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LEGISLATING FOR SITE-BLOCKING ORDERS

Graeme W Austin

The 2022 European Union-New Zealand Free Trade Agreement requires each party to "ensure that the judicial authorities may issue an injunction against an intermediary whose services are used by a third party to infringe intellectual property rights." Similar language appears in the 2022 United Kingdom-New Zealand Free Trade Agreement. These injunctions, known as "site-blocking orders", require Internet Service Providers to take reasonable steps to block access to online locations where infringing material can be accessed. While debate as to whether site-blocking orders should be available in New Zealand is now foreclosed, the trade agreements do not specify how such a regime should be organised. New Zealand should enact a legislative scheme that provides detailed guidance to decision-makers as to the circumstances in which site-blocking orders can be made. In the design of the regime, it would be helpful to draw on the legal analysis that has occurred in other jurisdictions, including the extensive analysis of the human rights implications of blocking orders, while tailoring the regime to the New Zealand legal context, taking account of the Bill of Rights Act 1990 and Te Tiriti o Waitangi, and relevant international human rights commitments. Given the relatively small size of the New Zealand market for creative content, consideration should be given to whether the power to grant orders should be vested in an administrative body, such as the Copyright Tribunal.

"MY RESPONSIBILITY IS TO THE COMPANY, IT'S ACTUALLY NOT TO SHAREHOLDERS": DIRECTOR INTERPRETATIONS OF THEIR DUTY TO ACT IN GOOD FAITH AND IN THE BEST INTERESTS OF THE COMPANY

Lynn Buckley, Susan Watson and Ljiljana Eraković

Directors have a duty to act in good faith and in the best interests of the company. Yet, the scope of this duty remains disputed. Longstanding debate has surrounded the duty, with arguments principally concerning to whom it is owed and what constitutes the company's interests. More recently, this debate continues in light of increasing societal expectations of good corporate behaviour and the sustainability crises facing the Earth system.

In this context, this paper explores how directors of New Zealand companies interpret their duty to act in good faith and in the best interests of the company. It draws on data generated in 22 qualitative interviews conducted with current professional directors sitting on private sector boards in New Zealand.

The paper begins with a discussion of the duty, which is enshrined in statute under s 131 of the Companies Act 1993, before outlining the research design. The findings detail an entity conceptualisation of the company whose interests are broadly construed to encompass not only its shareholders' interests, but also those of other stakeholders including the community and environment. The paper subsequently reflects on this consensus, considering the current legal landscape and implications for any further clarification of the duty.

DATA SOVEREIGNTY AND PRIVACY: A CHIMERA OR REALISTIC PROSPECT IN AOTEAROA/ NEW ZEALAND?

Gehan Gunasekara

The recent trend for large global digital platforms, such as Amazon Web Services and Microsoft, to establish data centres in New Zealand has renewed the debate surrounding data sovereignty in the digital era. This article discusses the relevance of data privacy law for data sovereignty. It explores motivating factors underlying sovereignty claims, emerging cloud models in respect to access and control over data, and the benefits of localisation before examining the territorial as well as extraterritorial application of the Privacy Act 2020, and how these provisions might be applied to data clouds both in New Zealand and overseas. It draws on emerging organisational and technical solutions such as use of data trustees and encryption, to ensure sovereignty over data governance. Finally, it draws on overseas data privacy jurisprudence to demonstrate the current shortcomings of existing legislative provisions, before proposing solutions, including reform of the Privacy Act 2020.

WAI 262 RESPONSE: PRIORITISING THE TREATY RELATIONSHIP TO DESIGN A RECONCILIATORY PROCEDURAL FRAMEWORK

Jayden Houghton

Māori and the Crown are designing frameworks to address the Crown's breaches of its guarantee under Te Tiriti o Waitangi 1840 to allow Māori to exercise tino rangatiratanga (chiefly authority) over their taonga (tangible and intangible treasures), including mātauranga Māori (the body of knowledge originating from Māori ancestors, including the Māori worldview and cultural practices). This article argues that the substantive framework to address the Treaty breaches asserted in the Wai 262 claim should enable Māori and the Crown to reconcile on those breaches. The article also recommends that Māori and the Crown design the substantive framework in a reconciliatory procedural framework in which Māori and the Crown prioritise a renewed treaty relationship. It uses a Tullyesque approach to reconciliation to provide guidance for the design of such a procedural framework.

INTELLECTUAL PROPERTY AND THE PROHIBITION ON CARTEL CONDUCT IN NEW ZEALAND COMPETITION LAW

John Land

This article examines the impact on the licensing and enforcement of intellectual property (IP) of the prohibitions on cartel conduct in the Commerce Act 1986 (the Act). It argues that as a result of recent legislative amendments, common and pro-competitive arrangements for licensing of IP rights will likely have become unlawful under the prohibition on cartel conduct in s 30 of the Act. Such arrangements will also likely give rise to a criminal offence under the new cartel offence provision in s 82B. As a consequence, the recent removal of the IP exception in s 45 of the Act was undesirable. The repeal of s 45 significantly detracts from the incentives to innovate that the conferral of IP rights are supposed to encourage. Further, the ability of IP rights holders to enforce their IP rights and settle legitimate disputes should not be diminished by the prohibitions on cartel conduct. At present, there is a risk that those prohibitions outlaw the reasonable settlement of IP enforcement litigation where that settlement includes a restraint on supply by the infringing party. Legislative amendment is required to ensure that reasonable settlement of IP enforcement litigation does not breach s 30 or amount to an offence under s 82B.

THE EVOLUTION OF THE INCOME TAX NEXUS RULES IN NEW ZEALAND'S STATUTES

Victoria Plekhanova

This article looks at the development and evolution of the income tax nexus rules in New Zealand statutes, and at how these developments are related to the main economic events and other factors that have together shaped New Zealand's income tax base. The primary aim is to identify the sources of the most common income tax nexuses in New Zealand statutes, and the reasons behind substantive changes to them over time. This largely historical research project provides the important contextual background necessary to understanding the inconsistencies in the existing statutory income tax nexus rules and to develop proposals for reform. It also helps advance a scholarly discussion about convergence and divergence of tax systems and tax rules.

LITIGATION FUNDING IN AN INSOLVENCY CONTEXT: A TRANS-TASMAN COMPARISON AND ANALYSIS

Lynne Taylor, Sulette Lombard and Christopher F Symes

It is not uncommon for Australian and New Zealand liquidators conducting an insolvent liquidation to identify a right to sue against a viable defendant, but for there to be insufficient assets in the liquidation to fund enforcement action. One funding option open to Australian and New Zealand liquidators in this circumstance is entry into a commercial litigation funding agreement. We undertake a comparative analysis of the key components of the Australian and New Zealand regulatory frameworks governing liquidators' entry into commercial litigation funding agreements to identify similarities and differences. These conclusions are used to assess the overall efficacy of each jurisdiction's framework and how each might be improved. We identify some similarities but a greater number of differences in the Australian and New Zealand regulatory frameworks. We assess New Zealand's framework as having greater uncertainty in its ambit which may have adverse consequences for New Zealand liquidators and funders given that several large litigation funders operate in both jurisdictions. We offer proposals tailored to each jurisdiction, but the identified differences between Australia and New Zealand mean that overall consistency in terms of legal frameworks and (it follows) outcomes will not be possible unless one jurisdiction makes an unlikely decision to embark on significant amendment of its corporate insolvency framework.