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REFLECTIONS ON THE ROLES OF THE SPEAKER IN NEW ZEALAND

HON MARGARET WILSON

The nature of the role of the Speaker in the New Zealand House of Representatives has reflected the evolution of the Parliament. The introduction of MMP in 1996 has had a major influence on the nature of the role of the Speaker. Not only has the House role of the Speaker changed with the management of many more Parties represented in Parliament, but the increasing administrative responsibilities of the Speaker has raised the tension between the duties of the Speaker and those of the Minister Responsible for Parliamentary Services. This tension is most apparent in the exercise of the independence of the Speaker. This article explores some of the reality of the MMP Speaker who must negotiate the various challenges to the independence of the Speaker under the current regulatory framework.

NEW ZEALAND CONSTITUTIONAL CULTURE

MATTHEW S R PALMER

This article takes seriously the relationship between culture and a constitution. It suggests that three aspects of New Zealand cultural attitudes to the exercise of public power are salient: egalitarianism, authoritarianism, and pragmatism. None of these attitudes support the constitutional norm of the rule of law and separation of powers in New Zealand, making that norm vulnerable. The salient New Zealand cultural attitudes to public power do reinforce the other three key norms of the New Zealand constitution: representative democracy; parliamentary sovereignty; and the unwritten and evolving nature of the constitution. The last of these is the most internationally distinctive aspect of New Zealand's constitution and resonates with both our British constitutional heritage and the Māori notion of tikanga; our constitution is not a thing but a way of doing things.

THE TREATY OF WAITANGI: A 'BRIDLE' ON PARLIAMENTARY SOVEREIGNTY?

DAVID V WILLIAMS

This paper looks at some English legal history as a means of trying to understand how the Treaty of Waitangi may be important to future reforms of New Zealand's constitutional structures. My starting point is the metaphor of the 'bridle' used by the thirteenth century English writer, Bracton, to describe the importance of restraining the arbitrary power of the King by principles of legality and due process. I note the importance of that thinking in the development of a system of constitutional monarchy in place of royal absolutism during the tumultuous years of the seventeenth century in England. Turning to Aotearoa New Zealand I describe the near invisibility of the Treaty of Waitangi in the key documents of the constitutional canon. I also point out that the rhetoric of the Treaty as a foundational compact for the nation is of no weight at all if parliamentary supremacy is invoked to displace Treaty rights. The blatant disregard of due process and putative Māori customary property rights in the foreshore and seabed controversies of 2003-2004 highlight the need, as I perceive it, for finding ways and means to place a constitutional 'bridle' on the arbitrary power of parliamentary supremacy. This contribution to the Review's theme of governance in Aotearoa New Zealand suggests that the Treaty of Waitangi will one day become such a 'bridle'.

REGULATING TAKEOVERS: THE REGULATORS AND THE COURTS: QUIS CUSTODIET IPSOS CUSTODES?

GEOFFREY MORSE

The appointment of specialist bodies to regulate the conduct of takeover bids raises the question as to what role the courts should play in this area of the law. The courts in the United Kingdom and those in Australia have shown clear differences of opinion as to what that should be. Whilst this is to some extent due to the genesis and development of the system of takeover regulation in each country, there is a marked difference in their judges' approach. The United Kingdom courts, conscious of the need for specialist knowledge in the modern global market, look only to protect an individual from abuse and to correct procedural rather than substantive errors. This approach is strongly backed by the United Kingdom Government. The Australian courts, with no such specialist knowledge, and applying concepts some forty years old, have nevertheless dissected the reasoning behind decisions of the regulators and substituted their own analyses. The result has been to lower the level of regulation, especially in the area of derivatives. The Federal Court has even challenged the very constitutionality of the regulators. But the impact of the EC Takeovers Directive, underestimated in the United Kingdom, and the reaction of the legislature in Australia to bolster their system, suggest that the gap may narrow in the future. For New Zealand, where specialist takeover regulation is still a relatively new concept, these issues are only just beginning to surface.

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THE FOUNDATIONS OF CORPORATE GOVERNANCE IN NEW ZEALAND: A POST-CONTRACTUALIST VIEW OF THE ROLE OF COMPANY DIRECTORS

CHRIS NOONAN AND SUSAN WATSON

The conventional shareholder-centric view of company law holds that directors manage the company for the benefit of shareholders of the company, and the shareholders have ultimate and residual control over the company. This article re-examines the source of the management powers of the board, and the legal relationship between shareholders and directors. It is argued that corporate governance in New Zealand has a statutory, rather than a contractual, basis, and shareholders cannot in any realistic sense be considered to control the business and affairs of companies. The board plays an essential role in New Zealand companies. It has an irreducible core set of functions relating to the supervision and monitoring of the business and affairs of the company. Where shareholders exercise management powers, whether under the corporate constitution or company law doctrine, the law imposes director-like duties on the shareholders. Theories of company law founded on incorporating simple shareholder-centric models are, therefore, unlikely to provide a satisfactory basis for the development of company law by the New Zealand courts.

CONTEMPORARY MĀORI GOVERNANCE: NEW ERA OR NEW ERROR?

DR ROBERT JOSEPH

There are significant differences between Māori and mainstream governance systems in New Zealand but both systems are reconcilable to each other within an appropriate legal and political environment. The literature concludes that there is no single model for best practice governance due to differences in legal systems, institutional frameworks and cultural traditions. A challenge for contemporary Māori governance is the appropriate integration of Māori governance values, laws and institutions into the New Zealand legal system. The current article discusses whether contemporary Māori governance developments adequately cope with specific challenges that contribute to the tensions present at the governance interface. The New Zealand Law Commission's recent Waka Umanga Project and its pending legislation could significantly manage many of the present governance challenges at the interface of Māori and mainstream governance in New Zealand, potentially improving both systems in the process.

INTERNATIONAL GOVERNANCE AND THE LIMITS OF ADMINISTRATIVE JUSTICE: THE EUROPEAN CODE OF GOOD ADMINISTRATIVE BEHAVIOUR

W JOHN HOPKINS

The internationalisation of domestic law is not a new phenomenon but in recent years there has certainly been a step change in such developments. This has occurred particularly through the growth of international institutions with de facto or de jure law making powers. These have occurred both at the global and the regional level with the WTO and the European Union the most obvious examples. This development of international 'governance' poses fundamental questions for our understanding of constitutional and administrative law. Such developments are executive in nature and cannot be effectively controlled by domestic parliaments. They require international mechanisms of democratic accountability and the development of administrative standards to ensure that the discretion that they exercise is confined, structured and checked. There have been limited moves in this area, most notably in the European Union. This paper examines these developments with particular reference to the European Union's Code of Good Administrative Practice and offers some future direction for the development of international administrative justice.