IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 9/2004

BETWEEN	RICHARD WILLIAM PREBBLE First Appellant
AND	KEN SHIRLEY Second Appellant
AND	RODNEY HIDE Third Appellant
AND	MURIEL NEWMAN Fourth Appellant
AND	DONNA AWATERE HUATA Respondent

Court: Elias CJ, Gault J, Keith J, Blanchard J, Tipping J

Counsel: J E Hodder and B A Davies for the Appellants
P J K Spring and A J Lloyd for the Respondent

Hearing: 5 October 2004

Judgment: 18 November 2004

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order made in the Court of Appeal prohibiting delivery of the proposed notice to the Speaker of the House of Representatives is discharged.

C The appellants are entitled to costs in this Court and in the lower courts. In the High Court, costs and disbursements are as fixed in that Court. In the Court of Appeal, the costs awarded are reversed with the addition of the appellants' appropriate disbursements. Since this is the first substantive appeal in this Court, counsel may file memoranda as to quantum and disbursements for an award of costs in the Supreme Court.

REASONS

ELIAS CJ

Background to the appeal

[1] ACT New Zealand is a political party registered under Part 4 of the Electoral Act 1993. In the 1999 general election its proportion of the votes cast entitled it to nine of the 120 seats in the House of Representatives.

[2] Donna Awatere Huata was elected as one of the nine ACT members of Parliament by reason of her place on the ACT party list, lodged under s127 of the Electoral Act. In February 2003 Mrs Awatere Huata was suspended from the ACT parliamentary party caucus. Her offers to give ACT her proxy for voting in the House were rejected by the parliamentary leadership of ACT. Since her suspension, Mrs Awatere Huata has not taken part in the work of the parliamentary party.

[3] The Constitution and Rules of ACT New Zealand require all those entered upon the party's register of candidates for seats in Parliament (from which the party list is drawn) to be members of the party.[1] Under the same rules, membership lapses if subscriptions to the party remain unpaid six months after they become due.[2] Mrs Awatere Huata's subscription as a member of ACT New Zealand was not renewed by her when it became due in February 2003. It remained unpaid in November 2003. Under the Rules she was no longer a member of ACT New Zealand at that time.

[4] Mrs Awatere Huata tried to renew her membership of ACT New Zealand on 6 November but the Board of the party refused to accept her subscription. On the

[1] Rule 23.5(e) Constitution and Rules of ACT New Zealand.
[2] Rule 5.2.

same date the acting leader of the parliamentary party reported to the Board that caucus took the view that Mrs Awatere Huata had left the caucus when her membership of ACT New Zealand lapsed.

[5] On 10 November 2003 the acting leader of the ACT parliamentary party gave notice to the Speaker of the House of Representatives that Mrs Awatere Huata was no longer a member of the ACT caucus. Such notice is required under Standing Order 35(1)(c) of the House of Representatives when there is a change in the parliamentary membership of a party. Any member of the House who is not a member of a recognised party (one "in whose interest" a member has been elected[3]) is required under Standing Orders to be treated as an independent member "for parliamentary purposes."[4] On receiving the notice that Mrs Awatere Huata was no longer included in ACT's parliamentary membership, the Speaker accordingly advised the House that from 11 November 2003 Mrs Awatere Huata was "regarded as an independent member for parliamentary purposes" and that "ACT now has eight members of Parliament".[5] The Speaker noted in his ruling:

> At this point, at least, no question of the member's seat becoming vacant under the provisions of the Electoral (Integrity) Amendment Act 2001 arises. That Act sets out certain conditions and procedures under which a member can be expelled from the political party for which he or she was elected. The acting leader of ACT has indicated an intention to invoke that legislation. Whether that is possible is a matter that does not arise at this time.

The Speaker made consequential adjustments to allocation of speaking slots in the House and indicated an adjustment of funding would be needed "to reflect the new party balances".

[6] On 10 November, the same date upon which he gave the Speaker notice that Mrs Awatere Huata was no longer a member of the ACT caucus, the acting leader of the ACT parliamentary party initiated a procedure under ss55A-55E of the Electoral Act to have her seat made vacant. The consequence of any such vacancy, on completion of the process, would be to replace Mrs Awatere Huata with the unelected candidate who stood highest on the ACT list.[6]

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[3] Standing Order 34(1).
[4] Standing Order 34(4).
[5] (11 November 2003) 613 NZPD 9837.
[6] Sections 134 and 137 Electoral Act.

[7] The relevant provisions of the statute are set out in para [34]. In brief, the statutory procedure requires written notice to the member of Parliament, an opportunity to respond, and confirmation by vote of two-thirds of the parliamentary members of the party before the parliamentary leader is able to give to the Speaker the statement which is the basis for treating the seat as vacant.[7] The only basis upon which the procedure can be invoked is a statement by the parliamentary leader of his belief that the member of Parliament concerned:

> has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election.[8]

[8] In letters to her dated 10 November and 13 November the acting leader of the parliamentary party set out the reasons for his belief that Mrs Awatere Huata had left the party and was distorting the proportionality of political representation in Parliament. The grounds given included those that Mrs Awatere Huata was:

- no longer a member of the ACT caucus;

- no longer a member of ACT New Zealand and had no prospect of being readmitted to membership.

The letters recited conduct by which Mrs Awatere Huata was said to have forfeited the confidence and trust of the other members of caucus. Such actions were said to demonstrate that she had left the parliamentary party and by her own actions obtained the independent status confirmed by the Speaker. Some of the conduct related to deception of caucus in various ways. (In one incident Mrs Awatere Huata was said to have attended a caucus meeting wearing concealed transmitting equipment belonging to a television company.) In addition, Mrs Awatere Huata was said to have voted against ACT in relation to the Maori Television Services Bill, withdrawn her share of the parliamentary funding (required by the caucus rules to be pooled), refused to yield her place on a select committee to a member of the ACT caucus, and laid an unfounded complaint against an ACT staff member with the Auditor-General.

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[7] Section 55D Electoral Act.
[8] Section 55D(a) Electoral Act.

[9] In responses of 10 November and 12 December Mrs Awatere Huata denied the allegations made against her. In particular, she denied that her conduct had affected the proportionality of political representation:

> Any effect on proportionality in relation to my position as an MP has come about as a direct consequence of the actions of yourself and/or the ACT caucus . . . I have continued to vote along the same lines I have voted over the past two and a half terms in Parliament. I have continued to represent ACT's interests on any Select Committee that I have been involved with. I have continued acting in the exact same way I have been acing as a Parliamentarian for the last two and a half terms. I have not left the ACT Party at all, rather the ACT Party has chosen to suspend and ostracise me.

[10] On 16 December the eight other members of the ACT caucus unanimously resolved to authorise the parliamentary leader of the party to provide written notice to the Speaker under s55A. (The minutes record that Mrs Awatere Huata was taken to have cast a dissenting vote.) The parliamentary leader of ACT drafted a letter to the Speaker which complied with the form prescribed by s55D. It:

- recited that the leader has "a reasonable belief that Mrs Donna Awatere Huata has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election";

- set out the sequence of notices and responses;

- advised that more than two-thirds of the parliamentary members of ACT, after consideration of the conduct and the response, had agreed that written notice should be given under s55A(3)(b).

The draft letter concluded:

> Accordingly, as far as I, as parliamentary leader of ACT, am concerned, Mrs Awatere Huata has ceased to be a parliamentary member of ACT.
>
> The Speaker must now proceed to publish a notice of vacancy in the *Gazette*, in accordance with section 134 of the Electoral Act 1993.

[11] The draft letter has not been sent. On 11 December 2003 Mrs Awatere Huata obtained an interim injunction in the High Court restraining the ACT parliamentary leadership from delivering notice under s55A(3)(b) to the Speaker pending the determination of proceedings brought to challenge use of the procedure in ss55A-55E of the Electoral Act.[9] The interim injunction was upheld on appeal to the Court of Appeal.

The litigation

[12] The substantive proceedings were heard in the High Court by Gendall J in February 2004.[10] A cause of action requiring the party to readmit Mrs Awatere Huata to membership was abandoned before the hearing. The two live causes of action at the hearing were Mrs Awatere Huata's application for a declaration that the caucus decision of 16 December was invalid by reason of predetermination and an application for an order prohibiting the parliamentary leadership of ACT from delivering notice to the Speaker under s55A(3)(b) upon the grounds contained in the letters of 10 and 13 November 2003.

[13] Mrs Awatere Huata was unsuccessful in her applications to have the caucus decision of 16 December declared invalid for predetermination. Since this ground is no longer in issue on the present appeal, it is unnecessary to explain the reasons given by Gendall J for coming to that conclusion.[11]

[14] On the application for an order prohibiting the delivery of the notice, Gendall J considered that the ultimate issue was whether, objectively viewed, the party leader could reasonably hold the view that the conduct of a member is such as to distort proportionality of party representation in Parliament.[12] Such conduct, he considered could include lapse in membership of the party (although it would not in all cases be determinative) and actions, more than trivial or transitory, which may be embarrassing to the party in a way that harms its standing and reputation.

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[9] *Awatere Huata v ACT New Zealand and Ors* HC AK CIV-2003-404-007014, CIV 7014-03, 11 December 2003 per Rodney Hansen J.
[10] [2004] 3 NZLR 359.
[11] At [62].
[12] At [42].

Representation in Parliament was wider than "formalistic voting".[13] Gendall J considered that it was impossible to hold that the leader's view was not reasonable.[14] Although the exclusion of Mrs Awatere Huata from the parliamentary party had ultimately been a decision of caucus and its leader in invoking the procedures in s55D , Gendall J was of the view that the enactment of ss55A-55E made it clear that the member's own "constructive departure" from both the political and parliamentary party was sufficient foundation for the leader's belief that she was acting in a manner which distorted proportionality of party representation.[15] The cause of action failed because "there has been shown to be no error on the procedure adopted, or as to the foundation for the reasonable belief of the leader so as to justify intervention by the Court in this process." [16]

[15] Mrs Awatere Huata appealed from the decision. The status quo was preserved pending the appeal by leaving the interim injunction in place. The appeal was heard in April and the judgment of the Court of Appeal was delivered on 16 July 2004.[17]

[16] Mrs Awatere Huata was unsuccessful in an appeal that the caucus decision to authorise delivery of the notice was invalid through predetermination.[18] Her appeal on that ground was unanimously dismissed by the Court of Appeal and is not the subject of further appeal to this Court.

[17] The second ground of appeal was based on a claim of illegality and irrationality in the exercise of a statutory power. As expressed in her pleadings, it was Mrs Awatere Huata's claim that the parliamentary leader of ACT "cannot have reasonably believed as a matter of fact that [she] had acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last General Election". On this ground, the Court of Appeal, by a majority, allowed Mrs Awatere Huata's appeal.[19]

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[13] At [43].
[14] At [45].
[15] At [51].
[16] At [51].
[17] [2004] 3 NZLR 382.
[18] At [124] – [136].
[19] McGrath J, Glazebrook J, Hammond J, and O'Regan J; William Young J dissenting.

[18] The majority judges in the Court of Appeal were of the opinion that the legislation provided that proportionality was distorted by a member only where the member's own conduct so altered the voting strength of a party in the House as to amount to defection. In coming to this conclusion, the judgments delivered by McGrath J (for himself, Glazebrook and O'Regan JJ) and Hammond J, referred to the legislative history, scheme and constitutional context of ss55A-55E. The legislative history relied on was the background of concern about defection from parties which prompted the amendment. The scheme of the provisions inserted in 2001 was thought to suggest that the three ways in which vacancy might occur were all concerned with "behaviour which has an effect similar to that of resignation."[20] In support of the conclusion that the legislation was concerned with defection through withdrawal of voting support the majority judgment relied upon the constitutional importance of the independence of individual members of Parliament and the guarantee in s14 of the New Zealand Bill of Rights Act 1990 of freedom of expression. It considered that both would be at risk if "proportionality" were treated as covering "a wider meaning than a resignation that can be shown by a withdrawal of voting support."[21]

[19] The majority judges considered that the statutory procedure did not cover the case where a change in relative voting strength and the number of seats held was due to an action taken by the party itself. In such case there was "an intervening factor which causes the disproportionality."[22] Voting behaviour in the House was thought to be "often the principal indicator of whether a member has defected in situations where there is no notice of resignation", depending on the "number and importance of votes cast" against the party.[23] The majority was of the view that:

> The section calls for behaviour indicating a continuing change in adherence to the party. It follows that disloyalty which merely causes a breakdown in trust and confidence between a Member and his or her party is not a defection, within the reach of the legislation. Furthermore, the situations with which the legislation is concerned do not include the consequences of an expulsion or suspension on account of a member's perceived misbehaviour, even if that does bring about a change in relative voting strength.[24]

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[20] At [80].
[21] At [95].
[22] At [104].
[23] At [105].
[24] At [105].

[20] The majority held that the evidence of Mrs Awatere Huata's voting patterns was insufficient to found a reasonable belief that proportionality had been distorted. They were of the view that the other matters of conduct raised by the parliamentary leader in correspondence did not suggest a withdrawal of voting strength by Mrs Awatere Huata.[25] They doubted that Mrs Awatere Huata's failure to renew her membership of ACT New Zealand could "signal a defection from the parliamentary party," but in any event considered that any distortion of proportionality could have been avoided by acceptance of her late renewal.[26] They considered that the Speaker's declaration that Mrs Awatere Huata was an independent member of Parliament (with consequences for adjustment of ACT's funding, speaking slots, and question rights in the House) had been brought about by the actions of caucus, and not by the member. They took the view that withdrawal of the pooled funding was necessary for Mrs Awatere Huata to continue functioning as a member of Parliament and, in those circumstances, was not a defection or indication that she had abandoned the party. The loss of ACT's formal representation on a select committee of which Mrs Awatere Huata was a member was a consequence of the caucus decision to expel her. And although the various matters of misconduct relied upon by the parliamentary leader in the letters of 10 November and 13 November were "reasonably regarded as having caused a breakdown in the relationship of trust and confidence between her and the other caucus members"[27] and "in combination, . . . indicate what could reasonably be viewed as a serious, even irreparable, breach of trust and confidence,"[28] they were of opinion that the conduct did not indicate defection from the party and was not within the scope of the legislation.

[21] The judges in the majority in the Court of Appeal rejected the suggestion that, on their interpretation, a member of Parliament who had been declared to be an independent member at the initiative of the party would in future be beyond the reach of the legislation. They considered that such a member was still under an obligation:

> … not to distort the party's proportionality, however the party may have treated them. It follows that despite having, in effect, been expelled by her party, the appellant is still required to avoid taking

[25] At [140].
[26] At [112].
[27] At [116].
[28] At [121].

> actions that would objectively signal that she has distorted proportionality.[29]

[22] William Young J dissented in the result.[30] He considered that the statute did not confine distortion of proportionality to the way in which a member of Parliament votes: "the statute refers to the 'proportionality of political party representation'."[31] The proportionality of political party representation was, he considered, so clearly distorted in the reduction of ACT's parliamentary strength from nine to eight, that the only real question was whether it was open to the parliamentary leader reasonably to form the belief that it was Mrs Awatere Huata who had caused that result. William Young J took the view that it was open to the parliamentary leader to form the view on reasonable grounds that Mrs Awatere Huata's expulsion from the parliamentary party was due to her conduct. The language of s55D(a) encompassed the situation in which the conduct of the member results in another taking the final step. As a matter of ordinary English usage, he considered that the member acts in a way that distorts the proportionality of party representation if her conduct made it "practically impossible for other members of the ACT caucus to continue to work with her as a colleague and thus resulted in her expulsion from the parliamentary party".[32]

[23] In accordance with the decision of the majority, Mrs Awatere Huata's appeal was allowed. The formal order of the Court prohibited the delivery to the Speaker of a "notice of disqualification founded on the grounds contained in the letters from the second respondent to the appellant dated 10 and 13 November 2003."[33]

The appeal

[24] It is from the Court of Appeal decision that the present appeal is brought by leave. The grounds of appeal approved reflect the different approaches taken in the High Court and Court of Appeal. They in turn are based on the positions adopted by the parties in the correspondence preceding the caucus vote on two matters:

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[29] At [106].
[30] At [156] – [171].
[31] At [166].
[32] At [169].
[33] At [142].

- whether "the proportionality of political party representation in Parliament as determined at the last general election" is affected by conduct other than voting patterns;

- whether the proportionality of political party representation in Parliament was affected by the conduct of the member herself when it was the caucus of the party which excluded her and the notice of the parliamentary leadership of the party which brought about her status for parliamentary purposes as an independent.

[25] Both parties were content to accept that the formation of the reasonable view of the parliamentary leader as to the member's distortion of party proportionality was a statutory decision amenable to judicial review. That assumption, turning on the statutory reference to the "reasonable" belief of the parliamentary leader, was acted on in the High Court and Court of Appeal. It is not necessary to express any concluded view on whether this approach is correct. It has not been the subject of argument in this Court. It is at least arguable that ss55A-55E describe not a statutory power of decision but a procedure (which must include a recital of his reasonable belief by the parliamentary leader), and that the supervisory jurisdiction of the Court is limited to ensuring that the procedure is followed and that it is invoked only for proper purposes. The parties to the appeal took the view that no question of the privileges of Parliament (including any composition privilege) arose to prevent judicial review. Mr Hodder argued however that, to the extent that conduct of the member of Parliament relied upon as distorting proportionality was conduct in the House (such as voting), judicial review would be limited to ensuring a "rational connection" between the conduct and the effect and would not entail substantive review, even for reasonableness. I consider that the case does not turn on the standard of judicial review. Nor is it necessary to express any concluded view on whether the opinions expressed as to the scope of parliamentary privilege in the judgment of McGrath J in the Court of Appeal are correct.[34] I consider that the disposition of the appeal turns largely on interpretation of the statute.

[34] [2004] 3 NZLR 382 at [40] – [72].

[26] Similarly, because they were not the subject of argument and were not necessary for the reasons of the majority judgment, I express no views on the correctness of the remarks made in the judgment of McGrath J about the decisions of the High Court in *Mangawaro Enterprises Ltd v Attorney-General*[35] and *Rata v Attorney-General*.[36]

The provisions of the Electoral Act 1993

[27] The Electoral Act 1993 introduced a mixed member proportional system of representation in the House of Representatives. It was enacted following the recommendations of a Royal Commission and two popular referendums. Central to the system is the political party. The proportion of the popular vote received by political parties determines representation in Parliament.[37]

[28] Representation in Parliament is much more than the exercise of voting on legislation. As discussed in the judgment of Keith J, Parliament is also the forum for a continuing appeal to the electorate by political parties and members. And significant work of the House is undertaken in select committees.

[29] In recognition of the change to an electoral system based on proportional representation of parties according to the support they obtain in general elections, the Standing Orders of the House were amended in 1996 to acknowledge the role of parties. The proportionality of party representation is now built into the Standing Orders regulating the distribution of seats on select committees, the allocation of question time, and the order of call in the House.

[30] The Electoral Act was amended by the Electoral (Integrity) Amendment Act 2001. The amendment followed concern about the incidence of party-changing by members of Parliament between elections. The Privileges Committee of the House of Representatives rejected a contention that a member elected on the list of one party under the 1993 Act had constructively resigned her seat by resigning from the parliamentary party for which she had been elected to become an independent

[35] [1994] 2 NZLR 451.
[36] (1997) 10 PRNZ 304.
[37] Sections 191 to 193 Electoral Act.

member.[38] It took the view that under the then existing legislation a seat became vacant only on written resignation by a member addressed to the Speaker. Amending legislation was introduced in December 1999 to address what was perceived to be a gap which undermined the principle of proportional representation in the Electoral Act.

[31] As originally introduced in December 1999, the Bill which was enacted as the Electoral (Integrity) Amendment Act 2001 dealt only with the consequences of notification to the Speaker of resignation by a member of Parliament from the political party in whose interest the member was elected. In September 2001 a change that was critical in securing the support needed for the passage of the Bill introduced a mechanism to enable a party itself to take steps to initiate a vacancy in a seat held by a member of Parliament elected for that party. That is the mechanism established by s55A(3)(b) and the sections which follow and which ACT has sought to invoke in the present case.

[32] Sections 55A-55E were inserted into the Electoral Act under the existing general heading of "Vacancies". Vacancies are created through a member's resignation from Parliament, supervening incapacity, or parliamentary dereliction. To these circumstances, the 2001 amendment added vacancy where a member "ceases to be a parliamentary member of the political party for which the member of Parliament was elected."[39] The new ground was enacted with the purpose described in s4 of the Electoral (Integrity) Amendment Act 2001:

> The purpose of this Act is to amend the principal Act in order to-
>
> (a) enhance public confidence in the integrity of the electoral system; and
>
> (b) enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors.

[33] The scheme of the provisions inserted is that although a seat becomes vacant if a member ceases to be a parliamentary member of the party for which he or she

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[38] *Report of the Privileges Committee on the question of privilege referred on 22 July 1997 relating to the status of Manu Alamein Kopu as a member of Parliament*, 1997 AJHR I 15B.

[39] Section 55A(2) Electoral Act.

was elected, ceasing to be a parliamentary member of the party for the purposes of vacancy is established only in two ways:

- by notice to the Speaker of resignation from the parliamentary party by the member or indication of intention to become an independent member or member of another party; or

- by notice from the parliamentary party that the member is distorting political party representation in Parliament.

The first mechanism depends on the voluntary action of the member. The second does not. It is a mechanism which can be imposed upon a member who does not choose to give formal notice to the Speaker of a change in status.

[34] The provisions must be read as a whole:

> **55A Member ceasing to be parliamentary member of political party**
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> (1) This section applies to every member of Parliament, except a member elected as an independent.
>
> (2) The seat of a member of Parliament to whom this section applies becomes vacant if the member of Parliament ceases to be a parliamentary member of the political party for which the member of Parliament was elected.
>
> (3) For the purposes of subsection (2), a member of Parliament ceases to be a parliamentary member of the political party for which the member of Parliament was elected if, and only if,—
>
> (a) the member of Parliament delivers to the appropriate person a written notice that complies with section 55B; or
>
> (b) the parliamentary leader of the political party for which the member of Parliament was elected delivers to the appropriate person a written notice that complies with section 55C.
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> **55B Notice from member**
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> A written notice under section 55A(3)(a) must—
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> (a) be signed by the member of Parliament by whom it is given; and
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> (b) be addressed to the appropriate person; and

(c) notify the appropriate person that the member of Parliament—

(i) has resigned from the parliamentary membership of the political party for which the member of Parliament was elected; or

(ii) wishes to be recognised for parliamentary purposes as either an independent member of Parliament or a member of another political party.

55C Notice from parliamentary leader of party

A written notice under section 55A(3)(b) must—

(a) be signed by the parliamentary leader of the political party for which the member of Parliament who is the subject of the notice was elected; and

(b) be addressed to the appropriate person; and

(c) be accompanied by a statement that complies with section 55D.

55D Form of statement to be made by parliamentary leader

The statement referred to in section 55C(c) must be in writing and signed by the parliamentary leader concerned, and must—

(a) state that the parliamentary leader reasonably believes that the member of Parliament concerned has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election; and

(b) state that the parliamentary leader has delivered to the member of Parliament concerned written notice—

(i) informing the member that the parliamentary leader considers that paragraph (a) applies to the member and the reasons for that opinion; and

(ii) advising the member that he or she has 21 working days from the date of receiving the notice to respond to the matters raised in the notice by notice in writing addressed to the parliamentary leader; and

(c) state that, after consideration of the conduct of the member and his or her response (if any) by the parliamentary members of the political party for which the member was elected, the parliamentary leader of that party confirms that at least two-thirds of the parliamentary members of that party agree that written notice should be given by the parliamentary leader under section 55A(3)(b).

55E Definitions

For the purposes of sections 55A to 55D, unless the context otherwise requires,—

appropriate person means—

(a) the Speaker; or

(b) if there is no Speaker, or the Speaker is absent from New Zealand, or the member of Parliament giving a notice under section 55A(3)(a) or the subject of a notice under section 55A(3)(b) is the Speaker, the Governor-General

parliamentary leader, in relation to a political party, means—

(a) the member of Parliament recognised for the time being as the parliamentary leader of the political party by the majority of parliamentary members of that party; or

(b) the member of Parliament for the time being acting as the parliamentary leader of that party

political party for which the member of Parliament was elected means—

(a) the political party in whose party list the member's name appeared at his or her election; or

(b) the political party identified as the political party for which the member is a candidate, in the nomination paper nominating the member as a constituency candidate, at his or her election.

[35] As the definition provisions make clear, the procedure for notice which conforms with s55D applies both to members elected by reason of their position on the party list and members elected for a constituency. The consequences of the member ceasing to be a parliamentary member of the political party are however different according to whether he or she was elected through a list or for a constituency. A vacancy in the seat of a list member of Parliament is filled from the party list.[40] A vacancy in the seat of a constituency member of Parliament is filled by a by-election.[41]

[40] Section 134 Electoral Act.
[41] Section 129 Electoral Act.

Membership of the parliamentary party and vacancy in a parliamentary seat

[36] The creation of a vacancy in a parliamentary seat is distinct from the way in which membership of a parliamentary party is brought to an end. The first is a statutory procedure with consequences provided for in the statute. Those consequences affect the composition of Parliament and important electoral interests. Subject to any question of privilege, judicial review is available to ensure that the procedure is lawfully invoked and applied. The question of membership of a parliamentary party is essentially governed by the rules of association of the party. The rules constitute a contract between the members and can be enforced through application to a court. The legal basis of a challenge to the validity of an expulsion from the parliamentary party differs from the legal basis of challenge to use of the procedures under s55A. Although the Electoral Act procedures were loosely referred to as effecting the expulsion of a member from the political party by both the Speaker[42] and the ACT caucus,[43] the grounds for expulsion under the rules of the parliamentary party will usually be wider than the distortion of political party proportionality which is the only ground for invoking the statutory procedure.

[37] Both ACT New Zealand and the parliamentary party derived from it are unincorporated associations which exist for political purposes. They are organised under the rules adopted by their members. While a court will enforce the agreement between the members of such bodies, including implied terms importing requirements of procedural fairness, associations will typically have wide freedom in their internal arrangements, including in the determination of their own membership and the achievement of their objects.

[38] The Constitution and Rules of ACT New Zealand confer discretion on the Board of the party to refuse any applicant for membership. Membership can be terminated by a majority of 75% of the Board, after notice and the opportunity of a hearing is given to the member.[44] The power to expel in this way extends to any member who is a member of Parliament.[45] The Rules provide that expulsion is "an

[42] In his Ruling under Standing Order 35(1)(c), (11 November 2003) 613 NZPD 9837, set out at [5] above.
[43] Minutes of ACT caucus, 16 December 2003.
[44] Rule 5.4, Constitution and Rules of ACT New Zealand.
[45] Rule 5.3.

appropriate remedy for conduct that the Board considers may bring the Party into disrepute."[46]

[39] The "Culture and Rules" of the ACT caucus, to which all parliamentary members have agreed to adhere, stress that "mutual trust, respect, loyalty, and frank communication" is essential to "the ACT culture".[47] The Rules require confidentiality of caucus discussions, loyalty to other members, pooling of parliamentary funds, and loyalty to the party. They permit expulsion of members from caucus.

[40] The acting leader's letter of 10 November 2003 to Mrs Awatere Huata purported to confirm that she was no longer a member of caucus. The notice then given by the parliamentary leader to the Speaker resulted in Mrs Awatere Huata being treated from 11 November 2003 as an independent member for parliamentary purposes and effected a reduction for parliamentary purposes in ACT's parliamentary membership to eight. Mrs Awatere Huata has not challenged the change in status, either in proceedings against the parliamentary party for its exclusion of her from caucus or by invoking the privileges jurisdiction of the House in relation to the notice to the Speaker. The legal challenge she brought to require ACT New Zealand to accept her subscription and re-admit her to membership was abandoned. I consider that the Court of Appeal was correct in the view that Mrs Awatere Huata had been expelled from the parliamentary party. The exclusion was acted on by the letter to the Speaker of 10 November, which resulted in his recognition of Mrs Awatere Huata's independent status for parliamentary purposes on 11 November. It is not in dispute that from then Mrs Awatere Huata has continued, for parliamentary purposes, as an independent member of Parliament. She had that status at 16 December when the caucus voted to authorise the parliamentary leader to deliver notice to the Speaker under s55A(3)(b).

[41] A number of grounds raised by the parliamentary leader in his letters of 10 November and 13 November to Mrs Awatere Huata seem to provide separately or in combination sufficient basis, if accepted, to justify expulsion from caucus in application of the caucus rules. The matter does not directly arise for determination

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[46] Rule 5.6.
[47] ACT New Zealand Caucus Culture and Rules (June 2001) at para 6.

in the appeal because there was no challenge to the exclusion of Mrs Awatere Huata from caucus or to the notice of the parliamentary party to the Speaker upon which her status as an independent member was confirmed. There seems however ample justification on material not controverted by Mrs Awatere Huata for the conclusion, accepted by all members of the Court of Appeal, that her conduct had caused a breakdown, "even irreparable,"[48] in her relationship with other caucus members. On the face of it, it is hard to escape the view that she had breached the requirements of mutual support and loyalty contained in the caucus rules to an extent that justified her expulsion from the parliamentary party.

[42] In addition, the lapse in Mrs Awatere Huata's membership of ACT New Zealand and the indication that the Board would not accede to its renewal seem sufficient in themselves to justify her exclusion from the caucus given the rules of both the political party and the caucus and the context of centrality of party under the Electoral Act. The ACT New Zealand Constitution and Rules require that all candidates for election be members of ACT New Zealand.[49] In the selection of the party list for elections, the "principal consideration" is "the ability of the Members named on the list to further the objects of the Party by participation in the Parliamentary process."[50] Continued membership of ACT members of Parliament in ACT New Zealand is assumed by the Culture and Rules of the ACT caucus. Thus, each member of caucus is obliged to: "grow ACT's vote, to increase the ACT party's membership and support,"[51] to assist and encourage "every other MP, candidates, those who work for ACT and ACT members,"[52] "to act at all times as leaders and role models for the Party,[53] "to assist to lift ACT's vote, and that means supporting the Party,"[54] and to attend ACT conferences.[55] In those circumstances it is implicit that continued membership of the party is required for membership of the caucus. Again, the matter does not directly arise for determination because there is no challenge to Mrs Awatere Huata's exclusion from caucus. Rather, the case has been

[48] [2004] 3 NZLR 382 at [121].
[49] Constitution and Rules of ACT New Zealand, Rule 23.5(e).
[50] Rule 23.5(d).
[51] ACT New Zealand Caucus Culture and Rules (June 2001) at para 20.
[52] At para 18.
[53] ACT New Zealand Caucus Culture and Rules, Rule 12.
[54] Rule 14.
[55] Rule 15.

put on the distinct basis of challenge to use of the statutory mechanism for determining vacancy in the parliamentary seat.

[43] The distinction is more than theoretical. Conflating the two in the present case seems to me to impede proper analysis of the statutory ground of distorting party political proportionality. For the reasons which follow in paragraphs [46] to [54], I am of the view that the scheme of the statute is that the proportionality of party political representation in Parliament is distorted when a member continues to serve in Parliament after ceasing to be a member of the political party for which he or she was elected. The relevant distorting "conduct" of a member is not properly to be equated to voting conduct in the House because the statute itself identifies cessation in membership of the party as the distorting condition which gives rise to vacancy if the statutory procedures are invoked.

[44] Conflating the question of membership of the party with the conditions under which vacancy is established also skews the causal inquiry as to whether the member's conduct has caused the distortion. Whether it was the party which excluded Mrs Awatere Huata from membership (as she argues) or whether her actions amounted to constructive abandonment of the party (as the party argues) is a distinction which in my view is not material to the proper application of the statutory vacancy procedures. If such exclusion has not been directly challenged and the member of Parliament continues in Parliament as an independent member or as the member of another party, I am of the view for the reasons that follow that there are grounds to invoke the procedures for creating a vacancy in the seat in the House. They can be instituted either by the member or the party.

Cessation of party membership distorts political party proportionality

[45] It was accepted on behalf of Mrs Awatere Huata that her acknowledged status for parliamentary purposes was as an independent. And it was not contended on her behalf that the result did not distort the proportionality of political party representation in Parliament. But on the interpretation accepted by the majority judges in the Court of Appeal, the vacancy procedures under the Act cannot be invoked by the party until her voting pattern suggests she has abandoned the party.

[46] As the heading to s55A and the terms of s55A(2) make clear, the occasion for vacancy in a seat arises when a member who is not an independent member of Parliament "ceases to be a parliamentary member of the political party for which the member of Parliament was elected". That membership of the political party is key is underscored by the fact that this section has no application to a member of Parliament elected as an independent. While vacancy is established under s55A(2) only upon notice to the "appropriate person" (a necessary formal step which in the case of party notice under s55A(3)(b) also contains procedural safeguards), the sense of the legislation is that the mischief the amending legislation was designed to address is the continuation in Parliament as an independent or member of another party of a member who has ceased to belong to the party for which he was elected. That appears most clearly from the wording of s55B(c)(ii). If a member of Parliament gives notice to the Speaker that he "wishes to be recognised for parliamentary purposes as either an independent member of Parliament or a member of another political party", the statute provides for vacancy in his seat.

[47] The member can bring about a vacancy at will. Both resignation and the wish to be recognised as independent or as a member of another parliamentary party are matters of choice for the member. Before delivering a notice under s55B, the member is not required to form an additional judgment that these steps will affect the proportionality of political party representation in Parliament. Given the purpose described in s4 of the 2001 Amendment Act and the scheme of the provisions inserted into the Electoral Act through it, it is clear that Parliament has taken the view that the proportionality of political party representation in Parliament as determined by electors is so distorted in such circumstances as to require correction by way of vacancy in the seat. No inquiry as to future voting intentions is needed to achieve the conclusion of distortion. The trigger for the Speaker to act is formal notification but the underlying mischief is the change in party membership status for parliamentary purposes of a member of Parliament.

[48] The mechanism for party notice provided for in s55A(3)(b) needs to be seen in the context of the member notice provided by s55A(3)(a). The party notice provisions are broadly comparable but contain safeguards to ensure fairness to the member and to ensure that the notice is authorised by the political party in a manner commensurate with the electoral significance of the action. The safeguards include

fair treatment of the member (through 21 days notice and the opportunity to respond). They include the parliamentary leader's written assurance to the Speaker that he reasonably believes the conduct of the member is distorting political party proportionality in Parliament. And they require a two-thirds majority endorsement of the parliamentary party before notice is given. These in turn set up political safeguards through public and formal statements against which the electorate can measure the party invoking the procedures.

[49] Such procedural and political safeguards apart, it is difficult to understand why the policy underlying member notice and party notice should differ. Both were inserted into the Electoral Act by Part 2 of the Electoral (Integrity) Amendment Act 2001 which is headed "Members of Parliament ceasing to be parliamentary members of their political parties". Their purpose was "to enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors."[56] The sense of the legislation is that, whether the eventual vacancy is a result of member notice or party notice, proportionality of political party representation in Parliament as determined by electors is distorted when the party affiliation of a member of Parliament changes; when he "ceases" to be a member of the party for which he was elected.

[50] The language of "cessation" is neutral as to cause. Such neutrality does not suggest that a member ceases to belong to the party only where he has resigned formally or by unequivocal conduct. Reciprocity in freedom of association is of the nature of voluntary groups, and is secured for ACT New Zealand and its parliamentary caucus by their rules. Just as members are free to move on from the party, the party is free to leave members behind, if it acts in accordance with its rules of association and if it is willing to wear the political risk of such action with the electorate. Whether the change in affiliation is as a result of the party acting to exclude the member of Parliament from its caucus or whether it is a result of the member of Parliament resigning or becoming independent, distortion of the proportionality of political party representation in Parliament as determined by electors equally results if the member continues to remain as a member of Parliament.

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[56] Section 4(a) Electoral (Integrity) Amendment Act 2001.

[51] The legislative history supports this textual reading. As originally introduced in December 1999 the Bill which became the 2001 Act would have depended solely on the member's voluntary action to create a vacancy by notification to the Speaker. The provision was originally headed "Member resigning from political party."[57] The wider approach eventually adopted suggests that addressing resignation or imputed resignation alone did not meet the problem. There is no basis for a construction that limits the statutory correction "to enhance public confidence in the integrity of the electoral system"[58] to cases where the change in allegiance is accomplished by the actual or constructive resignation of the member rather than a shift in allegiance, however caused.

[52] Nor is there any basis to read into the statute a limitation of the conduct distorting political party representation to voting conduct. Such interpretation is inconsistent with the reference to "political party representation in Parliament as determined at the last general election."[59] It wrongly suggests that party representation in Parliament is to be equated with voting. It invites consideration of the importance and pattern of a member's voting behaviour in the House, in a way that takes a reviewing Court uncomfortably close to scrutinising the working of the House and to making assessments about the political significance for the party of the member's voting behaviour.

[53] What distorts party political representation in Parliament for the purposes of the legislation is not the resignation or expulsion from the political party as such. Distortion is caused when a member of Parliament elected for one party remains in Parliament with a new affiliation or no affiliation to party. Such member can restore the proportionality of political party representation by giving notice under s55A(3)(a) which complies with s55B. Equally, the party can restore its proportionality by giving notice under s55A(3)(b) which complies with s55C and 55D as to procedure and form.

[54] It is clear that Mrs Awatere Huata is continuing as a member of Parliament with changed party status. That is conduct which distorts party proportionality. It is

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[57] Clause 5 Electoral (Integrity) Amendment Bill 1999.
[58] Section 4(b) Electoral (Integrity) Amendment Act 2001.
[59] Section 55D(a) Electoral Act.

therefore unnecessary to consider whether conduct other than continuing as a member of Parliament with changed allegiance would justify action under s55A(3)(b), but it is difficult to see that any other conduct would fall within the statutory scheme. Section 55A(3)(a) and (b) seem to me to be two sides of the same coin.

[55] The acting leader of the parliamentary party of ACT was clearly entitled to hold the reasonable belief that, by continuing as an independent member of Parliament for parliamentary purposes, Mrs Awatere Huata was acting in a way that distorted the proportionality of political party representation in Parliament as determined at the last general election. Mrs Awatere Huata has indicated that she intends to continue as a member of Parliament. The party has indicated that she will not be re-admitted as a member of ACT New Zealand or its parliamentary caucus. In such circumstances, it was well open to the parliamentary leader of the party to take the view that Mrs Awatere Huata was likely to continue to distort proportionality through her conduct in continuing as an independent member of Parliament.

[56] It follows that I would allow the appeal and discharge the order made by the Court of Appeal prohibiting delivery of the proposed notice to the Speaker of the House of Representatives.

GAULT J

[57] The interpretation and application of the provisions in ss55A-55E raise some complex questions that were not addressed in the argument. Both parties accepted that the reasonableness of the belief of the parliamentary leader as to the member's conduct having distorted the proportionality of party representation is amenable to judicial review.

[58] As pleaded, Mrs Awatere Huata's challenge was directed to two aspects of the process to which the provisions relate. It was alleged first that the "decision" of the party leader to advise Mrs Awatere Huata "as required by" s55D(b)(i) in the form of his letters to her of 10 and 13 November 2003 was *ultra vires* or, alternatively, irrational and without legal foundation. Secondly, it was alleged that:

> The delivery of any notice to the Speaker under section 55A would similarly be an action without foundation at law as the delivery would be *ultra vires* and/or irrational

[59] Section 55D(b)(i) does not directly require any decision. It requires a statement that an opinion, with reasons, has been notified to the member with advice of the time for a response. The underlying assumption that the leader has formed the opinion that s55D(a) applies, in the context, must include a willingness to consider any response and so is, at most, a tentative view as to any distortion of proportionality. It is difficult to see the content of this notification as reviewable.

[60] On the other hand, if the underlying circumstances to be attested to in the statements required by paras (b) and (c) of s55D could be amenable to review, the issue would arise whether they are integral parts of the statutory process by which a vacancy in the House is established. If that were the case, it would become relevant to consider the scope of the established privilege of Parliament to determine its own composition and any statutory inroad into that. That issue arises even more directly in respect of the delivery of the notice by a party leader to the Speaker under s55A.

[61] The scope of the composition privilege of Parliament (subject to any relevant statutory delegation or waiver) has been broadly stated.[60] And it may be that the structure of ss55A-55E (directed to statements rather than underlying facts) was adopted as more appropriate for parliamentary than curial supervision.

[62] There was no argument on these matters before us. However, because of the view I have reached on the merits of the claim as advanced and because of the fact that the provisions are to lapse at the next election, I am content to deal with the case on the assumptions made by the parties, but subject to the reservations I have raised about them.

[63] The facts, which are not contested, are set out in the judgments of Gendall J in the High Court and McGrath J in the Court of Appeal. In her reasons, the Chief Justice has summarised the relevant statutory provisions their context and their

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[60] *Erskine-May Parliamentary Practice* (23ed 2004) 90, P A Joseph *Constitutional and Administrative Law in New Zealand* (2ed 2001) 421, D McGee *Parliamentary Practice in New Zealand* (2ed 1994) 486, 487. The definition adopted at para [41] of McGrath J's judgment appears to focus only on the power of expulsion.

history. Keith J in his reasons has traced the increasingly important, and now central, role of political parties in the New Zealand electoral system and House of Representatives. That factor, in my view, was accorded insufficient weight by McGrath J and Hammond J in their emphasis upon the position of individual members of Parliament as a reason for adopting their "narrow" construction of s55D under which voting was considered the primary indicator of distortion of representation.

[64] I am satisfied that it was open to the leader to come to the reasonable belief that Mrs Awatere Huata had "acted in a way that has distorted, and is likely to continue to distort the proportionality of political party representation in Parliament as determined at the last general election".

[65] It is distortion of party representation not distortion of voting that is involved. Distortion of the proportionality of that representation must be caused by the conduct of the member ("acted in a way"). The wording contemplates the same conduct having distorted and being likely to continue to distort the proportionality. It is the effect rather than the conduct that is likely to continue. That indicates that voting is not the determinant. Indeed proportionality of representation is determined at the election before any voting ever takes place. I consider the provision is directed to conduct that is believed to constitute a departure from representation of the party for which the member entered Parliament at the last election.

[66] I have no difficulty in concluding that the leader of the ACT parliamentary party could reasonably have formed the belief that Mrs Awatere Huata had ceased to be a representative of the ACT party in the House (and thus distorted the proportionality of representation) after she ceased to be a member of the ACT party, having allowed her membership to lapse. I do not think it can be reasoned, as in the Court of Appeal, that Mrs Awatere Huata did not by her conduct cause the distortion of proportionality because the party could have allowed her to renew her membership. While permitting renewal could have reversed the position that by her own failure she had brought about, there was no obligation on the party to renew her membership and, without that, the position was one she had caused.

[67] In resting my decision on the lapse of membership I do not exclude the reasonableness of the same belief had it been formed by the party leader on the basis of matters referred to in the leader's letter of 13 November, but it is unnecessary to determine that. I am content to rely on the matters raised in the letter of 10 November the text of which is set out in para [11] of Gendall J's judgment and para [11] of McGrath J's judgment.

[68] By the time the leader came to give the notice to Mrs Awatere Huata on 10 November calling for her response, and thereafter, it was plain that she no longer was acting as a representative of the ACT party. Indeed for some time she had been acting independently and would inevitably be doing the same "for parliamentary purposes" thereafter once the letter of the same date from the leader to the Speaker was acted upon pursuant to Standing Order 34. Certainly by the time the leader would have given notice to the Speaker (but for the order of the Court) Mrs Awatere Huata was acting as an independent, no longer representing the ACT party, with the immediate consequence that party representation was distorted.

[69] I would allow the appeal with the consequences set out in the Chief Justice's reasons.

KEITH J

[70] I agree that the appeal should be allowed and that the order restraining the ACT party leadership from giving the Speaker of the House the notice of disqualification of Mrs Awatere Huata be set aside. I gratefully proceed on the basis of the detail given by the Chief Justice in her reasons.

[71] In these reasons, I indicate why I consider that the "act[ion]" and "conduct" to which s55D(a) and (c) of the Electoral Act 1993 refer are to be understood broadly and are not to be limited to voting in the House of Representatives. I also briefly address the question of causation arising from the expression in s55D(a) "that the member of Parliament concerned has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined in the last general election".

[72] Like the other members of the Court I proceed on the assumption, adopted by the parties, that the proposed action of the leadership is reviewable notwithstanding the very unusual wording of s55D and the possible role of Parliamentary privilege including compositional privilege.

[73] The purpose of the Electoral (Integrity) Amendment Act 2001, which added ss55A-55E to the 1993 Act, includes the enhancing of the maintenance of the proportionality of political party representation in Parliament as determined by the electors.[61] That emphasis on the representation of political parties in the House of Representatives highlights the central role of parties in the Electoral Act. That role was not of course a new one in 1993. That appears from the following brief account of the role of parties in the House and a related central function of the House.

[74] For Walter Bagehot, writing in 1867 just before the enactment of the Reform Act of that year and before the establishment of a strong party system in Britain, the main function of the House of Commons was to be an electoral college.[62]

[75] In the middle of the next century, Sir Ivor Jennings stated the primary function of the House of Commons in this single sentence: While for the most part the House appears to be legislating, what it is really doing is defending and criticising the government.[63]

[76] In his 1963 introductory essay to Bagehot's hugely influential book, that most experienced Parliamentarian Richard Crossman MP put the matter in a rather brutal way:

> Now the prime responsibility of the member is no longer to his conscience or to the elector, but to his party. Without accepting the discipline of the party he cannot be elected; and, if he defies that discipline, he risks political death. Even forty years ago it was still possible to cross the floor and survive. But today the member who loses the whip may win the next election, but after that the party machine will destroy him. Party loyalty has become the prime political virtue required of an MP, and the test of that

[61] Section 4 as set out by the Chief Justice, at [32] above, and repeated in the critical s55D(a), at [34] above.
[62] *The English Constitution* (1867) ch IV.
[63] *Parliament* (2ed 1957) 519; see also chs V, VI and X; for more recent United Kingdom writings see to the same effect eg Professor S A de Smith *Constitutional and Administrative Law* (2ed 1973) 237 and Professor Rodney Brazier *Constitutional Practice* (2ed 1994) 204.

> loyalty is his willingness to support the official leadership when he knows it to be wrong.
>
> One result of the virtual disappearance of the MP's independence is that the point of decision has now been removed from the division lobby to the party meeting upstairs. The debate on the floor of the House becomes a formality, and the division which follows it a foregone conclusion. It is what is said and done in the secrecy of the party meeting which is now really important – though the public can only hear about it through leaks to the press.[64]

[77] That emphasis on the electoral function of the House and the central role of party appeared in New Zealand at least as long ago as 1940. In that year Leicester Webb in *Government in New Zealand* said:

> Representative and responsible government is party government; since it is the party system which enables the electors to decide, not merely who shall speak for them in Parliament, but who shall govern them. … [I]n the great majority of constituencies elections are fought mainly and increasingly on party issues. The great majority of electors, that is, vote not for the candidate himself but for his party and do so on the assumption that he is not free, if elected, to change or abandon his party allegiance and that, during sessions, he will vote not according to the dictates of conscience or reason, but according to the instructions of the party whips.[65]

[78] Nearly 40 years on, another New Zealand scholar, Dr Alan Robinson, strongly echoed those positions when he spoke of one function of the House as

> a consequence of the competition of groups of politicians for the powers of the Crown combined with the advent of universal suffrage and frequent elections. The competition in Parliament has become one between two alternate governments, the Government of the day and the Opposition, who carry their competition to the public in order to gain a majority of seats at the next general election. Parliament has become a forum for party debate and a means of influencing electors by means of what is virtually a continuous election campaign. The underlying assumption of this activity is that the public is watching and will be influenced in its judgment at the next election.[66]

[79] That emphasis on the ongoing electoral role of the House of Representatives was not of course intended to deny the other functions of the House and Parliament, including the making of laws, the raising and voting of money, and the holding of the executive to account. They are important and legally and constitutionally required. They indeed provide important means by which members of Parliament,

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[64] Bagehot *The English Constitution* (Fontana ed 1963) 43.

[65] Webb *Government in New Zealand* (1940) see similarly F A Simpson *Parliament in New Zealand* (1947) 29-30.

[66] "Parliamentary Democracy in New Zealand …" in Sir John Marshall (ed) *The Reform of Parliament : Papers presented in memory of Dr Alan Robinson* (1978) 96-97.

organised through their parties, assist their parties in the House in the ongoing pursuit of electoral success, a pursuit which is vital for our system of democracy.

[80] The purpose of the 2001 Act to enhance the maintenance of the proportionality of political party representation in Parliament as determined by the electors reflects an essential feature of the reform to the electoral system made in 1993 following the report of a commission of inquiry recommending, and two popular referendums supporting, the introduction of a proportional electoral system. The Royal Commission on the Electoral System placed political parties at the centre of our Parliamentary and governmental system in its introductory chapter.[67] They were to be treated in a fair and proportionate way. Fairness between political parties accordingly was the first of the ten criteria[68] for judging voting systems:

> (a) **Fairness between political parties**. When they vote at elections, voters are primarily choosing between alternative party Governments. In the interests of fairness and equality, therefore, the number of seats gained by a political party should be proportional to the number of voters who support that party.

Also significant was this criterion:

> (i) **Effective parties**. The voting system should recognise and facilitate the essential role political parties play in modern representative democracies in, for example, formulating and articulating policies and providing representatives for the people.

Another was:

> (h) **Effective Parliament**. As well as providing a Government, members of the House have a number of other important Parliamentary functions. These include *providing a forum for the promotion of alternative Governments and policies*, enacting legislation, authorising the raising of taxes and the expenditure of public money, scrutinising the actions and policies of the executive, and supplying a focus for individual and group aspirations and grievances. The voting system should provide a House which is capable of exercising these functions as effectively as possible. (emphasis added)

[81] When the Commission applied the criteria it concluded:

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[67] *Report of the Royal Commission on the Electoral System : Towards a Better Democracy* (1986) paras 1.8, 1.9, 1.10, 1.13 and 1.18(b).

[68] Para 2.1.

> 2.4 Our present system of plurality voting usually fails to achieve results which give parties seats in Parliament proportional to the votes of their supporters. That is well known. The extent of the disproportionality is not, however, so well appreciated. The plurality system was not designed to achieve proportionality between political parties. Indeed, political parties did not exist when plurality was introduced.

Either MMP or STV would overcome the serious defects of plurality with respect to proportionality and MMP would be more likely than STV to do so. For that and other reasons including protecting and enhancing the role of political parties, the Commission unanimously recommended the introduction of MMP. It considered "MMP to be the best voting system for New Zealand's present and future needs".[69]

[82] That recommendation was the subject of the popular referendums held in 1992 and 1993, the second of which introduced the MMP electoral system. At the heart of that system is the proportional representation in Parliament of the parties according to the support they gathered from the people at the most recent general election: see especially ss191 to 193 of the Electoral Act.

[83] The Standing Orders of the House were amended in 1996 to reflect that change, in particular by expressly recognising for the first time the role of parties. Proportionality is built into the Standing Orders regulating the distribution among parties of seats on select committees, the allocation of questions for oral answer and the giving of the call in the House.[70] The ACT New Zealand caucus, in its "Culture and Rules" approved in June 2001, similarly recognises that "Parliamentary politics is a team activity". Further, "Every MP shall do all that the MP can to grow ACT's vote, to increase the ACT party's membership and support".

[84] The post 1996 commentators, including Sir Geoffrey Palmer and Dr Matthew Palmer, continue to emphasise that the New Zealand Parliament revolves around party political contest, with much time being spent on party political attack and defence.[71] In the introductory essay to the latest edition of the *Cabinet Manual*,[72] in

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[69] Paras 2.118-127, 170-177 and 182.

[70] Standing Orders Committee, *Review of Standing Orders* 2003 AJHR I 18B: see also Standing Orders 34-37, 74-78, 102, 117, 142-144, 184-187 and 365(2); and for party leaders, Standing Orders 34, 35, 117 (App A), 144 and 342.

[71] *Bridled Power : New Zealand Government under MMP* (3d ed 1997) 130.

[72] *Cabinet Office Manual* (2001) 4.

a passage unchanged since the original 1991 version, I identify the role of party in the present day House of Representatives in this way:

> Political parties provide a vital link between the people, Parliament and the government. The competition for the power of the state, exercised through the House of Representatives and the ministry, is a competition organised by and through political parties. It is party strength in the House after elections that decides who is to govern. It is the Parliamentary party or parties with the support of the House (and the ability to ensure supply - the money to fund the state's functions) that provides the government.

[85] To summarise, the constitutional and parliamentary context strongly supports the ordinary, broad meaning of "act[ed]" and "conduct" as used in s55D. All members of the ACT parliamentary party – as indeed of other parties – are to participate in the ongoing political and electoral process in the full range of ways available. Because of the dominant role of party, their freedom of expression is for the most part to be exercised within the caucus and other party processes. The central role of party, already well established by 1993, has been enhanced by the introduction of a proportional electoral system.

[86] It is against that context that I consider the narrow interpretation given by the majority of the Court of Appeal to the scope of s55D. I do not agree with it because of the ordinary meaning of the provisions, their purpose and their drafting history, as well as that context.

[87] The words "acted" and "conduct" are general words. On their face they are not limited to voting behaviour. The Court indeed accepts that at various points in its reasons: "the power [to give the notice] is concerned … with formal changes of numbers of a party"[73] and "the concept of distortion of proportionality … covers any impacts on the number of seats held by a party"[74] – exactly our case, says Mr Hodder for the ACT leadership: the electorate gave the party nine members and now they have eight. Nor do I see the scope of s55D as being limited, as the Court of Appeal says, by the "immediate context" of the other two bases for the operation of the 2001 legislation. To vacancies resulting from resignations, notified by the member, were added vacancies arising from "act[ion]" or "conduct" of the member distorting the proportionality determined at the last election, notified by the leader of the

[73] [2004] 3 NZLR 382 at [77].
[74] At [98].

parliamentary party. The three ways fall within the broad heading of Part 2 of the 2001 Act, "Members ceasing to be parliamentary members of their political parties".

[88] Finally, the drafting history supports the broad reading. As originally introduced in December 1999 the Bill which became the 2001 Act would have depended solely on the member's voluntary action to create a vacancy by notifying the Speaker to that effect: the provision was headed *Member resigning from political party*; see now s55B. The original Bill did not extend to the situation where it was the parliamentary party rather than the member that took the action. But in September 2001 the provision in issue here, empowering the parliamentary party to create a vacancy by giving a notice to the Speaker, was added to the Bill. That step was taken at the initiative of the New Zealand First Party. According to its leader, the original Bill was very bland; the addition significantly strengthened the Bill and gave it real teeth and practical effect. That party's votes were essential to the adoption of the 2001 Act.[75]

[89] I accordingly conclude that the Court of Appeal was wrong to limit the scope of s55D, in effect, to voting behaviour. The actions and conduct covered by the provision do include all those actions of a member which are capable of indicating that the member has acted in a way that has distorted the proportionality of political party representation.

[90] On the matter of causation (and again subject to the reservation I indicated at the outset of these reasons about the Court's role), I agree that the combination of Mrs Awatere Huata's failure to maintain her membership, her own serious conduct causing great damage to her relationship with the party and caucus which made the rejection of her application for readmission virtually inevitable, and her subsequent actions (which in the circumstances I need not specify) provided a proper basis for the party leadership to give the proposed notice of disqualification to the Speaker.

BLANCHARD J

[91] I too am of the view that the appeal must be allowed and the order of the Court of Appeal discharged.

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[75] (18 December 2001) 597 NZPD 13996 and 14055.

[92] The effect of s55D of the Electoral Act 1993 is that a party leader, in giving a notice under s55A(3)(b) to the Speaker (or the Governor-General, in the Speaker's absence), must have a reasonable belief that:

> (a) there has been and is likely to be a distortion of the proportionality of the party's representation in Parliament as determined at the last general election; and
>
> (b) the distortion was and will be caused by the member who is the subject of the notice, i.e. that the conduct (acts or omissions or both) of the member are the reason why the distortion has occurred.

[93] In my view, a s55A(3)(b) notice cannot be given merely because a member has become an independent member as a result of the Speaker's declaration to that effect and distortion has thereby arisen. It is necessary also that there be a reasonably held view that, as s55D(a) puts it, "the member … has acted in a way that has distorted, and is likely to continue to distort" proportionality. If it is not the actions of the member which have led to the declaration, it cannot, in my opinion, be said that the member has acted in a way that has distorted etc. A member who remains in Parliament after the Speaker has made a declaration does not by that fact alone cause the distortion. If it were otherwise, the Speaker's declaration under Standing Orders would be determinative of the leader's ability to give the s55A(3)(b) notice.

[94] As to (a): I am in agreement with Elias CJ and Keith J, for the reasons they give, that proportionality in this context concerns more than just voting strength in the House. It was entirely reasonable for the acting leader of the ACT parliamentary party to believe that there was and would continue to be distortion of ACT's proportionality as determined at the last election once Mrs Awatere Huata had been declared by the Speaker to be an independent member. ACT representation in Parliament was thereby reduced from nine to eight members with all the consequences under Standing Orders, including reduced money allocation and select committee membership and actual or potential disadvantage in relation to seating and speaking order in debates. ACT's position vis-à-vis other parties in all these respects, as established at the last election, was and was likely to be adversely affected, as well of course as the consequent reduction in its voting strength.

[95] As to (b): it was reasonable to believe that the root cause of the distortion was Mrs Awatere Huata's failure to maintain her membership of the ACT political party. The acting leader could reasonably hold the view that in so failing she set in train a process which required her exclusion from the ACT parliamentary party (caucus). The position of someone seeking re-admission to an organisation which they have voluntarily left (as by failing to meet its dues) is not to be equated with that of someone whom the organisation is seeking to expel in accordance with its rules. Whether or not the party has an absolute right to refuse someone re-admission after their membership lapses is a matter upon which I express no opinion. But, in light of the strained relationship (to put it at its lowest) which existed between Mrs Awatere Huata and the party at the time she sought re-admission to membership, the Board of the party was surely well within its rights in rejecting her application in the particular case. By her own conduct Mrs Awatere Huata had made rejection virtually inevitable. No challenge is in fact pursued to the decision of the Board to refuse her re-admission to membership of the party.

[96] The acting leader was advised by the president of the party that Mrs Awatere Huata would not be re-admitted. He could thereafter reasonably believe that that decision, which, it is to be noted, was not one made by caucus, led inexorably to the Speaker's declaration with its consequences for proportionality.

[97] It is implicit in the party rules that caucus members must be members of the party – it would be absurd if the obligation to be a member of the party, which is expressly required of its candidates for election to Parliament, ceased once they were elected. Caucus was therefore obliged by the party rules to take the step of excluding Mrs Awatere Huata and the acting leader was in turn obliged under Standing Order 35(1)(c) to notify the Speaker that this had happened. The Speaker was then required by Standing Order 34(4) to declare her an independent member of Parliament as he did on 11 November 2003. No action appears to have been taken by Mrs Awatere Huata by way of requesting reference to the privileges committee or otherwise in relation to the Speaker's declaration.

[98] A proper basis therefore existed for the giving of a notice under s55A(3)(b).

TIPPING J

[99] I too would allow this appeal with the consequence proposed by the Chief Justice. I can express my reasons briefly in view of the detail contained in the judgment of the Chief Justice.

[100] When Mrs Awatere Huata became an independent member of Parliament, the ACT party's proportion of the 120 seats in the House of Representatives changed from nine to eight. That change obviously distorted the proportionality of party political representation in Parliament as determined at the last general election. On becoming an independent, Mrs Awatere Huata ceased to be a member of ACT for the purposes of party political representation. She could not be an independent and represent ACT at one and the same time. That would be quite inconsistent with the fundamental purpose of ss55A-55E. What is beyond doubt is that the ACT party leader could form the reasonable belief that Mrs Awatere Huata's change of status from an ACT member to an independent had distorted and was likely to continue to distort the relevant proportionality.

[101] The sections of the Electoral Act 1993 under consideration are concerned with members of Parliament who cease to be parliamentary members of the political party for which they were elected. On becoming an independent Mrs Awatere Huata ceased to be a parliamentary member of the ACT party for which she was elected as a list candidate. With respect to the view which was adopted by the majority of the Court of Appeal, it would be strange if the very circumstance at which the sections are aimed did not in itself qualify as a distorting event. That would be the consequence if distorting circumstances are limited to voting behaviour.

[102] The remaining question is whether the ACT party leader could form the reasonable belief that Mrs Awatere Huata had acted in a way that had distorted and was likely to continue to distort the relevant proportionality. Translated to the distorting event in this case, this required the leader to hold the reasonable belief that it was Mrs Awatere Huata's conduct which had brought about her independent status. In my view the leader's belief that this was so was a reasonable belief.

[103] Mrs Awatere Huata had ceased to be a member of the ACT party when her subscription remained unpaid for six months. By clear and necessary implication that had disqualified her from continuing as a member of the ACT caucus. Her so-called expulsion from the caucus was more a recognition of that fact than an expulsion in the strict sense. In the circumstances the ACT party was entitled to decline to readmit her to membership. When she ceased to be a member of ACT's caucus, Standing Orders required the leader to notify the Speaker. This led inevitably to her becoming an independent for parliamentary purposes. There was therefore a sufficient relationship of cause and effect between her conduct and her becoming an independent. A causal nexus of this kind is a necessary requirement of the statutory provisions.

[104] In terms of the precise statutory question, I think it must be regarded as beyond doubt that the leader could form the reasonable belief that the necessary causal nexus existed and that the distortion inherent in Mrs Awatere Huata becoming an independent was likely to continue. Both of the pre-conditions to the delivery of a s55A(3)(b) notice were established. The Court of Appeal should not therefore have restrained its delivery. The conclusion reached in the High Court was the correct one, albeit I would prefer to base that conclusion on the process of reasoning I have outlined.

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