Ian Bassett **Barrister**

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29 August 2012

McLeod & Associates
Barristers and Solicitors
Level 11
Southern Cross Building
61 High Street
Auckland 1
Attention: Mr Richard McLeod

By email only

Re: Marriage Act Amendment Bill

I refer to my legal opinion by letter to you dated 27 August 2012 for your client Family First NZ ("Family First") regarding the likely legal effect of Ms Louisa Wall's Marriage (Definition of Marriage) Amendment Member's Bill.

I understand that questions have been raised as to whether a marriage celebrant solemnising a marriage is a person doing an act in the *"performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law"* within the meaning of s3(b) of the New Zealand Bill of Rights Act 1990 ("NZBORA").

In consideration of that issue I refer to *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 at [69] (HC) where the Court identified a non-exhaustive list of indicators (copy extract **attached**). In the present context:

1. The marriage celebrant must be a person authorised by the State to be a marriage celebrant.

2. The marriage celebrant performs his or her function pursuant to statute (the Marriage Act 1955).

3. The solemnisation of marriage is preceded by a statutory declaration to the State by one of the persons intended to be married (refer s23 of the Marriage Act 1955).

4. A marriage licence is issued by the State (refer s24 of the Marriage Act 1955) authorising the marriage to be performed.

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5. The marriage must be performed at the place specified in the licence (refer s31 of the Marriage Act 1955).

6. The words to be spoken by the couple to be married in the presence of the celebrant and witnesses are prescribed by statute (refer s31 of the Marriage Act 1955).

7. The form of documentation to be completed for the State by the celebrant, the couple and the witnesses are prescribed by law (Marriage (Forms) Regulations 1995). That documentation is to be returned to the State, duly executed and witnessed.

8. In the statutory context the celebrant can correctly be described as an agent of the State.

9. The resulting status of marriage upon solemnisation affects official status at law, including in relation to eligibility for state welfare and entitlements (ie such as superannuation etc), the status of children, parental responsibilities and inheritance laws.

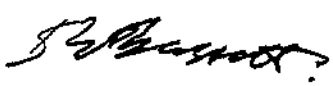
It remains my view that a marriage celebrant solemnising a marriage is a person falling within s3(b) NZBORA.

Furthermore although no marriage celebrant can be forced to solemnise a marriage (in conflict with their beliefs or otherwise), nevertheless it will be unlawful for such a person (with a s3(b) NZBORA role) to refuse to solemnise a marriage on any prohibited grounds of discrimination (refer section 19 NZBORA, which refers in turn to the prohibited grounds set out in s21 of the Human Rights Act 1993).

Although section 29 of the Marriage Act 1955 provides that *"A marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates"*, that is not an exemption in respect of the s19 NZBORA obligations.

I re-affirm my legal opinion to you dated 27 August 2012.

Yours faithfully



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notify the WCC accordingly. For its part, the WCC will no doubt wish to reconsider its position in relation to ss 91 and 92 of the RMA in the light of current circumstances. These may have changed materially and the Resource Management Amendment Act 2003 may possibly have some impact. On the basis of a firm proposal, the WCC (and as necessary the ARC) can consider the proposal and reach appropriate decisions. If still dissatisfied, Kitewaho has rights of appeal to the Environment Court.

[107] I also record that there was some discussion during the hearing before me about the merits of the structure plan approach adopted by the WCC in relation to subdivision applications. It appears this has already been the subject of at least one decision in the Environment Court involving Kitewaho. No doubt further consideration can be given to whether some form of structure plan for subdivision on the subject land is worth pursuing. I recognise that this normally calls for consideration on a catchment-wide basis which would extend beyond the subject land and I express no view on that issue.

[108] It may be that Kitewaho will consider that its best interests lie in joint discussions with representatives of the WCC and the ARC to determine the best and most practical way forward. To date, Kitewaho appears to have achieved little despite extensive and prolonged litigation. It may consider a more focused and practically orientated approach would be to its advantage.

[109] Finally, I record the WCC's earlier acknowledgment that certain observations made by the Judge in his first decision were not material and do not bind Kitewaho in other proceedings. These include his comment that the delays were largely motivated by costs disputes and the remarks in paras [78] and [80] of that decision about future landowners and the subdivider's system of private ways and roads.

Appeal allowed; cross-appeals dismissed.

Solicitors for the Waitakere City Council: *Kensington Swan* (Auckland).
Solicitors for the Auckland Regional Council: *Bell Gully* (Auckland).
Solicitors for the liquidators: *Lowndes Associates* (Auckland).

Reported by: Graeme Palmer, *Barrister*

Ransfield v Radio Network Ltd

High Court Auckland CIV 2003-404-569
24 May, 11 June 2004
Randerson J

Constitutional law – New Zealand Bill of Rights Act 1990 – Plaintiffs banned from talkback radio programmes – Whether defendants owed statutory duties – Whether breach of freedom of expression – Whether first defendants performing function or power conferred by law – Whether any such function or power was public or private – Whether pleadings could be amended – High Court Rules, RR 186 and 477 – Broadcasting Act 1989 – New Zealand Bill of Rights Act 1990, ss 3(b) and 14.

The plaintiffs alleged that they were banned from participation in talkback radio programmes operated by The Radio Network Ltd (TRN). They sought damages and injunctive relief against TRN and the Attorney-General as second defendant on behalf of the Minister of Broadcasting, alleging that there were statutory duties owed by the defendants by reason of the Broadcasting Act 1989 and licences granted to TRN for the purpose of radio transmission. They also alleged a breach of the rights affirmed in the New Zealand Bill of Rights Act 1990 including, in particular, an allegation of breach of the right to freedom of expression under s 14.

The defendants applied to strike out the plaintiff's proceedings under RR 186 and 477 of the High Court Rules. They asserted that there were no tenable causes of action pleaded by the plaintiffs.

Held: 1 There was no statutory duty requiring radio stations to permit the plaintiffs access to talkback radio. Nor was there any corresponding duty not to ban them from taking part. There was nothing in the terms and conditions of the spectrum licences issued to the radio stations that required them to provide programmes of any particular type or which would prevent a ban on access to talkback radio. There was therefore no tenable cause of action for breach of statutory duty (see para [34]).

2 Although the first defendants were performing a function or power conferred by law (licences under the Radio Communications Act 1989), that function was a private one. The New Zealand Bill of Rights Act therefore had no application to the first defendants' conduct of talkback radio programmes (see paras [73], [74]).

3 There were no other tenable causes of action in the plaintiffs' pleadings. Nor would amendment of the pleadings establish any such causes of action (see para [75]).

Result: Proceeding struck out.

right is conferred by or under the constitution or other instrument of incorporation or under rules or the bylaws of any body corporate. In contrast, the NZBORA has no application to purely private organisations carrying out private functions.

[65] Mr Gray referred me to two helpful articles by Professor Dawn Oliver of the United Kingdom. The first is "The Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act" (2000) PL 476 and the second is "Functions of a Public Nature Under the Human Rights Act" (2004) PL 329. In the first article, Professor Oliver discusses the relevance of a range of factors which may be considered in determining whether a particular body is a public authority or is a body whose functions are of a public nature under the 1998 Act. She considers, amongst other things, whether the focus of the inquiry should be on the function performed or on the nature of the body performing the function; the relevance of public funding or otherwise; the statutory scheme; issues of public interest and democratic accountability; the relevance of judicial review; and whether the body in question enjoyed special powers or authorities.

[66] Professor Oliver concluded at p 492:

> "The criteria for deciding whether a body is a public authority for all purposes – ie under section 6(1) but not under section 6(3)(b) and (5) – should place emphasis on whether it enjoys special powers and authority, and whether it is under constitutional duties to act only in the public interest which are 'enforceable', inter alia, via mechanisms of democratic accountability. On these criteria the meaning of public authority would be restricted to cover central and local government, the devolved bodies, the police, the armed forces and cognate bodies. Other bodies may well exercise public functions, and in doing so they will be bound by the Act to respect Convention rights. The definition of 'public function' should not however automatically follow that in the case law on judicial review: the issues are different and in particular there is no reason why bodies which violate Convention rights when exercising public functions should benefit from the protections of Order 53, the existence of which may have influenced the courts in developing the concept of public function for the purposes of that jurisdiction. Indicators of whether a function is 'public' will include whether it is a public service, the degree to which it is supported or underpinned by government, and whether it has special statutory powers. The courts should be wary of treating services offered either to the general public or to individuals as public functions unless they involve the exercise of coercive power or special authority, both because of difficulties in defining and limiting the extent of this form of vertical effect of the Act, and because such treatment legitimates state control of many activities by private bodies, often by individuals, thus rolling forward the frontiers of the state."

[67] In her second article, Professor Oliver took a rather restrictive view of the circumstances in which a body might be performing functions of a public nature under s 6(3)(b). She concluded, after reviewing the English authorities up to that point, that the only principled approach to the issue was whether the functions involve the exercise by private bodies of specific legally authorised coercion or authority over others which it would normally be unlawful for the private body to exercise: p 330.

[68] Professor Oliver emphasises, as she did in her earlier article, that private bodies in positions of power are often under private law duties or other regulatory control. She expresses the view that careful consideration is needed when determining whether a private body should be subject to the wide-ranging obligations inherent in the Human Rights Act. All these matters clearly need to be assessed but I would not support the narrow criterion suggested by Professor Oliver in relation to the NZBORA.

Discussion

[69] Having considered the submissions and authorities, my views can be summarised as follows:

(a) The fact that the entity in question is performing a function which benefits the public is not determinative. If it were, anyone delivering goods or services to the public under licence or other authority conferred by law, would fall within the section. That could not have been intended.

(b) Whether the function, power, or duty is carried out in public is immaterial. A public function, power, or duty under s 3(b) may be performed in private.

(c) Whether the entity is amenable to judicial review is not necessarily decisive and some care needs to be taken in applying decisions from that context for the reasons I have set out.

(d) The primary focus of inquiry under s 3(b) is on the function, power, or duty rather than on the nature of the entity at issue. Nevertheless, the nature of the entity may be a relevant factor in determining whether the function, power, or duty being exercised is a public one for the purposes of s 3(b).

(e) A person or body may have a number of functions, powers, or duties, some of which may be public and some private. It is essential to focus on the particular function, power, or duty at issue.

(f) Given the many and varied mechanisms modern governments utilise to carry out their diverse functions, no single test of universal application can be adopted to determine what is a public function, duty, or power under s 3(b). In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it "governmental" in nature or is it essentially of a private character?

(g) Non-exclusive indicia may include:

  (i) whether the entity concerned is publicly owned or is privately owned and exists for private profit;

  (ii) whether the source of the function, power, or duty is statutory;

  (iii) the extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme);

  (iv) whether and to what extent the entity is publicly funded in respect of the function in question;

  (v) whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty;

(vi) whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public;
(vii) whether coercive powers analogous to those of the state are conferred;
(viii) whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person (drawing by analogy on part of the definition of statutory power under s 3 of the Judicature Amendment Act 1972);
(ix) whether the entity is exercising extensive or monopolistic powers; and
(x) whether the entity is democratically accountable through the ballot box or in other ways.

[70] I emphasise that a decision in any particular case as to the applicability of the NZBORA will be fact dependent. The suggestions I have made are no more than a range of possible considerations. There may well be others. A flexible and generous approach is required. However, it must also be recalled that a private organisation (whether or not it is providing services to the public) is entitled to manage its business as it sees fit. Unless it is exercising public functions, powers, or duties conferred or imposed by or pursuant to law in terms of s 3(b), the only constraints upon its freedoms are those imposed by the general law.

The present case

[71] Here, the first defendants are privately owned companies which exist for the legitimate commercial purpose of producing profits for their shareholders. They each undoubtedly provide services to the public and they do so by virtue of the licences granted to them under the Radio Communications Act. In that sense, they are performing a function or power conferred by law.

[72] It is also true that by providing talkback radio programmes, radio stations are performing an important public role in promoting freedom of expression in the form of public debate on the issues of the day. In doing so, they are also promoting the public interest in the broader or altruistic sense. But are they performing a public function in terms of s 3(b)?

[73] I have concluded that the first defendants are essentially performing a private function. I am influenced by the clear distinction under New Zealand law between public and private broadcasters. Public radio is subject to sharply differing obligations from those affecting private radio and is obliged by the Radio New Zealand Act to pursue wholly different objectives in the public interest. In contrast, the government does not have any ownership interest in the first defendants and assumes only light-handed regulatory control through the Radio Communications Act and the maintenance of programme standards under s 4 of the Broadcasting Act. The government does not fund private radio. Nor does the government supervise the content of talkback programmes broadcast by the first defendants. It has no means of doing so other than through the retrospective complaints procedure under the Broadcasting Act. Finally, the provision of talkback radio could not properly be described as a governmental function. In the radio industry, any governmental functions are pursued through public radio.

[74] I conclude that the NZBORA does not apply to the first defendants in the conduct of talkback radio programmes.

Third issue – Whether there is any sustainable cause of action against the Crown

[75] I have already concluded that there has been no breach of statutory duty either on the part of the first defendants or on the part of the Crown. There are no relevant obligations on the Crown under the NZBORA. Nor could the Crown be liable for the actions of the first defendants who act independently of the Crown. There is nothing to support the principal and agency argument put forward by the plaintiffs. Any control exercised under the Companies Act has no bearing on the provision of talkback radio or how it is managed.

Result

[76] I conclude there are no tenable causes of action at law in the plaintiffs' pleadings. Nor am I able to envisage any way in which tenable causes of action could be established if the present statement of claim were amended.

[77] In the circumstances, this proceeding is struck out.

[78] If the defendants seek costs, they should file memoranda within four weeks of the date of issue of this decision. The plaintiffs will have a further four weeks thereafter to file any opposing memorandum.

[79] I record my thanks to all counsel and to the plaintiffs for the helpful submissions which have been made.

Proceeding struck out.

Solicitors for TRN: *Jones Fee* (Auckland).
Solicitors for Canwest: *C Bradley, Legal Counsel* (Auckland).
Solicitors for Uma Broadcasting: *Sinclair Black* (Auckland).

Reported by: Carolyn Heaton, *Barrister*