Richardson J for the Court, dealt with several vital competition law issues and recognised the significance of economic expertise both through lay membership of the High Court and through the witnesses called by the parties to adduce evidence on the economic issues.[26] The latter factors meant that an appellate court was unlikely to interfere with High Court factual findings unless, as subsequently occurred, the High Court was adopting a different approach to the Commission itself as an expert tribunal.[27]

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22 *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10 (CA).

23 *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA).

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

25 The Commerce Amendment Act 2001 altered the threshold in s 36 to prohibit persons taking advantage of a substantial degree of market power for a proscribed anti-competitive purpose.

26 *Tru Tone Ltd*, above, 357, Richardson J. As to lay membership generally, see Commerce Act 1986, s 77(1) and *The Laws of New Zealand* (Butterworths, Wellington) Competition, paras 229-233.

27 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429, 433 (CA) Cooke P; 446 Richardson J. And even decisions of the Commerce Commission, as an expert tribunal, will not necessarily survive scrutiny by the Court of Appeal: *Commerce Commission v Southern Cross Medical Care Society* (31 December 2001) Court of Appeal, CA 89/01, Richardson P and Tipping J, Keith J dissenting and relying in large part on the expertise and procedures of the commission: para 98 (ff).

The Judge's analysis of the underlying economic purpose of the legislation and its principal economic concepts deserves particular commendation. In an oft-cited passage, he said:[28]

> In terms of the long title the Commerce Act is an Act to promote competition in markets in New Zealand. It is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.

After referring to the statutory definitions of "competition" and "market" the Judge continued:[29]

> The identification of the relevant market is the first step towards the assessment of the current state of competition and of the nature and extent of any inhibition of competition. At each step it is a practical jury question of fact and degree.

And a little later:[30]

> … "Market" is ordinarily regarded as a multi-dimensional concept with dimensions of product, functional level, space and time.

The fact that competition is not a static state of affairs, but a process dependent on factors such as market concentration, barriers to entry, product differentiation, vertical relationships, arrangements between firms and behaviour was emphasised.[31] Applying these various economic concepts to the facts of the case, the Judge summarised the position in the following passage:[32]

> Viewed in relation to product and time the single album definition of market ignores commercial realities. It focuses on short-run phenomena. It presents a snap shot rather than a

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28 For example, *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662, 699 (CA); *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731, 756 (CA); *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR 301, 322 (CA); and *Commerce Commission v Taylor Preston Ltd* [1998] 3 NZLR 498, 502 (CA) Richardson J.

29 *Tru Tone Ltd,* above, 358, Richardson J. This passage was subsequently cited by the Court of Appeal in *Power New Zealand Ltd v Mercury Energy Ltd* [1997] 2 NZLR 669, 677 (CA). As to the market concept generally, see Megan Richardson and Philip Williams (eds) *The Law and The Market* (Federation Press, Sydney, 1995).

30 *Tru Tone Ltd,* above, 359, Richardson J. The statutory definition of "market" was subsequently amended by the Commerce Amendment Act 1990 to add a reference to substitutability: *The Laws of New Zealand* (Butterworths, Wellington) Competition, para 62.

31 *Tru Tone Ltd,* above, 363.

32 *Tru Tone Ltd,* above, 360.

> moving picture of continuing commercial activities. Supply to distributors is not acquired on an album by album basis, but by licensors giving rights to any album produced by the artist or label. In arranging supply the distributor achieves economies of scope in what is a continuing activity. And retailers and consumers along with distributors are dependent on the flow of new albums to join and, in part, to displace existing albums – a process recognised and encouraged in the promotional and pricing arrangements.

Consequently the imposition of maximum retail prices by Festival Records was held not to contravene either section 27 or section 36.

These various passages from the judgment of Richardson J are but a selection chosen to indicate why this judgment reassured the commercial community that its author had a sure grasp of the relevant economic concepts and that the Commerce Act would be applied to facilitate and not impede the desired competitive market objective. *Tru Tone* provided a solid basis for the courts in subsequent restrictive trade practices litigation.

VI PRIMARY PRODUCTION

The continuing importance of primary production to the New Zealand economy does not require to be substantiated. Over the past 25 years exports of meat, wool, dairy, fruit and forestry products have remained the most significant contributors to New Zealand's export trade.[33] The importance of this export trade to the New Zealand economy inevitably meant that successive governments took a close interest in it, manifested in government involvement in and financial support for the co-operative producer boards which controlled the marketing of much of New Zealand's primary production.[34] While the producer boards were affected by the reforms of the late 1980s,[35] they remained in existence with largely monopoly powers until the late 1990s.

Against this background it was not entirely surprising that the issue of the relationship between the regulatory powers of one of the producer boards and the Commerce Act

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33 See New Zealand Year Books for figures

34 See the Dairy Board Act 1961 (to be repealed on 27 September 2002: Dairy Industry Restructuring Act 2001, ss 165, 5, 14 and 2(1)(c)), the Meat Export-control Act 1921-22 (repealed by the Meat Board Act 1997), the Wool Industry Act 1977 (repealed by the Wool Board Act 1997) and the Apple and Pear Marketing Act 1971 (repealed by the Apple and Pear Industry Restructuring Act 1999).

35 See the Dairy Board Amendment Act 1988, the Meat Export-control Amendment Act 1989, the Wool Industry Amendment Act 1988, and the Apple and Pear Marketing Amendment Act 1988 which reduced direct government involvement in the operation of the Boards and any government financial support.

should reach the courts. In *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*[36] the issue was whether the power of the Board under section 31 of the Apple and Pear Marketing Act 1971 to impose levies on growers of such nature and incidence as the Board thought fit constituted a statutory exception to the Commerce Act by virtue of section 43(1) of that Act which provided:

> Nothing in this part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment …

In the Court of Appeal the four Judges who heard the case all decided that a second tier levy imposed by the Board on growers in respect of added production was "specifically authorised" by section 31 so as to be outside the reach of the Commerce Act. In reaching their decisions Cooke P, Richardson and Casey JJ all referred to the special position of the producer board in the New Zealand economy.[37] And Bisson J agreed with them.[38] But it is the judgment of Richardson J which contains a detailed account of the history and place of producer boards generally and the Apple and Pear Marketing Board in particular in the New Zealand economy and a comprehensive analysis of the relevant statutory provisions which led him inexorably to the conclusion that the levy was specifically authorised.

In reaching this conclusion the Judge had this to say about the relationship between the two Acts:[39]

> But the Commerce Act does not incorporate and reflect all public interest considerations under which commerce operates. It is not the only statutory expression of relevant public policies. Other statutes rely to a greater or lesser extent on regulation rather than competitive markets to achieve their public policy objectives in particular areas of the economy. Public regulation is provided for because of dissatisfaction with market results. Those laws are part of the legal framework within which competition law is to operate. Not surprisingly then the Commerce Act itself, through [section] 43, recognises that general competition policies must yield in appropriate cases to regulatory decisions. But in New Zealand, as in other countries, the regulated industries vary greatly in the rationale, administration and intensity of their regulations.

In other words, the Judge saw the relevant legislative framework as a large canvas in which the differing enactments needed to be reconciled in order to produce a harmonious

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36 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA); [1991] 1 NZLR 257 (PC).

37 *New Zealand Apple and Pear Marketing Board,* above, 165, 167-168 and 176.

38 *New Zealand Apple and Pear Marketing Board,* above, 177.

39 *New Zealand Apple and Pear Marketing Board,* above, 167.

landscape.[40] This reflected his approach to the balance required between the facilitation and regulation of commerce in the important area of primary production in New Zealand. A quite different perspective was to be adopted, however, when the case reached the Privy Council.

The judgment of the Privy Council delivered by Lord Bridge narrowed the focus of the case because, it was held, the issue raised "turns simply upon a narrow point of construction".[41] The broader approach of the Court of Appeal based on the special position of the producer boards in the context of the legislative landscape was rejected by the Privy Council:[42]

> Their Lordships fully recognise the great importance which the Judicial Committee of the Privy Council should always attach to the opinions of Judges exercising jurisdiction in a Commonwealth country in any matter which may reflect their knowledge of local conditions. Yet, when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation.

A close analysis of the relevant statutory provisions then led the Privy Council to the conclusion that the second tier levy under section 31 was not "a specific authorisation" which would satisfy the requirements of section 43(1) of the Commerce Act and was therefore unlawful as it contravened section 27 of the Act.[43] In this case by striking down the levy as anti-competitive the long arm of the Privy Council might be seen as having facilitated, in some small way, commerce in New Zealand. But the subsequent impact of the decision on the approach of the Court of Appeal to issues of interpretation under the Commerce Act may have been more significant.[44]

VII TELECOMMUNICATIONS

The contribution of the telecommunications industry to the development of competition law in New Zealand should not be under-estimated, but constraints of time and space preclude consideration of more than two, albeit significant, cases: first, the "AMPS-A" case which was concerned with the question whether Telecom Corporation of New Zealand Ltd should be authorised to acquire the "AMPS-A" radio frequency for its

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40 The value of considering the "legal landscape" constituted by other legislation is discussed in J Burrows *Statute Law in New Zealand*, (2 ed, Butterworths, Wellington, 1999) 155 ff.

41 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257, 263.

42 *New Zealand Apple and Pear Marketing Board,* above, 262.

43 *New Zealand Apple and Pear Marketing Board,* above, 265-266.

44 See for example *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429, 442 Richardson J.

national cellular telephone network,[45] and, secondly, the Clear Communications case which involved a claim by Clear that Telecom had contravened section 36 of the Commerce Act in respect of the terms imposed by Telecom for connection to Telecom's Public Service Telecommunications Network.[46] Both cases arose against a background of the corporatisation and subsequent privatisation of the public telecommunications system in New Zealand previously conducted as a State monopoly by the New Zealand Post Office. The sale by the Government in September 1990 of all of its shares in Telecom, apart from the Kiwi Share, to private interests was accompanied by the removal of Telecom's virtual monopoly and the opportunity for competition. At the same time the Government decided to leave the question of interconnection to market forces, subject only to the constraints of the Commerce Act and the "light-handed regulation" of the Telecommunications (Disclosure) Regulations 1990 (SR 1990/120). The Government conferred no statutory rights of interconnection and created no regulatory authority to resolve disputes in the absence of agreement as had occurred in other countries.[47]

In the AMPS-A case the Commerce Commission declined to grant clearance or authorisation of the acquisition by Telecom and this decision was upheld by the High Court. A five-member Court of Appeal allowed the appeal by Telecom on the grounds that while Telecom was in a dominant position (Richardson and Hardie Boys JJ dissenting) and its dominance would be strengthened by the acquisition, the likely public benefits of the acquisition would outweigh the likely detriment. While the judgments of the members of the Court of Appeal have been noted for their reliance on the dictionary definition of the expression "dominant",[48] the judgment of Richardson J deserves highlighting again for its

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45 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA).

46 *Clear Communications Ltd v Telecom Corporation of New Zealand* Ltd (1993) 5 TCLR 413 (CA) and *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

47 *Telecom v Clear*, above, 389-390 (PC).

48 *Telecom Corporation of New Zealand Ltd v Commerce Commission,* above, 433 Cooke P, 442 Richardson J, 447 Casey J, 448 Hardie Boys J and 448 McKay J. See Ministry of Commerce *Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: Discussion Document*, (Ministry of Commerce, Wellington, April 1999) paras 19 and 40-42. The Commerce Amendment Act 2001 altered the threshold in s 47 to prohibit business acquisitions which would have, or would be likely to have, the effect of substantially lessening competition in a market. The effect of this amendment on an applicant for a business acquisition clearance lodged with the Commerce Commission the day before the amendment was due to come into force was considered by the Court of Appeal in *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353. The Court, which did not include Sir Ivor, decided by a majority that the new threshold applied. Parliament then reversed the effect of this decision for applicants other than Progressive Enterprises Ltd, the applicant in that case: Commerce (Clearance Validation) Amendment Act 2001. For a criticism of this outcome, see Phillip Joseph "Retrospective Legislation and the 'Fruits of Forensic Victory'" [2001] NZ Law Rev 457.

perceptive comments on the influence and role of economics under the Commerce Act. After noting that it was not argued that the expression "dominant" was used in the statute in a particular technical sense or that there was a common usage of the term in the literature of economics, and after referring to the first passage from *Tru Tone* already cited, Richardson J continued:[49]

> That is the stuff of economics and for economists expressions such as "competition", "markets", and "efficiency" … immediately convey recognised concepts capable of description, debate and application. … While it would be naïve to think that economics furnishes a body of settled conclusions dispositive of any particular factual circumstances, economists can assist the Commission and the [c]ourts in identifying, explaining and debating economic theory including rival theories and their applicability in particular circumstances. And the uneasy relationship between economics and law is likely to improve as lawyers and economists become more familiar with each other's discipline and the inter-relationship of the two fields.

And then later:[50]

> To focus on the state of the market as of the date of hearing is to risk distortion of the conclusion by short-run phenomena. Competition is a dynamic process not a static situation. Market power is partly a function of time and it is limited by the presence of substitutes to which buyers may turn (cross-elasticity of demand), and by the ability of other existing producers or new entrants to expand output from existing facilities or by building new capacity (elasticity of supply) … The justification for regulation is the likely effect of a merger on the future exercise of market power. The rivalrist conduct of potential competitors has to be taken into account as a constraint upon the incumbent which may presently have the market to itself. … Contestability may be just as important in denying dominance as actual competition. Indeed, a firm may have a dominant position in a market even though it is not yet established in that market.

This latter passage explicitly recognises that commerce may be facilitated if a merger which would result in the acquisition of unconstrained market power is prohibited.

The decision of the Court of Appeal in the AMPS-A case was final.[51] But its decision in

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49 *Telecom Corporation of New Zealand Ltd v Commerce Commission,* above, 441-442. The reference to "concepts capable of description, debate and application" may have been drawn from "The Interface between Law and Economics in the Context of the Commerce Act 1986" in Rex Ahdar (ed) *Competition Law and Policy in New Zealand*, (Law Book Co, Sydney, 1991) 44, 47.

50 *Telecom v Commerce Commission,* above, 442-443.

51 Commerce Act, s 97(4); *The Laws of New Zealand* (Butterworths, Wellington) Competition, para 247.

the *Clear* case[52] was the subject of a successful appeal to the Privy Council.[53] Very briefly, the Court of Appeal upheld the decision of the High Court that Telecom was in breach of section 36 of the Commerce Act in its negotiations with Clear relating to access to the network, but that Clear was not entitled to any damages for breach. The Privy Council allowed the appeal to the extent that the terms of interconnection proposed by Telecom at the trial, based on the so-called Baumol-Willig Rule,[54] were held not to contravene section 36. The Privy Council reached this view on the basis that a person in a dominant position in a market did not "use" that position for a proscribed purpose unless that person acted in a way in which a person not in a dominant position but otherwise in the same circumstances would have acted.[55] The Baumol-Willig Rule was "a closely reasoned economic model"[56] which showed how the hypothetical firm would conduct itself and therefore justified Telecom's proposed terms of interconnection.

This decision of the Privy Council may be seen as the high point of the impact of the free market reforms where resolution of the interconnection dispute was left to market forces and the parties to resolve. The Privy Council recognised that the courts were not acting as regulators in proceedings under section 36 and pointed to Part IV of the Commerce Act which enabled the Government to introduce price control in markets which were not fully competitive.[57] This led the Privy Council, in the judgment delivered by Lord Browne-Wilkinson, to say:[58]

> Gault J … thought that it would be "unrealistic" to leave the matter of monopoly profits to regulatory intervention because of the Government's adoption of what is called light-handed regulation ie to leave the question of the terms of inter-connection to market forces rather than regulation. If, as Their Lordships consider, on the true construction of the Commerce Act, section 36 does not operate to exclude Telecom from initially charging monopoly rents (if any) and the elimination of such monopoly rents is (otherwise than by competition) within the

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52 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1993) 5 TCLR, 417 Richardson J agreed with "the comprehensive judgment" of Gault J.

53 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

54 *Telecom v Clear* above, 395-397; 405-409 (PC).

55 This test, subsequently described as a hypothetical "counterfactual", has been questioned by the Court of Appeal in *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, 577, *Telecom Corporation Ltd v Commerce Commission*, (17 September 2001) Court of Appeal CA 281/00; *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*, (5 November 2001) Court of Appeal CA 180/00, paras 72-73.

56 *Telecom v Clear,* above, 403.

57 *Telecom v Clear,* above, 404.

58 *Telecom v Clear,* above, 408. Emphasis added.

> province of Part IV of the Act, *it is irrelevant to the Court's function to take into account Government policy.* The Government can either adopt the policy of leaving Clear's competition to compete out Telecom's monopoly rents (if any) or activate the Part IV machinery which is available. The Part IV machinery does not require the imposition of any general regulatory regime presiding over the telecommunications industry. It can, if desired, be limited so as to fix the price chargeable for inter-connection by Telecom. ***But what policy the Government adopts is no concern of the Courts.***

This passage has echoes of Viscount Finlay delivering the decision of the Privy Council in *Crown Milling Co Ltd v The King* that: "It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy".[59]

The reluctance of the Privy Council in the *Telecom* case to recognise Government policy in this area meant that its decision was subject to some criticism in New Zealand.[60] It also led ultimately to the recent imposition by the Government of a regulatory regime for the supply of telecommunications services under a Telecommunications Commissioner.[61] At the same time the comments in the Privy Council judgment on the contrast between section 36 and the price control provisions in Part IV of the Act were to prove significant for a major pricing dispute in relation to the transmission of bulk electricity.

VIII ELECTRICITY TRANSMISSION

Like the telecommunications industry, the electricity industry has been the subject of major reforms over the past 15 years. The New Zealand Electricity Department, a Government department which owned the generation and transmission system, was corporatised under the State-Owned Enterprises Act 1986 as ECNZ[62] which has, in turn, subsequently been split up into Transpower, which operates the national grid, and four generation companies, Contact Energy, which was also privatised, Meridian, Mighty River and Genesis. At the next level, the reforms led to the corporatisation of local supply authorities, ie electric power boards and municipal electricity departments of territorial local authorities, the abolition of their defined franchise areas and the removal of legal

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59 *Crown Milling Co Ltd v The King* [1927] AC 394, 402, a view described as a disguised defence of a laissez-faire philosophy by Dr J R Robson in *The British Commonwealth: The Development of its Laws and Constitution* (2 ed, Vol 4, 1967) 292.

60 See Ministry of Commerce and Treasury *Regulation of Access to Vertically Integrated Natural Monopolies Discussion Document* (Wellington, August 1995).

61 Telecommunications Act 2001.

62 For a detailed description of the process, see Barry Spicer, *The Power to Manage* (Oxford University Press, Auckland, 1991).

entry barriers to the electricity distribution and retailing markets.[63] Once again, the reforms spawned litigation under the Commerce Act which reached the Court of Appeal.[64]

But the most contentious issue has been the protracted dispute between the Auckland Electric Power Board (subsequently Mercury Energy Ltd and then Vector Ltd) and the transmission arm of ECNZ (subsequently Transpower) as to the appropriate pricing arrangements for the delivery of bulk electricity via the national grid to the greater Auckland region. The first proceeding involved an attempt by the Power Board to maintain transitional arrangements terminated by ECNZ in 1992. ECNZ, which succeeded in having various Power Board causes of action struck out, accepted that as a monopoly supplier of electricity it was obliged to supply the Power Board at "fair and reasonable prices".[65] While avoiding expressing any view on the ECNZ concession, the Privy Council noted that it would result in commercial decisions left by Parliament to ECNZ being made by the Courts.[66] The Privy Council may also have had in mind the practical difficulties inherent in determining, at any particular time, what might constitute a "fair and reasonable price" for bulk electricity supplied by a monopoly supplier.[67]

That issue was directly before the Courts when the Power Board's successor, Vector Ltd, subsequently claimed that Transpower, as a monopoly supplier of essential services, was under a common law obligation to supply on terms, including prices, which were fair and reasonable. Vector invoked the common law doctrine of prime necessity.[68] The Court of Appeal, in a leading judgment delivered by Richardson P, rejected Transpower's argument that the doctrine was not part of the law of New Zealand, but upheld the argument that it was abrogated in this case by the existence of the price control provisions

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63 See Energy Companies Act 1992, Electricity Act 1992 and *Power New Zealand Ltd v Mercury Energy Ltd* [1996] 1 NZLR 686, 690-691.

64 For example, *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641 and *Power New Zealand Ltd v Mercury Energy Ltd* [1997] 2 NZLR 669.

65 *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551, 557 (CA) Richardson J; *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 387 (PC).

66 *Mercury Energy v ECNZ*, above.

67 In New Zealand, the High Court has recognised that difficult questions of pricing methodology are best left to an expert tribunal such as the Commerce Commission: *Auckland Bulk Gas Users Group v Commerce Commission* [1990] 1 NZLR 448 and *Welgas Holdings Ltd v Commerce Commission* [1990] 1 NZLR 484.

68 See Michael Taggart "Public Utilities and Public Law" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 214.

in Part IV of the Commerce Act: *Vector Ltd v Transpower New Zealand Ltd*.[69] In reaching this conclusion, the Court was clearly influenced by the Privy Council in the *Telecom* case.[70]

The turning point in the case was explained by Richardson P in one crucial paragraph:[71]

> We consider that in principle and on the authorities what may be called the common law doctrine of prime necessity came to form part of the common law of New Zealand. As noted above the doctrine embodies a principle that monopoly suppliers of essential services must charge no more than a reasonable price. The doctrine is a somewhat blunt instrument. It speaks of a bygone age where legislation had a limited role. It gives no guidance as to how the doctrine is to operate to fix prices in the complex environment of a modern economy and extensive legislative landscape. It is perhaps best viewed as a backstop common law remedy applied in the absence of other remedies and where there are no contra-indications to its use. We therefore turn to consider the statutory environment in New Zealand and how this environment impacts on the operation of the common law doctrine in the present case.

Here are encapsulated important themes for the resolution of commercial issues of this nature: the replacement of the common law by an "extensive legislative landscape"[72] and the need in a complex modern economy to recognise that legislation rather than the common law is more likely to provide a practical solution to the problems of monopoly pricing.

These themes are then reflected by the President when considering the place of the Commerce Act in the landscape:[73]

> We turn first to the Commerce Act. By that legislation Parliament clearly and deliberately moved away from earlier regulatory approaches to light-handed regulation. The selection of a particular form of regulation involves consideration by government and Parliament of fundamental issues of social and economic policy and obviously includes assessments of the tradeoffs between the costs associated with particular regulatory regimes and the benefits they are expected to deliver. If upheld in this case prime necessity would involve heavy-handed regulatory intervention on Transpower's pricing, through the Court and potentially on a day to day basis at the suit of individual customers of Transpower, of a type which Parliament

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69 *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646. Thomas J delivered a separate, concurring judgment.

70 *Vector v Transpower,* above, paras 7-9; 64.

71 *Vector v Transpower,* above, para 51.

72 Compare *Vector v Transpower,* above, paras 19-21.

73 *Vector v Transpower,* above, para 61.

> decided it did not wish to impose; and to do so would be inconsistent with the purpose and scheme of the Commerce Act.

This passage in the judgment is significant not only for its explicit reference to a legislative cost benefit analysis but also for its recognition that regulation through price control under the Commerce Act was to be preferred to the heavy-hand of the Courts.[74] There was, perhaps not surprisingly in view of the Privy Council's cautionary approach in the earlier case,[75] no appeal from this judgment of the Court of Appeal. But the judgment has not proved to be the last word as far as Transpower's pricing problems are concerned.[76]

IX SECURITIES LAW

The provisions of the Securities Act 1978 relating to the offering of securities to the public have given rise to a number of cases during the past 25 years but Sir Ivor appears to have delivered a reported judgment in only one of them: *Re AIC Merchant Finance Ltd.*[77] Fortunately, for present purposes, the Court in that case was required to consider the policy behind the legislation and the relationship between the Securities Act and the Illegal Contracts Act 1970. Richardson J had the opportunity to articulate the legislative philosophy in the following passages:[78]

> The pattern of the Securities Act and the sanctions it imposes make it plain that the broad statutory goal is to facilitate the raising of capital by securing the timely disclosure of relevant information to prospective subscribers for securities. In that way the Act is aimed at the protection of investors. That aim is achieved by regulating the conduct of issuers of securities and by providing sanctions for infringement by those issuers and their officers.

And:

> It is perhaps true to say that the premise underlying the Securities Act, as with much commercial law, is that the best protection of the public lies in full disclosure of the company's

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74 Compare *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551, 557 where Richardson J inferred that the Court might fulfil its price determination role through the appointment of a referee as suggested in *South Taranaki Electric Power Board v Patea Borough* [1955] NZLR 954, 956. The jurisdiction to appoint a referee was not explained, but might now arise under High Court Rules 324 (appointment of expert), 383A (arbitration by consent) or 384-416 (ordering of inquiry).

75 *Vector v Transpower,* above, para 28.

76 *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700.

77 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385.

78 *Re AIC Merchant Finance Ltd*, above 391-392.

> affairs and of the security it is offering. That then allows the investor to make an informed investment decision, which in turn facilitates the functioning of financial markets.

After then analysing the relevant provisions of the Securities Act in detail, the Judge concluded that the relief provisions under the Illegal Contracts Act were available and the appeal was allowed. The significance of the two passages cited is reinforced by the reliance on them in the subsequent decision of the Court of Appeal in *Securities Commission v Kiwi Co-Operative Dairies Ltd*.[79] The emphasis on the policy of disclosure of information is also reflected in the Securities Amendment Act 1988 provisions relating to the disclosure of the identity of persons who have become substantial security holders in public issuers[80] and the sanctions on insider trading provisions in Part I of the same Amendment Act.[81]

X LAW AND ECONOMICS

The fundamental changes to the commercial environment over the past 20 years, together with the enactment of legislation such as the Commerce Act, have stimulated a developing interest in the influence of economic concepts and principles on legislation and the relationships between the disciplines of law and economics. Those responsible for administering and applying legislation and policies based on economic concepts and principles need to have an understanding of them. This is especially so in areas such as competition law where economic concepts are paramount, but the need is not limited to such areas. And Sir Ivor has been to the forefront in both pressing for this understanding[82] and, where appropriate, in reflecting it in his judgments. I have referred in this paper to his significant competition law judgments which illustrate his understanding of economic concepts, but, as he has pointed out, the Court of Appeal has also taken into account economic considerations in other cases.[83] When considering Sir Ivor's contribution to the facilitation of commerce through the proper application of legislation based on economic principles his leadership in this area should not be under-estimated. At the same time Sir Ivor has seen economic analysis as part, albeit an important part, of a wider picture:[84]

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79 *Securities Commission v Kiwi Co-Operative Dairies Ltd* [1995] 3 NZLR 26, 31 Blanchard J.

80 Section 20 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC); *Mercury Energy Ltd v Utilicorp NZ Ltd* [1997] 1 NZLR 492.

81 Compare *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 (CA).

82 For example, Sir Ivor Richardson "Law and Economics" (1998) 4 NZBLQ 64.

83 Sir Ivor Richardson "Law and Economics – and Why New Zealand Needs It" (paper presented to New Zealand Law Society Conference, Wellington, 2001).

84 Sir Ivor Richardson "Law and Economics", above, 71.

> Economic analysis is not an Aladdin's lamp. There is more at stake than market trade-offs. Efficiency concerns are only one factor in an assessment of the public interest. But we need to appreciate the economic costs of less efficient solutions.

Sir Ivor has recognised that it is necessary "to strike a balance between fairness and efficiency".[85]

XI CONCLUSION

Implicit in Sir Ivor's approach to the place of economics in the law is the realisation that if market participants were left, unregulated and unrestrained, to pursue the maximisation of their own wealth by any means whatsoever the law of the jungle would probably prevail. Wider public interest factors, including the protection of consumer interests and the avoidance of fraudulent, unconscionable and anti-competitive behaviour, have led the state to impose regulatory constraints and sanctions and the courts to formulate common law and equitable standards and obligations which affect the conduct of market participants. By these means commerce is facilitated in a wider sense.

As far as competition and securities law is concerned, the principal constraints and sanctions are to be found in the relevant legislation. Day to day responsibility for administration of many aspects of this legislation rests with the respective Commissions. The role of the courts has been to interpret and apply the legislation in individual cases in a manner which reflects the underlying economic and social policies. At an appellate level, the court has decided relatively few cases, but, consequently, its decisions have been of considerable significance in determining the direction of the legislation. The role of Sir Ivor Richardson, as an influential member of the Court of Appeal over the past quarter of a century, has been to ensure not only that the economic and social policies underlying the legislation have been recognised, but also that they have been applied in a manner designed to facilitate the conduct of commerce in New Zealand. His judgments demonstrate a clear appreciation of economic concepts, wider public interest factors and the interest of the commercial community in decisions which promote efficient, fair and effective outcomes.[86] It is both a privilege and a pleasure to pay this compliment to Sir Ivor at this conference to mark his forthcoming retirement as President of the Court of Appeal.[87]

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85 Sir Ivor Richardson "Law and Economics – and Why New Zealand Needs It", above, 30.

86 Sir Ivor Richardson, "What Can Commercial Lawyers Expect of a Legal System?" (1998) 4 NZBLQ 128.

87 Compare "Law and the Law School in the Twenty-First Century" (2000) 31 VUWLR 55, 57.