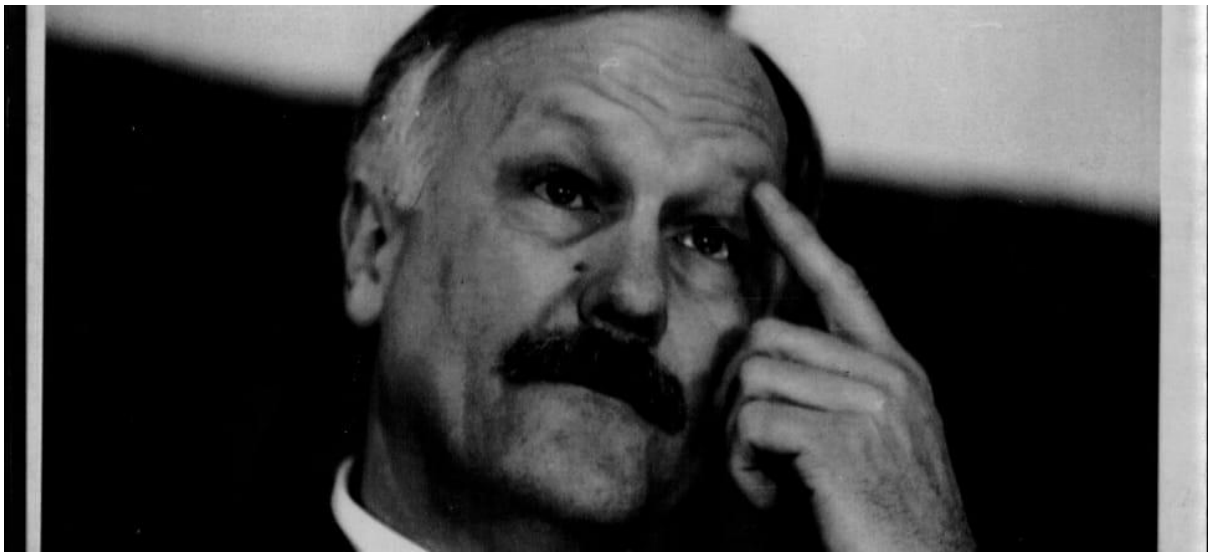

Roger Douglas, who was Minister of Finance during the Fourth Labour's Government's period of neoliberal economic reforms. File photo: Getty Images

SEPTEMBER 8, 2020

Geoff Bertram

Dr Geoff Bertram is Senior Associate of the Institute for Governance and Policy Studies at Te Herenga Waka—Victoria University of Wellington.

Ideasroom

Breaking out of neoliberalism’s ‘iron cage’

Punishing anti-competitive conduct and the abuse of market power by corporates, and protecting consumers, will only come with a radical reform of the 1986 Commerce Act, argues Geoff Bertram

The body of ideas known as neoliberalism dominated New Zealand policymaking for two decades following the 1984 election of the Fourth Labour Government. During those years, several major pieces of legislation, passed by Parliament in the clear light of day, entrenched neoliberal policy prescriptions on the statute book.

The neoliberal world view is now losing its hold on the hearts and minds of the nation’s policy elite, but the legacy of neoliberal law continues to put what I call an ‘iron cage’ around policy. Breaking out of that cage is extraordinarily difficult so long as much of the public

service remains wedded to it and Parliament lacks any clear programme of proposals for post-neoliberal legislation.

One of the laws removed regulatory constraints on business, and especially on big business, opening the way to a rapid rise in, and abuse of, market power.

That law, the Commerce Act 1986, stripped away old common law protections against monopolies, facilitated the consolidation of corporate empires via mergers and takeovers, legalised price-gouging and profiteering, and eliminated the former role of courts and tribunals in regulating prices.

In a recent working paper and journal article, I discussed the shortcomings of the Commerce Act 1986, the limited scope of efforts to modify it over the three and a half decades since its passage, and the need to replace it with something radically different.

The first big change made by the 1986 legislation was to legalise monopolistic price-gouging of consumers.

Previously, there was both common law protection against monopoly and specific statutory provision (in the old Commerce Act 1975) for the courts to impose penalties for unfair pricing. The new regime from 1986 made price regulation a political, not a judicial, decision.

The predictable result has been years of delay in confronting even the most egregious examples of monopoly conduct, while successive governments have waffled about "self-regulation" and "voluntary compliance" and "light-handed discipline" and "information disclosure".

Twenty years after a thorough Commerce Commission inquiry recommended direct regulation of airports, the sector is still subject only to information disclosure. Electricity line networks were left unregulated until they had raised their prices to monopoly levels; then regulation was brought in to protect, not reduce, those monopoly prices and accompanying asset values.

The second big change related to anti-competitive conduct.

Where previous legislation had followed the orthodox antitrust approach of spelling out prohibited conduct, the 1986 Act said only that if a firm had a "dominant" position in a market it must not "use" its market power for the "purpose" of excluding competitors.

That set of words amounted to three legal loopholes rolled into a single sentence. Unsurprisingly, there is not yet a successful major prosecution after three decades of transparent abuse of market power by big corporates. Occasional fiddling with the wording has left the central problem untouched.

The third big change involved the issue of who should benefit from mergers and takeovers: the general consuming public or the merging corporates?

The 1986 wording left the issue open by not requiring that the interests of consumers were paramount. Into the resulting gap sailed the neoliberal proponents of the Chicago School of

economics that makes “efficiency” (basically the profitability of the merging companies) the sole issue, while treating consumers’ welfare as irrelevant.

The words “long-term benefit of consumers” have become synonymous with corporate profiteering. If you think that is an outrageous misuse of language to cover up a corporate free-for-all, I agree.

And that suggests where to start with constructing a replacement piece of legislation: the upfront statement of purpose. The actual benefit of consumers, crystallised by the economist’s concept of consumer surplus, needs to be clearly specified as the essential test of whether a price is fair, whether a merger is desirable, and whether business conduct that kills off competitors is permissible. That would accord with philosopher John Rawls’s basic principle of justice: the interests of the weakest and poorest groups must have first call on the protective power of the state.

Second, the courts should have clear statutory wording directing them to provide common law (and commonsense) remedies against monopolistic abuses of market power. The 1986 Act, for example, removed the courts entirely from price-fixing, but a 2008 amendment has opened the way for deep-pocketed corporates to mount “merits appeals” against the feeble regulatory efforts of the Commerce Commission. But consumers and small business remain excluded; they lack the resources, champions and legal provisions that might give them some shred of genuine countervailing power.

Third, penalties for both individuals and entities that exploit consumers, or that intimidate smaller would-be competitors, must be specified to provide credible deterrence. And some champion for the poor and the weak has to be available to argue their case - a task the New Zealand state once performed, but from which it has abdicated in recent decades. The Commerce Commission would need a considerable make-over to be a credible candidate for that role.

This is an adaptation of an article in the latest issue of Policy Quarterly, a free publication from the Institute for Governance and Policy Studies at Te Herenga Waka—Victoria University of Wellington.