

FAYE MCINTOSH, ASSISTANT EDITOR

University of Otago

faye.mcintosh@hotmail.com

NINA OPACIC, ASSISTANT EDITOR

Victoria University of Wellington - Faculty of Law

nina.opacic@live.com

JOHN PREBBLE QC, EDITOR

Professor of Law, Victoria University of Wellington - Faculty of Law, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien, Adjunct

Professor of Law, University of Notre Dame Australia - School of Law

john.prebble@vuw.ac.nz

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VUWLRPS Special Issue on Consumer Law: Selected Papers by Kate Tokeley, Senior Lecturer in Law, Victoria University of Wellington

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VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"The Natural Health and Supplementary Products Bill: Homeopathy, the Truth and the Placebo Effect" 

(2014) NZULR 26(2) 421-440

Victoria University of Wellington Legal Research Paper No. 16/2016

KATE TOKELEY, Victoria University of Wellington - Faculty of Law

Email: Kate.Tokeley@vuw.ac.nz

The Natural Health and Supplementary Products Bill establishes a system for the regulation of natural health products in New Zealand. It sets out three principles that relate to consumer information. These

are: (1) that consumers should receive accurate information about natural health and supplementary products; (2) that they be told about the risks and benefits of using the product; and (3) that any health benefit claims made for the product should be supported by scientific or traditional evidence. This article examines how the Bill applies these principles to homeopathic remedies. There are two reasons for singling out this category of natural health product. First, the Bill, despite classifying homeopathic remedies as "natural health products", excludes homeopathic remedies from major parts of the Bill. This article argues that there is no good reason to treat homeopathic remedies differently from any other natural health products. The second reason for examining homeopathic remedies is that they provide an excellent case study for issues surrounding deception and the placebo effect. The placebo effect relies on deception. The healing occurs because of the belief in the product, not the product itself. The article explores the question of whether it can ever be ethical to mislead consumers in order to facilitate the placebo effect.

"A New Framework for Assessing the Personal Liability of Directors and Employees Under S 9 of the Fair Trading Act 1986"

New Zealand Law Review, Forthcoming

Victoria University of Wellington Legal Research Paper No. 166/2017

KATE TOKELEY, Victoria University of Wellington - Faculty of Law

Email: Kate.Tokeley@vuw.ac.nz

Section 9 of Fair Trading Act 1986 ("FTA") imposes strict liability on persons who "in trade" engage in misleading conduct. In the majority of cases the "person" who will be sued under this legislation is a trading corporation. But what happens when the corporation is insolvent or financially unstable? Can the aggrieved person successfully sue the individual responsible for the misleading conduct? Is this person (usually a director or employee) acting "in trade"? The literature and case law to date refer to two dominant approaches to answering this question. There is the broad approach, adopted by the Court of Appeal in *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17. In that case it was held that although directors and employees are not themselves trading on their own account, they can be considered as acting "in trade" because they are acting on behalf of a trading entity that is itself "in trade". This can be contrasted with the "narrow approach", which maintains that a person cannot be said to be acting "in trade" unless they are themselves "in trade" on their own account. Under this approach directors and employees can never be held liable as principals under s 9 for conduct engaged in on behalf of a company. Despite this standard two-option view, a close analysis of recent case law reveals that courts are, without full articulation, applying neither of these approaches, but are in fact moving toward a middle-ground approach. This article constructs a conceptual framework for this middle-ground approach which allows for employees and directors to be categorised as acting "in trade" only where their role is so intimately connected to the company business that they are effectively engaged in their own trading activity. This approach is both a reasonable interpretation of the phrase "in trade" and accords more closely with the policy objectives and underlying philosophical foundations of s 9 of the FTA than either the broad or the narrow approach.

"When Not All Sellers are Traders: Re-Evaluating the Scope of Consumer Protection Legislation in the Modern Marketplace"

Victoria University of Wellington Legal Research Paper No. 167/2017

KATE TOKELEY, Victoria University of Wellington - Faculty of Law

Email: Kate.Tokeley@vuw.ac.nz

Consumer protection statutes in both Australia and New Zealand impose obligations on people who are in trade. Courts have consistently interpreted the 'in trade' limitation as excluding private transactions. In New Zealand, a statutory provision operative since 2014 requires all sellers 'in trade' who transact over the internet to make it clear to consumers that they are a 'vendor in trade'. This helps consumers buying online to assess whether or not they are protected by consumer legislation. This article explores the emerging interpretation difficulties presented by the private seller exclusion in an age of online selling where the distinction between a commercial seller and a private seller is not always clear. The article considers whether there are good reasons, both in terms of policy and as a matter of statutory interpretation, to abandon the idea that private transactions are not 'in trade' and, therefore, not subject to consumer protection legislation. If the private seller exclusion is not abandoned, it is argued that there is an urgent need to update consumer legislation to clarify when sellers cross the line from being a seller entering a private transaction to being a person acting 'in trade'. Recommendations are made for the development of new statutory guidelines and definitions.

"Towards a New Regulatory Regime for New Zealand Online Auctions"

New Zealand Law Review, Number 1, pp. 91-119 (29), 2011

KATE TOKELEY, Victoria University of Wellington - Faculty of Law
Email: Kate.Tokeley@vuw.ac.nz

Recent statements by the Minister of Consumer Affairs indicate that developing consumer law so that it is technologically neutral is a priority. This article analyses how the current law responds to the technological innovation of the online auction. The article concludes that consumers using online auctions have fewer legal rights and more difficulties obtaining redress than consumers who purchase goods from shops or from New Zealand online stores. The two main risks facing consumers using online auction sites are that the goods are not delivered or that they are defective in some way. The article concludes that there is an urgent need to update the Consumer Guarantees Act 1993 to expressly cover online auctions. However, this amendment alone will not be sufficient to protect consumers using online auctions. Several other suggestions are made for creating a comprehensive regulatory framework for New Zealand online auctions. These suggestions include introducing a public enforcement agency to enforce the Consumer Guarantees Act, imposing a duty on suppliers to provide identity and contact information and enacting specific regulation for online auction site operators.

"Introducing a Prohibition on Unfair Contractual Terms into New Zealand Law: Justifications and Suggestions for Reform"

(2009) 23(4) NZULR 418-448

Victoria University of Wellington Legal Research Paper No. 169/2017

KATE TOKELEY, Victoria University of Wellington - Faculty of Law
Email: Kate.Tokeley@vuw.ac.nz

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.

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The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

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 Appellate 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.

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

Email: bblack@northwestern.edu

RONALD J. GILSON

Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)

Email: rgilson@leland.stanford.edu

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