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DIRECTORS' DUTIES ON INSOLVENCY IN NEW ZEALAND: AN EMPIRICAL STUDY

LYNNE TAYLOR

New Zealand company law, like many other jurisdictions, imposes duties on directors that are owed to the company but have creditor protection as their rationale. The success of this strategy in modifying directors' conduct depends on at least two factors. The first is whether the drafting and/or interpretation of the duties sets clear and appropriate limits on directors' decision making powers. The second is the extent to which the duties are enforced. Analysis of the content of the duties and the enforcement framework within which they sit predicts that under-enforcement is more likely to be the problematic factor in the New Zealand context. This prediction is largely borne out by the results of an empirical analysis of the case law generated by the creditor protection duties over a 24-year period. However, consistent with international trends, overall results suggest that a further limiting factor may also be relevant, the particular attributes of many directors of companies taking the form of small to medium enterprises. Likely reasons for this and potential reform options for future investigation are identified.

**LESSONS FROM THE NAVAJO TRIBAL COURTS –
TIKANGA MĀORI AS COMMON LAW?**

DR VALMAINE TOKI

Given the absence of orthodox statistical analysis to evaluate Te Kooti Rangatahi and Te Kooti Matariki, this paper applies an indigenous lens, tikanga Māori, to ascertain the success or otherwise of Te Kooti Rangatahi and Te Kooti Matariki. To understand the significance of tikanga Māori within a non-indigenous legal framework, the paper analyses whether tikanga Māori is common law. To provide context for this analysis the Navajo Tribal Court system, a system that applies Navajo Common Law, is informative. The unfettered and yet practical approach of the Navajo Tribal Court system to extend the reach of Navajo common law to not only criminal law but also civil law is refreshing. This extension is tantalising and appealing particularly when the Navajo Common Law concepts are set against comparable tikanga Māori concepts, providing an air of confidence for the developing jurisprudence of tikanga Māori as common law.

**PRUDENTIAL REGULATION IN 21ST CENTURY NEW ZEALAND:
THE CASE FOR DEPOSIT INSURANCE**

HELEN DERVAN AND SIMON JENSEN

This article examines the role played by deposit insurance in the promotion of financial system stability and as protection of retail depositors. It discusses the Reserve Bank of New Zealand's traditional opposition to its introduction, which is based on the view that deposit insurance would produce moral hazard, blunting incentives for insured market participants to guard against risk. This article argues that this view is increasingly outdated and untenable, and fails to take account of lessons learned from the Global Financial Crisis, which reveal that most retail depositors cannot provide meaningful market discipline. It argues that New Zealand depositors should have the same level of protection as is provided by most other nations and that there is no legal or market reason for New Zealand to remain an outlier.

**POLITICAL CONSTITUTIONALISM:
THE "CRITICAL MORALITY" OF CONSTITUTIONAL POLITICS**

EDWARD WILLIS

This paper takes seriously the idea that political constitutionalism can be used as a model for public law analysis. With specific reference to the archetypal political constitution of New Zealand, it demonstrates how political constitutionalism explains and justifies key aspects of real-world constitutional practice. However, the analysis also indicates that in practice constitutional politics can be sensitive to legal processes and liberal norms in ways that are difficult to reconcile with political constitutionalism as conventionally understood. The paper therefore challenges the characterisation of political constitutionalism as being "prescriptive without prescribing much" and suggests the need for a richer account of what is constitutional about politics. Drawing on an analogy with constitutional convention, it suggests that the "critical morality" of constitutional politics may help to provide this richer account.

IMMEDIATE INDEFEASIBILITY WITH TRANSACTIONAL UNCERTAINTY

JAYDEN HOUGHTON

This article makes two contributions to scholarship on New Zealand's new Land Transfer Act 2017. First, this article challenges the notion that the Act reaffirms the principle of immediate indefeasibility in New Zealand. It argues that, while the Act purports to reaffirm the principle of immediate indefeasibility, the new judicial discretion to alter the register in cases of manifest injustice in fact subverts the prevailing normative justification for interpreting indefeasibility as immediate – to give new and prospective bona fide registered owners transactional certainty. In doing so, the Act creates a degree of transactional uncertainty that belies the essence of what the principle of immediate indefeasibility stands for in New Zealand.

Secondly, this article argues that the new judicial discretion creates three uniquely problematic uncertainties for new and prospective bona fide registered owners. The three uncertainties are: uncertainty about whether a person is eligible to apply to the court for an order cancelling the bona fide registered owner's registration; uncertainty about the strength of that person's application; and uncertainty about how a court is likely to interpret its new power to make an order. The article concludes that the new uncertainties are significant enough to have commercial implications for New Zealand's land transfer system.

THE FUTURE OF ECONOMIC DISPARITY REDRESS IN NEW ZEALAND

NIKKI CHAMBERLAIN

*Economic disparity redress aims to compensate a spouse or partner for disparity that occurs at the end of a relationship because of the division of functions within the relationship. While the aim of economic disparity is commendable, in practice, the application and quantification of an economic disparity award has been problematic to the judiciary, practitioners and litigants. The New Zealand Supreme Court issued its first substantive judgment on economic disparity in *Scott v Williams*. Unfortunately, despite the opportunity to clarify this area of law, the decision confuses matters and contains certain findings that are in direct conflict with the statutory wording of the economic disparity provision in the Property (Relationships) Act 1976. The New Zealand Law Commission is currently reviewing economic disparity reform options. In light of *Scott v Williams*, and the issues it presents for all stakeholders, it is evident that reform is not only required, but the need for it has expedited.*

**PRESCRIPTIVE AND HOLISTIC CONTEXTUALISM:
EMERGING VARIANTS OF MODERN CONTRACT INTERPRETATION**

SIMON CONNELL

Debate over the proper approach to modern contract interpretation continues even in this era of modern contract interpretation where context is always considered. This paper identifies and contrasts two rival approaches to contract interpretation: "prescriptive contextualism" which demands that contract interpretation start with plain meaning, and only then go on to consider textual context, extra-textual context and finally commercial sense; and "holistic contextualism" which involves consideration of those same factors but is not fussy about the order. In setting out the two approaches, I provide an exposition of the present law of contract interpretation. Then, I consider the main arguments that can be advanced by proponents of the two approaches, and conclude by offering my own arguments that, I suggest, tip the scales in favour of holistic contextualism: the prescriptive process inhibits identification of viable interpretation, and is overly dependent on which words are used to start the interpretive process.

THE AUTHORITY FOR AND LIMITS OF COVERT INVESTIGATION METHODS IN NEW ZEALAND

JAMES MULLINEUX AND MICHELLE BROWN

Most covert investigation by New Zealand law enforcement agencies is not statutorily regulated. The paper examines the limits of covert operations and the authority for them, and shows that New Zealand courts control them indirectly by excluding evidence obtained in breach of rights or unfairly, and by encouraging the creation of agency guidelines designed to prevent such breaches. This paper considers mainly the New Zealand situation and notes the success of New Zealand courts in regulating covert operations after the fact by these means. It concludes that proposals to create a judicially authorised covert investigation warrant system subvert the common law's adversarial approach, and that the existing system, supplemented by guidelines, is the better solution.

**HAS THE *QUEEN V STRAWBRIDGE* BEEN RESURRECTED?:
CAMERON V R AND PUBLIC WELFARE OFFENCES**

STEPHEN ELIOT SMITH