NZULR ABSTRACTS
Vol 25, No 1 June 2012

"GUARDIAN OF THE PUBLIC INTEREST": INTERVENTION BY THE ATTORNEY-GENERAL IN CIVIL LITIGATION

DB COLLINS AND BL ORR

In New Zealand, the Attorney-General may intervene in private litigation as part of his or her role as "guardian of the public interest". This article examines the scope of that role. It reviews definitions of the term "public interest", discusses the political independence with which intervention should be conducted and discusses cases in which intervention has been allowed. It concludes that, while no precise criteria for identifying when the Attorney-General may intervene can be determined, it is nonetheless possible to discern certain categories of case in which intervention is more likely to be allowed than others.

THE FOUNDERS OF THE NEW ZEALAND LEGAL PROFESSION: THE FIRST COHORT OF LAWYERS 1841-1851

JEREMY FINN

This article attempts the first "cohort" study of the early New Zealand legal profession. It identifies 64 early lawyers in New Zealand between 1841 and 1851, and analyses the make up of that cohort of lawyers by looking at their places of origin, professional qualifications and legal experience prior to admission in New Zealand. It then considers the patterns of later professional practice by these lawyers, where this can be identified, including mobility both within the New Zealand and to or from the Australian colonies. It also examines some information about the legal practice of an early Nelson lawyer, John Poynter, before looking at the issues of death and ageing of the early lawyers and the extent to which they achieved, or failed to achieve, a degree of financial success.

PROPERTY RIGHTS IN RESOURCE CONSENTS: SOME THOUGHTS FROM LAW AND ECONOMICS

THOMAS GIBBONS

This paper asks a simple question: "Do property rights exist in resource consents under the Resource Management Act 1991?" It is troubling that there is no immediate answer, but the difficulty of this question is illustrated by s 122(1) of the Resource Management Act, which states that a resource consent is neither real nor personal property. This paper discusses the limitations of existing approaches based on notions of "ownership" and "formalism", arguing there is much to be gained from drawing on ideas from law and economics, and the notion of statutory property. Through considering economic concepts in the light of developing case law, this paper argues that notwithstanding the wording of s 122, property rights do exist in resource consents. While this does not mean s 122 is unproblematic, this framework provides a model of analysis for future cases and highlights opportunities for further research.

EXPLORATORY QUESTIONS IN ADMINISTRATIVE LAW

PHILIP A JOSEPH

This article explores five questions that bear upon our administrative law doctrines and method. It is purposeful to revisit these and ask whether they promote "best practice" in judicial review. Do they provide insight into the true nature of judicial review? Do they protect judicial review from the threat of resurgent formalism? Do they encourage rule of law scholarship for guiding judicial outcomes? Do they embrace the normative content of public law in the 21st century? I pose these questions with ambitious purpose: to prompt discussion, ideas, inquiry.

COUNTERFACTUAL ANALYSIS IN MERGER REVIEWS

JOHN LAND AND LEELA CEJNAR

The recent Australian Competition and Consumer Commission v Metcash Trading Ltd decision in Australia has left uncertain the correct approach to assessing whether a proposed merger or business acquisition has the likely effect of substantially lessening competition in a market in breach of s 50 of the Australian Competition and Consumer Act 2010 (Cth) or s 47 of the New Zealand Commerce Act 1986.

In this article we review the Australian and New Zealand jurisprudence and in summary take the view that:

- *assessing whether a merger will result in the likely effect of a substantial lessening of competition in a market requires a consideration of whether there is a real chance, or a real and substantial risk, of such a substantial lessening of competition;*
- *part of the assessment of whether there is such a real chance of a substantial lessening of competition is to consider whether in the absence of the proposed merger, there is a real chance of a counterfactual scenario arising under which there would be a materially greater level of competition than if the merger took place;*
- *it is not necessary for that purpose to establish that a particular counterfactual scenario is more likely than not to occur or to establish that a substantial lessening of competition is more likely than not to occur;*
- *in assessing whether there is a real chance of a counterfactual scenario occurring, the court or regulator should not take account of merely speculative possibilities;*

- *however, the court or regulator should not be too ready to dismiss the prospect of a more competitive counterfactual scenario occurring as "speculative" in a situation where the merger participants have a strong incentive to pursue a merger transaction and to argue to the court/regulator that there is no feasible pro-competitive alternative to the transaction.*

THE PECULIAR EVIL OF SILENCING EXPRESSION: THE RELATIONSHIP BETWEEN CHARITY AND POLITICS IN NEW ZEALAND

HAMISH MCQUEEN

The "political purposes doctrine" prohibits charities from seeking to influence the development of the law and policy, and from trying to sway public opinion toward a particular point of view. This article questions whether the political purposes doctrine should remain part of New Zealand law.

The article begins by defining the boundaries of the political purposes doctrine, and conducts a comparative analysis of the relationship between charity and politics in five Common Law jurisdictions. The bulk of the article then considers whether the political purposes doctrine can be justified. This part of the article is built around a "prima facie case" for giving charities a political voice, based on the added value that allowing charities free political speech could bring to a society. In support of the prima facie case, the decision of the High Court of Australia to remove the political purposes doctrine from Australian law in Aid/Watch Inc v Commissioner of Taxation *is examined. The article then considers whether there are any arguments that could rebut the prima facie case in favour of allowing charities to have political purposes. Ultimately the article concludes that the political purposes doctrine cannot be justified in its current form. The final part of the article considers the implications of this finding, and suggests a model of reform that could be used to remove the political purposes doctrine from New Zealand law.*

THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011: A JUST AND DURABLE RESOLUTION TO THE FORESHORE AND SEABED DEBATE?

ABBY SUSZKO

The Marine and Coastal Area (Takutai Moana) Act 2011 came into force on 1 April 2011. It seeks to settle the Foreshore and Seabed Debate by legislation. It repeals the Foreshore and Seabed Act 2004, divests the Crown of ownership over the zone, renames it the coastal marine area, restores the ability of Māori to access the High Court for determination of their rights, and establishes a new rights regime. The Attorney-General hailed the new Act a "just and durable resolution" to the Debate. This article critically assesses that claim.

I contend that a "just and durable" compromise could be reached between the different arguments about rights made during the Debate, and that for any solution to be acceptable to most New Zealanders several key aspects would be required. The right of Māori to be heard must be restored. Public access rights to the zone must continue, and the law must recognise legitimate Māori property rights. The regime must also provide for power-sharing arrangements between central and local government, and coastal tribal groups. Finally, it must give greater legal recognition to tikanga Māori as a legal source of property rights.

I examine the Act to see whether its structure produces such a compromise solution. I conclude that while the Act incorporates some aspects of such a solution, and may turn out to be "durable", it fails to incorporate several key aspects that are needed for it to be "just".