

**NZULR ABSTRACTS**  
**Vol 30, No 4 December 2023**

**AN ANALYSIS OF THE CASE FOR ALIGNING AGREED REMEDIES TERMS WITH ACTUAL LOSS EXPOSURES**

MOSHOOD ABDUSSALAM

*This paper argues for reforming the rules governing the control of remedial clauses in (Commonwealth) common law jurisdictions. In simple terms, this paper argues that remedial terms should not be seen, as some would have it, as creating a debt or ironclad obligation on the promisor. Instead, such clauses should be treated as a security against default, which is adjustable according to circumstances prevailing at the time of breach or enforcement. This argument is based on two socioeconomic levers—radical uncertainty and (the imperative to curb) over-indebtedness. Based on the first lever, a case is made for applying hindsight in enforcing remedial provisions. The second lever aims to demonstrate the fragility of economic systems and that widespread indebtedness, coupled with the strict enforcement of remedial clauses, can weaken promisor firms' resilience in a climate of economic contraction or recession.*

**STATELESS PEOPLE IN NEW ZEALAND: FIXING THE PROTECTION GAP**

NATALIE BAIRD

*Stateless people number at least 15 million worldwide, with the largest proportion living in the Asia-Pacific region. In 2014, the United Nations High Commissioner for Refugees adopted an ambitious Global Action Plan to End Statelessness 2014–2024. This Plan calls on states to take action to eradicate statelessness. As we near the end of the operational decade for the Action Plan, it is timely to consider the problem of statelessness in New Zealand and whether the current mechanisms for the protection of stateless persons in New Zealand are sufficient. This article examines the problem of statelessness in the New Zealand context and considers the adequacy of existing protections for stateless people in New Zealand. Ultimately, it argues that existing protections for stateless people are inadequate and recommends that New Zealand should accede to the Convention relating to the Status of Stateless Persons 1954 and adopt a statelessness determination procedure.*

**ACCOUNT OF PROFITS: AN EXEMPLAR OF FIDUCIARY DOCTRINE?**

PETER DEVONSHIRE

*The strict obligations governing the conduct of fiduciaries is intended to discourage temptation and encourage fidelity. These objectives potentially lose their force if the remedy has a different emphasis. An account of profits serves a crucial function in disgorging illicit gains. The determination of accountable gains and the amount that must ultimately be disgorged is a phased exercise which does not necessarily reflect the rigour of the duty it enforces. The implications are explored with reference to causation and allowances. The former is consistent with strict fiduciary standards to the extent that unauthorised gains are readily imputed to the breach. The latter is a nuanced exercise in which the relationship between duty and remedy is more tenuous. It is concluded that this is not necessarily inconsistent with the objectives of equity and that each can be explained on a principled basis.*

**CONSISTENCY OF SENTENCING IN NEW ZEALAND'S TAX EVASION PROSECUTIONS**

RANJANA GUPTA AND AKSHAY YERRA

*The public must believe that the laws of a country are legitimate. To assist with this, the present paper investigates the parameters considered by the judiciary when deciding on the appropriate degree of sanctions by analysing the selected published legal cases.*

*The stratified random sampling method was utilised to select the cases. The qualitative data analysis package NVivo 12 was used to analyse the evasion cases. The paper examines 70 tax evasion cases from 2007 to 2022.*

*The reference to various cases in the present research demonstrates that the non-custodial sentences were imposed on taxpayers who had pleaded guilty at the earliest opportunity; were of good character; took responsibility for their actions; were cooperative with the Inland Revenue Department (IRD); had severe medical issues; had no previous convictions; were the sole income earners in their family or did not use the evaded money themselves. A custodial sentence was imposed when the taxpayers did not show remorse for their actions; had gone to extreme lengths to conceal their offending; had previous convictions; did not cooperate with the IRD and had used the proceeds of their crime to fund a luxurious lifestyle. The prison sentences for the tax evaders convicted under the Crimes Act 1961 were much higher. The issuance of a reparation order depended on the taxpayers' financial circumstances. Further, the analysis found that in the cases involving "pay as you earn" tax (PAYE), income tax and Goods and Services Tax (GST), the courts treated the GST and PAYE more harshly than income tax. It is asserted that this research will give an overview for policymakers or tax authorities to consider if looking at sentencing.*

**CONTRACTUAL RETROSPECTIVITY**

JORDAN HALLIGAN AND INDIA SHORES

*This article is a response to the lack of practical legal scholarship concerning the retrospective operation of contractual terms under New Zealand law. It discusses the key case law, commentary and theory concerning contractual retrospectivity, before considering the practical application of these principles in three distinct contexts, that is, retrospective agreements, retrospective standard terms and retrospective exclusion clauses. It is acknowledged that, as with all instances of contractual interpretation and implication, significant*

*weight must be placed on the relevant context and the language used by the parties when determining whether or not a particular contractual term should operate retrospectively. It is, however, possible to derive various helpful “rules of thumb” from the cases, which may assist contractual parties, their legal advisers and the courts in resolving this issue.*

## **PUTTING THE GENIE BACK IN THE BOTTLE: REVISITING THE JUSTIFICATION FOR A DNA DATABANK**

CARRIE LEONETTI

*This article argues that DNA databanks should not be limited only to the DNA of individuals who are criminal-justice involved and that Parliament should enhance rather than prohibit academic research access to them rather than entrenching the dichotomy between those who “deserve” to have their DNA banked and those who do not. It notes that databanking offender and crime-scene DNA has resulted in the overrepresentation of Māori DNA in Aotearoa New Zealand’s databanks because Māori are overrepresented in the criminal and youth-justice systems, as both defendants and victims. It also argues that familial searching of DNA in criminal investigations further entrenches the two-tiered system.*

## **ENHANCED GOVERNANCE FOR FACIAL RECOGNITION TECHNOLOGY IN THE PUBLIC SECTOR**

DR ALAN TOY

*Facial recognition technology (FRT) could have significant benefits but only if the correct controls exist to encourage effective information governance consistent with international best practice. An advanced technology requires an equally advanced governance response. Regulation for governance of FRT depends both on the law and also on the practices of privacy professionals and others such as privacy auditors and AI auditors. Analysis of policy suggestions demonstrates that a major omission regarding information governance controls for FRT within the New Zealand public sector; particularly within the New Zealand Police, has been the failure to address the importance of privacy/AI auditing as part of the governance response. If New Zealand public sector organisations implement international best practice for information governance then the benefits of FRT may be attainable.*