IN THE SUPREME COURT OF NEW ZEALAND SC CIV 9/2004

BETWEEN **RICHARD PREBBLE, KEN SHIRLEY, RODNEY HIDE AND MURIEL NEWMAN**

Appellants

AND **DONNA AWATERE HUATA**

Respondent

Hearing 5 October 2004

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel J E Hodder, B A Davies for Appellants
P J K Spring, A J Lloyd for Respondent

CIVIL APPEAL

10.00 am

Hodder I appear with my learned friend Ms Davies for the Appellants.

Elias CJ Thank you Mr Hodder, Ms Davies.

Spring May it please the Court, I appear with Mr Lloyd.

Elias CJ Thank you Mr Spring, Mr Lloyd. Yes Mr Hodder.

Hodder It is perhaps inevitable that something should be said to recognise this is the first substantive hearing in this Court. Can I simply quote three sentences from your former colleague, Sir Ivor Richardson, I think from a Conference earlier this year but now in the New Zealand

Journal of Public and International Law where he said, "I predict that the new Supreme Court will be seen as an outstanding Court. The Judges come from a range of backgrounds and have a blend of expertise. They are very experienced in appellate work and in working together. They are well set to determine finally all issues that a final Court for New Zealand should determine as they have done often in five Judge Courts all except the handful of cases that have gone to the Privy Council." As he was the Special Adviser to the Working Group that assisted in forming this Court, can I say his words have special weight and can I endorse them.

Elias CJ Thank you very much Mr Hodder.

Hodder Your Honours, this case is important at several levels. It concerns the composition of Parliament. It involves inevitably the way in which the judiciary in its interpretation and application of legislation applying to Members of Parliament relates to certain parliamentary matters; and it has a direct impact on the parliamentary position of not only Mrs Awatere Huata but the Act caucus and indeed the MP in waiting, as it were, Mr Wang.

The appeal, as everyone knows, relates to the legal interpretation of legislation that was and is politically controversial, Sections 55C and 55D of the Electoral Act 1993. Again, as the Court will be well aware, in November 2003 the Acting Act caucus Leader Mr Shirley wrote to Mrs Awatere Huata to trigger the procedures established under s.55C. Those letters set out some 12 or so instances of perceived dishonest or duplicitous or disloyal conduct on the part of the Respondent. The Court of Appeal accepted, as did the High Court, that the Act leadership and caucus could reasonably regard the Respondent's conduct as causing a breakdown of the relationship and trust and confidence between her and other caucus members. But the Majority of the Court of Appeal held that on its interpretation of the legislation, which was focused on voting practice, her conduct and its destruction of caucus trust and confidence was irrelevant. We apprehend thats the primary issue in this case. The Appellants submit that the Court of Appeal Majority was in error and that the correct legal analysis and result was that provided by His Honour Justice Gendall in the High Court and endorsed by Justice William Young dissenting in the Court of Appeal.

The Written Submissions for the Respondent emphasise, as in part does the Majority Judgment in the Court of Appeal, the importance of what has been called "Burkean independence" of Members of Parliament; the reference of course to Edmond Burke. That is that Members of Parliament must follow their judgement and conscience and the contrast which the Respondent's Submissions draw is with MPs as mere party functionaries required to follow their leadership in all matters. This is of course an attractive form of rhetoric but as analysis, our submission is that it is inaccurate and inadequate. Three points

about that. The first is that as a matter of principle, the MMP system of election of Members of Parliament has entrenched and enhanced the long-standing reality and power of political parties. Second, as a matter of fact, this case is not about an MP struggling to reconcile conscience and party; it is about an MP whose conduct has been accepted in the Courts below as being sufficient to destroy her colleagues' trust in her dealings with them. And thirdly, as a matter of law, s.55D does, as I hope to explain, protect a Member of Parliament's dissenting vote on true matters of conscience.

There appear to be a number of points which are not now in dispute, as one would expect having got to a third level in relation to this matter. Firstly that the 2001 Amendment Act, or the Integrity Amendments, are designed to expand the scope for involuntary exit of sitting MPs. The second is that the lapse and non-renewal of the party's, membership of the Act Party, is not challenged – that was an original cause of action which was dropped before the High Court hearing. There can be no doubt about her status under Standing Orders as an Independent MP. In parliamentary terms, Act now has eight MPs, not the nine it had after the last general election. It's also not now challenged that the Act procedures were lawful. The complaint of pre-determination was dismissed in the Courts below and has not been pursued and it was accepted, as I have said in both Courts, that the Act leaders and caucus could and did reasonably believe that her actions, that is the Respondent's actions, destroyed trust and confidence in her on the part of her caucus colleagues. And finally, there can't be any doubt, because they say so, that the Judges of the Court of Appeal in the Majority consciously adopted a narrow or strict interpretation of this legislation and they did so on the basis of the legislative history, on what is described as the constitutional context which largely comes back to the idea of Burkean independence; and there's a passing reference at least to freedom of expression under the Bill of Rights Act. In fact, as we will submit, perhaps there is more emphasis required on the Bill of Rights 1688, not as a directly governing proposition but as a guide to the way in which the Court should approach this matter.

In his concurring Judgment, Justice Hammond agreed with the lengthy Judgment delivered by Justice McGrath and the interpretation, but Justice Hammond said that what was appropriate was the narrowest workable interpretation. That's at paragraph [148] of the Judgment. The Appellants agree that the Majority favoured the narrowest interpretation and say that that was an unnecessarily narrow approach, but we also submit critically that it's not workable. In particular because it emphasises voting in the House, it would require the Courts to investigate and decide on the conduct of an MP in Parliament by reference to their voting record and that is undesirable in terms of the appropriate relationship between the judicial and legislative branches of Government. And that reflects what is intended under the 1688 Bill of Rights division.

The alternative contention which the Appellants submit is appropriate and was accepted in the High Court is, we submit, a more orthodox reading of the legislation which is workable. Essentially that s.55D(a) of the Act extends to conduct which amounts to constructive defection from the caucus. That approach leaves the question of conduct distorting proportionality as generally one of fact for the caucus leader and the caucus super majority. And it means that the judicial role is applying orthodox judicial review rules. And that was what Justice Gendall did in the High Court and was endorsed by Justice Young in the Court of Appeal.

So it's obvious enough that this case is not straight-forward. The Judges so far considering the matter have divided two to four on it. And if it were not, if it were straight-forward, we would not be here troubling this Court. So we confess that we cannot point to words in the legislation which say explicitly something like, if a caucus MP undermines their colleagues' trust and confidence in them, that will justify a s.55C Notice. It isn't there. But the Respondent cannot point to words in the legislation which say explicitly something like, a s.55C Notice will only be valid if it's based on an MP consistently voting against their caucus in the House. That isn't there either. And that's what takes us into an excursion into various factors which statutory interpretation exercise requires to understand the meaning of the legislation as enacted by Parliament.

The Majority's Decision was explicitly founded on the political and parliamentary context and the legislative history, described in part as the constitutional context. The submission that we make for the Appellants is that analysis is flawed and we develop that in Section 2 of the Written Submissions. What I propose to do, if it's convenient to the Court, is go to Section 2 of the Written Synopsis and elaborate by reference to some of the matters referred to there. And I am entirely conscious, of course, that when I refer to the Royal Commission's Report on the Electoral System, that one of its distinguished members is part of the Court. So I fully expect to be corrected on errors if any.

With respect, it can't be in doubt that the effect of moving to MMP was, as I've already submitted, to entrench and enhance the position of political parties in our political system and in Parliament. As I recall, it was possible to read the Electoral Act 1956 and not know there were such things as political parties if one wasn't familiar with the environment.

Keith J Not quite I think. There were references but not very clear ones.

Hodder No-one could read the Electoral Act 1993 and not understand how critical political parties are. It's political parties and the votes for them that determine the membership of Parliament, the numbers that are attributable to each party and in terms of the party list, those who get selected as list candidates. The reason for referring to the

Commission's Report in these submissions, is of course that it describes the role of political parties in our democracy. It's not challenged in the Respondent's Written Submissions and it may be sufficient to move through it reasonably quickly. But one of the points that I take from it is that proportionality is a foundation stone. And that was of course the primary contrast between the old First Past the Post system and what we now have under MMP. There was also a discussion in the Royal Commission's Report of the work that Members of Parliament do and I will come back to that but the basic proposition is that a great number of things are done by Members of Parliament as part of the governance of the nation; it is not limited to formal voting in the House, and as we've come to see, voting in the House is actually somewhat ritualistic under the Standing Orders.

Having referred to Standing Orders I should say at once that, having reflected on the Court of Appeal's Decision, it may have been an error not to have taken the Court of Appeal to Standing Orders. That was not a matter that was referred to the Court of Appeal. But when one looks at the Standing Orders, and they are set out at Tab 16 of our Bundle, then in my submission, the way in which proportionality infuses all aspects of parliamentary activity becomes clearer. So in our Submissions, from paragraphs 2.7 and following, we have referred first to the Report of the Standing Orders Committee which came in after MMP was enacted so that the first MMP Parliament would be operating under rules that reflected what MMP was about, and that is what is at Tab 16 of the materials. As that Report says, on the very first page, page 10 in the second paragraph, the Committee decided to treat its order of reference as requiring it to carry out a complete review of Standing Orders to ensure that the House and its Committees were prepared to operate in the new environment. And on page 11, in the third paragraph, there's been a major change to the format, the organisation and the language of the proposed Standing Orders, probably the most extensive changes since the first Standing Orders were adopted. It perhaps goes without saying that Standing Orders are the description of what Parliament does and how it goes about doing it.

Tipping J Was there any discussion in the Court of Appeal, Mr Hodder, of the desirability of meshing the provisions of the Standing Orders with those of the legislation so far as that was possible? I take the answer must be no because if there was no reference to the former, meshing with the latter would not have arisen.

Hodder Only incidentally insofar as it was obviously known that under Standing Orders, the Respondent's status was as an independent MP.

Tipping J But how was the proportionality issue looked at vis a vis that Standing Orders position that if under Standing Orders she is an independent, and that's down from nine to eight, how could that not, how is that said not to be a change in proportionality?

Hodder Well it was said by us that it was, the reference in part to Mr Prebble's Affidavits which go to those points.

Tipping J Yes, but I saw no extended discussion of any counter-argument in the Judgment.

Hodder No, there isn't one.

Tipping J Well, there wasn't one.

Hodder There isn't one in the Judgments.

Elias CJ Is that because it's not really contended that the result doesn't distort proportionality; rather the question is whether it's the conduct of the Respondent that distorted proportionality.

Hodder I think that's correct. And it appears from the Appellants' perspective, that there can't be any doubt about that. The real issue is whether there's a link between the conduct of Mrs Awatere Huata and the fact that she is an independent and obviously the argument for the Appellants is that there is a clear linkage.

Tipping J But it's not accepted is it, that it's as simple as that?

Hodder Not accepted by the Respondent.

Tipping J No.

Hodder No. That's where the heart of the case comes to, as to whether that simple link, whether first it has to be that simple, and the question of obviously how simple, we say it's not difficult.

Tipping J But if there's been a distortion of proportionality for parliamentary purposes, it would seem a little odd that there hasn't been for Integrity Act purposes.

Hodder That is the fundamental criticism that we make of the Court of Appeal's Judgment and can I suggest that it's most manifest in the rather unexpected proposition that Mrs Awatere Huata is still at risk of a Notice under this Act even though for parliamentary purposes she is independent. That is logically required by the way the Court of Appeal has focused solely on voting practice. But in our submission it leads to quite strange results. If she is an independent MP for parliamentary purposes under Standing Orders, then one would expect her to have a full range of flexibility of the kind that you would expect with the word independent. But what the Court of Appeal Majority tells us is that she does not. As soon as she votes sufficiently against Act, that is sufficiently to satisfy a Court on the Court of Appeal Majority's analysis, then she's out, or she could be out. So we get, in a sense, two problems. The first is that for Electoral Act purposes she's not

independent, according to the Majority, but for Standing Order purposes she is, and the second is that for Standing Order purposes she's independent but for Electoral Act purposes she isn't in terms of her voting record.

Blanchard J I suppose she could go to the Speaker and ask the Speaker to reconsider the Ruling.

Hodder She could.

Blanchard J But presumably the Speaker would then say, well I made the Ruling on the basis of a communication I had from the Party. Have you challenged the decision of the Party that led to that letter?

Hodder Yes.

Blanchard J Now, I think you told us earlier that there was originally a challenge but it wasn't pursued.

Hodder Correct.

Elias CJ Was not the challenge to the parliamentary, to the Party treatment of membership rather than to the, oh it was also to the caucus determination. Yes.

Hodder There are three broad thrusts to the original pleading.

Elias CJ Yes.

Hodder One was to the fact that she had been denied renewal of her membership and therefore it was deemed to have lapsed and this had provoked the section, the Standing Order 34 Notice. The second was the question of whether it could at all be a distortion of proportionality and the third was the predetermination of caucus point. So we're back to one that's left. So the position at the moment is that there has been no claim that there was a misuse, or there was a breach of privilege effectively by the Party leader who under the Standing Orders is required to give a notice to the Speaker when there's a change in the caucus.

Tipping J That couldn't be challenged in the Court could it, as you imply.

Hodder Exactly.

Tipping J It has to be a breach of privilege.

Hodder But that's not all that can't be challenged in the Courts we would say. The real problem with this case, and with the voting emphasis is that if the Court of Appeal Majority is right and that what you have to focus on is the voting record, but it's not any particular vote, it's a general

judgmental issue, then you inevitably finish up with the Courts having to inquire or being invited to inquire as to whether or not the voting record is sufficient to justify a Notice under 55C. Which means one has to assess how important the particular vote was, how many they were, and as we've said in the Written Submissions, what the expectation of caucus was. And as I've pointed out, and as features in the parliamentary debates, what was Rule 242 and is now I think Rule 293 of the Labour Party's Constitution is quite strong on Party loyalty. The Act caucus Rules are not quite so strong. So does that mean that one has regard to different standards because the expectations are different. The moment that one asks the Court to go into that area which the Court of Appeal Majority effectively does, we say you finish up with 1688 Bill of Rights problems.

Elias CJ That depends upon the analysis and it depends upon whether the approach that the information relied upon by the caucus in expelling the MP is the conduct which is important in terms of the Electoral Integrity legislation.

Hodder Yes.

Elias CJ And I have been wondering whether there are not two different procedures being carried out here. The first being an expulsion procedure by what is essentially a private organisation and secondly, the Electoral Integrity procedure. And although in your Submission, paragraph F, your proposition, you put the matter in a bold way, I wonder whether the argument that requires you to look at the conduct relied upon by caucus in expelling the MP isn't part, doesn't require you for electoral purposes to be making the sort of inquiry you say the Court shouldn't be undertaking. Whereas if the analysis is that in forming the decision, the decision on expulsion by caucus, the inquiry of the Court is into whether a private organisation can take into account the sort of matters that you say destroy confidence and therefore destroy proportionality and you are left with an expulsion, then is not the expulsion, the fact of expulsion and the continuation of the MP in the House as an independent, sufficient grounds for invoking the Electoral Integrity provisions. In other words, are you not complicating matters and inviting the sort of inquiry that you say is impermissible by conflating the two steps because it seems to me there may well be two steps here.

Hodder I accept there may be two steps. I also accept I may be over-complicating it. But in my submission, the Standing Orders position, the Parliamentary position as an independent is a description of where things are at. How one gets there is a matter we need to look at in terms of the legislation rather than the Standing Orders.

Elias CJ Well do you even need to look at Standing Orders? Is this a parliamentary inquiry, that is the expulsion? Because that is something that is a decision of a private organisation. I'm talking in legal terms.

Hodder Yes, the reason for looking at the Standing Orders, in our Submissions, is primarily for two points. One is to show that there really is no argument not that proportionality has been distorted on any sensible basis. There were nine, there are now eight. And the parliamentary position recognises that. So to argue there hasn't been a distortion of proportionality requires an interpretation which doesn't fit with that reality.

Elias CJ Yes.

Hodder And the second proposition is that if one takes a conscious interpretative exercise into account as the Court of Appeal Majority did, it would be better to finish up in the same place as the parliamentary position than in a different place.

Elias CJ Yes, I understand.

Hodder And what we get is we finish up in a different place and we suggest that's unhealthy at various levels.

Gault J Mr Hodder, you indicated that there had been some steps to challenge the exclusion, I'm not sure whether it was a formal expulsion from caucus with the consequent Notice to the Speaker under the Standing Orders. How far did that go, and you say it was abandoned?

Hodder What happened was that Mrs Awatere Huata's membership of the political party lapsed and was not renewed and, in terms of those Rules, it had ceased on non-renewal after six months so it lapsed. Mr Prebble, or Mr Shirley wrote to the Speaker and said, our caucus has changed because caucus requires membership of the Party and under Standing Order 34 or 35 there is a requirement to notify the Speaker promptly of changes. When the first form of the Statement of Claim came out, one of the causes of action was to challenge that state of affairs. That is to say that there hadn't been a valid lapse or there had been an invalid non-renewal of the membership. So it went back to the Party membership.

Gault J So the challenge you're talking about was not a challenge to the activity in Parliament but a challenge in Court.

Hodder No, it was challenging the basis on which the letter delivered to the Speaker which under the Standing Orders was based and …

Gault J There was no protest at the time.

Hodder There was no protest in Parliament at the time.

Gault J Well, there's no protest at the Speaker's Ruling.

Hodder Right.

Gault J No attempt to have it raised at the Privileges Committee and the like.

Hodder No.

Gault J Thank you.

Hodder If it pleases the Court, I was looking at the Standing Orders issue, and I don't wish to labour the point if it's not necessary to do so, but can I give you some of the references in that Report under Tab 16 because, as I say, firstly this wasn't material referred to in the Court of Appeal and secondly it does reinforce what we suggest is an undesirable dichotomy between the parliamentary position and the Electoral Amendment Act position. The references that we say would be of assistance in considering the importance of proportionality to a range of parliamentary activities is reflected, as I've mentioned, on pages 10 and 11, and then on page 15 there was a separate heading about parties to be recognised and it notes that the present Standing Orders do not recognise individual political parties as such, although they do recognise a Government and an Opposition. In future, with the overall composition of the House being determined on the basis of party membership, the House's Rules will have to recognise this.

Gault J Where was that passage please?

Hodder This is on page 15 of the Report at Tab 16, and page 15 in the middle of the page, there's a heading "Parties". I've been referring to that first paragraph. Over the page, at the top of page 16, the same point is made in more detail. Party groups in all parliaments are generally recognised in order of size for seating purposes and the size of groups is an important factor in determining the order and opportunities for speaking. The membership of committees is usually in proportion to the strength of the parliamentary groups and this can apply also to the appointment of chairs of committees. Recognises that the Standing Orders and administration of the House and committees must take account of parties and their sizes and recognition of this is found in a number of Standing Orders. Can I suggest that what's interesting about that passage is it says nothing about voting as being, as it were, the be all and end all of what Parliament does. But that is, in fact, what the Court of Appeal Majority Decision is based on.

I refer Your Honours to page 20 of the Report. This again is of some significance. Under the revised Standing Orders the business committee of the House has a pivotal role to play. It's described in the second half on page 20. The point is made under, on page 21, under the heading "Chair and membership". The Speaker would chair the business committee. Every party with six members will be entitled to have a member on the committee. Now that's just one indication, nothing much to do with voting, but representation on that Committee

becomes quite critical if a party were to go from say six to five. But to emphasise nothing but voting doesn't recognise that aspect of what is going on.

Tipping J While we're talking about voting, how do they now actually vote? Does a representative of the party say eight votes or whatever it is for or against the …

Hodder Yes.

Tipping J So…

Hodder Effectively that's in the Standing Orders which I can take Your Honour to if it helps.

Tipping J No, I just wanted to have that …

Hodder Yes, you're broadly right.

Tipping J So, if the question is, how does Act vote, the answer is, eight votes, shall we say four?

Hodder There are rules about who has to be in the parliamentary precincts as to how many can vote.

Tipping J Oh right, but subject to those subtleties?

Hodder They don't all have to be in the building.

Tipping J But say Mrs Huata wanted to vote to the same effect as an independent, she wouldn't be casting a vote as an Act Member would she, she'd be voting as an independent

Hodder No.

Tipping J Albeit to the same effect?

Hodder No, and her votes are now counted separately in the Records of the House.

Tipping J Yes, thank you.

Hodder On page 23 there is a recognition about where party policies fit in relation to the new environment. The heading "Party policies" in the second half of the page. Again the discussion on that focuses very much on representing the party's policies and participating in debates. So in about the second to last sentence under that heading "Party policies" an MMP-elected system, which is based on party votes, is going to reinforce the party decisions taken outside the House, on particular items of business. Now that doesn't sound like Burkean

independence in its pure form and it obviously isn't. But that is the reality and the law. And again, interestingly, nothing about voting as such. The flip side of the emphasis on voting is that the Court of Appeal Majority describes things like Speaking Orders and the like as being incidental. That is a presumption rather than something that's either based on evidence or supported by the Standing Orders or anything else.

Elias CJ Well your point is that it's now a system of representation by parties, not a system of representation by individual members.

Hodder Yes, it goes one step beyond that perhaps. It's representation by parties in general terms and by the caucus specifically in terms of parliamentary activity. So what we say is that this Parliament is recognised under its own Standing Orders in reflecting the legislation as being one where there is a contest between caucuses and that's why we say when you come to look at the Act, when it's talking about proportionality as determined at the last election, it's actually talking about caucus. So, in answer to Justice Tipping's point, at page 28 of this Report, there's a brief discussion of voting on that page which is less cryptic than the Standing Orders. And so the bottom of page 28 and page 29 summarise the voting approach. And on page 31, there's a discussion of select committees where it's said, we submit accurately, in the fourth paragraph, select committees have become the "workhorses" of Parliament. And at the last sentence, Nowhere else in the Commonwealth do committees give such open and in-depth consideration to legislation. It's a critical part of parliamentary activity. It isn't voting in the House. Now I don't, I won't labour the point, but these matters are matters that are implicit largely in the affidavits Mr Prebble has sworn in this proceeding and which are in the materials.

Now those proposals in terms of the way in which the Standing Orders have worked are described in the Standing Orders that I have referred to at paragraph 2.11, 2.12 and 2.14 on page 8 of our Written Submissions. So seating, the Business Committee, speaking, voting, select committees, oral questions, there are six or seven categories of activity there which are reflected in the table of contents for example of the Standing Orders. But if one were to read the Court of Appeal Majority Decision, one would assume the only thing that parliamentarians do is vote in the House. And that is the critical feature in approaching this legislation. And the submission is that that is simply wrong.

That also takes us to my paragraph 2.14 which points out that Parliament's Standing Orders do recognise the boundary or perhaps the boundary implies something with a bright line, but the point where the judicial sphere and the parliamentary sphere come closest together in the Standing Orders that I've referred to there, and the general point is made in the Decision which bears Mr Prebble's name of the Privy

Council which is in the materials as well. But the basic proposition is, it's not just s.9 of the Bill of Rights 1688 that deals with this interface between the judicial and parliamentary spheres. It's also the wider penumbra of respect and mutual respect and restraint and the criticism, the primary criticism again of the Court of Appeal Majority's Decision is it doesn't recognise that. As Justice Hammond says, it goes for a bright line but the bright line is one which leaves only voting on the reviewable side of the line and when you review voting you get into the second tier level of problems.

Keith J So you're saying it's not really a bright line once you start that evaluative exercise.

Hodder Section 9 has to be interpreted as a bright line because it's an absolute privilege point.

Keith J Mm.

Hodder Now, we're not taking an absolute privilege point here.

Keith J No.

Hodder What we are saying is though that some of the considerations that go to justify absolute privilege also go to justify the wider form of restraint when one approaches something like this topic.

Elias CJ Where's your bright line though, if it's not just membership of caucus?

Hodder Our submission is you don't need a bright line. The bright line is provided at one level by s.9 of the Bill of Rights and the rest of it is a judicial review exercise. It says this is a power that's been conferred upon a leader of caucus, a statutory power, and it has got its own safeguards around it, notably the requirement for two-thirds support in that caucus, and subject only to rationality and normal judicial review, it's a question of fact and judgement. You don't need a bright line.

Elias CJ No, but I mean in terms of the facts, where do you draw your bright line if you go beyond simply membership of caucus because then you are, it seems to me, inviting a review of how the member is conducting themselves.

Hodder If one, we accept firstly that this isn't covered by parliamentary privilege and therefore it is open to review. The question which we emphasised in the Court of Appeal and which the Court of Appeal regarded as irrelevant, was the scope of that review. They regard it as irrelevant because they defined the legislation in such a way that nothing came within it except the voting record. If that's wrong and you take the approach that we favour then you accept there is judicial review subject to a rationality test, or capricious to use the words that

Justice Gendall uses, so there's a residual form of review. But it's limited.

Elias CJ What's the conduct reviewed though, on your analysis, because in terms of the grounds identified, if they are not simply grounds justifying suspension or expulsion and you rely on the fact of expulsion and the continuation of the MP as an independent, then you do invite the Court in its judicial review function to scrutinise the grounds which do include general matters of conduct both in and outside Parliament.

Hodder Yes. Well there'll be two factors we go to. One is rationality which is a stiff test. And the second is that the …

Elias CJ Well rationality just depends, takes its colour from the circumstances.

Hodder It does but inevitably it's going to be a rare, and I use the word, restrained matter. But the second point is that insofar as the Court is being lured into what looks like a review of parliamentary internal matters, it will simply decline to do so.

Elias CJ But you see, Mr Hodder, I don't understand why the internal matter that the Court is reviewing is a parliamentary one, why it isn't simply a decision taken by an unincorporated body, the caucus, and why you don't simply rely on the fact of expulsion and the fact of the continuation of the Member of Parliament in Parliament as the conduct for the purposes of the legislation.

Hodder It's Your Honour's over-complication point to me, I understand that. Perhaps we could have saved a lot of time by doing that, so yes, that's part of our argument.

Elias CJ Yes, well it's your proposition F effectively.

Hodder It is. It isn't the letter that was written in this case though.

Elias CJ But the letter that was written may be seen as serving two purposes because it was also the natural justice opportunity for the Member to respond to caucus over the suspension/expulsion point. It's just that I fully understand your admonition that the Courts shouldn't be scrutinising conduct in Parliament, but it seems to me that in fact that is what the Appellant invites the Court to do, applying a test of rationality of course which it says is a very narrow test, or severe test.

Hodder It is.

Elias CJ But it's still looking at the conduct of the Member including the conduct of the Member in Parliament.

Hodder Put it this way, perhaps in response to Your Honour. It would be sufficient, can I go back one step, in terms of the letter. we have said at

each stage that each of the matters raised in the letters plus the aggregate combination of them all justifies the position that the Act Party leaders and caucus have taken. So, within our submission is that it was sufficient to refer, as the letters did, to the fact that she's become independent in parliamentary terms. And if we hypothesise some other case where all that the leader does is say, you've become independent in terms of Standing Orders and therefore proportionality's been distorted, yes we would say that was sufficient. Now in this case, the letters do go further.

Keith J The proposed letter though to the Speaker didn't, did it, the proposed letter to the Speaker just tracked the requirements of the Act and didn't go back into the factual matters that had been explored in the November letters.

Hodder Yes, that's all that's required under the Act.

Keith J Yes, yes sure. Well that's another version maybe of the Chief Justice's point.

Hodder Well it goes back to the point that's made in our Submissions, can I suggest, that what the legislation focuses on are procedural matters, not substantive matters and I think that's consistent with the Chief Justice's point to me that going into substantive matters has all sorts of problems. So the Act is very consciously focused on procedural matters. It sets up processes and conspicuously, when you get to the point of a letter or a Notice going to the Speaker or the Governor-General, there's no expectation of some review exercise being undertaken at that level.

Gault J Can you just help me, Mr Hodder, I'm trying to understand the point that you're being asked about. What would the position be hypothetically if the dispute of whether or not a matter justified rationally reasonable grounds for belief was conduct in Parliament. Could that be reviewed?

Hodder No. I haven't quite finished my answer to the Chief Justice, if Your Honour pleases. What I was going to say is to the extent that we have in our letter and any future letter went beyond just saying the MP has become independent in parliamentary terms if that's what's happened, then to the extent it involves questions of conduct in Parliament then the appropriate approach, we would suggest, for the Court is to say there's a rational connection there which we won't go into. It's asserted by a leader of a party within the context of the legislation. So, yes you may have somebody asserting, and indeed the Court of Appeal Majority contemplates you always will have somebody asserting, it's about conduct in Parliament. But as long as on the face of it what was put to the MP by way of the letter has a rational connection with a concern about the effect on the caucus, then the Court would not go further.

Elias CJ But you raised some matters in Parliament in the letter, the voting on particular bills is raised.

Keith J Well you say that's part of the natural justice process that operates between the member and the caucus.

Hodder It's appropriate to do so for those reasons. All I'm suggesting in response to the Chief Justice's position is, if we raise a matter like that, then it's presumptively correct, it's presumptively unreviewable.

Keith J And the Act requires, doesn't it, that you give notice of the conduct or the actions in question to the member so that the member has the opportunity to respond.

Hodder Yes.

Elias CJ I think I need to be clear about what you're saying there. You say if one of the grounds relied upon by you is conduct in the House, then the Court cannot review it, even applying the rationality standard. Is that what you're saying?

Hodder Yes.

Elias CJ Well, isn't that to say that there isn't judicial review?

Hodder No, that's to say there would be a form of restraint on judicial review at the point where it takes the Court into considering parliamentary matters. And this case probably provides the best example …

Keith J It'd be a very unsatisfactory judicial review where you could look at some things but not others, wouldn't it?

Hodder I agree it's conceptually patchy for that reason but the reality is that this legislation, if one accepts there's judicial review as we do on the basis described in the Courts below, then one is at the margins of the point where the Courts start to review what happens in Parliament. And as one goes over the margin, then one doesn't review. Now a letter may cover matters that are within and outside that margin as indeed the letters in this case do. Most of them, the great majority of them, is concerned with matters outside caucus, sorry outside at least the formal procedures of the House. And so that contrasts with what the Court of Appeal Majority contemplates which is matters which would be almost exclusively on things within Parliament. And that's one of the reasons why we say that they have misconceived what this legislation must mean. I'm sorry.

Elias CJ No, that's fine.

Tipping J Mr Hodder, does your argument come down to this, that there's a single question realistically arising in this case and it's this: could the leader have reasonably believed that the MP's status as an independent had been brought about by her conduct.

Hodder Yes.

Tipping J That's as I understood it.

Hodder At the highest level of abstraction.

Tipping J At the highest level of abstraction.

Hodder Indeed, that's it. It may be appropriate because I apprehend it will be emphasised to say something about Burkean independence which is touched on at paragraph 2.17 and following of the Written Submissions and with reference to the Report that appears under Tab 13 of the Bundle of Authorities.

Elias CJ I'm sorry, can I interrupt you, I was just taking a note of what you said and it prompts a further question just to finish off on that. Could the reasonable leader have reasonably thought that the MP had become an independent through her actions. That's the same thing as saying could caucus have reasonably expelled her. If the Court was invited to look at whether a remedy could be provided for caucus's action, then quite a different approach would be applied than in supervising the exercise of a statutory power such as under the Electoral Act. You're into cases like **Datafin** and the **Aga Khan**'s case and **Finnigan and Recordon** and the level of Court scrutiny is in fact very narrow indeed. In fact on one argument there'd be very little. I cannot understand why you conflate the two stages if what you're saying is effectively that caucus was justified in expelling her.

Hodder I suspect that's the over-complication point again.

Elias CJ Alright, I won't labour it any more but that's the point and I'll want to hear the Respondent on that and I'd be grateful for anything you want to add on it.

Hodder Can I respond at one point at this stage.

Elias CJ Yes.

Hodder I propose to come back obviously to the text of the legislation, but if one looks at s.55A which is sort of the source point in relation to this, probably Counsel as much as anybody else can be partly forgiven for focusing on word by word analysis given the amount of scrutiny that this has been subjected to, but if we stand back a bit, what s.55A tells us is that every MP who is not an independent MP, that is elected as such, their seat becomes vacant if they cease to be a parliamentary

member of the political party for which they were elected. And then at subsection 3, they cease to be a parliamentary member if a notice is given under (b) in terms of s.55C. Effectively, as I apprehend it, really putting in nicer words what the Chief Justice has just described, this does contemplate expulsion by caucus, that's precisely what it contemplates. Cessation of being a member of the, parliamentary member, means cessation of being a member of caucus and it says explicity you can do it yourself, self-destruct as it were, or self-expel, or you can be expelled by the actions of the leader following a process which incorporates the support of a super-majority of caucus.

Elias CJ But in the scheme of the Act, expulsion doesn't of itself, or even with notice of expulsion, achieve the vacation of the seat. Caucus continues or the parliamentary leader plus caucus continues to have a discretion if you like to invoke that.

Hodder Yes.

Elias CJ And there may be circumstances …

Hodder Indeed.

Elias CJ … where a caucus might take the view that it doesn't want to create a vacancy.

Hodder Correct.

Elias CJ But it's their option on the scheme.

Hodder Correct. And that's one of the points. There's a point made in the Respondent's Submissions that says, this is an appalling interpretation because it means that without having been convicted of an offence to trigger s.55B, something which hasn't got that far might be the basis of an expulsion order. But the difference between 55(1)B and 55A is that 55(1)B is automatic, there's no discretion whatsoever. All sorts of things might happen in terms of the 55A process. And the process under 55C and D is designed to provide opportunities for reconsideration of that very discretion, to invoke 55A or not.

Tipping J Isn't the only issue whether the Notice was legally valid because it must imply a legally valid written Notice mustn't it? You can't just give a Notice for absolutely no basis at all, it has to be valid in the sense that it complies with the terms of the legislation.

Hodder Yes, well in terms of form there's obviously the requirements there which are reflected in the proposed letter to the Speaker and reinforced by the fact that the entire ethos of the parliamentary activity is to treat leaders of parties as extremely responsible and senior Members of Parliament and that the word is taken of Members and if they don't, there are privilege consequences.

Tipping J But the touchstone for it being legally valid is that the leader must have this relevant belief, isn't it as simple as that?

Hodder There's perhaps two stages in it.

Tipping J Well, yes.

Hodder The first stage is that there must be a form that says he asserts he has this belief and he's gone through the processes and what the Courts below have accepted as now we do is that that reasonable belief is reviewable but we have submissions about how wide or narrow that review is and obviously we say it's very narrow in the discussion that we've been having. The Court of Appeal Majority doesn't get there because it defines that discretion out of existence pretty much.

Tipping J Assuming he believed it, and no-one suggests he didn't believe it, the only issue is that he reasonably believed it.

Hodder Within the scope of rationality, yes, yes.

Tipping J This is why I have some sympathy with the Chief Justice with this over-complication. There's got to be some flesh on the bones to justify reasonableness.

Hodder Yes.

Tipping J That's really the analysis isn't it? Whether the facts were such that he had the reasonable belief, was capable of having a reasonable belief?

Hodder Yes, and what the Court of Appeal Majority says is we accept he has a reasonable belief about her disloyalty and that her conduct was enough to justify expulsion. It's just that that's all irrelevant because the only way you can have a valid notice is if it is focused on, and the belief relates to, expected voting practice.

Keith J But that's a different, I mean that's a distinct earlier point isn't it. What is the scope of factors relevant, what is the conduct that is relevant to belief? And that's a more clearly reviewable issue isn't it than the reasonableness of the belief?

Hodder Yes.

Tipping J But conduct's a somewhat unusual word defined if it's to be confined to voting.

Hodder That's why this isn't, this is why one can fairly say that this is a consciously narrow construction of the legislation. It doesn't use any reference to voting, it uses the phrase, "acted in a way" which in turn reflects in the word "conduct" as used in 55D para (c). So the word

"conduct" and the word "acts in a particular way" are words of general application, we say. And if one accepts that what one's focused on is caucus and that these are all things that relate to caucus, then in our submission the narrower argument is unsound and the approach in the High Court was entirely appropriate.

Now I was about to address the Report that's at Tab 13 which is the Alamein Kopu Report.

Elias CJ What do you take from it?

Hodder I take two things from it. One is that it records Parliament being jealous of the proposition that Parliamentarians, not the Courts, decide who should be Members of Parliament. That's the proposition that is discussed on pages 3 and particularly on page 5 of this Report. The suggestion was that the Committee should refer the concerns about Mrs Kopu to the Court of Appeal for an opinion and the Select Committee's Report is reasonably terse in saying no, no, this is not a matter for the Court of Appeal, this is a matter for us. Composition is for us to determine. Now I don't need to get into issues about composition privilege happily for these purposes but there's no suggestion here that Parliament is giving up its claims to be influential in relation to that matter. Nor is there anything in the Parliamentary history of the legislation we're now considering to suggest it was giving up this to some other form. So the idea that this has been deliberately handed over for close judicial administration which underpins the Majority Decision we say isn't supported here.

The second point is that there's a discussion given by, of course, the then Solicitor General, now Justice McGrath, about Burkean independence saying Burkean independence hasn't gone as a result of the 1993 changes which brought in MMP and contemplates that if you want to deal with questions beyond that, there will have to be further legislation. Defection from a political party has not been made a disqualifying event under the old s.55 (I'm reading from paragraph 29 of the Solicitor General's Opinion). There may be legislative questions whether this is a desirable legislative policy. If so that question needs to be resolved by Parliament. Well Parliament has. It's passed these amendments. And the discussion of Burkean independence is from paragraphs 26 through to 29 of that Report, pages 18 and 19 of the Select Committee Report itself.

Elias CJ I know Burke's speech is the most celebrated defence of the system but it's not just his vision of the former system. It's pretty well accepted I would have thought. So it's just this epithet can sound a little pejorative. It was a very good speech.

Hodder It was.

Keith J It's a long time before parties got their power isn't it?

Hodder Yes, it is. I mean there's a rather brutal response to it by Dr Cullen.

Elias CJ Yes.

Hodder In the Hansard propositions. And there are various references in the Hansard debates to gumboots being elected because they are on the party list. That kind of thing. So it's a wonderfully heroic proposition for independence in Parliament and it's stirring stuff. But it doesn't have a lot of resemblance to the current form of the Electoral Act.

Keith J Or even to previous practice. You know, you used the expression earlier, Mr Hodder, enhanced and something, the role of party in the 1993 Act and for the previous century at least in New Zealand and somewhat longer, about the same time in the UK, party discipline had been strong hadn't it?

Hodder Yes.

Keith J I thought I should go back and read Bagehot and he's writing in 1867 or whenever it is, right at the point when parties become more powerful. Just immediately before that Reform Act and Crossman in the standard introduction stresses that point, that parties had become much more prominent after Bagehot wrote.

Hodder And the 20th century is the century in which in both in the Westminster systems, the solidarity of parties in achieving social democratic reforms becomes important but so does party discipline.

Keith J Mm.

Hodder So Rule 242 as it was, and now Rule 293 of the Labour Party I'm sure has a fine history back into British late 19th century-early 20th century political history. And so the collectivist aspect of legislative process in parliamentary politics is somewhat overlooked when just one focuses on Burke's statements. Now inevitably what one finishes up with, we submit is both. There is a reconciliation of that. One can't deny the fundamental importance of political parties. One also can't deny that there's a public and political expectation and perhaps going to the definition of democracy that there's a degree of independent thought applied by members of political parties and caucuses. No-one denies that. The point that we make in relation to the legislation which is not really addressed by the Court of Appeal Majority Judgment goes back to that phrase in 55D(a) which says that they've acted in a way which has distorted and is likely to continue to distort (moves away from microphone) political party representation. Now the first limb is obviously historical but the second limb, in our submission, is extremely important. If there has been a conscience vote of the classic kind that we've seen in this country over the last 20 years on abortion or some other matter, the position of same sex marriages or whatever,

then having voted that way as a matter of historical fact, it perhaps is difficult to see that there's going to be a continuation of that. Now I'm putting aside questions of reviewability but just in terms of legislation. So it's kept there. The word likely is quite important. How does one know as a leader of a party whether it's likely that somebody's going to do something? In our submission it depends on whether you're able to have trust and confidence in that person. So the point we make about trust and confidence in caucus we say is reflected in that word likely and the importance of that second limb. And we say that in this case Mr Shirley and Mr Prebble had ample reason for their view that they could not have any confidence in what was likely to happen in relation to Mrs Awatere Huata on any aspect of her caucus conduct.

Tipping J It also protects against relying on one-off events. It requires, I would have thought, some pattern of conduct from which you can draw the inference of likelihood into the future. It protects the Member against being too suddenly ditched.

Hodder Yes. And one could say that combined with that, the cooling off period that's in paragraph B(ii) might go with that if in the heat of a full debate on some conscience issue there might be strong feelings but 21 days later there might be the possibility that everybody's calmed down somewhat. Now that's obviously with a degree of speculation in that but one can see there's a consistent procedural pattern which would allow for those sorts of scenarios. But your point, Your Honour, is the point that we make in our submissions.

The political history, the statutory history, we will all wait with great anticipation to see what Your Honours say about the use of Hansard in interpreting statutes after this exercise but there being a growing body of feeling that Hansard is not useful at least led by Lord Steyn and others but in this …

Elias CJ But it doesn't need to be resorted to if the legislation is clear anyway.

Hodder Yes. Well for better or worse, it has been resorted to …

Elias CJ You'd like to go to Hansard.

Hodder It has been resorted to by the Court of Appeal Majority but with respect, they have taken a different view of it than we suggest should be taken from it.

Gault J Can't you really say it's just equivocal? You can read it to support whatever view you want to take?

Hodder I would be happy to say it's equivocal. Well the point I take from Hansard, particularly because it's not spelled out anywhere else, is the Right Hon Winston Peters' point that an important factor is the electoral sanction.

Gault J Is the?

Hodder Electoral sanction of any misuse of this power or perceived misuse of this power.

Elias CJ But that's a submission you can make. You don't really need to take us to what one MP said.

Hodder I don't have to but he does say it twice very eloquently.

Elias CJ Yes, yes.

Hodder Just to back up. In terms of my challenge of course to the Court of Appeal's Majority, the Court of Appeal says this interpretation is based, and the first thing it talks about is legislative history which means Hansard. So it takes quite a lot out of this. And we say it's taken the wrong things.

Gault J Well it begins with the ordinary meaning doesn't it?

Hodder Yes.

Gault J There are a few paragraphs and then the legislative history.

Hodder Except even when they're talking about the ordinary meaning, they're partly talking about context.

Gault J Yes, yes.

Hodder When one's at paragraph [77] and [78]. In fact the critical paragraph in some ways where in our submission things start to slide is in the very early part of paragraph 77. So in the ordinary meaning of the provisions in the Electoral Act, the proportionality phrase means the number of seats each party holds relative to other political alignments in the house following a general election.

Gault J Well you would agree with that, yes.

Hodder We agree. The question is what amounts to a change in numbers in terms of the legislation. We probably agree with that too. But then the term proportionality was used indicates the power was concerned not only with formal changes of numbers to a party, and we can agree to that point …

Gault J Mm.

Hodder But things go wrong at "but". But also with changes in its voting strength.

Keith J Well it's also so that it doesn't derogate from the first half of the sentence does it? It's just that that's the idea that it comes to dominate is your complaint.

Hodder It is.

Keith J What about the phrase you left out, rather than more precise language. What, have you speculated about what more precise word you could use than proportionality?

Elias CJ In the context of this legislation, the Electoral Act?

Hodder Our submissions have consistently said that that phrase can only mean what you finish up with, which is called caucus at the end of it. So I suspect that what you might have done is used the word caucus and then defined it in exactly the same language, being the numbers of MPs produced by the proportional results of the previous election.

Keith J Mm.

Hodder So I haven't any more precise language to offer to the draughtsman.

Keith J No.

Hodder But I don't believe the draughtsman should be criticised for that language.

Elias CJ And if it's a fundamental proposition of the Act, it's a bit odd to see it referred to as lacking in precision.

Hodder So the voting strength sort of emerges out there as a dominant factor and never goes away really after that. But there is reference in the same paragraph a little further down to what parties can expect their members to ordinarily vote with them in the House. Well the expectation goes beyond that on our argument. The expectation is that they will act in a way which maintains trust and confidence between caucus colleagues. Now nobody's suggesting that there's always going to be sweetness and light in caucus but in the same way, there's never sweetness and light or not always sweetness and light in the employment relationship but in the employment relationship there's no difficulty about the proposition that trust and confidence is implicit in the relationship.

Tipping J I wondered whether another analogy, perhaps a little loose, might be an analogy of partnership? That they're in partnership to achieve certain gains in the broad, loose sense and in the same way as with partnership, there's an element of trust and confidence required.

Hodder Yes. In relation to something larger than the individuals which in this case is the party rather than a partnership.

Tipping J The firm is more than the individual members.

Hodder Yes. That's entirely consistent with the argument we are advancing. Can I just perhaps say this about Hansard and possibly escape from going too close into it. The first is that there was a radical change in the Bill which only comes about with the Supplementary Order Paper. So what …

Tipping J That's a different matter, isn't it Mr Hodder, from what Lord Steyn's been commenting on.

Hodder It is.

Tipping J I mean, his comments have been primarily about explanations haven't they.

Hodder Yes, yes.

Tipping J …rather than about the progress of a Bill.

Hodder Although I did rather think that Lord Steyn wanted to reverse the whole of **Pepper v Hart**.

Tipping J Yes.

Hodder In any event, the point about this is that, looking at Hansard overall and the debates in this needs to be understood in terms of the progress. So as the Court will know from our Submissions, this was a matter that was important in terms of the Labour Party's election campaign for the election that preceded the last general election. And the very first thing that was done when the House sat, as Hansard shows, is the Governor-General gives a speech and it starts talking about electoral integrity and they introduce as a matter of urgency the Bill. But what the Bill does, and the Bill is under Tab 3 of the materials, is it simply provides for there to be a vacation of a seat if a Member of Parliament formally resigns and so it didn't take very long for politicians in debate in the House to realise that this wasn't going to capture everybody; one had to be either brave or foolish to formally resign, but there was still the other area. And so the matter sat for quite some considerable time. The Bill was introduced on the 22nd of December 1999. It's almost two years later when it comes back in its revised form and it comes back in its revised form quite clearly because there had been negotiations between New Zealand First and the Government to change the wording. And the new provisions, which go beyond resignation by a Member, are the result of that. Which is why we say if anybody should be given some credit in relation to Hansard, it's in fact Mr Peters who became pivotal in getting this thing through. And it's Mr Peters who says, perhaps the major sanction in this thing against misuse is electoral retribution if there's a perception of misuse of these

provisions. So the comments that are made in the early stage of the Hansard debates in fact are focused on some quite different issue and which different remedy than you get when you get to the end of it. But even so, at the outset, there is concern expressed and I think we've quoted from Mr Upton's speech, a very principled speech, saying this puts too much weight on proportionality, not enough weight on the position of individual Members of Parliament. That's just at the resignation form of the Bill. So Hansard does record as one gets to the next stage, but two years later, on the Supplementary Order Paper, that this is a major change and the level of rhetoric goes up. And the level of concern goes up. So all those matters were thrashed out very thoroughly in Parliament. The Court of Appeal Majority says it doesn't pay much weight to those who were opposed to it. It only pays weight, or gives some weight, to those who have supported it. But then fails to cite what Mr Peters says about it. And in relation to the final stages of it, the basic proposition remains that it is about the possibility of expulsion. So the Attorney-General, speaking on the third reading debate, explains it by reference to the language of the Bill, says, this is 14056 under Tab 8, The important point the Bill makes is if a Member of Parliament ceases to be a member of the political party to which he or she was elected then that Member's seat will be declared vacant. That comes very close to the language of expulsion or the concept of expulsion which we were talking about before. So there's voluntary cessation and there's involuntary cessation. And in this case and this piece of legislation is concerned with involuntary cessation. Any differences between involuntary cessation and expulsion become rather subtle and in our submission unnecessary.

So in our submission, what one might take from the legislative history is that at a very broad level, it was designed to addressed post-election disloyalty.

Tipping J Is it of any significance that the Attorney-General said, I'm reading from your paragraph 2.29 Mr Hodder, that she said, while we act to express ourselves as individuals, that's the Burkean view, we do so within the confines of the discipline of the parties that we voluntarily join. That seemed to me to be a point of some possible significance that one renders oneself liable if you like to the discipline of the parties that you join and if you are undisciplined so to speak, then it may be a pointer.

Elias CJ Or if you are disciplined through expulsion.

Tipping J Yes, in the other sense, yes. I just noted that word or phrase, the discipline of the parties, that coming from an experienced politician seems to give a flavour of the sort of way in which parties work, at least to my untutored…

Hodder And it's consistent with the trust and confidence analogies that Your Honour put to me a little while ago, that there is a discipline within a

partnership, for example that one does nothing to disabuse others of the trust and confidence they should have. So that's a form of discipline in a wider sense. But it cuts both ways. The formal discipline of expulsions can be read into that as well. And we say there's nothing in what is said by the Minister in charge of the Bill to suggest that there's a particularly narrow construction required here. The problem was one that was difficult to deal with if one relied on Members to do formal things which is what the original Bill contemplated.

Blanchard J Well, what are we to make of the Minister's statement that the final version was considered not to be in accordance with the requirements of the New Zealand Bill of Rights Act? Do we know anything about that and does it require a narrow construction?

Hodder Hansard tells us that the original Bill was the subject of a favourable report on its Bill of Rights…

Blanchard J The original Bill yes, but …

Hodder The original Bill and this …

Blanchard J I took it is that this is a statement about the final version.

Hodder Yes, and it was the subject of some debate. Because it came in by way of an SOP, the requirements of the Bill of Rights Act didn't formally apply to it. But I think it emerged from the debates that the advice which may not have been written advice, was it probably didn't comply. But that would go to a question of at most, well it goes to two questions. One is interpretation, obviously in terms of freedom of expression but more perhaps what's contemplated in part in the Minister's speech is the possibility of a declaration of incompatibility which nobody is seeking thus far.

Blanchard J Well, we seem to have no argument about the Bill of Rights in this context.

Hodder It's had a passing mention and it gets a passing mention in the Court of Appeal Majority Judgment.

Gault J Mm. But what was it about the ultimate version that fell foul, supposedly, of the Bill of Rights.

Hodder We don't have the advice itself if there was any advice recorded in writing. The proposition, presumably, was that it somehow impinged on freedom of expression. But that's tied up, we would say, in the wider issue that the Bill expressly wrestles with which is the relationship between individual MPs' positions and the more collective exercise involved in caucus and proportionality.

Tipping J Well the Attorney-General touches on that at the very start of the passage that I was earlier referring to when she says, we hear a lot about rights and freedoms of the individual. It's also important not to forget the importance of stable good governance and so on. And so there's obviously a conscious wrestling by Parliament with these two.

Hodder That's our submission but these were matters that were squarely addressed and confronted by Parliament. The objections that are effectively implicit in the Majority's Judgment were considered, debated and in the end the legislation is enacted and it's part of our law.

Keith J And New Zealand First votes were essential to it being enacted. Was there a vote on the third reading?

Hodder Yes, it's not in the extracts I think you've got but it's at page 14074 of that volume of Hansard. The aye's were 64, the no's were 54 and the aye's comprised Labour, Alliance, New Zealand First and the no's comprised everybody else.

Keith J So it's almost the same as the Committee vote.

Hodder Yes, yes.

Keith J I see Mr Ryall said that this is Rule 242 in Statute.

Hodder Yes, he does.

Keith J Yes. It's about a very simple fact.

Hodder He also goes on in the next paragraph to recognise that electoral accountability's important. He would have been happy to rely on electoral accountability alone. But that does reinforce the point we make, that electoral accountability is a factor the Court is entitled to take into account.

Keith J Yes. I mean his point that the will of the people is clear in how they deal with party hoppers was borne out at the previous election.

Hodder Yes, yes. The next part of the Written Submissions which starts at paragraph 2.32 goes into the academic writing and to some extent refers as well to back to the Royal Commission's Report on what caucus does and in my submission there was a fair summary in our paragraph 2.34 and I wasn't proposing to go into any more detail than that. Indeed Sir the other materials support that proposition or those propositions.

Gault J Was there an argument in the Court of Appeal that the **Rata v Attorney-General** decision was wrong?

Hodder No, because we didn't pursue the point from the High Court where **Rata** was effectively over-ruled. So **Rata** is discussed by the Court of Appeal Majority because it wanted to reassure itself that it wasn't trespassing into Bill of Rights 1688 territory and they specifically over-rule **Rata**. We had taken the privilege point in the High Court and did not take it after it was rejected by Justice Gendall in the High Court. What we do say about **Rata**, which is I think the last case in this authority, is that it actually has a useful description, including some evidence, about what caucus does. At page 310 there's a reference to some evidence that describes a role, a wide range of things that caucus does and again, voting is about number 4 or 5 on the list.

Gault J It's a very narrow decision in its actual ratio. Nothing to do with the sort of circumstances of this case.

Hodder Correct.

Elias CJ Nor did the, whether a declaration could be made in relation to the Attorney-General's Certificate arise for consideration.

Hodder Yes, we haven't cited those sorts of authorities …

Elias CJ No.

Gault J No.

Hodder For that purpose. They are sensibly narrowly focused decisions and don't take us very much further here. So all that we would take from **Rata** is that it has a useful description of what caucus does in the relatively contemporary environment before MMP which could only be compounded or reinforced by the MMP process itself.

Keith J Is there any particular passage from the Professor Jackson extract that you would highlight? I was surprised on page 78 in the second paragraph when he said, ironically, whatever that means, another effect of MMP which was intended to mitigate that dominance that is of parties has been to strengthen or formalise the role. Sorry that was 78.

Hodder Page 78, which paragraph?

Keith J 78, the second full paragraph, the second sentence there. The first sentence is a straightforward statement, isn't it, that the process in the House is an on-going political process related to the next election and so on. It's just the next sentence in its comments on party seemed to me to be odd.

Hodder It seems, with respect to the author, to be two concepts being confused. One is plurality, party dominance which is what MMP was designed to deal with.

Keith J Yes, yes.

Hodder And the second is internal discipline, if you like, which MMP does reinforce.

Keith J Yes, yes.

Hodder But the reference to ironically doesn't seem to help.

Keith J No, no.

Hodder But it does bring out the fact there are two different concepts being talked about.

Keith J Yes, yes. But it's the previous sentence in some ways that is your point and …

Hodder Yes.

Keith J And it's the point that's made by the Palmers as well, isn't it, about the on-going political conflict being carried out on the floor of the House.

Hodder It's fundamental to our submission about the broader context which is that what MMP gives us is a political contest between caucuses across Molesworth Street which is an ongoing progress involving virtually every living moment of an MP's life, or every breathing moment of an MP's life. It is not realistic, we submit, to narrow it down to the voting patterns in the way that the Majority Decision would have us.

What I was going to do then was just to touch on the trust and confidence point. I'm reading at paragraph 15, page 15 of the Written Synopsis, in paragraph 236, we submit that the successful operation of a party's caucus is essential to representative democracy in New Zealand and a party MP is in a very different position from an MP who is independent. And at the risk of stating the obvious, the very first thing that s.55A tells us is that this legislation doesn't apply to independent Members of Parliament. So it draws a distinction between those who were elected as independents and those elected as party MPs. Now those who have the fortune to be elected as independent MPs, if that ever happens, can indulge in the adjectival form of independence without any inhibition whatsoever, but everybody else is subject to party discipline. That's really what that legislation in fact is telling us.

And so the point we would then go on to which becomes important in the way the argument developed certainly in the Courts below is that, if that's the case, then we submit that the caucus must have mutual trust and confidence. And as I said earlier, it doesn't mean that's sweetness light. Any large organisation, even a small organisation, struggles for sweetness and light. But it does require not undermining the trust and

confidence in the wider cause and we say that the essence of the Integrity Amendments is that when that's been damaged or destroyed, caucus is entitled to restore itself. And that's precisely what the Act leaders seek to do here. Mrs Awatere Huata's time with Act has gone. What they seek to do is to bring in Mr Wang who's next on the party list. In our submission that's exactly what the legislation contemplates. Now it can restore itself in one of two ways. The first is if somebody explicitly jumps ship or hops wakas. That's not specifically the issue here. The issue is whether it goes beyond that and we say there's the wider sense of acting in a way that distorts proportionality which includes acting in ways which undermine the necessary mutual trust and confidence. And we've already touched in part on why you would expect trust and confidence to be part of caucus operations. It comprises the MPs who are elected to represent the particular party and obviously that party above any other, and instead of any other, in all aspects of parliamentary work for the term of the Parliament. The idea is that they have to work to explain the party's merits and enhance the party's political fortunes throughout their time as parliamentarians.

Gault J This is really at the heart of this case, isn't it? We've got this wording in 55D, acted in a way that has distorted proportionality. And it's a question simply of the link, as you called it, or causation whether the statute contemplates only immediate and direct causation or whether it contemplates secondary causation or consequence. And you're saying that trust and confidence constitutes the link.

Hodder Yes.

Gault J Between the conduct and the distortion and that is encompassed, although the wording says, acted in a way that has distorted, you say that it should be read as, acted in a way that has led to distortion.

Hodder Yes.

Gault J And that's what the case is all about really isn't it?

Hodder At the heart of it, yes. And, obviously following on from what Your Honour just put to me, the proposition is that that language perfectly naturally encompasses constructive defection.

The point I was getting to just a moment ago was that caucus involves collaborative and individual activities which are going to inevitably be unsupervised. There's nobody, I mean there are whips no doubt, but inevitably, and as the literature demonstrates, political activity is going on all the time both at electorate and at parliamentary level so there has to be trust that your caucus colleagues are doing what you expect them to be doing in terms of promoting the party's interests. Obviously, though, some will do it according to their talents, in different ways and at different enthusiasms. That's not the point. The point is that they are working in the interests of the party's political fortunes. And so

there is a legitimate analogy with employment, partnership, whatever. It is also is relevant, in our submission, and it partly comes back to Justice Gault's point to me a minute ago, as to the definition of integrity. We haven't included that in the materials but the Shorter Oxford English Dictionary definition of integrity is the condition of having no part or element taken away or lacking, which is consistent with what's being talked about here. The condition of not being marred or violated. And then goes on to such matters as soundness of moral principle which perhaps we're not so concerned with here. But the first two propositions about the keeping whole explain the use of the word integrity in the name of the Amendment. And in our submission they're consistent with the argument and the way in which Justice Gault put it to me a moment ago. That that's exactly how you maintain integrity. If you've got less than the whole, integrity's been damaged. This legislation is a way of restoring that integrity. It may be a convenient point to adjourn.

Elias CJ Thank you, we'll take 15 minutes for the adjournment.

Morning Adjournment 11.30 am

Court resumed 11.48 am

Elias CJ Mr Hodder.

Hodder Thank you, Your Honour. I was going to turn to develop a little more the constructive defection or constructive abandonment argument that we make. In terms of the legal analogies, the one that we've mentioned in the Submissions at page 23 is with the employment jurisdiction, and the two decisions of the Court of Appeal there endorse the English test which effectively is that there is a term of trust and confidence implicit in the relationship between employer and employee and that there will be a constructive dismissal if the employee cannot be expected to put up the behaviour of an employer. In the High Court, Justice Gendall referred to the slightly earlier jurisprudence of constructive desertion but as I apprehend it from his discussion of it, there's an intent factor in there which isn't necessarily in terms of the employment jurisdiction and so we say intent is not essential here. The question would simply be adapting the words from an employment text which I'm taking from page 375 of the **Auckland Shop Employees** case that the employee cannot be expected to put up with it. Here, the caucus colleagues cannot be expected to put up with it. And to that extent, we say the legislation contemplates something tantamount to an expulsion although the language of expulsion was used before the break. There is a formal expulsion process under the Party Rules that hasn't been invoked but what effectively happens under the Act is something tantamount to that and which could be described that way.

Elias CJ But that's, expulsion under the Party Rules hasn't been invoked.

Hodder As against under the Act.

Elias CJ And what about under the caucus rules?

Hodder That hasn't been invoked.

Elias CJ I had assumed that the letter of 10 November amounted to an expulsion.

Hodder I don't believe the letter was a formal expulsion exercise as such. It may have been, again, effectively such but there wasn't a process.

Tipping J They were taking the view she was no longer a member?

Hodder Yes.

Tipping J So they could hardly turn round and expel her?

Hodder Yes, that she'd gone by her own actions.

Keith J So the two letters of 10 November, the one to Mrs Huata and the letter to the Speaker, both proceed on the basis …

Hodder Premised on that.

Keith J No longer a member.

Hodder Yes.

Keith J By her actions as an independent MP.

Blanchard J Was the view being taken that it was automatic under the Rules? That that was implicit in the Rules if not explicit?

Hodder Yes. And, given all that has been discussed about the importance of party, then although there's a different submission made on behalf of the Respondent, we'd say that's fundamental. This whole process is about being elected for a party. The idea that party membership is not critical to that is unsound, in our submission.

Blanchard J Well, the logic then is presumably she's not a member of the party, we don't have to take her back, therefore if she's not a member of the party, she can't be in caucus because the Rules implicitly don't permit that. We're obliged to tell the Speaker, presumably under Standing Orders.

Hodder Yes.

Blanchard J The Speaker then makes a declaration based on that notification.

Hodder Yes.

Blanchard J And then you would say, there's disproportion.

Hodder Yes. That's the more uncomplicated version.

Blanchard J Simple as that.

Hodder As I understand it yes.

Keith J 10.52.19 And the speaker draws those consequences that you took us to under Standing Orders about voting orders or speaking orders and so on.

Hodder Yes, yes. And in fact I think this is a case where the change has meant that the Greens now get called upon before Act does because of that change.

Keith J Yes.

Hodder So it's a direct impact of it. Your Honours, I was going to take you to the letters that trigger the process off which are at Volume 2, the blue volume of the Case under Tabs 13 and 14. Can I just say that there is, among other differences, a semantic difference on the word constructive between ourselves and our learned friends for the Respondent. There is what looked like an encouraging agreement in the Respondent's Written Submissions that s.55D extends to constructive defection but what the Respondents mean by constructive defection is in fact de facto defection as against some form of explicit voluntary defection. Whereas we say constructive doesn't mean de facto, it means what is meant in the employment context; that the behaviour of A is such as to justify B in terminating the relationship. So that semantic wrestling is in there. As I say the Submissions of the Respondents at paragraph 32 accept constructive defection but then define it as meaning de facto defection.

In terms of the first of those letters, and can I say that the letters in my submission do two things. They outline what I count as 13 separate matters which are relied upon and they reinforce, in a variety of ways, the expectation of mutual trust and confidence being part of caucus activities. So in terms of the short letter, the 10 November letter, there are effectively four points made there. The first is it's a pre-requisite of Act Parliamentary Party that you're a member of the Party. By your actions you're now an independent MP. That's the first. The second is withdrawal of pooled funding. The third is voting against Act in favour of Maori Television. The fourth is a complaint against Act staff. Now in terms of those, some of them are repeated in the longer letter which I'll come to. But the first, we submit, is important. I mean they're all important but the first one is fundamental and at least on the uncomplicated view, sufficient. The third of those, voting against Act

in favour of Maori Television, raises the vexed question about voting. The Court of Appeal Majority Decision suggests, well, it was only one vote. But there's no basis on which even in that context the Court was entitled to say whether that was or wasn't important. Nor should it have done. But in fact that's the very exercise that we're criticising the Majority Decision for leading to.

If I turn to the longer 13 November letter at page 150, the next Tab, the third and fourth paragraphs and the fifth paragraph are a statement of matters that can be described as trust and confidence. Those words aren't explicitly used but that's what they're talking about. And the end result is at the end of the third paragraph, your conduct made it impossible to include you in the normal planning and execution of party efforts in Parliament. Now that's the belief expressed by the leader. That's the belief that the Court of Appeal Majority says is irrelevant. That's the holding of the Court of Appeal Majority that we say is wrong.

Over the page, at the top of the next page, the second paragraph, sorry the first paragraph relates to stomach stapling. That's a specific example which is the fifth. The next paragraph has a second matter in relation to colleagues and being utilised by the Respondent to fulfil the speaking engagements. The next paragraph is in terms of having not said, having not done what it said would be done, that is to say an assurance of probity regarded as vital and being reneged on. Three paragraphs from the bottom of this page, we come back to the party status point. And at the bottom of the page the Maori Television Services Bill voting point.

At the top of the next page, an undertaking to produce documents but these assurances and undertakings prove empty. And then a somewhat startling proposition in the next couple of paragraphs about wearing transmitting equipment to a caucus meeting. And again, the last sentence on the third paragraph, you must know that no caucus could trust again a Member who tried to demand confidentiality for what was about to be said while wearing equipment to record for a television station. And then references to the lapse of party membership in the next two paragraphs which is in fact the tenth point and at the bottom of the page, the misuse of the electorate agent for personal matters and then over on the next page, page 4 of the letter, in the fourth paragraph, beginning, in the same radio interview, a statement which was demonstrably and blatantly untrue it was said and the comment was a breach of caucus rules. And then at the bottom of page 4, a development of the way in which representation of Act in Parliament has been adversely affected in the circumstances.

And the sentence which we suggest is relevant towards the end, While many of these matters may be relatively unimportant, collectively as with the seating and core priorities, they aggregate to prejudice our position vis a vis other parties and to distort the proportionality which

we should have been able to benefit from and to represent by virtue of having nine members in the full communion. Communion there, I suggest, being used as something equivalent to trust and confidence. And then the same point is made in the middle paragraphs, the third and fourth paragraphs on the final page.

All of which amounts to an extended proposition that the caucus colleagues should not and would not put up with this. And they didn't. So that's the basis on which the Court of Appeal Majority itself recognised that there was a reasonable belief that the Respondent had acted to destroy the trust and confidence of her caucus colleagues. But again the point that is central is that the Majority said that was irrelevant. And in our submission that's both surprising and involves a conclusion that's only reached by an extraordinarily narrow and consciously narrow interpretation of legislation.

Tipping J Yet the Judgment of the Court of Appeal appeared at one place to say it could only be voting but in other places there are sort of suggestions, veiled perhaps, that in extreme circumstances something else might qualify. But that really wasn't developed.

Hodder No.

Tipping J Is that a fair way to read it?

Hodder Yes. But in rejecting all of this, it's hard to know what's left so if none of this is relevant, which is what the Majority Decision says…

Tipping J Or enough.

Hodder And there's something other than voting, then I at least have difficulty in conceptualising what it is.

If I can then turn to the Court of Appeal Decision itself. It's in the transcript form in the Case on Appeal and has, as Your Honours may be aware, been reported in the most recent part of New Zealand Law Reports 2004, Volume 3 at p.359. The part that requires focus is a relatively short part of a long Judgment. It really is the part going from paragraph [77] to about paragraph [107]. So if one starts with paragraph [77] which we've already looked at to some extent, as I've mentioned, it starts early talking about voting strength and then records that there are certain expectations about caucus both in paragraph [77] and at around line 24 in paragraph [78]. And our submission is that the Court of Appeal is right there to talk about expectations. Those expectations are the same expectations articulated in the 13 November letter. Those are the expectations that go with caucus membership.

[79] and [80] look at the construction of the legislation and say, well two of the ways of getting out of Parliament under these circumstances involve the Member giving notice, explicitly saying they've resigned.

So there a form of resignation. And it then says, therefore, the third one must mean a form of resignation. And that gets it into a channel from which the reasoning never really escapes. So at line 46 is that phrase, behaviour which has an effect similar to that of resignation. Now in our submission, if that doesn't incorporate constructive dismissal or constructive abandonment circumstances, then it is too narrow and there's no reason to read the language down that way.

Paragraph [82] comes back …

Tipping J Before you move onto that, I was puzzled by that observation because if they would admit of behaviour which has an effect similar to that of resignation, it's very hard to know what that might be unless it is in something analogous to constructive defection or desertion one would have thought. Because it's the effect. It's the effect of someone having gone. If they haven't gone, what is the effect that is similar to them having gone that counts. I had some difficulty with that.

Hodder I suspect that that's what my learned friend, well the argument for the Respondent I apprehend will be that what they call constructive defection, what I call de facto resignation, is covered by this rather than what I would call true constructive abandonment.

Gault J But at the last sentence in the paragraph is an express rejection of that isn't it?

Hodder Mm, mm.

Gault J That may be if you're justifying expulsion but it cannot be characterised as resignation.

Hodder Yes, but that's an assertion rather than a proposition that's reasoned out.

Keith J Yes, and at this point, the attention to voting seems to have disappeared, doesn't it? Or to be downplayed. The language is not tied to voting in the House is it?

Hodder This paragraph isn't focused on that but reading the Judgment as a whole it's hard to see what else it can be focused on. And so, what I apprehend the Court is getting to when it says something which has an effect similar to resignation is that you lose the voting solidarity of that individual.

Keith J And only that.

Hodder Yes, and so if you can then see a loss of voting solidarity somewhere else, then you've got something similar to resignation. I apprehend that's what the Judgment is saying.

Tipping J Well the most obvious thing that would have an effect similar to resignation is not keeping up your membership.

Hodder Yes.

Tipping J In effect exactly similar to resignation if you equate the party with caucus. As my brother Blanchard was suggesting you could implicitly do before the adjournment.

Gault J You can't be both an independent and a member of a party's political caucus.

Hodder Correct.

Gault J Parliamentary caucus.

Hodder That's exactly what we've got at the moment according to the Court of Appeal.

Gault J So is not acting as an independent of the same effect as resignation?

Hodder Yes. And we would say that the thing that's common to all these formulations is what does caucus expect of itself and its members. It expects they act in a way that they can have trust and confidence in each other in relation to the party's objectives. That's gone where you have resignation. It's gone where you have independence. It's gone where you have the kind of behaviour that is complained of in the 13 November letter. That's the common thread that underpins the case for the Appellants.

The next section deals with …

Tipping J Just before you, I'm sorry to be tedious Mr Hodder, but the use of the word invariably in the penultimate line of [80], it is difficult to see that failure to cooperate with the party with the party or effectively advocate its policies will invariably do so. I just wonder whether the Court of Appeal here was stretching or struggling for something that would always amount to distortion whereas there may be some things that could amount to distortion in some circumstances but not in all. And that's where they've been seduced according to your argument into this voting. You see the use of the word invariably struck me there as searching for some universal touchstone that would always count.

Hodder Well.

Tipping J I may be being too subtle and linguistic but…

Hodder When one looks at paragraph [95], in the fourth sentence, third sentence says, these provisions do reduce the independence of members. However there is nothing in the language or context

indicating that proportionality covers a wider meaning than a resignation that can be shown by withdrawal of voting support. That's where they're headed for as I understand it in the discussion at paragraph [80].

Tipping J Because they saw that as something that they could say subject to the internal difficulties of deciding when voting counts as something that invariably will count. They didn't seem to be prepared to recognise conduct on a continuum at the top end of which might count and at the bottom end of which wouldn't count.

Hodder And it's not invariable either.

Tipping J No.

Hodder Because it depends on the importance of the votes. The Court of Appeal was careful to say, not every single vote. So the Dog Catchers Amendment Bill vote isn't the same as a vote on confidence and supply. Now that obviously makes sense if you're going down that track. But it's not invariable either. And then you've got the question of satisfying the second limb about likely to continue. But as far as following where paragraph [80] is taking this Judgment to, in my submission it's taking us to the formulation in [95].

I apprehend that I've said enough about legislative history and parliamentary matters. Whereas the extract at paragraph [86] from the Hon Lianne Dalziel. The only thing I need to do is say that in our submission, the way it's dealt with by the dissenting Judgment is an entirely coherent discussion of that. And at the bottom of paragraph [88] there's the discussion from the Minister, the Hon Margaret Wilson. As I've pointed out to Your Honours, what the Minister went on to say was the focus on somebody ceasing to be a member of the political party to which they were elected was sort of the core test.

Paragraph [90] there's a reference to the word integrity but without going into the definition. And to be fair, they weren't taken to a definition of the word integrity. But in my submission, that definition from the Shorter Oxford that I put to the Court is in fact helpful in this context. And the other point that I make in this area, of course, is they simply, at paragraph [95] the Court says there are statements in the course of the debates which suggest that they had a wider ambit but these are generally statements by members opposed to the provisions. They do not reflect the perspective or purpose of the majority of the House which supported the measure. Little weight can be accordingly attached to those views. Well, in that light, as I say, at the very least Mr Peters' comments had some weight.

And then, to follow up the point we were making a moment ago, as well as [95] we get [98] in terms of their conclusion. The concept of distortion of proportionality with which the 2001 amending Act is

concerned covers any impacts on the number of seats held by a party and therefore the relativity of voting strength between it and other parties represented in the House. Plain from the history of the legislation that change in substance which is not matched by a formal step such as resignation would meet that test. If I may say, the change of substance is effectively what's come about here but has gone unrecognised.

Keith J The first sentence has the kind of tension that sentence in paragraph [77] had in it, doesn't it. Because the first half of it you would …

Hodder It's general, yes.

Keith J You would agree with I guess any impacts on numbers.

Hodder Yes.

Keith J And therefore, I suppose they're saying, means as seen only in voting or something like that.

Hodder If we could go back to the way this part of the Judgment is structured, they start with the ordinary meaning but very quickly get into voting strength and expectations about caucus. They then move to the legislative history. There's then a passing reference, well the constitutional context is picked up from [91] onwards and that's the independence point. Then the Bill of Rights Act gets a passing mention in paragraph [96] and they get to their conclusion in [98]. So the focus stands very much on the construction about voting in our submission. It is central to the way in which the Court has approached its analysis of this. And by the time we get to [98] the game's over as far as the Appellants are concerned because the discretion that appears to be given the party leader under the legislation has effectively been defined out of existence by narrowing it down to relativity of voting strength and repeated formulations. So of course, insofar as the letter of 13 November is concerned, it has one reference, or possibly two, to the vote on the Maori Television Services Bill and everything else is deemed to be irrelevant. And in particular the trust and confidence matters are picked up in perhaps paragraph [107] in the conclusion. Having said they disagree with the High Court's versions, while actions by a member falling short of formal resignation may amount to defection, the notion of constructive desertion inappropriately broadens the scope of the legislation. Accordingly we must apply our narrow interpretation. So it inappropriately goes back to a perception about the limits which should be placed in this process which very largely is probably taken from the independence discussion under the heading Constitutional Context. With respect, the language of the Act doesn't require that at all.

Just before I pass completely from it, paragraph [103], again back to the legislative history, indicates a narrow focus on the problems of

members defecting from the parties in which they were elected by withdrawing their voting strength from them. We didn't just withdraw the voting strength. They moved body and soul into another waka, as the phrase goes. Then it goes on to really say that the legislative history doesn't indicate a concern over wider kinds of disloyalty. But that is …

Tipping J It's interesting, the bottom of [102] on that page, the previous page, seems to introduce yet another concept indicating resignation from, or severance of links with. And that's picking up a similar phrase at the end of the last paragraph. This is in the causation discussion.

Hodder Yes.

Tipping J Severing your links with, which is different from resignation, I suppose that's another way of putting what you would say was your constructive desertion.

Hodder But it might be the de facto one as well.

Tipping J The de facto one.

Elias CJ Well, that's giving notice that, that's a Member who should have given notice that he or she wanted to be treated as an independent.

Hodder Yes, the question that's particularly focused on here in the way the submissions are developed and the argument is developed is going beyond the de facto abandonment to what we call the constructive abandonment. And it's the way in which Justice Gault put it to me before, that's where the issue comes as to whether that distortion arising from conduct which justifies the constructive exiting of the member is caught by this legislation.

Elias CJ I'm not sure that I understand the difference between de facto and constructive in this sense. Can you just …

Hodder As I understand it, you've got actual resignation which is taking a formal some formal step, completely open. The second is, all of the above steps except no formal resignation, that's de facto.

Elias CJ Oh, I see.

Hodder The third step is constructive which says, although there is a consistent claim that the member remains and wishes to remain part of the process, their conduct is such that they are turfed out by their colleagues.

Blanchard J The two presumably shade into one another.

Hodder Yes, yes.

Blanchard J Not that it probably matters much.

Hodder Yes.

Tipping J Well, one is you are leaving us. The other is, we're entitled to leave you.

Hodder Yes. And that was one of the concerns that opponents of the Bill made consistently in the Hansard debates, saying, well this is exactly what it does and it's terrible. So it's then passed but is interpreted as not to mean that at all.

Paragraph [116] I mention in passing.

Elias CJ The heading also is neutral in that context. Just looking at the legislative text. There's no suggestion that who leaves, or, it's a state of affairs, that someone who has ceased to be a member of the, a parliamentary member of the political party.

Hodder And it's the involuntary ceasing to be which we're obviously concerned with.

I wasn't proposing to take the Court through, obviously it's all there in terms the way in which the Court goes through and dismisses all the matters that are dealt with in the 13 November letter and then comes back to conclude this point on paragraph [116] which are the trust and confidence points. They accept that they are reasonably regarded as having caused a breakdown but go on to say, as we have said, the legislation only covers acts which were themselves defections leading to changes of the number of seats held and voting strength in the House. Now again there's that two-part thing that Justice Keith has been mentioning. The first part might be acceptable, the second part goes off and narrows it in a way which we say is unjustified. And then the point of expulsion gets picked up in the next sentence, it does not cover other kinds of perceived disloyalty even if they are such that a Member might reasonably be expelled from the party she represents in the House. And overlooking really the point that I've been attempting to make that s.55A is all but the language of expulsion. Involuntarily ceasing to be a member of a political party, which is what it's about, is tantamount to a form of expulsion. And then the same point is made in paragraph [121]. In combination, all these matters could reasonably be viewed as a serious, even irreparable breach of trust and confidence but that is equally outside the scope of the legislation.

Now briefly, if I may, our Written Submissions don't address Justice Hammond's Judgment which starts at paragraph [144] but I have mentioned already that in paragraph [148] he says that the interpretation to be adopted here should be the narrowest workable interpretation of the provision under consideration. He first reasons it's

quite undesirable to have Courts passing what happens or conduct in Parliament. We would respectfully agree and say what the Court of Appeal Majority does is to focus exactly on that.

The second point is that they're looking for a relatively bright line in terms of avoiding inter-branch conflict. But the drawing of the relatively bright line leaves out all of the matters except voting as far as we read the Judgment, which means that on the reviewable side of the line one has a contradiction of His Honour's first point.

And then his third reason comes back to the concept of independence. And a proposition that is made towards the end of paragraph [152] that as a matter of broad policy, the Court would approach interpreting this legislation to support the acceptance of pluralism and diversity. Now that's difficult to be against pluralism and diversity. But we're talking about a party regime in a parliamentary system under MMP. So His Honour at [153] then goes on to criticise implicitly the idea of rigid adherence to the party line, second sentence in [153]. But again, with respect, rigid adherence to the party line with a certain degree of flexibility on the rigidity is what is expected in the regime we've got.

And he concludes by recognising in [155] that the interpretation adopted by the Majority which he supports will not resolve all the difficulties of this legislation. And what we apprehend His Honour is talking about there is the problem with reviewability of matters in Parliament and perhaps the point that is made by the Majority that Mrs Huata remains at risk even now of a Notice under 55(3)(a) if and when her voting record is sufficient to satisfy the Court that there has been a change in voting strength.

Keith J I was looking for that before, Mr Hodder, where is it?

Elias CJ [106] is it?

Hodder Paragraph [106].

Keith J Right, right, thanks.

Hodder It's discussed in paragraph 6.18 of our Written Synopsis.

Keith J Yes, thanks.

Hodder I think I'm repeating myself, but [106] seems to be the logical consequence of the focus on voting strength. If voting strength is the touchstone, then there's some sense in saying that even though for parliamentary purposes Mrs Awatere Huata is independent, she can still be at risk of being turfed out of Parliament by the acts of the Act caucus. That doesn't leave much scope for the idea of independence for parliamentary independent MPs and for that reason we suggest it raises questions about the reasoning that gets you here.

Tipping J One of the problems that has to be faced about the voting approach is its inherent uncertainty as to how many times, what degree of importance, how you can get in behind the parliamentary processes and find out whether such and such is regarded as important. I just flag that for the Respondent if they are seeking to uphold that approach.

Hodder That's the point that's dealt with very succinctly by His Honour Justice Young in the dissenting Judgment. Having got to that point, can I say that Justice Young says in approximately 15 paragraphs what I've been attempting to say to the Court for the last couple of hours and in the circumstances I suspect that's all I need to say in support of the appeal on the basis that the Written Submissions have been considered already by the Court, subject to questions the Court has.

Elias CJ Thank you Mr Hodder.

Hodder May it please the Court.

12.24 pm

Elias CJ Yes, Mr Spring.

Spring Your Honours, I began my submissions to the Court of Appeal in April of this year by saying that I agreed with my learned friend that in this case context was everything. The context that the Appellants urge on this Court, as in the Courts below, is political. They say that this is a statute framed by politicians, to be read by politicians, to be interpreted by politicians and that there is very limited scope for judicial review. We say that this context is constitutional. Constitutional in two respects. It is the right of those citizens who gave their party vote to Act at the last election to see that full slate of Act MPs retain their seats unless they fall foul of one of the carefully defined events in s.55, whether it be lunacy or a serious crime or the party-hopping provisions. There is also a correlative right …

Tipping J But on that, if I may just intervene on that, you're not actually voting for the individual are you, certainly not on the list. What's wrong to the Act adherent in just having another Act MP substitute for the one that's going? From the point of view of their interests in seeing that there's X number of Act MPs in the House.

Spring With respect, Your Honour, you are really voting for the list individual. They put up a list of candidates and those candidates have particular positions on the list. It's significant that Donna Awatere Huata has always occupied a fairly high position on that list, 4 or 5 depending on which election. The last three she's been put up. And if you, depending on how many votes that people get, the more and more of that list will get into the House.

Tipping J But say pretend I'm an Act voter and I vote for Act and the total number are nine. And as a result of something that happens, the ninth becomes the tenth but the effect is the same. Why is it so important that the individual should keep their seat as opposed to the numbers be kept up?

Spring We say Act, as all political parties do, happily promote their candidates. Donna Awatere Huata's not just another Act MP. She's the only Maori woman Act MP, or was at that election. It's not unreasonable to assume that she would have attracted votes. She puts a very different approach, a very different face on a party that might be seen as one of rich white waspish males. She had undoubted electorate appeal. That was why they put her at 4 and 5 consistently for three elections in a row.

Tipping J I'm sorry, I thought you were speaking in general constitutional terms. You're now making it sort of specific to your client. I misunderstood you, I thought you were espousing some general constitutional proposition so forgive me Mr Spring. I'll retreat gracefully and you can carry on.

Spring I think it applies either way.

Elias CJ Well, it is the case that the lists are published. And that voters who might be deciding which party to cast the list vote for may well be influenced by who would get in if the party attracts sufficient votes.

Spring That's it. I was at the point where I was saying there's a correlative right of that MP where they'd be on the list if they're elected to retain their seat unless they too fall foul one of those carefully prescribed events set out with considerable precision in s.55. That is the context with which we are dealing here. In my respectful submission, the statutory interpretation issues set out in the Judgment were not particularly difficult, not particularly novel, the wording was quite clear of the statute. There was no real recourse to Hansard. The reason the Court had recourse to it was because of the importance of the matter and as a check. And having a look at that language, it confirmed the true reading of the language. It was quite clear that the mischief the Court, Parliament was seeking to redress was one of MPs jumping wakas. Political musical chairs as the Hon Margaret Wilson put it quite colourfully in one speech.

Keith J That was the first mischief, Mr Spring, wasn't it in late 1999 but by September 2001 some kind of deal has been done between New Zealand First and the Government to bring them on board and the scope of the legislation was changed.

Spring Broadened, but it catches, it's really to make it effective, to make the sanctions effective you have to catch those people who should go but won't do the decent thing.

Keith J And who should go, you would say, is to be defined how, then?

Spring Well, when they give their votes to other parties.

Keith J And only that. That's not what you argued in the Court of Appeal was it?

Spring We had a slightly broader conception. We're happy to adopt the narrower conception of the Court of Appeal.

Keith J Yes, yes.

Spring The real check, though, Hansard is one. But the real check is one of constitutionality. And the Judgment of Justice Hammond, whilst in my respectful submission, not saying anything different to the Majority, does say it very pithily. His Honour identifies the two approaches. The bright line and the sending off or the playing the man down, the sports team analogy put forward by the Appellants and adopted by Justices Gendall and William Young. His Honour Justice Hammond then goes on to analyse the constitutional implications of those two approaches in three ways. First of all, His Honour looks at Article 9 and says the least damage, the least trespassing on Article 9 would be done by the first approach. And that is the real irony, and it's identified by the Majority in their Judgment, of the approach of Justice William Young. His Honour says he is concerned about the potential breach of Article 9. But then goes on to advocate a very broad inchoate notion, interpretation, of team-ship. Which may well result in far greater scrutiny of what goes on in Parliament than the much narrower one. You see the virtue of the Court of Appeal's narrow interpretation as it says, is that all you really have to look at is voting records. You don't have to embark upon a broader scrutiny and they didn't have to in that case.

Elias CJ But there may be an even narrower interpretation which is really the one that I was trying, probably not very well, to put to Mr Hodder. That is that there are two steps in this procedure in effect and that you may be right, the Court's may supervise closely the Electoral Act provisions because they touch on electoral representation but that in terms of, and there's plenty of authority on that, but in terms of the party right, the caucus right to determine its composition, you're talking about a private association which the Courts have traditionally not looked at closely provided basic procedural justice is followed. So I'm not sure about all these labels of close look or otherwise. It does seem to me there are different ways that this matter can be looked at which do, which may well give effect to the constitutional significance of the ultimate decision encapsulated in the Act.

Spring I believe Your Honour is right in identifying the two strands, the two processes which have been conflated. And they have not been …

Elias CJ Effectively they were looked at in **Peters and Collinge** weren't they, that's the way Fisher J looked at it.

Spring There would have been nothing to stop, well, put it this way. The Act Party could have simply expelled Donna Awatere from caucus, declared she was independent. They didn't have to necessarily invoke the party hopping provisions. But when they did, they took upon them the scrutiny of this Court. Even Justice William Young makes that clear. He accepts that judicial review is available because of the clear words of the statute.

Elias J Maybe it was a constructive expulsion.

Spring Could well have been, or a sacking.

Elias J Yes, yes.

Spring A simple sacking. I return to the second ground relied upon by Justice Hammond. Namely that of conflicts, the avoidance of conflicts. And those conflicts are of two types. Firstly the internal conflict in Parliament. Where do you draw the line. And secondly the conflict between this Court and Courts below and Parliament. The risk of those conflicts is minimised by the bright line approach.

Keith J How bright is it, Mr Spring. I understand it's bright in terms of saying we're going to narrow the, read narrowly the relevant factors. We'll look only at voting. Although, as we've been discussing, there are some ambiguities perhaps in the Court of Appeal's Judgment. But once you start looking at voting, there's the point that my brother Tipping made foreshadowing that it would be relevant to your argument really, about what votes, how many, how do you assess importance, how does the Court get evidence of that without infringing on Article 9. And that's Justice William Young's point isn't it?

Spring I've got two answers to that point Your Honour. And this is indeed a critical issue. My first point is this, and I differ from the Majority here. I believe that the dangers of Article 9 have been greatly overstated. I think it is more illusory than real, the problem. There is a fundamental difference between a Court looking at the fact of what has taken place in Parliament in order to decide something which took place outside it than the Court looking at it intrinsically for it's own sake of what took place in Parliament. The only reason the Court looks at what took place in Parliament, the voting record, is to determine the validity of what took place in the caucus room, the leader's reasonable belief. And that's outside Parliament. That's definitely outside Parliament. They look at it because they have to. The section, the Act mandates them to. They're not looking at parliamentary proceedings for their own sake. The analogy is this Court looking at Hansard to interpret a

statute. When it does so, it's not questioning those proceedings, it's looking …

Tipping J Is this the mere history argument? Is this the mere history argument, that phrase I take from the earlier **Prebble** case.

Spring Mm.

Keith J But surely this is a questioning isn't it? At the point that a judgement is being made, an assessment is being made of the importance of the vote and of the significance of the departure from the party line, that's not mere history, that's a judgement on top of the history isn't it. There was this vote that went against the party line and we are, so that's the history, but number two, we're going to assess that, we're going to make a judgement about that.

Spring Only for the purposes of making a judgement on the waka-hopping provisions which Parliament has said they must, which judicial review mandates them to.

Keith J I can understand that argument, and that's effectively the argument that everybody's accepting here that because there is legislation then the Courts can look at it but the argument that I think Mr Hodder was making and that Justice William Young was making in the Court of Appeal was a somewhat more subtle one isn't it? That's it's a colouring of the situation and the Courts should be reluctant to, given Article 9 and the ideas implicit all round it, the Courts should be reluctant to get too far into evaluation and assessment and so on. Not a breach of privilege but colouring the extent of review.

Spring I take that point but I'm about to move onto my second one, but I still reiterate that it is doing so for a very limited purpose, a purpose outside Parliament.

Keith J Yes sure, I accept that.

Elias CJ I'm sorry, what's the purpose outside, you mean the electoral purpose.

Spring They're looking at the actions of Messrs Prebble and Shirley not by a parliamentarian but by a party leader in applying the Electoral Integrity provisions. As I say, that's a personal, it's not the reason the Majority gave. I still think it deserves some weight and I submit it on that basis. But the second reason is, even on Mr Hodder's view, you are still going to have to scrutinise what went on in Parliament. Because he obviously suggests, well he argues to the broader mutual trust and confidence, he wouldn't deny that if you cast your vote against the party, if you jump the waka, that you are at risk of falling foul of these provisions. He must. And that must involve looking at Parliament. And that must bring into play the same evil that he rails against here. The same thing he criticised the Court of Appeal for. So either

interpretation, whether you have a bright line or a sports team, you're going to have to scrutinise Parliament. The question is which does the least damage.

Keith J I'm not sure what the bright line is that Justice Hammond is talking about. I thought when I read that, that he was just applying it to the voting line rather than to the evaluation or application aspect of it.

Spring I think he is.

Keith J So it's the voting point. And sure, that means you look at fewer things, you don't look at most of the material that's in the letters. You just look at the, well just the Maori Television vote is the only one that's raised on that reading.

Spring And that's pretty objective. It involves far less intrusion whereas if you have to run the whole gamut of the matters set out in the letters trust and confidence, one could get into all sorts of matters. Proceedings of select committees even. We don't know.

Keith J Well, that's a question isn't it of just how heavy the judicial review role is and then the argument against you is of course that it's a very limited review. Rationality in this context means pretty much hands off, not completely hands off.

Spring Yes, but they're seeking to expand the range of conduct within its purview enormously. That's the, again that's quite ironical, that in seeking to have that very limited review, at the same time they're saying, well, the focus is enormously broad. Because just about anything could give rise to a loss of trust and confidence.

Tipping J Most of what they assert in their letters have got nothing to do with parliamentary privilege. You say that Article 9 dangers have been exaggerated. I wonder, with respect, whether you aren't exaggerating the problems that would arise in relation to a wider view. I mean, take at random a number of the allegations in that letter. Nothing to do with parliamentary privilege at all.

Spring This particular case, yes.

Tipping J Yes.

Spring But we do not know. I mean …

Tipping J Well let's just confine ourselves to this case for the moment. I mean okay, you could posit a case of greater difficulty in that respect, but here it certainly isn't a manifestation of greater difficulty.

Spring I think the stronger point is that whichever approach you take, you're going to have to scrutinise voting records. You're going to have to look at the proceedings of Parliament.

Elias CJ Well not if you look at the expulsion as providing arguably sufficiency for invoking the provisions of the Electoral Act. You don't go near Parliament. There's an assessment made in-house by the caucus of whatever conduct it thinks justifies expulsion and as long as it's not colourable, that's really on the authorities I would have thought going to determine matters. I think that's quite a significant argument you're going to have to meet Mr Spring.

Gault J In other words, the 10 November letter is sufficient foundation without looking at the 13 November letter.

Spring I'll reflect further upon that and come back to it after the luncheon adjournment. If I could at this point continue on with the third matter set out in the concurring Judgment of Justice Hammond. And this is in many ways one of the most significant. His Honour makes the point that in a pluralistic, democratic society dissent and reasoned debate is something to be encouraged. In fact it's a necessity. And that it is truly ironical that when one's dealing with the waka jumping amendments designed to enhance our democracy, designed to make the elected MPs more responsive to the electorate, that under the Appellants' interpretation this new Amendment becomes a draconian element, a draconian new weapon of party discipline in the hands of leaders. One they never had before in the first past the post system.

Gault J How far can you use that argument when under this Act, if a member of a parliamentary party chooses to exercise these rights of dissent and free speech and become and independent and openly record that fact with the Speaker, they automatically lose their seat. So the statute contemplates that.

Spring But there's a fundamental difference, with respect I submit, with someone who maintains they are at all time being true to the positions of the party, but just questions the particular direction in which a party is going.

Elias CJ That's form though, isn't it?

Gault J The more openly you do it, the worse you are, is really the corollary. The more you invoke these rights, the worse you are.

Spring I've given the example in my Written Synopsis of Marilyn Waring and Mike Minogue and Derek Quigley. And there was never any question that those, I called them gadflies, those National Party MPs who took issue with the autocratic style of Sir Robert Muldoon and advocated different policies. Never any question of their loyalty to the National Party. Never any question of them jumping the waka.

Gault J Well, one of them was removed from Cabinet for the very reason that we're discussing, because of the requirements of collective responsibility. In respect of those Members of Parliament your freedom of expression goes. You've got it inside the caucus, you've got it inside the Cabinet room, you've got it in wider party political debates, but once you've become a member of the Ministry then, as Mr Quigley discovered, you don't actually have public freedom of expression.

Spring And he paid the price. But he did not lose his seat.

Gault J No, but there was no provision for that in the legislation at that time. And in fact, I mean did he survive the next election, did any of those three?

Spring I think one of them didn't stand. But the point I'm making is that it would have a chilling effect indeed on political freedom of expression if the interpretation advanced by the Appellants in this Court were to hold. It means that a leader, provided he or she can get the support of two-thirds of caucus, can effectively say to anyone who he's fallen out with, whether it be over policy or because they've had an affair with their spouse, or because they think they're not performing or because they think they're embarrassing the House in some way through involvement in a sex scandal or whatever. He can say, you are no longer one of us. We can't work with you any more. We no longer have trust and confidence in you.

Elias CJ That's how clubs operate.

Spring That's how Parliament would operate under their principles.

Elias CJ Well, it's how unincorporated societies operated. The law doesn't tell them who they're to continue associating with. It permits them to move on. That's the area, I'm sorry, that you said you'd come back to after lunch. But it bothers me.

Spring I like to hit it head-on now because my learned friend places some reliance, and I think Justice Gendall did as well, on the employer and employee analogy, a constructive dismissal, resignation. But it's fundamentally flawed because the employer here of Donna Awatere Huata is not the Act party. It's the people of New Zealand. And this is quite well put by the Hon Michael Cullen in saying being elected to Parliament's like a three-year contract. Those are the people who put her into office. Those are the people to whom she's finally accountable. Okay there is an important, she has, owes under the duty not to distort that representation. There is an element of accountability to Act. But her employer is not, she's not some servant that Act can dismiss if they've geared a two-thirds majority.

Gault J And it's not really the point of analogising employer; the point is analogising the circumstances of acting in a way that leads to the result though the other party finally takes the step. That's the analogy.

Spring It's whether judicial, with respect Your Honour, analogies such as that are judge-made constructs. They may serve a purpose in the common law and undoubtedly do. But we are interpreting a statute here.

Gault J Well, that's what you do in the Employment Relations Act which talks about unjustified dismissal. And the Courts have interpreted that as including resignation where it is forced.

Spring And in that particular statute it is quite valid. But in this particular statute we submit there is no room for (unclear word).

Gault J Well, no I think you're really being asked what's the distinction factor.

Spring The language is quite clear and it's still, even in my learned friend's submissions and unfortunately I have to say in the Judgment of Justice William Young, the words as determined at the last general election are really ignored, would not get the weight they reserve. That necessarily implies, proportionality implies a comparitor.

Keith J Well that's exactly isn't it what Act is saying. They said they got nine, they've got eight now. An exact comparitor. I thought you'd misrepresented, if I can say so, what Mr Hodder said in his submissions. I thought all of that part was all about looking at the nine-eight distinction.

Spring They still have nine because she still votes with them and she's offered them her proxy. If they took that proxy, they'd still have nine. They still have nine anyway, because she consistently votes with them.

Keith J That's on the voting argument but not on the broader argument that's being argued on the other side.

Spring But if the voting argument is correct, they still have nine …

Keith J Oh sure, I can see the force of that.

Tipping J But as they only have eight Act members now, don't they, for parliamentary purposes according to the Speaker. Do you suggest we can go behind the Speaker's Certificate. We must accept it as, for parliamentary purposes, Act, whereas they had nine, now they have eight.

Spring If they took her proxy they would have nine in Act.

Tipping J But she's an independent. They have eight. How can it be said that that doesn't distort proportionality? That simple fact of her becoming an independent.

Spring The purposes of the statute make it clear it's distortion of proportionality as determined at the last general election. As I was about to say, the last general election, that tag puts a snapshot of how it was at the last general election.

Tipping J The last general election there's nine. Now there is eight. Surely that is a diminution of one-ninth.

Spring Not in terms of voting strength.

Keith J Well that all turns, doesn't it, on the voting interpretation. But against that you've got the material that Mr Hodder took us to about the full range of activity that Members of Parliament engage in and it's much more than just voting isn't it?

Spring I accept that, but it's not capable of being determined at the last general election.

Keith J Well surely it is. You get nine people coming into the House who are part of the team, who are part of the group aren't they, who are going to represent the party in Parliament and outside obviously and they're going to represent them day by day in the on-going political electoral process and they're going to do that partly by voting but they do it by the whole range of other things, don't they, that are identified in the sources we were taken to.

Spring All that is capable of being determined at a general election is really voting strength. All you're entitled, all Act's entitled to is nine MPs who vote together. They're not entitled …

Keith J No, they're also entitled to a certain ranking at that point aren't they. Ahead of the Greens for instance.

Spring I accept that but …

Keith J And they've lost that. And they've lost other things.

Spring By their own action in writing to the …

Keith J Well that's a different point, the causation point's a different point.

Spring That is a different issue. Can I just say this. At the last general election, Act got nine MPs, nine votes, not nine MPs who would necessarily get on with each other. Not nine MPs who would work as a team necessarily. It might be hoped they would work as a team.

Gault J Not nine MPs who would vote together?

Spring What, nine MPs.

Gault J The general election determines membership before any vote is ever cast. The representation is fixed then.

Spring Matters such as team-ship and mutual trust and confidence cannot be determined at the last general election. They might be desirable. They might be essential for a political party to function effectively, but they are not guaranteed by the Electoral Integrity Amendments. Because they are not there on the wording.

Gault J What about, the electorate would know presumably, or could know, the rules of the party? What binds these people together, what they're voting for?

Spring You might be, with respect, describing a greater degree of sophistication to the electorate, I mean those matters aren't put in political advertisements, aren't heavily put forward in political advertising prior to the general election. A more sophisticated voter might but I suspect that a lot wouldn't. They'd be swayed by other factors.

Elias CJ Mr Spring, is that a convenient time for us to take the luncheon adjournment.

Spring I think it is, there was one other point, I'll make it after the …

Elias CJ No, would you like to develop it now please.

Spring Maybe I should now. It came up in argument. It's a statutory interpretation point. It came up in argument before Justice Hammond; indeed it was Justice Hammond who spotted it but it wasn't mentioned in the Judgments and we omitted from our Submissions. His Honour made the point that if one looks at the purpose section of the 2001 Amendment Act 4(b), it says the purpose of this Act is to amend the principal Act in order to (b) enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors. It dovetails quite neatly with my point of, as at the last general election.

Elias CJ Except it's political party representation which underscores the point made by the Appellants, that it's not about, the electoral system is not about representation by individuals, it's by representation of the electors parties.

Spring Still, the last point, I accept that, but the electors is still significant. Electors act at general elections. I just thought for completeness' sake I should mention that last point.

Elias CJ Yes, thank you. Alright we'll take an adjournment. We'll resume at 2.15 thank you.

Court adjourns 12.56 pm

Court resumes 2.15 pm

Elias CJ Yes, thank you Mr Spring.

Spring Your Honours, I should have mentioned before now that I have divided the argument up with my learned Junior in relation to the first point on appeal which I will be handling and he will be handling the second and the third points. On reviewing the matter over the lunch time, I believe it would be, the matters which are interesting the Court at this particular time are more happily dealt with in his section of the argument and I believe I have covered, to my satisfaction in any event, the matters which I wish to cover in the first point on appeal, namely the proper construction of the statute, the constitutional implications and Hansard. So unless there are any further matters I could assist the Court with in relation to the first ground of appeal which is essentially the first 15 pages of our Submission, I propose to hand over to him.

Elias CJ Yes, thank you Mr Spring. Yes, Mr Lloyd.

Lloyd Chief Justice, Members of the Court, before I embark on talking to the Submissions precisely on the second and third causes of action, it would perhaps be more appropriate to deal with some of the issues which my friend has just eluded to in terms of matters that seem to concern Your Honours that perhaps more properly can be dealt with under my thread. And if I can start perhaps with the question from Justice Tipping, and really the observation that it seems odd that we could have a situation where proportionality will be affected in terms of the Standing Orders but that the Respondent argues that proportionality isn't affected in terms of the legislative provisions. And in respect of that, there are, I think, two main issues which should be considered. The first is that proportionality under the Standing Orders is just a different construct from proportionality in the purposes of the legislation. This relies heavily on what my learned friend has already submitted to you, but the point is essentially this. The Standing Orders deals with the day to day operation of the way in which Parliament works. It deals with right now, in October 2004, the composition of Parliament, the parliamentary composition of Parliament and the way in which the Speaker and everyone else in Parliament must deal with the operation of Parliament. The purpose of the proportionality aspects of the Integrity provisions is something, in my submission, quite different and that is this. The proportionality provisions are designed to protect a status quo, namely the status quo that was determined at the last general election in terms of, we say, voting strength. If the concern Your Honours have is that, oh but at the

last general election there were nine Act MPs, there are now eight as is recognised under the Standing Orders with the declaration that Mrs Awatere Huata is now independent, that in our submission is relevant to the day to day operation now but so long as Mrs Awatere Huata continues to support her former colleagues in the way she supported them when she was a member of the caucus before the expulsion, excuse me, start again, before the point of time in which the Appellants sought to have her removed from the House, then there has been no change to proportionality. It is a slightly odd contradiction that there can be one version of proportionality for the purposes of Standing Orders and one for the purposes of the legislation. And there's no two ways around that. My friend Mr Hodder suggested that that was a problem with the Judgment in the Court below. Well, with respect, no. If it's a problem, it's a problem with the legislation. That's the way it is intended in the legislation. To look at a snapshot in time at the time of the last general election. And the Standing Orders just serve quite a different point.

Gault J I'm sorry, I'm not following the point that you're trying to make. I can understand you're talking about different points in time but isn't that the very purpose of determining whether there's been a change?

Lloyd Yes, I guess so. And perhaps I've put too much emphasis on the point in time. The issue really I think, and submit, is that the construct in s.55D is proportionality of political party representation as determined at the last general election and I guess in that respect I put emphasis on the phrase, determined, and what my learned friend has already submitted to you, elements that are capable of being determined as opposed to elements that aren't capable of being determined. Whereas the Standing Orders just deals with a more empirical fact of whether or not someone is currently a member of a particular parliamentary party or not. I guess that is the only extent to which I would rely on the time issue. Sir that may not …

Gault J Thank you.

Blanchard J It's almost like a freeze frame against a moving picture.

Lloyd Yes, yes Sir. It almost is. And again, that's an outcome of the way in which the legislation is intended to operate. The legislation is clearly intended to protect the result of the last general election and we say that it isn't simply there were nine MPs wearing the Act badge before, now there are eight. We say it's slight more substantive than that. The point is that there were nine MPs who were elected by the Act voters to sit in the House and vote in accordance with Act's policies. We say that hasn't changed. What's changed is that eight of them now don't want the other one around.

Gault J Well, you say it hasn't changed, but can a member be both an independent and a member of a party parliamentary caucus?

Lloyd The latter concept, the member of a parliamentary caucus is to be confined to just within the context of s.55D, then with respect Sir I think the answer has to be yes. You can be an independent for the purposes of the Standing Orders but you …

Gault J But that section itself says it applies to one but doesn't apply to the other.

Lloyd Yes, in terms of looking at the point in time at which you take the picture, if you like, clearly at the beginning of s.55 where it sets out here that this is only going to apply to MPs who are members of parties, sort of clearing the ground if you like early on for the real debate. Of course it's only ever going to apply to members who are members of parties. Independents, this just doesn't arise as an issue.

Tipping J Can we go behind the Speaker's declaration that she's now an independent. Mustn't she be regarded as an independent also for the purposes of the Act, the legislation. How could she be an independent for one purpose, but not an independent for the purposes of the legislation?

Lloyd I'll try and deal with it in two parts. I certainly do not want to be seen to suggest that you need to go behind the Decision of the Speaker. Once the parliamentary leaders of Act chose to write to the Speaker and ask him to declare Mrs Awatere Huata an independent MP, that is a matter clearly protected by Article 9 and clearly within the context of the House. There is no challenge to Mrs Awatere Huata being declared independent by the Speaker. There cannot be, not in this Court. So no Sir, we cannot go behind the Speaker's decision to declare her independent. But what we can look at is something that occurred outside of Parliament and is quite separate although clearly linked to the request to the Speaker to have her declared independent, and that is the reasoning used by the parliamentary leaders in their letters of 10 and 13 November to the Respondent which included an argument that because she let her party membership lapse, she could no longer be a member of the Act caucus, therefore they said in this letter outside of Parliament, which is something we can look at, they felt that they were under an obligation to inform the Speaker that she was now independent and to have her declared independent. We don't challenge the fact that she's been declared independent, Sir. What we challenge is whether or not outside of Parliament that fact provides a ground that can inform a reasonable belief.

Elias CJ If you look at the text of the legislation, s.55B in particular, that's the Notice provision. Do you have it?

Lloyd Notice from a member.

Elias CJ Yes, notice from a member.

Lloyd Yes, Ma'am.

Elias CJ The member, if he or she gives notice that they wish to be recognised for parliamentary purposes as either an independent member or a member of another political party, the result follows automatically. What do you say for parliamentary purposes means there, if it doesn't coincide with the subject of the standing orders. They must all be concerned with parliamentary purposes at the time, must they not?

Lloyd Yes. I think that must be right. I take the phrase, for parliamentary purposes, to mean in which caucus does one sit when in Parliament. And what we're talking about here in terms of the membership of a party for parliamentary purposes, I think we would all agree, that we're talking about Mrs Awatere Huata's initial membership for parliamentary purposes of the Act caucus and then she's been declared independent. I think that's right Ma'am, I think that that is the touchstone. The problem with 55B looking at it of course, is that, the first point I guess is this isn't our situation obviously. And it really hits on the causation argument which I will come to very shortly, that you eluded to very early on when you said, oh but if this is a case of there being consequences of, just a distortion of proportionality, those consequences, then isn't the correct question instead of focusing on about whether those consequences have actually occurred is actually to look at who caused them. And of course in 55B this is the beginning of a theme which says that this legislation only applies to people who cause their own consequences. Now I fear I haven't answered your question directly.

Elias CJ Well, maybe I misunderstood you. I thought you were drawing a distinction between the Standing Orders which were concerned with parliamentary purposes at the time or as they change, and s.55D which you said, as I understood it, is directed at the proportionality at a snapshot, i.e. as at the time of the last election. It may be that I'd misunderstood.

Lloyd No I don't think you have. I think perhaps I've, if I can try and summarise it like this. It's my submission to you that the proportionality of, or proportionality for the purposes of the Standing Orders deals with the empirical fact about whether or not a particular MP is or is not within the caucus at a point in time. And it's unarguable, and we don't intend to argue any differently, that Mrs Awatere Huata is an independent MP right now. She is not a member of the Act caucus for parliamentary purposes right now under the Standing Orders. The point that I was trying to make was that the construct of proportionality under s.5 is a different construct. It's not an empirical question as to whether or not someone is or isn't wearing the badge of that party right now. It's whether or not they are effectively fulfilling a particular role and that role, we say, is the role that they were fulfilling on the day, on election day, at that point in

time, when they were wearing the badge. And we say that on election day, or after election day, what was determined at that general election was that Act would have nine MPs, that those nine MPs would include Mrs Awatere Huata and that she, along with the other eight, would vote in accordance with Act policies by and large when it came to votes in the House. And we say that is the snapshot that's taken then.

Gault J What do you say about the whole purpose of these sections subsequent to the Supplementary Order Paper which appears to be directed to a member ceasing to be a member of the party, parliamentary party?

Lloyd I'm not sure, with respect, it's my submission that that doesn't quite capture what the purpose of this, I guess this is your question, what do I see as being captured by the purposes of the Supplementary Order Paper?

Gault J Well, what do you rely on for the particular purpose you've been contending for, in the face of that heading?

Lloyd I'm sorry Sir, I'm not familiar with the heading you're referring to.

Gault J The heading in the section refers to ceasing to be a member of a parliamentary party.

Lloyd Yes.

Gault J That seems to be the focus whereas you are saying, no the whole focus of the Integrity provisions is what happened on election night. And what I'm asking you is, how do you get that in the face of what seems to be a provision directed to an on-going situation during which somebody ceases to be a member?

Lloyd Sir, I think what I would say is this. The Integrity provisions 55A through E provide three mechanisms by which one ceases to be a member of their political party for parliamentary purposes in accordance with this aspect of the legislation.

Tipping J Or ceases to be a Member of Parliament.

Lloyd Ceases to be a Member of Parliament, correct Sir. The first is the one that the Chief Justice took me to, is where, or the first two really are there, is where you either resign explicitly or you make a clear statement of intent that you will leaving your political party. 55D, 55C and D provide this third mechanism which is the very mechanism we're dealing with here Sir. And I guess it comes down to the causation issue. The matter you seem to have raised with me Sir, if I'm correct, is you say at the beginning of this series of sections, it's the heading sets out clearly that what we're talking about is members ceasing to be parliamentary members of a political party. And my submission is that the way in which you cease to become a member of

a parliamentary party under the Standing Orders, namely the Speaker essentially has the absolute right to declare you independent or not, and that can't be questioned into, certainly not here, it might be able to be questioned into as a matter of privilege in the House but not here, is different from the mechanisms here. And the mechanism here we're concerned about, s.55D, says that you must act, you being the Member of Parliament, you must act to effect proportionality and only when that happens are you deemed under these sections to have left your parliamentary party. So my submission, Sir, is this. If you have not acted in a way that can distort proportionality but your parliamentary leader nevertheless goes and tells the Speaker either you have, or some other reason and asks you to be declared independent under the Standing Orders, that might well have an effect under the Standing Orders but it won't have an effect under these provisions.

Tipping J Is your point essentially that you've got to accept she's an independent, but she didn't bring that about?

Lloyd Yes, Sir.

Tipping J It's no more complicated than that isn't it?

Lloyd It probably isn't any more complicated than that Sir actually.

Keith J Simply causation then?

Lloyd Yes. The Chief Justice identified earlier the distinction here between expelling a member from caucus and utilising the Integrity provisions to have them removed from Parliament and how they're quite separate inquiries, quite separate series of actions that result in, in my submission, quite separate things. On the first matter, you might have matters which affect, in my learned friend's language, trust and confidence such that caucus members feel they can no longer act, work, with a member. And they may feel, or their caucus rules may give them the right to utilise that as a mechanism for expelling a member from caucus, and in the case of the Act Party there were provisions that provided for a formal vote which, if supported by three-quarters of the members of the caucus, would lead to such expulsion. On the other hand we have these Integrity provisions which are aimed at quite a different result. Not just expulsion from caucus but dismissal from Parliament. Now it may well be that some of the actions that would justify an expulsion would also justify the procedures under 55D to have that person expelled from Parliament. But that's not going to be the case in all instances. And it's our submission to you that that's not the case here.

Elias CJ What about continuing in Parliament as an independent? Isn't that conduct which distorts the proportionality of Parliament?

Lloyd The response is two-fold. And the first response is, no it's not because proportionality of Parliament on our submissions to you relates to relative voting strength and so long as that independent supports her former colleagues, as this independent has, then the relative voting strength isn't affected, therefore proportionality's not affected. And my learned friend made a good point on this with respect. The offer of a proxy vote was made to the Act caucus. When one, just because one's an independent or a member of another party, doesn't prevent you from offering your vote as a proxy vote. In those circumstances there could have been no question as to whether or not there would be a change in the relative voting strength. Because the Act caucus could have retained the ability to exercise the proxy vote. So that's the first response, Ma'am, to the question of, but isn't it a change of proportionality by continuing to act as an independent.

Elias CJ Well, it's your submission that the fact of independence vis a vis the parliamentary party is not what affects proportionality for the purposes of s.55D. It is only if the voting strength of the party is affected, the proportionality is affected.

Lloyd Yes, and our second submission, supporting submission I suppose is this. Even if the Court is minded to think that the mere fact that Mrs Awatere Huata is now an independent MP has altered proportionality, then that's when the causation argument kicks in. And it is, in our submission, important to identify who caused that to come about. Because the Act makes it quite clear it must be an action of the member that has distorted proportionality and not otherwise.

Gault J Can I just come back to the proxy point. Would it follow from your argument that a member resigning from her parliamentary political party under 55B could retain her seat in the House by offering a proxy to the party from which she resigned?

Lloyd I don't believe so and I'll have to check the legislation Sir. But as I understand it, 55B, the notice from the member and 55C, the notice from the parliamentary leaders, the mere giving of the notice is what triggers the …

Blanchard J There's no disproportionality element.

Gault J It must underlie these provisions that somebody resigning under 55B affects proportionality.

Lloyd You're saying a Member could resign from his or her political party, even join another political party, ask to be included in their caucus in the House but so long as they left their proxy vote with their old party.

Gault J Well, I'm thinking more particularly of an independent who automatically otherwise would lose his or her seat under 55B, on your argument it would seem could retain the seat simply by saying I'm

going to give a proxy to my former party. Now, I wonder whether that is a relevant factor?

Lloyd I think I understand the concern Your Honour has. I don't think that that is the outcome though. If you issue a notice under 55B, that's it, that's the end of the matter. The Speaker …

Elias CJ But there must be some …

Keith J The notice as got to be given to the Speaker though, doesn't it? If you get a very public declaration, I am no longer a member of X party, I am however giving them my proxy, or I'm not giving them my proxy but I'm no longer a member of the party…

Lloyd But I'll continue to vote…

Keith J And I'll continue in Parliament. I'm not going to give notice to the Speaker. Isn't that the sort of action that should come under 55D?

Lloyd And Your Honour's point here is that because it's a public declaration and not a declaration to the Speaker, it's not captured by 55B, so that my …

Keith J Not on the face of it.

Lloyd My previous response that 55B would automatically operate to have them kicked out covers the issue that's been raised by Justice Gault. But in your question Sir, in relation to a public statement of that effect, look this may well be the one slightly odd, yet another slightly odd situation that might arise which in the current drafting of this legislation would mean that yes, Sir, I would have to accept on this argument that that person stays.

Tipping J Is it the only difference that under 55B you voluntarily wish to be recognised as an independent and under 55D your client has involuntarily been recognised as an independent.

Lloyd Yes.

Tipping J Wherein lies the difference then, apart from causation?

Lloyd Well possibly none. Because the issue then, if that's the case Sir, the issue comes to be exactly that. You say involuntary, has involuntarily become an independent.

Tipping J Yes, she either went willingly or she was led kicking and screaming, to use a colloquialism.

Lloyd And the willingly is 55B and the kicking and screaming is 55D.

Tipping J 55D.

Lloyd Well there will be, with respect, two categories of the 55D case actually. One will be where she has in substance actually defected but has simply not done the right thing and handed in the resignation and stuck around, and has tried to stick around. And that, with respect, is the correct use of 55D.

Tipping J Anyone who's removed from their political party and doesn't join another one must become an independent mustn't they?

Lloyd Yes. Yes.

Tipping J I really think this case comes down to causation.

Lloyd I can move onto that in more substance if Your Honour would like.

Tipping J Well, no I don't want to choke you off.

Lloyd No, not at all and it may be useful to head straight there.

Tipping J We're making very, very fine and difficult distinctions otherwise.

Lloyd We are, but that is the nature of this legislation unfortunately. There's no secret that it's problematic. And I think, on reflection with Justice Keith's point, that is a situation where if the declaration was made publicly, I'm going to, I'm not going to be within caucus any more of my party, but I'm going to, or I'm going to resign my political membership. I'm not going to be within caucus but I'm going to leave my proxy vote with them, because it's a public declaration and not a declaration to the Speaker, it isn't captured by 55B with automatically has you removed. It's the 55D case. And on our construction, I think I would have to acknowledge that it's a case where perhaps that person would have the right to stay in Parliament because the leader wouldn't be able to point to a change in relative voting strength. That's the only, the submission would have to be that that's the only slightly odd aspect of our interpretation, where with respect, the Appellants' interpretation creates all sorts of trouble. We have situations where, if it's really the case that trust and confidence is the touchstone and a caucus can decide that they want to expel a member because they no longer trust them, and then that expulsion because it leads to independence and that independence creates disproportionality, what you get is a situation where the reason for the loss of trust and confidence becomes the operative reason. 55. And you get into a situation where if …

Elias CJ Well the expulsion or the independence becomes the operative reason in itself.

Lloyd Yes, and then perhaps you go back into the causation argument of who's caused the independence. Which is a slightly different debate to the one that …

Keith J Well is there a causation problem, though, issue with the stage that the Member is independent and continues to act as an independent. You're really still saying that that was caused by the initial expulsion decision if that was the step.

Lloyd Yes. And with respect, it must be. If I, in the case of Mrs Awatere Huata, the fact that she turns up to work today and acts and carries out her job as an independent MP, she has no other choice because she has been declared independent as, we would say, a result of actions of the Appellants. The fact that …

Tipping J Why are we keeping on talking about expulsion? I thought the problem here was that she let her membership lapse and she wasn't let back in. The Court of Appeal didn't seem to think much of that line of argument but frankly I think it's got some force.

Lloyd The Court of Appeal identified that, and perhaps this relates to something Your Honour said earlier, you said that you wondered if the constructive resignation effectively, by not renewing your membership, was constructive resignation, it was as good as resigning essentially, is how I understood Your Honour to suggest that might be the case. With respect …

Tipping J Well forget how I might have put it earlier. My concern here is that she simply, for good, bad or indifferent reasons, allows her membership to lapse. She then ceases to be a member of the party. They then take the view, well if you're no longer a member of the party, you don't qualify to sit in our caucus.

Blanchard J Well in fact there are two different organisations.

Tipping J Yes.

Blanchard J There's the political party and there's the caucus. The caucus would appear under at least an implicit provision of the rules, to be obliged to give effect to those rules if the party hasn't let her come back in but caucus is obliged to say, well you can't be a member of caucus and we've got to give the notice under Standing Orders.

Lloyd And that, I'm comfortable with that to there Sir. But then we get into the question of that's investigating the stream of expulsion, not the stream of dismissal under s.55A. It may well be. Our first response to this is there is no provision in the caucus rules which requires you to remain a member of the political party, they're quite separate institutions in the party. If Your Honour is minded to think that it's implicit in the caucus, if not in the caucus rules then in the conduct of

caucus, that members of caucus should remain members of the political party.

Blanchard J Well the political party rules.

Lloyd Well the political party rules may cover that issue.

Blanchard J Yes. They'd be a fairly extraordinary set of rules if it wasn't implicit. Because you've got to be a member of the party in order to qualify to go onto the list. It can't be the case that the moment you've go onto the list and got elected you can then resign from the party or let your membership lapse and say, well I can continue as a member of caucus. That would be ridiculous.

Lloyd Yes, yes. And if it is the case that Your Honours are minded to believe that a lapse in membership of the political party membership makes it ridiculous for you to be able to claim to still be a member of the caucus, that is one thing. But to then leap from there to say, failing to remain a member of the political party means I lose my seat as an elected MP, a constitutional office recognised in statute, is something quite different and in my …

Blanchard J Well it's the process of causation that leads through to the Speaker's declaration. At that point the argument that you've, that's already been addressed takes over, what's the consequence of that. But you're now addressing the question of causation. And it seems to me that this point is critical to that.

Lloyd Yes, can I start with this observation. It's in the Written Submissions and I'm sure it's something Your Honours have in mind, that the concern here is this. If the Appellants' view is right and they can point to a breach of caucus rules, whatever those caucus rules say, we say there has been no breach of caucus rules in this case but.

Blanchard J Was it caucus rules or party rules?

Lloyd Well, the Appellants say it's caucus rules in the letter of 13 November.

Blanchard J Well is that simply a misnaming of what they were talking about. As I understand it they're talking about party rules.

Lloyd Well, there's never been any evidence that there's a party rule that says that, with respect.

Gault J I'm just a bit troubled about the extent to which we can go into this. There is no extant question before us as to whether Mrs Huata was rightly excluded from caucus. So we must take as a starting point that she's not a member of caucus.

Lloyd That's fine Sir. And the reason it's fine is because of the two different streams that are possible here. One, a stream of procedures which leads in expulsion from caucus and the other a stream of procedures which leads to dismissal from the House under the Electoral Integrity provisions. It is my submission that the Respondent can accept, for the purposes of this argument, that to cease to be a parliamentary member of the Act party gives grounds for her to be expelled from Parliament. But that is as far as it can go. It cannot be that the effective rules of a private, unincorporated body can effectively act as delegated legislation to then provide a reason for her to be expelled from Parliament, dismissed from Parliament.

Keith J That proposition you just stated, Mr Lloyd, is inconsistent isn't it with the argument that your side is making that everything turns on voting. You were just allowing the possibility that no longer being a member of the parliamentary party could be a basis for the operation of the vacancy provision.

Lloyd No Sir, sorry that isn't what I intended to say. I intended to say quite the opposite. No longer being a member of the parliamentary party, that is you've been expelled by your caucus for whatever reason. But let's just …

Keith J Well, that's the causation point isn't it. But I thought you were accepting that if you'd taken some action that led to you no longer being a member of the parliamentary party, then you might come within the scope of 55D. I thought that's what you said a couple of minutes ago but maybe I misheard you.

Lloyd No, no you did hear me right. There is no causal link though. It could be the same....

Keith J That's a separate point.

Lloyd It's quite a distinct, there are two utterly distinct streams. It's just that the same action might found good reason to expel you as it might found a good reason to form a reasonable belief under the Integrity provisions.

Elias CJ But if you're lawfully expelled, so you have the status of an independent, on your argument the caucus couldn't have recourse to s.55D.

Lloyd Not automatically. Not simply by saying, we've expelled you, you're an independent, therefore you have acted in such a way as to change proportionality.

Elias CJ Why not?

Lloyd Because you need to know what the reasons were for the expulsion because the mere fact, it's our submission, that the mere fact of expulsion cannot in and of itself inform a reasonable belief under s.55 because it may well be that the expulsion has been brought about by a, in this case an example, a breach of a caucus rule which is effectively just a rule of a private unincorporated body.

Blanchard J I don't know where you get this caucus rule from. It says quite clearly in the letter of 10 November, the one that went to the Speaker and I think also, although I haven't got it in front of me, the one to your client, talking about the party rule.

Keith J That's even more general isn't it? Tab 12 is the Speaker's letter, the letter to the Speaker.

Lloyd Sir, in answer to that question, if it is the political party rules, that's just as bad in my submission. It's still a rule of a, in the case of the political party I think also, an unincorporated private body that has rules that regulate its members' conduct. If a breach of those rules can all of a sudden provide the basis for you to remove a Member of Parliament from his or …

Elias CJ That's how they come in.

Lloyd … her seat.

Blanchard J Surely you've got to challenge the expulsion.

Lloyd Possibly.

Blanchard J And that hasn't been done.

Lloyd If I can address the Chief Justice's point. With respect Ma'am, no it isn't how you come in. It's how you offer yourself up for election but how you come is when somebody walks into the voting booth and casts votes for you.

Elias CJ No, I'm talking about how you come into the party.

Lloyd How you come into the party.

Elias CJ You adhere to the rules of that association.

Lloyd Yes, yes that's right.

Elias CJ So why can't you go out via the rules of that association?

Lloyd Well you can Ma'am but it's a question of what you go out of. You can go out of the party and you can …

Elias CJ Yes, that's all I'm talking about at this stage. You go out of the party, then you have the status that you're not in the party so you're an independent MP. What is the policy that stops the caucus then invoking the scheme of s.55D? And saying your conduct is that you're continuing to act as an independent MP and that distorts the proportionality of Parliament as established by the last election.

Lloyd I have been wanting to say that the reason you can't say that is because that doesn't provide enough information to meet the requirements of s.55 and the reason I think that is the case is it comes back to our issue of who's caused the independence. It is not accepted by the Respondent….

Gault J You don't have to look into the reasons for resignation under 55B.

Lloyd No, no. But that is because it's, with respect, 55B, the issue we have in this case would never arise in a 55B case. Because what we're talking about is whether or not, in this case we're talking about, as Justice Tipping said, it's an involuntary exit. 55B is a voluntary exit. It's hard to imagine someone being before you arguing…

Gault J You're coming back to the exit. The question is of continuing conduct acting as an independent.

Lloyd I guess there are two points. First of all, it's our principal submission that the only conduct of interest is voting. And so that's the first response. But if the Court is not minded to accept that, the only conduct that could constitute or affect a distortion of proportionality would be a change in voting but it could be other conduct and in this case we're talking about the mere fact of being independent and continuing to be an independent MP. Then it does come down to who caused the independence. And it is the Respondent's submission that in this case her being, the fact that she is an independent MP was brought about by the actions not of hers but of the Appellants and therefore it doesn't fit within that part of s.55D which requires there to be actions of the member distorting proportionality.

Tipping J Are you still relying on the subtle point that an omission is not an action? In other words, she omitted to renew her subscription, therefore that wasn't an action. That featured at some earlier stage, I'd just like to know explicitly whether that is still relied on. It's difficult to reconcile with the word conduct that also appears in the same section.

Lloyd In the sense that it is relied upon and there are really three points to the lapsed membership issue from the Respondent's point of view. The first is the one just identified by you, Sir, namely that it is arguable that the lapse of membership is not an action of the …

Tipping J It's arguable but it's not really arguable is it Mr Lloyd?

Lloyd I suspect, well Sir it's my submission to you that …

Tipping J What about a failure to vote? Are you going to say that's not conduct?

Lloyd I would say that isn't conduct Sir. That partly is bolstered by the operation of the proxy vote system in the sense that if Mrs Awatere Huata fails to vote …

Blanchard J And the first point's omission, not action?

Tipping J What's the second one?

Lloyd Sir, omission, not action. The second point is the one identified by the Majority in the Court. Namely that the true operative action in respect of the membership is their refusal to allow her to renew her membership. But thirdly…

Tipping J Hang on, just before you leave that one, because frankly for me this is getting very close to the kernel of the case. Therefore I want to feel very fully what you're saying. You're saying the Court of Appeal said that the operative cause or the real cause was them not allowing her back in?

Lloyd Yes.

Tipping J And you adopt that point?

Lloyd We adopt that point as the second.

Elias CJ That's the party not allowing her back in?

Lloyd The party chose to return her cheque. Justice Tipping earlier talked about it as, was the lapsed membership a constructive resignation and no it wasn't because as soon as the lapsed membership became, as soon as the Respondent became aware of the lapsed membership she immediately sent off a cheque for her dues. That was returned with a no thank you, we don't want it.

Tipping J So the refusal to let her back in was the operative cause, that's the second point. And the third one?

Lloyd And the third one, and in my submission, the strongest one, is that a reason, is the issue about the party, or either the political party rules or the caucus rules whichever one it is, if those rules operate to provide a reason which can be used under s.55, if an understanding, an interpretation of the section is taken that allows those rules to provide the reason for the operation of s.55, what we are effectively allowing is rules of a political party, of an unincorporated association, to effectively become delegated legislation. Because what you're saying is they can, a political party can write whatever it likes into its caucus

rules. As soon as one of those caucus rules is breached, then they can seize upon it as a reason for expulsion.

Elias CJ (away from microphone) the rules permit the caucus to act in accordance with those rules and the member who adheres to the parliamentary caucus agrees to be bound by them. The result of that is not, the next process is the legislative process and that's where you start with her status as an independent MP and then the legislative process simply requires an assessment of whether her continuing as an independent MP distorts proportionality as established at the last election. The treatment by the parliamentary caucus of the MP has to be validly determined within its own terms. It's not a parliamentary process. It's determined by the rules. But that's not to say that there's delegated legislation or that the rules of the caucus become part of the legislative process. The result may establish sufficient foundation to invoke the legislative process but it is a different, it's not the same thing, it seems to me.

Lloyd Yes, I think that's right but it's just, what's evident in that analysis of it, with respect Ma'am, is that if the Act caucus had gone through and expelled Mrs Awatere Huata in accordance with its own rules, then it would be possible to challenge that decision if it was felt that it wasn't justified, taking into account the rules in the manner which was just described. But of course in this case that didn't happen.

Elias CJ Well effectively it did happen. It happened, it could have happened serially, it could have happened that they expelled her first and then sought to invoke the statutory provisions but they had to comply with natural justice in terms of their own rules in any event and they gave all the reasons effectively why they were looking to expel on one view of the material. I don't see that they can't do it as part of the same process. Because there's after all, under the rules a 75% majority, under the statute it's a different majority, but here it was a unanimous resolution. I don't think it matters that the forms may overlap. I think you still have to unpick things and work out what was done within the province, the proper province, of the parliamentary caucus and then what is the legislative process and what do you start from in the legislative process.

Lloyd That must be right but what I submit it highlights is this. The mere fact of the result, the mere fact of expulsion, and I use that meaning expulsion, cannot be enough on its own to justify, especially in a situation where you conflate the two procedures, it cannot, the mere result expulsion being declared independent, although of course when you conflate them that isn't the outcome, it's dismissal, but that on its own cannot inform what you've described as the legislative procedures. You need to look at the reasons for the expulsion and then take those reasons for the expulsion and put them in the legislative context.

Gault J Why?

Lloyd Because if you don't, you cannot determine whether those reasons constitute actions of the member that have distorted the proportionality.

Blanchard J But you haven't challenged the expulsion.

Lloyd Expulsion never happened.

Tipping J It wasn't necessary because she'd already gone.

Lloyd That's what they say.

Tipping J Well, can you say anything other?

Blanchard J You haven't challenged that either.

Lloyd Well that's the purpose of this litigation, with respect. There is a challenge to the very claim that they didn't need to expel her because she'd already left the caucus. And that challenge is the claim that it is simply incorrect to assume that membership of caucus required, in light of any evidence to the contrary, membership of caucus required membership of the political party.

Keith J Except that's what the acting leader said, didn't he, in his letter to Mrs Awatere Huata and that wasn't taken up say with the Speaker or with the Privileges Committee or by Court action at that time. And so you get the Speaker stating the fact in terms of the Standing Orders and stating the consequences.

Lloyd The statement I think you're referring to, Sir, was contained in the letter to Mrs Awatere Huata on either the 10th or the 13th or both. From memory it isn't …

Tipping J It says it is a pre-requisite of membership of the Act parliamentary party that the MP is a member of the party. Now there is nothing express but you've agreed I thought with my brother Blanchard a few minutes ago that it was clearly implicit. But you may have been a little incautious in making that agreement.

Lloyd I was hoping for the purposes of that argument then to say, even if it is assumed, even if it is accepted for the purposes of that argument, that it could be implicit.

Tipping J It must be implicit, mustn't it? Can you argue that it's not? I mean do you argue that's it's not?

Lloyd We do.

Tipping J You have to don't you?

Lloyd We do and that's contained in the Submissions and I can go through them although I suspect the key is this. The rules in terms of the caucus rules, and I make it clear that you have to be a member of the political party to stand for election but not any further. And it is submitted that there's simply no evidence other than a bald assertion at the time that you need to retain your party membership in order to retain your place in caucus.

Blanchard J So you'd be able to resign from the party on day one and say, well thanks very much for getting me into your caucus, now I'll stay here without being a member of the party.

Lloyd You could do that, assuming that it doesn't fit into any other …

Blanchard J It's a pretty obvious gap…

Lloyd It is, but I come back to the point that that might justify your expulsion from the caucus but that is a matter between you and your caucus members who are members of this unincorporated private group.

Blanchard J Well, in a way it's not a matter for the caucus, it's a matter for the party. The party would say to the caucus, you've got somebody there who can't be there under our rules. Because she's not one of our members any longer.

Lloyd The problem I keep coming back to there Sir is there is no rule that says that.

Blanchard J I agree. But we're talking about the fact that it must be implicit that that's what the rules mean. Because otherwise it's open to such abuse.

Tipping J Could we got to the actual rule? Just so that we can just look at it with your argument that it's not implicit because I think this is very important, at least for me it is.

Lloyd There is, I can go to the caucus …

Tipping J Are you able to point us to the actual rule that says that you've got to be a member when you first go on the list?

Blanchard 83(5)(e).

Tipping J What tab is that?

Blanchard J 22.

Keith J Well 20 paragraph 1 in terms of the candidates' register requires to get on the candidates' register that you're a member. And then 22(2)(c)

again is to be a constituency candidate you've got to be a current member.

Tipping J The question is whether or not it's so obvious that it doesn't require saying that if you have to be a member at the start, you have to remain a member. And there has to be quite a strong argument that it's so obvious that it doesn't need to be said. That's what implication of terms is all about.

Lloyd The same argument could be made, with respect, that it's so obvious that you have to be a member of the political party to go up for initial election in the first place that it doesn't need to be said, but it is expressly said.

Keith J And then at the bottom of 23(5)(d), this is the constituency, sorry the list provision, that last sentence is interesting isn't it. The principal consideration in compiling the list shall the ability of the members named on the list to further the objects of the party by participation in the parliamentary process. Which looks, doesn't it, to the next three years and looks to much more than just the way votes are cast on particular pieces of legislation.

Lloyd Yes, and I guess the Respondent's position in this respect comes back to the distinction between being a member of the parliamentary caucus and being a Member of Parliament. And it may well be that a breach of, may well be this informs us as to whether or not one is entitled or otherwise to be dismissed from caucus. But unless the reason for that dismissal, in this case the lapsed party membership, can also fit within the legislative process under s.55 as well as within the expulsion process in terms of expelling you from caucus, then in terms of this case it doesn't get the Appellants to where they want to go. And it comes back, I guess, to our submission that to allow an interpretation of this Act which would in effect mean that these rules which are drafted up in some way or other procedurally with the approval of the party membership, would allow those rules to set the parameters by which a person who has been elected as an MP can remain in office or not. It is in my submission remarkable to allow a private body's, an unincorporated private body's, rules to all of a sudden determine whether a person who holds the office of an MP can stay in office or goes.

Elias CJ Well that, that doesn't follow, it seems to me. But I think I understand, or I think we understand your argument on that. Did you want to develop that or any other point …

Lloyd Not that point Ma'am.

Elias CJ … further or did you want to go back to the desertion point.

Lloyd Yes. Perhaps just develop that point with just this one final exposition. This is quite messy. It is a situation where, unless you do restrict the interpretation of the section to be the bright line, if you like, of the relative voting strengths, you get into the situation where you do have a situation where effectively private body rules start determining whether or not an MP stays in or doesn't, stays out of Parliament and that really is the last submission I'd like to make on that point. The bright line would render these discussions irrelevant.

Keith J Not completely, would they, because the private body rules might differ between different parties as Mr Hodder pointed out by reference to the Labour Party rule.

Lloyd Yes.

Keith J So, if you're just looking at voting, even there, on the kind of approach that's been adopted by the Court of Appeal, a Labour Party member might be more at risk than an Act Party member. Because of the difference in the private body's rules.

Lloyd I guess so. That would be right. But it's not to the detriment of the independence of an MP. Indeed…

Keith J Well except that's what they've agreed to haven't they? They've become a member of whichever party it is and they've signed up to those rules.

Lloyd That's right and as long as they stick to those rules, in my submission, as long as they stick to those rules with respect to voting, then they're safe. If they don't respect those rules in respect of voting, then they're not safe. But that's the kernel of our submission.

Keith J And so that does mean, doesn't it, that, contrary to what you said a moment ago, that the private body's rules would have an impact in terms of some of the possible ways in which the Court of Appeal Judgment might be applied.

Lloyd Yes, but not by creating, effectively determining the issue of whether or not an MP stays out. Rather, the difference that's being talked about here in terms of the voting could only be something like an argument that says there is no change in relative voting patterns because we have always been entitled just to vote whichever way we like. So in my respect, that's a factual matter, that's an inquiry into the actual factual matter as to whether or not that's the way in which the relative voting strength's been in the past. It's almost accidental, if you like, but that's because it's spelled out in the rules.

Justice Tipping mentioned the issue of the partnership analogy and how it's implicit in partnership, in fact deemed in partnership, that there will be certain aspects of trust and confidence and that one might

think that that is also implicit and deemed and part of being a member of a political party. And I just wish to respond on that. It's the Respondent's submission that there's nothing in the Act that requires this and this goes back to our earlier submission that what we must look at in the terms of this legislation is matters that are capable of being determined at a previous general election and what isn't capable of being determined is that a parliamentary party will necessarily continue to be able to work with each other and coexist with each other. Furthermore, to read into this legislation a concept of implicit trust and confidence akin to partnership or some other vehicle is to create a situation where this interpretation of s.55 simply becomes so broad that it starts capturing so much conduct that in the Respondent's submission just simply cannot be intended to be caught by this legislation. That is the principal concern here about the way in which the Appellants want this Court to interpret these provisions. They want, the Appellants want these provisions to be interpreted so broadly that a whole manner of situations will fall within it that ought, in the Respondent's submission, not properly fall within it. For example, and these are identified in the Submissions, the poor performer in the House. It may well be that a Member of …

Tipping J Are you off causation now Mr Lloyd? I just wondered exactly what this related to. I'm obliged for you helping with that partnership. Because there's something about causation I wanted to ask you if you've left it, but if you're coming back to it I'll leave it.

Lloyd I am coming back to it Sir. If you have a situation where someone is a poor performer in the House, perhaps they just continually get embarrassed by the Opposition Benches in debates and so on and so forth. Very disappointing because when they were elected into Parliament and placed on the list it was never anticipated this would be the case. You might have a situation where the members essentially feel, fellow members of the caucus, essentially feel that they cannot trust them in the House, they cannot work with them in the House. They are an embarrassment to them. If they can no longer work with them in the House and they are effectively meaning that they're playing a man down in the House, nine, not eight because one's perfectly hopeless quite frankly, then on the Appellants' definition you have a situation where that can be said to be affecting proportionality. They can expel them from caucus and they can then say, you're no longer with us. We can no longer trust you. You're no longer the ninth player. We need a replacement. That, in the Respondent's submission, is not a situation which is intended to be captured here.

Elias CJ Why do you say that, because as has been referred to us, there is a political cost for invoking these procedures. Why is that not a sufficient answer. Why should not the parliamentary caucus be able to determine who's going to remain within it? And then invoke the statutory procedures.

Lloyd And then pay the price or not at the next election.

Elias CJ Yes.

Lloyd First point is that we have legal mechanisms and legal protections here which, if they don't have a legal remedy, that is, in the Respondent's submission, problematic. Simply leaving it to the political remedy makes one wonder why it was ever placed in legislation at all and perhaps could have been just a matter dealt with by the Standing Orders of the House. It wasn't and Parliament expressly decided not to do that. That's the first point. The second point is that's cold comfort for the MP who is excluded from the House for whatever reason that her caucus colleagues deem good enough to say that they've lost trust and confidence in her or him.

Elias CJ But that exclusion can be challenged. It's a different legal inquiry based on rules of association which the member agreed to adhere to and there'll be some rudimentary natural justice requirement that the Courts will look at. So the MP isn't left without any remedies and it can't be a wholly colourable pretext for getting rid of someone. But this is an association of people who've agreed to work together for a common cause. What is the objection to them dealing with the question of membership as a matter of internal management?

Lloyd The objection to it, when it's put together like that Ma'am, I think is this: that effectively says that a parliamentary leader with two-thirds support of his caucus will choose which MPs…

Elias CJ 75% under their rules.

Lloyd 75% under their rules, that's right because it will be the higher of the two thresholds of course, because the first will have to be met before the second. So 75% support of the caucus. All the other members, the other 25% serve at the whim of that 75%. The situation would be, in my submission, captured well in the closing passages of our Written Submissions. We refer to the Canadian case, recent Canadian case of **Roberts** at page 28 of our Submissions. And in **Roberts** they identified that an essentially, a situation would arise where the Member of Parliament under the definition that Your Honour has just identified, the circumstances identified, effectively starts serving at the pleasure of her colleagues, at 75% of her colleagues. But that just simply isn't how a House of Representatives in a democratic society works. An MP isn't there to serve at the …

Elias CJ But it's not an automatic exit from Parliament. So it doesn't automatically convert into an expulsion from Parliament. There then is the statutory process that has to go through. And it's only if there is conduct which affects proportionality that you can use it and there has to be a two-thirds majority support and there has to be the procedure followed.

Lloyd But as I understood Your Honour's questions, they've been suggestive of a belief that being an independent MP might well be enough for the conduct. Now you could imagine a situation where the party creates a caucus rule that essentially says a member of the caucus can be expelled from the caucus for any reason that the leader of the party wishes. If the leader of the party then expels someone from caucus and they become independent, on the analysis that we've been discussing, there's a belief that that independence might well form the grounds for the dismissal under the Integrity provisions.

Elias CJ If the expulsion isn't challenged.

Lloyd If the expulsion isn't challenged.

Elias CJ And if it's assumed to be lawful.

Lloyd And if the rules, if the caucus rules give an absolute power to the parliamentary leader to determine …

Elias CJ Well there's no such thing as absolute power. Oh, I shouldn't say that.

Lloyd If they give a very broad discretion to the parliamentary leader to determine whether or not somebody should remain in the caucus, then effectively what you're saying is the Members of Parliament for that party, the MPs for that party, serve not at the pleasure of the constituencies who vote them in and out at each general election, as we have, I submit to you, commonly understood and do commonly understand the role of the MP, is that they're working for us, not their parliamentary leaders.

Elias CJ That takes us right back to the question of whether the Electoral Act is about representation by party as opposed to representation by the individual. So I think, I do understand your submission Mr Lloyd. Perhaps we won't get any further.

Lloyd Your Honours, I don't think there's any other issue other than that of causation left to discuss. I wonder if you would like, if now is an appropriate time to take the adjournment and deal with that at the conclusion.

Elias CJ We thought we'd carry on and complete, unless you, or do you think that we will need longer.

Lloyd Certainly, I won't go 'til 4 o'clock. I would imagine. And if that then leaves us with time for…

Elias CJ Do you expect to be very long in reply Mr Hodder?

Hodder No.

Elias CJ Alright.

Lloyd I'm happy to continue if that's Your Honour's preference.

Elias CJ Yes, continue thank you.

Lloyd Just to introduce this, perhaps I'll say this. It's the Respondent's position that the bulk of the actions complained of in the letters simply don't affect relative voting strength so therefore aren't issues that could ever affect proportionality under the section. That, of course, relies implicitly on the earlier submissions in relation to that proportionality can only be affected by matters which affect relative voting strength. The reason I say that and start there is that there are two of the complaints raised in the letters of 10 and 13 November that might seem to impact on relative voting strength and it's in the context of those complaints that the causation arguments perhaps is best run.

Tipping J If she didn't cause her becoming an independent it would be very difficult to find she caused anything.

Lloyd Yes. And I hope to persuade you of that very point.

Tipping J Yes, that seems to me to be the bottom line.

Lloyd Well we can go straight to that, I think Sir, in light of that. Justice Young, in the Court of Appeal, said in his dissent, said that it was obvious that proportionality was affected when the Respondent became independent. However, with respect to His Honour, there are two reasons why the Respondent says that isn't so. The first is the one I've identified, namely if she continues to keep voting then it doesn't affect the relative voting strength. But the second one is this issue of causation. Justice Young used a rugby analogy where a player perhaps strikes another player and is sent from the field by the referee and in that case His Honour concluded that it is clear that it is the player that has caused his dismissal. It's a fiction or it's just incorrect to refer to the referee causing the dismissal where it's the player who's caused the dismissal. The rugby analogy in the Respondent's submission does not mirror this case. But indeed, looking at it in the Respondent's submission, illustrates where the causation arguments do properly lie. First, and this echoes some of what has already been said so I'll just cover it briefly. In the rugby case there are express rules setting out prohibited conduct. Express rules that are passed by the body that has authority to regulate the behaviour of rugby players, namely the Rugby Union or the IRB. But in our case it is submitted that notwithstanding the Second Appellant's view to the contrary, there is no rule that says let your party membership lapse and you're out. Secondly, even if there was, it couldn't affect the status of a duly elected MP for the reasons I've identified because in this case the analogy to the Rugby Union isn't the caucus, it's Parliament. The

caucus can't determine who, in the Respondent's submission, sits or otherwise as an MP in the House of Representatives. That is the sole province of Parliament. Parliament passes legislation regulating who can and who can't be an MP. And in this case Parliament have passed s.55 more broadly, not just the Integrity provisions we're talking about here but those express requirements under s.55 proper, that says these situations are the situations where you can and can't remain to be a Member of Parliament. So, in the Respondent's submission, Parliament is analogous to the Rugby Union or the IRB in that case and there's been no breach of any rules, it is submitted, that have been passed there.

Now that said, the causation argument comes in like this. Justice Gault asked the question of whether this was essentially an issue of immediate causation that was being argued for by us as opposed to a perhaps eventual consequences type causation argument that was being advanced by the Appellants. And I submit that is properly the case. We say there are three reasons why this Court should prefer the immediate causation requirement, argument for the requirements under s.55 and require the actual actions under s.55 to be the actions of the Respondent and not the reactions of the Appellants. The first argument is the language and His Honour identified that and I'll take that no further. The second argument is the one that I've been making ad nauseum really which is the consequences of not so defining the section, namely that it would be so broad that it would capture all sorts of scenarios. And the third one essentially is this: when a member of a parliamentary caucus disappoints their colleagues, the colleagues have a choice. They can do one of two things. They can stand by that member or they can say, no you're an embarrassment to us, we're going to cut you loose. That response is a choice of the caucuses. It is not required, it is an action they choose to take and accordingly, in this situation it is submitted, that their choice not to stand by their colleague but to cut her loose, and the way in which they did that was write to the Speaker and ask him to have her declared independent, it is submitted is clearly an action of the Appellants and not of the Respondent's and this is …

Gault J It's just re-stating the question though, isn't it because the response would be, in the circumstances we had no choice?

Lloyd If their argument is founded on the basis that they had no choice because they had lost trust and confidence in her, they could not work with her any more, then the latter part of that claim, we've lost trust and confidence in you but we can no longer, we've decided we can no longer work with you, must indicate that they had a choice in the Respondent's submission. They could have stood by her. Indeed, it was in February 2003 that they suspended the Respondent from caucus. Nine months passed where she remained a parliamentary member of Act but was suspended from caucus so she wasn't entitled to sit in on caucus meetings and participate in caucus but nevertheless

was still a parliamentary member of Act. In those nine months only two things happened. One is her membership lapsed. The second is that there were the charges laid in relation to the fraud matters. Now, it is submitted that it is clear that there was a choice on the way in which the caucus decided they wished to deal with their colleague and they themselves chose to cut her loose. It's their actions that have caused the disproportionality of her being declared independent, if indeed it has caused a distortion in proportionality. They could have stuck by her. They chose not to. She wanted them to. She still wants them to. She offered her proxy vote to them. They turned it down. There is, in my submission, clear evidence of every intention of hers to stay with them and clear evidence of every intention of theirs to get rid of her and that much can be seen by some of the media comments that have been picked up in the Majority's Judgment in relation to the other matter which isn't on appeal here. So that really is the nub, if you like, of that causation argument. It was up to them whether to stick by her or not. They chose not to. They asked the Speaker to declare her independent. They brought upon themselves any disproportionality that's flowed as a consequence of that.

That's all I'd like to say on the issue of causation unless Your Honours have any questions.

Tipping J I have one – actually it's now become two. Assuming we were against you on the question of the implication that you have to remain a member of the party, assume that and I'm far from a concluded view. How would that affect your causation argument? Because her failure to renew or her allowing it to lapse for six months, is then the immediate cause of her disqualification, if you like, from remaining with Act and her thus becoming an independent.

Lloyd I guess I go to the reasoning adopted by the Majority in the Court below, which is along the lines of what I've been talking about, namely that the party had the choice of sticking with her or cutting her loose.

Tipping J Oh, you mean they could have let her back in.

Lloyd They could have let her back in.

Blanchard J They have to mitigate.

Tipping J And my second question is this. How do you relate this causation topic to the statutory criterion of reasonable belief?

Lloyd You can't have a, in the Respondent's submission, you can't have a reasonable belief that there's causation there if there's not. Causation is an on/off concept.

Tipping J Causation is a very slippery and sliding concept in the law. If it was open to the parliamentary leader reasonably to take the view that she had caused her own downfall, I'm speaking colloquially, would that not be sufficient because the statutory criterion goes to both distortion and causation. And likelihood into the future.

Lloyd If, we'll focus on the present case because that's exactly where we are. In the present case it's submitted that, while matters of causation may well be blurry or slippery or difficult to define in general terms, it isn't the case here. If the mechanism that's being focused upon is the lapsed membership mechanism and not a general loss of trust and confidence, then the way in which the lapsed membership mechanism came around is so clear, in my submission, that there is no blurry line or slippery slope. Her membership lapsed. She asked for it to be renewed and they chose not to renew it. So in my submission in this case, on that analysis, it simply could not found a reasonable belief that she has caused her own demise if you like. And I guess that's the response in the context of this case.

Tipping J Yes, thank you very much, thank you.

Elias CJ Thank you Mr Lloyd.

Lloyd I'm obliged Ma'am.

Elias CJ Yes Mr Hodder.

Hodder Thank you, Your Honour, I was going to mention four matters as part of a response. The first is that my learned friend suggested that the Article 9 dangers were overstated and one of the things I'd omitted to do was draw Your Honours' attention to paragraph 105 of the Court of Appeal's Judgment, more explicitly where the third sentence says, Depending upon the number and importance of votes cast, voting against one's party may conclusively indicate that the member has defected. It goes to the point that number and importance does require an assessment. That's inescapable as I read the Court of Appeal Majority Decision.

The second point is that there was some discussion about the relationship between Standing Order 34 and the legislation. Some discussion may be an understatement. But the point that I didn't do was to take the Court to the language of Articles 34 and 35 which are under Tab 18 of the Bundle. I think this illuminates the context in which some of the discussions were taking place with my learned friends. To start with, Standing Order 35, which is the wrong way round, a party must inform the Speaker of 1(c) it's parliamentary membership and must be informed of any change in these matters. Hence the obligation perceived to make the matter known on the view that I'll come to about the implied term. But going back to Article 34, we see the very language in 34(1) and 34(2). Members who cease to

be members of the party for which they were originally elected may be recognised for parliamentary purposes. I'll leave the Court with the implications of that but can I say that in relation to these Standing Orders adopted by the very same Parliament which enacted the Integrity Amendments, to suggest that when they used the phrases about the members of the parties for which they were originally elected that they meant only proportionality in the sense of voting strength and not all the other aspects of parliamentary matters that are affected by proportionality requires some rather strong assumptions which, in our submission, are not justified.

The third point …

Keith J Just on that, Mr Hodder, there may not be much in it, but I take it that Standing Orders 34 and 35 are 1996 are they, and so it was the next Parliament that passed the Integrity legislation but, it's just you said the same parliamentarians, I wasn't sure of the date of the …

Tipping J Brought into force 20 February 1996. And then amended on various dates, it's the title page.

Keith J Mm, mm.

Hodder No, Your Honour's correct.

Keith J So there'd be, as I said, there may not be much in it.

Hodder The 1999 general election in between. That's right. The third point I was going to mention is the references to proxies and the comments that Mrs Awatere Huata has been voting with the Act Party. There is no contemporary evidence on that. The evidence is focused on the date at which this first came before the High Court. And my instructions are that's not to be assumed. I don't believe it's important, but I just want to record that that's not a matter which the Appellants accept as the case. But that's the specific rather than the more general point the Court's concerned with.

And the final matter was that there were questions asked in relation to the Act Party rules in relation to party membership and again, if I can refer the Court to those. It was Tab 22 of the blue Volume Two of the Case on Appeal. And, although it isn't explicit in our Submissions, the proposition for the Appellants is that it was clearly implicit. The first reference comes up on page 2-189 of the Case in Clause 20 heading Candidates Register. Any Member may at any time by giving notice apply to have his or her name entered in the Candidates Register. It's picked up again in 21.2(b). Every nominee for selection who is not already a Member shall concurrently apply to become a Member. As one would expect, 22.2(c) requires that those who vote on it are Members. And then, although I may not have got all the references, there's the one that His Honour Justice Keith I think

referred to at the end of page 2-192 about furtherance of the objects of the Party. And then at the very end of Clause 23, the proviso when the Board brings somebody in who wasn't on the Potential List of List Candidates, the proviso is that no person should be named on the List who is not a Member. That, together with the MMP context, in our submission, fully justifies the proposition that it's implicit that there be continuing membership of the political party for a Member of Parliament under the regime as it currently operates. Those are the four matters I propose to draw the attention of the Court to.

Elias CJ Yes, thank you Mr Hodder.

Hodder May it please the Court.

Elias CJ Well, thank you Counsel, we are indebted to you for your submissions and for the succinct compilation of the materials and in particular for the happy thought of the separate green and blue, was that you Mr Hodder, yes well that was very helpful indeed. So thank you very much and we will take time to consider our decision in this matter.

Court adjourns 3.48 pm.