

Aukuso v Hutt City Council [2004] DCR 322

JUDGE B DAVIDSON:

Introduction:

[1] On 27 May 2003, the second respondent, the Electoral Officer for Hutt City Council declared that the First Past the Post ("FPP") electoral system had achieved a majority of votes in the electoral system poll held six days earlier. FPP had received 15,488 votes (61.6 per cent) of a total cast of 25,154. The voter turnout was 37.76 per cent.

[2] The Single Transferable Vote ("STV") alternative had attracted 9,666 votes (38.4 per cent). An 11 per cent swing in favour of STV, or against FPP would have led to a different result.

[3] The Petitioners contend that the poll result should be declared void. In essence they contend that certain irregularities, alleged breaches of the principles of the Local Electoral Act 2001 ("the Act") materially affected the result in that they permeated the conduct of poll so fundamentally that they substantially affected the result.

[4] Both respondents (first respondent "the council" second respondent "the Electoral Officer") contend that the poll result is safe. They say that even if there are demonstrated breaches of the principles of the Act, these cannot either in law or in fact amount to irregularities. Further they contend even if the alleged breaches can amount to irregularities, legally and factually, they did not materially alter the poll in that the Petitioners cannot show that "but for" these irregularities STV would have carried the vote.

The issues

[5] Three critical issues require determination --

- (i) Have the Petitioners shown on the balance of probabilities that there was an irregularity/irregularities in the conduct of the poll? If not the petition must be dismissed.
- (ii) If so, did any demonstrated irregularity/irregularities materially affect the result of the poll? If not the petition must be dismissed.
- (iii) If so should the poll result be declared void?

Outline of my judgment

[6] This paragraph is an index for this judgment:

Factual Background

Paragraphs [7] to [41] inclusive

In this section I will outline the relevant facts and resolve any areas of disputed facts. Such areas are extremely limited.

Local Electoral Act ("the Act") 2001

Paragraphs [42] to [59] inclusive

In this section I will deal with the relevant provisions of the Act.

Irregularity

Paragraphs [60] to [100] inclusive

In this section I will determine what an irregularity is for the purposes of s 98 of the Act and decide whether breaches of principle contended by the petitioners do amount to irregularity, both legally and factually.

Material Effect

Paragraphs [101] to [120] inclusive

In this section I will discuss whether any demonstrated irregularity/irregularities materially affected the poll.

Costs

Paragraph [121]

In this section I will deal briefly with the question of costs.

Factual background

[7] The factual background, although largely undisputed, does need to be dealt with in some detail.

[8] Under Part 2 of the Act a local authority may resolve to change its electoral system. Whether it does so or not it must give public notice of the right of electors to demand a poll on changes to the electoral system. These provisions for alteration in the electoral system are a reflection of a stated purpose of the Act:

to modernise the law governing the conduct of local elections and polls and in doing this to --

...

(c) allow diversity (through local decision-making) in relation to --

- (i) the particular electoral system to be used for local elections and polls; and
- (ii) the particular voting method to be used for local elections and polls: [Section 3(c)]

[9] On 10 July 2002, the council's Strategy & Policy Committee considered a report prepared by the Electoral Officer on electoral system changes for the 2004 triennial local body elections. The report recommended that the committee consider four options said to be available to progress the issue of electoral system change. The four options were as follows:

Option A	-	That the Council undertake public consultation.
Option B	-	That the Council reach its own decision as to retention of FPP or change to STV and publicly notify.
Option C	-	That the Council resolved to undertake a poll on the issue.
Option D	-	That the Council do nothing other than publicly notify electors of the right to demand a poll.

[10] The report included the resolutions of various Ward Committees and Community Boards that had been made earlier. Five of seven Ward Committees and Community Boards had resolved that Option D should be chosen.

[11] The Electoral Officer estimated that the cost of the poll would be in the region of \$80,000 - \$100,000. He noted that these funds were available in the Election Reserve Fund.

[12] The 10 July 2002 meeting of the Strategy & Policy Committee was attended by the Mayor, Councillor Styles and others. Option D was adopted. A recommendation was as a result made to the council "that it chooses to do nothing but publicly notify of a right to demand a poll on the electoral system to be used for the next two triennial elections by 19 September 2002".

[13] Six reasons were given for supporting Option D. These were as follows:

- o STV was complex and confusing.
- o It would be prudent to wait and see how STV fared when used by District Health Boards.
- o The council should adopt a low risk position until more information was known.
- o There was no apparent call from the public for change.
- o STV would involve additional expense.
- o Elector demand (at 5 per cent) for a poll would not be difficult to achieve if there in fact was such a demand.

[14] There was no reference either in the report of the Electoral Officer or the Committee's debate on the topic as to the principles of the Act set out in s 4, notwithstanding that both were making decisions under the Act.

[15] The recommendation of the Strategy & Policy Committee was considered by the council on 23 July 2002. The council adopted the Committee's recommendation. Although there was no reference to any of the s 4 principles, it is clear that the council was making a decision in respect of the Act.

[16] Public notice of the elector's right to demand a poll was given in September 2002. The cut-off date for such a demand was eventually extended until 28 February 2003. Such a demand was received on 28 February 2003. Appropriate arrangements were set in place for the poll to proceed on 21 May 2003.

[17] It is clear from a series of emails in early March 2003 that the question of the cost of STV was of concern. Early indications were that STV would be marginally more expensive to manage than FPP. By 7 March 2003, however, the council had received advice that the Department of Internal Affairs would meet the cost of developing the STV calculator, a cost that the council had originally considered it might need to bear itself.

[18] On 11 March 2003, the council dealt with the Electoral Officer's report in respect of the successful elector demand. The council resolved to "develop a publicity campaign that presents the facts about the two electoral systems available, and also presents its reservations about the wisdom of introducing an STV system without proper trial". This resolution was not unanimously supported. Those councillors who opposed the resolution expressed a lack of confidence that any publicity campaign would be free from "political taint". A theme of this meeting which in my view tainted subsequent events was an apparent resolve by the Mayor and some councillors to explain publicly why the council had not earlier supported STV.

[19] A Publicity Sub-Committee comprising the Mayor and Councillors Jamieson and Styles was established. Concern was also expressed about the cost of the poll itself, which Councillor Styles noted could be as high as \$220,000 including "a representation review".

[20] On 26 March 2003, a local newspaper, the *Petone Herald*, featured a regular article "View from The Terris". This is a regular contribution by Mayor Terris to this local newspaper. In this article the Mayor said, inter alia:

There is some support for STV around Wellington and none at all in the rest of the country -- most of New Zealand's local authorities are staying with First Past the Post. Part of the reason for this is the cost which in our case could run to well over \$200,000 ... *for these reasons I and my Council will be actively opposing a change to STV.*

[21] The Editor noted these remarks were "the personal views of Hutt City Mayor John Terris".

[22] The following day, 27 March 2003, the Auditor-General's Office wrote to the council's Chief Executive about the *Petone Herald* article and other proposed similar articles. Without going into the detail of the letter, it is clear that it amounted to a caution to the council about the use of public funds to finance a non-neutral publicity campaign. The author of the letter observed:

If the Council proceeds with a publicity campaign, either in addition to or in the absence of provision by the Electoral Officer of neutral information, other than in terms of its resolution CO30325 it could be perceived as acting more out of the self-interest of its members than in the interests of providing electors with useful, unbiased information on the proposal that is the subject of the poll. Such a perception could give rise to questions about the propriety of the Council's action

[23] The same day, the Mayor's column "View from The Terris" was repeated in abbreviated form in another local newspaper, the *Wainuiomata News*. Again the question of the cost of STV, now estimated at about \$250,000, was raised. The council paid for the cost of the newspaper article. Similar articles appeared in two other local newspapers -- the *Hutt News* (1 April 2003) and the *Stokes Valley News*. Once again these were council funded. These articles were once again headed "View from The Terris". Once again the cost of STV was said to be around \$250,000.

[24] The *Hutt News* article drew the attention of the Auditor-General. The primary area of complaint was the Mayor's reported costing of STV at \$250,000.

[25] The cost breakdown, although not given in the specific *Hutt News* article, was set out elsewhere in the same edition. The breakdown was said to be as follows:

Poll Costs	\$ 80,000
Computer Costs	\$ 20,000-\$40,000
Representation Review Costs	\$100,000

[26] I shall deal with the question of the costs in more detail later, suffice to say at this stage that the Petitioners in essence contend that these statements as to cost were misleading. Later, on 17 April 2003, the Auditor-General likewise saw the asserted cost in the absence of any breakdown as misleading.

[27] The Publicity Sub-Committee referred to in para [15], met for the only occasion on 7 April 2003. The sub-committee approved the placing of council funded advertisements in the *Hutt News*. The advertisements were to set out the reasons why council did not introduce STV in 2002, and also to set out the views of individual councillors in respect of STV. Councillor Styles was to email any further ideas for the advertisements to council. As a result, individual councillors were asked to submit a brief statement in respect of STV.

[28] The council's advertisements referred to in para [27] were prepared by Sugar Media Limited, a media company contracted to the council. In addition they were perused by the council's legal advisers.

[29] On 9 April 2003, The *Petone Herald* published a letter from the Mayor. The letter set out the reason for the council's resolution in July 2002. In addition there was a further article entitled "View from The Terris" in the same edition in which the Mayor said: "For these reasons, I and my council will be actively opposing a change to STV". This article was not funded by the council.

[30] Between 20-26 April 2003, a number of individual councillors prepared and distributed survey and information sheets to residents in their respective local areas. There was a consistent theme in the information sheets that STV would cost \$250,000 to introduce and would result in the loss of local representation. Although of course these information sheets were all released by councillors in their individual capacities, there was a common theme that had been rejected by the council because of likely cost and loss of local representation. The evidence of Councillor Styles at the inquiry is of significance

here. As a member of the Publicity Sub-Committee, he had on 9 April 2003 provided the council with a list of the reasons to support its earlier decision not to hold an electoral poll of its own motion. Central to these reasons were cost and loss of local representation. He, in his personal capacity, prepared the first information sheet. Other councillors adopted his format with individual modifications.

[31] On 22 April 2003, the *Hutt News* carried articles by both the Mayor ("City Faces Enough Challenges Without STV Distraction") and Mr Hurring, on behalf of the Electoral Reform Coalition ("STV - Your Right to Decide!"). Once again the Mayor's article focused on the likely cost of introducing STV and the loss of local representation. Although written by the Mayor in his personal capacity and not an official council publication, the article once again sought to justify the council's earlier decision by reference to questions of cost and loss of local representation.

[32] Two days later on 24 April 2003, the Electoral Officer saw the need to enter the growing media debate. This resulted from a complaint to him by the Electoral Reform Coalition. He described some of the information, circulated by "Proponents of FPP" as confusing. He sought to correct information about cost and loss of local representation. His media release was published in the *Hutt News* on 29 April 2003 along with information from him about the two voting systems.

[33] In the same edition of the *Hutt News* on 29 April 2003, the council published the first of its publicly funded advertisements. A second was published a fortnight later on 13 May 2003.

[34] The advertisement said the council had reservations about STV. Those reservations included the fact that STV was said to be complex and confusing, expensive, that there had been no sign that the public wanted such a change and that it would be prudent to wait and see how it operated for District Health Boards. Six councillors, including the Mayor, provided brief comments about the merits of each electoral system. Five, including the Mayor, openly supported FPP and commented negatively on STV.

[35] This advertisement was referred to the Auditor-General by the Electoral Reform Coalition. The Auditor-General was concerned about the overall lack of neutrality in the advertisement and wrote to the council advising as such. The advertisement, in the Auditor-General's view, arguably breached the "Suggested Guidelines for advertising and publicity by local authorities". The Deputy Auditor-General noted:

The Council could be perceived as acting more out of self-interest of its members than in the interests of providing electors with useful, unbiased information.

[36] The second advertisement published on 13 May 2003 deleted the personal comments of individual councillors. This came about in response to the Auditor-General's correspondence and following legal advice by the council. Once again however, the advertisement included as reservations of STV questions of cost and lack of public demand.

[37] In the same publication the council's Chief Executive Officer in fact published the council's response to the Auditor-General's complaint, together with an assurance to ratepayers that the council had throughout acted appropriately.

[38] The poll result was declared as I have referred to in para [1] on 27 May 2003.

[39] As can be seen from the factual narrative set out, issues of costs and loss of representation were highly topical during the lead up to the poll and during the poll itself. These two issues are to a large measure interrelated. The cost of the actual poll itself was estimated at \$80,000. However, the Act provided for an elector-demanded poll as a matter of statutory right. Once such a demand had been received the poll had to take place. At that stage it seems to me cost became immaterial.

[40] Further, loss of local representation was not automatic should STV in fact be carried. A change in local representation could only come about as a result of a representation review, an entirely separate process from the electoral poll.

Core facts

[41] From the preceding factual narrative, a number of essential and undisputed facts in my view emerge. In turn from those facts, certain conclusions are equally firm and available:

- o The method of voting at any election must be a matter of fundamental importance. After all the method of voting is the facilitation of the right to vote.
- o The Act clearly made it incumbent on all local authorities, including Hutt City Council, to confront and deal with the issue of the electoral system for local elections. This had to be confronted for the 2004 elections.
- o In the absence of any Council initiative, there was an absolute right of electors to demand a poll.
- o The council, in making decisions under the Act, had to take into account the principles of the Act as far as practicable.
- o The options available to the council were threefold
 - It *could* resolve to adopt STV or retain FPP,
 - It *could* resolve to undertake a poll, and
 - It *had* to give public notice of the right to demand a poll
- o On 10 July 2002, the Strategy & Policy Committee recommended that the council "do nothing but publicly notify of a right to demand a poll". This was adopted by the council on 23 July 2002.
- o Unfortunately, it seems to me that for reasons not explained directly in the evidence, both the Strategy & Policy Committee and the council saw fit to document reasons for this decision that do not really accord with the decision itself. The council had only resolved to

- publicly notify the right for an elector-demanded poll. Otherwise it had resolved to do nothing. It had neither accepted or rejected STV any more than it had resolved to retain or reject FPP. It had chosen to meet its minimum legal obligation of public notification, but otherwise to "fence-sit".
- o It could not be said, in my view, that the council had necessarily considered and rejected STV. The council, in adopting Option D, had resolved to "do nothing". The reasons for supporting Option D however, were rather criticisms of STV. As events later unfolded these reasons for adopting a "do nothing" approach later became reservations about introducing STV. This change in emphasis, although subtle, is nevertheless significant. From a "do nothing" position there developed an anti-STV position without any consideration by the council of the principles of the Act set out in s 4.
 - o Once a valid elector-demand was received the poll had to proceed. The council could not stop it. At that point the cost became immaterial. To suggest that the poll cost of \$80,000 was some reason to vote against STV must be wrong. The cost was unavoidable and in my view became, or should have become, immaterial.
 - o The council resolution of 11 March 2003, after receipt of the elector demand, "to develop a publicity campaign that presents the facts about the electoral systems available and also presents its reservations about the wisdom of introducing an STV system without proper trial" again did not truly reflect the council's position and opened the pathway for council to adopt publicly an anti-STV position. The reservations simply were the reasons wrongly given in July 2002 for adopting Option D. In other words, over a ten month period, what had started out as a "do nothing" position (other than notify the right for an elector-demand), became a vehicle for a reasonably sustained anti-STV campaign.
 - o The campaign ran for nearly two months. Much was undoubtedly pro-FPP and anti-STV. Some was funded by the council. Other material released into the public arena by the Mayor and other councillors, although in their personal capacities, carried a clear innuendo of council support. Some articles, although not funded by the council, left a distinct impression that the council had resolved against STV; when in reality it had not. Some of the material said to be by way of reservation about the introduction of STV in reality amounted to opposition. Some was misleading, leaving electors with the distinct impression that STV would cost \$200,000 - \$250,000 to introduce and would necessarily result in the loss of local representation. Neither in fact were necessarily correct.

The Local Electoral Act 2001 ("the Act")

[42] The Act replaced the Local Elections and Polls Act 1976.

[43] In large measure the Act is similar to the earlier legislation. However, there are significant and important differences.

[44] I have already noted that one of the stated purposes of the Act is to allow electoral system diversity. Another purpose is to implement the principles of the Act. [Section 3(d)]

The principles of the Act

[45] Because the principles of the Act are fundamentally important to a determination of the petition, I set out the provisions in full:

4. Principles -- (1) The principles that this Act is designed to implement are the following:

(a) fair and effective representation for individuals and communities:

(b) all qualified persons to have a reasonable and equal opportunity to --

(i) cast an informed vote:

(ii) nominate 1 or more candidates:

(iii) accept nomination as a candidate:

(c) public confidence in, and public understanding of, local electoral processes through --

(i) the provision of a regular election cycle:

(ii) the provision of elections that are managed independently from the elected body:

(iii) protection of the freedom of choice of voters and the secrecy of the vote:

(iv) the provision of transparent electoral systems and voting methods and the adoption of procedures that produce certainty in electoral outcomes:

(v) the provision of impartial mechanisms for resolving disputed elections and polls.

(2) Local authorities, electoral officers, and other electoral officials must, in making decisions under this Act or any other enactment, take into account those principles specified in sub-section (1) that are applicable (if any), so far as is practicable in the circumstances.

(3) This section does not override any other provision in this Act or any other enactment.

(Emphasis added.)

[46] For the respondents it was contended that s 4(2) did not impose any absolute obligation on either the council or the Electoral Officer to take into account the principles of the Act. It was submitted that any obligation arose only when either respondent was making a statutory decision under the Act and then only as far as practicable in the circumstances.

[47] That submission, in my view, suffers from an obvious semantic difficulty. Section 4(2) makes it plain that the local authority or electoral officer in making decisions under this Act or any other enactment must take into account the principles of the Act as far as practicable. The provisions means exactly what it says -- nothing more, nothing less. In decision-making under the Act, regard must be had to the principles as far as practicable. In the context of this petition the crucial decisions of the Strategy

& Policy Committee, the Publicity Sub-Committee and the council itself, must logically be decisions made under the Act. Any suggestion otherwise would be tantamount to a conclusion that each committee or the council itself were acting unlawfully or ultra vires. No such suggestion was made or could be made.

[48] The phrase in s 4(2) --"in making decisions under this Act"-- must, in my view, be given a broad meaning. It cannot be restricted purely to actual formal decisions but must be taken to mean all aspects and ambits of the decision-making process. In the context of this inquiry, the decision of the council on 23 July 2002 to adopt Option D was clearly a decision under the Act. The subsequent decisions to establish a Publicity Sub-Committee and its decisions itself, must also be related decisions under the Act equally attracting the legislative attention of s 4.

[49] I can see no other possible construction to be put on s 4. To write down its effect in the way suggested on behalf of the respondents demeans the principles themselves which after all are only a codification of established electoral law and practice.

Part 4 disputed elections and polls

[50] Sections 93 -103 inclusive deal with inquiries into elections and polls. Sections 98 and 99 are critical. They provide as follows:

- 98. Result of inquiry** -- The District Court Judge must determine whether, --
- (a) as a result of an irregularity that in the Judge's opinion materially affected the result of the election or poll, the election or poll is void:
 - (b) in the case of an election, the candidate whose election is complained of, or any and which other candidate, was elected:
 - (c) in the case of a poll, any and which proposal was carried.
- 99. Election or poll not void by reason of certain irregularities** -- (1) If subsection (2) applies, an election or poll must not be declared void on the ground of --
- (a) any irregularity in any of the proceedings preliminary to the voting; or
 - (b) any failure to hold the election or poll at any place appointed for holding the election or poll: or
 - (c) a failure to comply with the directions contained in this Act or any regulations made under this Act as to the conduct of the election or poll or the counting of the votes: or
 - (d) by any mistake in the use of prescribed forms.
- (2) This subsection applies if the District Court Judge conducting an inquiry into the conduct of an election or poll, having taken account of whether the election or poll was conducted in accordance with the principles set out in section 4, considers that the irregularity, failure, or mistake referred to in subsection (1) did not affect the result of the election or poll.

[51] During the inquiry I expressed the tentative view that each of the provisions (a), (b) and (c) of s 98 stood alone, each requiring the Judge to make a separate determination depending on the course of the

inquiry. Sections 98(b) and (c) arise, it seems to me, only when the Judge exercises his or her discretion under s 97(1)(b) to direct a recount or scrutiny of the votes given at the election or poll. Presumably such a discretionary power would be exercised by the Judge only when there was evidential material at the inquiry suggesting that some recount or scrutiny should be undertaken.

[52] It seems to me therefore, that for the purposes of this inquiry the focus must purely be on s 98(a) on a stand-alone basis. This is of some significance because the moment it is considered on its own the determination is only whether an irregularity materially affected the result of the poll. Sections 98(b) and (c) are prefaced by an actual recount or scrutiny with hardcore evidence of vote counting or vote scrutiny.

[53] Put another way, it is not necessary when the Judge embarks on the required determination under s 98(a) for there to be any actual recount or scrutiny. Not only is that not necessary but also clearly such was never envisaged. The required determination focuses only on whether there has been an irregularity and the material effect if any.

[54] There was much debate at the inquiry about s 99 of the Act. In its heading, it seems clear enough -- that a poll is not void by reason of certain irregularities. Subsection (1) sets out the situations where a poll is not to be declared void. In themselves this seems clear enough, but the qualifying provision "if subsection (2) applies" creates an obvious problem.

[55] Subsection (2) applies if the Judge conducting the inquiry "having taken account of whether the poll was conducted in accordance with the principles of s 4 considers that the grounds referred to in the subsection *did not affect the result of the poll*". (Emphasis added.) The provision seems, on its face, to be superfluous. If the Judge concludes that the irregularity, failure or mistake did not affect the result of the poll, then surely that would dispose of the inquiry without anything further required of the Judge.

[56] Section 120(2) of the Local Elections and Polls Act 1976 was in broadly similar terms:

An election or poll shall not be declared invalid by reason of any irregularity in any of the proceedings preliminary to the voting, or by reason of any failure to hold the election or poll at any place appointed for holding the election or poll, or to comply with the directions contained in this Act as to the taking of the election or poll or the counting of the votes, or by reason of any mistake in the use of the forms in the First Schedule to this Act, if it appears to the Magistrate having cognisance of the question that the election or poll was conducted in accordance with the principles laid down in this Act, and that the irregularity, failure, or mistake did not affect the result of the election or poll.

[57] In argument at the inquiry, all counsel acknowledged the inherent difficulty and illogicality of s 99(2). Why it should be seen necessary for a Judge who has determined that an irregularity did not affect the result of the poll, to then even turn to the saved situations under subs (1) seems to me difficult to comprehend.

[58] I am reinforced in the view that I can regard s 99(2) as superfluous in any event by the situations envisaged by subs (1) of the kind not to result in poll invalidation. The situations covered, it seems to me, are of form not of substance. Here the complaint is essentially one of substance. Section 99(1)

embraces minor irregularities or failures that could not be seen to have any material effect on the poll in themselves.

[59] I have dealt only with the truly relevant provisions of the Act. From this, three critical aspects for the determination of this inquiry emerge --

- o The principles of the Act cannot be written down or given lip service. Local authorities and electoral officers must take them into account as far as practicable in making decisions under the Act. The only limit is one of practicability.
- o The determination I am required to make under s 98(a) stands alone. It is not constrained, as to materiality of result, by the vote counting or scrutiny exercise envisaged by ss 97(1)(b), 97(2) and 98(b) and (c).
- o The saving provision of s 99 has no application in this particular inquiry.

Irregularity

[60] I have already noted the provisions of s 98(a) of the Act.

[61] I must now determine what an "irregularity" is for the purpose of s 98(a) and whether the breaches of principle contended by the petitioners do amount to irregularity both legally and factually.

[62] "Irregularity" is not defined in the Act. What an irregularity is therefore, is a matter of statutory interpretation.

[63] Regard must be had to its ordinary meaning in everyday language, any meaning that can be properly given by reference to other decided cases, and any meaning that can reasonably be derived from the statutory scheme as a whole.

[64] Because it is not defined in the Act, it must be that the Act is not an absolute or final code on the issue of irregularity.

The New Zealand cases

[65] It must be borne in mind that the greater majority of the New Zealand cases were decided prior to the 2001 Act. Those earlier Acts did not have a principles provision as the current Act does, as set out in s 4. It must also be borne in mind that no case has as yet comprehensively or exhaustively set out to define the scope of "irregularity". There is obvious good reason for this -- the variety of circumstances alone that could potentially arise would make such attempt problematic and probably futile. The New Zealand, and indeed overseas cases to which I was referred, need to be seen in that light. In each case the Judge was responding to the facts special to that particular case.

[66] In *re Auckland Harbour Bridge Election Petition and Onehunga Borough Council Election Petition* 14 MCD 229 the unauthorised photograph of a candidate and the unauthorised description of a

candidate as a "JP" were held by Richardson SM to amount to an irregularity. At pp 231-232, the learned Magistrate said:

Under Part IV of the Act I am required to consider whether any irregularity has taken place: while under sections 53 to 64 conduct at or in relation to elections which may constitute offences is clearly set forth, what is or may be an irregularity under Part IV is not defined. In its plain and ordinary grammatical sense "irregular" is the antonym of regular and the noun "irregularity" likewise an antonym of regularity. The *Shorter Oxford English Dictionary* (3rd ed) Volume 1 defines the adjective "irregular" as not in conformity with rule or principle contrary to rule ... abnormal, and the noun "irregularity" as the quality or state of being irregular. The *New English Dictionary* by Sir James Murray, Volume 5, defines similarly as want of conformity to rule -- deviation from or violation of a rule of law or principle ... deviation from what is usual or normal. Funk and Wagnall's *New Standard Dictionary of the English Language* Volume I gives a like definition and includes "divergence from what is customary or fit, inconsistency, impropriety".

Applying these definitions to the noun "irregularity" as used in section 74 it is my view that *anything done in breach of any established rule, custom or law as to the conduct of elections or the behaviour of persons relating thereto, may constitute an irregularity*. The extent of the breach or impropriety to establish an irregularity is a question of fact to be determined in each case. It is not necessary to show that any offence has been committed -- most, if not all offences provided under the Act would, if established, constitute an irregularity but the converse does not apply. An irregularity is wider in its ambit but may be less in degree of seriousness or misconduct than an offence.

It is a fundamental principle of our democratic system of government recognised at common law and reinforced by statute that elections should be "free and pure" that electors be not subject to influence, interference or pressure as to their choice but should have complete freedom of mind in reaching their decision without concern for reprisals.

[67] In *Waimairi County Election Petition* (1974) 14 MCD 144 Evans SM undertook a detailed consideration of the meaning of "irregularity" in deciding whether an anonymously distributed pamphlet defamatory of an election candidate was an irregularity. He concluded at p 148:

In my opinion the present context, by which I mean the Act as a whole and more particularly the other sections having relationship to section 74, indicates that the word "irregularity" in section 74 is to be given a broad meaning. In saying this I do not overlook the only judicial interpretations of the word that my limited researches have disclosed and which I have referred to. In my opinion that interpretation depended on its particular context.

[68] In *Re Election for Mayor of the Far North District* [1993] DCR 769 nearly 6000 votes were received for two candidates, one of whom withdrew and the other who in fact was disqualified on citizenship grounds. In deciding that no irregularity arose, Judge Moore said at p 781:

In the present context of a formal, legally regulated process, "irregular" means: not in conformity with the law prescribing and regulating that process.

While "irregular" and thus "irregularity" may in some context refer to or include non-conformity with moral principle, such a meaning is not in accordance with the nature and extent of the Court's jurisdiction under the Act. Where moral concepts might be seen as being reflected in the law which the Court must apply on this topic it is in the context, and only in the context, of electoral malpractice ie proscribed practices. Such offences are irregularities because they are breaches of the law governing the formal conduct of elections.

Quite apart from the wording of the relevant portions of the Act there are compelling constitutional reasons for adopting that definition. In some of its jurisdictions the Court is empowered or required to do or order what is just or fair or reasonable in all of the circumstances, or in some other way to take into account and give expression to a broad overview of merits. Section 104 of the Act leaves no room for such an approach. The reasons are obvious: it is not for Judges to make political decisions or to be drawn into the political arena. The merits of a political candidate or issue as such) are not a proper subject to judicial decision-making. *Any broadly based jurisdiction to evaluate the merits of an election outcome could not avoid, at the very least, the risk of a Judge being invited to come to conclusions on issues political rather than justiciable.*

[69] In *Re Taradale Ward Election Petition* [1994] DCR 221 an unsuccessful candidate contended certain defamatory statements of him by other candidates and the local newspaper amounted to an irregularity. Judge Adeane said at p 224:

The constitutional aspect favours a narrow construction. *The Court should assume no greater power to review decisions made in the democratic ballot box than is absolutely necessary to correct specific, manifest and material errors in the electoral process.* The Local Elections and Polls Act 1976 cannot be construed as conferring on the Court the right to revise the results of democratic election on broad moral or philosophical grounds.

[70] *Bright v Mulholland* [2002] DCR 196 is the only known decision in respect of the 2001 Act. It was contended that four candidates, three of whom were successful, for the 2001 Auckland City Council election made public statements opposing privatisation of water when they in fact had made private pledges to their party supporting privatisation. The petition was dismissed on jurisdictional grounds. Judge McElrea was not required to consider the meaning of "irregularity" but said at p 205:

[47] Even if there is some confusion in the public mind as to the term "privatisation" it is a very different thing to say that candidates have fraudulently induced electors to vote in a particular way. Even if a candidate took advantage of such confusion knowing that different interpretations might be put on the meaning of his or her words I do not see how that can be regarded as any sort of electoral irregularity or misrepresentation. Indeed some might say that it is of the very nature of politics that candidates will promote their policies in this way, unrestrained by any political equivalent of the misleading or deceptive conduct provisions of the Fair Trading Act relating to commerce

[71] Later at p 206:

[51] *Likewise I consider that the sort of matter complained of here is not something that Judges should be inquiring into.* Even if the candidates had made electoral promises which were inconsistent with loyalty pledges made to their party that could be relevant in one of two ways (character of candidate and the breaking of electoral promises).

[72] In a general sense the earlier New Zealand cases indicate a willingness to give a broader definition to the word "irregularity". More recent cases, although contending for a narrower construction, limited to non-conformity with the law and process of elections, have become clouded by the Court's express reluctance to engage in any sort of moral judgment in respect of the election or poll. In my view whilst the comments of Judges Moore, Adeane and McElrea are entirely correct, they have overshadowed the cumulative effect of their decisions when put against the earlier cases. In the end I do not see them as being significantly divergent at all, indicating that a proper interpretation to be placed on the word "irregularity" is a broad one, but only where there has been some departure from accepted rule, law, or practice as far as the election or poll is concerned. The qualification of moral limitation more recently stated is entirely apt: that irregularity cannot be gauged by result, or by an attempt to second-guess a poll result.

Common law

[73] The classic statement for the avoiding of elections is contained in *Woodward v Sarsons* (1875) LR 10 CP 733. At p 743 Lord Coleridge CJ said:

... we are of the opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the

tribunal should be so satisfied ie. that there was no real electing by the constituency at all if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer.

[p 744] ... and we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was a reasonable ground to believe that a majority of electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was a reasonable ground to believe that a majority might have been prevented from electing the candidate they preferred, then we think the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament ... As to the second ie that the election was not really conducted under the subsisting election laws at all we think, though there was an election in the sense of their having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied as a matter of fact, that the election was not an election under the existing law.

[74] Although a number of other cases were referred to me in argument, in the end there is a common theme that an election or poll result can be struck down if something irregular occurred that "permeated or infected" (adopting the phraseology from *Featherston v Tully* [2002] SASR 302 p 335), the whole of the poll itself.

The Irish cases

[75] Considerable reliance was placed by the petitioners of the dual decisions of the Irish Supreme Court in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 and *Hanafin v Minister for Environment* [1996] 1 IR 175.

[76] In *McKenna* the majority of the Supreme Court held the use by the Minister for Equality and Law Reform of public funds to fund a campaign to influence the voters in favour of a "yes" vote, was an interference with proper democratic and constitutional process. There public funds had been set aside for a publicity campaign to encourage a "yes" vote in a referendum on the removal of the constitutional prohibition on divorce.

[77] After the referendum was held, *Hanafin* sought to declare the result void. The Irish Supreme Court held that the unconstitutional expenditure of public moneys (as described in *McKenna*): p 21:

amounted to an interference with the conduct of the referendum by the local returning officers. The purpose of the campaign was to influence the electorate to vote in the manner favoured by the Government and in my opinion it is not open to the state to contend that it wholly failed to achieve this purpose. It was submitted by the Attorney-General that because the advertisements were not misleading, and would have been unobjectionable if not financed unconstitutionally with public funds they should not be treated as being in any way tainted by the unconstitutional funding. I am wholly unable to accept this submission. The advertising campaign cannot be severed from the funding because without the funding there would have been no such campaign. They are inextricably linked together. The campaign was the product of the funding and it did in my opinion constitute an interference with the conduct of the referendum by the local returning officers. -- per Blayney J at p 21.

The Act itself:

[78] I have already noted that "irregularity" is not defined in the Act.

[79] What can safely be said however by any plain reading of the Act is that s 4(2) requires that local authorities and electoral officers must, in making decisions under this Act, take into account as far as practicable the principles in s 4.

[80] It seems abundantly clear to me that subject to limits of practicability that if local authorities and electoral officers do not take into account the principles contained in s 4 when making decisions under the Act then those decisions must at least on a prima facie basis be "irregular".

[81] To suggest otherwise would be to promote the regularity of decisions made ignoring the principles where there was no practicable reason so to do.

Conclusion -- Irregularity

[82] What can I draw from the foregoing review of the New Zealand cases, the common law principles, the Irish cases, the statutory context and the plain meaning of the word "irregularity"?

[83] In the end it seems to me that "irregularity" means just what it says. It is probably incapable of exhaustive and complete definition and to attempt to do so would be futile and perhaps even dangerous. Such course would also be unnecessary. Each set of circumstances must be judged on its particular facts, bearing in mind the following:

- o While the word "irregularity" is to be given a broad meaning it must be constrained by the word itself -- something which is not regular or not in conformity.
- o I must not allow myself to be persuaded by the morality or fairness of the result -- some significant irregularity must be demonstrated.
- o Mere technical breaches will not suffice -- there must be something that infects or permeates the poll itself.
- o The principles of the Act are more than directory. Subject to issues of practicability they are in fact obligatory.

[84] On behalf of the first respondent, Ms Scholtens QC sought a firm and conclusive determination of the definition of "irregularity". As there is no right of appeal from any decision she sought such a definition for future cases. She asks for a narrow refined construction limited to electoral offences or irregularity breaches. She argued that any broader determination would open the floodgates for local body electoral petitions in a way burdensome to local authorities.

[85] My conclusions must not be seen as exhaustive or all-embracing. They are conclusions responding to what has happened here. As Mr Taylor rightly in my view submitted such circumstances are likely to be rare and unlikely to be replicated.

[86] Here the poll concerned the method of voting, the actual facilitation of the right of every citizen to vote and participate in the democratic process. It is hard to see a circumstance more fundamental to the electoral system itself. The fundamental nature of the poll is reinforced by various of the principles of the Act -- that all qualified persons have a reasonable and equal opportunity to cast an informed vote; that there be public confidence in, and public understanding of, local electoral processes through the

provision of elections that are managed independently from the elected body; protection of freedom of choice of voters and the provision of transparent electoral systems.

[87] Where these principles have not been taken into account by those required, irregularity must arise. To suggest otherwise would be not only to undermine the principles of the Act but the whole philosophy of electoral freedom and choice. Put bluntly, in my view, a breach of the s 4 principles can amount to an irregularity.

[88] Was there an irregularity here and if so where?

[89] The petitioners contend that "irregularity" arose in any one of four ways. Two are expressed in the alternative.

[90] Firstly, it is contended that the council used public funds to mount a publicity campaign that was non-neutral and/or advocated one particular poll answer. This is said to have arisen through advertisements in columns by the Mayor, including "View from The Terris" and "Viewpoint".

[91] Secondly, and as an alternative to the first, it is contended that the Publicity Sub-Committee carried out a campaign that was not neutral and/or advocated one particular poll answer. The same articles are relied upon.

[92] Thirdly, it is contended that "irregularity" arose because the council and various councillors, including the Mayor, knowingly or recklessly as to whether their statements were accurate, published misleading and inaccurate information for the purposes of advocating one particular answer in the poll by stating STV would involve spending of \$250,000 and/or a loss of local representation.

[93] Fourthly, it is contended irregularity arose because the electoral officer failed to take reasonable action to stop these irregularities or correct their effect.

[94] In my view, the first and third grounds have been made out by the petitioners. I do not need to consider the second ground.

[95] I have already described the fundamental nature of the poll affecting the facilitation of the right to vote. For the council to embark on a campaign promoting FPP and denigrating STV, if not an irregularity in itself, must undoubtedly have become so when public funds were used to fund that campaign. I have a clear view that this amounts to an irregularity by breach of principles 4(1)(c)(ii), (iii) and (iv) of the Act. The use of public funds to promote one side of such a fundamental electoral debate must in itself, without more, be irregular. As was noted in *Hanafin* (above), this "amounted to an interference with the conduct of the referendum . . .".

[96] I am left with the distinct impression that this may have come about with some degree of inadvertence, initially at least, on the part of council.

[97] For reasons not adequately explained the council saw the need, upon receipt of an elector demand for a poll, to justify its decision some ten months "earlier to do nothing" by publicly stating its reasons, not so much to do nothing, but against STV. In doing so the voting public, in my view, could well have been misled in a number of important ways:

- o The voters may well have thought council had internally voted against STV. The council had not. It had opted to do nothing but satisfy its obligation to notify electors of the right to demand a poll. Although "doing nothing" might accord with the principles of the Act because it left the way open for an elector-demanded poll to later justify such position by advocating FPP and denigrating STV must be a breach of principle and therefore "irregular".
- o The voters were led to believe that there was no demand locally for STV. At best there was only anecdotal evidence of this.
- o The voters were led to believe STV would cost \$200,000 - \$250,000 to introduce, something which was plainly wrong. Such figures course openly allowed FPP proponents to claim that the cost of STV could well be spent on other more needy local expenditure requirements. Potentially this must have diverted voters away from STV.
- o The voters were led to believe that STV would inevitably result in a loss of local representation. This was plainly wrong, certainly until a representation review had been undertaken. In areas where there was acute concern about the loss of local representation, this must have operated as a powerful influence on the minds of the voters.

[98] During this period caution was reminded of the council from the Electoral Reform Coalition, the Auditor-General and one or two councillors. The council chose to continue with the campaign with some slight modification.

[99] For the respondents it was suggested that the council was entitled to take the stance it did and expend public moneys to explain such a stance. The issue however is not lawfulness but "irregularity". No electoral offence was committed. However, the pro-FPP, anti-STV nature of the council's media releases, and those funded by it, amounted to an irregularity of such a fundamental nature that the poll as a whole, in my view, was infected and permeated.

The position of the Electoral Officer

[100] I find that the ground alleging breach of duty by the Electoral Officer has not been made out. In my view, he acted correctly throughout. He issued neutral, informative and unbiased information about the two voting systems. When he saw concerning aspects of the public debate, he corrected them by his informative media release of 24 April 2003, published in the *Hutt News* five days later. I can see nothing more that the Electoral Officer could have done. I find therefore that the ground against him has not been made out

Material effect

[101] I have already noted the stand-alone nature of s 98(a). The determinations that are required to be made under s 98(b) and (c) require evidence of recount and scrutiny. They are determinations requiring exactitude. They must be seen in contrast to s 98(a) which requires that the irregularity, in my opinion, materially affected the result of the poll.

[102] Once again, regard must be had to the plain meaning of the provision.

The provision does *not* read:

That in the Judge's opinion materially affected the result of the poll in that a different proposal would have been carried.

This is reinforced by the discretionary nature of the determination. To have an opinion that an irregularity materially affected a result is not to have hard core and absolute evidence that a different result would necessarily have been carried.

[103] More than that, only under a s 98(a) determination can a poll be declared void. If so the poll has to be re-done (s 102). Where there is proper evidence from a recount or scrutiny that a different result or candidate would have been carried the poll is not void; a new result is substituted. It cannot be, in my view, that the evidential foundation for a s 98(a) determination is the same as that for the determinations required under (b) and (c) -- simply because were it so s 98(a) would in itself become meaningless.

[104] Section 98(a) must be reserved for cases where it cannot be said that a different poll or election result would have been carried, but where it can be said that the irregularity had a material effect on the result without necessarily altering the result.

[105] It seems to me that what must be determined is that the voting was materially affected by the irregularity/irregularities. If during that inquiry circumstances arise that lead to an actual recount or scrutiny, then it is open for the Judge to conclude that a different result would have been carried. If so the result is altered, not the poll declared void.

[106] The respondents contended for a "but for" test ie that but for the irregularity the result would have been different. In submitting that the respondents conceded that if I had reasonable grounds for believing the result would have been different, but for the irregularity, then the jurisdiction to avoid arises.

[107] It seems to me that the respective submissions on material effect are in fact not far apart at all. To say that the voting was materially affected by the irregularity must in reality be much the same thing as saying that there are reasonable grounds for believing the result would have been different but for the irregularity.

[108] In the end I am of the view that the question of material effect will most often depend on the nature and quality of the available evidence. Only by assessing the strength and weaknesses of that

evidence can I decide whether the irregularity, in my opinion, materially affected the result. Whether I predicate that by deciding if the irregularity materially affected the voting or by deciding there is reasonable ground for believing a different result would have been carried, but for the irregularity, very much begs the issue.

[109] Here there was little disagreement between the two expert witnesses, Professors Vowles (for the petitioners) and Bean (for the respondent). Both were of the view that the poll was a low information poll, in the sense that the debate between the merits of FPP and STV would not be well understood by electors. In such a poll "cues of elites" were an important guide for voters. Voters would look to important persons for a lead as to how to place their vote. Cues from the Mayor and councillors undoubtedly would be important.

[110] Professor Vowles attempted to provide some basis of measuring the effect of the pro-FPP campaign. In a very general sense Professor Bean was comfortable with Professor Vowles' findings that the pro-FPP campaign might have accounted for around 4 per cent of the poll result. Professor Bean, at p 112 notes of evidence, said:

If you take a very deep breath and say that this equation with one variable in it completely explains the campaign effects in this case that the FPP campaign on balance might have been worth about 4%.

[111] Of course it is important to remember that there was no quantification, and indeed no attempt at any such quantification, of the effect purely of the irregularities. The 4 per cent net effect assumes neither irregularity or otherwise.

[112] The position of Wainuiomata was specifically raised by me at the inquiry. There is evidence that Wainuiomata electors were acutely sensitive for historical reasons, to a potential loss of local representation. Had it voted in accordance, with the average across the other wards instead of the lowest STV result it did achieve, then a 4 per cent alteration in the overall result would have occurred. This on its own would have given STV a 43 per cent return overall, described by Professor Bean as a modest swing.

[113] The respondents contended that regard must be had to the effect of the pro-STV campaign with its own elites advocating support. That cannot be the focus. The focus is purely on the material effect of any irregularity or irregularities. Indeed to have regard to the pro-STV campaign in effect means falling into the realm of moral and political judgment and not to assess the inquiry on the basis of irregularity and material effect.

[114] In the end the issue is whether in my opinion the irregularity materially affected the result. There must be evidence proven by the petitioners on the balance of probabilities capable of supporting such an opinion. In other words the opinion I reach must be one open on the available evidence even if another Judge may have reached a different view.

[115] The petitioners submitted that the elements of a s 98(a) determination (irregularity, material effect, and discretion to void a poll) formed an interrelated and single complex, each aspect drawing on the

other. It was submitted that where the irregularity was fundamental and contagious as long as the petitioners could demonstrate a substantial effect on the voting then the requirement of material effect had been made out. The respondent, as I have noted, contended for a harder "but for" test.

[116] Whichever test I apply I am left in a state of considerable uncertainty about the evidence of material effect.

[117] As I have described there were irregularities. They were fundamental going to the facilitation of a basic right of citizenship, the right to vote. What affect those irregularities had however, I cannot say. There is some evidence to support the possibility of an altered Wainuiomata Ward result had voters responded in a way similar to that averaged across the other wards. That evidence however could not be regarded as firm or convincing. The other evidence about a 4 per cent weight to be given to the pro-FPP campaign is misleading. It is equally capable of arising in an entirely regular and proper campaign.

[118] I am left with less than firm evidence of a potentially different voter response in Wainuiomata and with some other evidence incapable of any form of exactitude, that voters may have taken voting cues from the irregular aspects of the council's publicity. Equally voters may have taken voting cues entirely from the regular aspects of the council's publicity. Neither Professors Bean or Vowles could safely determine one way or another. Nor realistically could this ever be determined.

[119] In the end I cannot say that in my opinion the irregularity/irregularities materially affected the poll result. Although it is a matter upon which I am entitled to express an opinion, it must be one that is sustainable on the evidence. To reach such an opinion would be unsustainable on the evidence of material affect placed before me.

[120] Accordingly, in terms of the issues I have identified in para [5] the petition will be dismissed.

Costs

[121] All parties asked that costs be reserved. Accordingly they are. If issues of costs cannot be resolved as between the parties then memoranda are to be filed and exchanged and the matter set down for hearing by the Registrar.

Petition dismissed