2021 PUBLIC HEALTH SUMMER SCHOOL

UNIVERSITY of OTAGO
Te Whare Wānanga o Otāgo
NEW ZEALAND
WELLINGTON

Breaking out of the 'iron cage': Removing statutory barriers to transformational change

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3 February 2021

#phss2021

The problem

- 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 our 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 by tying the hands of Government and the courts.

- 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.

Neoliberalism's statutory legacy: examples

- Permanent fiscal austerity and submission to top-down rules: s.26G of the Public Finance Act 1989
- Monopoly profiteering is legal and anti-competitive conduct gets a free pass: Commerce Act 1986
- Proper cost-benefit assessment of overseas investment is illegal: Overseas Investment Act 2006 ss.16 and 17.
- Socially responsible behaviour by SOEs is trumped by the profit requirement: State Owned Enterprises Act 1986 s.4.
- Government's in-house operational capabilities stripped back: Ministry of Works and Development Abolition Act 1988; Crown Research Institutes Act 1992 s.48 (repeal of Scientific and Industrial Research Act 1974).
- Public-sector dysfunction flowing from "New Public Management" and "funder-provider split" under the State Services Act 1988

and then the sector-specific ones….

- Electricity Industry Reform Act 1998

- Change Response (Emissions Trading) Amendment Act 2008 and Climate Change Response (Moderated Emissions Trading) Amendment Act 2009 (setting up the toothless Emissions Trading Scheme)

- and plenty more (including repeated structural changes to the health system)….

Section 26G of the Public Finance Act 1989

- Lays out so-called “principles of fiscal responsibility”
- Treats Government as simply a firm or household subject to an externally-imposed budget constraint
- Requires debt to be reduced to and held at “prudent Levels” (currently treated as 20-25% of GDP)
- Requires the operating budget to be continuously balanced over the medium term
- Focuses on Government “net worth” even though Government is inherently a non-market set of activities and the “umbrella for a rainy day” image is pure fiction with no economic substance
- Allows departures from the “principles” to be temporary only and at potentially high political cost

26G Principles of responsible fiscal management

(1) The Government must pursue its policy objectives in accordance with the following principles (the **principles of responsible fiscal management**):

(a) reducing total debt to prudent levels so as to provide a buffer against factors that may impact adversely on the level of total debt in the future by ensuring that, until those levels have been achieved, total operating expenses in each financial year are less than total operating revenues in the same financial year; and

(b) once prudent levels of total debt have been achieved, maintaining those levels by ensuring that, on average, over a reasonable period of time, total operating expenses do not exceed total operating revenues; and

(c) achieving and maintaining levels of total net worth that provide a buffer against factors that may impact adversely on total net worth in the future; and

(d) managing prudently the fiscal risks facing the Government; and

(e) when formulating revenue strategy, having regard to efficiency and fairness, including the predictability and stability of tax rates; and

(f) when formulating fiscal strategy, having regard to the interaction between fiscal policy and monetary policy; and

(g) when formulating fiscal strategy, having regard to its likely impact on present and future generations; and

(h) ensuring that the Crown's resources are managed effectively and efficiently.

(2) However, the Government may depart from the principles of responsible fiscal management if—

(a) the departure from those principles is temporary; and

(b) the Minister, in accordance with this Act, states—

(i) the reasons for the departure from those principles; and

(ii) the approach the Government intends to take to return to those principles; and

(iii) the period of time that the Government expects to take to return to those principles.

My suggested change: repeal the entire section

(For a recent critique of top-down fiscal and monetary rules and a suggested alternative approach see Peter R. Orszag, Robert E. Rubin, and Joseph E. Stiglitz, *Fiscal Resiliency in a Deeply Uncertain World: The Role of Semiautonomous Discretion*, Washington DC: Peterson Institute Policy Brief 21-2, January 2021, https://www.piie.com/sites/default/files/documents/pb21-2.pdf)

Commerce Act 1986

In its original form

- stripped away old common law protections against monopolies, eliminating the former role of courts and tribunals in regulating prices
- facilitated the consolidation of corporate empires via mergers and takeovers
- allowed anti-competitive conduct by large corporations unless they openly revealed that their purpose was to destroy competition

As amended in 2000 and 2008

- Declared the taking of excessive profits even under regulation to be legal – by requiring only that "suppliers of regulated goods or services … are limited in their ability to extract excessive profits" (s.52A(1))[emphasis added]
- Stated that its purpose was to "promote competition in markets for the long-term benefit of consumers within New Zealand" (s.1(A)) – not to provide consumers and small enterprises with immediate protection against monopolistic predation. No definition of "long term benefit" was provided.

Geoff Bertram, "Why the Commerce Act 1986 is unfit for purpose", *Policy Quarterly* 16(1): August 2020 pp.80-87

Some suggested changes

- Put teeth back into anti-trust policy
- Resurrect some of the Commerce Act 1975's blunt prohibition of profiteering, its quick-response provisions for inquiring into possible cases of abuse of market power, and its specific criminal penalties
- Put the interests of New Zealand consumers explicitly at the centre of the law as the overriding goal to which other goals are subsidiary. A new "purpose statement" is needed without weasel words.
- Make the taking of excess profits illegal, except where clear evidence can be presented to justify a greater return. That would put the burden of proof where it belongs – on the profit-taker.
- Specify forms of anticompetitive conduct that are proscribed, and replace "purpose" with "effect" as the test of anticompetitive conduct in general.

State Owned Enterprises Act 1986 s.4:

4 Principal objective to be successful business

(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—

(a) as profitable and efficient as comparable businesses that are not owned by the Crown; and

(b) a good employer; and

(c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

- Social responsibility is allowed only when it contributes to profit. That's the significance of the words "to that end".

  (*Wellington Regional Council v Post Office Bank Ltd,* High Court, Wellington, 22 December 1987, CP 720/87, Greig J.)

- "The formal separation of commercial and social objectives envisaged in the SOE Act has resulted, in practice, in the negation of social objectives. This … was an important step on the way to privatisation."

  (Taggart, M., *Corporatisation, privatisation and public law* Auckland: New Z Legal Research Foundation Occasional Paper 31, 1990, http://www.nzlii.org/nz/journals/NZLRFOP/1990/31.html p.2.)

SOE Act continued

- The common-law duties of a monopoly supplier were extinguished by the Act: "It is not a case where Parliament would have intended the powers of this new commercial entity would be limited by ancient doctrine ...The modern controls are commercial and political. Any former common law disability - if such ever existed - no longer applies"

(McGechan J in *Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd, High Court, Wellington, 1 December 1992 CP 661/92, p.20.* See S. Mataga "Case Notes" *Auckland University Law Review* 7(2): 430-434.)

- So when KiwiRail refuses to preserve and complete the electrification of the Main Trunk line, and NZ Post closes down branches and removes mail boxes from suburbs, and Airways NZ withdraws control-tower services from airports, they are just obeying their statute.

- Creation of new Crown entities such as Kainga Ora has been an *ad-hoc* response that leaves the original statute standing.

What to do?

- Either dump it
- or rewrite it with a wellbeing objective instead of profit.
- State ownership with no social purpose does not make sense.

Overseas Investment Act ss.16, 16A and 17

- Overseas investors wishing to buy sensitive land are subject to a so-called "benefit to New Zealand test" which is in fact nothing of the sort, but wastes a lot of time and resources.

- Section 17 of the Act is carefully worded to prohibit Government Ministers from weighing the costs of a foreign purchase against the benefits. They can consider only the benefits.

- So Government in 2018 could not prevent Nongfu Spring from buying-up an artesian water source for a mass bottling plant in 2018, nor in 2020 could it even contemplate preventing Oceana Gold buying a dairy farm at Waihi for conversion to a toxic waste dump

- Official advice to Ministers last year from LINZ:

> 27. You are limited to considering the benefits of the transaction by reference to the 21 benefit factors set out in the Act and Regulations. You cannot consider matters outside of those factors. The Act allows you to consider the *benefit* of transactions, but in most cases does not allow you to consider the *detriment* of transactions.

Confirmation from High Court in *Coromandel Watchdog v Minister of Finance and Associate Minister of Finance and Oceana Gold*, [2020] NZHC 2345 at paragraph :

[57] The provisions enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no 'catch-all' provision enabling Ministers to consider "any other matters" the Ministers consider to be relevant. The legislature has left no such discretion to the relevant Ministers. Unlike, for example, the "benefit to the public" test in s 67(3)(b) of the Commerce Act 1986, which is framed more generally and allows decision-makers considerably more scope to take into account a greater array of factors,[26] the Act's "benefit to New Zealand" test is heavily circumscribed. It constrains decision-makers to a greater extent than similar tests in other statutory contexts.

Here are the key sections:

16A Benefit to New Zealand test

General test

(1) The benefit to New Zealand test is met if all of the following are met:

(a) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17; and

17 Factors for assessing benefit of overseas investments in sensitive land

(2) The factors are the following:

(a) whether the overseas investment will, or is likely to, result in—

(i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or

(ii) the introduction into New Zealand of new technology or business skills; or

(iii) increased export receipts for New Zealand exporters; or

(iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or

(v) the introduction into New Zealand of additional investment for development purposes; or

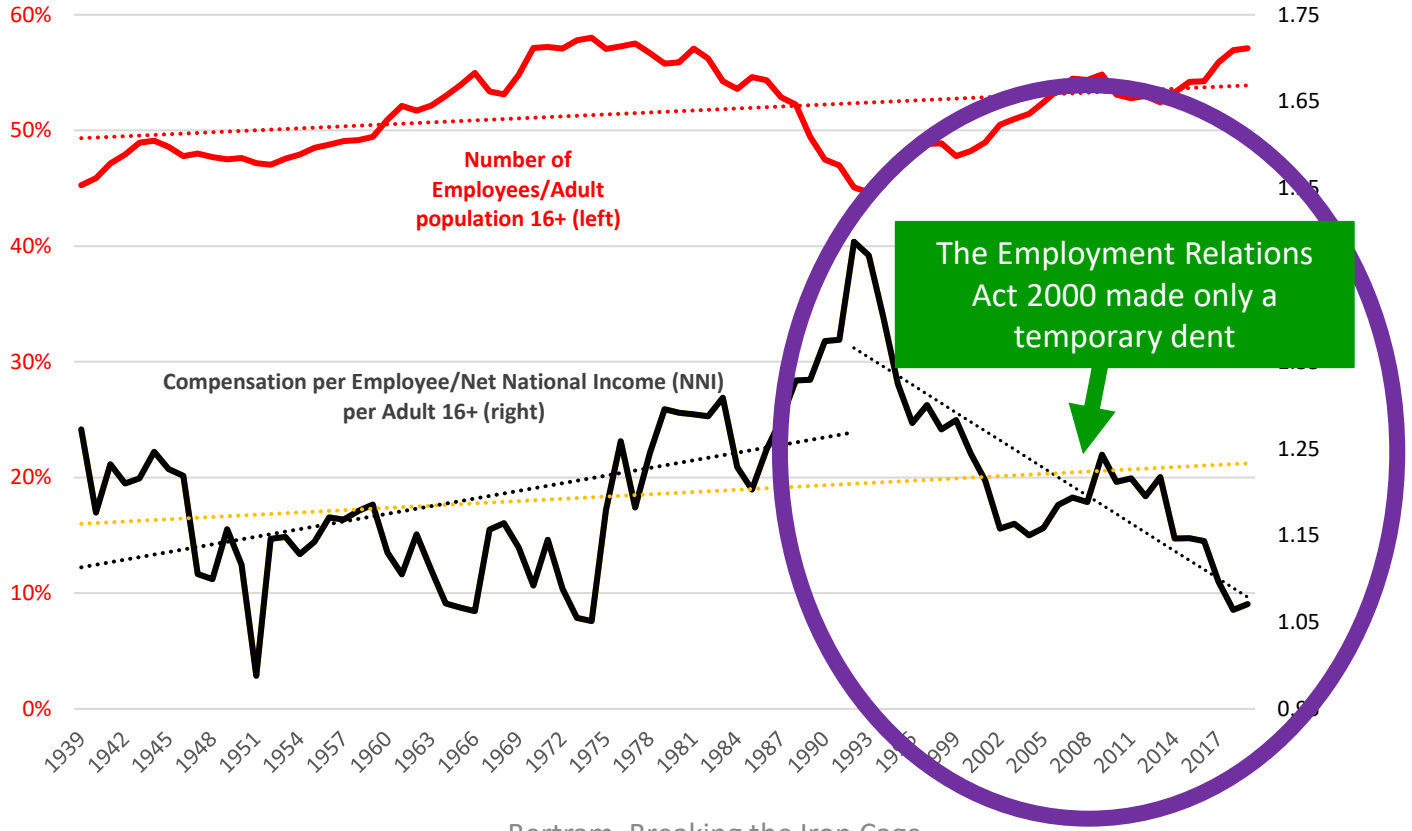
(vi) increased processing in New Zealand of New Zealand's primary products:

- Parliament is currently considering introducing a special-purpose cost-benefit assessment limited to water bottling only, while reinforcing the prohibition of cost-benefit assessment in other situations

- My suggestion: just replace s.16A(1) and 17(1) and (2) with provision for a cost-benefit assessment - in place of the current "con job" (quoting Rod Donald in *Hansard* Vol.626, 14 June 2005, p.21553).

Geoff Bertram "Benefit to NZ test a sham", *CAFCA Watchdog* No 155 December 2020 pp.25-37; and *Submission to the Finance and Expenditure Select Committee on the Overseas Investment Amendment Bill No 3,* October 2020, http://www.geoffbertram.com/fileadmin/publications/Bertram%20submission%20to%20the%20Finance%20and%20Expenditure%20Select%20Committee%20on%20the%20Overseas%20Investment%20Amendment%20Bill%20No%203.pdf .

… then there's the long shadow of the Employment Contracts Act 1992…….



Where to from here?

- Creating avenues of escape from the iron cage involves a careful, strategic process of weeding out the poison pills that have been built into our laws and our policy processes
- Not another giant transformational leap like the 1980s
- Just a slow process of picking up the pieces while holding onto the genuine gains of the past three decades
- Get rid of specific provisions and structures that
  - block Government from moving in a progressive direction,
  - block our courts from applying time-tested common law principles,
  - load our public sector with too many well-paid but unproductive and self-serving career managers,
  - cripple the provision of many collectively-funded services by imposing a model of arms-length contracting when integrated supply chains would perform better