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SECTIONS 50 AND 40 OF THE PUBLIC WORKS ACT 1981 — SEQUENTIAL PROVISIONS

ELIZABETH TOOMEY

This article examines the relationship between sections 50 and 40 of the Public Works Act 1981. Contrary to the views of the Crown, Land Information New Zealand, the Office of Treaty Settlements and the courts, the paper argues that the two sections can only operate as sequential provisions. It highlights the three fundamental errors that the relevant authorities have made with respect to section 50. Section 50 involves the transfer of an existing public work; and does not give the Crown any discretionary powers with respect to the transfer of any land. Section 40 provides the procedure for the disposal of land no longer required for a public work. Thus, the time frame within which section 50 can operate must have expired before section 40 can be activated. The article offers a critical analysis of the latest decision on this point: Te Runanga O Ngati Awa v Attorney-General.

INTRODUCING A PROHIBITION ON UNFAIR CONTRACTUAL TERMS INTO NEW ZEALAND LAW: JUSTIFICATIONS AND SUGGESTIONS FOR REFORM

KATE TOKELEY

This article examines the question of whether New Zealand should legislate against unfair contractual terms. It considers the extent to which New Zealand law already restricts the use of such terms and concludes that prohibiting a contractual term merely on the basis of substantive unfairness is a novel and drastic move away from principles of freedom and sanctity of contract. Such a move is accompanied by the dangers of loss of certainty and the risk that a court or other decision-maker will make false assumptions about buyer preferences. However, despite these dangers, a prohibition on unfair terms can be justified if it is limited to unexamined, standard form terms in consumer contracts. These terms are not taken into account by consumers when making purchasing decisions. Market forces cannot operate effectively on these terms and there is therefore a danger that some of these terms may be unfair.

The article critically examines the proposed Australian unfair terms provisions and the unfair terms legislation of both the United Kingdom and the Australian State of Victoria. Recommendations are made for drafting New Zealand provisions on unfair terms. Statutory definitions for the concepts of "unexamined terms", "standard form terms", "consumer" and "unfair terms" are suggested. Penalty and enforcement issues are also examined.

THE RELATIONSHIP BETWEEN EQUALITY AND LIBERTY

NICHOLAS SMITH

This article analyses the relationship between equality and liberty. "Basic equality", the fundamental belief in equal human worth, is distinguished from the various equalising projects we might be committed to. It is argued that basic equality itself requires a strong commitment to certain important liberties — those typically found in a Bill of Rights. The second meaning of "equality", as a policy goal, may clash with particular important liberties and then a balancing process must be entered into. If we bear in mind that fundamental liberties should themselves be protected because of our commitment to basic equality we will be less likely to accept, uncritically, arguments for the suppression of basic freedoms couched in terms of "equality".

THE COMPARATIVE IRRELEVANCE OF THE NZBORA TO LEGISLATIVE PRACTICE

ANDREW GEDDIS

The New Zealand Bill of Rights Act 1990 (NZBORA) was intended to improve the attention paid to individual rights when enacting and applying legislation. To use a term commonly deployed in contemporary constitutional theory, it was meant to enable a "dialogue" between legislative and judicial views on rights. However, in practice the NZBORA's impact on parliamentary lawmaking practice has been negligible. This article examines the various mechanisms by which the NZBORA brings rights-issues to the fore and how these were supposed to increase dialogue between the branches of government, and explains why these have not had the expected effect. It then concludes by using two case studies — the Electoral Finance Act 2007 and the Misuse of Drugs (Classification of BZP) Amendment Act 2008 — to flesh out its general claims.

JUDICIAL REVIEW: THE FADING OF REMEDIAL DISCRETION?

JOHN CALDWELL

The remedial discretion in the law of judicial review has previously been of central importance to the supervisory courts in their efforts to balance public law rights against the wider public interest. In recent comments emanating from judgments in both the House of Lords and New Zealand Court of Appeal, however, appellate judges have signalled that this remedial discretion is now to be exercised on only a narrow and exceptional basis. This article examines the contextual background to the shift in judicial direction, and postulates that the enhanced focus on the rule of law and human rights, and increased judicial reliance on the notions of justiciability, variegated review, and materiality, have resulted in the remedial discretion becoming of more peripheral significance. The specific factors that were traditionally proferred as reasons for declining relief in discretion are also examined here, and the argument is made that these reasons are likely to prove much less persuasive in the future.