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## Announcements

New Zealand Legal History: Papers by Mark Hickford, Pro Vice-Chancellor and Dean of Law, Victoria University Wellington

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## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

### "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910-1920"

*Victoria University of Wellington Law Review, Vol. 38, No. 4, pp. 853-924, 2008*
*Victoria University of Wellington Legal Research Paper No. 147/2016*

**MARK HICKFORD**, Victoria University of Wellington - Faculty of Law
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This extended essay argues for a new approach towards the writing of constitutional histories of the Crown within New Zealand. It looks specifically at the conceptions of the relationship between the Treaty of Waitangi, the common law and customary interests that the Crown and its legal advisors actually employed in internal deliberation and external positioning. In looking at the processes for

articulating the Crown's preferred legal position during John Salmond's tenure as Solicitor-General, this article notes the overwhelming prevalence of statute and Treaty-based conceptions in law (as well as areas of historical change and discontinuity). Common law approaches emerged in the later twentieth century through newly minted theories or doctrines of aboriginal title but were never regarded as distinct options by the historical actors themselves. The concern of this article is with how those actors – most notably Salmond – conceived, acted upon and adapted their perception of the Crown's constitutional obligations to Māori. In mapping the course of a Crown legal "register" or way of speaking about native title and the Treaty of Waitangi, the essay aims to reveal the rich and contested nuances of the approaches assumed by the legal advisors to the Crown on the question of the Treaty from 1910 until 1920 and its relevance to a governmental outlook on customary property.

### "The Historical, Political Constitution -- Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value"

*NZLR 4, 585-623, 2013*
*Victoria University of Wellington Legal Research Paper No. 148/2016*

**MARK HICKFORD**, Victoria University of Wellington - Faculty of Law
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This article contends that the concept of political constitutionalism in New Zealand is not merely of explanatory value. Rather if it is approached with a historically nuanced sense, then its normative value becomes clearer, with “normative” here meaning a focus on expanding and diversifying areas of contestability and dissent in and through politics as opposed to relying on case-by-case legalism. With reference to the complex histories of Crown-indigenous relations and the development of colonial New Zealand’s constitutional setting in 1852, this article argues that the real, historicised “lives” of the constitution yield normative understandings of our own political constitution in contemporary times. The risk is that, barring a sensitively historical approach, the particular values of political constitutionalism will lie neglected and forgotten. It is analytically inadequate to simply dub these aspects of constitutionalism as “pragmatic” given richer veins of intellectual and political thought were tapped into, deployed, and contested. And these supply a more granular, nuanced picture of historical, political constitutionalism in and as a process.

### "'Vague Native Rights to Land': British Imperial Policy on Native Title and Custom in New Zealand, 1837-53"

*The Journal of Imperial and Commonwealth History Vol. 38, No. 2, June 2010, pp. 175-206*
*Victoria University of Wellington Legal Research Paper No. 149/2016*

**MARK HICKFORD**, Victoria University of Wellington - Faculty of Law
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What is often referred to as a common law doctrine of aboriginal or customary title neither underpinned imperial policies towards Māori property rights in the 1830s and 1840s nor was it viewed as a settled or broadly accepted legal doctrine. Rather, critics of imperial policies applying to New Zealand deployed these legal sources in order to challenge and influence the workings of imperial policy on British settlement within New Zealand. The particular emphasis of such policy was on disciplining the extent of such settlement and providing a land fund from crown grants. Imperial policy-makers did not endorse these legal sources despite their use in the decision of the New Zealand Supreme Court in Regina v. Symonds (1847). In this context, there was no consensual legal view or approach as to the nature or content of indigenous property rights. Ultimately, in the face of disagreement, diverse views of the nature and extent of Māori property rights persisted. The perceived non-justiciability of such rights meant that political spaces rather than the courts were of ongoing significance to characterising and debating such rights.

### "'Settling Some Very Important Principles of Colonial Law': Three 'Forgotten' Cases of the 1840s"

*Victoria University of Wellington Law Review, 35, 1, 1-71, 2004*
*Victoria University of Wellington Legal Research Paper No. 150/2016*

**MARK HICKFORD**, Victoria University of Wellington - Faculty of Law
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This article reintroduces the 'forgotten" cases of R v Taylor, Attorney-General v Whitaker and Scott v Grace and considers their specific historical contexts. They raise controversial questions about the extent of the New Zealand governor's ability to grant lands outside of the provisions of local ordinances and imperial statutes by using the prerogative. The article notes the flow-on effects of the policy lacuna created by these judgments. The judgments of Justice Chapman and Chief Justice Martin caused

considerable unease on the part of the colonial government and policy-makers in London as well as some New Zealand Company operatives. This in turn led to the subsequent legislative and policy efforts to qualify the reach of prerogative powers in colonies. The text of the cases is appended to this article.

### ''Interpreting the Treaty — Questions of Native Title, Territorial Government and Searching for Constitutional Histories''

*Brad Patterson, Richard S Hill and Kathryn Patterson (eds), After the Treaty: The Settler State, Race Relations and the Exercise of Power in Colonial New Zealand (Wellington, 2016)*

**MARK HICKFORD**, Victoria University of Wellington - Faculty of Law
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This essay deals with the various perspectives and interpretations of the Treaty of Waitangi over time. Drawn from a multi-author collection of essays in memory of the scholarship of the historian Ian Wards, the author argues that, whilst we must be mindful of not producing 'treaty-centric' histories, it is important not to reduce the historical interpretative complexities of the Treaty. Hickford continues by stating that one must be cautious when assuming the framers' original intent deserves priority attention in interpretation. Instead we must look more deeply into the texts to embrace the nuances, complexities and frailties within them, including the ways in which they instantiated a number of interpretative communities. It is concluded that whilst the texts lived many lives of interpretation, argument and negotiation, their significance lies in their strength as texts, allowing them to become a lasting focus for political relations, and the development of constitutional histories (even as these material realities of indigenous and colonial co-existence were concealed or masked).

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Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

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 Massachussetts 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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