# NZULR ABSTRACTS
# Vol 26, No 2 DECEMBER 2014

## DECENT EXPECTATIONS? THE USE AND INTERPRETATION OF HOUSING STANDARDS IN TENANCY TRIBUNALS IN NEW ZEALAND

SARAH BIERRE, MARK BENNETT AND PHILIPPA HOWDEN-CHAPMAN

*KEY WORDS: Property condition, private rented housing, rented housing, housing policy, housing law, health*

## ACCESS TO JUSTICE VS ACCESS TO JUSTICE FOR SMALL AND MEDIUM-SIZED ENTERPRISES: THE CASE FOR A BILATERAL ARBITRATION TREATY

PETRA BUTLER AND CAMPBELL HERBERT

*The growth of businesses in New Zealand is constrained by the relatively small size of the New Zealand market. Expansion into foreign markets is therefore critical for business growth. However, businesses – small and medium-sized enterprises in particular – trading across multiple jurisdictions face barriers to accessing justice when disputes arise. Because of these barriers businesses are dissuaded from engaging in international trade, even though to do so would be beneficial for both the businesses and the economy generally. The proposed solution is to reduce barriers to accessing justice through a Bilateral Arbitration Treaty: a treaty which supplants the existing systems of cross border litigation, replacing it with a dispute resolution mechanism resembling international commercial arbitration. This article explains the proposal by Gary Born, and the ways in which such a dispute resolution mechanism would serve to enhance access to justice, especially for small and medium enterprises in New Zealand.*

## UNITS, EXCLUSION, AND GOVERNANCE: BRIGHT LINES AND BODY CORPORATES IN NEW ZEALAND

THOMAS GIBBONS

*A number of cases have set out that the "fundamental theme" of the Unit Titles Act 1972 was the distinction between common property and units. This article argues otherwise, drawing on property law theory relating to exclusion and governance, provisions of the Unit Titles Act 1972, and case law. With cases under the 1972 legislation remaining relevant to the Unit Titles Act 2010, the article then shifts to consider the 2010 legislation, and how it should be read so as to abandon the bright line between common property and unit property suggested by this "fundamental" theme.*

## ASSESSING OFFENCE SERIOUSNESS AT SENTENCING: NEW ZEALAND'S GUIDELINE JUDGMENT FOR SEXUAL VIOLATION

DANICA MCGOVERN

*The seriousness of an instance of sexual violation is the major determinant of the sentence imposed on the offender. The way in which offence seriousness is assessed is, accordingly, very important. This article critiques the way in which* R v AM*, the New Zealand Court of Appeal's guideline judgment for sexual violation, directs sentencing judges to assess offence seriousness. The critique is on two fronts. The first is conceptual. The article asks whether AM measures offence seriousness in a way that is theoretically sound. In order to answer that question, the article develops and applies a theoretical underpinning for the assessment of offence seriousness in respect of sexual violation. The second is purposive. The question asked is whether the way in which AM measures offence seriousness fulfils the purpose of guideline judgments – to increase consistency and transparency in sentencing. Three of the factors currently used to assess offence seriousness (harm to the victim, mistaken but unreasonable belief in consent, and prior consensual sexual activity) are found to be problematic on one or both fronts. It is recommended that these three factors no longer be used to assess offence seriousness.*

## THE DISTINCTION BETWEEN TAX AVOIDANCE AND TAX EVASION

JAMES MULLINEUX

*This paper examines the alleged overlap of tax avoidance and tax evasion and the supposedly elusive distinction between them. It shows that the claimed difficulties are in part the result of the Common Law habit of compressing the separable concepts of the prohibited act and its unlawfulness, and sometimes any associated state of mind, into unitary concepts. The paper concludes that the overlap isreal, but that with the aid of a little theory, the concepts can be separated and a clear and valid distinction drawn between them: tax avoidance, though a civil wrong on its own, is also the actus reus of tax evasion.*

## BALANCING RIGHTS AND INTERESTS: THE POWER TO COMPULSORILY ACQUIRE DNA FROM SUSPECTS IN NEW ZEALAND

NESSA LYNCH

*In the almost twenty years since the enactment of the Criminal Investigations (Blood Samples) Act 1995, the power to compulsorily acquire DNA from suspects has broadened considerably in scope. This article considers the proper scope of such a power in balancing the public interest in the prevention, detection and prosecution of crime, with the fundamental rights and interests of the individual suspect.*

## DO CCA ADJUDICATORS HAVE THE JURISDICTION TO MAKE ss 19–24 DETERMINATIONS?

JOHN REN

*The Construction Contracts Act 2002 (CCA) does not have any express provision on the issue posed in the above title of this article. Given that, two recent High Court decisions,* Redhill *and* Inframax*, are relevant to the issue and assume great importance. They hold that an adjudicator has the jurisdiction to make a determination under the payment claim and payment schedule provisions of the CCA, ie ss 19–24, and that courts can then decide the same issues regarding the same payment claim or payment schedule as have been decided by the adjudicator. This article argues that: (1) the relevant CCA provisions do not support the High Court decisions, but rather support the contrary proposition that an adjudicator does not have that jurisdiction; (2) the decisions are contrary to the no-appeal scheme of CCA adjudication and have implications that are unfair in ways not sanctioned by the CCA; (3) adjudication of the merits of a contractual dispute is key to the CCA's success, and the decisions may seriously undermine the CCA by discouraging adjudicators from doing so; and therefore (4) the decisions should be revisited by the courts at the earliest opportunity.*

## *PLANET KIDS*: THE RESURRECTION OF THE FAILURE OF CONSIDERATION APPROACH TO FRUSTRATION?

MARCUS ROBERTS

*The New Zealand Supreme Court had its first opportunity to pronounce upon the doctrine of frustration in* Planet Kids v Auckland Council*. This article will argue that the approach taken to frustration by William Young J in this case pointed towards the concept of failure of consideration. This article will argue that the failure of consideration approach is useful insofar as it avoids the conceptual pitfalls of the failure of a common purpose approach. However, the approach runs afoul of the weight of contrary English dicta and the wording of the Frustrated Contracts Act 1944. In the end it will perhaps have to be treated as a litmus test rather than a definitive answer in itself.*

## BEARING THE WEIGHT OF THE WORLD: PRECAUTION AND THE BURDEN OF PROOF UNDER THE RESOURCE MANAGEMENT ACT

GREG SEVERINSEN

*Taking a precautionary approach means, in simple terms, that any uncertainty in our scientific understanding of environmental effects should not be used as an excuse to avoid taking action to prevent harm. While New Zealand's most prominent environmental statute, the Resource Management Act 1991, does not refer to precaution in the consenting context, the courts have in some instances been willing to interpret its provisions in a precautionary manner. Some commentators have favoured the imposition of a burden of proof on an applicant as a tool to achieve precaution. This article considers whether such a burden of proof can be sustained under the Act, and whether this would promote precautionary outcomes. It argues that such a simplistic approach to the burden of proof in the complex and multi-party context of the Act is unworkable, and that the inquisitorial and administrative character of the Act demands, in fact, that no burden of proof be recognised at all. This article comprises part of a wider body of work investigating precaution in the consenting context of New Zealand's resource management law, including the role of the concept in the standard of proof and in a consent authority's overall broad judgment. The work as a whole argues that precaution should not be provided for by the mechanical procedural rules governing the fact-finding process (such as in the standard or burden of proof). It should rather be enabled or facilitated by the fact-finding exercise – in the sense that low probability effects should not be cast aside as irrelevant when proving future effects – but addressed substantively at the stage at which a consent authority exercises its expert discretion.*

## ACCIDENT COMPENSATION AND DEGENERATIVE CONDITIONS: ARE WE CLOSE TO CLARIFYING THE CONFUSION AND ACHIEVING JUSTICE?

DOUG TENNENT

*This is a follow-up to a previous article published in the June 2009 edition of the NZULR. The earlier article concerns the approach of the Accident Compensation Corporation in declining cover where degeneration is identified in the injured part of the body on the basis that it is a personal injury caused wholly and substantially out of the ageing process. The article challenged this approach to the issue of degeneration on the basis of an alternative approach proposed by two orthopaedic surgeons, Peter Robertson and Ross Nicholson. The current article, in still very much advocating the Robertson/Nicholson approach, notes the shifting position of the courts in the field of degeneration to one which is more supportive of the Robertson/Nicholson approach. The article, noting the reluctance of the courts to fully adopt the approach, suggests that the appropriate application of the causation test as applied in* Accident Compensation Corp v Ambros *to cases where degeneration is an issue would support the full adoption of the approach.*

## THE NATURAL HEALTH AND SUPPLEMENTARY PRODUCTS BILL: HOMEOPATHY, THE TRUTH AND THE PLACEBO EFFECT

KATE TOKELEY

*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.*

## UNCERTAINTY AND POTENTIAL OVERREACH IN THE NEW ZEALAND COMMON PURPOSE DOCTRINE

JULIA TOLMIE

*Section 66(2) creates a form of secondary party liability for criminal offending that is known as the common purpose doctrine. In this article the legal principles developed in the New Zealand case law to give shape to the common purpose doctrine as set out in s 66(2) are examined. It is suggested that they raise concerns about uncertainty and overreach in the operation of s 66(2). In some instances this is because key concepts have been left undefined, and in others it is because individual legal requirements have been deliberately defined in very broad terms. Broad and vague articulations of each of the different legal requirements that make up the common purpose doctrine create the possibility, on any given set of facts, of a mismatch between the moral culpability of a party and their conviction for serious criminal offending.*

## GOODS AND SERVICES TAX ON PRIVATELY-IMPORTED GOODS

SHIV NARAYAN

*The Goods and Services Tax Act 1985 does not require foreign suppliers to collect goods and services tax (GST). In addition, private importers are not required to pay GST unless the value of an imported consignment exceeds a de minimis threshold. Domestic retailers are crying foul; in their view, failing to levy GST on imports below the threshold makes the prices of New Zealand firms uncompetitive compared to offshore firms. This, they claim, erodes tax revenue and damages the local economy. But is the threshold really as problematic as local retailers contend? If it is problematic, are there alternatives better than the current regime? This article investigates. The article consists of three parts: the first part reviews the history and operation of GST; the second part examines the problems of a de minimis threshold; and finally, in the third part, the article considers potential options for reform.*