

**IN THE DISTRICT COURT  
AT KAITAIA**

**CIV 2014-029-126**

IN THE MATTER OF      THE ELECTORAL ACT 1993

AND

IN THE MATTER OF      AN APPLICATION BY HONE PANI  
TAMATI WAKA MENE HARAWIRA,  
FORMER MEMBER OF PARLIAMENT,  
FOR AN ORDER THAT A RECOUNT  
OF ELECTORATE VOTES IN THE TE  
TAI TOKERAU ELECTORATE BE  
CONDUCTED

Recount:                8-9 October 2014

Decision:              9 October 2014 (outcome)  
                             16 October 2014 (reasons)

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**DECISION OF JUDGE T J BROADMORE (REASONS)**

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**Introduction**

[1]      This is the “*expanded version*” promised in my decision of 9 October 2014 as to the outcome of the recount of electorate votes in the Te Tai Tokerau electoral district.

[2]      At the general election held on 20 September 2014, the count on election night of the votes in the Te Tai Tokerau electoral district showed the following votes for each candidate:

Kelvin Davis (Labour)	9,710
Hone Harawira (Internet-Mana)	8,969
Te Hira Paenga (Maori)	2,565
Clinton Dearlove (Independent)	451

[3] The election night majority for Mr Davis was therefore 941 votes.

[4] However, the election night totals do not include special votes. As is the case in all electoral districts, the special votes were counted over the following two weeks with the final declaration of the result of the poll being made at 2.00pm on 4 October. On the final figures for Te Tai Tokerau, and as shown in the table after [40] below, Mr Davis remained the highest polling candidate, but with the reduced majority of 739 votes over Mr Harawira.

[5] As was his right under s 180 of the Electoral Act 1993, Mr Harawira applied to a District Court Judge for the conduct of a recount of the votes in the Te Tai Tokerau electorate. I was appointed by the Chief District Court Judge to conduct that recount. That application was made and filed in the District Court at Kaitiaia on 7 October 2014, and the deposit of \$1,000 required under s 180(3) of the Act was paid.

[6] Thereafter I gave notice to the Returning Officer and all candidates standing in the electoral district in terms of s 180(5) of the Act, and the recount commenced at 9.30am on 8 October. The recount took place at the premises of the Returning Officer in Northcote, Auckland, within the electoral district.

### **Representation and attendance at recount**

[7] Mr Harawira, the applicant, was represented by Mr Graeme Edgeler, and Mr Davis by Mr Robert Gallagher, assisted by Mr Richard Northey. Neither of the other candidates attended or were represented. It is a quirk of the Electoral Act that the candidates themselves are not permitted to attend at a recount. (Nor, as a matter of interest, are the media.) Mr Edgeler and Mr Gallagher were accompanied by

scrutineers, whom I do not need to identify, but whose presence during the recount was invaluable.

### **Preliminary**

[8] The recount commenced with a *mihi* led by Mr Robert Peden, the Chief Electoral Officer.

[9] I appointed as scrutineers all persons on lists supplied by the respective parties, on the basis that no more than three from such lists would be present at any one time in the room where the recount was physically to take place.

[10] The parties confirmed that the main issue for consideration was the disallowing of special declaration votes which, if allowed on a recount, could conceivably affect the result. By contrast, they each accepted that the recount of votes counted on election night was unlikely to alter the figures by more than a handful of votes.

[11] It was clear that the Mana Movement had a number of other concerns about the way the electoral system operated, particularly in the case of Maori voters. But Mr Edgeler and those attending with him accepted that, in relation to those concerns, there was little if anything that could be achieved on a recount; and that they would have to be investigated in other ways.

[12] As to investigation of the special declaration votes issue, the parties tentatively agreed on a process whereby a senior staff member of the enrolment services section of the Electoral Commission would explain and then demonstrate the way in which special declaration votes were processed, with a view to then considering the prospect of adopting a process which would involve reviewing only a sample of the total disallowed votes.

[13] It was noted that, if the Returning Officer's decisions on disallowing special declaration votes were vindicated, there might be little point in proceeding with a recount of the votes counted on election night.

## **Testing the disallowed special declaration votes**

### *Mana concerns*

[14] As noted earlier, the special declaration votes which were counted after election night amounted in the case of Te Tai Tokerau to some 5,000 votes. Of those votes, a little over 900 were rejected by the Returning Officer on the grounds that the voter was not qualified to vote either in the Te Tai Tokerau electorate or at all.

[15] The Mana representatives advanced Mr Harawira's view that the rejection of such a large proportion of the special votes – not far short of 20% of the total – suggested that something was amiss. He considered, in particular, that the decisions of the Returning Officer, made on the basis that the persons making special declaration votes which were disallowed on the basis that they were not currently registered to vote, or could not even be found in enrolment records, should be investigated.

[16] As agreed, a senior staff member of the enrolment services section of the Electoral Commission then gave us a short introduction to the processes followed in the Registrar's office to check whether a person completing a special vote declaration was qualified to vote in the Te Tai Tokerau electorate.

[17] Following that, a party including two or three representatives from each of the Labour and Mana parties, Mr Peden (the Chief Electoral Officer), Ms Kristina Temel (the Electoral Commission's legal officer), and myself, travelled to the Takapuna office of the Registrar for a demonstration of the process on the Commission's computer. (Unfortunately, the Commission's electronic network could not be extended to the Returning Officer's temporary premises because it is available only on a secured network.)

*Normal procedure for checking special voting declarations*

[18] The normal checking procedure involves that, as a starting point, all special declaration votes are scanned so that they can be brought up on a screen<sup>1</sup>. The voter's name and other details are entered by the operator in places indicated on the screen adjacent to the scanned image of the declaration; and the operator, aided by searching and matching functions on the computer, thereupon follows a process which may be visually represented in the attached flow chart.

[19] Both Mr Edgeler and Mr Gallagher accepted that the steps indicated in the flowchart properly reflected the relevant provisions in the Act, so that an outcome which indicated that the voter was qualified, was qualified only to register a party vote, or was not qualified, was valid in terms of the legislation. I agree, and in particular, it is perfectly clear that a person who is not enrolled in the Te Tai Tokerau electorate is ineligible to vote for a candidate standing in that electorate; and that if he or she is not enrolled in any electorate, then, subject to what I next say, he or she is not qualified to cast either a constituency vote or a party vote.

[20] The electoral rolls are continuously updated between elections to record new registrations, changes of address and the like. In the 12 months before each general election the Commission writes to every voter on the roll seeking confirmation of their current address and details. If the letter is returned marked "*gone no address*" (GNA) the staff of the enrolment office make a number of inquiries, including by way of data matching with other organisations where privacy considerations are not an issue, attempting to contact voters by telephone and other means. A person may register as late as the day before the election, but not on the day itself.

[21] People not registered are not entitled to vote. If they purport to vote by way of special declaration, their vote will not be counted.

[22] I pause to mention a particular issue with Maori voters. Every five years (usually in the same year as the five-yearly census), Maori voters have the

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<sup>1</sup> The declaration is the only document examined – the vote itself remains sealed in a separate envelope until the Returning Officer accepts the declaration as establishing that the voter is entitled to vote.

opportunity to move from the general roll to the Maori roll, and *vice versa*. If they do not exercise that option (by completing and returning a form to the Registrar of Electors, or by online communication), they retain registration on their existing roll.

[23] Voters are removed from the roll if letters from the Electoral Commission seeking an update of their details are returned marked GNA, other means to locate them and confirm their details have failed, and that situation persists for more than three years. See ss 89D – 89G and 109 of the Act. Further, a person sentenced to a term of imprisonment has his or her registration cancelled automatically pursuant to s 80(1)(d) of the Act, and needs to re-register following his or her release.

### *Locating GNA voters*

[24] Through their computers, enrolment officials literally have at their fingertips a variety of means of tracking down the current addresses of GNA voters. As a first step, they can search on various combinations of names, parts of names (even a few consecutive letters), addresses and dates of birth. Such searches can directly bring up the voter at a different address, bring up the names of people with the same date of birth one of whom might be the voter under another name, or bring up a number of people with the same surname living at an address at which it appears possible that the voter also lives. Enrolment officials also follow up clues from the telephone book or from mobile phone numbers the voter might previously have supplied, and make actual calls to numbers possibly used by the voter.

[25] The second step is by way of data-matching with information held on other databases to which the Registrar has access. A good example is the NZ Transport Agency register of motor vehicles. (The Registrar does not have automatic access to information held by some agencies, such as the Inland Revenue Department and the Ministry of Social Development.)

[26] Armed with the information thus obtained, enrolment officials can then write again to GNA voters seeking completion of updated details so that the voter may be included on the roll. But if the voter does not answer the letter, or reminders, by

completing and returning the forms, the enrolment official essentially runs out of options.

### ***Locating special declaration voters***

[27] A special declaration voter is relevantly one who presents at a voting place on election day claiming to be entitled to vote, but whose name does not appear on the printed rolls held at the voting place, who completes and furnishes a special declaration vote - or a person who otherwise completes and furnishes such a declaration which reaches the Returning Officer so as to be included in the count of special votes.

[28] Before that voter's vote can be counted, the Returning Officer must check that the voter is entitled to vote either in that electorate or at all.

### ***Our review of the decisions made by the Returning Officer***

[29] As noted in [17] above, a small group including me and representatives of the parties proceeded to the office of the Registrar of Electors in Takapuna, where a senior official demonstrated to us the procedures outlined above and answered questions about the process. We then returned to the Returning Officer's premises in Northcote, where there was an opportunity for each of the parties to confer privately, in the light of the demonstration we had witnessed, as to how matters might then proceed.

[30] Each of the parties took a pragmatic approach to the matter. They each accepted that, if no errors were revealed in the examination of a sample of the 900-odd disallowed special votes, then there would be a strong probability that the errors, if any, discovered by an examination of the entire body of disallowed special votes, would be nowhere near sufficient to affect the overall outcome of the poll. So they reached agreement that a sample, representative geographically of the whole electoral district, would be taken, that each party would select declarations for examination, and that the declarations would then be examined in the same way as the demonstration. If no, or essentially no, errors came to light, then they would

each accept that there were unlikely to be any errors which were significant overall; and Mana, for its part, would waive its right to have each declaration examined.

[31] The parties then looked through the disallowed declarations. In the end, between the two parties, they selected some 69 declarations. I accept, as did the parties, that the selection was not random – although I observe that the vote itself remained secret for reasons already discussed. In the end, nothing turned on that. I am grateful to the parties for agreeing to proceed in this way. An enormous amount of time was saved.

[32] We then returned to Takapuna, where the 69 selected declarations were examined, using the same techniques described above.

[33] There turned out to be four separate categories of disallowed declarations: first, cases where the voter had never registered even though, in some cases, he or she had “*voted*” in earlier elections and been contacted expressly about the need to register; secondly, cases where the voter had previously registered but the registration had lapsed because the Commission’s letter to the voter as to updating details had been returned GNA, reminder letters had drawn no response, and the search techniques described earlier had failed to assist the Commission in either locating the voter or eliciting a response from him or her at a new address, and that situation had prevailed for more than three years; thirdly, cases where the voter was registered on the general roll, having failed to exercise an option to transfer to the Maori roll; and finally cases where the voter had been sentenced to imprisonment, his or her registration had been cancelled as a result, and the voter had not re-registered after release.

[34] (In the third case, where the voter was registered on the general roll, the voter’s party vote would have counted in the general electoral district which included the voter’s address. That this had not been done was a mistake on the part of the Registrar of Electors – but there was no application for a recount of the party votes. There were, moreover, only two declarations in this category.)



[35] Similarly, there were only two cases of released prisoners failing to re-register.

[36] In the first category, there were about 15 voters who not only had never previously enrolled, but who could not be traced through the search techniques described earlier. That is not to say they did not exist: in some cases they were known or known of by one of the scrutineers. It is just that they had not left an electronic footprint accessible to the Commission.

[37] It took about five hours over two days to review the 69 votes. In many cases, the scrutineers asked quite searching questions of the electoral official operating the computer; but were satisfied with the response – as was I. The scrutineers did not seek source documents, copies of forms sent to or completed by voters, miscellaneous correspondence to the voter, or records of data-match searches. I think this was appropriate: as Judge Adams said in *Waitakere No 2*<sup>2</sup>, nothing in the Act permits enquiries in the nature of an audit of the Commission's records pertaining to each voter. But, even without such an audit, it is apparent that scrutiny of all 930 declarations could well have taken three or four days.

### **The recount**

[38] Whilst the review of special votes was proceeding, the Returning Officer and her team of counters were able to complete a full recount of all ordinary votes. Where there were doubts about a vote, they were discussed with the parties' scrutineers. In every case, the Returning Officer and the scrutineers were able to reach agreement on the outcome. As a result, I was not called on to rule on any ordinary votes. The outcome of the recount of ordinary votes was that minor adjustments were required to all totals, as shown in the table after [40] below.

### **The parties' position following the review**

[39] After completion of the review, Mr Peden, Ms Temel and I met with Mrs Harawira and Mr Edgeler on behalf of Mana and Mr Harawira, and Mr Northey and

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<sup>2</sup> Application for recount in Waitakere electoral district, judgment No 2, 20 December 2011 (Waitakere District Court) at [34].

Ms Giordini on behalf of Labour and Mr Davis. The Mana representatives formally waived any further review of the special declaration votes, and accepted the outcome of the recount. The Labour representatives acknowledged that stance, with which they agreed.

[40] I therefore proceeded to issue the decision of 9 October 2014. For convenience, I reproduce below the table from that decision recording the outcome of the recount:

<b>Candidates</b>	<b>Party</b>	<b>Official Result</b>	<b>Recount Result</b>
DAVIS, Kelvin	LABOUR	9,710	9,712
DEARLOVE, Clinton	INDEPENDENT	451	454
HARAWIRA, Hone	MANA MOVEMENT	8,971	8,969
PAENGA, Te Hira	MAORI	2,565	2,579
<b>Candidate Informals</b>		437	418
<b>TOTAL</b>		22,134	22,132

[41] I further agreed to issue this expanded version of my decision explaining the details of the recount.

[42] There remains for me to issue a further decision – more properly, I think, a memorandum rather than a decision or judgment - to record matters coming to my attention during the recount, of concern to the parties, but not affecting the result. The parties agreed to send me memoranda summarising those concerns. They may also seek orders as to costs.

[43] Finally, I repeat below the substance of the closing paragraph of my decision of 9 October.

[44] I take the opportunity to record the skill and professionalism displayed during the recount by the Returning Officer and her team, and the assistance I received from the Chief Electoral Officer and the Commission's legal adviser. The public, and our democracy, are well served by them and the Commission's staff generally. I am also grateful for the positive, co-operative, and collegial manner in which representatives of the parties approached the recount and interacted with me.

[45] Having reflected on the events of the recount, I wholeheartedly agree with the observation of Judge Adams in *Waitakere (No2)* that it was a “*rare privilege*” to have been involved.

A handwritten signature in black ink, appearing to read "T J Broadmore". The signature is written in a cursive, flowing style with a large initial 'T'.

T J Broadmore

**District Court Judge**

# FLOWCHART 1 – SPECIAL VOTE CHECKING

## SPECIAL DECLARATION VOTE CHECKING (Flowchart 1)

