Recalibrating Honest Concurrent Use Under New Zealand’s Trade Marks Act 2002
Rob Batty

Under s 26(b) of New Zealand’s Trade Marks Act 2002, a person who has “honestly” used a trade mark in the marketplace can potentially register it despite the trade mark being identical or confusingly similar to an existing registered trade mark. This provision gives effect to the “honest concurrent use” doctrine. Despite honest concurrent use being a long-standing feature of New Zealand trade mark law, this article explains that there are significant problems with the operation of s 26(b) under the 2002 Act. Moreover, scrutiny over the origin of the honest concurrent use doctrine raises questions over its continued place in a modern registration system. In light of the issues surrounding the operation of s 26(b) and its historical origin, this article proposes and evaluates two models for recalibrating honest concurrent use under the 2002 Act.

Advance Directives Refusing Treatment: A Proposal for New Zealand
Chan Hui Yun

Healthcare consumers in New Zealand may make advance directives (ADs) in accordance with the common law under the Health and Disability Commissioner Code of Health and Disability Services Consumers’ Rights Regulations 1996 (Code of Rights). An AD is a choice about future health care intended to be effective when a consumer becomes incompetent. An AD is challenging to implement because of questions about its validity and applicability. There is a lack of clarity about its binding status in New Zealand and measures to create and implement them. Some jurisdictions, such as England and Wales, and Australia, have sought to clarify the use of ADs through statutory regulation. Should New Zealand adopt a similar approach? Or is there a preferable alternative utilising the existing legal regime? This article considers the statutory approach and argues that instead of enacting a new statute to govern ADs, the preferred option is to establish a special regime for consumers wishing to use ADs, using a nationwide pro forma. This proposal is consistent with the patient-centred aims of the Code of Rights, which has its genesis from health law reforms following the Cartwright recommendations. Additionally, the proposed regime can be integrated into the existing framework of the Code of Rights, which retains the flexibility of making ADs under the common law and circumvents the limitations of the statutory approach.

More Than Basic: Causation in Securities Misstatement Cases
Benjamin Liu

In misstatement cases, a causal link can be based on the claimant’s reliance on the misstatement (direct causation), or the reliance of a third party or a class of third parties (indirect causation). In terms of direct causation, whether the misstatement is a cause of the loss can be determined by the “but-for” test and, in cases where a non-fraudulent misstatement would be in the plaintiff’s favour assuming it were true, by the SAAMCO test. While the general rule is that the burden of proof for causation is on the plaintiff, this has been changed by statutes in the United States, Ontario and New Zealand regarding misstatements in prospectuses. In addition, the United States case law has created a presumption of reliance in class actions. The purpose of these measures is to address the evidential difficulties faced by investors in securities misstatement cases. Currently, neither approach has been adopted under the Australian law. However, a string of recent interlocutory judgments show that a market-based causation is at least arguable in the context of securities class actions.

Fossil Fuel Subsidy Reform: A New Zealand Perspective on the International Law Framework
Vernon Rive

This article examines and critiques New Zealand’s role in international efforts towards the coordinated reform of fossil fuel subsidy practices, including through its leadership of the Friends of Fossil Fuel Subsidy Reform (FFFSR), a coalition of nine non-G20 countries who have formed an alliance in advancing international fossil fuel subsidy reform efforts. A particular aspect of New Zealand and FFFSR attention and strategy to date — a focus on fossil fuel consumption subsidies in developing countries — is assessed against principles of equity, “common but differentiated responsibilities and respective capabilities” and the duty of developed nations to “take the lead” on climate change mitigation. The article also explores arguments concerning the importance of supply-side climate mitigation measures and the need to take into account risks of stranded fossil fuel production assets in domestic climate change policies.
The internet has introduced a new dimension to the tort of defamation. Publication is a crucial element in the defamation action for without publication there can be no damage to reputation. As the tort moved to strict liability in the 19th century one issue that troubled the judges was the extent to which secondary publishers, those who assist in disseminating the defamatory material but do not know the material is defamatory, could be liable. Over the late 19th and early 20th century innocent dissemination became a common law defence to the defamation action. The defence can be traced to Emmens v Pottle, a case decided in the late 19th century where the Judges were primarily concerned with the concept of publication. This article traces the relationship between the requirement of publication and the innocent dissemination defence through the 19th and early 20th century, and the inconsistencies that occurred to the meaning of "publication" as a result. The article analyses the extent to which the earlier cases can be used by analogy when determining the liability of the online intermediary for defamatory statements made by others, and concludes that the inconsistencies seen in the earlier cases are mirrored in the internet intermediary cases as the judges would the law to meet the new technology.

NO-FAULT COMPENSATION AND UNLOCKING TORT LAW’S “RECIPROCAL NORMATIVE EMBRACE”
Jesse Wall
The purpose of this article is to explain how the principle of corrective justice has been displaced by the provision of no-fault compensation for personal injuries. In explaining the transition from tort liability for personal injuries to no-fault compensation, the aim is to identify the norms that are adhered to, and the norms that are abandoned, under either scheme. The explanation unfolds through three sections. Section 2 examines the principled basis for a no-fault compensation scheme that is formulated in the Woodhouse Report. Section 3 then turns to consider how, in the absence of a no-fault compensation scheme, the principle of corrective justice imposes an agent-relative duty of reparation on those responsible for causing a wrongful loss. Section 4 then considers how the duty of reparation can be discharged by a third party when we reconfigure our conception of “wrongful loss” and considers the implications of the reconfiguration for the fault principle. Viewing the transition from tort law actions to no-fault compensation in this way enables us to appreciate how a “normatively significant connection between actions and their outcomes” is severed through the reconfiguration of “wrongful loss”.

TWO ISSUES IN MISLEADING OR DECEPTIVE CONDUCT
Matt Berkahn and Lindsay Trotman
The Godfrey Hirst case involved allegedly misleading or deceptive statements made by a large carpet manufacturer to prospective purchasers of its products. As the impugned conduct was directed at the general public, or a section thereof, it was necessary for the Court to identify the target audience of the conduct — “the consumer” — to whom the conduct was directed. This article addresses two issues that arose in the course of the Court’s identification of that target audience. First, should the consumer be defined by reference to a hypothetical person who represents the “reasonable” members of the class (the test favoured in recent Australian cases); or by reference to the actual target class, excepting “outliers”? We conclude that the latter approach strikes a better balance between the expectation of a certain level of reasonableness on the part of consumers, on the one hand, and the protection of their interests, on the other. Second, is an alleged victim’s lack of care relevant to the characterisation of a defendant’s conduct as misleading or deceptive? We conclude that consumers are not required to take steps to protect themselves from being misled or deceived by conduct that would, without such steps, be misleading or deceptive. Rather, references to consumer carelessness in Godfrey Hirst and other cases mean only that a Court, in assessing the likely effect of impugned conduct, must consider if it was that conduct that caused error, rather than a consumer’s own carelessness.

INDEPENDENT CONTRACTORS AND STRIKE ACTION IN NEW ZEALAND
Shae McCrystal
This article is a continuation of Shae McCrystal, “Organising Middle Earth? Collective Bargaining and Film Production Workers in New Zealand” (2014) 26(1) NZULR 104, which considered whether self-employed workers in New Zealand could lawfully engage in collective bargaining. The notable omission from that article was the legal status of any strike action undertaken in conjunction with such bargaining. The present article explores exactly that question, considering the liability that may arise when a group of self-employed workers collectively withdraw their labour in the pursuit of better terms and conditions of engagement. This is explored through the lens of labour law and competition law, with comparative analysis that draws parallels with the legal position in Australia.
Since 2008, the Government has proposed a number of changes to New Zealand’s major environmental planning legislation, the Resource Management Act 1991 (the Act). A set of changes proposed in 2013 suggested a suite of reforms to both the “principles” sections of the Act and to the procedures for plan-making and resource consents. The changes to the principles sections proved controversial and provoked significant opposition from a number of parties in Parliament. The Bill put before Parliament in late 2015 removed the changes to the principles sections but retained and expanded on the procedural changes. This article looks at the interpretation of the Act and develops a framework for assessing these changes, noting that decision-making under the Act is more political than legal in nature, and arguing that this feature of the law demands concern for how much the public can participate in decisions, rather than the nature of the principles formally stated in the legislation. The article then argues that as a result it is the proposed procedural changes, not the changes to the principles in the Act, that should attract serious concern.