

NZULR ABSTRACTS
VOI 21, No 1 June 2004

**MAORI PROPRIETARY CLAIMS TO THE FORESHORE AND SEABED
AFTER NGATI APA**
RICHARD BOAST

This article discusses aspects of the aftermath of the Court of Appeal decision in Attorney-General v Ngati Apa [2003] 3 NZLR 643, a decision which gave rise to the possibility of territorial claims by Maori groups to the foreshore and seabed. Key post-Ngati Apa developments include a number of policy papers released by the Government and by Maori, a detailed report on the issue by the Waitangi Tribunal, an interim determination by the Maori Land Court and the release of the Government's Foreshore and Seabed Bill in April 2004. The article concentrates in particular on the options available in the Maori Land Court and attempts to guess how the Maori Land Court's jurisdiction might have been exercised. The article also considers briefly the effects of the current Bill on both the High Court and the Maori Land Court.

**RETHINKING THE MISUNDERSTOOD AND MUCH MALIGNED REMEDIES FOR
RECKLESS AND INSOLVENT TRADING**
CHRIS NOONAN AND SUSAN WATSON

This article analyses the New Zealand courts' treatment of sections 135 and 136 of the Companies Act 1993, focusing on the remedies awarded for reckless and insolvent trading and how they fit with the conception of a company. The divergent approaches of the courts are argued to be unpredictable and inconsistent with the legislation. However the fault for this is said to lie in the legislation itself. It is concluded that if sections 135 and 136 are to remain in the Companies Act 1993, they should be viewed as duties effectively owed by directors to creditors of the company, therefore alleviating the sections' misunderstood purpose and rationale. It is preferable, however, to correct the misconceptions through carefully crafted statutory amendment.

**TAVITA AND ALL THAT: CONFRONTING THE CONFUSION SURROUNDING
UNINCORPORATED TREATIES AND ADMINISTRATIVE LAW**
CLAUDIA GEIRINGER

This article assesses the impact of New Zealand's unincorporated human rights treaty obligations on administrative decisions. The author explores two models that have been invoked by the Court of Appeal in its recent jurisprudence to explain the impact of unincorporated treaty obligations on administrative power: the mandatory relevant consideration model and the presumption of consistency model. She suggests that there is a lack of clarity in the jurisprudence as to the relationship between these two models. This is regrettable, given that the two models have the potential to impact differently on administrative decision-making. The article concludes with some suggestions as to how the less well understood of the two models, the presumption of consistency, can appropriately be utilised in administrative law cases, particularly when human rights are at stake.

**IS A DOMINANT FIRM'S BELOW COST PRICING ALWAYS
A BREACH OF SECTION 36 OF THE COMMERCE ACT?**
PAUL G SCOTT

This article discusses predatory pricing and section 36 of the Commerce Act 1986 by analysing the High Court's and Court of Appeal's judgments in Commerce Commission v Carter Holt Harvey. One of the great problems with predatory pricing is that it looks like competition at work. The author argues that courts can only distinguish between the two by closely analysing each case. The article examines the economics and United States law of predatory pricing. It discusses section 36 and argues that it can distinguish between legitimate below cost pricing and predatory pricing. The article then discusses the Carter Holt Harvey decisions and argues that their reasoning does not adequately distinguish the two types and will capture legitimate below cost pricing.

THE AVAILABILITY OF ALLOWANCES IN EQUITY: REWARDING THE BAD GUY
JESSICA PALMER

This article argues that the foundations for awarding allowances in equity to breaching fiduciaries are unsatisfactory. The author assesses the justifications used by the courts including that justice, the nature of the asset and the breaching fiduciary's good faith all require an allowance. She concludes that these justifications are flawed. Instead, it is argued that the core fiduciary responsibility of loyalty should be considered in a less rigid way, removing the need for allowances to be awarded. In rare cases such as Boardman v Phipps, where the profit results from activity which does not breach the duty of loyalty, there should simply be no breach. In all cases where the duty of loyalty has been breached, no allowance should be given.