

if this message does not display correctly, click [here](#)



## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

### VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

Vol. 1, No. 1: Aug 23, 2011

#### [JOHN PREBBLE, EDITOR](#)

Professor of Law, Victoria University of Wellington, Honorary Research Fellow,  
Monash University

[john.prebble@vuw.ac.nz](mailto:john.prebble@vuw.ac.nz)

[Browse ALL abstracts for this journal](#)

Links: [Subscribe ~ Unsubscribe](#) | [Distribution](#) | [Network Directors](#) | [Submit ~ Revise Your Papers](#)

## Announcements

Victoria University of Wellington and the Social Science Research Network announced the Victoria University of Wellington Legal Research Paper Series on 27 July 2011. Welcome to all our readers. This is the first issue of the series.

## Table of Contents

### **The Legitimacy and Purpose of Intellectual Property Chapters in FTAs**

[Susy R. Frankel](#), Victoria University of Wellington

### **Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges**

[Elisabeth McDonald](#), Victoria University of Wellington - Faculty of Law

[Yvette Tinsley](#), Victoria University of Wellington - Faculty of Law

### **Remoteness Re-Invented?**

[David McLauchlan](#), Victoria University of Wellington - Faculty of Law

### **'The Sky Didn't Fall In': An Emerging Consensus on the Shape of New Zealand Labour Law?**

[Gordon John Anderson](#), Victoria University of Wellington - Faculty of Law

### **The Problem with Suing Sovereigns: *Sloman v. Governor and Government of New Zealand (1876)***

[Geoff McLay](#), New Zealand Law Foundation, Victoria University of Wellington - Law Faculty

### **Essay - Tolerating Confusion About Confusion: Trademark Policies and Fair Use**

[Graeme W. Austin](#), Victoria University of Wellington

[^top](#)

## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

### VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

#### "The Legitimacy and Purpose of Intellectual Property Chapters in FTAs"

*CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS*, Ross Buckley, Vai Io Lo, Laurence Boulle, eds., Wolters Kluwer, 2008

[Victoria University of Wellington Legal Research Paper No. 1](#)

**SUSY R. FRANKEL**, Victoria University of Wellington

Email: [Susy.Frankel@vuw.ac.nz](mailto:Susy.Frankel@vuw.ac.nz)

This chapter discusses the role and function of intellectual property chapters in Free Trade Agreements (FTAs). In the intellectual property context, FTAs are primarily used to increase the obligations of parties. Multilateral negotiations at the TRIPS Council, of the World Trade Organization (WTO), are largely stalled and so proponents both for and against any increases in intellectual property protection use alternative forums to pursue their interests. One such forum, used mostly by those seeking to increase levels of intellectual property protection, is FTAs. The other key WTO agreements, the GATT and GATS, provide most-favoured nation (MFN) exceptions for FTAs. This means that the provisions of the FTA only apply to the FTA parties and not to other WTO members. The TRIPS Agreement has no equivalent MFN exception. This chapter discusses how the absence of an MFN exception for intellectual property chapters in FTAs only serves to increase protection; protection cannot be decreased. Against this background the chapter analyses the legitimacy of this one-way effect, in light of the object and purpose of the TRIPS Agreement. The chapter discusses the impact of TRIPS-plus on small, developed countries with market economies. Although of different sizes, both New Zealand and Australia may fit this description when compared with, for example, the United States and the European Union. This chapter suggests that continuous wave of TRIPS-plus in FTAs is not sustainable or desirable in the long term. The final part discusses some alternative approaches to the use of FTAs to negotiate new intellectual property norms.

#### "Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges"

*Victoria University of Wellington Law Review*, Forthcoming

[Victoria University of Wellington Legal Research Paper No. 2](#)

**ELISABETH MCDONALD**, Victoria University of Wellington - Faculty of Law

Email: [Elisabeth.McDonald@vuw.ac.nz](mailto:Elisabeth.McDonald@vuw.ac.nz)

**YVETTE TINSLEY**, Victoria University of Wellington - Faculty of Law

Email: [Yvette.Tinsley@vuw.ac.nz](mailto:Yvette.Tinsley@vuw.ac.nz)

Fifteen years after the Law Commission's rejection of pre-trial recording of cross-examination, it is back on the reform agenda. Drawing from research examining comparative pre-trial and trial practices in cases of sexual offending, this article discusses the backdrop to the debate surrounding pre-recording, including the provisions of the Evidence Act 2006 and

the approach of the courts to alternative ways of giving evidence. The benefits and drawbacks of pre-trial recording of evidence for adult witnesses are canvassed – including practical, evidential and psychological issues – leading to the conclusion that rather than a presumption in favour of any particular alternative way of giving evidence, close consideration of the individual circumstances of each case is required.

### **"Remoteness Re-Invented?"**

*Victoria University of Wellington Legal Research Paper No. 3*

**DAVID MCLAUCHLAN**, Victoria University of Wellington - Faculty of Law

Email: [David.McLauchlan@vuw.ac.nz](mailto:David.McLauchlan@vuw.ac.nz)

This article discusses the fundamental questions concerning the application and conceptual basis of remoteness of damage in the law of contract that are raised by the decision of the House of Lords in *The Achilleas* [2009] 1 AC 61. It commences with a review of the academic literature that had a significant influence on their Lordships' judgments in that case. While acknowledging the obvious theoretical difference between the two main schools of thought - one treating the remoteness rule as agreement-centred (with the task of the court being to identify an implicit allocation of risk) and the other treating it as a gap-filling device or default rule - the article questions whether the distinction has practical consequences. After a close analysis of each of the judgments in *The Achilleas*, which reveals, contrary to the view expressed in a recent English High Court case, a majority in favour of an agreement-centred approach, the article discusses, inter alia, the factors that ought to be weighed in determining whether a loss is too remote and the correctness of their Lordships' unanimous decision to overturn the award of damages for lost profits that had been made by the, also unanimous, lower courts.

### **"'The Sky Didn't Fall In': An Emerging Consensus on the Shape of New Zealand Labour Law?"**

*Australian Journal of Labour Law, Vol. 23, 2010*

*Victoria University of Wellington Legal Research Paper No. 4*

**GORDON JOHN ANDERSON**, Victoria University of Wellington - Faculty of Law

Email: [gordon.anderson@vuw.ac.nz](mailto:gordon.anderson@vuw.ac.nz)

When the Labour government introduced the Employment Relations Act 2000 it was met with a hostile and vociferous campaign of opposition from both the opposition National party and employer lobby groups. A decade later that opposition has largely faded away as it became clear that the labour market changes achieved under the Employment Contracts Act remained intact and as the ground of labour relations changed within that new environment. A year after its election in late 2008 the National government has yet to introduce significant amendments to the Employment Relations Act and looks unlikely to do so. This article asks whether a broad consensus has emerged on the shape of labour law and examines the reasons why such a consensus seems plausible. In doing so it reviews developments under Labour and considers the direction that National might take during its term of office.

### **"The Problem with Suing Sovereigns: *Sloman v. Governor and Government of New Zealand (1876)*"**

*Victoria University Wellington Law Review, Vol. 41, p. 404, 2010*

*Victoria University of Wellington Legal Research Paper No. 5*

**GEOFF MCLAY**, New Zealand Law Foundation, Victoria University of Wellington - Law Faculty

Email: [Geoff.McLay@vuw.ac.nz](mailto:Geoff.McLay@vuw.ac.nz)

In *Sloman v. The Governor and Government of New Zealand* the plaintiff attempted to sue the New Zealand Government for failing to make good on emigration contracts concluded in Europe. This article analyses the decision in *Sloman*, that the New Zealand government could not be sued in English courts, both within its own historical context and with respect to 19th century concerns over the general inability of the Crown to be sued. The article points to archival documents which show that the New Zealand Government itself was concerned, in the wake of the earlier loss of the *Cospatrick*, as to its own ability to recover the passage monies it had paid, and whether that recovery might be prevented by a lack of legal personality in the English Courts. The article concludes that while *Sloman* is an important case in its own right, there is also a need for greater investigation of both the practical and theoretical legal difficulties that faced the New Zealand Government in its development and immigration projects of the 1870s.

### **"Essay - Tolerating Confusion About Confusion: Trademark Policies and Fair Use"**

[\*Arizona Law Review\*, Vol. 50, 2007](#)

*TRADEMARK LAW AND THEORY*, Graeme B. Dinwoodie and Mark Janis, eds., Elgar Press, 2007

[\*Arizona Legal Studies Discussion Paper No. 07-18\*](#)

[\*Victoria University of Wellington Legal Research Paper No. 6\*](#)

**GRAEME W. AUSTIN**, Victoria University of Wellington

Email: [graeme.austin@vuw.ac.nz](mailto:graeme.austin@vuw.ac.nz)

In this essay, Professor Austin urges courts to be more critical of the role played by the "ordinarily prudent consumer" in trademark law. Trademark infringement law's "straightforward story," which typically justifies trademark rights in terms of protecting consumers from the harms of likely confusion and dilution, does not adequately capture the need for countervailing principles and policies to contribute to the shape of trademark doctrine. The essay argues that recognizing the incapacity of the likelihood of confusion and dilution analyzes to capture the empirical reality of the consumer experience should lead to a greater preparedness to weigh countervailing policies and principles more heavily in the scale.

Trademark "fair use" doctrine provides a useful context in which to explore these ideas. The Supreme Court's approach to fair use in *KP Permanent Make-Up, Inc. v. Lasting Impressions I, Inc.* risks valorizing consumer confusion in a context in which it should be downplayed. Moreover, the Court's holding risks constraining the analytical space available in trademark law for expression and development of policy concerns other than those that underlie trademark's straightforward story.

[^top](#)

## **Solicitation of Abstracts**

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading

scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the [Law School](#) has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

## Submissions

To submit your research to SSRN, sign in to the [SSRN User Headquarters](#), click the My Papers link on left menu and then the Start New Submissions button at top of page.

## Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email:

[RPS@SSRN.com](mailto:RPS@SSRN.com)

## Distributed by:

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

## Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK

Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)

Email: [bblack@northwestern.edu](mailto:bblack@northwestern.edu)

RONALD J. GILSON

Stanford Law School, Columbia Law School

Email: [rgilson@leland.stanford.edu](mailto:rgilson@leland.stanford.edu)

Please contact us at the above addresses with your comments, questions or suggestions for

LSN-LEG.

[^top](#)**Links:** [Subscribe to Journal](#) | [Unsubscribe from Journal](#) | [Join Site Subscription](#) | [Financial Hardship](#)

## Subscription Management

You can change your journal subscriptions by logging into [SSRN User HQ](#). If you have questions or problems with this process, please email [UserSupport@SSRN.com](mailto:UserSupport@SSRN.com) or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

## Site License Membership

Many university departments and other institutions have purchased site licenses covering all of the journals in a particular network. If you want to subscribe to any of the SSRN journals, you may be able to do so without charge by first checking to see if your institution currently has a site license.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- [Accounting Research Network](#)
- [Cognitive Science Network](#)
- [Corporate Governance Network](#)
- [Economics Research Network](#)
- [Entrepreneurship Research & Policy Network](#)
- [Financial Economics Network](#)
- [Health Economics Network](#)
- [Information Systems & eBusiness Network](#)
- [Legal Scholarship Network](#)
- [Management Research Network](#)
- [Political Science Network](#)
- [Social Insurance Research Network](#)
- [Classics Research Network](#)
- [English & American Literature Research Network](#)
- [Philosophy Research Network](#)

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact [site@ssrn.com](mailto:site@ssrn.com) for more information.

## Individual Membership (for those not covered by a site license)

Join a site license, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: <http://www.ssrn.com/subscribe>

## Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for a journal, please send a detailed explanation to [Subscribe@SSRN.com](mailto:Subscribe@SSRN.com)

[^top](#)

---

To ensure delivery of this journal, please add [LSN@publish.ssrn.com](mailto:LSN@publish.ssrn.com) (Legal Scholarship

**Network)** to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email [usersupport@ssrn.com](mailto:usersupport@ssrn.com) or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

## FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at [Site@SSRN.com](mailto:Site@SSRN.com)

[^top](#)

Copyright © 2011 Social Science Electronic Publishing, Inc. All Rights Reserved