IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-260
[2023] NZHC 1823

UNDER	the Judicial Review Procedure Act 2016
AND	the Broadcasting Act 1989
BETWEEN	NZ OUTDOORS & FREEDOM PARTY First Applicant
AND	VISION NZ Second Applicant
AND	FREEDOMS NEW ZEALAND Third Applicant
AND	AOTEAROA LEGALISE CANNABIS PARTY Fourth Applicant
AND	THE ELECTORAL COMMISSION Respondent

Hearing:	20 June 2023, further submissions received 27 and 28 June 2023
Counsel:	S J Grey for applicants P J Gunn and A P Lawson for Respondent L Kibblewhite for interested party (New Zealand Labour Party)
Judgment:	13 July 2023

JUDGMENT OF ELLIS J

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[1] Under pt 6 of the Broadcasting Act 1989 (the BA) any registered political party is eligible to receive an allocation of broadcasting funding, in advance of a General Election. As a result of a legislative decision that access to television programming and advertising should not be dictated by the wealth of a party or its donors, such

access is limited by the amount of funding a party receives under pt 6. Allocation decisions are made by the Electoral Commission (the Commission), by reference to a list of criteria set out in s 78(2) of the BA.[1]

[2] Despite the undoubtedly well-intentioned aims of this regime, the difficulties it presents have long since been recognised. For some time now the Commission has itself acknowledged that allocation decisions are fraught. For example the Independent Electoral Review's June 2023 Interim Report notes:[2]

> Since 2014, the Electoral Commission has generally recommended that parliament review both the broadcasting allocation criteria and the broadcasting regime. It has noted that applying the allocation criteria is a difficult and time-consuming exercise, requiring consideration of both tangible and intangible factors, and that the outcome is almost always unpopular as parties have different views about fairness.

[3] As will be discussed later, the principal reason that applying the allocation criteria is difficult is because there is an almost irreconcilable tension between them. As Professor Andrew Geddis has said:[3]

> The underlying problem is that the current allocation criterion tries to be all things to all people. It both rewards the larger parties for their greater levels of public support and seeks to "provide a fair opportunity to each political party… to convey its policies to the public". Any distribution decision is thus torn between contradictory goals, and the net result is near universal condemnation of the system by those participants who are most affected by it.

[4] So what Professor Geddis calls a "status quo bias" is inherent in the criteria.[4] Smaller and newly formed parties argue that the larger, established parties receive too much of the overall allocation amount. Their sense of unfairness is exacerbated by the fact that the bigger parties already "enjoy greater attention from the 'free' media", pushing new or smaller parties further into the fringe.[5] And as Dr Claire Robinson has observed, no new minor party has been elected to Parliament since 1999.[6]

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1 These are set out at [20] below.

2 Independent Electoral Review *Interim Report* (June 2023) at 226.

3 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014), at 206.

4 Geddis, *Electoral Law in New Zealand: Practice and Policy*, above n 3, at 205.

5 Geddis, *Electoral Law in New Zealand: Practice and Policy*, above n 3, at 205.

6 Claire Robinson "Submission to the Justice and Electoral Committee on the Inquiry into the 2020 General Elections and Referendums" at 9-10. Dr Robinson also notes the tensions inherent in the s 78(2) factors.

She argues that the current funding allocation system makes it hard to introduce new ideas, convey competitiveness and redress imbalances of power, representation or inequity.[7]

[5] The "status quo bias" and the tension within the allocation criteria lie at the heart of the present case. The applicants are all small political parties. Some are relatively nascent, although the Aotearoa Legalise Cannabis Party has, in one form or another, contested the last nine elections.[8] The combined allocations they have received under pt 6 ahead of the General Election called for 14 October 2023 constitute 4.8 per cent of the total funding pool, whereas the combined allocation to Labour and National is 55 per cent.[9] The five parties currently represented in Parliament have received 76.8 per cent of the total pool.

[6] So, in these proceedings the applicants challenge their allocations. They say they are the result of a misapplication of the relevant statutory criteria and do not accord with either the New Zealand Bill of Rights Act 1990 (NZBORA) or the International Covenant on Political and Civil Rights (ICCPR).[10] They seek a direction that the allocation decisions be made again and declaratory relief (detailed later).

Funding election programmes and advertising: relevant legislative scheme

The Electoral Act 1993

[7] Although it is pt 6 of the BA that contains the statutory provisions of most relevance to these proceedings, there are aspects of the Electoral Act 1993 (the EA) that are relevant too.

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7 At 10.

8 The New Zealand Outdoors & Freedom Party (NZOFP), was registered as a political party in New Zealand just before the 2017 General Election, Vision New Zealand (Vision NZ), was registered as a political party before the 2020 General Election, Freedoms New Zealand (Freedoms NZ), was registered in February 2023 as an "umbrella" party intended to allow other registered or unregistered political parties to collaborate under a single platform and the fourth applicant is the Aotearoa Legalise Cannabis Party, registered in May 1996.

9 For reasons that will be discussed later, Vision NZ received no allocation of funding.

10 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

[8] First, s 4B of the EA establishes the Commission as a Crown entity. The Commission's purposes are set out in s 4C, which states:

> The objective of the Electoral Commission is to administer the electoral system impartially, efficiently, effectively, and in a way that—
>
> (a) facilitates participation in parliamentary democracy; and
>
> (b) promotes understanding of the electoral system and associated matters; and
>
> (c) maintains confidence in the administration of the electoral system.

[9] Section 4D provides for the membership of Commission: one member as the Chief Electoral Officer (who is also the Chief Executive), one member as the chairperson; and one member as the deputy chairperson. The members of the Commission are stated to be the board for the purposes of the Crown Entities Act 2004.

[10] The Commission's various functions are set out in s 5 and include carrying out duties in relation to electoral broadcasting under pt 6 of the BA. Section 7 is important, and requires the Commission to act independently in performing its statutory functions and duties, and in exercising its statutory powers, under both the EA and the BA.

[11] Secondly, applications for registration of an eligible political party are governed by s 63 of the EA.[11] Applications are to be made in writing to the Commission and (relevantly):

> …
>
> (d) shall be accompanied by a declaration made by the secretary of the party in the manner provided by section 9 of the Oaths and Declarations Act 1957, which declaration shall—
>
> (i) state whether the party is a party in respect of which there are 1 or more component parties; and
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> (ii) where the party has 1 or more component parties, state the name of each component party; …

[12] "Component party" is defined in s 3 as meaning:

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[11] An "eligible political party" is defined in s 3 of the EA as "a political party that has at least 500 current financial members who are eligible to enrol as electors".

> … in relation to a registered political party (in this definition called the **registered party**) or in relation to a political party that is applying for registration (in this definition called the **applicant party**),—
>
> (a) a political party that is a member of the registered party or of the applicant party; or
>
> (b) a political party that has combined some or all of its membership with that of another political party and thereby formed the registered party or the applicant party or augmented the membership of such a party, as the case may be

[13] These provisions are relevant because the second applicant, Vision New Zealand (Vision NZ), is a "component party" of the third applicant, Freedoms New Zealand (Freedoms NZ).[12] The possibility of the New Zealand Outdoors and Freedom Party (NZOFP) also becoming a component party of Freedoms NZ ahead of the 2023 General Election is under negotiation and may depend, in part, on this judgment. There is a discrete issue in this case—discussed later—as to how component party status plays out in the funding allocation process.

Part 6 of the Broadcasting Act

[14] The relevant BA provisions are ss 70 to 80.

[15] Section 70 limits the broadcasting of election programmes to certain specified circumstances. It relevantly provides:

> (1) Except as provided in subsections (2) and (3), a broadcaster may not, at any time, broadcast an election programme.
>
> (2) A broadcaster may, for the purpose of a general election, broadcast an election programme if—
>
> (a) the programme is promoted by a party or group of related parties; and
>
> (b) the programme is broadcast during the election period; and
>
> (c) the broadcasting costs are paid from money allocated to the party or group of related parties under section 79.
>
> (3) A broadcaster may, for the purposes of a general election or by-election, broadcast an election programme if that programme—

[12] The New Nation Party also falls under the Freedoms NZ umbrella group but is not a party to these proceedings.

(a) is promoted by—

(i) a constituency candidate; or

(ii) a party with the authority of a constituency candidate; and

(b) relates solely to the constituency candidate at the election; and

(c) encourages or persuades, or appears to encourage or persuade, voters to vote for that candidate; and

(d) is broadcast during the election period for the election; and

(e) is broadcast for a fee that may, but need not, be paid from money allocated to a party or group of related parties under section 79.

(4) Nothing in this section restricts—

(a) the broadcasting, in relation to an election, of news or comments or current affairs programmes; or

(b) the broadcasting of any non-partisan advertisement, as a community service, by a broadcaster.

[16] "Broadcaster" is defined in s 69 as meaning either a television broadcaster or a radio broadcaster.

[17] Section 72 prohibits broadcasters from offering or giving to any party or constituency candidate terms for broadcasting time that are more favourable than those offered or given to any other party or constituency candidate that buys, or expresses an interest in buying, comparable time from that broadcaster.

[18] Section 74 authorises a deemed appropriation of public funding for election programmes and election advertising (subs (3)) and obliges the Commission to make allocation decisions. It states:

(1) In relation to each general election, the Minister of Justice must give notice to the Electoral Commission of the amount of money appropriated by Parliament for the purpose of enabling parties to fund—

(a) all of the broadcasting costs incurred in relation to the broadcast of party election programmes; and

(b) all or part of the broadcasting costs incurred in relation to the broadcast of candidate election programmes; and

(c) all or part of the production costs, whenever incurred, in relation to—

(i) party election programmes; and

(ii) candidate election programmes; and

(d) all or part of the publishing costs incurred in relation to the publication of election advertisements on the Internet during the election period; and

(e) all or part of production costs, whenever incurred, in relation to election advertisements published on the Internet—

(i) during the election period; or

(ii) before and during the election period.

(2) The Electoral Commission must decide, under section 79, how the amount in subsection (1) is to be allocated to parties.

(3) For a general election that takes place after 2017 (a subsequent general election), an amount of money equal to the amount of public money allocated under section 79 at the immediately preceding general election must, unless an Act of Parliament expressly provides otherwise, be deemed to have been appropriated by Parliament for the purposes of enabling parties to fund the costs specified in subsection (1) incurred in relation to the subsequent general election.

(4) An amount of money deemed by subsection (3) to have been appropriated by Parliament for the purposes specified in that subsection is payable out of public money for those purposes without further appropriation than this section.

[19] Section 76 requires any party that considers it will be qualified to receive an allocation of money to provide the Commission with written notice of qualification. Such notice must include (among other things):[13]

> [d]etails of any relationships that may exist between the party and any other party in New Zealand that the Electoral Commission may need to take into account in allocating money to political parties;

[20] Section 78 is the central provision for the purposes of these proceedings. Subsection (1) makes it clear that a party may only receive an allocation if notice has been given in accordance with s 76 and was a registered party at the time of the dissolution or expiry of Parliament. Subsection (2) sets out the mandatory allocation criteria:

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[13] BA, s 76(3)(e).

(2) In allocating money to a party, the Electoral Commission must have regard to—

(a) the number of persons who voted at the immediately preceding general election for that party and for candidates belonging to that party; and

(b) the number of persons who voted at any by-election held since the immediately preceding general election for any candidate belonging to that party; and

(c) the number of members of Parliament who were members of that party immediately before the dissolution or expiration of Parliament; and

(d) any relationships that exist between a party and any other party; and

(e) any other indications of public support for that party, such as the results of public opinion polls and the number of persons who are members of that party; and

(f) the need to provide a fair opportunity for each party to which subsection (1) applies to convey its policies to the public by the broadcasting of election programmes on television.

[21] Section 79 governs' the allocation decision itself. It relevantly provides:

(1) The Electoral Commission's decision on how the money referred to in section 74 is to be allocated to parties—

(a) must set out the allocations (which must be in any proportions that the Electoral Commission thinks fit); and

(b) may include conditions as to the manner in which a party is to spend its allocation.

(2) An allocation may be made to a group of related parties.

(3) An allocation may not be made to an individual party if that party is to receive an allocation as part of a group of related parties.

…

[22] And s 80 contemplates that a s 79 allocation decision may be varied in certain circumstances, including "if there has been a significant change in the relationship between a party that has received an allocation of money and any other party".[14]

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[14] Subsection (3).

[23] Although parties may only use allocated funds for the purpose of making and screening an election programme, they are free to spend their own funds on the production of an election programme (although the amount spent is counted as part of their total election expenses).[15]

The rights engaged

[24] There is no dispute that issues around election broadcasting engage a number of rights contained in the ICCPR and confirmed in the NZBORA.

[25] In particular, art 25 of the ICCPR relevantly states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

[26] The cognate NZBORA right is found in s 12, which provides:

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

[27] Both art 25 and s 12 require "genuine periodic elections". What is meant by "genuine" is an election that is free and fair. As explained in the General Comment on art 25:[16]

> 19. In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws

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15 Broadcasting Act 1989, s 80A.

16 United Nations Human Rights Committee *General comment adopted by the Human Rights Committee Under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights* UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) (emphasis added).

> guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. *Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party*. The results of genuine elections should be respected and implemented.

[28] The pt 6 restrictions placed on television broadcasting and advertising are undoubtedly concerned with placing limits on campaign expenditure of the kind italicised above. As Clifford J said in *Watson v Electoral Commission*:[17]

> [165] The controls in the Broadcasting Act reflect a particular concern that the power of broadcasting, and especially television broadcasting, is such that without constraints, the views of the wealthy and powerful (including the broadcasters themselves) could swamp the free expression of ideas by citizens which is a necessary condition of the exercise of the right to participate in general elections. To create a level playing field between political parties, the Broadcasting Act provides for the free, or publicly-funded, broadcast of election programmes by political parties. …

[29] Equally, however, restrictions of this kind place limits on the rights affirmed by ss 13 and 14 of the NZBORA.

> 13 **Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> 14 **Freedom of expression**
>
> 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.

[30] So even as between fundamental rights, there is a tension here.

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[17] *Watson v Electoral Commission* [2015] NZHC 666 between [114] and [153].

The Court of Appeal's decision in *Alliance*

[31] It is useful to say something at this point about the Court of Appeal's decision in *Alliance Party v Electoral Commission* (*Alliance*).[18] That decision has had some influence on the way in which allocation decisions under pt 6 are now made.

[32] Prior to 2017, the Commission was required to allocate to eligible parties broadcasting *time* for opening and closing addresses, as well as funding. Before the 2008 General Election, the Commission had available to it 72 minutes of time on Television New Zealand and Radio New Zealand for opening addresses, 30 minutes for closing addresses and $3,211,875 of funding. The Alliance Party (Alliance) was allocated one minute for an opening address, $10,000 in broadcast funding and a further $7000 in production funding but received no time for a closing address.[19] Alliance challenged the lawfulness of the Commission's decision not to allocate it time for a closing address.

[33] The allocation decision was made under s 73(1) of the BA which (at that time) provided:

> (1) In respect of each election period, the Electoral Commission must allocate to political parties, in such proportions as the Electoral Commission considers appropriate, the time that TVNZ and RNZ have made available for opening addresses and closing addresses in accordance with section 71A.

[34] The Court of Appeal acknowledged that pt 6 of the BA places a "distinct constraint" upon the activities that could otherwise be undertaken by political parties in a General Election.[20] It then went on to consider what are now the factors in s 78(2) (then contained in s 75(2)) noting that the Commission regarded them as exhaustive, and that there was little guidance in the BA itself as to the weighting of these factors.[21]

[35] While acknowledging the very limited time available for allocation, the Court saw the Commission's decision to allocate time in a way that precluded smaller parties

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18 *Alliance Party v Electoral Commission* [2010] NZCA 4, [2010] NZAR 22 [*Alliance*].

19 The Alliance Party was then an "umbrella" party comprising the New Labour Party, Social Credit Party, Mana Motuhake, the Greens and the Liberal Party.

20 At [19].

21 At [22].

from making a broadcast closing addresses at all as erroneous.[22] It was satisfied that a plain reading of s 73(1) meant that each party should be afforded time for both an opening and closing address, and made a declaration to that effect.[23] Justice Hammond, writing for the Court, said that "[i]f there is any doubt about the meaning of the words, that meaning should be preferred which accords with the critical context of this allocation: that of a general election".[24] He observed that pt 6 of the BA "significantly constrains the ability for political parties to communicate messages directly to voters"[25] and that, in interpreting the Act "[s]tatutory language should be read, if reasonably possible, in a way which facilitates the important democratic feature of dissemination of election messages".[26]

[36] The Court also considered whether the $10,000 allocated to the Alliance would give the party a fair opportunity to convey its policies to the public by the broadcasting of election programmes on television, as required by what was then s 75(2)(f) (now s 78(2)(f)).[27] The Alliance had taken particular issue with the Commission's explanation that "the minimum amount allocated reflects the costs of a basic radio advertising campaign for a month".

[37] The Court accepted that the wording of this explanation was unfortunate, but could not necessarily be read as meaning the Commission had not turned its mind to the cost of a television campaign.[28] It observed that if the Commission had only turned its mind to the cost of a radio advertising campaign, the funding allocation would have been in error.[29] But because the 2008 General Election had already occurred, and so the decision was "moot in a technical sense", the Court declined to make the declaration sought.[30]

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22 At [34].
23 At [35] and [45].
24 At [35].
25 At [18].
26 At [35].
27 At [37].
28 At [43].
29 At [43].
30 At [43].

Previous allocations and foreshadowed reform

[38] Before (finally) turning to the decision-making process and the decision in this case, there are two further matters deserving of mention.

[39] The first is the allocation decisions made before the previous two general elections, in 2017 and 2020. The funding available for allocation on both occasions was $4,145,750.00 (GST inclusive). The decisions adopted a "categorisation" approach to allocation, which involved grouping eligible parties into different funding classes.[31] Thus:

(a) in 2017 there were 22 parties and nine categories, and (relevantly):[32]

(i) Aotearoa Legalise Cannabis Party was in category eight and received one per cent of the allocation ($41,478);

(ii) NZOFP was in category nine and received 0.9 per cent of the allocation ($37,330);

(b) in 2020 there were 19 parties and six categories, and (relevantly):[33]

(i) Aotearoa Legalise Cannabis Party was in Category five and received 1.5 per cent of the allocation ($62,186); and

(ii) NZOFP and Vision NZ were both in category six and each received 1.25 per cent ($51,821).

[40] The second matter is that in May 2022 the Minister of Justice established the Independent Electoral Review (IER). The IER was established as an independent panel for the purpose of considering how to make electoral laws in New Zealand clearer, fairer and more accessible. The IER's Terms of Reference (ToR) are broad,

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31 By which is meant that all the parties in the same class received the same allocation of funding.

32 In the previous (2014) election the Aotearoa Legalise Cannabis Party had received 0.46 per cent of the party vote, with a slightly higher average percentage in the Northland, Mt Roskill and Mt Albert by-elections.

33 In the previous (2017) election, the Aotearoa Legalise Cannabis Party had received 0.31 per cent of the party vote and the NZOFP had received 0.06 per cent of the vote.

allowing the panel to examine all areas of the electoral system, including election broadcast funding. More specifically the ToR acknowledge that "[e]lectoral legislation must also remain consistent with the rights and freedoms reflected in the New Zealand Bill of Rights Act 1990" and refer to one of the IER's objects being a review not only of the EA and associated regulations but also pt 6 of the BA.[34]

[41] As noted earlier, the IER released its interim report on 6 June 2023. Its final report is due in November this year (after the General Election). In that interim report, the IER has recommended that the restrictions on the use of television and radio for election advertising be abolished, with parties free to advertise as they wish up to their campaign spending limits.[35] This would, in turn, abolish the funding process currently in place.[36] If those proposals are implemented, the issues raised by this case would disappear. The interim report is now open for public submission.

The impugned decision

The deemed appropriation for 2023

[42] On 17 October 2022, the Minister of Justice notified the Commission that the amount of money appropriated by Parliament for political party broadcasting election programmes and general election advertising for the 2023 General Election was, again, $4,145,750.00 (GST inclusive). This is the deemed appropriation amount under s 74. There has, accordingly, been no increase in the funding amount since 2017.

[43] On 19 January 2023, the Prime Minister announced that the 2023 General Election would be held on 14 October this year.

The Commission's process begins

[44] On 1 February, the Commission began the allocation process by issuing a Gazette notice. Written submissions from parties as to their eligibility to receive funding were required by 1 March, and oral hearing dates were also set. The Commission's aim was to make a decision by 12 May.

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34 Independent Electoral Review *Terms of Reference* (March 2023) at [7]-[8].
35 Independent Electoral Review, *Interim Report,* above n 2, at [14.38].
36 Independent Electoral Review, *Interim Report,* above n 2, at [14.40].

[45] In accordance with s 76 of the BA, each of the applicants notified the Commission of their qualification for allocation. Vision NZ gave notice on its own behalf but also advised it was a component party of Freedoms NZ. Freedoms NZ gave notice as an "umbrella" party on behalf of itself, Vision NZ and the New Nation Party.[37] The New Nation Party did not give notice on its own behalf and so was ineligible for separate funding. NZOFP gave notice on its own behalf but advised it was in the process of becoming a component party of Freedoms NZ.

[46] On 3 March 2023 the Commission wrote to each of the applicants explaining the allocation process and how any allocated funds could be spent. Written submissions, focused on the s 78(2) criteria, were invited. These were to be received by 24 March. The applicants were also invited to make oral submissions if they wished.

Making the decision

[47] The Chief Electoral Officer, Mr Le Quesne, detailed the Commission's decision-making process in his affidavit. He said that before hearing orally from all those applicants who wished to be so heard on 13 and 14 April, the Board was provided with background information which included:

(a) the written submissions from all of the parties;

(b) the latest polling data;

(c) data for each of the parties regarding votes at the general election and by-elections and number of MPs;

(d) copies of the 2017 and 2020 Broadcasting Allocation decisions; and

(e) a copy the Court of Appeal's *Alliance* decision.[38]

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37 The term "umbrella" party does not appear in the legislation but is commonly understood as meaning a party which includes one or more component parties.

38 Above n 18.

[48] The Board's notes of the oral submissions received were before me in evidence. They show that in the course of the submissions made on behalf of NZOFP (by Mr Simmons (President), Ms Grey and Ms Pokere-Philips (Co-Leaders)), they:[39]

(a) referred to information evidencing an increase in support since the 2020 General Election and NZOFP's substantial membership (4000 members plus 21,308 subscriber members) and its growing social media engagement;

(b) explained it had faced difficulties before the 2020 General Election due to COVID-19 and the lack of funding that it received that would (otherwise) have enabled it to advertise; and

(c) suggested it was arguable in terms of s 78(2) that smaller parties should receive greater funding than the larger ones.

[49] After the completion of oral submissions, the Commission met four times: on 14 April and on 1, 8 and 12 May.

[50] Before the 1 May meeting, staff provided the Board with:

(a) each party's membership numbers and numbers of followers on social media;

(b) a background note on polling and the most recent poll data;

(c) legal advice;

(d) advertising cost information from FCB (the Commission's advertising agency);

(e) the amounts allocated to parties for the 2011, 2014, 2017 and 2020 elections;

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[39] Freedoms NZ, Vision NZ and the New Nation Party chose not to make oral submissions.

(f) a sample template showing each party and data relating to each of the s 78 criteria for each party to help with identifying potential categories; and

(g) a sample excel spreadsheet with embedded formulae that enabled the Commission to model various funding allocations.[40]

[51] The advertising cost information provided was also before me in evidence. It included the estimated "ratecard cost" of certain television programmes for September/October 2023. A programme's "ratecard cost" is the cost to purchase a 30 second advertisement slot during its broadcasting time. As would be expected, programmes with a higher viewership that are broadcast in the evening—such as Hyundai Country Calendar or Seven Sharp—attract a higher ratecard cost when compared to programmes broadcast early in the morning or late at night. Based on the ratecard costs in evidence, the most expensive time on TVNZ1 or TVNZ2 in this year's election month (October) is a slot on 1 News at 6:10 pm, with a cost of $26,363.40 for 30 seconds. The cheapest is Breakfast Early at 6.20 am, in October, at $1207.00 for 30 seconds.[41]

[52] Also addressed was the impact of recent inflation on advertising costs, and the forecasted amount of inflation for the coming year. In the period between the 2020 General Election and the upcoming 2023 General Election, it was estimated that these costs will have risen by an aggregated amount of 26 per cent.

[53] Before the 8 May meeting the Board was provided with further, updated, information. By the end of that meeting, the Board had reached a preliminary decision about the categories and allocations. Staff were instructed to prepare this initial decision for final review, which occurred on 12 May. On that day the Board confirmed its final allocation decision.

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[40] As I understand it, this simply means that the Commission could see what effect changing the amount allocated to one party would have on the allocations to other parties.

[41] Oddly, the evidence is that this is slightly cheaper than the same slot in September.

The decision itself

[54] In the Commission's Decision there were seven categories of funding, with allocations as follows:[42]

Category	*Political Party*	*Allocation (%)*	*Allocation ($) incl GST*
1	New Zealand Labour Party	30	$1,234,724
2	The New Zealand National Party	25	$1,036,438
3	ACT New Zealand The Greens, The Green Party of Aotearoa/New Zealand	8.5 8.5	$352,389 $352,389
4	Te Pati Māori/Māori Party	4.8	$198,966
5	New Zealand First Party	4	$165,830
6	New Conservative The Opportunities Party (TOP)	3.2	$132,664 $132,664
7	Aotearoa Legalise Cannabis Party DemocracyNZ Freedoms New Zealand Heartland New Zealand Party NZ Outdoors and Freedom Party ONE Party Animal Justice Party Aotearoa NZ Protect and Prosper New Zealand	1.6 1.6 1.6 1.6 1.6 1.6 1.6 1.6	$66,332 $66,332 $66,332 $66,332 $66,332 $66,332 $66,332 $66,332
Total			$4,145,750

[55] It will be observed that NZOFP, Freedoms NZ and the Aotearoa Legalise Cannabis Party were all placed within the seventh category; each will receive a 1.6 per cent ($66,332.00) allocation. Vision NZ did not receive any funding, for reasons that will be set out shortly.[43]

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42 Electoral Commission "Broadcasting Allocation for the 2023 General Election" (12 May 2023) [Broadcasting Allocation]; The way in which the categories and funding levels were arrived at will be discussed in more detail later in this judgment.

43 Broadcasting Allocation, above n 42, at [35].

[56] Early on in its decision, the Commission said:

> 23. Some parties' submissions to the Commission questioned the existing broadcasting statutory scheme and the broadcasting allocation criteria. These matters are outside the scope of what we can consider as part the allocation process for the 2023 election. An independent electoral law review is currently underway which includes Part 6 of the Broadcasting Act and the broadcasting allocation within its terms of reference. No legislative changes have been made to the broadcasting allocation criteria since the previous allocation.
>
> 24. A number of the statutory criteria require an assessment of past performance, acknowledging parties' previous electoral success, but they also require the Commission to have regard to the need to "provide a fair opportunity for each political party ... to convey its policies to the public". Rather than being a simple mathematical exercise, the legislation provides no guide to weighting and requires the Commission to use its judgment when considering all of the criteria.
>
> 25. In considering the requirement for fairness and in exercising its discretion, the Commission acknowledges the importance of the statutory context that prohibits parties using their own money to buy broadcast advertising time. The Commission has continued to have particular regard to the New Zealand Bill of Rights Act 1990, freedom of expression, and judicial rulings confirming that providing parties with a fair opportunity to convey their policies to the public requires every party to be given an allocation.

[57] The decision records that the Commission had considered its previous allocation decisions, but took the view it was not bound by them nor the underlying processes. It states that it expressly had regard to each of the s 78(2) factors, as I summarise below.

The number of persons who voted at the 2020 general election for each party and for candidates belonging to each party[44]

[58] The decision set out the 2020 results in tabular form, which records (among other results) that:[45]

> (a) the New Zealand Labour Party received 50.01 per cent of the total party votes and 48.07 per cent of the total candidate votes;

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44 As recorded in the official election statistics.
45 At [26].

(b) the New Zealand National Party received 25.58 per cent of the party votes and 34.13 per cent of the candidate votes;

(c) the Aotearoa Legalise Cannabis Party received 0.46 per cent of the party votes and 0.28 per cent of the candidate votes;

(d) Vison NZ received 0.15 per cent of the party votes and 0.08 per cent of the candidate votes; and

(e) NZOFP received 0.11 per cent of the party votes and 0.28 per cent of the candidate votes.

The number of persons who voted at any by-election held after the last election for any candidate belonging to that party

[59] There had been two by-elections since the last General Election: Tauranga (18 June 2022) and Hamilton West (10 December 2022). Again, the results are set out in tabular form. Of some relevance to the present proceeding is the NZOFP's performance in Tauranga, where its candidate obtained close to five per cent of the vote. The performance of its candidate in Hamilton West was poorer, with only 0.86 per cent.[46]

[60] But the Commission noted the difficulties associated with giving such results too much weight, because:[47]

> … by-elections may not necessarily indicate a party's nationwide support. They are a candidate contest within a single electorate, there is no party vote, not all parties contest them, and turnout can be lower.

The number of MPs who were members of each party immediately before the dissolution or expiration of Parliament

[61] Again, these figures (as at May 2023) were simply set out in a table, which shows:[48]

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46 At [27].
47 At [27].
48 These numbers reflected changes during the parliamentary term, including the Hamilton West by-election, the resignation of the MP for Mt Albert and the Speaker informing the House that two other MPs were to be regarded as independent members for parliamentary purposes.

(a) the New Zealand Labour Party had 62 MPs (52.1 per cent of the total);

(b) the New Zealand National Party had 34 MPs (28.57 per cent of the total);

(c) ACT New Zealand had 10 MPs (8.4 per cent of the total);

(d) the Greens, The Green Party of New Zealand Aotearoa/New Zealand had nine MPs (7.6 per cent of the total); and

(e) the Māori Party had two MPs (1.68 per cent of the total).

The relationships between each party and another party (if any)

[62] Because it is of some importance in these proceedings, I set out the Commission's assessment under this heading, as it pertains to the second and third applicants, full:

> 33. Freedoms New Zealand is a registered umbrella party with two registered party component parties - Vision New Zealand and the New Nation Party.
>
> 34. Two parties (Freedoms New Zealand and Vision New Zealand) separately gave notice to the Commission by 1 March 2023 of their eligibility for an allocation. The New Nation Party did not give notice of their eligibility for an allocation. We understand that Freedoms New Zealand will contest the party vote with candidates from all three parties on the list, and that component parties will contest the electorates under their own party names.
>
> 35. Each of the Freedoms New Zealand Party and Vision New Zealand are eligible parties for an allocation. However, section 79(3) precludes the Commission allocating money to individual parties if the party has received an allocation as part of a group of related political parties. For that reason, Freedoms New Zealand has been given an allocation as part of this decision. Accordingly, Freedoms New Zealand's component party (Vision New Zealand) has not received an allocation. However, Vision New Zealand and New Nation Party results at the previous general election (if applicable), by-elections, polling and support have been taken into account when considering Freedoms New Zealand's overall allocation.

[63] Then, the Commission recorded:

> 36. No other parties notified that they had any relationships with any other parties that the Commission might need to consider in allocating money.
>
> 37. If circumstances change, the Commission will consider varying its overall allocations in accordance with section 76A [sic].

Any other indicators of public support for each party

[64] Under this criterion, the Commission considered the results of public opinion polls, party membership numbers and "other indications of public support, such as social media following".[49]

[65] The decision sets out the averages of opinion poll results for each party in tabular form. The public opinion polls included were:[50]

(a) One News Colmar Brunton/Kantar (December 2020 – March 2023);

(b) MediaWorks/Newshub Reid Research (July 2021 – January 2023); and

(c) Roy Morgan (November 2020 – May 2023).

[66] The applicants featured in only the first of these, with average polling results of:

(a) 0.4 per cent for Aotearoa Legalise Cannabis Party

(b) 0.3 per cent for NZOFP; and

(c) 0.2 per cent for Vision New Zealand.

[67] As for membership numbers and social media, the Commission said:

> 40. The Commission sought information from eligible parties on their membership numbers. Where this has been provided, it has been on a confidential basis. However, not all parties provided their membership

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49 At [38].
50 At [39].

> numbers so a direct comparison between parties could not be made. Nevertheless, where it was provided it was considered. Parties also talked about all the different channels that they use to engage with electors that also indicate measures of support, including social media, email lists, public meetings, and volunteers. These matters have been considered.
>
> 41. The Commission acknowledges the increased use of social media by parties on a variety of platforms to build their profile, communicate their messages and engage with the public. The Commission received and considered the number of followers that each party has on differing social media platforms such as Facebook, Twitter, TikTok, Instagram and YouTube, and email lists as provided by some parties. People can 'follow' a party or sign up to receive emails for one or more reasons. For this reason, although these numbers are a measure of engagement, they are not always a straightforward measure of support. The numbers may also reflect the types of social media that a party chooses to utilise, the emphasis they place on this form of engagement and the demographics of a party.

The need to provide a fair opportunity to each party to convey its policies to the public by the broadcasting of election programmes on television

[68] The Commission began this part of its decision by observing that the effect of the allocation is that it caps the broadcasting time that a party can access because the BA prevents a party from using its own funds to purchase broadcasting time on television and radio. The Commission recorded that it had specifically considered the cost of advertising on television but acknowledged that a party is free to use the allocation for radio or online programmes and advertisements as it sees fit.

[69] The Commission noted:

> 44. The overall size of the fund available for allocation is also an important factor. In 2017, Parliament increased the size of the monetary allocation from $3,283,250 to $4,145,750 (including GST) and removed free time for opening and closing addresses. This is the third election at which the same amount of money has been available and there have been significant increases in costs during that time. In particular, the Commission notes that the cost of television advertising (as well as radio and internet advertising) has increased significantly over the last three years. Consequently, in category 7, the Commission has allocated amounts to the smaller parties that are, proportionally, slightly larger than in previous allocation decisions. The Commission must ensure that all parties, including the smaller parties, are afforded a meaningful opportunity to convey their policies to the public in accordance with the fairness criterion and freedom of expression.
>
> 45. On the question of fairness, smaller parties highlighted the objective of the MMP electoral system to deliver a more representative

> Parliament and the relative difficulty they face getting opportunities to communicate their policies. Smaller parties noted that parties in Parliament have access to administrative support and more media coverage by virtue of having one or more MPs.
>
> 46. Parties have also continued to highlight the importance of reaching electors in te reo Māori, an official language of New Zealand, and other languages, as well as the ability to communicate across geographically large electorates. The Commission regards those matters as relevant to the allocation in considering how to ensure that all parties have a fair opportunity to communicate to all voters.

[70] As noted above, the Commission had said earlier in its decision that it had had particular regard to the NZBORA and freedom of expression, and that providing parties with a fair opportunity to convey their policies to the public required every party to be given an allocation.[51]

The allocation

[71] In terms of the system of allocation, the Commission considered it appropriate:[52]

> … to continue the approach taken in previous broadcasting allocation decisions of classifying parties into categories of similar type for the determination of the allocation of broadcasting money. As the broadcasting allocation requires the distribution of a finite amount of money, the Commission regards it appropriate to consider what percentage of the total each party should be allocated. Parties' submissions generally supported the Commission's practice of placing eligible parties into categories.

[72] It then set out the categories and the percentage allocations I have, myself, set out at [54] above.

Subsequent events

[73] The day after the Decision was issued, NZOFP and the Freedoms NZ announced an intention to work more closely together.[53]

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51 At [25].
52 At [47].
53 The parties have apparently postponed the formalisation of the relationship pending the outcome of this hearing.

[74] On 17 May, the Commission emailed the NZOFP and Freedoms NZ, advising the Commission now considered NZOFP to be a component part of Freedoms NZ and that the relevant funding allocations would be varied accordingly.

[75] Between 18 and 23 May, there were communications between NZOFP, Freedoms NZ and the Commission about the status of the relationship between the NZOFP and Freedoms NZ.[54] NZOFP and Freedoms NZ also sought to clarify the Commission's interpretation and application of the BA, and how the funding allocation might be varied. They asked for more time to allow NZOFP to consider the Commission's position before (and if) the allocations are changed.

[76] On 26 May, the applicants commenced these proceedings.[55]

The grounds of review

[77] It is not disputed that, as an independent Crown entity, the Commission exercises statutory powers of decision that are amendable to judicial review. Before examining the merits of the application for review in this case, however, it is useful to set out the key statutory provisions.

[78] In their first cause of action the applicants say the Commission failed to have any or adequate regard to the mandatory criteria in section 78(2) of the BA, and in particular:

(a) failed to have adequate regard to recent by-election results and other indications of public support, including membership numbers and social media following;

(b) simply averaged out the results of polls since the 2020 election, without considering any trends in support, disadvantaging parties not named in

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54 The allocations variations have not yet been made, pending the provision of this information about these relationships.

55 The applicants' original statement of claim included a fourth cause of action alleging that pt 6 of the BA is inconsistent with the rights protected by the NZBORA and New Zealand's international rights obligations. Counsel for the applicants later responsibly accepted this ground could not be addressed in an urgent fixture.

polls and/or which were not in existence during the entire polling period and/or whose support rose during the polling period;

(c) failed to allocate funds to each of the applicants that were sufficient to fairly convey their policies to the public by the broadcasting of election programmes on television;

(d) failed to allocate funds for each of the qualified registered parties under the third applicant's umbrella that were sufficient to fairly convey their policies to the public by the broadcasting of election programmes on television;

(e) failed to make fair provision for parties which formed relationships after the broadcasting allocation, "for example by providing for the transfer of their funding to any group of parties that they agreed to join or by allocating nominal funding to each qualifying component party"; and

(f) failed to consider:

> … perceptions and other operational difficulties advertising using social media including overseas control of social media, publicity that social media is a source of disinformation, and restrictions on advertising on social media, and the risk of political parties having social media advertising and/or entire social media accounts banned for challenges government laws, policies and/or prevailing narratives.

[79] The second cause of action alleges the Commission has acted illegally, irrationally and contrary to the principle of legality, but in terms of particulars, adds nothing to the first.

[80] The substantive relief pleaded for these causes of action is a direction that the Commission reconsider the allocations and a direction that the Commission retain all funds until the review and reallocation is completed.

[81] The third cause of action is focused largely on the "umbrella" party issue and what the applicants say is the Commission's lack of clarity in that regard. It seeks declaratory relief as follows:

> A. A declaration that section 78 requires a fair allocation to each party that qualifies for a broadcasting allocation to receive sufficient allocation to fairly convey its policies to the public by the broadcasting of election programmes on television.
>
> B. A declaration that section 78(2)(f) of the Broadcasting Act requires the Commission to ensure that where a broadcasting allocation is made to a group of related parties, it must be sufficient to enable each registered party in the group to fairly convey its policies to the public by the broadcasting of election programmes on television.
>
> C. A declaration that the current application to the third applicant does not make adequate provision for the second and third applicants and for New Nation Party to each receive sufficient allocation to fairly convey its policies to the public by the broadcasting of election programmes on television.
>
> D. A declaration that where a registered party such as the first applicant which has received a broadcasting allocation ("an additional component party") joins a group of parties such as the third applicant which has received a group broadcasting allocation, then the group allocation does not provide an allocation for the additional component party for the purposes of section 79(3).
>
> E. A declaration that the current allocation to the third applicant does not make any or adequate provision for the first applicant to receive an allocation as part of that group for the purposes of s79(3).
>
> F. A declaration that the current allocation to the third applicant does not make any or adequate provision for the second applicant to provide a fair opportunity for the first applicant to convey its policies to the public by the broadcasting of election programmes on television.
>
> G. Such other declarations as the Court feels fit to provide to assist with facilitating a fair general election.

[82] The discussion of the claim below is structured as follows:

(a) by-election results and other indications of public support: s 78(2)(b) and (e) (the matters referred to in [78](a) and [78](b) above);

(b) sufficient funding to fairly convey applicants' policies to the public: s 78(2)(f) (the matters referred to in [78](c) and [78](f) above); and

(c) umbrella and related parties (the matters referred to in [78](d) and [78](e), together with the third cause of action).

By-election results and other indications of public support: s 78(2)(b) and (e)

[83] I begin with some general points.

[84] First, there can be no doubt that the s 78(2) allocation criteria have always favoured the established political parties. That may partly be seen is an artefact of history (the fact that the BA predates the introduction of the mixed-member proportional (MMP) electoral system) although as I discuss below, there are other arguments that can be made in favour of that approach—at least where time and/or finding is limited, as it now is. As first introduced, for example, the Broadcasting Bill 1988 (the Bill that became the BA) had far stricter eligibility criteria; in order to be given any broadcasting time (for example) the party concerned would have been required to have had at least 10 candidates contesting the *previous* general election.[56] A new party would have been ineligible to receive any time at all.[57] And even as originally enacted, the then s 75(1) made eligibility contingent on (among other things):

(a) the party having consistently expressed philosophies or policies on a range of issues over the period of 12 months immediately preceding the issue of the writ for the election; and

(b) in the case of a general election, persons belonging to that party being candidates at that general election for at least 10 seats in the House of Representatives.

[85] So, for example, a "single issue" party could not then have qualified for broadcasting time.

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56 (13 December 1998) 495 NZPD 8829; referring to cl 56(c) of the Broadcasting Bill 1988 (118-2).
57 (13 December 1998) 495 NZPD 8829.

[86] As well, between 1990 and 1996, s 73(3) of the BA required that, in allocating time to political parties under that section, the Authority was to:[58]

> … classify as major political parties for the purposes of this Part of this Act, the political parties that, in the opinion of the Authority, are entitled to a maximum allocation of broadcasting time

[87] It could not sensibly be suggested that the Authority would have classified a new or minor party as a "major" party for that purpose.

[88] And, of course, s 78(2) as originally enacted (as s 75(2)) contained no reference to the need to provide a fair opportunity for each party to convey its policies to the public. That criterion was not introduced until 1996.[59] And even then, adding a criterion relating to "fairness" into the statutory calculus could not alter the underlying reality; what it mainly did was create the tension noted earlier. As Geddis has said:[60]

> … [t]the "fairness' rational for regulating access is undermined by the fact that the allocation formula contained in [what was then] s 75(2) of the Broadcasting Act 1989 closely links the amount of access granted to each political party to the past level of public support it has enjoyed.

[89] Despite the fact that (overall) the criteria tend to favour established parties, however, it is plain, and important, that the allocations here did not simply mirror the results of the last general election. Although it would be surprising if there was not *some* relationship (given the results of the previous election constitute a mandatory and undisputrable statutory criterion) the relationship is far from an exact one. That can be seen from the graph provided to the Court by counsel for the Commission, which shows the differences between an allocations based solely on the 2020 election results and the allocations that have in fact been made:

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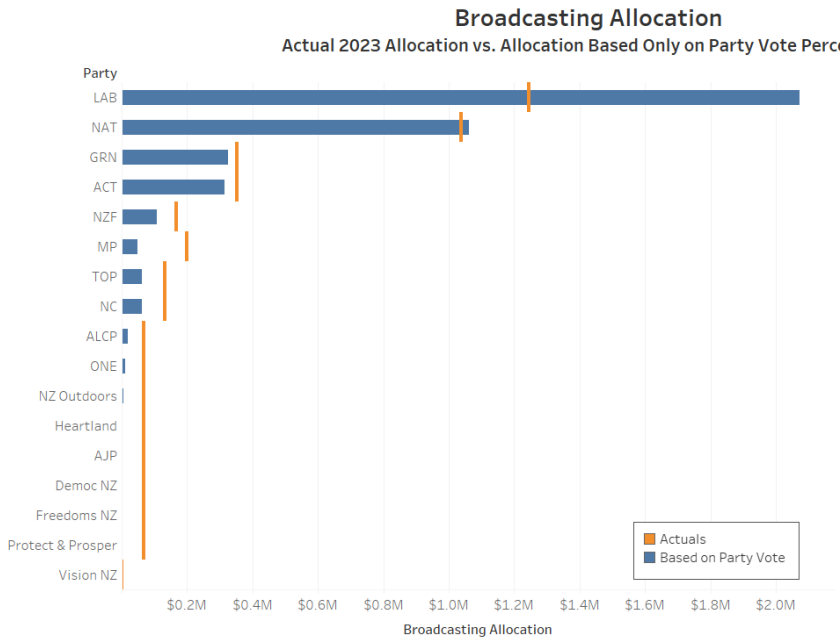
58 As inserted by s 6 of the Broadcasting Amendment Act (No 2) 1990.
59 As inserted by s 19 of the Broadcasting Amendment Act 1996.
60 Andrew Geddis "Reforming New Zealand's Election Broadcasting Regime" (2003) 14 PLR 164 at 178-179.



Party	Actual 2023 Allocation	Allocation Based on Party Vote
LAB	$1,243,725	$2,073,290
NAT	$1,036,438	$1,060,483
GRN	$352,389	$325,856
ACT	$352,389	$314,662
NZF	$165,830	$107,790
MP	$198,996	$48,505
TOP	$132,664	$62,601
NC	$132,664	$61,357
ALCP	$66,332	$19,070
ONE	$66,332	$11,608
NZ Outdoors	$66,332	$4,560
Heartland	$66,332	$1,244
AJP	$66,332	$0
Democ NZ	$66,332	$0
Freedoms NZ	$66,332	$0
Protect & Prosper	$66,332	$0
Vision NZ	$0	$6,219

[90] The second general point is that the Courts have repeatedly emphasised the importance of the Commission's discretion in this area (and others) and the related importance of the Courts maintaining a relatively "hands off" approach. For example, in an (admittedly somewhat different) context the Court of Appeal has said:[61]

> … the Electoral Commission … holds a key position and serves a number of vital functions in the operation of the nation's electoral system …
>
> The functions and powers of the commission conferred by ss 5 and 6 [of the EA] of course are not unfettered. It is well established that such powers are to be exercised within the limits imposed by and for the purposes arising from the statute establishing the body, and, depending on the terms of the principal statute, in accordance with other relevant laws …
>
> The explicit statutory emphasis upon independence in s 7, which identifies legislation as the only source of qualification on the duty to act independently, is directed to independence from political influence but it also reinforces the status of the commission in the electoral system.
>
> The status, broad functions and powers of the commission are balanced by the statutory responsibility and accountability regime applicable to a Crown entity.
>
> The statutory provisions relating to the functions, powers and composition of the commission also are to be seen against a background of its establishment. The Royal Commission on the Electoral System proposed the establishment

61 *Electoral Commission v Cameron* [1997] 2 NZLR 421(CA) at 432 – 433.

> of an Electoral Commission which was to carry out a full range of important public functions relating to elections in an independent way…
>
> …The line may not be easy to draw in particular instances. But the standing and responsibilities of the commission justify a conservative approach to interference with its functions. They are, after all, at the heart of the operation of our democratic system of government and, as with other advertising in the electoral field, any public statements made by the commission always will be susceptible of dispute, correction or complementation in the public arena.

[91] So the prospect, for example, of a single Judge substituting her own view (or even indicating her own view) of appropriate funding allocations for that of the specialist statutory tribunal charged with making those allocations is not one that could properly be countenanced. As the Court of Appeal said in *Alliance* "[i]n matters relating to the election of members of Parliament, [the] Court should not intrude any further than is absolutely necessary to determine lawfulness".[62]

[92] It seems to me this principled position of deference poses a quite fundamental difficulty for the applicants in terms of any challenge to the Commission's allocation decision based on the way it has applied and weighed any of the s 78(2) criteria. Nonetheless I address the points raised about s 78(2)(b) and (e) on their merits, briefly, below.

[93] As is evident from my earlier summary of the Commission's decision, the Commission did expressly consider the results of the two by-elections, membership numbers, social media following and poll results. That included more particularly, the results of the Tauranga by-election, presence on social media and membership numbers all of which suggest that there has been some increase in support over the last three years, at least for the NZOFP.

[94] But as the Commission noted, for a number of different, but equally cogent, reasons those indicators have their limitations.

[95] First, obtaining five per cent of the vote in a particular electorate (Tauranga) does not equate to a likelihood of obtaining five per cent overall at the next general election and here, the result in Hamilton West (six months *after* Tauranga) suggests

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62 *Alliance,* above n 18, at [43].

nothing of the kind. In that by-election, the total number of votes received by the first, second and fourth applicants *combined* was less than two per cent. Moreover, giving the results of a single by-election "too much" weight risks unfairness to other parties who might have greater support nationwide but who, for whatever reason, chose not to contest that particular seat.

[96] And the question of party membership is complicated by the fact that that information was not made available by all parties and is regarded as confidential. Unless the statute makes it mandatory for parties to provide such information, the Commission will inevitably be left to make of the incomplete data what it can, as it says it did here.

[97] Complicated, too, is the question of social media presence. As the Commission noted, there is no necessary or direct relationship between the number of followers a party or person has and active support for that party or person, although it may be indicative of interest. As well, social media engagement varies demographically and so, in some cases, may not be a good proxy for support.

[98] As for poll results, it must necessarily be accepted that they are only as telling as the questions that are asked by the pollsters. The Commission's report clearly shows this, and that—by and large—the major polls are not concerned with the smaller parties. So just as it would be wrong to regard membership numbers or social media presence as determinative in one direction, so too would it be wrong to regard poll results in that way. There is no evidence that the Commission did so.

[99] In the end, there is a range of factors to be considered by Commission under s 78(2)(b) and (e). For the reasons given, none of those factors could properly be seen as conclusive evidence of public support; they are, at best indicative. The weight to be given to each—whether individually or in the wider context of the other s 78(2) factors and the limited funds available—is necessarily a matter of judgment and discretion for the Commission. It is impossible to say there has been an error in that regard.

Sufficient funding to fairly convey applicants' policies to the public: s 78(2)(f)

[100] As noted earlier, there is potentially a tension between the first five s 78(2) factors and the requirement under s 78(2)(f) to "provide a fair opportunity for each party … to convey its policies to the public by the broadcasting of election programmes on television". Nonetheless it is not disputed that the Commission is required to take s 78(2)(f) into account and its decision records that it did so.

[101] One difficulty for the applicants here relates to what a "fair opportunity" looks like. Devoid of context, for example, it might be arguable that it requires the smaller or nascent parties to receive more, or equal, funding to the larger, established ones. But interpreted in context—the context of the other s 78(2) criteria—things are not that simple. As I have said, those criteria evince a statutory intention to favour the larger, established, parties; a balance must be struck.

[102] And in any event, "fairness" means different things to different people. The position traditionally taken by the larger parties, for example, is that in light of the limited pool, it is not "fair" to allocate more than a small amount of funding to new or minor parties. As noted by Geddis:[63]

> In contrast to these complaints about status quo bias in the allocation process, the larger political parties argue that the ease with which a party can qualify for a share of access to the broadcast media has enabled fringe organisations to siphon this resource away from more "serious" electoral contenders. In the wake of MMP's introduction, the number of parties meeting the eligibility requirement at each election has increased markedly, rising form seven in 1993 to a high of 27 in 1999, before falling back to 18 in 2011. The broadcasting advertising rates have increased at a faster pace. Thus "serious" electoral contenders have had to share s progressively shrinking pie with an increased number of peripheral groupings, whose actual electoral success is negligible. Larger parties allege that spreading access to the broadcast media across this range of parties hinders the ability of those parties that are most likely to enter Parliament to communicate their campaign messages to the electorate.

[103] The proposition that giving established parties more of the broadcasting pie is not, by and of itself, to be regarded as "unfair" has also been confirmed by the Courts

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63 Geddis, *Electoral Law in New Zealand: Practice and Policy*, above n 3, at 205.

elsewhere. For example in *Canada (A-G) v Reform Party of Canada* McFadyen J (writing for the majority of the Albertan Court of Appeal) said:[64]

> [76] Further, I do not accept that there is unfairness to or discrimination against individual members of political parties by unequal access by political parties to broadcast time. I do not accept that a political party, which enjoys limited support of a small number of individuals who wish to promote a specific interest … is the equal of a political party which has the support of a far greater number of voters and genuinely strives to provide information about its program for the governing of the country. Seen from the point of view of an individual member, such a scheme would result in discrimination against individuals in the larger group, by giving each individual in the smaller party greater access to broadcast time than that enjoyed by each individual of the larger party. Fairness is achieved, not by equal treatment of political parties, but by fair treatment measured by popular support with the objectives of the election process in mind.

[104] And similarly, in the context of the Scottish National Party's challenge to the BBC's approach to election programming, the Court said:[65]

> Impartiality in this context is not to be equated with parity on balance as between political parties of different strength, popular support and appeal … It means fairness of allocation having regard to these factors.

[105] All that being said, I do accept that "fairness" under s 78(2)(f) requires the allocation of funding to each party (subject to the discussion of s 79(3) below) that is sufficient to purchase at least *some* television advertising. I think that is clear enough from the *Alliance* decision.

[106] Again, however, the reality is that there is a limited pool of funding available. The total size of that pool has not increased for six years whereas advertising costs have risen by over 25 per cent. And yet the evidence in this case shows that, despite no increase in the funding pool for six years, the smaller parties (the parties falling within the lowest funding category) have received an *increase* in funding over that time. Thus:

(a) the funding allocated to NZOFP has increased by 78 per cent since 2017, and 28 per cent since 2020; and

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64 *Canada (A-G) v Reform Party of Canada* [1995] 123 DLR (4th) 366 at 390-391.

65 *R v British Broadcasting Company; Ex Parte Referendum Party* [1997] EMLR 605 at 609.

(b) the funding allocated to the Aotearoa Legalise Cannabis Party has increased by 60 per cent since 2017, and seven per cent since 2020.

[107] And although I accept in a general way Ms Grey's point that $66,332 would buy only two of the most expensive 30 second advertising slots during October (the month in which the general election will occur)[66] the cost figures make it clear there are many other options: seven October slots during "the Chase", immediately before the six o'clock news (during which the most expensive slot is available), 15 slots in October a few minutes earlier than the news (during "the Chase"), 21 slots in October at the best time (7.20 am) during the "Breakfast" show on TV One, and more. Or any combination thereof.

[108] Lastly, there is Ms Grey's point that the alternative of advertising on social media is not without its own difficulties. She says that, despite some or all of the applicants' significant presence in that space, there are problems with it. Those problems (as articulated in the claim) include overseas control of the relevant platforms, adverse publicity associating social media and disinformation, restrictions on advertising and the possibility of bans on some of the relevant accounts.

[109] I acknowledge that social media is not the panacea it might once have been hoped to be for those such as the applicants and that there are, or may be, problems of the type identified. But although the possibility of the applicants advertising on social media *might* be relevant under s 38(2)(f), there is nothing to suggest it was relied on here by the Commission to justify allocating them less to advertise on television; that possibility did not feature in the s 78(2)(f) analysis at all. Rather, it seems to me that the analysis was focused on allocating the applicants meaningful funding for television advertising, regardless of the other available options.

[110] For all the reasons I have given it cannot be said that s 78(2)(f) has been ignored here.

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[66] Slots in September are generally between seven and 22 per cent cheaper than October slots, although there seem to be one or two exceptions, where the September slot is cheaper.

Umbrella and related parties

[111] Freedom NZ (an umbrella party) has been allocated the same funding as the other single parties in category seven and Vision NZ (a component party) received no funding at all. As well, the Commission has indicated to NZOFP that it will lose its separate funding if it chooses to become a component part of Freedom NZ.

[112] The basis for these decisions is s 79(3) of the BA which, to reiterate, provides:

> An allocation may not be made to an individual party if that party is to receive an allocation as part of a group of related parties.

[113] The statement of claim pleads, however, that s 79(3) does not preclude the Commission from making an allocation to both an umbrella party and one of its components. Although that submission was not pursued with any real vigour before me, to the extent it is maintained I do not agree with it. Section 79(3) is clear enough in its terms, and even clearer when read in context, and in light of its purpose.

[114] There is no way in which an allocation under pt 6 could be made to an individual party "as part of a group of related parties", other than by making an allocation to the umbrella party. And that such a relationship is relevant to allocations is not only plain from s 78(2)(d) but it is also:

(a) why parties are required to advise the Commission at the time of notifying their eligibility whether they have a relationship with another party; and

(b) why s 80 permits the Commission to alter an allocation if there is a significant change in the relationship between the relevant party and another.

[115] The Commission sought further to explain and support this rule by reference to the Parliamentary debates surrounding the insertion into the BA of the predecessors to s 79(3) by way of the Broadcasting Amendment Bill (No 2) 1993.

[116] On the first reading of the Bill, the Minister of Broadcasting explained that one of its objects was to provide "for greater recognition of the place of groupings of political parties" and to permit (what was then) the Broadcasting Standards Authority "to take into account relationships between parties when allocating time and funding for election programmes".[67] He explained that cl 13 of the Bill (as introduced) would have amended the allocation criteria "to include qualifying groups of parties, thereby providing for recognition of the relationships between parties". It also provided (he said):[68]

> … that a group of related parties may qualify for allocations by collectively putting up for election at least 10 candidates. That means that an individual party that has fewer than 10 candidates in an election, by being part of a qualifying group, could still receive an allocation to broadcast election programmes in its own name or that of the group.

[117] This statement made it clear that the purpose of the proposed amendments was to enable small parties to form groupings that would be recognised collectively and enable them to pass the (then) s 75(1)(c) funding threshold. As mentioned earlier, s 75(1)(c) provided that, for a party to be eligible for the allocation of broadcasting time or money in advance of a general election, there had to be persons belonging to that party who would be candidates for at least 10 seats in the House of Representatives at that election. So the amendment meant that, for the first time, smaller parties (parties standing less than 10 candidates) might get a look in the allocation door.

[118] This proposal appears, however, to have been met with some consternation by the Hon Richard Prebble (then in opposition), who seemed particularly concerned at the advantage this (and another proposed amendment, which did not ultimately proceed) would give the Alliance party (which, as it was later before the Court of Appeal, was a grouping of smaller parties). He said:[69]

> As the Bill is written it appears that all parties will have opening and closing addresses. It appears to me that the Alliance is being told that it can have six opening addresses and six closing addresses. Each member-party will say that its policy is to support the Alliance.

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67 (23 March1993) 534 NZPD 14214. A second aspect of the Bill was to permit all political parties (including those parties that did not qualify for state funding) to spend their own funds on the purchase of air time up to a defined maximum level. Although this aspect of the Bill survived the Select Committee process, it did not eventually find its way into the Act as passed.

68 (23 March 1994) 534 NZPD 14215.

69 (23 March 1994) 534 NZPD 14228.

[119] It seems these concerns were taken on board. The Bill was reported back from the Commerce Committee with substantial changes, including the addition of:

(a) a new s 73 (relating to the allocation of broadcasting *time* to parties) and which included as subs (3):

> The Authority shall not under this section allocate any time to an individual political party if that political party has received an allocation of time under this section as part of a group of related political parties.

(b) an equivalent amendment to s 74A (governing the allocation of *money* to parties) in the form of a new subs (3):

> The Authority shall not under this section allocate any money to an individual political party if that political party has received an allocation of money under this section as part of a group of related political parties.

[120] During his second reading speech the Minister explained:[70]

> It is feared that by double-dipping—that is by being eligible to spend in more than one capacity—some parties could seek to exceed the restrictions that are placed on spending. *By preventing component parties within a group from qualifying to receive allocations* or spend funds *in cases in which the group had elected to do so collectively, the amendments recommended by the committee would remove the scope for any such abuse*.

[121] Section 74A(4) now finds form in s 79(3).

[122] I agree with the Commission that the legislative history confirms what in my view is evident from the statutory words: that the purpose of s 79(3) is to avoid "double-dipping" in the form of a party effectively receiving an allocation both as an individual party and as part of a group.

[123] Lastly, there is the alternative argument advanced for the applicants was that the operation of s 79(3) could and should be avoided in a case such as the present by

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[70] (1 July 1993) 536 NZPD 16540 (emphasis added); the reference here to spending more relates to the other proposal which did not survive the Committee of the Whole House.

simply allocating more funding to the "umbrella" party to recognise that it had constituent parts and, perhaps, the need for more complex messaging.[71]

[124] But I think the answer to this is that the funding allocation made to an umbrella party falls to be considered by reference to the s 78(2) criteria just like any other. It might well be, for example, that the combined heft of an umbrella party's component parties do operate to lift that party into a higher funding category—by reference to those criteria—although it did not do so here. So while NZOFP would lose its entitlement to individual funding if it becomes a component party of Freedoms NZ (because of s 79(3)) whether or not Freedoms NZ then gets an increase in funding is an open question and a matter for the Commission, to be determined by weighing the relevant factors and, possibly reconsidering some or all the allocations.

[125] Any reconsideration of this kind is, however, most unlikely to involve some kind of mathematical exercise whereby the umbrella party simply receives the NZOFP allocation on top of its own. That is for the same reasons that an umbrella party does not simply receive the combined funding its component parties would individually have received plus an allocation for itself. It seems to me that would indirectly cut across the clear intent of s 79(3) and would require the Commission to ignore many of the s 78(2) criteria all together.

[126] Having said all that, I acknowledge that, since the 1996 repeal of the former s 75(1)(c) "10 candidate" eligibility requirement,[72] there may now be a question about what advantage there is in forming an umbrella party—at least for broadcasting funding allocation purposes. It may, in fact, be disadvantageous from that perspective as it has, arguably, been here. But after receiving further information on that issue after the hearing it seems there remain other possible advantages. As I understand it, and subject to certain limitations, supporters of the individual component parties can be urged to cast their party vote for the umbrella party in the hope of, in combination, exceeding the five per cent threshold. In other words, umbrella parties may well be a

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71 In the latter respect Ms Grey said that the simple act of explaining on air that Freedom NZ was an umbrella party which incorporated certain other component parties would, by itself, likely use up a whole 30 second advertising slot.

72 Pursuant to s 19 of the Broadcasting Amendment Act 1996.

vehicle that can be used to give candidates from the component parties (who are on the umbrella party's party list) a better chance of being elected.

Conclusion

[127] It follows that the applicants' application for review cannot succeed and it is dismissed. I have discerned no error in the Commission's approach or its application of that approach. The declarations sought cannot be made, although I hope that some of what I have said above gives the applicants greater clarity about the application of the relevant provisions to umbrella and component parties.

[128] As noted at the beginning of this judgment, there are plainly difficulties with both the principles underlying, and the operation, of Pt 6 of the BA. Ultimately, I do not think these difficulties can be resolved by the Courts. Although I accept—as I know the Commission does—that a number of fundamental rights are at stake, those rights themselves have complexities and can pull in different directions. Parliament has struck a clear and deliberate balance between them in the form of Pt 6 and it is almost certainly for Parliament to recalibrate the balance as and when it sees fit.

Costs

[129] The parties are agreed that costs should lie where they fall, and I make an order accordingly.

[130] I thank all counsel for their courteous and helpful submissions.

Rebecca Ellis J

Solicitors:
Crown Law, Wellington