

NZULR ABSTRACTS
Vol 26, No 3 JUNE 2015

IN MEMORIAM
SIR IVOR RICHARDSON: A SHORT TRIBUTE FROM THE
EDITORIAL BOARD
PROFESSOR ATH SMITH

Many of our readers will be aware that Sir Ivor Richardson, one of the major figures of New Zealand's legal community during the last half of the 20th century, died in December 2014 after a short illness. The current Editorial Board, of which he was a member at the time of his death, wishes to pay tribute to him and his remarkable career, and to thank him for his work for the Review.

GOING FOR THE BROKE: MAKING BANKRUPTCY LAW IN NEW ZEALAND
c. 1860–1867

STUART ANDERSON

This is a study of law-making in New Zealand's early years of responsible self-government. English bankruptcy law was too cumbersome to transplant, perhaps out-dated too, so the search was for an indigenous text both practical and cheap to implement. Conceptions of what was suitable varied greatly in the different provincial centres, and the resulting pattern of legislation reflects the ability of representatives of one province after another to turn the legislative process their way. The article tracks the Debtors and Creditors Act from its birth in 1862, through the varied experiences of its application that led to significant amendments pushed from Christchurch and Dunedin, and eventually its replacement with an Anglo-Scottish text thought suitable by the Auckland mercantile elite.

DIVERSITY, QUOTAS AND COMPROMISE IN THE BOARDROOM: TACKLING GENDER
IMBALANCE IN ECONOMIC DECISION-MAKING

ANNICK MASSELOT AND TIMOTHY BRAND

New Zealand has a low proportion of female board members on large listed private companies and currently has no plans to introduce measures to tackle this problem. By contrast, several European countries including Norway and France have recently introduced legislative corporate quotas aimed at increasing the number of women on the boards of large companies. Similarly, the European Union is introducing a 40 per cent procedural quota, which requires member states to appoint female applicants to supervisory boards providing that they are at least equally qualified as competing male applicants. The rise of such measures has not been restricted to Europe; India and Malaysia have also turned to legislative action. Other countries such as the United Kingdom and Australia have adopted a self-regulatory approach to the issue with mixed results. This article explores why New Zealand has favoured either no action or very 'soft' measures aimed at increasing the number of female board members. It is found that historically there has been significant resistance to the introduction of mandatory measures due to the lack of 'quota culture' in New Zealand policy making. Does New Zealand need to force change to its regulatory framework to effect change in this area? And if so, how?

PREVENTIVE DETENTION IN NEW ZEALAND: A CRITICAL
COMPARATIVE ANALYSIS

ANTHONY GRAY

New Zealand has recently introduced a new system of preventive detention. Unlike previous systems, this does not apply at the time of sentencing, but within six months of the due release date of a prisoner. The regime will apply where a court is satisfied that an individual is at high risk of imminent sexual offending, and suffers from a severe disturbance in behavioural functioning. The article challenges the premise of the new legislation that it is possible, with an acceptable degree of accuracy, to predict future dangerousness. Aspects of the legislation suggest incompatibility with the New Zealand Bill of Rights Act.

THE BATTLE OVER KNOWING RECEIPT

ROHAN HAVELock

The basis of liability for the knowing receipt by a third party of property subject to a trust continues to generate controversy. The action is traditionally conceived of as an equitable wrong, and is also associated with the protection of equitable property rights. In addition, there has been a concerted (chiefly academic) movement to subsume it within the law of unjust enrichment and characterise it as strict liability. While this attempt has been rejected in Australia, the application of unjust enrichment in this context has not been considered at the highest appellate level in either New Zealand or England. The purpose of this article is to undertake a reappraisal of the basis of liability in doctrinal terms. It is argued that the introduction of unjust enrichment has been premised on wrong assumptions and has tended to cloud, rather than illuminate, the true nature of liability. Further, even on its own terms, unjust enrichment is mismatched to typical knowing receipt situations.

**RETHINKING SEXUAL CONSENT: VOLUNTARY INTOXICATION AND
AFFIRMATIVE CONSENT TO SEX
SARAH CROSKERY-HEWITT**

Despite the centrality of consent to the definitions of sexual offences under the Crimes Act 1961, it remains a relatively under-theorised concept. In this paper I offer a critique of the current position through a feminist lens, examining its implications for women's sexuality. Case law concerning intoxicated consent is analysed as a specific example of the limitations that the current conceptualisation of sexual consent places on women's sexual autonomy. Specifically, I critique the treatment of the "voluntariness" of intoxication as relevant to the question of consent, and the requirement of extreme intoxication for consent to be called into question. In response to these issues, I argue that a re-conceptualisation of consent as a communicative, affirmative standard is necessary to better enable women to exercise their sexual autonomy. Such a standard may challenge the rape myths subscribed to by many judges and jurors, and may promote more empowered conceptions of female sexuality.

Keywords: sexual offences, consent, alcohol.

**HOW A CLARIFICATION OF DURESS RENDERS THE "EQUITABLE" DOCTRINE OF
ACTUAL UNDUE INFLUENCE FUTILE**

ANJA KANTIC

This paper highlights the difficulties with the current law relating to transactional consent coerced by pressure. It will consider how an unclear application and incorrect explanation of the doctrines of actual undue influence and duress unnecessarily confuse the law. The law can be clarified through an elimination of needless complexity, and this paper proposes that the best way to achieve this is to jettison the doctrine of actual undue influence. A better understanding of the conceptual and practical scope of duress in its modern guise demonstrates how actual undue influence adds confusion, rather than assistance, to the law. Further, it is apparent that the "equitable" doctrine actually operates as a creature of common law but misleadingly behind the cloak of equity. The paper will consider how duress can be better explained and understood by avoiding consideration of irrelevant factors such as disadvantage and intention, and focusing instead on illegitimately coerced consent. If judges are able to consider duress by balancing coerced consent with illegitimate pressure, this area of law will receive some long-needed clarification

**NEW ZEALANDERS IN CRISIS IN AUSTRALIA: THE ABSENCE OF
A SOCIAL SAFETY NET**

TAMARA WALSH

In 2001, Australian social security law was amended to restrict the access of New Zealand nationals to Australian social security benefits. In addition to this, the policies of many States and Territories render New Zealand nationals ineligible to receive other forms of social assistance, such as housing and disability services. For the many thousands of New Zealanders living in Australia, this means that they may find themselves ineligible to receive social welfare support in the event that they experience a crisis or an unexpected change in circumstances. Using data obtained from welfare rights services, the lived experience of New Zealanders in need of social assistance in Australia is discussed. This article examines the relevant social security law in detail, and identifies legal arguments that could be made to challenge ineligibility, as well as presenting options for reform.

CASE NOTE

**ANIMAL WELFARE SENTENCING: CONDIGN SENTENCES IMPOSED FOR
PREMEDITATED, DEPRAVED AND SADISTIC TORTURE OF ANIMALS**

ANITA KILLEEN

Two recent District Court sentencing decisions (New Zealand Police v Heka and New Zealand Police v Growcott) have addressed the appropriate sentencing levels for cases involving the sadistic torture of animals. The decisions signal a development in the law in New Zealand relating to the wilful ill treatment of animals. They are significant both for their recognition that the sadistic torture of animals may be considered as a potential precursor for violent offending against humans and for highlighting how the specific recognition of animal welfare offending within the Probation Service pre-sentence tool for risk assessment can affect the reoffending prediction score and impact upon sentencing outcomes.

The decisions emphasise the need to denounce and deter this type of offending, and they acknowledge that the resulting pain, distress and suffering experienced by animals is a relevant factor to be taken into account at sentencing. Importantly, the decisions place a renewed emphasis on the totality principle when sentencing animal cruelty offending. Judges have a positive obligation to review the aggregate sentence and ensure that it is proportionate to the overall level of criminality. A judge should first consider the sentence for each individual offence and then determine whether the circumstances call for a concurrent or cumulative sentence, and whether the sentence as an aggregate is ultimately a fair one.

This case note (1) reviews the Heka and Growcott decisions, and (2) considers two changes the Probation Service could implement which would contribute in a meaningful way to more accurately assessing a defendant's risk of reoffending and in turn lead to better sentencing outcomes.