

## NZULR ABSTRACTS

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### BINDING REMEDIES: THE NGĀI TAHU TREATY SETTLEMENT NEGOTIATIONS IN A POST-HARONGA CONTEXT

MARTIN FISHER

*Treaty of Waitangi settlements in New Zealand have been a result of political compromise. While financial limits have been set and the relativities between settlements have been established, there has been no concrete formula. The Crown and the Māori negotiating group have sat down at the negotiating table and worked out a figure, largely under the control of the Crown. In contrast, the Waitangi Tribunal has held the potential use of binding powers since 1989 for SoE lands and Crown Forest assets, but has only used these once. Ngāi Tahu's settlement was a result of compromise, but at various points in its negotiation process it also wanted the Tribunal to use its binding powers. Within the context of the current High Court, Court of Appeal and Supreme Court decisions in the Mangatu and Ngāti Kahu cases, this article will explore some of Ngāi Tahu's efforts at the use of binding powers for their claims and what the recent judicial backing of those powers means for settlements that have passed and the remaining settlements to come.*

### RESTITUTION OF UNDUE TRANSFERS IN THE CIVIL LAW AND THE COMMON LAW

SONIA MEIER

*The concept of unjustified enrichment is well known both in the common law and the civil law. There is, however, a remarkable difference when it comes to the question of what makes this enrichment unjust or unjustified. This paper intends to shed light on this problem by sketching the civilian background (I) and explaining how unjustified enrichment works in modern German law (II) in contrast to English law (III). By means of five case scenarios, it will illustrate the difference of the approaches and the main arguments fourteen years after Peter Birks switched from an unjust factor approach to an absence of basis approach (IV) and conclude with a general outlook (V).*

### LIABILITY OF CORPORATE REPRESENTATIVES FOR MISLEADING OR DECEPTIVE CONDUCT REVISITED

MATTHEW BERKAHN AND LINDSAY TROTMAN

*A corporate representative may be liable for misleading or deceptive conduct in one of two ways: by contravening s 9 of the Fair Trading Act 1986 (principal liability); or by assisting the corporation to contravene s 9 (accessorial liability). This article is concerned only with the former. The courts of New Zealand, when addressing the issue of when a corporate representative may be liable as a principal for misleading or deceptive conduct, have tended to focus on the "in trade" requirement of s 9 of the Fair Trading Act 1986. They have identified "broad" and "narrow" approaches to this question, based on whether the requirement is confined to the conduct of a person who trades on his or her own account or includes a person whose conduct is on behalf of another party, such as a company. We discuss these approaches, as highlighted in the Court of Appeal decision in Body Corporate 202254 v Taylor, a case recently referred to by the Supreme Court in Dallas v Wellington City Council. We argue that the broad/narrow debate on the meaning of "in trade" should be irrelevant to principal liability for a corporate representative. Instead of focusing on the meaning of "in trade", we argue that the focus should be on who has engaged in the impugned conduct: the corporation or the individual? Such an approach would align with the "mere conduit" principle, under which the focus is on who has engaged in the impugned conduct: the conduit or the originator?*

### BEYOND COUNTRY-BY-COUNTRY REPORTING: A MODEST PROPOSAL TO ENHANCE CORPORATE ACCOUNTABILITY

ANDREW JOHNSTON AND KERRIE SADIQ

*The issue of corporate accountability is as old as the corporate form. Regulators have conventionally sought to ensure corporate financial accountability by requiring companies to make public financial disclosures, with shareholders and creditors able to act on that information in their dealings with the company. Over time, these financial reports were considered inadequate in addressing the economic, social and environmental consequences of multinational enterprises. As a result, the system of corporate accountability has developed around two main pillars: corporate governance and corporate social responsibility (CSR), with the former focusing on accountability to shareholders and the latter on accountability to wider stakeholders. However, these pillars have failed adequately to address the ways in which companies contribute to, and impact upon, the economic sustainability of the societies in which they operate. As public concern about aggressive tax avoidance by the largest corporate groups has grown, another means of holding companies accountable has begun to develop, centred on country-by-country (CbC) tax reporting. Although its origins can be traced to efforts to enhance CSR, CbC tax reporting has, until recently, largely been viewed by policymakers as a mechanism to address tax integrity rather than as part of the broader project of ensuring public corporate accountability. In this article, we argue that public CbC tax reporting has the potential to form a third pillar of corporate accountability, supplementing corporate governance and voluntary CSR, and enabling shareholders and stakeholders better to hold companies to account. We then argue that, in order for CbC tax reporting to contribute to these wider accountability goals, it should go beyond current proposals for quantitative disclosure of tax payments and take the form of a mandatory Comprehensive Accountability Report which contains both quantitative and qualitative data.*

## **CYGNET FARMS AND THE STATE OF THE LAW OF NEGLIGENCE IN NEW ZEALAND**

ALLAN BEEVER

*This article examines the decision of the High Court in Cygnet Farms Ltd v ANZ Bank NZ Ltd (No 2). It argues that the judgment in this case reveals a significant level of confusion about the law of negligent misrepresentation and its relationship with the law of contract. It suggests that this confusion is the result of systemic problems with this area of New Zealand law. In short, the law of negligent misrepresentation and of negligence generally has descended into an entirely unacceptable state and is in desperate need of revision.*

## **TENANT LIABILITY FOR NEGLIGENT DAMAGE FOLLOWING HOLLER V OSAKI**

DAVID GRINLINTON

*Prior to the enactment of the Property Law Act 2007 (PLA 2007) both commercial lessees and residential tenants who were responsible for negligently caused damage to premises ran the risk of being sued by the landlord, or the landlord's insurer, in a subrogated claim. This potential liability was not widely appreciated by lessees and, where such a claim was brought, often had serious financial consequences for them. The PLA 2007 reformed the law in this area by providing limited immunity from such liability for commercial lessees. It was initially thought that these reforms did not apply to residential tenancies subject to the Residential Tenancies Act 1986 (RTA 1986).*

*The Court of Appeal in Holler v Osaki held that the exoneration provisions do extend to residential tenants. In coming to this conclusion the Court traversed a number of complex legal matters, including the interpretation of the meaning of specific sections in pt 4 of the PLA 2007 and in the RTA 1986, and the Tenancy Tribunal's extended jurisdiction under s 85 of the RTA 1986. The consequences of the decision are far-reaching. It has shifted the balance of power in the landlord-tenant relationship with significant economic and practical consequences as landlords deal with the effects of the decision. It also has implications for long-established principles of insurance law, including insurable risk, and insurers' rights of subrogation.*

*This article will examine the historical background to the issue, the law reforms provided through ss 268–271 of the PLA 2007, the decisions of the Court of Appeal and of the lower courts in the Holler v Osaki saga, and the impact of the outcome on landlords, tenants and insurers. Recent law reform proposals by the government are also considered.*

## **TAKING REHABILITATION SERIOUSLY IN SENTENCING: TRANSFORMING IT FROM AN EXPEDIENT TO A SENTENCING PRINCIPLE**

MIRKO BAGARIC AND THEO ALEXANDER

*Rehabilitation is one of the key objectives of sentencing. It is also a commonly invoked mitigating factor. Good prospects of rehabilitation can significantly mitigate the penalty which is imposed on an offender. However, the criteria applied by the courts to determine an offender's prospects of rehabilitation are obscure and the jurisprudence relating to the circumstances in which rehabilitation is relevant is unsettled. Moreover, there is no settled position regarding the weight that rehabilitation should have in the sentencing calculus. This article attempts to inject clarity into this area by proposing several key reforms. The first is that decisions by courts relating to the prospects of rehabilitation should be made on the basis of more rigorous, empirically grounded and transparent criteria. Second, the role of rehabilitation in sentencing should be expanded. In particular, contrary to the current orthodoxy, it should be capable of having a meaningful role even in relation to very serious offences. Third, the weight that courts give to rehabilitation in relation to serious offences should be made clearer. The focus of this article is on sentencing law in Australia, however, the reform proposals are (with some minor caveats) equally applicable to New Zealand, given the similar sentencing regimes in the two countries.*

## **THE FIRST PROCEDURAL CODE IN THE BRITISH EMPIRE: NEW ZEALAND 1856**

SHAUNNAGH DORSETT

*In 1856 New Zealand enacted a new regime for civil procedure. In so doing, it became the first colony in the Empire to create a comprehensive code of civil procedure. Innovative and wide-ranging, its authors drew on multiple sites from around the Empire (and beyond), instituting reforms not yet possible in England, and establishing the foundations for New Zealand's modern system of civil procedure. This article traces the origins of, and inspirations for, the 1856 Code. It focuses on two key aspects of reform: pleading and "fusion". The article seeks to draw attention to the neglected history of procedure in general and to the place of New Zealand in the story of 19th century procedural reform in England and its Empire in particular.*

## **CONCEPTUALISING INDIGENOUS RIGHTS IN AOTEAROA NEW ZEALAND**

ANDREW ERUETI

*In the past thirty years, New Zealand has undertaken a series of significant reforms directed at recognising the rights of Māori as an indigenous people. In this article, I explore the conceptual basis of these reforms, including Treaty settlements and legal claims to natural resources. While these are often lauded as breakthrough, I identify a lacuna in New Zealand indigenous rights architecture – the absence of measures that recognise Māori political authority. This largely results, I argue, from the way successive New Zealand governments and the courts have conceptualised indigenous rights – preferring rights to culture and property conceptual categories over those that focus on history.*

## **RETHINKING THE TAXATION OF (LARGE) CORPORATES**

MARK BOWLER-SMITH

*This article starts the process of rethinking the taxation of large, privately-held corporations. After outlining the impact of large, private corporations on the commons and the idea of “communal resources”, it explores what is meant by wealth and corporate wealth, and analyses the thinking on why corporations are taxed. This article argues that (i) legitimate justifications for taxing large private corporations are not limited to corporate income taxation; and (ii) justifications specific to a corporate income tax do not hold up to close inspection, particularly in relation to large private corporations. This article also seeds the idea that a levy on corporate expenditure could conceivably form the basis of an alternative approach to corporate taxation.*

## **MARKS AND SPENCER AND THE FUTURE OF IMPLIED TERMS**

MATTHEW BARBER\*

*The recent United Kingdom Supreme Court decision in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd is a milestone in the law of terms implied in fact. Lord Neuberger, delivering the majority judgment, effectively rejected Lord Hoffmann’s attempt to conflate implying terms with the construction of the contract as set out in Attorney General of Belize v Belize Telecom Ltd. Lord Neuberger instead affirmed the more traditional business efficacy and officious bystander tests. It is inevitable that this issue will be raised in the Supreme Court of New Zealand. This article examines the choice that court will have to make between affirming the previous tentative support for Lord Hoffmann’s approach and returning to a rule-based approach centred around the business efficacy test. It examines the judgment in Marks and Spencer, and locates the approach of Lord Neuberger in the context of that of Lord Hoffmann. Although there has been some support in New Zealand for the Belize Telecom approach to implied terms, there has also been uncertainty as to how this should be achieved, and a tendency to continue to apply the previous tests. For the purpose of comparing the two approaches, this article considers how Lord Hoffmann’s approach might be most effectively adopted, including the possibility of relocating the inquiry from contract meaning to contract content. Finally, the basis for choosing between the two approaches is considered.*

## **REVIEW ARTICLES**

### **HAPPY SISYPHUS A REVIEW ARTICLE OF G PALMER AND A BUTLER, A CONSTITUTION FOR AOTEAROA NEW ZEALAND**

LEONID SIROTA

### **ALLAN BEEVER’S ONE-DIMENSIONAL TORT UNIVERSE: A REVIEW ARTICLE OF ALLAN BEEVER, A THEORY OF TORT LIABILITY**

ZOË SINEL