IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 102/2017
[2018] NZSC 123

BETWEEN	HINEMANU NGARONOA, SANDRA WILDE AND ARTHUR WILLIAM TAYLOR Appellants
AND	ATTORNEY-GENERAL First Respondent
	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	ELECTORAL COMMISSION Third Respondent

Hearing:	26 March 2018
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	R K Francois for Appellants Ngaronoa and Wilde F M R Cooke QC, P A Joseph and E M Gattey for Appellant Taylor U R Jagose QC, P T Rishworth QC and D J Perkins for First Respondent
Judgment:	14 December 2018

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS

WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] Section 268 of the Electoral Act 1993 (the Act) provides that a number of the other provisions in the Act may only be amended or repealed if passed by a majority of 75 per cent of members of the House of Representatives or carried by a majority of electors at a referendum. The provisions protected or entrenched in this way are described as the "reserved provisions".[1] The issue before us is what is meant by the description of the reserved provisions in s 268(1)(e), namely:

> section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

[2] Section 74 sets out the qualifications for registration as an elector and as an electoral candidate. Broadly, every adult person is qualified to be registered if he or

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1 Electoral Act 1993, s 268(1).

she is a New Zealand citizen or a permanent resident and meets various residential requirements. Section 3(1) defines an adult as a person of or over the age of 18 years. Section 60(f) deals with the ability of a member of the New Zealand Defence Force outside New Zealand to vote, relevantly, if he or she is of or over the age of 18 years on polling day.

[3] The present question about the meaning of s 268(1)(e) arises out of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the 2010 Amendment). The effect of the 2010 Amendment is that all persons sentenced to a term of imprisonment after the commencement of that Act are disqualified for registration as electors and so unable to vote. The position prior to the 2010 Amendment was that those detained in a penal institution under sentences of life imprisonment, preventive detention or a term of imprisonment of three years or more were disqualified from voting.[2]

[4] The appellants, who are prisoners, say that the 2010 Amendment affected s 74 of the 1993 Act so as to engage the requirement in 268(2) that it be passed by a majority of 75 per cent of members of the House of Representatives (referred to as a supermajority to distinguish it from a majority). They brought proceedings contending that the 2010 Amendment was invalid because it was passed by an ordinary majority.[3] The High Court dismissed an application for interim orders relating to the appellants' voting rights in respect of the 2014 general election.[4] The appellants were subsequently unsuccessful in their claims for declaratory relief in the High Court[5] and in the Court of Appeal.[6] Both Courts concluded that s 268(1)(e) protects only the minimum voting age, that is, 18 years. The appellants appeal with leave to this Court.[7]

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2 Electoral Act 1993, s 80(1)(d) (as enacted).

3 Proceedings were also instituted seeking a declaration that the 2010 Amendment is inconsistent with the protection given to the right to vote in s 12 of the New Zealand Bill of Rights Act 1990. The High Court granted a declaration: *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; that decision was upheld by the Court of Appeal in *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 and in this Court: *Attorney-General v Taylor* [2018] NZSC 104 [*Taylor* (declaration of inconsistency)].

4 *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705 [Interim relief judgment].

5 *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 (Fogarty J) [HC judgment].

6 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (Winkelmann, Asher and Brown JJ) [CA judgment].

7 *Ngaronoa v Attorney-General* [2017] NZSC 183. Leave to appeal was declined in relation to the other question raised by the proceedings, namely, whether the 2010 Amendment discriminates on the ground of race.

As the appeal turns on the interpretation of the statute, it is helpful to begin with the statutory scheme.

The statutory scheme

[5] The key provisions are found in the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and the Electoral Act 1993. The latter statute also incorporates a reference to the Constitution Act 1986.

The Bill of Rights

[6] Section 12 of the Bill of Rights protects the right to vote. The section is in the following terms:

> **12 Electoral rights**
>
> Every New Zealand citizen who is of or over the age of 18 years—
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
>
> (b) is qualified for membership of the House of Representatives.

[7] Section 12 is to be construed in light of the purpose of the Bill of Rights which includes protecting and promoting "human rights and fundamental freedoms in New Zealand" as well as affirming "New Zealand's commitment to the International Covenant on Civil and Political Rights [ICCPR]".[8] In addition, s 6 of the Bill of Rights provides that wherever "an enactment can be given" a rights-consistent meaning, "that meaning shall be preferred to any other meaning".

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[8] Bill of Rights, long title, referring to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and see s 2. Article 25 of the ICCPR protects the right of citizens: "(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; …".

The Electoral Act 1993

[8] The Act was enacted "to reform the electoral system and to provide, in particular," if carried by the referendum held under the Electoral Referendum Act 1993:[9]

> (a) for the introduction of the mixed member proportional system of representation in relation to the House of Representatives:
>
> (b) for the establishment of an Electoral Commission:
>
> (c) for the repeal of the Electoral Act 1956

[9] The Act deals with all of the aspects of the electoral system including the establishment of the Electoral Commission, the House of Representatives, the Representation Commission, the registration of political parties, the qualification and registration of electors, and the running of elections.

[10] Registration as an elector is a prerequisite to both voting and standing as a candidate for election as a member of Parliament. As noted above, s 74(1) provides that, subject to the provisions of the Act, adult New Zealand citizens or permanent residents can register as an elector of an electoral district.[10] A person who is qualified to register as an elector of an electoral district is required to register as an elector of an electoral district.[11] A person who is Maori[12] may register either as an elector of a Maori electoral district or as an elector of a General electoral district but must choose one or the other of these options.[13]

[11] Generally, the effect of s 60 of the Act is that only a person whose name lawfully appears on the roll and is qualified to be registered as an elector may cast a vote at an election.[14] Only those registered as electors are qualified to be a candidate

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9 Electoral Act 1993, long title. Hence, commencement of the Act was linked to the referendum: s 2(1).

10 Above at [2].

11 Section 82(1). It is an offence for a person who is required to apply for registration under s 82 to "knowingly and wilfully" fail to apply: s 82(5). The person may only register as an elector of a single electoral district: s 75(1).

12 Defined in s 3(1) to mean "a person of the Maori race of New Zealand; and includes any descendant of such a person".

13 Section 76(1).

14 Section 60(a).

and to be elected as a member of Parliament either for that electoral district or as a list candidate.[15]

[12] If a person is disqualified from registering as an elector, that person cannot vote or qualify as a candidate for election as a member of Parliament.[16] Section 80 of the Act describes those who are disqualified as electors. The persons disqualified for registration are in four broad groups: a New Zealand citizen or permanent resident who is outside New Zealand and has not been in New Zealand within a stated period;[17] persons detained in hospitals under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a secure facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 to whom certain conditions apply;[18] persons whose names are on the Corrupt Practices List for any district;[19] and prisoners.[20] As to the latter, s 80(1)(d) disqualifies:

> (d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the [2010 Amendment].

[13] Against this background, reference can be made to the entrenchment provision, s 268. Section 268 is in the following terms:

> **268 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the following provisions (hereinafter referred to as **reserved provisions**), namely,—
>
> (a) section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
>
> (b) section 28, relating to the Representation Commission:
>
> (c) section 35, and the definition of the term General electoral population in section 3(1), relating to the division of New Zealand into electoral districts after each census:
>
> (d) section 36, relating to the allowance for the adjustment of the quota:

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15 Section 47. Applications for registration are dealt with by the Electoral Commission: s 83 and see s 89(1).

16 The effect of disqualification is that the person's name is to be removed from the register: s 98.

17 Section 80(1)(a) and (b).

18 Section 80(1)(c).

19 Section 80(1)(e).

20 Section 80(1)(d).

(e) section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

(f) section 168, relating to the method of voting.

(2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—

(a) is passed by a majority of 75% of all the members of the House of Representatives; or

(b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts:

provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

[14] Two initial observations can be made about s 268. First, it provides for what are termed "manner and form" restrictions, that is, limits on the procedure or process to be adopted by Parliament if Parliament wishes to amend or repeal the reserved provisions.[21] Second, s 268 is not itself described as a reserved provision. This form of protection is described as "single" entrenchment and may be contrasted with "double" entrenchment.[22] The latter term encompasses those situations where a special majority or other procedure is required before the entrenching provision itself may be amended.[23] Against this background, it is useful now to say a little about each of the provisions referred to in s 268(1).

[15] The first of these provisions is s 17(1) of the Constitution Act. That section provides that the term of Parliament, "unless Parliament is sooner dissolved", is three years. Section 17(2) states that s 268 of the Electoral Act 1993 applies to s 17(1).

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21 See, for example, Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [16.2]; and CC Aikman "Parliament" in JL Robson (ed) *The British Commonwealth: The Development of its Laws and Constitutions – Volume 4: New Zealand* (2nd ed, Stevens, London, 1967) 40 at 66–67. This term originates in s 5 of the Colonial Laws Validity Act 1865 (Imp) 28 & 29 Vict c 63, as interpreted in *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC).

22 See, for example, KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 7.

23 See, for example, *Canadian Taxpayers Federation v Ontario (Minister of Finance)* (2004) 73 OR (3d) 621 (ONSC). This case dealt with Ontario legislation which required new taxes to be supported by a majority in a referendum before being enacted. The manner and form provision was not itself so entrenched. The Superior Court of Justice of Ontario upheld a new health tax which was passed following an amendment to the manner and form provision itself.

[16] The second of the provisions, s 28 of the Act, establishes a Representation Commission "in order to provide for the periodical readjustment of the representation of the people of New Zealand in the House of Representatives".[24] Section 28(2) sets out the composition of the Representation Commission. The Commission has additional members for the purposes of determining the boundaries of the Maori electoral districts.[25]

[17] Section 35, the third of the provisions, imposes a duty on the Commission "to divide New Zealand into General electoral districts from time to time in accordance with this section and section 269" (a transitional provision).[26] Section 35(2)(c) requires the Commission to "effect such subsequent division … only after each subsequent periodical census and on no other occasion". Section 35(3) sets out, subject to the transitional arrangements, the basis on which each division is to be effected. Section 35(4)–(6) deal with timing issues, for example, when the Surveyor-General is to call a meeting for the purpose of nominating a chairperson and when the Government Statistician is to report the results of the census.

[18] The next of the provisions referred to in s 268(1) is s 36. That section sets out the allowance for the adjustment of the quota. Section 36 provides as follows:

> Where, in the opinion of the Commission, General electoral districts cannot be formed consistently with the considerations provided for in section 35 so as to contain exactly the quota, the Commission may for any General electoral district make an allowance by way of addition or subtraction of General electoral population to an extent not exceeding 5%.

[19] The next provision referred to in s 268(1) is s 74. As noted above, that section deals with the qualification of electors. Section 74 is in these terms:

> (1) Subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if—

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[24] Electoral Act, s 28(1). Section 27 provides for the House of Representatives to "have as its members those persons who are elected …. in accordance with the provisions of the [1956 or 1993 Acts], and who shall be known as **members of Parliament**".

[25] Section 28(3) and (4). The chairperson of local government is a member of the Commission but is not entitled to vote: s 28(5).

[26] The "General electoral population" is defined in s 3(1) to mean "total ordinarily resident population as shown in the last periodical census of population and dwellings with the exception of the Maori electoral population".

(a) that person is—

(i) a New Zealand citizen; or

(ii) a permanent resident of New Zealand; and

(b) that person has at some time resided continuously in New Zealand for a period of not less than 1 year; and

(c) that electoral district—

(i) is the last in which that person has continuously resided for a period equalling or exceeding 1 month; or

(ii) where that person has never resided continuously in any one electoral district for a period equalling or exceeding 1 month, is the electoral district in which that person resides or has last resided.

(2) Where a writ has been issued for an election, every person—

(a) who resides in an electoral district on the Monday before polling day; and

(b) who would, if he or she continued to reside in that electoral district until the close of polling day, have continuously resided in that electoral district for a period equalling or exceeding 1 month,—

shall (whether or not he or she does so continue to reside in that electoral district) be deemed, for the purposes of subsection (1)(c), to have completed on that Monday a period of 1 month's continuous residence in that electoral district.

[20] Section 268(1)(e) refers as well to the definition of "adult" in s 3(1) (persons of or over the age of 18) and s 60(f). As noted above, s 60 lists those who are qualified to vote.[27] Section 60(f) makes particular provision for members of the Defence Force who are overseas and provides that those who are qualified to vote include:

(f) any member of the Defence Force who is outside New Zealand, if he or she is or will be of or over the age of 18 years on polling day, and his or her place of residence immediately before he or she last left New Zealand is within the district.

[21] Section 168 is the final provision identified in s 268. Section 168 deals with the method of voting[28] and states:

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27 Above at [11].

28 Section 149 provides that polling is to be by secret ballot.

(1) The voter, having received a ballot paper,—

(a) shall immediately retire into one of the inner compartments provided for the purpose; and

(b) shall there alone and secretly vote—

(i) by marking the party vote with a tick within the circle immediately after the name of the party for which the voter wishes to vote; and

(ii) by marking the electorate vote with a tick within the circle immediately before the name of the constituency candidate for whom the voter wishes to vote.

[22] The section goes on to provide for the form of the ballot paper and method of voting where the paper comprises only a party vote or only an electorate vote.[29] Section 168(4) states that every voter before leaving the inner compartment is required to fold the ballot paper "so that the contents cannot be seen, and shall then deposit it so folded in the ballot box".

The judgments in the Courts below

[23] In the High Court, the argument before Fogarty J was that the whole of s 74 was a reserved provision. In rejecting that submission, Fogarty J considered s 6 of the Bill of Rights applied requiring the Court to prefer a meaning consistent with the rights in the Bill of Rights. But the Judge took the view that the "natural and only" meaning of s 268(1)(e) was that "those provisions" referred to all three sections, that is, ss 74, 3(1) and 60(f), so as to limit entrenchment to the minimum voting age.[30] Fogarty J saw the use of the word "those" before "provisions" in s 268(1)(e) as critical and concluded that s 6 of the Bill of Rights could not justify what would be "a forced and fallacious" construction, namely, that all of s 74 was entrenched.[31]

[24] The Court of Appeal agreed with Fogarty J that s 268(1)(e) was not engaged by the 2010 Amendment. In reaching that conclusion, the Court differed from Fogarty J in that the Court considered s 6 of the Bill of Rights did not apply. That was

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29 Section 168(2) and (3).

30 HC judgment, above n 5, at [109]. Ellis J reached the same view in the Interim relief judgment, above n 4.

31 At [107]–[108].

because s 268(1)(e) was not a limit on the electoral rights protected by s 12 of the Bill of Rights. In this respect, the Court saw the position as the same as that applied in *Terranova Homes & Care Ltd v Service & Food Workers Union Nga Ringa Tota Inc*.[32] The Court put it in this way:[33]

> … the fact that an interpretation may offer less protection of a given right than that afforded in the Bill of Rights does not mean that that interpretation is one that is inconsistent with the Bill of Rights. Section 6 does not mandate an interpretation that replicates the extent of protection afforded under the Bill of Rights but rather only requires a preference for a rights-consistent interpretation over one that is inconsistent.

[25] Because neither the construction preferred by the Court nor that advanced by the appellants was inconsistent with s 12 of the Bill of Rights, s 6 was not engaged.

[26] Turning then to the text and purpose, the Court said both supported the interpretation that only the minimum voting age was entrenched. The Court emphasised a number of textual points including the construction of the subclauses in s 268(1); the qualifying effect of the words "so far as those provisions" in s 268(1)(e); the likelihood that if it was intended all of s 74 be entrenched, this would have been done "more clearly";[34] and the need to give some meaning to the opening words of s 74 which state that s 74 is subject to other provisions in the Act.

[27] The Court of Appeal saw the purpose of s 268 as being "to immunise the electoral system against party-oriented and political game-playing" along with a concern to prevent political parties manipulating the electoral system.[35] The concern was not to protect the right to vote itself but rather to protect those parts of the system "where a party might be inclined to tinker" for electoral gain.[36]

The approach of the parties

[28] The arguments on appeal can be summarised in the following way.

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32 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.
33 CA judgment, above n 6, at [38].
34 At [79].
35 At [102].
36 At [102].

[29] The first part of the argument for the appellants relies on the fundamental nature of the right to vote. In that context, it is submitted that the age at which a person becomes entitled to vote is linked with the entitlement to vote. Because s 74 confers the entitlement or qualification to vote, it should be construed as encapsulating the right to vote.

[30] This argument, which is new, makes a distinction between those aspects of s 74 dealing with the fundamental aspects of the right to vote (which are said to be entrenched) and those matters which serve to regulate the modalities of voting. It is said those modalities are not entrenched.

[31] The second submission is that the limits on prisoners' voting rights were universally agreed by Parliament in 1993 and that set a standard for what later restrictions on the right are permissible absent change by a supermajority.

[32] The next, and alternative, submission is that all of s 74 is entrenched. Any changes to the qualification for registration set out in s 74 are accordingly protected by s 268. Again, on this basis also, the 2010 Amendment was not validly enacted.

[33] In relation to these submissions the appellants draw in aid the direction in s 6 of the Bill of Rights to prefer an interpretation consistent with the Bill of Rights; the common law principle statutes should be interpreted consistently with fundamental rights;[37] and the ICCPR. Mr Francois for the first and second appellants also relied on the principles of the Treaty of Waitangi. Mr Francois further submitted that there were breaches of the Crown Entities Act 2004 and of the requirements of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

[34] The first respondent's primary contention is that the wording of the statute makes it plain that what is entrenched is only the minimum voting age. In addition, it is submitted that s 6 of the Bill of Rights is not applicable because s 268 is a manner and form provision.

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[37] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.

The interpretation of s 268(1)(e)

[35] We deal first with the text.

The statutory language of s 268(1)

[36] Two main points can be made about the text. First, in s 268(1)(e) the words "so far as those provisions prescribe 18 years as the minimum age" qualify the reference to s 74. Those words must refer to all three provisions, ss 74, 3(1) and 60(f), to give some meaning to the phrase "so far as" especially when coupled with "those". That follows because neither s 3(1) nor s 60(f) "prescribe 18 years" as the minimum voting age.[38] Rather, reading the two provisions with the relevant part of s 74 has the effect of prescribing the minimum voting age. In addition, the natural meaning of the words "so far as" before the words "those provisions" suggests a carve out of an aspect of s 74, namely, the ability to register as an elector on turning 18 years or, as in the case of members of the Defence Force who are outside New Zealand, where he or she will be 18 years or older on polling day.[39]

[37] Further, s 74(1) is expressed to be "subject to the provisions of this Act". Some meaning has to be given to these words. Other provisions in the Act, such as s 47 dealing with the qualifications for candidacy as a member of Parliament, s 60 dealing with who may vote, and s 80 which sets out the matters which disqualify a person from voting, can cut away the qualifications in s 74.[40] As the Court of Appeal put it, unless those other provisions are all impliedly entrenched, which seems unlikely, amendment to those other provisions could "effectively side-step the entrenchment of s 74".[41] If s 60 was impliedly entrenched, there would have been no need to refer to s 60(f) in s 268(1)(e).[42] An interpretation of s 268(1)(e) as limited to protecting the minimum voting age accordingly makes sense of these prefatory words to s 74(1).

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38 See the discussion in the Interim relief judgment, above n 4, at [74]–[75]; HC judgment, above n 5, at [107]; and CA judgment, above n 6, at [74].

39 We agree with the submission for the Attorney-General that the words "or to vote" at the end of s 268(1)(e) are needed to include members of the Defence Force not otherwise qualified to be registered but to whom s 60(f) applies.

40 The Solicitor-General accepted that compliance with the requirements of s 268(1)(e) could not be avoided by simply amending the voting age via a provision other than ss 3(1), 60(f) and 74.

41 CA judgment, above n 6, at [80].

42 At [80]; and see [82].

[38] Part of the appellants' response to this concern is the submission that only certain parts of s 74 are entrenched. In particular, it is said, those parts regulating the modality of the franchise can be distinguished from those limits on right to vote which have the effect of abrogating the right. This argument is based on the premise that the age of entitlement to vote is so inextricably linked with the entitlement to vote itself that the entrenchment must apply to the latter.

[39] The distinction sought to be drawn does not withstand analysis in the present context. It requires the Court to engage in line drawing where there is no suggestion that was intended. To give one example, would a distinction be drawn between the conferral of the ability to register and to vote on New Zealand citizens (which is protected in s 12 of the Bill of Rights) and the restrictions on qualification in s 74 deriving from the residency requirements which may also affect the rights of New Zealand citizens?[43] There is nothing on the face of s 268(1)(e) to suggest that these types of distinctions are to be drawn.

[40] The appellants rely in this respect on *Sauvé v Attorney-General of Canada*[44] and on *Hirst v United Kingdom (No 2)*.[45]

[41] *Sauvé* was a challenge to a provision in the Canada Elections Act[46] denying the right to vote to those prisoners serving a sentence of two years or more on the basis of inconsistency with, relevantly, the right to vote in s 3 of the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada allowed an appeal against a decision of the Federal Court of Appeal which had upheld the provision on the basis the infringement of the right to vote was justifiable in a free and democratic society. McLachlin CJ delivering the judgment for the majority noted the right to vote was "fundamental" to "democracy and the rule of law" and so could not "lightly" be set aside.[47]

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43 The appellants' approach also raises a question about the treatment of s 74(2) which deals with residential qualifications in the period after a writ has been issued for an election.

44 *Sauvé v Attorney-General of Canada* 2002 SCC 68, [2002] 3 SCR 519.

45 *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR).

46 Canada Elections Act SC 2000 c 9, s 51(e).

47 *Sauvé*, above n 44, at [9].

[42] Mr Cooke QC for Mr Taylor relies on the distinction drawn by the Chief Justice in that case in the context of a comparison between youth voting restrictions and limits on the rights of prisoners to vote.[48] The former were described as "regulating a modality of the universal franchise" whereas inmate disenfranchisement was seen as treating certain prisoners as an "excluded class" who were "unworthy to vote".[49] Similarly, reference is made to the contrast drawn in *Hirst* between a minimum age requirement and the ban on prisoner voting which was challenged in that case. The former, it was said, "may be envisaged with a view to ensuring the maturity of those participating in the electoral process".[50] The ban on convicted prisoners voting was, on the other hand, found to be inconsistent with the protection of the right to vote in the European Convention on Human Rights.[51]

[43] The distinction relied on by the appellants which is made in both those cases is one made in the context of considering whether the limiting provision is nonetheless justified. In *Sauvé*, for example, the Government accepted the legislation limiting prisoners voting rights was inconsistent with the right to vote in the Charter but maintained it was a justifiable limit. That inevitably required the Court to consider the proportionality of the limit in a way similar to that discussed in the New Zealand context in *R v Hansen* in determining whether the statutory presumption of the purpose of supply or sale of controlled drugs was a justified limit on the presumption of innocence.[52] In the present case, where it has been accepted the 2010 Amendment is inconsistent with the right to vote and not a justified limit in terms of s 5 of the Bill of Rights, the dichotomy Mr Cooke relies on does not advance consideration of s 268(1)(e).[53]

[44] The fact that there are restrictions on the right to vote in the Act also tells in favour of there not being a more general entrenchment of the right to vote which is

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48 Counsel for Ms Ngaronoa and Ms Wilde largely adopted the submissions advanced on behalf of Mr Taylor so little distinction needs to be drawn between the appellants' arguments.

49 At [37].

50 *Hirst*, above n 45, at [62].

51 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS 9 (opened for signature 20 March 1952, entered into force 18 May 1954), art 3 obliges the contracting parties "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

52 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

53 In the *Taylor* (declaration of inconsistency) proceeding, above n 3, there was no challenge to the finding of inconsistency.

clearly seen as subject to limitations not specifically mentioned in s 268. The s 12 right was never without qualification. There is nothing in the wording or, as will become apparent, the purpose, to suggest that those were intended to be immutable or the only possible limitations.

[45] The second point that can be made about the text of s 268(1)(e) is that the logical way to achieve the result contended for by the appellants would be to separate out the reference to ss 3(1) and 60(f) from s 74. Instead, as the Court of Appeal observed, the word "and" is used between each of the references (and the definition in s 3(1), and section 60(f)) which suggests a link between the age qualification in s 74 and the provisions which follow.[54]

[46] This last point gains some impetus from the fact that, in this respect, s 268(1)(e) follows a different pattern from the other parts of s 268(1). Each of s 268(1)(a) to (d) and (f) sets out the reserved section and then gives a short description of the subject matter.[55] For example, s 268(1)(b) reads: "section 28, relating to the Representation Commission" and s 268(1)(d) reads "section 36, relating to the allowance for the adjustment of the quota". Viewed against this pattern, s 268(1)(e) distinguishes the part of s 74 which is entrenched by adding the rider "so far as those provisions prescribe 18 years as the minimum" voting age.

[47] As the Court of Appeal said:[56]

> If Parliament intended to entrench all of s 74, it could be expected to have done so more clearly. Following the general style of s 268(1), we would expect to see s 74 separated out in its own paragraph, with the usual description of subject matter. And even if that simple drafting technique was not followed, if s 74 was intended to be treated differently from ss 3(1) and 60(f) …, then, consistent with the overall style of s 268(1), we would expect to see the description "relating to the qualification of electors" following the mention of "s 74" in the paragraph … .

[48] We conclude that the only possible interpretation of the text is that s 268(1)(e) entrenches only the minimum voting age. This approach is also consistent with the legislative history of s 268 to which we now turn.

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54 CA judgment, above n 6, at [71].
55 The Court of Appeal makes the same point: at [77].
56 At [79].

The legislative history

[49] The predecessor to s 268 of the Act was s 189 of the Electoral Act 1956 (the 1956 Act). Section 189 provided as follows:

> **189. Restriction on amendment or repeal of certain provisions—**
>
> (1) This section applies to the following provisions of this Act (hereinafter referred to as reserved provisions), namely:
>
> (a) Section twelve, relating to the duration of the House of Representatives:
>
> (b) Section fifteen, relating to the Representation Commission:
>
> (c) Section sixteen, and the definition of the term "European population" in subsection one of section two, relating to the division of New Zealand into European electorates after each census:
>
> (d) Section seventeen, relating to the allowance for the adjustment of the quota:
>
> (e) Subsection one of section thirty-nine, and the definition of the term "adult" in subsection one of section two, and paragraph (e) of section ninety-nine, so far as those provisions prescribe twenty-one years as the minimum age for persons qualified to be registered as electors or to vote:
>
> (f) Section one hundred and six, relating to the method of voting.
>
> (2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—
>
> (a) Is passed by a majority of seventy-five per cent of all the members of the House of Representatives; or
>
> (b) Has been carried by a majority of the valid votes cast at a poll of the electors of the European and Maori electoral districts:
>
> Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

[50] Section 39(1), referred to in s 189(1)(e), equated to s 74 of the current Act and dealt with the qualification for registration as an elector. Section 39(1) relevantly read as follows:[57]

> (1) Subject to the provisions of this Act every adult person shall be qualified to be registered as an elector of an electoral district if—
>
> (a) He is a British subject; and
>
> (b) He is ordinarily resident in New Zealand; and
>
> (c) He has at some period resided continuously in New Zealand for not less than one year; and either
>
> [resided in that electoral district for various periods of time] … .

[51] Section 2(1) defined "adult" as meaning "of or over the age of twenty-one years".

[52] Section 99(e) was in similar terms in material respects to s 60(f) and stated:

> **99. Who may vote—**Subject to the provisions of this Act, the following persons, and no others, shall be qualified to vote at any election in any district, namely:
>
> …
>
> (e) Any serviceman who is outside New Zealand, if he is or will be of or over the age of twenty-one years before polling day, and his place of residence immediately before he last left New Zealand is within the district.

[53] Two key points can be made about s 189 of the 1956 Act. The first point is that the same features were entrenched, that is, the term of Parliament, the Representation Commission, the division into General electorates, the allowance for the adjustment of the quota, the minimum voting age, and the method of voting. The second point about s 189 is that it followed the same pattern in terms of sentence structure as s 268 does.

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[57] Section 39(2) and (3) of the Electoral Act 1956 dealt with qualifications for the Maori and European electoral districts and subss (4) and (5) with consequential references to the respective electoral districts.

[54] Against that background, it is of some relevance that at the time of introduction, it was clear the intention was to entrench only the minimum voting age.[58] The Hon John Marshall noted that the reserved provisions were "six in number", namely, "the provisions relating to the life of Parliament, the method of voting, the constitution and order of reference of the Representation Commission, the age of voting, the total population, and the tolerance of five per cent".[59] The same approach has been adopted in subsequent debates.[60]

[55] There were also some questions then, and in later debates, as to why the scope of entrenchment was not broader.[61] For example, the Hon Rex Mason said:[62]

> Clause 189A crystallises the law and tells us it is not to be altered. Paragraph (e) has been mentioned but not clarified. Why is the restriction to twenty-one years as the minimum age for persons qualified to be registered as electors or to vote, alone crystallised in the Bill? Why are not other provisions put beyond the power of ready alteration?
>
> There is only one point which would be a practical one. It is a long time since we spoke of property qualifications, but does not this admit of the ready introduction of property qualifications? I know how out of date such a qualification would appear today, but while we are establishing the law this restriction seems rather emphatic and rather aggressively points to the omission of the provisions to ensure that we could not have property qualifications introduced, thereby completely frustrating the whole basis of this Bill. Such a provision would, of course, count for more than all the other provisions of the Bill put together. I should like to know what is the significance of that. There may be a very good reason for the form of the clause but I should like to have it clearly set out.[63]

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58 The Electoral Bill 1956 (89–1) as introduced did not include any entrenched provisions; their addition was recommended by the Electoral Bill Committee. The Bill was introduced on 12 October 1956 and passed later that month: (12 October 1956) 310 NZPD 2450; and (26 October 1956) 310 NZPD 2839.

59 (26 October 1956) 310 NZPD 2839. In his memoirs, the Rt Hon Sir John Marshall noted the concept of entrenchment was introduced so that "future governments would not change the basic electoral laws", including "the age at which a person becomes entitled to vote, …": John Marshall *Memoirs – Volume One: 1912 to 1960* (Collins, Auckland, 1983) at 247.

60 (20 May 1975) 397 NZPD 1188 in debate on the Electoral Amendment Bill 1975 (33) amending the predecessor to s 74. By contrast, in the debates on the Electoral Reform Bill 1993 (209) the then Attorney-General, the Hon Paul East, described the entrenched provisions as including "the qualification of electors to vote": (3 August 1993) 537 NZPD 17140.

61 For example, in the context of debates on the Electoral Amendment Bill 1975 (33) there was discussion about the lack of entrenchment of the provisions relating to the Maori seats: (13 June 1975) 398 NZPD 2123–2124.

62 (26 October 1956) 310 NZPD 2845.

63 See also Hon Ralph Hanan, (26 October 1956) 310 NZPD 2850, who queried the failure to entrench provisions relating to the Maori seats.

[56] We interpolate here that, at the time of their introduction, the provisions were seen as having moral rather than legal force. Nonetheless, Professor Andrew Geddis notes that Parliament has "acted unanimously on each of the four occasions it has amended the entrenched provisions".[64] On other occasions, proposals to amend the entrenched provisions "including extending the term of Parliament to four years" were not pursued when it became apparent unanimity would not be obtained.[65]

[57] The Royal Commission on the Electoral System described the reserved provisions as capturing the minimum voting age but the Commission said that there was some uncertainty about the scope of that reserved provision.[66] The appellants can accordingly point to the absence of any attempt to clarify the position in the 1993 Act because the same formulation was used. Against that, it is clear that the Commission's recommendation for a more expansive protection of the qualifications to vote was not adopted.[67]

[58] Accordingly, the legislative history supports the approach adopted in the Courts below.[68] We turn, finally, to the legislative purpose.

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64 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 46.

65 At 46. Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland, 2017) at 446 cite the one situation where a reserved provision has been amended by a contested vote (79 to 13, four more votes than required to achieve a 75 per cent majority), namely, the Electoral Reform Bill 1995 (81) which amended s 168 relating to the method of voting. See also Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 [Royal Commission Report] at [9.175].

66 Royal Commission Report, above n 65, at [9.177]–[9.179], and Recommendation 70.

67 Recommendation 70 recommended entrenching "(a) the elements of the right to vote and to be a candidate". The Electoral Law Committee considering the Royal Commission report also recommended entrenchment of "any restriction or limitation of the elements of the right to vote and to be a candidate": Electoral Law Committee "Inquiry into the Report of the Royal Commission on the Electoral System" [1987–1990] XVIII AJHR I17B at 122–123.

68 The legislative practice since 1956 has been to treat the entrenchment of s 39, and now s 74, as extending only to the minimum voting age. Hence, for example, the reduction of the minimum voting age from 21 to 20 years in 1969 and from 20 to 18 years in 1974 were the subject of unanimous agreement: (20 August 1969) 362 NZPD 2107; and (19 September 1974) 394 NZPD 4368–4369. See Geddis, above n 64, at 46; and Electoral Amendment Act 1969, s 2, and Electoral Amendment Act 1974. Changes to prisoners' voting rights by amendment to the disqualification provision have not been treated as engaging s 268: Electoral Amendment Act 1975, s 18(2) (all prisoners were permitted to vote); and Electoral Amendment Act 1977, s 5, which reinstated the disqualification on prisoner voting.

The purpose of entrenchment

[59] The short point that can be made about the legislative purpose is that entrenching only the minimum age entitlement is consistent with the legislative purpose. That is in the sense that it is clear the legislature chose certain matters to entrench and intentionally did not entrench all aspects of the right to vote.

[60] The overall purpose of s 268 is captured by the statement of the Hon John Marshall on the introduction of the predecessor to s 268 found in the 1956 Act. Mr Marshall, then Attorney-General and Minister responsible for the Bill, described the move to entrenchment as "a genuine, … attempt to place the structure of the law above and beyond the influence of Government and party".[69] He continued:[70]

> Those reserved provisions, … are there to provide the best safeguard we can work out to protect what in the unanimous view of Parliament are essential safeguards for our democratic method of electing the people's representatives.

This observation remains apt given the scheme of the 1993 Act. As the historical commentary on the introduction of the entrenchment provision indicates, the reference to the intention to remove aspects of the electoral law from the reach of party political tinkering is important.[71] The historical material provides some context as to why the particular provisions identified in the initial Act and carried through to s 268 of the current Act were marked out. Two general themes can be identified from this material.

[61] The first of these general themes is that concerns were expressed in the lead up to the introduction of the 1956 Act about the vulnerability to change by political parties of matters regarded as constitutionally important. These concerns were highlighted by the abolition of the Legislative Council by the Legislative Council Abolition Act 1950. Neill Atkinson notes that the abolition of the Legislative Council "focused

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69 (26 October 1956) 310 NZPD 2839.

70 (26 October 1956) 310 NZPD 2840.

71 Alan McRobie "The Electoral System" in Philip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 312 at 343 refers to the entrenchment provision as "an important bulwark against hasty amendment". He states that "by entrenching these key provisions Parliament indicated, clearly, its desire to remove them from the partisan political arena": at 317. See also the history of electoral law prepared by the Department of Justice, Appendix A to the Royal Commission Report, above n 65, at [7.57]–[7.63]. The report notes that the only major area of contention revolved around the voting age: at [7.63].

renewed attention on the existing machinery of democracy".[72] The then National Government set up a Constitutional Reform Committee in 1950. The Committee recommended the establishment of a Senate and also discussed the value of entrenchment to provide some security for any newly established second chamber.[73]

[62] The second general theme that can be identified in the historical commentary is that there were concerns about the treatment of specific aspects of the electoral system and a desire to ensure that those matters were free from party political influence. Elizabeth McLeay, for example, discusses the extension of the parliamentary term in the course of World War I; the controversial extension of the term by a year in the course of the Depression by the United-Reform Coalition Government; and the further extension of the term by the Labour Government during World War II.[74] Another aspect of the electoral system which gave rise to controversy in the years leading up to the 1956 Act was the Representation Commission, its composition, how votes were weighted particularly vis-à-vis rural and urban voters and, as well, the operation of what is now the allowable variance in the quota.[75]

[63] Elizabeth McLeay discusses the controversies over these issues and then summarises the position in this way:[76]

> … the electoral issues that had divided the parties, but which they could also compromise upon, were included in Section 189 [the predecessor to s 268]. Thus, at least on these issues, the politicians of the 1950s decided to compromise and negotiate in an attempt to provide future electoral rule stability and, in so doing, protect their own interests. The other issues that found themselves under the entrenchment umbrella were those on which there was cross-party agreement, such as the parliamentary term, an unsettled issue since the 1930s, and the generally accepted measures of the 21-year-old age-eligibility provision and the secret ballot.

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72 Neill Atkinson *Adventures in Democracy: A History of the Vote in New Zealand* (University of Otago Press, Dunedin, 2003) at 166.

73 Constitutional Reform Committee "Reports of the Constitutional Reform Committee" [1952] IV AJHR I18 at 39–45.

74 Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018) at 85, and see also 67–73, 78–79, 88, 93, 99 and 122–124. Scott, above n 22, at 6 describes the entrenched provisions as encompassing "amongst other things the only constitutional subjects on which there has been bitter party controversy during this century"; see also McRobie, above n 71, at 315–317; and the history prepared by the Department of Justice, Appendix A to the Royal Commission Report, above n 65, at [7.49]–[7.52] and [7.63].

75 McLeay, above n 74, at 68–73; and McRobie, above n 71, at 315 and 317.

76 At 170.

[64] In light of this context, it is plain that the purpose was not to entrench all of the fundamental attributes of the right to vote. For example, s 12 of the Bill of Rights guarantees genuine periodic elections. The protection afforded to "periodic" elections is reflected in the entrenched provisions. But the requirement for "genuine" elections would capture a broad range of aspects of the statutory scheme, many of which are not entrenched.[77]

Does the Bill of Rights mandate a different interpretation?

[65] Plainly, s 268 is intended to make it more difficult to amend or repeal the reserved provisions and so give the matters reserved greater protection from amendment or repeal than other aspects of the electoral system. However, when the matter is considered in context, it is clear that it was not the parliamentary intention to entrench anything other than the minimum voting age in s 268(1)(e).[78] We accordingly agree with Fogarty J that the "natural and only" meaning is that s 268(1)(e) only entrenches the minimum voting age.

[66] We rely for this conclusion on the discussion of the text and the legislative history, above, which is supported by the purpose albeit in the more limited sense identified. The qualifications set out in s 74 enable a person to register and so to vote. Accordingly, while there is an obvious link between the qualification and the right to vote, s 268(1)(e) does not entrench anything other than the voting age. Even if s 6 of the Bill of Rights applies, there is no other possible interpretation of s 268(1)(e).[79] On this approach, the other matters relied on by the appellants, such as the ICCPR and the

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77 Steven Wheatley "Democracy in International Law: A European Perspective" (2002) 51 ICLQ 225 at 238 refers to genuine elections as those that "reflect accurately the will of the people, and protect the electorate from government pressure and fraud"; and see Petra Butler "Democratic and Political Rights" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 481 at 520–521.

78 See *R v Hansen*, above n 52, at [61] per Blanchard J.

79 We do not therefore need to decide on the correctness of the approach of the Attorney-General that s 6 did not apply because this is a manner and form provision. Nor do we need to decide if the Court of Appeal's approach to s 6 in this case or in *Terranova*, above n 32, is correct.

common law principle of legality, do not assist. The same point applies to the argument based on the principles of the Treaty of Waitangi.[80]

[67] A further point relates to the importance of laws affecting the democratic process. The Supreme Court of the United States, for example, has adopted a heightened standard ("strict scrutiny") of review in cases involving democratic processes.[81] The concern to ensure and promote protection for democratic process is reflected in New Zealand by the protections afforded to that process in the Bill of Rights. In the present context, given our view of the meaning of s 268(1)(e) we do not consider this aspect adds anything further.

[68] We add that there are other available means of protecting, and so advancing, the electoral rights protected by s 12 of the Bill of Rights, including the Electoral Act itself.[82] The following examples suffice: s 197 which creates an offence of interfering with or influencing voters;[83] ss 203 and 204 which deal with obligations on officials and others to maintain secrecy;[84] and ss 215 to 218 dealing with corrupt practices, such as treating and undue influence.[85]

[69] The availability of these remedies also tells against adopting what would be an otherwise unavailable meaning of s 268(1) simply to ensure the particular manner and form or procedural protection provided by s 268 is available. These remedies do not deal directly with the adult franchise. But they protect aspects of the right to vote

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80 Leave to appeal was not granted on the argument, addressed in the Court of Appeal, based on discrimination. Nor do the arguments there were breaches of the Crown Entities Act 2004 and of the requirements of the UN Standard Minimum Rules for the Treatment of Prisoners advance the case.

81 See, for example, *Harper v Virginia State Board of Elections* 383 US 663 (1966) which involved an attempt to implement a poll tax to participate in the Virginia state election; *Anderson v Celebrezze* 460 US 780 (1983) involving an attempt to create an early deadline for third party candidates to have their names included on the ballot for Presidential elections; and *Hunter v Underwood* 471 US 222 (1985) which concerned an Alabama statute that disenfranchised persons convicted of crimes involving "moral turpitude".

82 These provisions are discussed in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [12.13.1]. The authors also note that the right to vote has been seen as not self-executing: at [12.6.1] and [12.6.3]. This notion may underlie the Attorney-General's submission that the right to vote is instantiated by but not created by the Electoral Act.

83 See also s 197A (interfering with or influencing advance voters) and s 199A (publishing false statements to influence voters).

84 A person who commits an offence against s 203 is guilty of a corrupt practice: s 204.

85 See also ss 219–222 dealing with illegal practices.

without which the eligibility to vote can be undermined. It is also helpful to emphasise that s 268 gives procedural protection. It does not distinguish between lowering or raising the minimum age to vote, for example, even though one would infringe on the right to vote and the other broaden that right.

Conclusion

[70] For these reasons, we consider s 268(1)(e) is confined to protection of the minimum voting age. We therefore dismiss the appeal. It is accordingly not necessary for us to consider relief and, in particular, the enforceability of s 268. On that point, the Solicitor-General conceded that if s 268(1)(e) was engaged by the 2010 Amendment, the Court could declare the Amendment invalid. The enforceability of entrenchment provisions like s 268 has been the subject of debate over a number of years both in New Zealand and in comparable jurisdictions.[86] Those authorities indicate the pendulum has swung in favour of enforceability but we would prefer that issue to be resolved after argument on the point.

Costs

[71] Given the public interest nature of the appeal, costs should lie where they fall. We make no order as to costs.

ELIAS CJ

[72] The innovation of entrenchment introduced in the Electoral Act 1956 was retained in the Electoral Act 1993 which introduced mixed member proportional representation. By entrenchment, "basic provisions of the Electoral Act"[87] were protected against amendment or repeal except by vote of 75 per cent of all the members of the House of Representatives or majority approval in a referendum of electors.

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86 For example, see *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262; *Attorney-General for New South Wales v Trethowan*, above n 21; *R v Mercure* [1988] 1 SCR 234; *Re Hunua Election Petition* [1979] 1 NZLR 251 (SC) at 298; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13], [16] and [17]; and *Westco Lagan v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].

87 As they were described by the Electoral Law Committee of the House of Representatives in recommending adoption of the Royal Commission on the Electoral System's recommendations: Electoral Law Committee "Inquiry into the Report of the Royal Commission on the Electoral System" [1987–1990] XVIII AJHR I17B at [15.7].

[73] The "basic provisions" entrenched were described by the Electoral Law Committee of the House of Representatives as those dealing with:[88]

> (a) the term of Parliament;
>
> (b) the method for the determination of the number of seats and their boundaries, including the provisions for the constitution and functioning of the Representation Commission;
>
> (c) the qualification of electors;
>
> (d) the method of voting.

[74] The "qualification of electors" is prescribed by s 74 of the Electoral Act 1993. Its terms are set out below at [117]. In summary, and "subject to the provisions of this Act", s 74 qualifies as an elector able to be registered "every adult person" who is either a New Zealand citizen or permanent resident, subject to additional residency requirements for the particular electorate. "Adult" is defined generally for the purposes of the Act by s 3(1) as "a person of or over the age of 18 years", "unless the context otherwise requires".[89] Only registered electors may vote and are eligible to become members of Parliament.[90]

[75] Entrenchment is provided by s 268 which prevents the "reserved provisions" of the Act identified in s 268(1) being amended or repealed except by 75 per cent majority of "all the members of the House of Representatives" or by a majority vote at referendum.[91] The principal issue on the appeal is the meaning of s 268(1)(e). The appellants say it reserves all qualifications for electors contained in s 74. The respondents say it reserves only the age of voting. Section 268(1)(e), the only paragraph in s 268(1) dealing with the topic of the general qualification of electors and the voting rights of the New Zealand Defence Force, reserves:

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88 At [15.7.1].

89 The voting age in New Zealand was 21 until 1969, when it was lowered to 20. In 1974 the age was lowered to 18, where it has remained.

90 Electoral Act 1993, ss 60 and 47 respectively.

91 The Royal Commission on the Electoral System in 1986 recommended that the entrenchment provision should itself be entrenched. It did not however regard double entrenchment as "crucial": Report of the Royal Commission on the Electoral System "Towards a Better Democracy" [1986–1987] IX AJHR H3 at [9.188]. In part its recommendation was made on the assumption that the traditional reluctance to bind Parliament in this way would be overtaken by then-current proposals in the draft Bill of Rights (which would have prevailed against inconsistent subsequent legislation). The New Zealand Bill of Rights Act 1990 was however enacted as ordinary legislation which yields to unmistakeable inconsistent legislation. Double entrenchment was not adopted in the Electoral Act 1993.

(e) section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

[76] I consider that s 268(1)(e) in its own terms reserves all qualifications for electors contained in s 74 and, in addition, makes it clear that the age of qualification (defined in s 3(1) as 18 years) is reserved along with the age separately specified in s 60(f) as that at which members of the New Zealand Defence Force who are serving overseas may vote. As is further explained below at [121]–[138], I consider that the natural meaning of s 268(1)(e) is that it entrenches all qualifications identified in s 74 but only so much of ss 3(1) and 60(f) as set 18 years as the qualifying age for registration of electors and the eligibility to vote of overseas servicemen. I reach that conclusion on the text and structure of s 268(1)(e) but I consider it is also the meaning required by the wider context provided by the background of electoral rights and is not inconsistent with the legislative history, which has been one of unresolved doubt as to the meaning of s 268(1)(e). In this view I differ from the Courts below and from the interpretation preferred by the other members of this Court.

Qualification, disqualification and entrenchment

[77] Section 268(1)(e) of the Electoral Act 1993 is in the same terms as the former s 189(1)(e) of the Electoral Act 1956 which similarly entrenched the voting qualifications then contained in s 39 of that Act. Section 39(1) of the Electoral Act 1956 provided that "subject to the provisions of this Act every adult person shall be qualified to be registered as an elector of an electoral district if" a British subject ordinarily resident in New Zealand who had "at some period resided continuously in New Zealand for not less than one year" and within the electoral district for not less than three months (with an exception for those whose employment entailed travel).

[78] Qualification under s 74 of the Electoral Act 1993 continues to require minimum periods of residency within New Zealand and within an electorate. It provides that "subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if" a New Zealand citizen or a permanent resident who has "at some time resided continuously in New Zealand for a period of not less than 1 year" and has resided either continuously within the electoral

district for one month or (if the person has never resided continuously in any one electoral district for one month) the electoral district is the last in which he or she has resided.

[79] Section 74 is located in Part 5 of the Act, which is headed "Registration of electors". Most of the provisions in Part 5 are concerned with rules and procedures for maintaining the electoral roll. Section 74 however is located under the subheading "Qualification of electors". The heading within s 74 is also "Qualification of electors". Since under s 60 only those who are qualified to be registered may vote in elections, elector qualification under s 74 is the gateway for "who may vote".[92]

[80] In addition to s 74, the subpart of Part 5 in which it is located contains ss 75–81. Section 75 prohibits registration in respect of more than one electoral district. Sections 76–79 are concerned with exercise of the option to register on the Maori roll and to transfer between the general and the Maori rolls. Sections 80 and 81 are concerned with disqualification from registration.

[81] Section 81 is machinery for notification to the Electoral Commission of one basis of disqualification, that of prisoners.[93] Section 80 is headed "Disqualifications for registration". It disqualifies from registration three categories of persons who are otherwise qualified as electors. Since without registration an elector cannot cast a vote, s 80 amounts to a disqualification from voting which is an exception to the general principle of universal suffrage adopted in successive Electoral Acts since 1893.[94] To the extent that such disqualification applies to New Zealand citizens, it is also a limitation on the right to vote contained in s 12 of the New Zealand Bill of Rights Act 1990.

[82] The first category disqualified under s 80 is identified by absence from New Zealand. New Zealand citizens who are not in New Zealand and who have not been

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92 Section 60 is headed "Who may vote".

93 Section 81 provides that where a person who has been sentenced to imprisonment is received into prison, the prison manager, within seven days, is to forward to the Electoral Commission a notice showing the name, previous address and date of birth of that person, as well as the name and address of the prison.

94 The Electoral Act 1893 extended the vote to all adult women, marking the beginning of universal suffrage in New Zealand.

in New Zealand within the last three years are disqualified under s 80(1)(a). Permanent residents who are not in New Zealand and who have not been in New Zealand within the last 12 months are disqualified under s 80(1)(b). Equivalent disqualifications according to presence in New Zealand were contained in s 42(1)(a) and (b) of the Electoral Act 1956 as amended by the Electoral Amendment Act 1980.

[83] The second category disqualified under s 80 of the 1993 Act comprises prisoners or those detained for mental health treatment for criminal justice reasons. As originally enacted in 1993, the disqualification of prisoners and those detained for mental health purposes arising out of criminal offending was confined to those detained for three years or more, as the Royal Commission had recommended. Provisions providing for disqualification had earlier been contained in the Electoral Act 1956.[95] The shifting provisions for disqualification of sentenced prisoners are further described at [90]–[98].

[84] The final category disqualified from registering as electors are those subject to orders for corrupt electoral practices.

[85] Since enactment of the original entrenchment provision in the Electoral Act 1956, there have been four amendments treated as amendments of reserved provisions.[96] All were passed in amending legislation that was passed by votes meeting the threshold of 75 per cent of the members of the House of Representatives.

[86] There have been two amendments to expand the disqualification of prisoners since 1956. The first, in 1977, was to reinstate the disqualification of all prisoners after a brief period of full enfranchisement implemented by the Electoral Amendment Act 1975. The second was the 2010 amendment by ordinary majority to s 80 of the Electoral Act 1993 expanding the disqualification of prisoners serving sentences of

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95 Section 42.

96 The Electoral Amendment Acts of 1965, 1969, 1974 and 1980. The 1965 Amendment Act amended the division of New Zealand into European electorates after each census, provided for in s 16 of the Electoral Act 1956, a reserved provision. Both the 1969 and 1974 Amendment Acts changed the definition of adult (from 21 to 20 in 1969 and from 20 to 18 in 1974). These amendments altered s 2(1) which was a reserved provision in the 1956 Act. The 1980 Amendment Act made significant changes to the 1956 Act, including to ss 16 and 39, both of which were reserved provisions. See Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 45, n 97.

three years or more or those detained for three years or more in mental institutions for criminal justice reasons to disqualify all serving prisoners.[97] The amendment was passed by ordinary majority apparently on the assumption that such amendment to s 80 did not affect the provisions entrenched by s 268(1)(e). There is no reference to s 268(1)(e) or to entrenchment in the Hansard debates relating to the 2010 amendment to prisoner disqualification under s 80.

[87] As currently in force, s 80(1) provides:

> **80 Disqualifications for registration**
>
> (1) The following persons are disqualified for registration as electors:
>
> (a) a New Zealand citizen who (subject to subsection (3)) [exempting public servants, members of the Defence Force, and others] is outside New Zealand and has not been in New Zealand within the last 3 years:
>
> (b) a permanent resident of New Zealand (not being a New Zealand citizen) who (subject to subsection (3)) is outside New Zealand and has not been in New Zealand within the last 12 months:
>
> (c) a person who is detained in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a secure facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and to whom one of the following applies:
>
> (i) the person has been found by a court or a Judge to be unfit to stand trial within the meaning of the Criminal Procedure (Mentally Impaired Persons) Act 2003, or has been acquitted on account of his or her insanity, and (in either case) is detained under an order or direction under section 24 or section 31 or section 33 of that Act or under the corresponding provisions of the Criminal Justice Act 1985 and has been so detained for a period exceeding 3 years:
>
> (ii) the person has been found by a court, on conviction of any offence, to be mentally impaired, and is detained under an order made under section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or section 118 of the Criminal Justice Act 1985, and has been so detained for a period exceeding 3 years:

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97 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 4.

(iii) the person is subject to, and has for a period exceeding 3 years been subject to, a compulsory treatment order made following an application under section 45(2) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or a compulsory care order made following an application under section 29(1) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:

(iv) the person is detained under section 46 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, and is a person to whom paragraph (d) would otherwise apply:

(d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010:

(e) a person whose name is on the Corrupt Practices List made out for any district.

[88] The Electoral Law Committee which considered the report of the Royal Commission recommended that "any restriction or limitation" on the right to vote and to be a candidate should be entrenched in addition to the entrenchment of the qualifications for registration recommended by the Royal Commission.[98] The entrenchment of the disqualification provision was not a recommendation made by the Royal Commission itself and it was not adopted in the 1993 Act. As explained further at [157]–[158] I think the idea of entrenching s 80 was misconceived and that it is unsurprising that the Royal Commission on the Electoral System had not thought to recommend it. But for present purposes it is sufficient to note that s 80 is not one of the reserved provisions identified in s 268(1) of the Electoral Act 1993. It was however enacted as part of the Electoral Act 1993 by unanimous vote.

[89] If s 74 is an entrenched provision, a related question on the appeal is whether the addition or expansion to any disqualification under s 80 constitutes amendment of the qualification of "every adult person" who fulfils the citizenship and residential requirements in s 74. As I indicate below, I am of the view that additional disqualification or expansion of an existing disqualification (which is equivalent to the imposition of additional disqualification) is inevitably an amendment of what I consider to be the entrenched qualification of electors contained in s 74. I did not

98 Report of the Electoral Law Committee at [15.7.1].

understand the first respondent to suggest otherwise if, contrary to the principal contention, s 74 is entrenched and not simply the age of voting.

History of prisoner disqualification from registration as electors

[90] The disqualification of serving prisoners from registering as electors has changed under the electoral legislation from time to time. There has been some such restriction since enactment of the New Zealand Constitution Act 1852 (Imp). The New Zealand Constitution Act disqualified "aliens" and those convicted of "any treason, felony, or infamous offence, within any part of Her Majesty's dominions", unless pardoned or until completion of the sentence imposed.[99] The restriction of disqualification to those convicted of felonies meant that not all prisoners were excluded from registration.

[91] When universal male suffrage was introduced in 1879 the disqualification of prisoners was extended for one year following release from detention.[100] The Electoral Act 1893, which extended the franchise to adult women, removed the 12 month post-release disqualification for prisoners and disqualified only current sentenced prisoners convicted of offences punishable by imprisonment for "one year or upwards".[101] Disqualification of serving prisoners was carried over into the Electoral Act 1905 and the Electoral Act 1927.[102]

[92] Section 39 of the Electoral Act 1956 qualified all adult "British subject[s] … ordinarily resident in New Zealand" who fulfilled other residency requirements similar to those now contained in s 74. Section 42 of the Electoral Act 1956 disqualified persons in respect of whom reception orders under the Mental Health Act 1911 were in force, all those "detained pursuant to convictions in any penal institution", and those whose names were on the "Corrupt Practices List".

[93] The Electoral Amendment Act 1975 revoked the citizenship requirement for qualification, making qualification depend on permanent residency.[103] It also repealed

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99 New Zealand Constitution Act 1852 (Imp), 15 & 16 Vict c 72, s 8.
100 Qualification of Electors Act 1879, s 2(4).
101 Electoral Act 1893, s 8.
102 Electoral Act 1905, s 29(1); and Electoral Act 1927, s 32.
103 Electoral Amendment Act 1975, s 16(1).

the disqualification of prisoners altogether.[104] The 1975 amendment to the Electoral Act 1956 also removed disqualification for those subject to compulsory treatment orders for mental illness other than those detained in a penal institution who had been transferred to psychiatric hospitals as special patients under s 43 of the Mental Health Act 1969.[105] But in 1977, by amendment to the 1956 Act passed by ordinary majority, the disqualification of all those detained in penal institutions after conviction was reinstated once more.[106]

[94] The 1977 legislation did not reinstate the disqualification of those detained in mental hospitals except for those who were detained under penal provisions. There has been no disqualification for those detained for mental illness without a criminal basis for detention since 1975. As the Royal Commission commented, since 1975 "[t]he main rationale for the existing disqualification is therefore not any supposed lack of mental competence or responsibility indicated by general committal to a mental hospital but the need to treat criminally convicted mental patients in the same way as other prisoners, though its effects are wider than that".[107] The Royal Commission considered that if the disqualification of prisoners was to remain for those sentenced to three or more years' imprisonment, "then a similar disqualification should remain for those who, following criminal proceedings, have in fact been detained under the relevant sections of the Mental Health Act for a period of 3 or more years".[108]

[95] On the general topic of disqualification of prisoners, the Royal Commission pointed to the fact that such disqualification dated from a time when voting was considered a privilege, rather than a right. (It treated the right to vote as obtained with universal suffrage in 1893.) The Royal Commission considered that even when voting became recognised as a right, imprisonment "could still be looked on as the temporary exclusion of a person from the community".[109] It referred to the inconsistency of exclusion with then-contemporary penal theory and with the approach taken in Canada under the Canadian Charter of Rights and Freedoms. It was not impressed by

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104 Section 18(2).
105 Section 18(2).
106 Electoral Amendment Act 1977, s 5.
107 Report of the Royal Commission on the Electoral System at [9.22].
108 At [9.22].
109 At [9.17].

arguments of administrative inconvenience in affording the vote to prisoners or any parallel with exclusion of those disqualified because of corrupt electoral practices.[110] It pointed out that "imprisonment may not in itself be an adequate criterion of the seriousness of a crime when there are other alternative sentences or penalties which may be imposed":[111]

> Why, it may be asked, should a convicted prisoner be disqualified when someone fined for the same offence retains the vote? The sanction is also random in its timing, penalising only those who happen to be in prison at the time of the election and not those who are not.

[96] Despite these doubts, the Royal Commission acknowledged a widespread public view, with which it expressed some sympathy, that punishment for a serious crime against the community might properly involve a further forfeiture of some rights, such as the right to vote.[112] It therefore recommended that the disqualification should be retained for those who had been sentenced to a long term of imprisonment:[113]

> Long-term prisoners can be viewed in the same way as citizens absent overseas who lose their right to vote if they are away for more than a certain length of time. We therefore recommend that the disqualification should be limited to prisoners serving a sentence of imprisonment equal to or greater than the maximum period of continuous absence overseas consistent with retaining the right to vote, namely 3 years.

[97] As noted earlier, the Electoral Act 1993 followed this recommendation. As enacted, s 80(1) disqualified only those serving sentences of more than three years' imprisonment together with those subject to life sentences or sentences of preventive detention.

[98] The disqualification of prisoners from elector registration remained on the basis of the Royal Commission's recommendation until enactment of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010. It prevents

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110 The Royal Commission recommended retention of the disqualification of those found guilty of corrupt practices relating to an election: "People who have seriously abused their own and others' voting rights are appropriately penalised in this way by a temporary suspension of their rights. We agree with the general principle underlying this provision": at [9.16].

111 At [9.20].

112 At [9.21].

113 At [9.21].

registration by any person detained in a prison under sentence after commencement of the Act.

Issues on the appeal

[99] In the Courts below the appellants argued that the whole of s 74 was entrenched.[114] In response the Attorney-General contended, as is contended in this Court too, that the text and structure of s 268(1)(e) entrenches only the age of elector eligibility. On this basis the Solicitor-General argues that s 74 cannot be read to confer an "overarching right to vote" such as "is to be found in treaties and constitutions (including unwritten ones) or in bills of rights" and that the authorities from Canada and other jurisdictions cited by the appellants are not in point because they arise in a different constitutional context. The Solicitor-General argues that an interpretation of s 268(1)(e) which confines what is reserved to the age qualification "enables content to be given to the opening words of s 74(1) ('Subject to the provisions of this Act …')". That argument was successful in the High Court and Court of Appeal.

[100] In this Court, the principal argument for the appellants was that it was not necessary to establish that other qualifications contained in s 74 (based on citizenship and residency) were entrenched. The appellants suggested such elements were not essential to the right to vote and could be treated as machinery or "modalities" of the right, not in themselves entrenched or reserved. Such elements could be "regulated" by legislation passed in the usual manner, without 75 per cent majority. What was clearly entrenched they say, however, was the provision that "every adult person is qualified to be registered", an expression of universal suffrage they say is reserved by s 268(1)(e). The appellants point out that the limits on prisoner voting rights enacted in 1993 and following the recommendation of the Royal Commission were enacted in s 80 by unanimous vote in Parliament, setting a benchmark that could only be extended by a 75 per cent majority of the members of the House of Representatives. Only as a fall-back argument did the appellants put forward their original argument in the lower Courts that s 74 as a whole is entrenched by s 268(1)(e).

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[114] *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 (Fogarty J) [HC judgment]; and *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (Winkelmann, Asher and Brown JJ) [CA judgment].

[101] The primary argument advanced by the appellants is one of some difficulty. It requires some aspects of s 74 to be treated as essential qualification and others as mechanical provisions not subject to entrenchment. It is not easy to identify which fits into which category. It also strikes me as implausible that elements of qualification such as citizenship and permanent residency could be regarded as other than fundamental to qualification as an elector. For the reasons given in what follows and as already foreshadowed I am of the view that s 74 as a whole is entrenched by s 268(1)(e). I reach that conclusion on the text and structure of s 268(1)(e). But I consider it is a conclusion also consistent with the context of electoral rights and is not inconsistent with the legislative history.

[102] Although the removal of voting rights from all sentenced prisoners was in form an amendment of s 80 (by expansion of disqualification) rather than an amendment of s 74 (the qualification provision), the amendment in substance amends or abrogates the entrenched qualification contained in s 74. I consider that adding to the scope of the disqualification of prisoners amounts to alteration of the qualification provided by s 74 and that it required a majority of 75 per cent of the members of the House of Representatives to comply with s 268(1)(e). In effect this is what was submitted by the appellants based on the fact that s 80 was passed unanimously. I take the view that it follows not from the original unanimous vote (although that does add moral force) but from the structure and text of s 74 and its relationship with the disqualification provision, as explained at [157]–[158].

[103] I consider that the New Zealand Bill of Rights Act is an aid to interpretation of the Electoral Act, as Fogarty J in the High Court treated it but contrary to the view taken in the Court of Appeal. In particular, I do not accept that s 6 of the New Zealand Bill of Rights Act (which requires a rights-consistent meaning where such meaning can be given) has no application to a "manner and form" provision such as s 268. And I would not follow the Court of Appeal decision in *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*,[115] relied on by the Court of Appeal in the present case, if it is taken to suggest a general approach that s 6 of the New Zealand Bill of Rights Act does not require a preference for an interpretation that

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[115] *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

is more consistent with the protection of rights. I explain my reasons for this view briefly in what follows because I would reach the conclusion that all qualifications in s 74 are entrenched by s 268(1)(e) even without recourse to s 6 of the New Zealand Bill of Rights Act.

The relevance of rights in interpretation of s 268(1)(e)

[104] It is accepted by the Attorney-General in the present appeal that s 80 as amended in 2010 is inconsistent with the New Zealand Bill of Rights Act and is not a justifiable limitation in a free and democratic society. In this, the Attorney-General maintains the position taken in *Attorney-General v Taylor*.[116] The question for the Court is not therefore consistency with s 12 of the New Zealand Bill of Rights Act but rather whether the 2010 amendment of s 80 was in substance amendment of s 74 of the Electoral Act which required enactment by a majority of 75 per cent of the members of the House of Representatives. That turns on the meaning of s 268(1)(e) in which the context of electoral rights in itself is important.

[105] The importance of electoral rights is emphasised by recognition in the New Zealand Bill of Rights Act that the right to vote of each citizen is a fundamental human right and that limitations on rights are only acceptable if they can be "justified in a free and democratic society".[117] Implicit in s 5 as well as in s 12 of the New Zealand Bill of Rights Act is the notion that democracy is a foundational principle of the legal order. But indeed that is also inherent in New Zealand's democratic form of government under successive electoral legislation based on universal suffrage since 1893. The New Zealand Bill of Rights Act supports these processes of democracy which are essential for the legitimacy of law-making.

[106] The Court of Appeal in the present case applied its earlier decision in *Terranova Homes* in taking the view that s 6 of the New Zealand Bill of Rights Act could not be applied in the interpretation of s 268(1)(e) because it does not require preference for a tenable rights-consistent interpretation unless another tenable interpretation is "inconsistent" with the New Zealand Bill of Rights Act.[118] Since the

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116 *Attorney-General v Taylor* [2018] NZSC 104.
117 New Zealand Bill of Rights Act 1990, ss 12 and 5 respectively.
118 See CA judgment at [35]–[38].

Court considered a more restricted scope of the entrenchment section did not itself amount to breach of the right in s 12 and so could not be said to be "inconsistent" with the right to vote, it was of the view that s 6 did not require preference for an interpretation that provided better protection:

> [38] As noted in *Terranova*, the fact that an interpretation may offer less protection of a given right than that afforded in the Bill of Rights does not mean that that interpretation is one that is inconsistent with the Bill of Rights. Section 6 does not mandate an interpretation that replicates the extent of protection afforded under the Bill of Rights but rather only requires a preference for a rights-consistent interpretation over one that is inconsistent. Here, because neither interpretation can be seen as inconsistent with s 12 of the Bill of Rights, we do not consider s 6 is engaged.

[107] The Court of Appeal also considered that s 6 had no application to a "manner and form" provision such as s 268 because the manner of enactment in itself could not infringe a substantive right under the New Zealand Bill of Rights Act. It also regarded s 6 as applying only where a tenable interpretation would be inconsistent with a protected right. Otherwise, it thought, there would be "replication" of the protection under the New Zealand Bill of Rights Act.

[108] I am unable to agree with this approach. It mistakes the constitutional position occupied by both the New Zealand Bill of Rights Act and the Electoral Act.

[109] The rights contained in the New Zealand Bill of Rights Act are not set apart from the general legal order. They express values that have been legislatively identified as fundamental to it. As Cooke P pointed out in *R v Goodwin:*[119]

> The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance; … .

[110] The qualification of voters in the Electoral Act bears directly on the human right to vote. Section 268(1)(e) is properly understood as protecting that right and the principle of universal suffrage. The Electoral Act is the foundation of law-making legitimacy in a representative democracy. The very fact that the provisions in the Act regarded as fundamental have been the subject of entrenchment for more than 60 years is recognition of its status.

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[119] *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

[111] The New Zealand Bill of Rights Act, as its long title makes clear, was enacted "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". The purpose of protection and promotion means that interpretations which protect and promote rights are to be preferred in application of s 6 of the Act. Where a provision is enacted to provide protection for fundamental rights, as the entrenchment of s 268 clearly has as its purpose both in its text and context in the Electoral Act and as explained in the legislative history referred to below at [139]–[156], it should be construed to promote that protective purpose where it can be.

[112] Although I consider that s 268(1)(e) in its own terms protects all qualifications of electors contained in s 74 from bare majority amendment or repeal, if there had been any doubt (such as was expressed in Parliament in 1975), I consider that the enactment of the New Zealand Bill of Rights Act compels the interpretation that better protects and promotes the right to vote and the democratic values behind the Bill of Rights Act.

[113] I consider McGrath J was right when in *Zaoui v Attorney-General*[120] he expressed the view that s 6 of the New Zealand Bill of Rights Act requires the court to prefer the meaning which is least infringing of protected rights:

> [36] These provisions require the Court to prefer an interpretation consistent with protected rights where one is reasonably available: *Ministry of Transport v Noort* [1992] 3 NZLR 260 at p 272; *Quilter v Attorney-General* [1998] 1 NZLR 523. Section 4 precludes the Court from reading the legislative text in a way which nullifies it or is so inconsistent with the statutory purpose as to do violence to its scheme. But subject to those limits these provisions require the Court to apply the meaning of the text that is most in accordance with the freedoms protected by the Bill of Rights. In doing so … the first step is to identify the meanings that are reasonably available and then to consider which of them least infringes on the protected rights. Depending on what those inquiries show it may be necessary to ascertain the extent to which the right is limited and whether effect can be given to it.

[114] Section 6 is to be construed to give effect to the purpose of the New Zealand Bill of Rights Act in promoting and protecting human rights whenever an enactment "can" be interpreted to do so. It requires preference for the meaning which is most

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120 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA).

protective of and best promotes human rights whenever such a meaning is tenable. The approach applies to provisions which themselves have the purpose of promoting or protecting human rights, as I consider is the purpose of the entrenchment of elector qualification in s 268. This is not to "replicate" the protection provided in the New Zealand Bill of Rights Act but to ensure that a provision supportive of a fundamental right is best fit for purpose. I consider that the Court of Appeal proceeded on a narrow view of the scope of s 6 of the New Zealand Bill of Rights Act which has no support in the language of that provision. Section 6 does not require an available meaning to be "inconsistent" with rights as a threshold for the preference in interpretation it directs. And it is difficult to see that the purpose of the New Zealand Bill of Rights Act in protecting and promoting human rights can be met if it is confined in this way. It is an approach that counsel for Mr Taylor was right to suggest smacked of the "austerity of tabulated legalism"[121] that is inappropriate for legislation properly seen as constitutional.

Qualification of electors under s 74

[115] In general only those qualified to vote and who are enrolled or have applied to be registered as electors before polling day are qualified to vote under s 60 of the Electoral Act. In addition, under s 60(f) any member of the Defence Force who is outside New Zealand if 18 years or over on polling day may vote in the district in which he or she resided immediately before leaving New Zealand.

[116] "Qualification of electors" is dealt with in ss 74 to 81 of the Act. Section 75 deals with registration in respect of more than one electoral district. Sections 76–79 deal with the option of Maori who are qualified to register either as an elector of a Maori electoral district or as an elector of a General electoral district. The sections of general application under the heading "Qualification of electors" are s 74, itself headed "Qualification of electors" and s 80 headed "Disqualification for registration". Section 81 is machinery for notification of disqualification under s 80.[122]

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121 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328 per Lord Wilberforce.

122 Section 81 requires the prison manager of the prison in which a sentenced prisoner is first received to forward a notice within seven days of receiving the prisoner to the Electoral Commission.

[117] Section 74 is in the following terms:

> **74 Qualification of electors**
>
> (1) Subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if—
>
> (a) that person is—
>
> (i) a New Zealand citizen; or
>
> (ii) a permanent resident of New Zealand; and
>
> (b) that person has at some time resided continuously in New Zealand for a period of not less than 1 year; and
>
> (c) that electoral district—
>
> (i) is the last in which that person has continuously resided for a period equalling or exceeding 1 month; or
>
> (ii) where that person has never resided continuously in any one electoral district for a period equalling or exceeding 1 month, is the electoral district in which that person resides or has last resided.
>
> (2) Where a writ has been issued for an election, every person—
>
> (a) who resides in an electoral district on the Monday before polling day; and
>
> (b) who would, if he or she continued to reside in that electoral district until the close of polling day, have continuously resided in that electoral district for a period equalling or exceeding 1 month,—
>
> shall (whether or not he or she does so continue to reside in that electoral district) be deemed, for the purposes of subsection (1)(c), to have completed on that Monday a period of 1 month's continuous residence in that electoral district.

[118] Section 80, as amended in 2010, disqualifies from registration as electors three principal categories of persons: those who have not been in New Zealand within the last three years (in the case of New Zealand citizens) or within the last 12 months (in the case of permanent residents); those who are sentenced prisoners or who under criminal justice provisions have been detained in a hospital for mental health reasons; and those whose names are on the Corrupt Practices List made out for any electoral district.

[119] As indicated at [90]–[98], disqualification of those detained in mental institutions, those on the Corrupt Practices List, and at least some sentenced prisoners has featured in all electoral acts since 1852. Since the 1956 Act amendment to the entrenched provisions has required a parliamentary majority of 75 per cent of the members of the House of Representatives. Neither in the 1956 Act nor in the 1993 Act, however, has the general disqualification provision (s 80 in the 1993 Act) itself been entrenched.

[120] The amendment to s 80(1)(d) in 2010 extended disqualification from those serving sentences of three years or more to disqualify all serving prisoners from registration as voters in the following terms:

> **80 Disqualifications for registration**
>
> (1) The following persons are disqualified for registration as electors:
>
> …
>
> (d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010:

Entrenchment of elector qualification or age only?

[121] Section 268(1)(e) deals with entrenchment in relation to s 74 and its meaning is the critical issue on the appeal. But because the arguments made on the appeal in part turn on the way in which other provisions entrenched are referred to and the consistency of expression, it is necessary to set out the section in full:

> **268 Restriction on amendment or repeal of certain provisions**
>
> (1) This section applies to the following provisions (hereinafter referred to as **reserved provisions**), namely,—
>
> (a) section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
>
> (b) section 28, relating to the Representation Commission:
>
> (c) section 35, and the definition of the term General electoral population in section 3(1), relating to the division of New Zealand into electoral districts after each census:

(d) section 36, relating to the allowance for the adjustment of the quota:

(e) section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

(f) section 168, relating to the method of voting.

(2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal—

(a) is passed by a majority of 75% of all the members of the House of Representatives; or

(b) has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts:

provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

[122] In most of the paragraphs in s 268(1) there is reference to a single section, together with a description of what it is about. Only paras (c) and (e) also refer to and therefore entrench definitions contained in s 3(1).

[123] In the case of para (c), the definition referred to is the definition of the term "general electoral population". The description given in para (c), "relating to the division of New Zealand into electoral districts after each census," is appropriate only to refer to s 35 rather than to the definition embedded in it and separately entrenched.

[124] Paragraph (e) is the only paragraph not containing a description of the section referred to (s 74). It also refers not only to the definition of adult in s 3(1) but also to the prescription of 18 years in s 60(f), relating to eligibility to vote for servicemen overseas. All other paragraphs (apart from the definition referred to in (c)) refer simply to the single section entrenched.

[125] I am unable to read the text of s 268(1)(e) as limiting the reference to s 74 by the words "so far as those provisions prescribe 18 years as the minimum age", therefore entrenching only the age of 18 years and not the other qualifications for

registration as an elector.[123] I consider that the subsection scans more naturally as a reference to s 74, followed by an expansion ("and") to include the definition in s 3(1) of "adult" and a reference to the age of eligibility of overseas servicemen contained in s 60(f). The sense of the clause "so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote" seems to me to apply to the second two provisions mentioned: the definition of adult in s 3(1) and the reference to 18 years in relation to s 60(f).

[126] First, that is the scheme of the references to the other sections in s 268(1)(a)–(d) and (f) even if s 74 is not described, as the other provisions are. Each identifies a section of the Act which is subject to entrenchment. None of the other paragraphs purport to qualify or limit the scope of the sections referred to. The clauses describing the effect of the sections are not substantive. Since s 74 is identified in its own terms as being concerned with the "qualification of electors", the absence of a description in itself is not of significance. This interpretation is consistent with the structure of para (c) which also indicates first the identification of s 35 and then adds to it "*and* the definition of the term general electoral population in section 3(1)",[124] in what is clearly addition to the entrenchment of the principal provision referred to, as I think the references to ss 3(1) and 60(f) are additions to the identification of s 74 for the purposes of entrenchment in s 268(1)(e).

[127] "Those provisions" refer to the provisions which are additional to the reference to s 74, s 3(1) and s 60(f). Their entrenchment is appropriately limited because both cover wider matters than qualification as an elector, the burden of s 74. In the case of s 3(1) the definition has general application in the Act. There is no equivalent obvious reason to limit the entrenchment of s 74, providing for qualification as electors. With respect to these additional provisions, it is perfectly sensible to limit the entrenchment "so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote".

[128] Secondly, the internal scheme of s 268(1)(e) is I think consistent with that reading. Section 74 is referred to first and separated by a comma from the introduction

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123 Compare the reasons given by Ellen France J above at [36].
124 Emphasis added.

of reference by conjunction to "the term adult in section 3(1)". If the entrenchment was intended to apply only to "the term adult as used in s 74 and defined in s 3(1)" it would have been more natural to refer to it in that way and sequence, tying the reference to s 74 to the term "adult".

[129] Nor do I accept the view taken in the Court of Appeal and endorsed in the reasons of the other members of this Court that reference to s 74 is necessary to "prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote".[125] That does not seem to be accurate in relation to the reference to s 60(f), which is complete in itself without reference to s 74 and indeed is directed at a special entitlement to vote, rather than qualification for registration.

[130] In relation to the definition of adult in s 3(1), it seems overly technical to emphasise the reference to the definition as necessarily pulling in the principal provision in which it is used. That is of course formally the case, but it seems to me that the limitation ("so far as") is directed at the actual effect and perhaps arises from the attempt to straddle the effect of two different approaches (the definitional use of s 3(1) and the explicit provision in s 60(f)). The limitation "so far as", if "those provisions" are a reference to ss 3(1) and 60(f), makes it clear that it is only the aspects of ss 3(1) and 60(f) that bear on the minimum age that are entrenched. The structure of para (e) and the punctuation is not inconsistent with that reading and it strikes me as the natural sense. It was necessary for the draftsman to be specific about the entrenchment of part only of ss 3(1) and 60(f) but there was no basis for filleting the protection of s 74, a fundamental provision in the scheme of the Act designed to identify who qualifies as an elector.

[131] Thirdly, the expansion of the entrenchment provided in s 268(1)(e) to the definition in s 3(1) of the Act was necessary if entrenchment of the age of qualification (one aspect only of the qualifications provided for in s 74) was not to be avoided by change of the definition of "adult". The entrenchment of the age distinctly ensures that the age is protected from amendment, either by raising or lowering.

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[125] See CA judgment at [74]; and the reasons given by Ellen France J above at [36]. See also *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705 at [74]–[75] per Ellis J.

[132] Fourthly and most importantly, it is highly improbable that in the scheme of the entrenched provisions referred to in s 268(1) the qualifications of electors would not be entrenched. They are fundamental to the democratic system and the expression of universal suffrage. I agree with the appellants that the expression "every adult person" expresses the essentiality of universal suffrage restricted only by age.

[133] The High Court of Australia has held in *Roach v Electoral Commissioner* that universal suffrage is now a historical constitutional fact in Australia protected by the requirement in the Australian Constitution that the Senate and House of Representatives be "directly chosen by the people":[126]

> Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.

The High Court held that legislative exclusion of all sentenced prisoners from voting was unconstitutional because it was not justified by any "substantial reason", although the former exclusion of prisoners serving sentences of three years or more was justified.

[134] The outcome of invalidity in *Roach* turns on the Australian Constitution. The present case is concerned not with constitutional validity or whether there is "substantial reason" to disenfranchise sentenced prisoners (an issue on which the High Court of Australia and the Supreme Court of Canada are in agreement that disqualification of all prisoners cannot be justified).[127] Rather, the question for this Court is whether there has been compliance with the entrenchment provision in s 268 of the Electoral Act. But in considering the meaning of s 268(1)(e), the context of electoral rights makes the approach taken by the High Court of Australia helpful, in recognising the universal suffrage implicit in reference to representatives "directly chosen by the people".

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126 *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 223 CLR 162 at [7] per Gleeson CJ (who was in the majority but gave separate reasons).

127 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519. See also *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber, ECHR).

[135] The provisions of the Electoral Act are more explicit recognition than an acknowledgement that representatives be "directly chosen by the people". Section 74 provides that "every adult person" qualifies as an elector. It is even more clearly a recognition of universal suffrage. Entrenchment means it is not possible to restrict the franchise by introducing for example a property qualification or excluding women because that would be to deny the qualification by s 74 of "every adult person". Unless entrenched, such amendment is theoretically possible. It is inconceivable that these elements would not be protected while the other elements referred to in s 268(1)(a)–(d) and (f) are.

[136] As already indicated, I consider that Fogarty J was right to take into account the right to vote recognised as a human right in s 12 of the New Zealand Bill of Rights Act when interpreting s 268(1)(e).[128] Entrenchment seeks to protect fundamental elements of the electoral system and important values such as are authoritatively recognised in the New Zealand Bill of Rights Act. A rights-consistent approach to interpretation is required under s 6 of the New Zealand Bill of Rights Act when construing a provision intended to protect a fundamental right. But indeed, I think that the context of electoral participation, which underlies legislative and legal legitimacy in our order, makes it impossible to accept without unmistakeable language that the qualification of electors is protected only in the age prescribed and not to give effect to the purpose of protecting "every adult person" in qualifying as an elector if he or she meets the minimum age, the citizenship or permanent residency requirements, and the residential qualifications.

[137] Finally, I do not accept that the words "subject to the provisions of this Act" in s 74 support a narrow interpretation of s 268(1)(e).[129] At [157]–[158] I consider the effect of the disqualifications provided by s 80 of the Act. I accept that they modify the qualification of electors. That is not to treat the disqualifications as themselves "impliedly" entrenched. As explained at [157], the effect of entrenching the qualification but not the disqualification is in my view that the disqualification may be removed by legislation passed in the ordinary manner but no additional disqualification can be adopted without 75 per cent majority vote or referendum. It

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128 See HC judgment at [71]–[78].

129 Compare CA judgment at [80]; and the reasons given by Ellen France J above at [37].

does not follow from the fact that qualification is expressed to be "subject to the provisions of this Act" that the disqualifications enacted unentrenched would "effectively side-step the entrenchment of s 74", supporting the view that only the age is entrenched.[130] Expansion of or addition to the disqualification in s 80 would amend the qualifications settled in s 74. It is therefore necessary that they be passed by a 75 per cent majority of the members of the House of Representatives or by referendum. For present purposes it is enough to say that I do not accept that the words "subject to the provisions of this Act" in s 74 will have no meaning if s 74 is entrenched by s 268(1)(e).

[138] I consider the meaning I prefer on the text and in light of the purpose of s 268(1)(e) is also not inconsistent with the legislative history, to which I now turn.

Legislative history

[139] The Electoral Act 1956 was enacted with bipartisan support and unanimously. In moving that the Bill be committed the Attorney-General, the Hon John Marshall, described it as "a major advance in the progress of democratic government in New Zealand".[131] It was an "attempt to place the structure of the law above and beyond the influence of Government and party". The Bill introduced a "unique … feature in the law" in the reserved or entrenched provisions "which place obstacles in the way of amending or repealing those reserved or entrenched sections".[132]

[140] Mr Marshall identified the six reserved provisions as:[133]

> … the provisions relating to the life of Parliament, the method of voting, the constitution and order of reference of the Representation Commission, the age of voting, the total population, and the tolerance of five per cent. Clause 189A refers to the appropriate clauses in the Bill covering the points I have just enumerated.

[141] The purpose behind entrenchment was described by the Attorney-General:[134]

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130 As the Court of Appeal thought at [80], in reasoning adopted by Ellen France J: see above at [37].
131 (26 October 1956) 310 NZPD 2839.
132 (26 October 1956) 310 NZPD 2839.
133 (26 October 1956) 310 NZPD 2839.
134 (26 October 1956) 310 NZPD 2840.

> Those reserved provisions, and those obstacles placed in the way of their amendment, are there to provide the best safeguard we can work out to protect what in the unanimous view of Parliament are essential safeguards for our democratic method of electing the people's representatives. I am very happy to be in the position to say that Parliament is unanimous on these points, and I do want to express the appreciation of the Government for the co-operation that has been received in bringing about this position. It represents what we all agree is a fair and reasonable and impartial method of protecting the electoral system.
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> …
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> The principles which we have tried to apply in the drafting of this Bill are worthy of mention. The first is that no qualified person should be deprived of the opportunity to register or to vote. In other words, everybody who is entitled to vote should be able to vote. The second is that no vote should be invalid because of some mistake on the part of an official. … Thirdly, we have tried to see that on polling day voters should be free from all influence and propaganda by parties or candidates. …

[142] The Leader of the Opposition, the Rt Hon Mr Nash, affirmed the bipartisan spirit in which the Bill had been developed and the end in view:[135]

> The objective on both sides was the same. We wanted to find a way by which everyone qualified to vote would have the right to vote without interference. We wanted to ensure that democratic principles should prevail in the determination of who should write the laws. We may have strayed from democratic principles to the extent that an age is given, because I do not know when democracy commences. I am not certain that it commences after a person becomes twenty-one [the then age of qualification], but we wanted every qualified adult to have a vote. An important qualification is that the voter shall be a British subject. A foreign immigrant has the right after a period of years of residence in this country—I think five years at present— to become naturalised, which automatically gives him the right to vote. A British immigrant has the right to vote after twelve months' residence, and must reside for three months in a given district.

[143] The Attorney-General made it clear that the "unique" feature introduced into the law was in order to "protect what in the unanimous view of Parliament are essential safeguards for our democratic method of electing the people's representatives".[136] A "democratic method of electing the people's representatives" is not safeguarded unless the basis of participation through universal suffrage is secured. First among the principles identified by the Attorney-General as being those on which the House had acted in reserving the "appropriate clauses in the Bill" was therefore "that no qualified

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135 (26 October 1956) 310 NZPD 2843.
136 (26 October 1956) 310 NZPD 2840.

person should be deprived of the opportunity to register or to vote".[137] The minimum age in that context was part only of the "qualification" of "every adult person" who was a British subject and fulfilled the residency requirements.[138] The clause providing "the essential safeguards" was what the Attorney-General treated as entrenched, although he referred to it as "the age of voting".[139] It was not "every adult" who was entitled to be registered but every qualified person.

[144] Mr Nash did not suggest that entrenchment was limited to age. He indeed wondered whether setting a minimum age was in accordance with "democratic principles" but indicated that the purpose of the House as a whole was that "we wanted every qualified adult to have a vote". And he acknowledged in that connection that an "important qualification" provided for was that the voter was to be a British subject.

[145] The Royal Commission on the Electoral System which proposed the adoption of a mixed member proportional system of representation in its report in 1986, later implemented in the Electoral Act 1993, recommended retention of the protection provided by reserving important provisions of the Act against repeal or amendment except by a 75 per cent majority of the members of the House of Representatives.[140] It referred to the protections then current in s 189 of the Electoral Act 1956, which it said in a "summary listing" related to:[141]

> (a) the qualification of electors (at least so far as age is concerned);
>
> (b) the method of voting;
>
> (c) the method for the determination of the number of seats and their boundaries including the provisions for the constitution and functioning of the Representation Commission; and
>
> (d) the 3-year term of each Parliament

[146] The Royal Commission acknowledged that this "summary listing" did not adequately identify the complexity of the actual provisions, the effect of which was "not always clear".[142] Nevertheless, subject to some comments on "certain important

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137 (26 October 1956) 310 NZPD 2840.
138 See Electoral Act 1956, s 39.
139 (26 October 1956) 310 NZPD 2839–2840.
140 See Report of the Royal Commission on the Electoral System at [9.174]–[9.188].
141 At [9.177].
142 At [9.177].

questions of definition", the Royal Commission was clear that "the 4 sets of provisions listed above are critical and should be retained".[143] In questioning the need to retain a distinction between "the right to vote and the right to be a candidate", the Royal Commission made it clear that its comment "assumes, contrary to parliamentary practice, that not only the voting age but also the right to vote is entrenched by the present provisions; the effect of the wording of s 189 is not clear".[144]

[147] The Royal Commission therefore indicated that there was some doubt about whether entrenchment of the qualification of electors was limited to age. Although it treated not only the voting age but also the right to vote as entrenched by the present provisions, it acknowledged that was not "parliamentary practice".[145] In this the Royal Commission seems to have been referring to doubts expressed in Parliament in 1975 in considering amendments to the Electoral Act 1956 relating to electorate residency provisions.

[148] An issue arose in 1975 as to whether a 75 per cent majority was required.[146] The uncertainty as to this matter of interpretation was the subject of contributions by the Hon Dr A M Finlay, then Minister of Justice, and Sir John Marshall, who had earlier as Minister in charge of the Electoral Department introduced the entrenchment provision in s 189 at the time of enactment of the Electoral Act 1956. The Leader of the Opposition, then Mr Muldoon, had suggested to the Speaker in 1975 that the clauses in issue were reserved. Dr Finlay, who disagreed, referred to the earlier description of Mr Marshall in 1956 that the six reserved provisions included "the age of voting", without reference to other voter qualifications. In responding to the doubts raised by the Leader of the Opposition, Mr Marshall said that he remained of the view that only the voting age had been entrenched in 1956 but acknowledged that the provisions were "somewhat ambiguous" and that there was room for argument. He considered that the matter would have to be settled.

[149] The Speaker too acknowledged that members of the House, which included "the very eminent legal people we have in this House", could not agree on the

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143 At [9.178].
144 At [9.178].
145 At [9.178].
146 See discussion at (9 July 1975) 399 NZPD 2963–2965.

interpretation of s 189(1)(e).[147] An opinion was obtained from Crown Law that the proposed amendments to s 39 of the Act did not have to be passed in the manner provided by the entrenching provision in s 189(1)(e), although the advice did not provide any reasons. The Speaker, relying on the opinion, ruled that the amendments did not come within the entrenchment provision. As the Court of Appeal pointed out and as the Solicitor-General acknowledged on the appeal to this Court, the approach taken by Parliament was not the subject of authoritative ruling as to the meaning of s 189(1)(e) of the Electoral Act 1956 and does not bind the courts in their function of interpretation.

[150] The doubts expressed in 1975 meant however that the uncertainty about the meaning of s 189(1)(e) and whether it entrenched only the age of qualification was known to the Royal Commission and was considered in its 1986 report. The Royal Commission recommended that, instead of determining the protection by listing the formal statutory provisions, it would be preferable to undertake the "very difficult task" of identifying "the essential matter that is reserved".[148]

[151] The recommendation made by the Royal Commission was:[149]

> **70.** The provisions of the Electoral Act which state:
>
> (a) the elements of the right to vote and to be a candidate;
>
> (b) the elements of the method of voting;
>
> (c) the method for the determination of the number of seats and their boundaries, including the provisions for the constitution and functioning of the Representation Commission;
>
> (d) the term of Parliament; and
>
> (e) the tenure of the Electoral Commissioner
>
> should be protected from the ordinary legislative process. They should be subject to repeal or amendment only if the legislation recites that it is repealing or amending a reserved provision and is supported by three-quarters of all members of the House or by the electorate in a referendum. The protecting provision should itself be protected in the same way, and the relevant provisions should be enacted in the first place only in that way.

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147 (9 July 1975) 399 NZPD 2965.
148 Report of the Royal Commission on the Electoral System at [9.179].
149 At [9.188].

[152] When the report of the Royal Commission was considered by the Electoral Law Committee, the Committee recommended that "stated provisions" of the Act continue to require change by a 75 per cent majority or by referendum. Those "stated provisions" dealt with the term of Parliament, the method of determination of the number of seats and their boundaries together with the functioning of the Representation Commission, the qualification of electors and the method of voting.

[153] The recommendation of the Royal Commission that the legislation identify "the essential matter that is reserved" was not eventually adopted, and the 1993 Act continued the approach taken in s 189 of identifying provisions of the Act which were reserved, although on the assumption that that would entrench "the qualification of electors", without indication that it entrenched only the matter of age.

[154] The text of the former s 189(1)(e) was carried over into s 268(1)(e) of the Electoral Act 1993. The Attorney-General, the Rt Hon Paul East QC, in the second reading of the Bill described the existing entrenchment provision as including the "qualification of electors to vote", as was consistent with the report of the Electoral Law Committee.[150] That seems to have been the assumption on which s 268(1)(e) was enacted. There was no reference to any understanding that it entrenched only the age of qualification, even though it is expressed in the same terms as the former s 189(1)(e). The protection of elector qualification was the purpose of the entrenchment provision looked to by the Royal Commission and adopted by Parliament in s 268. The Electoral Act 1993 was also passed against the background of the New Zealand Bill of Rights Act enacted in 1990 and its recognition that every New Zealand citizen has the right to vote.

[155] With adoption of universal suffrage in New Zealand in 1893, voting in New Zealand, as the Royal Commission pointed out, "ceased to be a privilege extended only to those who were thought to deserve it, and became a right, open to all members of the community unless there was good reason to restrict it".[151] The right to vote in the International Covenant on Civil and Political Rights, ratified by New Zealand in 1978, is a right possessed by each citizen "without unreasonable restrictions … to vote

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150 (3 August 1993) 537 NZPD 17140.

151 Report of the Royal Commission on the Electoral System at [9.3].

and to be elected at genuine periodic elections … ".[152] The qualification of electors under the Electoral Act 1993 is wider than the right to vote. As the Royal Commission pointed out, the extension of the right to vote to permanent residents contained now in s 74 is unusual. In most countries the right to vote is tied to citizenship. In New Zealand it seems originally to have developed out of the former right to vote of British subjects residing in New Zealand. The Royal Commission also expressed the view that the residency requirements imposed under the 1956 Act (and largely maintained in the 1993 Act) are "generous" and "comparatively liberal".[153] Nevertheless, the right to vote is implicated in the qualification and disqualification of electors under the electoral legislation. And the wider qualifications expressed in the Act are protected from amendment or repeal except by 75 per cent majority or by referendum.

[156] What is to be made of this legislative history? It indicates some doubt about the effect of s 189(1)(e), with opinions going both ways in Parliament. The question was never authoritatively resolved. It was not adverted to in the debates which led to enactment of the Electoral Act 1993 which seems to have proceeded on the assumption that the qualification of electors was protected by entrenchment. I do not consider this legislative history is compelling on the question of interpretation, although I consider that the indications in 1993 that the qualifications for electors were entrenched had overtaken the earlier doubts, notwithstanding maintenance of the same language of entrenchment. The Attorney-General, in the second reading of the Bill, referred to entrenchment of the "qualification of electors to vote" and there is no reference in 1993 to the view that the only aspect entrenched was the age of voting. There was in 1993 the additional contextual significance of the enactment of the New Zealand Bill of Rights Act recognising the right of citizens to vote. I do not see that the legislative history indicates a different interpretation than I come to on the basis of the text. And such interpretation itself must now be undertaken against the recognition of the right to vote as a fundamental human right in the New Zealand Bill of Rights Act.

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152 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 25(b). Periodic elections are secured under s 17 of the Constitution Act 1986 which governs the term of Parliament. And the other provisions of the Electoral Act, the most important of which are reserved provisions, are designed to ensure that elections are "genuine".

153 Report of the Royal Commission on the Electoral System at [9.7].

The relationship between qualification under s 74 and disqualification under s 80

[157] The disqualifications contained in s 80 as adopted by unanimous vote in 1993 are effective to limit the qualification contained and entrenched in s 74. That effect is provided for in s 74 by the opening acknowledgment that the qualifications described are "subject to the provisions of this Act". But amendment to s 80 cannot set up additional disqualification of electors without detracting from the general qualification under s 74 unless it is enacted by 75 per cent majority of the members of the House of Representatives or by majority vote at referendum. Amendment by ordinary majority vote in Parliament cannot side-step the entrenchment which protects the universal suffrage implicit in the qualification of "every adult" who meets the residency and citizen qualifications which express the right of universal suffrage.

[158] As already indicated, I am of the view that it was misconceived for the Electoral Law Committee to have recommended that the disqualification of electors should be entrenched. That had not been the recommendation of the Royal Commission, probably for the good reason that it is mistaken to suggest any symmetry between qualification and established disqualification. The disqualifications passed in 1993 unanimously were within the scope saved from inconsistency with the qualifications prescribed by the opening words of s 74. The entrenchment of s 74 does not prevent their constriction or removal by legislation carried by simple majority vote in Parliament, because such legislation would not be inconsistent with the qualifications prescribed. But additional disqualification would be amendment of the general qualification. As indicated at [101], I reach this position on the basis of the structure and text of s 74 and the context provided by the subpart of the Act in which both are situated rather than the fact that s 80 was originally enacted by unanimous vote.

Conclusion

[159] I would allow the appeal. Because it imposed a new disqualification on electors otherwise qualified under s 74 by simple majority, I consider that the Electoral Act (Disqualification of Sentenced Prisoners) Amendment Act 2010 did not comply with the requirements of s 268(1)(e) of the Electoral Act 1993. It was acknowledged by the Solicitor-General that, if that position was reached, the 2010 Amendment Act

would be ineffective. As my view is a minority one it is unnecessary for me to consider the form of relief that might otherwise have been appropriate.

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