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**NATURAL RESOURCES, NEW GOVERNANCE AND LEGAL REGULATION:
WHEN DOES COLLABORATION WORK?**

CAMERON HOLLEY AND NEIL GUNNINGHAM

This article examines the implications for natural resource management of the “new governance”, a collaborative, participatory and deliberative approach to solving public and environmental problems that has important implications for the way we understand and apply law and regulation. Evaluating two distinct natural resource management programs developed under the Resource Management Act 1991 and the Local Government Act 2002, the article provides one of the first comparative and empirical examinations of the performance of new governance in New Zealand. Our analysis of these programs yields insights for new governance jurisprudence including an evaluation of the “default hybridity” relationship between traditional law and new governance. It also enables recommendations to be made as to how to increase the success of new governance collaborations in practice. These have considerable implications for the law and regulation of natural resource management in New Zealand.

**PRIVILEGE AND TAXATION ADVICE: NEW ZEALAND’S NONDISCLOSURE RIGHT
COMPARED WITH THE TAX ADVISER’S PRIVILEGE IN THE UNITED STATES**

KEITH KENDALL

New Zealand and the United States stand alone as the only common law jurisdictions that clearly extend privilege protection to tax advice beyond the legal profession. The means by which each jurisdiction has done so are very different, with the United States explicitly incorporating common law privilege into its revenue statute, whereas New Zealand has created a statutory right for communications from non-lawyer tax professionals that is separate from the privilege that applies to communications from legal advisers. Analysing the common law context in which these provisions were introduced demonstrates that the means chosen tend to be consistent with the approach each jurisdiction has adopted in similar matters in the past. New Zealand’s extension, implemented some seven years after the extension in the United States, seems to have benefited in both scope and design from the United States’ experience, as a number of features avoid the problems that have arisen from the structure of the United States’ provision.

PRECAUTIONARY NEW ZEALAND

ALEXANDER GILLESPIE

The importance of taking a precautionary approach to environmental matters has been an accepted principle on the international stage since 1992. Since this time, the ideal has been incorporated into instruments as both a general and specific consideration. When it has become specific, such as with fisheries and genetic modification, risk is dealt with in a very detailed way, in which methods to deal with each level of risk are carefully set down. In many ways, in these situations, questions of how to deal with uncertainty are largely removed by clear criteria through which risks are managed. When considerations of precaution are dealt with in general frameworks and ways to manage risk are not tightly prescribed, multiple options avail themselves that allow precaution to be dealt with in either a ‘strong’ or ‘weak’ manner. The dividing points between the strong and weak versions of the principle are the nature of the threat, the triggering point for the principle and the reversal of the burden of proof.

Within New Zealand, precautionary approaches are prevalent throughout many areas of environmental policy. When the issue is dealt with implicitly, the practice exists midway between the precautionary principle and the precautionary approach. When it is dealt with explicitly, precautionary measures can be adopted provided they are based on reliable evidence. If adopted, such precautionary measures can provide the basis for certain actions, such as moratoriums, if ongoing scientific studies are undertaken to resolve the full extent of the risks at hand within a reasonable period of time. Once these studies are undertaken, then the options avail themselves to either continue with the status quo (as a moratorium) or move toward a more regulated environment, in which each risk is dealt with on an individual basis.

**TRAUMATISED BODIES: TOWARDS CORPOREALITY IN NEW ZEALAND’S
PRIVACY TORT LAW INVOLVING ACCIDENT SURVIVORS**

JENNIFER MOORE

*This article combines several different literatures (legal, medical and theoretical) in order to explore privacy law cases which involve accident survivors. I adopt an inductive methodology which emphasises the accident survivors’ experiences. Their accounts demonstrate their position of special vulnerability. However, accident survivors currently receive inadequate protection because the New Zealand privacy tort does not recognise their special vulnerable status. The accident survivors’ privacy claim in *Andrews v TVNZ*, for example, failed because the Court held that the publication was not highly offensive. The legal status quo is problematic because accident survivors whose privacy has been breached expect the law to provide protection at a time when they are vulnerable and unable to protect themselves. The privacy intrusions experienced by accident survivors cause adverse health outcomes. Alternative perspectives from theoretical and empirical medicine reveal the extent of the problem and help to suggest necessary reforms. This literature justifies recognising accident survivors as a special class of plaintiffs. New Zealand’s privacy tort could be reformed by presuming that they have a reasonable expectation of privacy and that images of accidents are distressing and humiliating.*

OPT IN OR OPT OUT? A CLASS DILEMMA FOR NEW ZEALAND

VINCE MORABITO

In October 2008, New Zealand's Rules Committee released publicly its proposal for the introduction of a class action regime in the High Court. The Committee's study of class action reform (which was finalised in July 2009) represents the first formal consideration of whether United States-style class actions should be introduced in New Zealand. Thus, the Committee's proposal, as embodied in draft legislation and Rules, warrants close analysis and consideration, independently of whether the New Zealand legislature will eventually implement the Committee's recommended regime. The aim of this article is to provide a critical evaluation of one of the most important and unique features of the class action regime proposed by the Rules Committee, namely, the conferral on trial judges of the power to decide, with respect to each class action proceeding, whether membership in the group of claimants represented in the litigation is to be determined via an opt out device or an opt in device.

NEW ZEALAND'S CONSTITUTIONAL CRISIS

JOEL COLÓN-RÍOS

New Zealand's constitution is undergoing a crisis of democratic legitimacy: how to understand New Zealanders as authors of their constitution, if the constitution rests on rules and conventions that were not adopted by the people and, more importantly, cannot be altered through democratic procedures? How can we make New Zealand's constitutional regime legitimate from a democratic perspective? In answering these questions, this article will advance a conception of democratic legitimacy according to which a constitutional regime must provide an opening for the exercise of constituent power (understood as the people's unlimited faculty of transforming constitutions through extraordinary and participatory procedures). This conception of democratic legitimacy, although informed in important ways by concepts developed in the tradition of written and entrenched constitutions, can be applied in a meaningful way to a constitutional system such as that present in New Zealand. New Zealand's constitutional thought, in contrast to its English counterpart, has embraced in important ways a distinction between Parliament and people, attributing the latter with a democratically superior power of constitutional reform.

