

**NZULR ABSTRACTS**  
**Vol 27, No 2 December 2016**

**THE TEACHING OF LEGAL ETHICS IN NEW ZEALAND**  
**ALAN BEEVER**

*The New Zealand Council of Legal Education (CLE) requires New Zealand law schools to teach a course in legal ethics that includes an examination of traditional moral theories. This demand rests on the assumption that those theories provide the basis for legal ethics. This article questions that assumption. It shows that the CLE's requirements are founded on a misunderstanding about the nature of at least most moral philosophy. In fact, that form of theorising on its own can tell us little or nothing about legal ethics.*

**THE TRANS-PACIFIC PARTNERSHIP IN NEW ZEALAND'S CONSTITUTION**  
**OLIVER HAILES AND ANDREW GEDDIS**

*By the time it was formally signed by New Zealand in February 2016, the Trans-Pacific Partnership Agreement (TPP) had morphed from an unassuming regional bargain into a mammoth agreement embracing some 40 per cent of global GDP and one third of world trade. The effects of the TPP, and whether those effects are desirable, are subject to fundamental disagreement within Parliament and wider society. Recognising that the final prospects for the instrument's entry into force remain mired in United States domestic politics, this article is not principally concerned with supporting or opposing New Zealand's ratification of the TPP. It instead interrogates the instrument's constitutional meaning by examining the challenge that investment treaties pose for traditional accounts of New Zealand's constitution. To do so, we develop what we term a "globalised constitutional realism" approach; combining the insights of "new constitutionalism" with the "constitutional realism" method of analysis advocated by Matthew Palmer. We then explore three different constitutional effects that entering into the TPP may come to have: broadening a parallel form of adjudication; introducing a wide-ranging takings doctrine; and constraining Parliament's legislative capacity. Finally, we conclude our discussion with some thoughts on the overall legitimacy of these changes to New Zealand's constitutional ordering.*

**THE ICS PRINCIPLES: A FAILED "REVOLUTION" IN CONTRACT INTERPRETATION?**  
**DAVID MCLAUHLAN**

*Lord Hoffmann's well-known restatement of the principles of contract interpretation in the Investors Compensation Scheme case (ICS) has been contentious, and even described as revolutionary, ever since it was pronounced in 1997. Although the restatement was adopted on countless occasions by the courts, especially in England and New Zealand, the reaction of some judges and many commercial practitioners was hostile. The concerns of the latter are now, it seems, being heeded. There have been several indications recently that the revolution, if not entirely quelled, has been stifled and that, while the courts continue to adopt as their starting point Lord Hoffmann's first principle that the task of interpretation involves ascertaining the meaning that the document would convey to a reasonable person with knowledge of the background at the time of the contract, it is arguably no longer true to say that there has been the "fundamental change" in the law under which "almost all the old intellectual baggage of 'legal' interpretation has been discarded" that his Lordship suggested. This article outlines some reasons why it might be argued that the main elements of the traditional approach to contract interpretation, including the plain meaning rule, have largely been restored, so that not a great deal has changed after all in this important branch of the law of contract. On the other hand, it will also be seen that, although there has been a significant change in emphasis that appears inconsistent with the ICS principles, particularly insofar as it is now regularly said that only in truly exceptional or unusual circumstances should considerations of commercial common sense be allowed to prevail over perceived plain meanings, it is too simplistic to suggest that there has been a return to a literalist approach to interpretation.*

## **THE WRONG TORT IN THE RIGHT PLACE: AVENUES FOR THE DEVELOPMENT OF CIVIL PRIVACY PROTECTIONS IN NEW ZEALAND**

**TIM BAIN**

*The law has always struggled with privacy. People feel wronged when the boundary between their private and public lives is disregarded; yet quantifying and categorising that wrong has never been easy. In New Zealand, the courts have attempted to fill the breach by developing two separate torts: the tort of publication of private facts and the tort of intrusion into seclusion. This paper argues that the former action misapplies the concept of privacy in a way that undermines the law's coherency and effectiveness. Building on first principles, it is contended that it would be better to rely on the tort of intrusion into seclusion, alongside the equitable breach of confidence action, to remedy actionable breaches of privacy.*

## **TAX LITIGATION IN NEW ZEALAND: AN EMPIRICAL ANALYSIS**

**CALLUM J.L. BURNETT**

*The Taxation Review Authority, New Zealand's first instance tax tribunal, hears cases between taxpayers and the Commissioner of Inland Revenue. The aims of this paper are to provide information about the Authority and to assess taxpayers' ability to access justice before it. The paper analyses the 140 cases the Authority decided between 2006 and 2016, focusing on taxpayer outcomes, the Authority's judges and improvements to taxpayers' access to the Authority. Key topics discussed include the success rates of taxpayers appearing with and without representation; meritless, vexatious and serial litigation; the time taken to deliver judgments; and the reporting of the Authority's cases.*

## **WHO PARTICIPATES AS AMICUS CURIAE IN WORLD TRADE ORGANISATION DISPUTE SETTLEMENT AND WHY?**

**NICOLA CHARWAT**

*Following criticism of the closed and confidential character of dispute settlement at the World Trade Organisation (WTO), in 1998 the Appellate Body controversially recognised its own and the panels' discretionary authority to admit amicus curiae briefs submitted by civil society. While supporters of their inclusion welcomed the decision as a much-needed reform that would improve the quality and legitimacy of decisions, many developing states remain opposed on the grounds that it favours participation by civil society from developed countries and further entrenches their interests and priorities. Despite the extensive literature around the WTO amicus curiae, there has been no close and systematic analysis of who participates as amici curiae and whose interests are represented. This article fills that gap. I classify the 99 amici curiae submissions from 162 civil society participants made in disputes reported between 1996 and 2014 according to their interest type and geopolitical background to provide an empirical basis on which to discuss these questions. Of particular concern is whether amicus curiae participation enables the presentation of public interest perspectives and whether these presentations include civil society from developing countries. I argue that while the identified patterns of civil society participation point to the dominance of a group of key repeat-players from developed countries, their submission of joint amicus briefs with NGOs from developing countries indicates the potential for amicus curiae participation to widen the knowledge bases and perspectives presented in WTO dispute settlement.*

## **INDEPENDENT CONTRACTORS AND STRIKE ACTION IN NEW ZEALAND**

**TIHO MIJATOV, WARREN FORSTER, TOM BARRACLOUGH**

*On most accounts, access to justice presupposes access to the law. To understand the state of access to justice for injured people in New Zealand engaged in ACC disputes, we studied the state of access to law as evident from several hundred judicial decisions determined under the ACC legislation's statutory dispute resolution process decided between 2009 and 2015. We employed a retrospective thematic analysis, by which we gave a detailed description of access to law as expressed in court decisions. Based on that analysis, we conclude that barriers to access to law for that period are comprehensive. Seven themes emerged that indicated barriers: lack of citation of the governing statute, or case law, lack of reference to parties' submissions, problems with public availability of legal materials, undue deference given to the review decision by courts on appeal, misuse of the legal test for an appeal against discretion, and the nature of the appeals structure. We conclude by considering the implications of this state of affairs on New Zealand's personal injury system and explaining why we believe these findings are significant in that context.*

**IMPLEMENTING “FAIR AND EFFECTIVE REPRESENTATION”?:A REVIEW OF THE  
LOCAL ELECTORAL OPTION  
JANINE HAYWARD**

*The Local Electoral Act 2001 (LEA) introduced the electoral option which makes provision for councils and their communities to decide between using first-past-the-post (FPP) or the single transferable vote (STV) for local body elections. This article asks which of the two voting systems would best meet the principle of “fair and effective” representation also established in the Act. I argue that although “fair” is a problematic measure, STV is more effective than FPP on several counts. The article then asks, if STV provides more effective representation than FPP, why are so few council elections being held using this voting system? Here, I argue that the decision-making process established in the LEA enables incumbent councils, with high incumbency rates and strong self-interest, to retain the status quo and dominate the electoral option at the expense of communities who struggle to initiate and achieve a change in the electoral system. Moreover, the LEA option creates perpetual uncertainty for everyone; council and community decisions can perpetually “trump” each other. Alternatives to the option need to be urgently considered to achieve effective representation in local government.*

**CORPORATE MANSLAUGHTER IN NEW ZEALAND:WAITING FOR A DISASTER?  
MAXWELL H. SMITH**

*This paper aims to answer two simple questions: why and how New Zealand should introduce an offence of corporate manslaughter. The paper begins by setting out the various models of corporate liability that will form the basis of any offence of corporate manslaughter: vicarious liability, the identification doctrine, attribution theory, organisational fault and aggregation. Next, the paper discusses how these theories of corporate liability have been implemented in practice by looking at corporate manslaughter offences in the United Kingdom, Canada, the Australian Capital Territory and Ireland. The corporate manslaughter offences in these jurisdictions are evaluated using the criteria that culpable companies must be able to be successfully prosecuted with penalties severe enough to deter future offences. The second half of the paper focuses more specifically on New Zealand. It establishes the status quo by describing the current liabilities that companies face for workplace deaths under health and safety legislation. In this context, the policy arguments for and against a corporate manslaughter offence are weighed up in order to show that there are overwhelming policy reasons to introduce a new offence. Finally, this paper concludes by presenting a possible formulation of corporate manslaughter in New Zealand based on the preceding discussion.*

**AN EXAMINATION OF NEW ZEALAND CRIMINAL APPEALS TO THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL 1841–2015  
ANDREW GRANT**

*This article considers the 14 criminal cases in which leave was granted to appeal to the Privy Council from New Zealand between 1897 and 2015, a number heavily disproportionate to the volume of domestic criminal appeals during that period. Analysis of these 14 cases suggests that the Privy Council was both reluctant to give leave to appeal on most criminal matters and unrealistically expensive for most criminal appellants. This combination led to only an extremely small percentage of Court of Appeal judgments on criminal matters being appealed further to the Judicial Committee of the Privy Council (Board). This analysis also sheds light on the nature of appeals that came before the Board from New Zealand, and lends weight to the view that the Supreme Court of New Zealand is a more effective administrator of New Zealand criminal justice than was the Privy Council.*

## **THE UK AND THE EU: THE WHINGE IN (AND OUT OF) THE WILLOWS?**

**MEL KENNY**

*On 23 June 2016, the United Kingdom (UK) voted by 51.9 per cent to leave or “Brexit” the European Union (EU). The vote followed a surreal debate in which one group of “eurosceptics” argued the negative case “for” the EU (“project fear”); while a second group promoted a threadbare “Brexit” prospectus, confident that their case would escape scrutiny and that any critics could be dismissed with Imperial swagger (“having one’s cake and eating it!”). Meanwhile, though both sides agreed that “Brussels” had to be “shaken out of its complacency”; Westminster is now cobbling together a strategy to define what “Brexit” might mean. Whatever it may mean, “Brexit” comes at a time when the EU is vulnerable; facing a refugee crisis, Eurozone crisis and Russian aggression. Yet the UK has its own problems inter alia deficit spending, a productivity gap and an “unbalanced” economy. This paper asks whether “Brexit” might have more positive effects for both the UK and the EU, or whether there might be a further “Greek option” which finesses “Brexit” and conciliates the parties to this dysfunctional relationship.*