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Announcements

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"Wakatū: Crown-Māori Fiduciary Obligations and the Ongoing Relevance of Te Tiriti o Waitangi"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 32/2019

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In 2017, the Supreme Court in Proprietors of Wakatū v Attorney-General recognised for the first time in New Zealand that the Crown has enforceable private law fiduciary duties to Māori in relation to 19th century land purchases. Those duties arose as a result of the Crown's unilateral power to extinguish native title and enable the alienation of Māori land, coupled with an assumption of responsibility on the part of the Crown to act in the Māori proprietors' best interests. This

coupled with an assumption of responsibility on the part of the Crown to act in the Māori proprietors' best interests. This paper submits that this recognition provides the springboard from which future courts might recognise the fiduciary duty as arising from the Treaty of Waitangi, based on the doctrine of Crown pre-emption embodied in article II. The recognition of Crown-Māori fiduciary duties has two key implications: first, fiduciary law is expanded to hold the Crown as fiduciary, thus blurring the traditionally distinct categories of public and private law in a way favourable to Māori; secondly, the availability of fiduciary duties will confer legitimacy on the current Treaty settlement process in acting as a legal backstop for Māori in the negotiations process. The recognition of specifically Treaty-based Crown-Māori fiduciary duties goes further; it has the potential to create a new area of jurisprudence, as some Treaty breaches will become enforceable in a court of law, and in particular in the law of fiduciaries. As a result, Wakatū has the potential to reconfigure the nature of the Crown-Maori relationship and the place of the Treaty of Waitangi within New Zealand's constitutional landscape.

"Mediating Multiple Lines of Accountability in the Kiwifruit Case"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 33/2019

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Strathboss Kiwifruit Ltd v Attorney-General (Kiwifruit) held the Ministry of Agriculture and Forestry (MAF) liable in negligence for the Psa3 incursion. In this paper I consider the role of Kiwifruit in holding MAF to account for the incursion and how this interacts with public law lines of accountability. The experience of Kiwifruit demonstrates that, in recognising that a duty of care is owed by the government in tort, courts should ask themselves two questions. First, whether accountability has already been achieved. And secondly, if accountability has already been achieved, whether imposing multiple lines of accountability will complement each other or risk creating a dysfunctional accumulation of accountability mechanisms. This would give proper regard to the role that tort is able to play in holding the government to account and would serve to recognise the unique nature of the government as a litigant.

"Kaitiakitanga and the Conservation Estate: Protecting Māori Guarantees Under the Treaty of Waitangi Through the New Zealand Bill of Rights Act 1990"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 34/2019

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Māori are tangata whenua (people of the land) of Aotearoa New Zealand. The development, sustenance and transmission of mātauranga Māori (Māori knowledge) requires a relationship between tangata whenua and their taonga (everything that is held precious). Since the arrival of Europeans, this relationship has been compromised by environmental degradation, the alienation of tangata whenua from traditionally owned lands and urbanization.

The conservation estate is one of the few remaining avenues through which Māori can fulfil their cultural obligations as kaitiaki (guardians) over their taonga. Since the creation of the conservation estate, the Crown has assumed near-absolute management. As the Waitangi Tribunal's Ko Aotearoa Tēnei report identified, the exclusion of Māori from participation in the management of the estate renders the Crown in breach of both the governing legislation, the Conservation Act 1987, and the Treaty of Waitangi.

This paper considers whether the exclusion of Māori from the governance of the conservation estate, frustrating their ability to act as kaitiaki over their taonga, breaches two rights under the New Zealand Bill of Rights Act 1990. The paper asks whether the Crown's exclusion violates s 15, the right to manifest religion or belief, or s 20, the right to culture.

This paper concludes that the scope of both rights can incorporate, and protect, the exercise of kaitiaki obligations, with s 20 being the most appropriately tailored to protecting this practice. The analysis explores the parameters of both rights and considers whether similar claims taken in comparative jurisdiction can provide guidance for the inclusion of this practice under New Zealand Bill of Rights Act. Recognising kaitiaki obligations as protected under the Act provides that in acting as a gatekeeper between Māori and their ability to sustain a relationship with their taonga, the Crown is breaching human rights.

"Improving Compliance in the Three Waters: The Tension between the Rule of Law, Accountability and Subsidiarity"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 35/2019

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Levels of compliance, monitoring and enforcement in the three waters – drinking water, wastewater and stormwater – are inadequate. The three waters review is currently investigating options to improve compliance because of the serious adverse effects a lack of compliance has on our health, environment and economy. This paper argues that the current governance arrangements are the reason for the lack of compliance. Local authorities lack the resources to ensure compliance is consistent and effective which undermines equality before the law and congruence. The various actors and forums also dilute accountability. While theoretically subsidiarity and accountability justify the current arrangements, in practice local responsibility for compliance is inefficient and there is weak democratic accountability. This paper analyses the inherent tension between the rule of law, accountability and subsidiarity by assessing the compatibility of these principles with possible changes to the three waters governance arrangements to improve compliance. Despite the difficulty in resolving the tension, this paper argues that changes to the governance arrangements must be made and suggests that a mixture of compliance responsibilities at central and regional governance levels would be most appropriate.

"Man vs Machine: Accountability Mechanisms and New Technology"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 36/2019

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Technology is becoming more complex and is increasingly being used in law. Tools used to assist in decision making are also becoming more complex. It is important to ensure accountability structures keep up with developments in technology so that we do not lose control of decision making processes. This paper identifies four types of decision making: human decisions, decisions using non-machine learning algorithms, decisions using machine learning algorithms, and decisions where machine learning makes the decision. Issues are identified in applying accountability mechanisms for each, focusing on challenges in pinpointing an actor to hold accountable and finding forums equipped to ask questions. The use of machine learning is a significant hurdle in being able to choose an actor because these kinds of algorithms are opaque and require significant expertise to comprehend. Users do not necessarily know how the algorithm works and so cannot provide adequate account for the decisions that the algorithm makes. Programmers may have to shoulder some of the accountability burden, however they too may be unable to provide complete answers. Likewise, forums may lack knowledge to ask meaningful questions as a result of lack of expertise and lack of transparency on the part of the algorithm. Problems identifying these parties in an accountability context need to be resolved for the future as machine learning algorithms become more common.
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