

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2007-485-2418**

UNDER Part 1 of the Judicature Amendment Act  
1972

AND The Declaratory Judgments Act 1908

IN THE MATTER OF The Electoral Finance Act 2007

AND The New Zealand Bill of Rights Act 1990

BETWEEN JOHN SPENCER BOSCAWEN  
First Applicant

AND GARTH NEIL MCVICAR  
Second Applicant

AND GRAHAM STAIRMAND  
Third Applicant

AND RODNEY PHILIP HIDE  
Fourth Applicant

AND THE ATTORNEY-GENERAL OF NEW  
ZEALAND  
Respondent

Hearing: 15 May 2008

Appearances: J Pike, C Inglis and L Fong for Respondent (applicant for strike-out)  
N Pender and P Butler for Applicants

Judgment: 20 June 2008 at 2.40pm

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**RESERVED JUDGMENT OF CLIFFORD J**

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## **Introduction**

[1] The applicants have commenced proceedings for judicial review of the Attorney-General's decision to not bring to the attention of the House of Representatives, pursuant to s 7 of the Bill of Rights Act 1990 (NZBORA), provisions of the Electoral Finance Bill 2007 ("the Bill") which the applicants say were inconsistent with rights and freedoms contained in NZBORA.

[2] In this application, the Attorney-General seeks to strike out the applicants' proceedings.

## **Background**

[3] The applicants commenced their proceedings by statement of claim dated 1 November 2007, and at the same time sought urgency. The respondent opposed that application, and subsequently applied for orders striking out the applicants' claim in its entirety. That strike-out application was originally set down to be heard on 27 November 2007. Prior to the hearing of that application, and following further submissions from the applicants and the respondent, I heard an application from the applicants for urgency on 22 November. That same day I declined that application.

[4] The applicants subsequently, by consent, amended their statement of claim and the respondent renewed his strike-out application. The hearing on 15 May was, therefore, of the respondent's application to strike out the applicants' amended statement of claim.

[5] In their original statement of claim, the applicants claimed the respondent had erred in law by failing to exercise his s 7 duty to report to the House the various ways in which, the applicants asserted, the Bill's provisions were inconsistent with, or created unjustified limitations on, rights and freedoms contained in NZBORA.

[6] By way of relief, the applicants at that time sought the following declarations:

- a) That the respondent erred in not bringing to the attention of the House of Representatives provisions in the Bill that appeared to be inconsistent with the rights and freedoms contained in NZBORA;
- b) That the respondent should bring to the attention of the House of Representatives all provisions in the Bill that appear to be inconsistent with rights and freedoms contained in NZBORA; and
- c) That the respondent should recommend to the House of Representatives that the Bill be reintroduced so that the House of Representatives could debate all inconsistencies with NZBORA on the first reading of the Bill.

[7] Reflecting the passage of the Bill into law as the Electoral Finance Act 2007 (“the Act”), the applicants’ amended statement of claim:

- a) Again asserted the respondent’s s 7 duty to report, but now said it was a continuing duty;
- b) Repeated, with modifications to reflect – I assume – differences between the provision of the Bill and the Act, the various ways in which they claimed the Bill and the Act were inconsistent with NZBORA;
- c) Asserted that the respondent had failed to exercise his s 7 duty by not reporting those inconsistencies upon the introduction of the Bill, or thereafter; and
- d) By way of relief, sought declarations that:
  - i) The respondent had been in breach of his s 7 duty by not reporting those inconsistencies, upon the introduction of the Bill and thereafter; and

- ii) Sought declarations that the Act was, in the various ways asserted by the plaintiffs, inconsistent with NZBORA.

[8] The respondent, in applying for strike-out, did so by reference to Article 9 of the Bill of Rights 1688 (1 Will. and Mar., Sess. 2., cl. 2) (“Article 9”), for if Court considered the applicants’ claim it would – he said – infringe the privileges of Parliament. More generally, and with reference to principles of comity, the Court should not engage in the review applied for. To do so would be to fail to recognise the respective constitutional roles of Parliament and the Courts. To the extent that the applicants sought declarations that the provisions of the Bill (and the Act) were inconsistent with rights and freedoms contained in NZBORA, the Court had been invited to grant a declaration of inconsistency (which it had never done) on a moot point (which it does not do).

## **Discussion**

[9] Section 7 of NZBORA provides as follows:

**7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**

Where any Bill is introduced into the House of Representatives, the Attorney-General shall, –

- (a) In the case of a Government bill, on the introduction of that Bill; or
- (b) In any other case, as soon as practicable after the introduction of the Bill, –

bring to the attention of the House of Representatives any provision in the bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

[10] Section 7 imposes an obligation on the respondent. That obligation implicitly requires the respondent to consider all bills introduced into the House and explicitly requires the respondent to bring to the attention of the House apparent inconsistencies between the provisions of a bill and the rights and freedoms contained in NZBORA.

[11] The Bill was introduced on 23 July 2007 and had its third reading on 20 November 2007. At no point during this period did the respondent bring to the attention of the House any alleged inconsistencies between it and NZBORA. In these proceedings, the applicants ask the Court to review the actions of the respondent in not reporting alleged inconsistencies. To do so, the applicants would have the Court review the provisions of the Bill and the Act in detail against the terms of NZBORA. If the Court agreed with the applicants as to the existence of such alleged inconsistencies, the respondent would have erred in law, for he did not identify those inconsistencies as breaching his s 7 duty to report to the House.

[12] Section 4 of the Judicature Amendment Act 1972 prima facie allows judicial review of this alleged breach, for there is little doubt that s 7 amounts to a “statutory power”.

[13] The respondent based his strike-out application on the proposition that the Court is prevented from undertaking that judicial review for want of jurisdiction. The respondent’s fundamental position was that judicial review of the exercise of s 7 would amount to reviewing matters within the exclusive cognisance of Parliament, something prevented by Article 9, which applies to New Zealand through s 3(1) of the Imperial Laws Application Act 1988.

[14] In applying to strike out the applicants’ claim on that basis, the respondent relied on the principles relating to strike-out as summarised by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267:

- a) Assume the facts pleaded are true and that amendment to the pleadings cannot rectify the deficiencies;
- b) The causes of action must be so clearly untenable they cannot possibly succeed;
- c) The jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied that it has the requisite material before it; and

- d) Difficult questions of law requiring extensive argument do not preclude a strike-out

[15] I also note, in this context, the following comments of Tipping J in *Curtis v Minister of Defence* [2002] 2 NZLR 744 where strike-out was also sought on the basis that the question raised in the proceedings was non-justiciable:

*Basis of strike-out*

The conventional basis for striking out a proceeding is when it can be said with certainty that, even if all the facts alleged in the plaintiff's statement of claim are true, no cause of action exists. The present case represents a slight variation from that situation, albeit it can still be viewed in those conventional terms. It is perhaps more accurate to say of this case that the proceeding should be struck out because, on the unchallenged evidence and on a correct application of the law, the case necessarily involves an issue which is not justiciable. In such circumstances we consider it appropriate for the proceeding to be struck out. The situation is the same as or at least closely analogous to one in which there is no cause of action on the pleaded facts. In each situation it can be posited with certainty at the outset that the applicant has no prospect of obtaining the relief sought. It is therefore both in the public interest and in the interests of the parties that the litigation be brought to an end before trial. (at [29])

[16] Article 9 reads as follows:

That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.

[17] Article 9, in terms of the drafting parallelism evident in the Bill of Rights 1688, was Parliament's response to certain matters complained of in the preamble namely that James II had, "with the Assistance of diverse evil Counsellors Judges and Ministers employed by him" endeavoured to "subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome ... By Prosecutions in the Court of Kings Bench for Matters and Causes cognizeable only in Parlyament".

[18] The Article 9 privilege was described by Lord Browne-Wilkinson in *Prebble v Television NZ Ltd* [1994] 3 NZLR 1 in the following terms:

Article 9 of the Bill of Rights 1688 precludes any Court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament. It is well established that the article prevents a Court from entertaining any

action against a member of the legislature which seeks to make him legally liable, whether in criminal or civil law, for acts done or things said by him in Parliament. Thus, an action for libel cannot be brought against a member based on words said by him in the House. (p 3)

[19] Article 9 can from that perspective therefore be seen as a protection for individual members against criminal or civil proceedings that would infringe on them personally. This is a consequence which this application for judicial review would not – at least so obviously – have on the respondent.

[20] Lord Browne-Wilkinson acknowledges, however, that Article 9 is to be seen in a wider context:

In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] AC 765; *Pepper (Inspector of Taxes v Hart)* [1993] AC 593. As Blackstone said in his commentaries (17<sup>th</sup> ed, 1830), vol 1, p 163:

“... the whole of the law and custom of parliament has its original from this one maxim, ‘that whatever matter arises concerning either house or parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere’. (p 7)

[21] This broader context was considered in *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 307-308. There the Court of Appeal observed that:

There is an established principle of non-interference by the Courts in parliament proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice ... However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a bill in Parliament.

[22] Having said that the rule might be one of practice the Court nevertheless recognised that it was founded on statute, referring to the Bill of Rights 1688 generally. It continued in its analysis by stating:

Surely in a democracy it would be quite wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament ... Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the house to consider.

[23] Therefore the basic issue for this application is whether, in terms of Article 9 itself, and the broader context provided by the principle of comity – that is the established principle of non-interference by the Courts in Parliamentary proceedings – the actions of the respondent under s 7 constitute “proceedings in Parliament”. If they do, then the applicant’s challenge to the legality of that action is non-justiciable and therefore the relief sought by way of declarations would not be available to them.

[24] Further, and on the basis of the amended statement of claim, the question of whether the applicants can properly rely on the Declaratory Judgments Act 1908 in seeking this relief is also to be considered. In both contexts, the question of the availability of “declarations of inconsistency” arises. If, however, the applicants’ challenge to the legality of the respondent’s actions is not justiciable, that question may not need to be addressed directly.

[25] The Courts have twice considered the question of whether in light of Article 9 the Court has jurisdiction to judicially review the Attorney-General’s actions under s 7 of NZBORA.

[26] In *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, the plaintiffs had incurred losses due to a ban on the export of indigenous timber, and were aggrieved when legislation (the Forests Amendment Act 1993) offering adjustment assistance, but not compensation proper, was passed. They argued that the legislation breached NZBORA, and that therefore the Attorney-General should have brought those matters to the House’s attention upon the bill’s introduction. As he had not done so, the legislation was invalid. The plaintiffs’ pleadings were struck out and they sought a review of the Master’s decision.

[27] Gallen J, at pp 458-459, upholding the Master’s decision, found that the statutory process of the Attorney-General examining and reporting on bills under s 7

was a proceeding in Parliament, and thus exempt from judicial review. In reaching this conclusion, Gallen J relied principally on Article 9, and *Bradlaugh v Gossett* (1884) 12 QBD 271. Having acknowledged the Crown's emphasis on the broader principle of mutual restraint which applies to the relationship between the judiciary and the legislature, he concluded:

In the end it seems to me that the most significant aspect of this case is the fact that the prime safeguard upon which the plaintiffs rely, that of the obligation on the Attorney-General to report, is in my view a procedural consideration designed to ensure that members of Parliament are fully aware of the consequences of the passing of a particular Bill as proposed. Members of Parliament are there as representatives of the community at large and in the absence of some entrenched constitutional provision, it seems to me that the Court would be usurping the authority of the legislature if it endeavoured to substitute its own opinion of the legislation proposed.

[28] The High Court's decision in *Mangawaro* was explicitly confirmed by the Court of Appeal in *Awatere Huata v Prebble* [2004] 3 NZLR 359. *Awatere Huata* concerned Ms Donna Awatere Huata's challenge to the lawfulness of the ACT party caucus's decision to take formal steps under the Electoral Act 1993 to vacate her seat as a member of Parliament. It was accepted by the parties in the Court of Appeal, in contradistinction to the position in the High Court, that parliamentary privilege did not preclude the Court considering Ms Huata's challenge.

[29] Notwithstanding that, the Court of Appeal considered it was "bound to satisfy itself" that privilege did not apply. In confirming that it did not, McGrath J for the majority held that:

In summary the Courts recognise that, in order to ensure the effective functioning of the legislative process, the internal proceedings of the House of Representatives must be scrutinised and supervised by the House itself and not by the Courts. The recognition of such a privilege is necessary for the effective functioning of the legislative chamber. The Courts will consider the existence of and determine the scope of any possible privilege, if required to do so in litigation, but they will not consider the application of an acknowledged privilege to particular circumstances to decide if they fall within the privilege. It has, however, been decided that privileges of Parliament do not cover matters concerning rights that parties to litigation seek to exercise in the Courts independently from the operations of the House. (at [51])

[30] In so doing, he described *Bradlaugh v Gossett* as the "high point" of judicial recognition of the rule that Courts do not inquire into the internal proceedings of

Parliament, and is seen (for example, Joseph “Administrative Law” (2005) NZ Law Review 123 at p 157) as indicating a narrowing of that exclusive cognisance rule.

[31] At the same time McGrath J chose to explicitly confirm Gallen J’s decision in *Mangawaro*. He did so in the following terms:

That a statutory power is being exercised does not of itself take a matter outside of internal parliamentary procedures. For instance, s 7 of the New Zealand Bill of Rights Act 1990 imposes a duty on the Attorney-General, on the introduction of a Bill to the House, to bring to its attention any provision that is inconsistent with that Act. *Although that is the exercise of a statutory power by a Minister it is an internal parliamentary matter, within the area covered by privilege (Mangawaro Enterprises Ltd v Attorney-General [1994] 2 NZLR 451 per Gallen J).* The statutory duty is of course binding on the Attorney-General, but its discharge is administered by the House rather than by the Courts. [Emphasis added] (at [55]).

[32] In my judgment, therefore, *Mangawaro*, as – deliberately – confirmed by the Court of Appeal in *Awatere Huata*, is very persuasive, albeit not binding, authority that s 7 imposes a duty on the respondent which is properly to be regarded by this Court as forming part of the proceedings of Parliament, and therefore not the subject of judicial review.

[33] The applicants submitted, however, that I should not follow *Mangawaro* and *Awatere Huata*. In so doing they relied on other aspects of *Awatere Huata* itself, and what they described as the narrower approach taken to the principle of exclusive cognisance and other Article 9 privileges in such cases as *Buchanan v Jennings* [2002] 3 NZLR 145 and *Queen v Speaker, House of Representatives* [2004] NZAR 585. They also relied more generally on the report of a joint committee of the House of Lords and House of Commons, chaired by Lord Nicholls of Birkenhead, which in 1998 and 1999 undertook a comprehensive review of the concept of Parliamentary privilege.

[34] They pointed, in particular, to the view expressed by that joint committee that the oft quoted statement of Blackstone in his celebrated 18<sup>th</sup> century *Commentaries* (as relied on by the Courts in *Mangawaro* and *Bradlaugh v Gossett*) is now accepted as being too wide and sweeping.

[35] For my part, and for reasons similar to those expressed by Gallen J, I am also of the view that when the Attorney-General responds to his duty under s 7 of NZBORA and determines – as the case may be – that there are or there are not inconsistencies between a bill and the rights and freedoms contained in NZBORA, and therefore determines whether to draw or not draw such inconsistencies to the attention of the House, the Attorney-General performs a function which falls within the proceedings of Parliament. I think, therefore, that questions of the privilege, whether described in terms of non-interference in the internal proceedings of Parliament, or as questions of Article 9 privilege (noting that in *Awatere Huata* McGrath J analysed the latter separately from the former), mean that judicial review is not available.

[36] In my judgment, the respondent is performing a Parliamentary function, and not one in his capacity as a member of the executive. I think this conclusion is reinforced by the provisions of s 7 which require him to report not only on government bills, but on all bills. This conclusion is further reinforced by s 7's effective replication in, and supplementation by, Parliament's Standing Orders (2005). Chapter V, the section of Parliament's Standing Orders guiding legislative proceedings, by including provisions on s 7 in SO 266, confirms an intention by Parliament that the s 7 duty was part of Parliament's proceedings. By the same token, those Standing Orders are inconsistent with an intention of Parliament, in enacting s 7, that Parliament "did not wish to make the process an internal one protected from judicial review" (see *Awatere Huata* at [60]).

[37] Moreover, and as found by Gallen J in *Mangawaro*:

I do not think it is proper to describe the obligation imposed upon the Attorney-General as a right of the citizen at all. It is a safeguard designed to alert members of Parliament to legislation which may give rise to an inconsistency and accordingly to enable them to debate the proposal on that basis. That would appear to bring it directly within the ambit of the term "proceedings of Parliament".

[38] Therefore, and in terms of *Awatere Huata*, s 7 does not create rights independently of the House, so as to indicate that its exercise will not be privileged.

[39] This situation can be contrasted to the decision of the Niue Court of Appeal in *Kalauni v Jackson* [2001] NZAR 292 and the decision of the Cook Islands Court of Appeal in *Robati v Privileges Standing Committee of the Parliament of the Cook Islands* [2001] NZAR 282. In those cases, challenges to actions taken as regards the vacation of members' seats and the discipline of members respectively were held to be justiciable, for they directly impacted on members' rights both inside and outside of the jurisdictions' legislatures in question.

[40] Section 7 lies within Part 1 of NZBORA, labelled "General Provisions", separate and distinct from Part 2, labelled "Civil and Political Rights". The Rt Hon Geoffrey Palmer (as he then was), when introducing NZBORA as a bill into the House, specifically talked about the procedural provisions, then talked about the rights protected by the Bill (NZPD 502, p 13040). Just as it would be illogical to argue ss 2 to 6 in Part 1 create rights, for they are simply not framed in such a manner, nor does s 7.

[41] In my view therefore, and like Gallen J in *Mangawaro* as approved by the Court of Appeal in *Awatere Huata*, I consider s 7 to be an intra-Parliamentary procedure provision which does not have the capacity to affect the rights of other persons. I conclude, therefore, that the respondent's actions in responding to the s 7 duty fall under the non-justiciable and privileged category of internal Parliamentary proceedings.

[42] To the extent that the applicants asserted that the respondent's role under s 7 is a continuing one, I note simply that there is not, in my judgment, any justification for that interpretation of s 7. The provision is clear: the obligation to report arises on the occasion of the introduction of a bill. It is not, in my judgment, a continuing obligation.

[43] Although Gallen J in *Mangawaro* relied particularly on Article 9 privilege, the broader principle of comity referred to in, inter alia, *Te Runanga o Wharekauri Rekohu*, supports a similar conclusion.

[44] There are, with respect to the concerns and interests reflected in that principle of comity, in my judgment intrinsic dangers for the Court in embarking on judicial review of s 7 decisions.

[45] As McGechan J said in *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, of this more general principle:

Here, the Court is invited to review actions of the Attorney-General that occur in the House and in the course of the legislative process. Judicial review of such actions would take the Courts right into that process and in a way that manifestly risks creating significant tensions between Parliament and the Courts.

[46] As very clearly evidenced by the relief originally sought by the applicants, namely a declaration by the Court requiring the respondent to make certain statements to the House including recommending to the House the reintroduction of the Bill, the Courts would, in my judgment, be intruding in an unwise manner into the processes of the House as it passes legislation. I accept that, urgency having been declined, the applicants no longer seek that relief. Finding, however, that the respondent's actions in response to s 7 are justiciable by way of judicial review would almost inevitably, in the future, invite further such applications.

[47] Applying this principle of comity to NZBORA helps to illustrate the separate and distinct roles of Parliament and the judiciary in this area. It is useful, in this context, to quote the Rt Hon Geoffrey Palmer's description of the New Zealand Bill of Rights bill upon its introduction to the House on 10 October 1989 (NZPD 502, p 13039):

The Bill makes provision for *two levels* of scrutiny, and thus protection of the rights in it. First, clause 6 [section 7] requires the Attorney-General to report to the house when he or she considers that any provision in a Bill is inconsistent with the rights contained in the New Zealand Bill of Rights . [...] The *second level* of scrutiny will be provided by the Courts. [Emphasis added]

[48] The Prime Minister then went on to detail what would become ss 4, 5 and 6 of NZBORA.

[49] The roles accorded to Parliament and the Courts by those provisions seem reasonably clear. NZBORA provides for scrutiny specifically by Parliament via s 7, and scrutiny by the Courts through ss 4, 5 and 6. In terms of comity and common sense as per *Westco Lagan*, the Court would in my view therefore be unwise to exercise a power of review of s 7 actions.

[50] On the basis that I do not consider that s 7 decisions are amenable to judicial review, by reference to Article 9 privilege and the broader principles discussed above, it follows that the pleaded relief is not available to the applicants.

[51] The applicants' amended statement of claim also relied on the jurisdiction provided by the Declaratory Judgments Act 1908. In my view, that Act provides no basis for the pleaded relief.

[52] The position under the Declaratory Judgments Act is well-established. Under that Act Courts will not answer abstract questions, as the applicants clearly wish the Court to do here (see: *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 at 85). There is no dispute between the parties within which to make a declaration under the Declaratory Judgments Act. Without such a dispute the applicants cannot, in my judgment, rely on the Declaratory Judgments Act.

[53] More generally, and as acknowledged by the parties in their submissions, these proceedings inevitably raise the question of the availability under NZBORA of declarations of inconsistency.

[54] The applicants contended that the acknowledgement of such a jurisdiction by the Courts would contribute in a positive manner to Parliament's proper passage of laws affected and potentially affected by NZBORA and would, in more general terms, reflect an appropriate constitutional dialogue between the Courts and Parliament. The applicants referred to this dialogue as something akin to a "chat over the fence".

[55] Therefore, the applicants argued, since NZBORA was not entrenched, and did not entitle the Courts to strike down or otherwise invalidate contravening

legislation, that dialogue would not infringe the principles of comity and mutual restraint that I have referred to earlier in this judgment. Further, the applicants submitted that they did not seek a form of relief that would have the effect of usurping or unduly influencing Parliament's sovereignty as legislative and deliberative assembly. Rather, they sought non-binding declarations that would give effect to the intent of s 7, and the wider policy and scheme of NZBORA.

[56] The respondent argued that such declarations of inconsistency have been discussed, but never granted in New Zealand; they are not an accepted and determinate remedy. Moreover however, the respondents argued that declarations of inconsistency would be impossible to grant; the Court had no jurisdiction to award them. Their submission was that declarations of inconsistency as formal remedies would inherently breach Parliamentary privilege by impugning the internal proceedings of the House.

[57] In determining to grant the respondent's strike-out application, I recognise that NZBORA, and disputes about whether and to what extent the provisions of other legislation are inconsistent with the rights and freedoms contained in NZBORA will, in other contexts, be very significant and proper matters for the Courts of New Zealand. The decision of the Supreme Court in *R v Hansen* [2007] 3 NZLR is very clear on that point.

[58] I have, moreover, real reservations about the validity of the respondent's argument as to the availability of declarations of inconsistency, as formal relief, based on a claim of privilege. Whilst I accept that such declarations of inconsistency could shift the boundaries between the Courts and Parliament, I do not see their grant, particularly given s 4 of NZBORA, as necessarily entailing a breach of Parliamentary privilege. However, this does not of itself lead to the conclusion that – as a general proposition – formal relief by way of declarations of inconsistency will be available in New Zealand. I note that other jurisdictions have accepted the remedy, but only after explicit legislative sanction through the inclusion of a statutory power: see Human Rights Act 1998 (UK), s 4; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36. I note further that the Court of Appeal did not make such a declaration in *R v Poumako* [2000] 2 NZLR 695. I note finally that

unlike in the cases of *Reid v Minister of Labour* [2005] NZAR 125 and *Zaoui v Attorney-General (No 3)* (HC AK CIV-2003-404-5872 1 December 2003 Williams J), the applicants have not sought declarations of inconsistency through NZBORA itself.

[59] I make those remarks in acknowledgement of the very detailed and careful submissions I heard on this matter. Beyond that, I do not think it is necessary or appropriate in this decision to consider further the general question of the possible availability or legitimacy of declarations of inconsistency as formal relief under NZBORA.

[60] The respondent's application to strike out the applicants' claim for judicial review under the Judicature Amendment Act, and for declarations under the Declaratory Judgments Act, is granted.

[61] I perceive no reason why costs should not follow that event. The parties may apply, however, if they are unable to settle that question between them.

**“Clifford J”**

Solicitors: Kiely Thompson Caisley, Wellington for the Applicants.  
Crown Law Office, Wellington for the Respondent.