IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CIV-2010-483-230

UNDER	Part 1 of the Judicature Amendment Act 1972
IN THE MATTER OF	a decision made pursuant to the Wanganui District Council (Prohibition of Gang Insignia) Act 2009
BETWEEN	PHILIP ERNEST SCHUBERT Applicant
AND	WANGANUI DISTRICT COUNCIL Respondent

Hearing: 17 November 2010

Appearances: D Webb and S Rollo for the applicant
H Wilson and H Brown for the respondent

Judgment: 3 March 2011

JUDGMENT OF CLIFFORD J

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Introduction

[1] The Wanganui District Council (Prohibition of Gang Insignia) Act 2009 ("the Wanganui Act"), a local act, enables the Wanganui District Council ("the Council") to make bylaws specifying public places in the Wanganui district ("the District") as places where persons may not display gang insignia at any time.[1] On 31 August 2009 the Council made the Wanganui District Council (Prohibition of Gang Insignia) Bylaw ("the Bylaw").

[2] Mr Schubert, the applicant, is a member of the Hells Angels motorcycle gang, which he describes as a club. He applies for judicial review of the Bylaw.

[3] Mr Schubert focuses his challenge on the geographic extent of the prohibition on the display of gang insignia introduced by the Bylaw. Mr Schubert says that, contrary to s 5(6) of the Wanganui Act, the Bylaw in effect specifies all public places in the District as places where persons may not display gang insignia. The Bylaw is therefore ultra vires (ie not authorised by) the Wanganui Act. Further, the Bylaw is, in terms of s 5 of the New Zealand Bill of Rights Act ("NZBORA"), for the same reason, a disproportionate restriction on the right to freedom of expression. The Wanganui Act does not mandate such a breach of NZBORA. The Bylaw is therefore not authorised by the Wanganui Act for that reason as well. Even if the Bylaw is authorised by the Wanganui Act, the Council erred in law when it made the Bylaw as it failed to consider the values of NZBORA. The Bylaw is also invalid in terms of s 17 of the Bylaws Act 1910. For all or any of these reasons, this Court should declare the Bylaw invalid.

[4] The Council's position is that the Bylaw is authorised by the Wanganui Act. The Bylaw does not, in effect, specify all public places in the District as ones where persons may not display gang insignia. Nor is the Bylaw – in terms of its geographic coverage – a disproportionate restriction on the right to freedom of expression in breach of NZBORA. However, even if the Bylaw was for that reason an otherwise

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[1] In September 2009, the New Zealand Geographic Board recommended "Wanganui" be spelt "Whanganui", as that was how the local iwi would have spelt it. The Act was passed and the Bylaw made before that decision, using the spelling "Wanganui". To avoid confusion I have adopted that spelling throughout.

disproportionate restriction on that right, Parliament mandated that outcome when it passed the Wanganui Act. Therefore, if the Bylaw otherwise breaches NZBORA, it is still authorised by the Wanganui Act and, as regards NZBORA, is "saved" by s 4. Finally, the Council was not required to consider the values of NZBORA when it made the Bylaw. But if it was, it did.

Background

[5] Considering Mr Schubert's various grounds of challenge to the Bylaw necessarily involves discussing the background to the Council's promotion of the Wanganui Act, and its making of the Bylaw. An important part of that narrative is the Council's concerns, over time, at the negative impact gang activities have had on Wanganui and its citizens. The Council's attention was drawn relatively early on in that process to the relevance of NZBORA. Consideration of Mr Schubert's challenges also necessarily involves close analysis of the terms of the Wanganui Act and the Bylaw, and their legislative history. Parliament's consideration of the implications of NZBORA for the Wanganui Act, both as originally introduced and as enacted, and for any bylaws made under the Wanganui Act, is an important part of that analysis.

[6] I do not think it is necessary to go into those matters in great detail at this point. However, a relatively brief description of the background to the Wanganui Act and the Bylaw provides context for the more detailed discussion which will follow.

[7] I draw that description and relevant other parts of this judgment from the affidavit material provided by the parties.

[8] Mr Michael Laws, the Mayor of Wanganui at the time of the making of the Bylaw, provided an affidavit which set out a full narrative of the background to the Bylaw, and appended extensive material taken principally from the minutes of relevant Council meetings. In addition, Inspector Duncan McLeod, the Wanganui Police Area Commander, provided an affidavit which dealt with similar matters from the point of view of the Police.

[9] For the applicant, two affidavits were provided by Mr Jarrod Gilbert, a sociologist studying towards a PhD on the rise and development of gangs in New Zealand. Mr Gilbert's affidavits provided a range of information relating to gangs, their traits and characteristics, in particular as to the significance and role of gang insignia. Mr Gilbert also provided views on gang violence generally, gang clashes and issues relating to the intimidation and harassment of the public by gang members.

[10] By 2005, the Council and the wider Wanganui community had, understandably in my view, been concerned about the adverse impact of gang activity for a number of years. Surveys conducted by the Council and local entities showed that gang issues, "intimidation by gangs" and "the influence of gangs", were significant issues for the youth of the town. In that year the Council began considering options for dealing with the apparent gang problem. An important Council meeting was held on 10 March 2006. That meeting was called to consider the introduction of a bylaw to help address gang related issues. At that meeting the Council was briefed by Police on gang related arrests and activity in the District. There had, during the past two weeks, been serious confrontations between the Hells Angels and Mongrel Mob gangs. Gang confrontations had taken place at two suburban service stations and at the Wanganui Hospital. People in the central business district had been intimidated by gang members' behaviour. At that meeting, and as Mr Laws puts it in his affidavit, "it was resolved that the Council was to draft a bylaw banning gang regalia from the Central Business District and all other public places in the Wanganui District". A number of councillors were wary about the use of the phrase "all other public places." The minutes of that meeting record that "public places are defined and could be parks, reserves and beaches with congregations of the public on lawful business".

[11] In April 2006 a draft bylaw was presented to the Council and approved. I was not provided with a copy of that draft bylaw. At that meeting, Mr Laws said that "public places had been defined and were the parks and reserves owned by the Council, shopping precincts in Wanganui – Aramoho, Gonville, Springvale and Wanganui East".

[12] In December 2006 the Council resolved that the proposed bylaw, prohibiting the wearing of gang patches in the Central Business District and other public places, be added to the Council's referendum for 2007.

[13] In February 2007 the Council decided that, rather than promulgate the bylaw under the Local Government Act 1974, it would support the introduction of a local bill to give the Council such bylaw-making powers. Mr Laws explains in his affidavit that that decision was "taken to ensure that arguments that the proposed bylaw might infringe on the rights protected by the New Zealand Bill of Rights 1990 (the "NZBORA") were appropriately addressed". At that point the Bylaw was described as "a bylaw to prohibit the wearing of gang insignia in public places, including the Central Business District, parks and other recreational areas".

[14] A local bill was drafted.[2] The Wanganui District Council (Prohibition of Gang Insignia) Bill ("the Bill") was introduced to Parliament by Wanganui MP, Chester Burrows, on 20 November 2007. This initiative was supported by the Wanganui Police, the National Police Headquarters, and the New Zealand Police Association. The Bill had its first reading on 2 and 16 April 2008.

[15] On 20 February 2008 the Attorney-General reported to Parliament, pursuant to s 7 of NZBORA, that the Bill constituted a limitation on the right to freedom of expression that was not reasonably justifiable.

[16] The Law and Order Select Committee considered the Bill in 2008. It reported the Bill back, with amendments, to Parliament on 29 September 2008. The Wanganui Act received assent on 9 May 2009.

[17] The Bylaw was released for public consultation in June and July of 2009. A Council subcommittee considered submissions in July and August, and on 31 August the Council accepted the recommendation of that subcommittee that the Bylaw be introduced. The Bylaw came into force on 1 September 2009.

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2 Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (171-3).

Is the Bylaw in breach of s 5(6) of the Wanganui Act?

Section 5(6)

[18] Section 5(6) of the Wanganui Act provides:

> A bylaw must not be made under subsection (1)(a) if the effect of the bylaw, either by itself or in conjunction with other bylaws made under subsection (1)(a), would be that all the public places in the district are specified places.

[19] Section 5(6) is properly understood in the context of the Wanganui Act as a whole, and its legislative history. As Burrows, *Statute Law in New Zealand*, provides:[3]

> It is important that the section of the Act under construction be read in light of the Act as a whole. The New Zealand Courts, particularly the Court of Appeal, often emphasise what they call the "scheme of the Act".

[20] Burrows also acknowledges the significance of legislative history to the proper understanding of an enactment.[4]

[21] The purpose of the Wanganui Act, as set out in s 3, is "to prohibit the display of gang insignia in specified places in the District." That very specific purpose is, in my view, properly understood by reference to the broader purpose of the Act, reflected in s 5(5) which refers to preventing or reducing "the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs".

[22] Accordingly, s 12 of the Wanganui Act makes it an offence for any person to display gang insignia at any time in a specified place in the District. For the purposes of s 12, and the Wanganui Act more generally:

a) Gang insignia is defined as:

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3 J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 258.

4 See 265 and onwards.

i) a sign, symbol, or representation commonly displayed to denote membership of, an affiliation with, or support for a gang, not being tattoos; and

ii) includes any item of clothing to which a sign, symbol, or representation referred to in paragraph (a) is attached.

b) Gang is defined as:

i) Black Power, Hells Angels, Magogs, Mothers, Mongrel Mob, Nomads, or Tribesmen; and

ii) any other specified organisation, association, or group of persons identified in a bylaw made under section 5.

c) Specified place is defined as a public place designated as a specified place for the purpose of the Act in a bylaw made under s 5 of the Act.

d) Public place is defined as:

i) a place:

- that is under the control of the Council; and
- that is open to, or being used by, the public, whether or not there is a charge for admission; and

ii) includes:

- a road, whether or not the road is under the control of the Council; and
- any part of a public place.

[23] Section 5(1) gives the Council the power to make bylaws designating public places to be specified places or "identifying" further organisations as gangs. In making such bylaws, the Council must use the special consultative procedure provided by s 83 of the Local Government Act 2002 (subs (2) and (3)). Section 5 then provides three important restrictions on the Council's bylaw-making powers:

a) Pursuant to subs (4), the Council may only make a bylaw identifying a further organisation as a gang if it is satisfied that that organisation has a common name or common identifying signs, symbols or representations and its members, associates, or supporters individually or collectively promote, encourage, or engage in a pattern of criminal activity; and

b) In terms of designating public places to be specified places, and in addition to the geographic restriction found in subs (6), subs (5) - using the words referred to at [21] – provides as follows:

> (5) The Council may make a bylaw under this section only if it is satisfied that the bylaw is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.

The Bylaw

[24] The Bylaw does two things.

[25] First, pursuant to s 5(1)(b) of the Wanganui Act, it adds to the list of organisations designated as gangs for the purposes of the Act: the Red Devils, Head Hunters, and Mungukaha. To that extent, Mr Schubert did not challenge the Bylaw.

[26] Second, pursuant to s 5(1)(a) of the Wanganui Act, it declares to be specified places:

a) all public places within the Wanganui District urban area, as shown on the Wanganui District Council Prohibition of Gang Insignia Boundary Map (clause 3.2 of the Bylaw), including both sides of the roads and footpaths (whether or not the road is under the control of Council), parks, reserves, public buildings and beaches; and

b) three further more specific locations, namely Mowhanau Beach and Village, Bason Botanical Gardens and Lake Wiritoa together with

> some nine local halls, their adjoining car parks and 100 metres of the approaching public roads in each direction of those halls.

[27] The map at clause 3.2 of the Bylaw is reproduced as Schedule I.

[28] That area comprises what were described in the Council's discussions as, all of Wanganui's urban and peri-urban areas. The term "peri-urban" is not one I was familiar with. It is defined in the Shorter Oxford English Dictionary as "*adjective* (esp in Africa) immediately adjoining a city or conurbation".

[29] The impact of the Bylaw relative to all public places within the District under the control of the Council, and all roads in the District, is shown on a map produced by the Council for the purpose of the hearing of Mr Schubert's application. That map is set out in Schedule II.

[30] The issue raised by Mr Schubert's first ground of challenge to the Bylaw is a relatively straightforward one. That is, does the Bylaw breach the prohibition in s 5(6), as that section is to be properly interpreted?

The interpretation of s 5(6)

[31] Section 5(6) did not appear in the Bill as first introduced. It was added pursuant to the following recommendation of the Select Committee: [5]

> We recommend amending the bill by adding new clause 5(5) to make it clear that the Wanganui District Council could not make all public places in the district specified places using bylaws. Some submitters were concerned that the council could designate the whole district as such. We understand it is a well-established principle that a power to regulate an activity does not amount to total prohibition, but this amendment would provide certainty.

[32] That understanding seems to have stemmed, in turn, from the Report of the Department of Internal Affairs to the Law and Order Committee, which said:[6]

> Concern was expressed by one submitter that WDC may be able to use the power provided by this Bill to make all locations in the district specified

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5 Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (171-2) (select committee report) at 3.

6 Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (171-2) (Department of Internal Affairs Report) at [10.3.2].

> places, or even to make the district as a whole a specified place. It is considered that the Bill does not provide such scope to the bylaw-making power and that if WDC were to take such a step, it would open itself up to legal challenge. It is well-established that the power to regulate an activity is not a licence for total prohibition. If the Committee has concerns about this issue, the clause 5(1)(a) could be amended by adding "within a defined area of the district" after "public place".

[33] It seems clear, therefore, that s 5(6) was indeed added to make explicit the common law principle that where a power to regulate is given, a total prohibition cannot be imposed.

[34] The distinction between powers to regulate and powers to prohibit was discussed by the Privy Council in the leading case of *Municipal Corporation of the City of Toronto v Virgo*.[7] There the Municipal Corporation was given a power to make bylaws regulating or governing trade. In reliance on that power, the Municipal Corporation passed a bylaw prohibiting hawking on the eight main streets of Toronto. The Privy Council upheld the decision of the Supreme Court of Canada that the bylaw was ultra vires. The Privy Council said:[8]

> No doubt regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shows that when the Legislature intended to give power to prevent or prohibit it did so by express words.

[35] A recent New Zealand case considering this issue is *Willowford Family Trust v Christchurch City Council*.[9] That case concerned the power given under the Prostitution Reform Act 2003 to make bylaws for the purpose of regulating the location of brothels. The Christchurch City Council passed a bylaw which stated that brothels were only to be allowed within a small area of the Christchurch CBD. Judicial review of that bylaw was sought on a number of grounds. One of the main concerns of the applicants was the effect of the bylaw on small owner-operator

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7 *Municipal Corporation of the City of Toronto v Virgo* [1896] A.C. 88 (PC).

8 Ibid, at 93.

9 *Willowford Family Trust v Christchurch City Council* HC Christchurch CIV-2004-409-002299, 29 July 2005.

brothels, largely run in suburban areas from people's homes. The Court held that the effect of the bylaw was to prevent prostitutes who worked at such brothels from plying their trade in a substantial part of the city. As in *Virgo* the area that was excluded was that area of the city where they were best situated to work. The Court noted that the question was not ultra vires in the classical sense, as the Council clearly had the power to regulate brothels. Rather, the question was whether the bylaw "crossed the line" of reasonableness, or amounted to an unlawful restriction on trade, or effectively prohibited small owner–operated brothels. Again, as in *Virgo*, answering that question involved an assessment of the substantive effect of the bylaw in the context of the rights created under the Prostitution Reform Act 2003. Because, in terms of *Virgo*, the effect of the bylaw was to prohibit a certain statutorily recognised class of sex workers from plying their trade at all in a substantial and important part of the city, the bylaw was found to be invalid. Whether that conclusion was based upon unreasonableness, "prohibition", or restraint of trade did not, the Court said, greatly matter.

[36] In reliance on the *Virgo* and *Willowford Family Trust* decisions, Mr Schubert argued that a local body may not exercise a power to regulate an activity which prohibits that activity. That proposition is undoubtedly correct. Its direct relevance here is less clear. When the Privy Council in *Virgo* identified the distinction between regulating and prohibiting, it pointed to the language used in the relevant Ontario statute. It observed that in that statute, where the legislature intended to give power to prevent or prohibit, it did so by express words. Because the power in question was expressed as being one to govern or regulate, no power of prohibition arose.

[37] Here, as the Council pointed out, Parliament chose to legislate in terms of giving the District Council the power to prohibit. Therefore, the Council argued, Mr Schubert could not rely on the authority of *Virgo*, *Willowford* and like decisions to challenge the Bylaw.

[38] The distinction between a power of regulation and prohibition was recognised by the Supreme Court, as it then was, in *Wilton v Mt Roskill Borough*

Council.[10] In that case, local authorities had power under the Municipal Corporations Act 1954 and the Health Act 1956 to regulate, license or prohibit the keeping of animals. A Mt Roskill bylaw prohibited the keeping of certain numbers of dogs and cats in premises within the district, and operating hospitals, homes or boarding kennels for dogs or cats, in either case without a licence. That bylaw was challenged as being ultra vires. Discussing the decision in *Virgo*, and a number of Australian cases which had also considered the principle that a power to regulate an activity implies the continuation of that activity and therefore not its prohibition, Hardie Boys J distinguished Virgo, stating:[11]

> [I]n *Municipal Corporation of the City of Toronto v Virgo* [1896] A.C. 88 ... the Court was considering a power to pass bylaws for "regulating and governing" hawkers; Lord Davey said (ibid., 93) that it appeared to their Lordships that the real question was whether under that power "the Council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised". He pointed out the difference between "the prohibition or prevention of a trade and the regulation or governance of it, and indeed," he said, "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed" (ibid, 93).
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> Here, however, the power to prohibit the keeping of animals is conferred expressly under the Health Act or under the Municipal Corporations Act if the existence or keeping thereof within the district is, or in the opinion of the Council is, likely to become a nuisance or injurious to health...

[39] He went on to comment:

> The disjunctive "or" makes it clear that the Council may exercise any one of these three powers to the exclusion of the others.

In other words, the power to prohibit could be exercised on its own to achieve just that – prohibition.

[40] I therefore accept the thrust of the Council's submission that the application of cases such as *Virgo* and *Willowford* does need to take account of the difference between a power to regulate and – as here – an express power to prohibit, at least to a certain extent.

[41] Having said that, I nevertheless think that those decisions are relevant when considering whether the Bylaw is not authorised by the Act because the power to

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10 *Wilton v Mt Roskill Borough Council* [1964] NZLR 957 (SC).

11 Ibid, at 958.

prohibit is not one to prohibit generally, but one to prohibit in specified places. They are therefore relevant when considering whether – in breach of s 5(6) – the Bylaw involves a prohibition on the wearing of gang insignia "the effect of which is that all public places in the district are specified places".

[42] In *Virgo*, when considering the significance of the principle that a power to regulate may not amount to a prohibition, the Privy Council observed as follows:

> It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the city. Their Lordships cannot accede to this argument. The question is one of substance and should be regarded from the point of view as well of the public as of hawkers. The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying their goods off or of trading with the class of traders in question …

The question, the Privy Council said, was reduced to a bare question of power: did the Act give the city of Toronto the power, in substance, to prohibit hawkers?

[43] *Virgo*, and similar cases, support the proposition that in construing the constraint contained in s 5(6), what must be looked at is the substantive effect of the Bylaw.

[44] More generally, section 5(1) of the Interpretation Act 1999 reads:

> The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[45] Commenting on s 5, the Supreme Court has recently observed:[12]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[46] The need to assess the substantive effect of the Bylaw is reinforced by the terms of s 3 of the Wanganui Act. As noted, the purpose of the Wanganui Act is to

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[12] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

prohibit the display of gang insignia "in specified places in the district". The disjunctive reference to "specified places" and to "the district" confirms that Parliament's intent was that the District as a whole was not to be a specified place. Rather, it was a – by definition limited – number of specifically identified places, within the District, that were to be "specified places".

[47] Interpreted in that way, the question is: what is the substantive effect of the Bylaw and does the Bylaw breach s 5(6)?

[48] Here, the Council argued simply that the Bylaw was limited and did not breach s 5(6) because, as a matter of fact, it designated some, but not all, of the public places in the District as specified places. In my view, that is to take a literal, and not a purposive, approach to the prohibition contained in s 5(6). In my view, in terms of *Virgo* and like cases, it does not take account of the substantive effect of the Bylaw.

[49] The map in Schedule II shows that the only public places in the District that have not been designated as specified places are fifteen reserves, three parks, one reservoir and one lake, which are all well outside the Wanganui city limits, and the roads that are not within any of the specified areas or "adjacent" to the designated public halls.

[50] The direct effect of the Bylaw, therefore, is that gang insignia may not be displayed on any road, or other Council-controlled area, within the greater Wanganui urban area. Nor may they be displayed in, or adjacent to, the other specifically designated areas.

[51] I accept that, literally speaking, not all public places in the District therefore are specified places. Nevertheless, substantively and for all practical purposes, that is the effect of the Bylaw. A person who might otherwise wear or display gang insignia can now only do so on the relatively small number of roads that provide access to remoter areas of the District and beyond and in the few parks and reserves not specifically designated. Even when doing so, they would have to take off that gang insignia, or for example remove it from a vehicle or cover it, in the vicinity of the various more specific locations also designated in those outlying areas. Although

no specific figures were provided, I think it is reasonable to infer, moreover, that by far the largest percentage of people directly affected by the Bylaw, gang members living in Wanganui, live within the areas designated as specified places in the Bylaw. It is, moreover, no answer to the assertion that the Bylaw breaches s 5(6) to say that gang insignia may still be displayed in private places. The restriction provided by s 5(6) is directed at public places.

[52] On a day-to-day basis, therefore, those persons are – in effect – prohibited from wearing or displaying gang insignia throughout Wanganui. They may only do so by going outside that broad urban area, or when they have arrived at one of the non-designated outlying parks or reserves.

[53] In my judgment, therefore, and in breach of the restriction on the power to make bylaws contained in s 5(6), the Bylaw does have the substantive effect that all public places in the District are specified places. This interpretation of the limits that are placed on the power to prohibit is strengthened, to my mind, by s 6 of the Wanganui Act which provides for the signposting of specified places "on, or adjacent to, the place to which the notice relates". That provision indicates that Parliament did not envisage that the entire city of Wanganui – even less the District – would, in substance, be designated a specified place. Rather, similar to public liquor bans, certain parts of the city and District would be designated and signposted as such.

[54] I therefore find that the Bylaw is not authorised by the Wanganui Act for that reason.

[55] In responding to this aspect of Mr Schubert's challenge to the Bylaw, the Council not only addressed those arguments but went on to consider the reasonableness of the Bylaw. Its general submission was that even an unambiguous power (here to prohibit) cannot be exercised unreasonably, and it is appropriate (in the context of Mr Schubert's challenge to the Bylaw as ultra vires for being in breach of s 5(6)) for the Court to consider the reasonableness of the extent of prohibition effected by the Bylaw. The Council went on to submit that generally a *Wednesbury* reasonableness standard was appropriate, but that a more intense standard of

proportionality may sometimes be applied, especially in cases involving NZBORA issues.

[56] Based on that analysis, the Council summarised its position in this way:

a) Applying a *Wednesbury* standard, the Bylaw should be upheld as a partial prohibition because a sensible person would not believe it absurd that the Council chose the "specified places" which are covered in the Bylaw.

b) In the alternative, should the Court decide that significant rights are at issue in this case and hold that this justifies applying a more intense standard of review, the Bylaw should be upheld as proportionate.

[57] In my view, issues of reasonableness and proportionality are not directly relevant here. Put very simply, and given an appropriate – whatever standard is adopted – factual background, it may have been reasonable for the Council – especially if assessed on a *Wednesbury* basis – to prohibit the wearing of gang insignia throughout the District. Very simply, such a prohibition, though reasonable, would nevertheless – in terms of s 5(6) – have been ultra vires. The question is, as the Privy Council observed in *Virgo*, one of "bare" vires.[13]

[58] I acknowledge that here I have undertaken my analysis of Mr Schubert's challenge to the vires of the Bylaw in terms of s 5(6) by reference to the explicit restriction on the bylaw-making power provided by that section. In doing so, and acknowledging from a Bill of Rights point of view that this may be something of a sterile exercise, I have put aside issues that arise if s 5(6) is itself seen as being prompted by Bill of Rights' concerns, or issues that arise more generally when the principle of legality – in that it also protects Bill of Rights' values – is taken into account. In my view, in this case those matters are more conveniently considered when addressing the question of whether the Bylaw constitutes a disproportionate restriction on NZBORA right to freedom of expression and, if it does, whether the Bylaw is, nevertheless, still intra vires (ie authorised by) the Wanganui Act. Those are the issues to which I now turn.

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[13] At 93.

General NZBORA considerations

[59] Mr Schubert's first NZBORA contention was that the display of gang insignia constituted the exercise of the right to freedom of expression and was therefore, prima facie, protected by s 14 of NZBORA. The Council, although raising issues as to the importance of that particular example of expression, accepted that position.

[60] Mr Schubert accepted that the Wanganui Act mandated bylaws which imposed limits on that right to freedom of expression. For Mr Schubert it was conceded that a bylaw that prohibited the wearing of gang patches in the CBD, and a number of parks within Wanganui, may well have been such a bylaw.

[61] Mr Schubert contends, however, that because of the geographic extent of the Bylaw, the Bylaw imposes limits on the right to freedom of expression that cannot be said to be, in terms of s 5 of NZBORA, reasonable and demonstrably justified in a free and democratic society. He says that the Wanganui Act did not empower the Council to pass such a Bylaw, and the Bylaw is therefore invalid because it is not authorised by the Wanganui Act.

[62] The Council for its part accepted that, through the Wanganui Act, the Bylaw imposed limits on the right to freedom of expression affirmed by NZBORA. The Council says, however, that those limits are reasonable and demonstrably justifiable. If not, they are mandated by the Wanganui Act and therefore protected by s 4 of NZBORA.

[63] The parties differ, therefore, on two principal issues:

a) Whether the Bylaw places limits on the right to freedom of expression affirmed by NZBORA that are reasonable and demonstrably justified?

b) If the Bylaw places limits that are not reasonable and demonstrably justified, is it for that reason not authorised by the Wanganui Act?

I will, therefore, consider this part of Mr Schubert's challenge to the Bylaw by reference to those two issues.

[64] It is important to note, at this point, that Mr Schubert's challenge is to the actions of the Council in enacting the Bylaw. Furthermore, he directs that challenge at the geographical extent of the designation by the Council of the public places that were to be "specified places". It is the passage of the Bylaw which, of course, brought into effect a ban on the display of gang insignia (as defined). The effect of that ban – in terms generally of the limitations it imposes on the right to freedom of expression – has three operative parts. They are, namely:

a) the definitions of "gang insignia" and "gangs" and the use of the term "display" – as provided by the Wanganui Act;

b) the extension of the defined term "gangs" – as incorporated in the Bylaw; and

c) the geographic extent of that ban – as reflected in the designation in the Bylaw of public places as specified places.

[65] It is only the final element that Mr Schubert challenges.

[66] I note that the definition of gang insignia in the Wanganui Act is very broad. As defined, gang insignia would include the smallest and least offensive visible emblem associated with a gang. Mr Gilbert, in his affidavit, provided to the Court pictures of a wide range of objects on which images of Hells Angels gang insignia are produced. Included was an otherwise plain grey sweater which displays a small "death head" embroidered emblem. The "death head" emblem is the skull device which forms the centre of a Hells Angels patch. In this particular instance, that device was displayed in a similar manner as devices of well-known brand names are displayed on fashion clothing more generally. Any bylaw made under the Wanganui Act would, by reference to the definition of gang insignia provided by the Wanganui Act, make it an offence to display that small, and what I think might well be argued to be itself non-intimidatory and non-confrontational, label, in any place designated a specified place. To that extent, any such bylaw made under the Wanganui Act might

be argued to be one that imposed a disproportionate restriction on the display of gang insignia and one that was not demonstrably justifiable in a free and democratic society. It is possible to consider a challenge to a prosecution under the Wanganui Act involving such an insignia brought – pursuant to s 6 of NZBORA – on the basis that the defined term "gang insignia" should be interpreted so that it only applies to signs, symbols or representations which are not only commonly displayed to denote membership of or affiliation with or support for a gang, and which also tend to intimidate the public or incite confrontation between gangs.

[67] In terms of the prohibition provided by s 12 on "display", it would also be possible to argue that an NZBORA consistent approach to the interpretation of the term "display" would be to require an act which could reasonably be seen as giving rise to a real risk of the occurrence of intimidation, harassment or confrontation.

[68] Mr Schubert's challenge to the Bylaw raised neither of those issues. I do not therefore consider it appropriate for me to consider in great detail, or express any concluded view on them. Some brief comment is, however, appropriate.

[69] In an observation that can be seen as reflecting both the breadth of the definition of gang insignia and the potential breadth of the undefined term "display", the Attorney noted in his report to Parliament:

> As the offence provision is based on specified locations, rather than the purpose or conduct of the wearer, it does not differentiate between wearing[14] or display of insignia that does in fact have an intimidatory or confrontational purposes or effect and that which does not. ... The offence provision extends to prohibit conduct that does not have [the] effect of reducing the likelihood of gang confrontations and the intimidation of members of the public.

[70] Given the terms of the Attorney-General's report – including that observation – and Parliament's decision to proceed with the Wanganui Act in the form it finally did, there would be an argument that as regards those aspects of the Act the proper interpretation is that Parliament intended those "disproportionate" impacts. Therefore, to the extent any bylaw is thereby in breach of s 5 of NZBORA by reference to those aspects of the Wanganui Act, is it saved by s 4. An assessment of that argument is, however, a matter for another day.

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[14] The reference to "wearing" gang insignia was deleted by the Law and Order Select Committee.

[71] Mr Schubert's challenge is to the action of Council in making the Bylaw and, in that, to the geographic extent of the areas it designated. It is with this issue that this judgment is concerned.

[72] It is, I think, helpful to understand at the outset the perspective that each of the parties brought to this issue. Anticipating his argument on the second question, Mr Schubert simply says that the Wanganui Act does not empower the Council to pass bylaws that breach NZBORA. The Bylaw, constituting an unjustified limitation on the right to freedom of expression, breached NZBORA and is therefore not authorised by the Wanganui Act.

[73] On this issue I understood the Council to argue – in many ways accepting Mr Schubert's principal contention – that correctly interpreted the Wanganui Act provides for bylaws that are consistent with NZBORA. That is, the restrictions on the bylaw-making power that exist in the Wanganui Act, particularly in s 5(5), ensure that bylaws made under the Wanganui Act do not breach NZBORA. As set out in its written synopsis:

> The Council's submission is that the empowering Act is clear and unambiguous. It permits the Council to pass bylaws that prohibit the display of gang insignia in specified public places. Such a bylaw can only be made when the Council is satisfied that certain conditions exist and can only be made subject to certain limitations. That interpretation is consistent with the rights and freedoms contained in the NZBORA.

And further:

> The limitation on the freedom of expression permitted by the empowering Act is demonstrably justified pursuant to section 5 of the NZBORA.

[74] Again anticipating its argument on the second question, the Council further submits – somewhat awkwardly in my view given the first limb of its argument – that if a bylaw does breach NZBORA, then s 4 of NZBORA protects that bylaw, as long as the bylaw is otherwise authorised by the Wanganui Act. Here, the Bylaw is authorised because the Council, in terms of s 5(5), was satisfied that the Bylaw was reasonably necessary. Its decision on that matter, whether assessed in terms of *Wednesbury* reasonableness or a more intense standard of review, was one this Court should uphold. Either way, the Bylaw is valid.

[75] The question then becomes one of what is the correct approach to analysing the two questions posed at [63]?

[76] The answer to the first of those questions requires the application of s 5 of NZBORA, in the manner unanimously agreed to by the Supreme Court in *Hansen*,[15] noting the difference in view between the majority and Elias CJ as to when s 5 is properly applicable. Section 5 provides:

> **Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[77] As Elias CJ, by reference to the Supreme Court of Canada in *R v Oakes* and subsequent decisions,[16] put it, the application of s 5 involves the following analysis:[17]

> ...The objective sought to be achieved by the limiting provision must be of sufficient importance to warrant infringement of a fundamental human right. The limitation must be no more than is reasonably necessary to achieve the purpose. The objective against which a provision is justified cannot be wider than can be achieved by the limitation of the right.

[78] How I should go about answering the second question is not as straightforward. The issue raised is that discussed in *Hansen*, namely how is the interpretation exercise required by s 6 of NZBORA to be carried out, including the relationship between that exercise and the "justified limitations" provisions of s 5 of NZBORA.

[79] Section 6 provides:

> **Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

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15 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.
16 *R v Oakes* [1986] 1 SCR 103 (SCC).
17 At [42].

[80] Tipping J discussed what is involved in the s 6 interpretational exercise in the following terms:[18]

> This argument raises, at least implicitly, a question about the correct approach to s 6 of the Bill of Rights in the light of ss 4 and 5. Does the court look first for the most Bill of Rights consistent meaning the statutory provision is capable of bearing, or does the court first identify the meaning which, on ordinary principles of statutory interpretation, the provision should be given? Section 6 is concerned with meanings which are inconsistent with the rights and freedoms contained in the Bill of Rights.[1] It is only when a meaning is inconsistent that the preference for a consistent meaning mandated by s 6 comes into play.[2] Logically, therefore, the court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned. The court then tests that meaning for Bill of Rights consistency along the lines set out below.
>
> [1. Although in its terms s 6 is directed to interpretation, it serves the collateral purpose of encouraging explicitness if Parliament wishes to enact a provision which is inconsistent with a right or freedom contained in the Bill of Rights.
> 2. Or less consistent than another tenable meaning.]

[81] Tipping J went on to observe that if an apparent inconsistency is identified at that point the Court must then examine the apparent inconsistency to see whether it constitutes a justified limit.[19] Blanchard and McGrath JJ expressed similar views.[20]

[82] To adopt strictly the approach taken by the majority in *Hansen*, therefore, involves identifying the meaning that the statutory provision bears without reference to the "preference" with which s 6 is concerned. The majority spoke of this in NZBORA terms as ascertaining the "natural" or "intended" meaning, as the first step in the process of determining whether that meaning constituted a justified limitation and, in turn, if it did not, whether there was an alternative meaning properly available which was more consistent and was therefore to be preferred in terms of s 6. Yet, as posed, the second issue here invites an analysis that includes s 5 in a unitary interpretational exercise. That is, whether and to what extent the Wanganui Act mandates bylaws which impose unreasonable restrictions on the right to freedom of expression? Therefore, and acknowledging the obvious authority of *Hansen* on this matter, the issue I have grappled with is whether I should adopt the *Hansen* approach to the interpretational exercise that answering the second of the two questions calls for? I have concluded I should not. In my view, what s 6 requires me to do is to prefer the most Bill of Rights consistent meaning that can be given to the

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18 At [88].
19 At [90].
20 At [50]-[60] and [190]-[192].

Wanganui Act on the crucial question of the extent to which the Wanganui Act authorises bylaws that limit the right to freedom of expression.

[83] In reaching that conclusion, I note that at a number of places in *Hansen* the Judges acknowledge that different contexts could call for different approaches. As Blanchard J put it, commenting on the approach taken by the majority:[21]

> It may be said that this approach to ss 4 – 6 is not the one taken in *Moonen* but in that case there was no meaning that, from the language and history of the act and the circumstances at the time of its enactment, was obviously the one intended by the legislature. Moreover, it was indicated in *Moonen* itself that other approaches could be open which would probably lead to the same result in the case. The Bill of Rights does not mandate any one method of sequence of application for applying and reconciling ss 4 – 6 in a given case. Those sections are broadly complementary but not necessarily always harmonious. When new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall Parliamentary intention.

[84] I think there are a number of aspects of the context of this case that support the approach I propose taking.

[85] *Hansen* concerned a provision with respect to which there was a clearly established meaning. That appears to have been an important factor for the majority in terms of their conclusion as to how the interpretational exercise should be carried out in that case, namely with that established meaning as the starting point. That is not the case here. There is no established meaning at issue. Rather, Mr Schubert's challenge to the Bylaw asks the common, judicial review, question: is the Bylaw not authorised by the Wanganui Act?

[86] Moreover, NZBORA consistency issues are a feature of the Wanganui Act's legislative history. The Wanganui Act had its origin, at least in part, in the Council's concerns that s 155(3) of the Local Government Act 2002 might make it difficult for the Council to make the type of bylaw it had in mind. When the Wanganui Act was introduced – and as already noted – the Attorney-General, reporting to Parliament pursuant to s 7 of NZBORA, concluded that clause 6 of the Bill as introduced constituted a limitation on the s 14 right to freedom of expression that could not be justified in terms of s 5. The Law and Order Select Committee reporting on the Bill

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[21] At [61].

acknowledged that conclusion. It "took this issue seriously" and had "worked hard to address these changes". Changes had been made to render the Wanganui Act more NZBORA compliant. The Committee concluded:

> We accept that allowing the Wanganui District Council to make these by laws could be perceived to breach the New Zealand Bill of Rights Act, but we think for the safety and desirability of the residents of Wanganui these powers are reasonable.

[87] On the basis, therefore, that Parliament did intend to limit the right to freedom of expression, I think the interpretational exercise required here is to ask the question to what extent did Parliament intend to do so?

[88] That context, in my view, therefore calls for an approach to the interpretation question different to either of those set out in *Moonen*[22] and *Hansen*, albeit one more akin to that adopted in *Moonen* than in *Hansen.*

[89] In that regard, this case is more similar to those of *Drew* and *Brooker*.[23]

[90] In *Drew*, the Court of Appeal was concerned with the interpretation of a provision in the Penal Institutions Act 2004 that gave prisoners a right to attend disciplinary hearings and cross-examine witnesses. What the Court had to decide was whether that right to cross-examine implied a right to representation and, therefore, whether regulations prohibiting such representation in all situations were ultra vires the Penal Institutions Act. The Court approached that interpretational issue, having regard in particular to the right to natural justice, seen in that case principally as a common law right, but also of course articulated in s 27(1) of NZBORA. Similarly, in *Brooker*, the Supreme Court considered the required actus reus of the offence of disorderly behaviour as affected by the right to freedom of expression. That is, in what circumstances would the countervailing values (law and order and privacy) protected by the criminalisation of disorderly behaviour impose a justifiable limitation on the exercise of the right to freedom of expression and allow the criminalisation of expressive behaviour.

[91] In both cases a unitary, or one step, approach to interpretation was adopted.

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22 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

23 *Drew v Attorney-General* [2002] 1 NZLR 58; *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

[92] The two issues raised by this aspect of Mr Schubert's case are broadly similar.

[93] In *Drew,* the Court of Appeal held that the regulation in question was ultra vires the enabling Act as it denied the natural justice that was part of the right of cross-examination given by the enabling Act. The Court of Appeal also held that the regulation was not protected by s 4 of NZBORA, because the enabling Act had to be given a meaning consistent with NZBORA. The Court of Appeal said the following:[24]

> [Because of our conclusions it is] not really necessary to respond to Mr Butler's argument that the regulations in question are protected by s 4 of the Bill of Rights. However, we are satisfied that this argument is so plainly erroneous that it is desirable that we despatch it in the present case rather than leave any lingering doubt that it might have had validity. Counsel was correct, of course, when he said that a regulation is an enactment". Section 29 of the Interpretation Act 1999 confirms that position. But the answer to counsel's argument is that, in striking down the regulations because they are ultra vires the empowering section (s 45), the Court is not doing so only because they are inconsistent with the Bill of Rights. To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision, read, just like any other section, in accordance with s 6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s 45 a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s 6, that meaning is to be preferred to any other meaning. As Mr Wilding said, s 4 is not reached.

[94] That is the interpretational approach that I will adopt. The question is a classic judicial review one: what does s 5 of the Act empower the Council to do, and has the Council in some way stepped outside the power that it was given? That interpretational exercise is carried out in light of s 6 of NZBORA. This, in my view, principally involves assessing the significance of the fact that, in s 5(5), the restriction on the Council's bylaw-making power was not expressed simply by reference to bylaws that were reasonably necessary, but was expressed by reference to bylaws that the Council was "satisfied" were reasonably necessary.

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[24] At [68].

Is the Bylaw a disproportionate restriction on the right to freedom of expression and thus in breach of NZBORA?

[95] It goes without saying that the values protected by the right to freedom of expression articulated in s 14 of NZBORA are fundamental and significant. Thus: [25]

> Under s 14 of NZBORA, everyone has the right to freedom of expression, including the freedom, to seek, receive and impart information and opinions of any kind in any form. This right is as wide as human thought and imagination.

[96] In *Brooker,* Justice McGrath cited the Supreme Court of Canada saying:[26]

> The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

[97] There is also no doubt, in my view, that the Bylaw effectively restricts freedom of expression of those who would otherwise communicate their membership of, and commitment to, a gang organisation – such as the Hells Angels Motorcycle Gang – by wearing or otherwise displaying gang insignia. For the Council, Mr Wilson acknowledged as much, whilst querying the value that was to be accorded to such expression. As to that query, and as the Attorney-General observed in his report to Parliament, "intimidatory expression is given little value under section 14 but that cultural, political or religious expression is more strongly protected"

[98] The Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)* addressed the extent to which expressive activity, such as wearing a gang patch, is protected as speech, concluding that if an activity conveys or attempts to convey a meaning, it has expressive content and prima facie force in the scope of the guarantee.[27] The authors of *The New Zealand Bill of Rights Act: A Commentary* suggest that New Zealand adopt the Canadian approach to conduct as expression, "in

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25 *Moonen*, at [15].

26 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114], citing *Ching RWDSU, Local SS8 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at [32].

27 *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927 at 969-970.

which the inquiry focuses upon whether the conduct was intended to deliver a message".[28] That approach would accord with New Zealand authority, such as *Police v Geiringer*,[29] where it was held that lying down in front of a car with the intent to stop the driver was expression. That approach also accords with the approach of the New Zealand courts in flag-burning cases. In *Hopkinson v Police* the High Court held that the right to freedom of expression was engaged when the law criminalised the act of flag burning.[30] So did the Court of Appeal in *R v Morse*.[31] That conclusion is in line with both American and Canadian case law.[32]

[99] At the same time, it is also well accepted that the right to freedom of expression is properly limitable by reference to other values important in a free and democratic society. The International Covenant on Civil and Political Rights, with reference to the right to freedom of expression, provides as follows in Article 19:

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights of reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[100] The Supreme Court in *Brooker* proceeded on the basis that the right was not unqualified: the question there was the extent to which freedom of expression should be restricted for reasons of public order in terms of a prosecution for disorderly behaviour.

[101] In this context, as I think is well known, the wearing of gang patches – and hence the display of gang insignia as that term is defined in the Wanganui Act – is prohibited in certain circumstances by a number of bodies to whom NZBORA applies, pursuant to s 3. For example, and no doubt in the interests of the maintenance of law and order, gang patches may not be worn in the courts or their

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28 Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at [13.7.10].

29 *Police v Geiringer* [1990-92] 1 NZBORR 331.

30 *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

31 *R v Morse* [2009] NZCA 623.

32 *City of Harvard v Gaut* 277 Ill App 3d 1 259; *Chalifoux v New Caney Independent School District* 976 F. Supp. 659(S.D. Tex. 1997); *Stephenson v Davenport Community School District* 110 D.3d 1303 (8th Cir. 1997); and *R v Bitz* [2010] 3 WWR 322.

precincts. It has never been suggested, as far as I am aware, that that restriction on the right to freedom of expression is other than, in terms of s 5, a reasonable limit prescribed by law and one that is demonstrably justified in a free and democratic society.

[102] Similarly, it is possible to conceptualise a bylaw under the Wanganui Act that would – when assessed against the public interest in avoiding or preventing the intimidation or harassment of members of the public by gang members, or preventing confrontation between gangs – be demonstrably justified in a free and democratic society. Mr Schubert conceded that a bylaw of the type he said that the Council may once have had in mind, namely one that prohibited the wearing of gang patches only in the CBD and a number of parks within Wanganui, may well have been such a bylaw that would be demonstrably justified in a free and democratic society.

[103] The question is: is the Bylaw such a restriction?

[104] As both parties acknowledged, the test for determining whether a limitation is reasonable and demonstrably justified in a free and democratic society was set down in *Hansen*. Justice Tipping said:[33]

> This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

[105] That approach was supported by the other members of the Supreme Court. Chief Justice Elias however considered that s 5 was something to be considered by Parliament, while the Courts should simply adopt the most rights consistent interpretation that they can.[34] That approach was essentially adopted from the

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33 *Hansen v R* [2007] 3 NZLR 1, at [104].

34 Ibid, at [6].

Canadian case *R v Oakes*,[35] although Tipping J preferred the words "no more than is reasonably necessary" to "as little as possible" in limb b(ii). Generally speaking, the first two questions (sufficiently important objective and rational connection) are considered to be threshold questions, while the final two are substantive.[36]

[106] As the Council also accepted, the onus lies on it, the Council, to establish that the test has been met. In *Ministry of Transport v Noort*,[37] Richardson J stated that "the onus is on those relying on s 5 to show that the limit is reasonable and can be demonstrably justified in a free and democratic society". A similar approach was adopted by Gault J, and McKay J concurred with Richardson J. In that case, the claimant had first to show that there was a prima facie breach of their rights. Then, if s 5 was relied upon – as, at least in part, the Council did here – then the Council had to show that such a breach was one that was reasonably justifiable in a free and democratic society.

[107] The purpose of the Bylaw is "to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs" (s 5(5) of the Wanganui Act). I have no difficulty concluding that to be a sufficiently important objective to justify some curtailment of the right to freedom of expression.

[108] The next question is whether the limiting measure is rationally connected with its purpose. In this case, the police of Wanganui reported to the Council that they considered that when people saw gang patches, they were intimidated. The police also considered that gang patches increased the chances of clashes between gangs. The Council had conducted its own research, which identified the significance of gang intimidation in Wanganui. Members of the Council would also have had their own personal knowledge of the situation and had no doubt listened to views expressed by the citizens of Wanganui. Again, I have no difficulty concluding that the limiting measure is rationally connected with its purpose, noting that this is a threshold question.

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35 *R v Oakes* [1986] 1 SCR 103.
36 See Tipping J in *Hansen v R* at [121]-[122]
37 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

[109] The strength of that connection is, however, relevant to the analysis of whether this represents the minimum impairment necessary to reasonably achieve the purpose. Here, while gang insignia is one way in which gang members identify each other, there is no evidence before the Court that it is the only means of identification. The police themselves recognise that they are able to identify gang members when they are not wearing any gang insignia, so there is little reason to suspect that the gang members themselves cannot do the same. In that connection, it seems that while a ban on the display of gang insignia may have some effect on gang confrontations, it is not likely to stop them altogether.

[110] The same might be said for intimidation of the public by gang members. The police in Wanganui consider that people are intimidated by the mere presence of people wearing gang patches, and that when gang patches are worn people only see the patch and not the person. That people are intimidated by gang members wearing gang patches is, in my view, undoubtedly true. At the same time, people are also intimidated by gangs because of the actions of the gang members. The Bylaw does not address intimidatory acts by gang members, which are criminalised by other enactments. Therefore, once again, whilst the ban may have some effect on the extent to which people are intimidated by gang members, the extent of that effect is difficult to determine.

[111] The Council itself understood those limitations: as the Law and Order Committee observed when reporting the Bill back to Parliament:

> We understand that the Council does not believe that the enactment of this Bill would solve the gang problems in Wanganui, but considers that it could form the beginning of a solution.

[112] The next, and substantive, question is therefore whether the Bylaw, in designating what I have held to be in effect the whole of the District as a specified place, does no more than is reasonably necessary for the sufficient achievement of its purpose?

[113] As noted at [10] to [17], the record of the Council's consideration of a bylaw banning the display of gang patches in Wanganui appears to reflect different understandings as to the geographic extent of such a ban at various points.

[114] Be that as it may, the question of the terms of the Bylaw to be passed by the Council under the Act was considered at an extraordinary meeting of the Council on 22 May 2009. The minutes of that meeting record that "the specified public places where the display of gang insignia is intended to be prohibited, will be tabled at the meeting. Those areas are being established in consultation with Wanganui Police".

[115] It would appear that various options for specified places, including maps, were tabled at the meeting. Copies of those materials were not provided to me. A discussion then took place. The key elements of that discussion would appear to have been:

a) Inspector McLeod named locations in which gang-related incidents had occurred over the past four years. These included parks, educational facilities, sports clubs and fields, beaches, swimming pools, the airport, a racecourse, Government departments and many streets. Mr McLeod said there would be difficulty in specifically identifying those locations in the Bylaw for the Police to act upon.

b) In response to a query, Mr Borrows explained that the definition of "public places" was made as wide as possible, and although it could not include all of the District, it could include all of Wanganui's urban area.

c) Councillor Stevens thought limiting public places to urban areas only in the Bylaw was not sufficient and suggested peri-urban areas be included. The minutes record the Council resolving that "the definition of "specified places" for point of view of Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009 be urban and peri-urban areas of Wanganui City".

[116] That motion was carried unanimously.

[117] The Council then consulted on the Bylaw. The results of that consultation were received in August 2009, and the subcommittee appointed to hear them reported back to the Council. It recommended including a number of other places as

specified places, namely the Mowhanau beach and settlement, various local halls in the District, the Bason Botanical Gardens and Lake Wiritoa. Those recommendations were discussed at a Council meeting held on the 31st of that month.

[118] Those recommendations were adopted by the Council.

[119] In terms of the geographic extent of the Bylaw, the following aspects of the Council's decision-making process are to be noted:

a) It was again brought to Council's attention that it could not determine that all the public places in the District were specified places. The geographic extent had been raised in submissions by Hells Angels. In response, it was noted that whilst the Council was prevented from naming all of the District as a specified place, it was in fact only defining an estimated 1.7 per cent of the District. I note that that percentage would appear to be considerably in error, as the restriction is not drafted by reference to the entire area of the District, but by reference to public places within the District.

b) The Council's formal resolution, on the question of geographic extent, resolved as follows:

> THAT the submission of the Mowhanau Community Society be accepted and that the drawing up of any map attached to the bylaw, ensure that all public places (including the Mowhanau children's playground and Kai Iwi beach foreshore), be included as a 'specified place' as it relates to the Mowhanau area.
>
> THAT all community halls referred to in the bylaw include a 100 metre surrounding radius to ensure all footpaths and surrounds are similarly designated as a 'specified place' for the purpose of the bylaw.
>
> THAT the Bason Botanic Gardens and Lake Wiritoa be added to the list of 'specified places' for the purpose of the bylaw.

[120] The Bylaw was passed, and came into force on 1 September 2009.

[121] Taken overall, therefore, there was throughout the process of the Council's consideration, first of a bylaw under the Local Government Act and then of the

Wanganui Act and the Bylaw themselves, little express discussion of why it was necessary to designate as specified places all the public places within the Wanganui District's urban and peri-urban areas, together with the area of the Mowhanau Beach and Village and the rural halls, the Bason Botanic Gardens and Lake Wiritoa, as already described. Rather, the Council's decision on this question would appear to have its origin in the Council's concern with the extent of gang activity in Wanganui, and Inspector McLeod's comments that there would be difficulty in specifically identifying relevant locations in the bylaw for the Police to act upon.

[122] In terms of the extent of the gang related activities at the centre of the Council's concerns, the most detailed information was provided to the Council by the Police in response to an Official Information Act request made by the Council in March 2007. A copy of that reply was appended to Mr Laws' affidavit. The Council had asked for information regarding the "number, frequency and magnitude of gang clashes in Wanganui". The Police had been asked to look at "gang confrontations, clashes and incidents". As the Police's response to the Council noted, the concept of "gang clashes" was not defined. For the purposes of its inquiry the Police determined that it would respond to the request by reporting on incidents of gang related activity that had a public aspect. Thus:

a) most disorder offences were included;

b) domestic violence offences were not included (unless these spilled out into the public arena);

c) search warrants and traffic related offences were only included if there was a particular public safety interest eg firearms located; and

d) offences between rival gang members at the prison were excluded.

[123] The information provided covered the three calendar years 2004, 2005 and 2006.

[124] Overall, the Police reported to the Council that 11 such offences were reported for 2004, 17 for 2005 and 48 for 2006. Appendix A of the Police's report to the Council detailed the offending involved.

[125] In his affidavit, Inspector McLeod provided different information. He said that Police records showed that within the Wanganui area over the period 2004 to 2006 there had been 77 "gang related offences" recorded in 2004, 82 in 2005 and 191 in 2006. Inspector McLeod did not describe what counted as a "gang related offence". Nor did the submissions I received reconcile the two pieces of information.

[126] Moreover, the submissions made on behalf of the Council do not refer to that evidence in any detail. Nor was the argument advanced that the detail of that offending, in particular as it involved questions of public intimidation or clashes between gangs, supported the geographic extent of the Bylaw. Rather, the more general argument was advanced that:

a) the Council determined that prohibiting gang insignia in specified areas of the District would fulfil the objective of reducing public intimidation and gang confrontations and violence based on Police advice that:

    i) there were a number of negative aspects to gang patches, including intimidation;

    ii) the wearing of gang patches created a heightened risk of clashes between gangs; and

    iii) gangs were routinely involved in the intimidation of the public and used their gang insignia for that purpose.

b) the Bylaw had had, since its introduction, an impact on the level of gang confrontation and intimidation, as confirmed by the Police. In particular:

i) there had been a noticeable reduction in the visibility of gang members;

ii) groups of gang members are no longer seen congregating in formerly usual public haunts such as outside court, WINZ and on certain residential streets; and

iii) there had been a positive impact on the level of comfort and security by members of all aspects of Wanganui; and

iv) the view expressed is that people feel safer and less intimidated as a result of the Bylaw.

c) the Bylaw had, in fact, had an impact on the level of gang confrontation and intimidation following its introduction.

[127] Whilst the evidence, in particular the Police response to the Council's Official Information Request, confirmed the existence of a problem with gang violence in Wanganui, and of various "gang-related incidents", I do not consider that – on the basis of that argument – the Council discharged the onus on it to satisfy me that the Bylaw – in terms of the way in which Council designated its geographic extent – impaired gang members' freedom of expression no more than was reasonably necessary for sufficient achievement of its purpose.

[128] Perhaps, in terms of the materials put before the Court, the strongest support for the Council's approach came from the wide range of locations in which, as identified by Inspector McLeod, "gang-related incidents" had occurred. At the same time I note the comment made by Inspector McLeod in his affidavit, as referred to in the Council's submission, that:

> Since the bylaw came into force there has been a noticeable reduction in the visibility of gang members. We no longer see patched groups of gang members congregating at formerly usual public haunts such as outside court, WINZ and on certain residential streets.

[129] Given that comment, it seems at least reasonable to conclude that the Council could have passed a bylaw that described, with considerably more specificity than

was the case in the Bylaw, the "public places" that it was to affect. It is, furthermore, difficult to discern any reasoned basis upon which the Council extended the definition of "specified" place from urban to peri-urban areas. I am, therefore, not willing to find that the Bylaw imposed the minimum impairment on the right to freedom of expression that was necessary to achieve the aim of minimising gang confrontations and reducing intimidation of the public by gangs. Taking into account the concerns outlined above as to the efficacy of the Bylaw in achieving those aims, and the comments of Inspector MacLeod, it does appear that the aim of the Wanganui Act could reasonably have been achieved by limiting the prohibition to a number of more specific areas including perhaps the CBD, parks and beaches and certain residential streets. I have not been provided with evidence to show that to do so would have not been practicable, nor any explanation for why the difficulties Inspector McLeod identified in specifying such locations (see [115]a)) could not have been overcome. Without those matters having been addressed I am unwilling to hold that the extent of the prohibition was reasonably necessary because of practical difficulties with a more specific prohibition.

[130] Furthermore, I am not persuaded that the measure is proportionate to the infringement of rights involved. The measure stops gang members, most of whom would live in Wanganui, from exercising their right to free expression in relation to their membership of that gang anywhere in public in the city they live in. It stops them walking to a friend's house with a gang patch on, or driving across the town. This is to be contrasted not only with the importance of the aim, but the likelihood that this measure will achieve that aim. While the aim itself is important, a large proportion of the activities that are being targeted are already otherwise illegal. Furthermore, there are questions as to the effectiveness of the Wanganui Act and the Bylaw to achieve those aims. Taking those matters into account, I am not satisfied that the limit on the right to freedom of expression is proportionate to the aim that is sought to be achieved. The Bylaw is therefore, by virtue of its broad geographic scope, an unjustified limitation on the right to freedom of expression.

Is the Bylaw nevertheless intra vires the Act, and therefore saved by s 4 of NZBORA?

[131] Mr Schubert in effect argues that the bylaw-making provisions of s 5 of the Wanganui Act should be interpreted consistently with NZBORA. Bylaws – here as regards the effect of the designation of public places (subs (1)(a)) –will only be valid, therefore, to the extent they impose restrictions on the right to freedom of expression that are reasonable and demonstrably justifiable in a free and democratic society. On the basis that the Bylaw did impose unjustifiable restrictions on the right to freedom of expression, it was not authorised by the Wanganui Act and therefore invalid.

[132] The Council's submission was that, even if it did not discharge the onus on it of establishing that the limits on the right to freedom of expression effected by the Bylaw were, as regards its geographic extent, justifiable, Parliament had mandated that outcome when it passed the Wanganui Act. The Bylaw was therefore authorised by the Wanganui Act and saved by s 4 of NZBORA.

[133] The starting point of the analysis is s 6 of NZBORA. Can the bylaw-making power found in s 5 of the Wanganui Act be given an interpretation that is consistent with NZBORA?

[134] The nature of that interpretational exercise was considered by the Supreme Court in *Hansen*. Justice McGrath commented in *Hansen* in the following terms:[38]

> To qualify as a meaning that can be given under s 6 what emerges must always be viable, in the sense of being a reasonably available meaning on that orthodox approach to interpretation. When a reasonably available meaning consistent with protected rights and freedoms emerges the Courts must prefer it to any inconsistent meaning.

[135] Justice Tipping made a similar comment:[39]

> The language I have used earlier in these reasons, which inquires whether a suggested meaning is reasonably possible seems to me to come as close as possible to capturing the way in which the statutory "can" in s 6 must be applied. It is by this measure of reasonable possibility that I would distinguish at least some English discussions on the subject: they seem to

[38] At [252].
[39] At [158].

adopt a meaning which is unreasonably possible from an interpretative point of view. I say that because alternative meanings have been found in England, under the aegis of s 3, despite an acknowledgment that this defeats Parliament's purpose. In England s 3 appears at times to have been construed as mandating a judicial override of Parliament, if Parliament's meaning is inconsistent with a right or freedom. That, for me, would be to use s 3 (the New Zealand s 6) as a concealed legislative tool. Whether it is appropriate in England is not for me to say, but I am satisfied it is not appropriate in New Zealand

[136] As previously set out, s 5 states:

> **Power to make bylaws designating specified places or gangs**
>
> (1) The Council may, from time to time, make bylaws—
>
> (a) designating any public place as a specified place for the purposes of this Act:
>
> (b) identifying an organisation, association, or group of persons as a gang for the purposes of this Act.
>
> (2) In making a bylaw under subsection (1), the Council must use the special consultative procedure set out in section 83 of the Local Government Act 2002.
>
> (3) Section 86(2)(a) and (b) of the Local Government Act 2002 apply to the making of a bylaw under subsection (1) as if it were an activity described in section 86(1) of that Act.
>
> (4) The Council must not make a bylaw identifying a gang under subsection (1)(b) unless it is satisfied that the organisation, association, or group proposed to be identified has the following characteristics:
>
> (a) a common name or common identifying signs, symbols, or representations; and
>
> (b) its members, associates, or supporters individually or collectively promote, encourage, or engage in a pattern of criminal activity.
>
> (5) The Council may make a bylaw under this section only if it is satisfied that the bylaw is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.
>
> (6) A bylaw must not be made under subsection (1)(a) if the effect of the bylaw, either by itself or in conjunction with other bylaws made under subsection (1)(a), would be that all the public places in the district are specified places.

[137] Express restrictions on the power to designate places as specified places are set out in subs (5) and (6). The Council must be "satisfied" that the bylaw is "reasonably necessary". The effect of the bylaw must not be that all public places in

the District are specified places. The second of those restrictions is concerned with the extent of the prohibition, and places upper limits on the designation of specified places. It does not, in my view, provide substantive guidance as to which places should or may be designated as specified places. Clearly, compliance with subs (6) does not result in compliance with subs (5).

[138] Subsection (5) is substantive in nature. It provides that the Council must be satisfied that the bylaw is reasonably necessary to achieve one of the two purposes set out. The section, however, goes no further than setting out the "reasonably necessary" test. It does not specify how that test is to be applied, nor what countervailing values and interests are to be balanced against the aims of preventing or reducing the likelihood/potential for public intimidation/harassment or gang confrontation. Guidance on those matters is not provided elsewhere in the Wanganui Act. The Act, therefore, does not give express guidance to the Council as to how to assess and be satisfied as to what is reasonably necessary. That said, s 6 of NZBORA directs that, if possible, the words "reasonably necessary" are to be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights.

[139] In my view, the obvious interpretation of "reasonably necessary" that would comply with NZBORA, is that it will only be "reasonably necessary" to designate a public space as a specified place if to do so, and therefore to bring into force the prohibition on the display of gang insignia in that space, would represent no more than a reasonable limit on the right to freedom of expression that is demonstrably justifiable in a free and democratic society. In that assessment the relevant countervailing value is essentially that of the preservation of law and order, reflected in s 5(5) of the Wanganui Act and in the expression of the right itself in NZBORA.

[140] There is nothing in the Wanganui Act which prevents this interpretation from being adopted. The question then becomes, in terms of the approach taken by the majority in *Hansen*, whether that is an interpretation that is tenable on the words of the section, a meaning that is reasonably open? On the other hand, is that interpretation linguistically stretched, and therefore not required to be adopted by s 6 of NZBORA?

[141] It seems clear that to interpret the term "reasonably necessary" in s 5(5) of the Wanganui Act in terms of s 5 of NZBORA is not to linguistically stretch the words of the section. Applying the test of whether a limit on the right is a justified one necessarily asks the question of whether the extent of the limit is reasonably necessary to achieve the objective. Moreover, the phrase "reasonably necessary" was the very phrase used by Tipping J in *Hansen* in discussing the question, in that case, of minimal impairment. Blanchard J used the same phrase, referring to the Canadian Supreme Court's decision in *Chaulk*.[40]

[142] To interpret a "reasonably necessary" test in that way is not to depart from the meaning of the section. Rather it is to infuse the interpretation of the section with a rights focussed approach, which, where possible, is what s 6 of NZBORA requires. I do not think it could be said that such an interpretation is not reasonably open, not tenable or is linguistically stretched.

[143] Nor is the legislative history of the Wanganui Act as it relates to the bylaw-making power inconsistent with that interpretation.

[144] In his report to Parliament the Attorney-General acknowledged the ongoing significance of NZBORA for bylaws made under the Wanganui Act. As he observed:[41]

> The power to make bylaws in clause 5 does not exclude the requirement that it be exercised consistently with the Bill of Rights Act. For that reason, together with the requirement of reasonably necessity in clause 5(4), the scope of the power will be limited in practice.

[145] I acknowledge that the Attorney-General seems to envisage that the requirement for NZBORA consistency would be separate from the "reasonably necessary" test in s 5. Nevertheless, this passage is still important as it drew to Parliament's attention, at an early stage in the legislative process, the Attorney's view that the bylaw-making power would have to be exercised consistently with NZBORA.

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40 *R v Chaulk* [1990] 3 SCR 1303 (SCC).

41 Wanganui District Council (Prohibition of Gang Insignia) Bill (171-2) (Attorney-General's report) at 2.

[146] The very same issue was also drawn to Parliament's attention in the report of the Department of Internal Affairs. That report stated that:[42]

> ***NZBORA consistent interpretation***
>
> Firstly, the courts may interpret the Bill as merely authorising the making of bylaws that are consistent with NZBORA. As any bylaws prohibiting the wearing or display of gang insignia would appear to limit the right of freedom of expression, they would have to be demonstrably justified under section 5 of NZBORA. Otherwise, they could be struck down as ultra vires the empowering statute (see Drew v Attorney-General).
>
> Any such interpretation would severely limit the [Council's] bylaw-making power, as the broad prohibition contained in the Bill is likely to be justified in very few public places. In fact, it is arguable whether such a broadly worded prohibition could ever be justified.
>
> An interpretation consistent with NZBORA would therefore frustrate the intention of the Bill.
>
> ***Clearly NZBORA inconsistent interpretation***
>
> Alternatively, the court could view the Bill as mandating the making of NZBORA inconsistent bylaws. However, the courts are likely to require very clear language in the legislation to this effect.
>
> Under such an interpretation, any subsequent bylaws would be protected under section 4 of NZBORA and could not be struck down as inconsistent with the right to freedom of expression.

[147] The Department therefore, in a similar manner to the Attorney-General, pointed out to the Select Committee, and through it Parliament, the significance of NZBORA for the bylaw-making powers provided by the Bill. In doing so, the Department would appear to have focussed on the breadth of the prohibition reflected in the "wearing or display" provisions of the Bill, rather than directly on the question of the extent of public places the Council might properly designate. Having said that, the need for "very clear language" to mandate the making of NZBORA inconsistent bylaws was specifically referred to.

[148] When reporting back to Parliament on the Bill the Committee commented on NZBORA matters:

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[42] Wanganui District Council (Prohibition of Gang Insignia) Bill (171-2) (Department of Internal Affairs report) at 11.

New Zealand Bill of Rights Act 1990

> We recognise that a prima facie examination shows that parts of this bill, as introduced, could be found to be inconsistent with the New Zealand Bill of Rights Act. We took this issue seriously and have worked to address these concerns and create the right balance. We have recommended several changes, which are addressed in more detail in the remainder of this report, to make the bill more compliant with the New Zealand Bill of Rights Act. We accept that allowing the Wanganui District Council to make these bylaws could be perceived to breach the New Zealand Bill of Rights Act, but we think for the safety and security of the residents of Wanganui these powers are desirable.

[149] The "several changes" referred to by the Committee involved:

a) the Bill had originally prohibited the "wearing or display of gang insignia"; the reference to "wearing" was deleted to "make the Bill more compliant to the New Zealand Bill of Rights Act 1990";

b) a provision was introduced requiring the signposting, where reasonably practical, of specified public places;

c) a requirement that any by law be reviewed after five years was introduced; and

d) the Bill was amended to explicitly provide that the Police were the only enforcement agency with respect to any bylaws made.

[150] At the same time, the "reasonably necessary" test in s 5(5) was retained, and no general provision was inserted to dis-apply NZBORA considerations as regards to the bylaw-making power.

[151] Taken overall, in my view the legislative history is not inconsistent, and in fact objectively understood is consistent, with interpreting the "reasonably necessary" test in the manner I consider appropriate.

[152] If that were the end of the matter, the conclusion that the Bylaw was not authorised by the bylaw-making power contained in the Wanganui Act would, at this point, have been reached. The "reasonably necessary" test in s 5(5), however, is not expressed objectively. That is, s 5(5) does not say that the Council may only make

bylaws that are reasonably necessary, which I have held would require NZBORA compliance. Rather it provides that the Council may only make bylaws if it is satisfied they are reasonably necessary. Here, having considered the question of the significance of gang activity in Wanganui for some time, the Council explicitly resolved that it was satisfied it was reasonably necessary to pass the Bylaw in the terms that it did. Although not put exactly this way by the Council in its submissions, in my view to conclude that the Bylaw is not authorised by the Wanganui Act because this Court considers, as a matter of law, that it constitutes an unjustified limitation would be to fail to consider the significance of Parliament's decision to express s 5(5) in the way it has done, namely that it left the conclusion as to what is "reasonably necessary" to the Council.

[153] The Council's decision as to whether the Bylaw was "reasonably necessary" fundamentally involved the Council determining the geographic extent of the Bylaw. The Council's decision on that issue was a local one, and informed by local issues and understandings. Overruling such a local decision, made by democratically representatives of a local community, requires careful decision-making. As Tipping J observed in *Hansen*:[43]

> Ultimately, the judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill or Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. In the *Denbigh High School* case, Lord Hoffmann observed that even if there had been an infringement of the right in question, he would have been of the opinion that the infringement was justified. He added that the school was entitled to consider that its rules were necessary for the protection of the rights and freedoms of others. His Lordship's use of the word "entitled" is a clear demonstration of the view that the courts should allow the decision-maker, here the school, some degree of discretion of judgment. If the decision-maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.

[154] That Parliament left that decision to the Council requires this Court to give to the Council and its decision as regards the Bylaw what is called the appropriate "degree of latitude".

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[43] *Hansen v R* [2007] NZSC 7 at [117].

[155] Tipping J went on to comment, referring to the situation where Parliament itself has legislated the relevant limit:[44]

> This general approach, with which I respectfully agree, can be figuratively described by reference to a shooting target. The court's view may be that, in order to qualify, the limitation must fall within the bull's-eye. Parliament's appraisal of the matter has the answer lying outside the bull's-eye but still on the target. The size of the target beyond the bull's-eye will depend on the subject matter. The margin of judgment or discretion left to Parliament represents that area of the target outside the bull's-eye. Parliament's appraisal must not, of course, miss the target altogether. If that is so Parliament has exceeded its area of discretion or judgment. Resort to this metaphor may be necessary several times during the course of the proportionality inquiry; indeed the size of the target may differ at different stages of the inquiry. The court's job is to delineate the size of the target and then say whether Parliament's measure hits the target or misses it.

[156] Another way of categorising the decision I have to make is whether, notwithstanding the view this Court has expressed in terms of the way this case was argued on the NZBORA implications of the Bylaw, did the Council – in a judicial review sense – act unlawfully in reaching the conclusion that it did. Here, the question of the intensity of review to be applied by this Court to the Council's decision arises.

[157] As I have held, in my view the use of the term "reasonably necessary" in s 5(5) necessarily directed the Council's attention to NZBORA issues. Moreover, and as the history of this matter makes clear, NZBORA issues have in many ways been at the heart of the decision-making processes relating to the Wanganui Act and the Bylaw throughout their history. Furthermore, important human rights are involved. I therefore am not persuaded that I should approach the question of the lawfulness of the Council's decision on a *Wednesbury* reasonableness basis. Rather, I think a considerably more intensive standard of review is appropriate.

[158] Applying such a standard of review, which I think has equivalent effect to giving the Council a moderate, but not overly large, margin of appreciation, it is difficult to conclude that, in the way it reached its decision that the geographic extent of the Bylaw was reasonably necessary, that the Council acted lawfully. I reach this conclusion by reference to what was, in my view, a lack of a sufficiently close

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44 At [119].

analysis of the correlation between that geographic extent and the offending and other behaviour involving gangs that gave rise to the Council's concerns.

[159] Having said that, and as importantly here, whatever standard of review or margin of appreciation is adopted, it was fundamental that the Council properly consider NZBORA issues and in particular , whether – in the sense I have held the term means - the geographic extent of the Bylaw as determined by the Council was "reasonably necessary".

[160] But, as the record of the Council's decision-making shows – especially at the key point when it agreed upon the geographic extent of the Bylaw – it would appear that the Council was under the erroneous view that NZBORA issues were no longer relevant to that decision. In particular, and with reference to the minutes of that 31 August meeting:

a) At various points it was noted that the Attorney-General's NZBORA concerns had been "overruled" by Parliament and that "the provisions of the New Zealand Bill of Rights Act 1990 had been distinguished by Parliament for the purpose of the Act and the Bylaw". When one Councillor asked what it meant to say that the Bill of Rights had been "distinguished" the minutes record Mr Laws saying that "in the context of the report it meant that Parliament recognised a matter existed but had put that matter aside".

b) More generally, the Council simply resolved:

   i) that the Council is satisfied that the above bylaw "is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs"; and

   ii) that "the Council considers that the safety and security of the Wanganui community is fundamentally more important than the rights of gang members, and that the provisions of the New

> Zealand Bill of Rights Act 1990 have been distinguished by Parliament for the purpose of the above Act and by-law".

[161] It is difficult to avoid the conclusion that when considering the specific terms of the Bylaw itself following the passage of the Wanganui Act, the Council failed to give proper attention to NZBORA issues. It is perhaps sufficient to note that – as recorded above – the terms of the Council's final consideration of the Bylaw proceeded on the basis that Parliament had "distinguished" NZBORA and that, therefore, those matters were of little or no relevance for the Council's final decision.

[162] I acknowledge that there is no doubt that the Council had been aware of NZBORA issues up to this point. It was by reference to those issues that the Council had decided to promote a local Act, rather than face the difficulty created by s 155(3) of the Local Government Act 2002. Moreover, the Council was aware of the consideration of NZBORA issues by the Law and Order Select Committee, and the conclusions it had expressed on those matters. But it would appear that those issues played little part in its final decision on the geographic extent of the Bylaw. That part was, in my view, insufficient in terms of the requirement that the Council be "satisfied" that the Bylaw is "reasonably necessary", which I have held includes NZBORA compliance, to establish the lawfulness of that decision.

[163] In all of this, the Council placed some emphasis on the fact that no equivalent of s 155(3) of the Local Government Act 2002 was included in the Wanganui Act. In the Council's submission, that was a strong indication that the bylaw-making power was not subject to NZBORA considerations.

[164] That provision reads as follows:

> No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of the Act.

[165] The Council had, originally, intended to make a bylaw which would ban the display of gang insignia in public places. It is clear that in the process of considering such a bylaw the Council's attention was drawn to s 155(3), and the difficulties that that provision would cause given the type of bylaw the Council had in mind. As can now be seen, very clear NZBORA issues are raised in the way the Wanganui Act

defines the terms "insignia" and uses the term "display". If the Council had, through its normal bylaw-making power, purported to introduce a bylaw that itself defined "insignia" and used "display" in that way, considerable difficulties with s 155(3) would have arisen. The Council resolved to proceed by promoting a local Act. It would therefore have been more than a little unusual if that local Act had included the very provision of the Local Government Act it had been designed to avoid.

[166] Therefore, in my judgment the non-inclusion of s 155(3) is best understood by reference to those aspects of the Wanganui Act and its background, rather than an indication that the preference created by s 6 of NZBORA had been dis-applied.

Result

[167] The overall result is, therefore, a declaration as sought by the applicant, Mr Schubert, that the Bylaw is invalid being ultra vires (ie not authorised by) the Wanganui Act.

[168] In summary, I reach that conclusion for the following reasons.

[169] The Wanganui Act allows the Council to make bylaws banning the display of gang insignia in specified public places in the District. Parliament left it to the Council to specify those places. But Parliament imposed a restriction on the overall extent of any such bylaw or bylaws. Parliament said that the Council could not make a bylaw or bylaws which would ban the display of gang insignia in all public places in the District.

[170] The first issue in this case is whether that is the effect of the Bylaw. I am required to take a substantive, and not literal, approach to that question. I accept that, literally speaking, the Bylaw does not ban the display of gang insignia in all public places in the District. However, because the Bylaw bans the display of gang insignia throughout the wider Wanganui urban area, and in a number of other places in the District, in my view that is the substantive effect of the Bylaw. I have therefore found that the Bylaw is not authorised by the Wanganui Act and is invalid for that reason.

[171] The second issue in this case relates to the important right to freedom of expression. The overall purpose of the Wanganui Act, and therefore of any bylaws made under it, is to "prevent or reduce the likelihood of intimidation or harassment of members of the public by gang members and to avoid or reduce the potential for confrontation between gangs". Banning the display of gang insignia in public places can contribute to achieving that important purpose. Therefore, although bylaws under the Wanganui Act will limit the right to freedom of expression that gang members exercise when they display gang insignia, such limits can be justified and lawful. However, when making a bylaw, the Council needs to consider the significance of that right. Although the Council was aware, when it made the Bylaw, would limit gang members' freedom of expression, it mistakenly understood that it was not required to consider the significance of that right relative to the effect of the Bylaw, and did not do so. I have found that the Bylaw is invalid for that reason also.

[172] In coming to these conclusions I emphasise that I well understand the concern the citizens of Wanganui have with respect to the adverse impact gang violence on their city in recent times. No Judge of this Court could be unaware of that impact. I also note Mr Schubert's own acknowledgement that a bylaw which more closely defined specified places could well be one that was authorised by the Act.

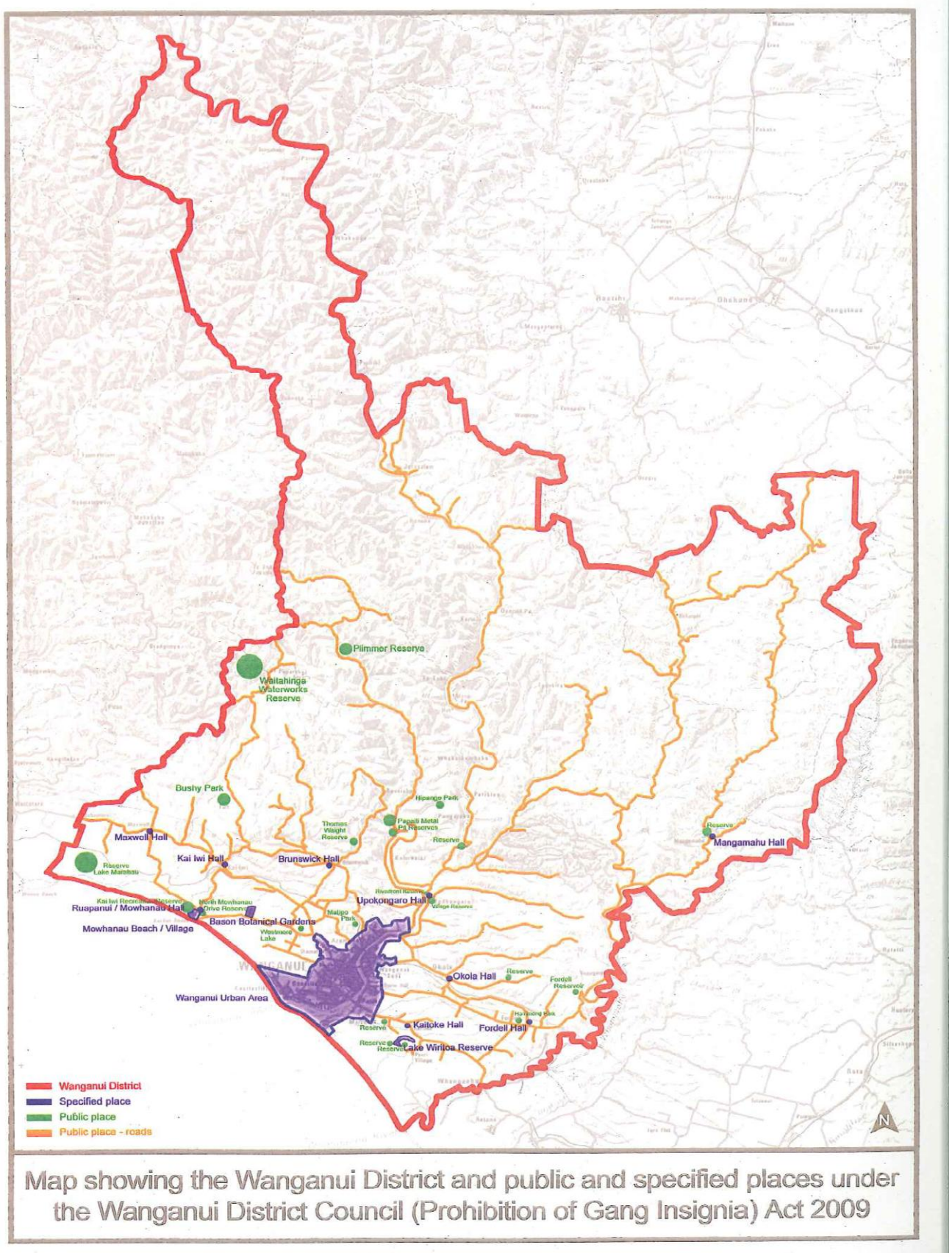
[173] There is, therefore, clearly an opportunity for the Council to reconsider the question of an appropriate bylaw under the Act, bearing in mind the findings I have made and the views I have expressed.

Costs

[174] The question of costs is reserved. If the parties are unable to reach agreement on that matter, brief submissions may be filed.

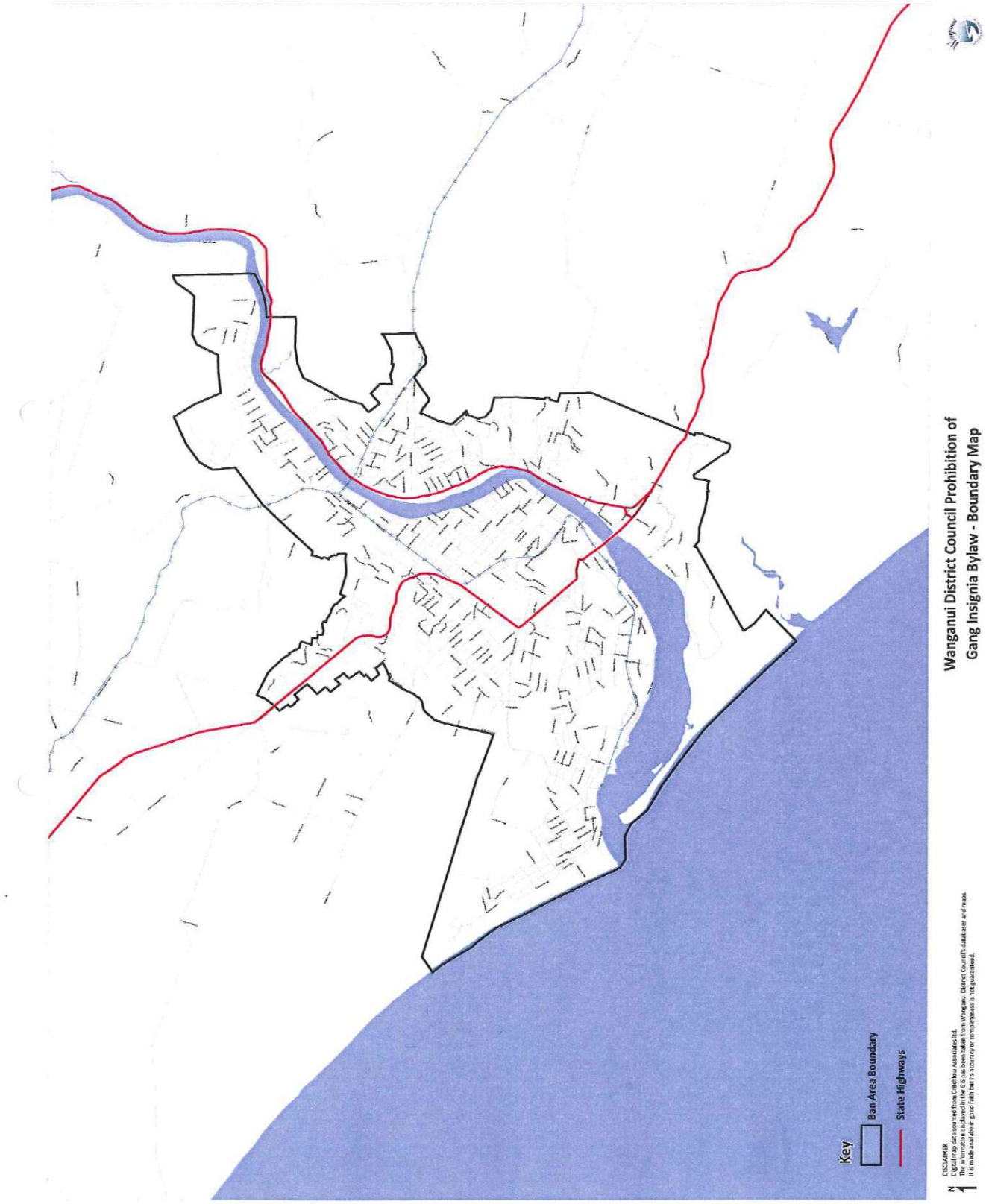
"Clifford J"

SCHEDULE 1



Map showing the Wanganui District and public and specified places under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009

SCHEDULE 2


Wanganui District Council Prohibition of Gang Insignia Bylaw - Boundary Map
Key
Ban Area Boundary
State Highways
N
DISCLAIMER
Digital map data sourced from Critchlow Associates ltd.
The information displayed in the GIS has been taken from Wanganui District Council's databases and maps.
It is made available in good faith but its accuracy or completeness is not guaranteed.