IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 14/2022**

BETWEEN	**MAKE IT 16 INCORPORATED**
	Appellant
AND	**ATTORNEY-GENERAL**
	Respondent

OUTLINE OF PROPOSED ORAL ARGUMENT FOR THE ATTORNEY-GENERAL

11 July 2022

Te Tari Ture o te Karauna
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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS OUTLINE OF PROPOSED ORAL ARGUMENT CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

MAY IT PLEASE THE COURT:

1. Subject to any questions the Court wishes us to focus on, the oral submissions for the Attorney-General will seek to emphasise the following points.

ACCOMODATING JUDICIAL RESTRAINT IN THE DECLARATION OF INCONSISTENCY JURISDICTION

2. The Court of Appeal conducted the *Oakes* analysis but exercised its discretion to withhold a remedy because judicial restraint was warranted.

3. The *Taylor* courts made clear that the jurisdiction to give a Declaration of Inconsistency (**DoI**) is discretionary and the exercise of that discretion may be required to accommodate judicial restraint, but there was no argument for withholding the remedy in that case. The nature and scope of the discretion arises more plainly in this case.

4. Judicial restraint is exercised during the orthodox *Oakes* analysis, as Doogue J did in the High Court. Where the subject engages complex matters of social policy, or difficult moral choices, there will likely be more than one solution that meets the test of rational connection to the purpose. The Court can accommodate deference or the need for restraint (if that is the best term for it) by widening the latitude given to Parliament, without the need to consider withholding a declaration.

    4.1 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [153].

    4.2 *R v Hansen* [2007] 3 NZLR 1, Tipping J at [119].

    4.3 *Make It 16 v Attorney-General* [2020] NZHC 2630 at [109].

    4.4 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402.

    4.5 Cf. *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

5. Judicial restraint may be exercised after the *Oakes* analysis:

5.1 Is the ground for doing so that a *Hansen* indication will suffice?

Attorney-General v Taylor [2017] NZCA 215, [2017] 3 NZLR 24 at [41], [149] to [164]; cf. *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [52] (Glazebrook and Ellen France JJ) and [102] (Elias CJ).

5.2 Or is it better confined to matters of utility?

R (Chester) v Secretary of State for Justice [2013] UKSC 63; [2014] AC 271; *Re Close's Application for Judicial Review* [2020] NICA 20; *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [58]

6. Exceptionally, the motivation for judicial restraint may be constitutional legitimacy. Adherence to fundamental democratic principle or the inherent limits of the judicial function in such cases may require recognition that responsibility for the decision rests with Parliament or that a democratic process should be followed first:

6.1 *Attorney-General v Taylor* [2017] NZCA 215; [2017] 3 NZLR 24 at [69] and [171].

6.2 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

7. Extension of the universal franchise falls inside that exception, for the reasons identified by the Court of Appeal, and more particularly because the extension of the mandate is quintessentially a matter for Parliament, and Parliament says by way of s 268 of the Electoral Act 1993 that any change must have broad political support.

8. Extension of the franchise to 16- and 17-year-olds is conceptually distinct from the earlier reduction from 21 to 20 and then 18. A strong case was made for 18 to be accepted as the proxy for adulthood. Protecting the right of adults to participate in elections does engage the judicial branch (as in *Taylor*) which is confirmed for 18-year-olds, in any event, by s 12 of the New Zealand Bill of Rights Act 1990. No case is advanced for 16- and

17-year-olds to be treated as adults. Rather the question is whether the franchise should be extended to them even though they are not adults.

9. Where the Court is moved to recognise restraint on this exceptional ground, and as soon as it does so, the DoI proceeding should be ended.

THE OAKES ANALYSIS

10. Where a range of rational responses is available to a question of policy, s 5 should not require the Crown's burden in justification to go beyond identifying that the chosen option lies within the range of rational alternatives.

11. The Court of Appeal was wrong to require evidence from the Attorney-General to justify 18 as a preferable voting age to 16. That 18 was an option available to Parliament was self-evident, and apparent from the legislative history of the Electoral Act which was put before the Court. The Court should not have reversed on this point.

11 July 2022

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A M Powell / A P Lawson
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant