IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 57/2021
[2022] NZSC 138

BETWEEN	MALCOLM BRUCE MONCRIEF-SPITTLE First Appellant
	DAVID CUMIN Second Appellant
AND	REGIONAL FACILITIES AUCKLAND LIMITED First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	22 February 2022
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	J E Hodder KC, P A Joseph and J A Tocher for Appellants K Anderson, A S Butler KC and K E F Morrison for Respondents J S Hancock for Human Rights Commission as Intervener
Judgment:	5 December 2022

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **Leave to adduce the affidavit of 18 February 2022 of David Cumin is declined.**

C **Costs are reserved.**

REASONS
(Given by Ellen France J)

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The appeal

[1] This appeal concerns the way in which freedom of expression affects the decision of the first respondent, Regional Facilities Auckland Ltd (RFAL), to cancel a contract for hire of the Bruce Mason Centre in Takapuna. The Centre is one of Auckland Council's venues which is managed by RFAL. An Australian promoter, Axiomatic Media Pty Ltd (Axiomatic), had hired the Bruce Mason Centre for presentations by two speakers, Stefan Molyneux and Lauren Southern. The speakers have been described as "alt-right" commentators. Complaints were made about the

event and the contract for hire was cancelled by RFAL because of concerns about health and safety risks arising from anticipated protests against the event.

[2] The decision to cancel the contract was challenged by the appellants, Malcolm Moncrief-Spittle and David Cumin. Mr Moncrief-Spittle had bought a ticket for the event and was disappointed when it was cancelled. Dr Cumin is an Auckland ratepayer and a member of the Auckland Jewish community. His concern is that his community's use of Council facilities could be adversely affected in the future by threats from those wanting to disrupt such events.

[3] The appellants sought judicial review of the decision to cancel. They argued, first, that RFAL had acted irrationally, perversely and arbitrarily. In concluding that there was an unacceptable security risk, they said that RFAL did not obtain and have regard to relevant information including the views of the police, Axiomatic's security resources, and the ways that Australian venues (at which Mr Molyneux and Ms Southern had spoken) managed risks to security and safety. It was also alleged that if RFAL had obtained and had regard to all relevant information, it could not rationally have concluded that the event posed an unacceptable security risk justifying cancellation. Second, the appellants pleaded a failure to act consistently with rights guaranteed under the New Zealand Bill of Rights Act 1990 (the Bill of Rights), including the right to freedom of expression.

[4] The High Court dismissed the appellants' claim.[1] The appellants' appeal to the Court of Appeal was unsuccessful.[2] Although the outcome was the same in both Courts, the Courts adopted different reasoning. The High Court found that RFAL's decision to cancel the contract was not amenable to judicial review and that the Bill of Rights did not apply. The Court of Appeal said that the decision was amenable to judicial review and that the Bill of Rights applied. But the claim failed because the decision to cancel was reasonable both in administrative law terms and under the Bill of Rights.

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1 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399, [2019] 3 NZLR 433 (Jagose J) [HC judgment].

2 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795 (Kós P, Cooper and Courtney JJ) [CA judgment].

[5] It is convenient to deal with the latter, the Bill of Rights claim, first as the approach to that claim provides a necessary framework for resolution of the appeal. The issues arising on the appeal accordingly are as follows:

(a) Does the Bill of Rights apply?

(b) If the Bill of Rights is applicable, was the decision to cancel a breach of protected rights?

(c) Is the decision by RFAL to cancel the contract amenable to judicial review and, if so, what are the available grounds of review?

(d) If the decision is reviewable, was the decision to cancel unreasonable and how is freedom of expression taken into account in that assessment?

[6] We discuss each of these issues in turn after first setting out the factual and legal context.

Narrative of events

[7] On 13 June 2018 Axiomatic contacted Auckland Live, the operational division of RFAL responsible for venues used for live performances, about hiring a venue for two speakers in early August 2018. Of the two venues and the available dates, Axiomatic chose the Bruce Mason Centre and the event was pencilled in for 3 August 2018.[3] When asked for more information about the event, in an email of 13 June 2018 Axiomatic told RFAL that the speakers were Stefan Molyneux and Lauren Southern.

[8] RFAL gave Axiomatic its standard form venue hire agreement on 15 June 2018. The venue hire fee was $5,000 or 12.5 per cent net of box office takings, whichever was the greater. The agreement required Axiomatic to provide a written health and safety plan for the event and the venue addressing hazards to RFAL's reasonable satisfaction. This was to be provided at least 10 days in advance of the

[3] The other available venue was the ASB Theatre at Aotea Centre (as it was then called).

event. Axiomatic completed and returned the agreement. It was countersigned by RFAL on 18 June 2018.[4]

[9] Tickets went on sale shortly after, on 29 June 2018. At the same time Axiomatic publicised the event's date and venue. Tickets were priced at between $79 (for a general admission) and $749 each (including dinner with the two speakers). Mr Moncrief-Spittle purchased the event plus dinner package. Within a short period of time, RFAL began to receive complaints from members of the public. Social media commentary included the launch of a petition seeking the cancellation of the event.

[10] RFAL decided it needed to know more about the matter. To put the need for further information in context, Axiomatic had not indicated at the time of making its booking that there were security issues that would need to be addressed and paid for (based on its experience holding the same event in Australia which had necessitated special security arrangements).[5] Further, in the 13 June 2018 email, the two speakers had been described as "a renowned philosopher and author" and "a documentary filmmaker and best-selling author". There is no explanation of why Axiomatic did not tell RFAL about the potential for security issues and why it was proceeding on a different basis in New Zealand than had been considered necessary in Australia. As a result of the absence of information, it was not until inquiries were made following the receipt of the first series of complaints that RFAL found out that for the Australian leg of the speakers' tour, ticketholders had only been told of the venue 24 hours before the scheduled event.

[11] On 5 July 2018 a representative of Auckland Peace Action[6] asked the Council directly for the event to be cancelled. On the morning of the next day, Auckland Peace Action issued a press release announcing its intention to confront the speakers in the streets and blockade entry to the Centre. The director of Auckland Live,

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4 There were separate agreements between the promoter and the speakers. In terms of these agreements the speakers would be paid AUD 10,000 each plus a share of profit from merchandise sales.

5 The Court of Appeal discussed the evidence about what Axiomatic told RFAL at the time. The Court proceeded on the basis the evidence of RFAL's witness that nothing was said to her about likely security risks was correct: CA judgment, above n 2, at [73]. We do the same.

6 Self-described as a grassroots community activist group that is involved in organising to promote peace and justice. In their communications to the Council, Auckland Peace Action stated that hosting "two prominent fascist[s]" was a "threat to the peace and good order of New Zealand".

Robin (Robbie) Macrae, had previous experience with a protest blockade in 2016 at the Viaduct Events Centre involving Auckland Peace Action.

[12] RFAL management met to discuss the issue. As the Court of Appeal noted:[7]

> There was particular concern over the fact that the Bruce Mason Centre was located on the corner of two busy roads in Takapuna which were surrounded by local businesses and restaurants. This would make crowd and traffic control, and separating attending patrons from protestors while preserving public access to other businesses, difficult. There was a high degree of risk to safety if the Centre had to be evacuated. There was concern at the cost of additional security measures. No bond or guarantee had been obtained from Axiomatic to cover such expenses.

[13] Later in the morning of 6 July 2018, Mr Macrae decided to cancel the event. The Court of Appeal summarised his evidence as to how he reached that decision as follows:[8]

> He identified the competing demands as being the right to protest in a safe environment, Auckland Peace Action's reputation for blocking events it disagreed with and the potential for disruption and violence. Mr Macrae said that he did not want to risk being in breach of his health and safety obligations with the potential for prosecution in that regard, nor to be responsible for anyone being harmed at the event.

[14] Axiomatic was advised of the decision to cancel the contract by telephone. The reason given was security concerns. RFAL wrote formally to Axiomatic confirming that decision on 10 July 2018. Axiomatic did not dispute the cancellation.[9] It agreed to the refund of the tickets and its deposit.

The statutory framework

[15] In determining whether the Bill of Rights applies and whether the decision to cancel was reviewable, we need to explain the statutory scheme applicable to RFAL.

[16] By way of introduction to the statutory framework, we note that local government in the Auckland region was reorganised in 2010 to create what is commonly referred to as the Auckland "super city". Auckland Council was

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7 CA judgment, above n 2, at [16].

8 At [17].

9 In a telephone call Axiomatic asked, amongst other things, if there was anything it could do to allay the security concerns.

established as the unitary authority for Auckland.[10] That same year, the Auckland Transition Agency (the entity responsible for planning and managing the reorganisation of Auckland local government)[11] was directed to establish a number of council-controlled organisations.[12] Among them was a charitable trust named Regional Facilities Auckland which was to hold and manage assets formerly held by territorial authorities in the Auckland region, including the Bruce Mason Centre.[13] RFAL, a limited liability company and a council-controlled organisation, was to be Regional Facilities Auckland's governing body and trustee.[14] RFAL is wholly owned by Auckland Council.

[17] Certain assets which had been held by territorial authorities in the Auckland region, including venues such as the Bruce Mason Centre, were vested in RFAL in its capacity as trustee of Regional Facilities Auckland.[15]

[18] Turning then to the Local Government Act 2002, the purpose of local government as expressed in s 10 of that Act has varied but, at the time that the contract was cancelled, the purposes in s 10(1) were as follows:[16]

> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

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10 Local Government (Auckland Council) Act 2009 [Local Government Act 2009].

11 Local Government (Tamaki Makaurau Reorganisation) Act 2009, s 13.

12 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010 [Organisations Order].

13 The other council-controlled organisations (CCOs) were the waterfront development entity, Auckland Council Investments Ltd, Auckland Council Investments (AIAL) Ltd, Auckland Council Property Ltd, and Auckland Tourism, Events and Economic Development Ltd.

14 Organisations Order, cl 9(4) and (5).

15 The vesting of assets was achieved by the Local Government (Tamaki Makaurau Reorganisation) Council-controlled Organisations Vesting Order 2010 [Vesting Order].

16 In 2010, s 10 of the Local Government Act 2002 included as one of the purposes of local government "to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future". The expression of the purpose as it was in 2018 was inserted by the Local Government Act 2002 Amendment Act 2012, s 7. The purpose reverted to essentially the previous formulation in 2019.

[19] Section 11 of the Act requires local authorities to give effect to the statutory purposes and to perform duties and exercise rights conferred by or under the Act or any other enactment.

[20] Part 5 of the Local Government Act sets out the requirements for governance and accountability of council-controlled organisations, like Regional Facilities Auckland and RFAL, and the procedures for the transfer of local authority undertakings to those organisations, as occurred here.[17] The principal objectives of council-controlled organisations, as set out in s 59(1), are relevantly to:

> (a) achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent; and
>
> (b) be a good employer; and
>
> (c) exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so; and
>
> …

[21] Council-controlled organisations must have a statement of intent that complies with the statutory requirements[18] and make their decisions in accordance with that statement.[19] The statement of intent relevantly here provided that RFAL's "primary activity" was "to act as a corporate trustee for Regional Facilities Auckland".[20] In addition, the statement of intent noted that Regional Facilities Auckland "supports" the vision of Auckland Council "for Auckland as a vibrant, dynamic international city by providing a regional approach to running and developing Auckland's arts, culture and heritage, … leisure, sports and entertainment sectors".[21] The Trust achieves its role which includes "advancing the social and cultural well-being of Aucklanders" by,

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17 Local Government Act 2002, s 55. The procedures to be followed before a CCO is established are set out in ss 56 and 82. CCOs are defined in s 6(1) of the Act.

18 Local Government Act, s 64 and sch 8 cls 7 and 8.

19 Local Government Act, s 60(a).

20 *Statement of Intent Regional Facilities Auckland 1 July 2017 to 30 June 2020* at 4. This Statement of Intent "publicly states the activities and intentions of Regional Facilities Auckland Limited (RFAL) and Regional Facilities Auckland (RFA) for the next three years, and the objectives to which these activities will contribute": at 4.

21 At 4.

amongst other matters, "assisting Auckland Council in the delivery of the Auckland Plan".[22]

[22] Section 65(1) of the Local Government Act makes it clear that as a shareholder in RFAL, Auckland Council must monitor performance of that organisation to evaluate its contribution to the achievement of:

> (a) the local authority's objectives for the organisation; and
>
> (b) (if applicable) the desired results, as set out in the organisation's statement of intent; and
>
> (c) the overall aims and outcomes of the local authority.

[23] In terms of the statement of intent, s 65(2) requires the local authority to either agree to it or, if not, to take all practicable steps under sch 8 cl 5 to require it to be modified.

[24] We also need to note that under the Local Government (Auckland Council) Act 2009, council-controlled organisations that own or manage assets with a value of more than $10 million are classified as a "substantive council-controlled organisation".[23] Substantive council-controlled organisations must give effect to the relevant aspects of the Council's long-term plan.[24] In its capacity as trustee vested with a range of regional assets worth well over $10 million, including the Auckland Art Gallery, Auckland Zoo, Mt Smart Stadium, and the Bruce Mason Centre, RFAL is a substantive council-controlled organisation.[25]

[25] It is helpful now to say a little more about Regional Facilities Auckland, the charitable trust for which RFAL is the trustee.[26] The objectives of the Trust are found in cl 9(3) of the Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010 (the Organisations Order). That

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22 At 4.
23 Section 4(1).
24 Local Government Act 2009, s 92(1).
25 Vesting Order, cl 14(1). Under s 91 of the Local Government Act 2009, the Council may impose additional accountability requirements on substantive CCOs.
26 We note that in December 2020, Regional Facilities Auckland merged with Auckland Tourism, Events and Economic Development to become Tātaki Auckland Unlimited Ltd. In this judgment we will still refer to Regional Facilities Auckland.

clause reiterates the themes apparent in the excerpt from the statement of intent we set out above, describing the objectives in these terms:

> (a) to support the vision of Auckland as a vibrant city that attracts world class events and promotes the social, economic, environmental, and cultural well-being of its communities, by engaging those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport, and entertainment activities …

[26] As required, the trust deed establishing Regional Facilities Auckland has a statement of purpose which is congruent with these objectives.[27] Those charitable purposes are as follows:

> 3.2 … In order to:
>
> (a) **Engaging the Communities of Auckland**: support the vision of Auckland as a vibrant city that attracts world class events and enhances the social, economic, environmental, and cultural well-being of its communities, by providing Regional Facilities throughout Auckland for the engagement of those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport, and entertainment activities: and
>
> (b) **Providing World Class Regional Facilities**: develop and maintain, applying a regional perspective, a range of world class arts, culture, heritage, leisure, sport, and entertainment venues that are attractive both to residents of and visitors to Auckland;[28]
>
> the Trust has been established, and is to be maintained, to promote the effective and efficient provision, development and operation of Regional Facilities throughout Auckland for the benefit of Auckland and its communities (including residents of and visitors to Auckland) and in particular:
>
> (c) **Development and Operation of Regional Facilities**: to promote, operate, develop and maintain, and to hold and manage interests and rights in relation to, Regional Facilities throughout Auckland, and to promote and co-ordinate strategic planning in relation to the ongoing development and operation of such facilities;
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> (d) **Provision of High Quality Amenities**: to provide, and to promote the provision of, high quality amenities at Regional

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27 Organisations Order, cl 9(2).

28 "Regional Facilities" are defined in the trust deed as meaning "venues, attractions and other facilities throughout Auckland that are community assets of regional significance, including arts, cultural, heritage, education, sports, entertainment, recreation and leisure facilities, indoor and outdoor venues and stadiums …, and all property and undertakings relating to such facilities, including in particular arts, cultural, heritage, education and other collections associated with such facilities".

> Facilities throughout Auckland that will facilitate and promote arts, cultural, heritage, education, sports, recreation and leisure activities and events in Auckland which attract and engage residents and visitors; and
>
> (e) **Prudent Commercial Administration**: to administer, and to promote the administration of, Regional Facilities throughout Auckland on a prudent commercial basis, so that such facilities are operated as successful, financially sustainable community assets.

[27] Finally, we note that the trust deed sets out the respective roles of RFAL, as trustee, and Auckland Council. The background section records RFAL's responsibility "for coordinating the effective and efficient provision, development and operation of Regional Facilities throughout Auckland, for the benefit of Auckland and its communities, and its anticipated activities".[29] Under cl 4.1, RFAL has "overall control of, and responsibility for, the Trust Fund and the administration of the Trust". The Council's role "is to oversee the conduct of" RFAL and "to exercise its powers under the terms of" the trust deed in order to "protect the public interest, and in particular the interests of Auckland and its communities, in relation to the Trust Fund and the proper administration of the Trust".[30]

The judgments below

High Court

[28] In reaching the view that the decision to cancel the contract was not amenable to judicial review, Jagose J focussed on RFAL's activities.[31] In terms of those activities, the Judge examined the Organisations Order directing the establishment of the Trust, the trust deed and the relevant statements of intent. The Court saw these as having effected a separation between the Council and the Trust. The Council had the objective of providing community facilities and the Trust's function was to manage them. The Council had not devolved any direct responsibility for community well-being to the Trust. Therefore, RFAL was not exercising any public power in deciding to cancel the event.

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29 Recital E. Reference is made to facility management, events planning and marketing in relation to these facilities.

30 Clause 4.2.

31 The fact that RFAL was a trustee of a charitable trust on its own was not decisive.

[29] For essentially the same reasons, the Judge found that RFAL was not subject to the Bill of Rights. Rather:[32]

> RFAL is just a trustee of the trust in which ownership of the Bruce Mason Centre is vested, the trust's functional "provision, development and operation" of which is not 'governmental' in nature.

[30] Finally, the Judge concluded that neither of the appellants had standing to bring the proceeding.[33]

Court of Appeal

[31] In determining that the decision was amenable to judicial review and that the Bill of Rights applied, the Court of Appeal rejected the High Court's approach that RFAL's status was "merely subsidiary".[34] Rather, after considering the purpose of the legislative reforms and the relevant statutory framework, the Court accepted the appellants' submissions that "RFAL stands in the shoes of the Auckland Council".[35] Further, the Court said that in cancelling the contract, RFAL was exercising a public power. While the immediate context of the cancellation decision was commercial, its wider context was not comparable to cases where a narrow approach to the availability of judicial review has been taken. In support of that conclusion, the Court identified a number of factors, including the absence of a requirement on RFAL to administer the assets on a competitive commercial basis. The Court noted also that the statutory function of providing venues for live performances engaged rights protected both at common law and under the Bill of Rights.

[32] However, the Court did not accept the appellants' arguments that the cancellation decision was unreasonable because of the process followed. Rather, the

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32 HC judgment, above n 1, at [51].

33 The then Mayor of Auckland, Philip Goff, was initially named as a respondent on the basis he had made or dictated the decision to cancel. The High Court rejected this ground and it was not pursued in the Court of Appeal.

34 CA judgment, above n 2, at [32] and [45]–[50].

35 At [50].

Court considered it was reasonable for RFAL to consider the practicalities they had identified. The Court also said it was reasonable for RFAL:[36]

> … to be influenced by the fact that when Axiomatic made the booking, it did not disclose the controversial nature of the event and the steps taken in Australia to avoid advance publicity. … RFAL was entitled to make its own assessment of the risk and of the practical steps that would be required to manage that risk based on the knowledge and resources then available to it.

[33] The Court's view was that RFAL's security concerns were substantiated.

[34] Turning to the Bill of Rights, the Court found that cancellation was a reasonable limit on the rights to freedom of expression and of peaceful assembly both of which were engaged by the decision to cancel the event.

[35] Finally, the Court rejected the High Court's finding that the appellants did not have standing to bring the proceeding.[37]

Does the Bill of Rights apply to RFAL's decision?

The Bill of Rights

[36] The application of the Bill of Rights is dealt with in s 3:

> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[37] The question for us is whether RFAL comes within s 3(b).

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36 At [93].

37 The Court also accepted submissions for the appellants that the costs award made by the High Court should be reduced.

The s 3(b) test

[38] The starting point in considering the approach to s 3(b) is that, as was said in *R v N*, s 3(b) "must be given a generous interpretation appropriate for that legislation concerned as it is with human rights and fundamental freedoms".[38]

[39] The approach that has generally been used to determine whether an organisation comes within s 3(b) is that discussed in *Ransfield v Radio Network Ltd*.[39] Randerson J said the subsection had three elements, that is, the Bill of Rights applies if the act in question takes place:[40]

> (a) in the performance of a function, power or duty by any person or body;
>
> (b) which is conferred or imposed by or pursuant to law; and which
>
> (c) is public.

[40] The first two questions were not seen generally as causing particular difficulty. It was the latter question, namely, whether in that case the radio stations were exercising a public function or power, which was the "more difficult question".[41] In terms of what was "public", Randerson J said that the function must be "governmental" in nature in order to come within s 3(b) as a public function, power, or duty.[42] The Judge then summarised his views noting, first, the fact that the body in question is performing a function with public benefits was not determinative.[43] Whether the function, power, or duty was carried out in public was immaterial in that a public function, power or duty may be performed in private.[44] Nor did the Judge consider that amenability to judicial review was necessarily decisive.[45] Further, the Judge saw the "primary focus of inquiry" under s 3(b) as being on the particular function, power or duty not on the nature of the body in question.[46] The nature of the body may nonetheless be relevant in deciding whether the function, power, or duty is a public one for these purposes.

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38 *R v N* [1999] 1 NZLR 713 (CA) at 721.
39 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC).
40 At [47].
41 At [49].
42 At [58].
43 At [69(a)].
44 At [69(b)].
45 At [69(c)].
46 At [69(d)].

[41] Next, Randerson J noted that a body may have a number of functions, powers, or duties, some private and some public. Hence it was important to focus on the particular function, power, or duty in issue.[47] The Judge acknowledged that various mechanisms are used by governments to carry out their "diverse functions" so there could be no "single test of universal application" in determining whether the function, power, or duty is public in nature.[48] The Judge saw the issue as, broadly:[49]

> … how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it "governmental" in nature or is it essentially of a private character?

[42] Randerson J then set out some indicia, which were not exhaustive and not intended to be exclusive, that might assist in determining whether s 3(b) applied, namely:[50]

> (i) whether the entity concerned is publicly owned or is privately owned and exists for private profit;
>
> (ii) whether the source of the function, power, or duty is statutory;
>
> (iii) the extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme);
>
> (iv) whether and to what extent the entity is publicly funded in respect of the function in question;
>
> (v) whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty;
>
> (vi) whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public;
>
> (vii) whether coercive powers analogous to those of the state are conferred;
>
> (viii) whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties or liabilities of any person (drawing by analogy on part of the definition of statutory power under s 3 of the Judicature Amendment Act 1972);
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> (ix) whether the entity is exercising extensive or monopolistic powers; and
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> (x) whether the entity is democratically accountable through the ballot box or in other ways.

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47 At [69(e)].
48 At [69(f)].
49 At [69(f)].
50 At [69(g)].

[43] Similar issues have been addressed in the United Kingdom in relation to the interpretation of s 6 of the Human Rights Act 1998 (UK). Section 6(1) provides that it is unlawful for public authorities to act in a way which is incompatible with a Convention right.[51] "Public authority" is then defined as including, in s 6(3)(b), persons "whose functions are functions of a public nature". In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*[52] and *YL v Birmingham City Council*,[53] the House of Lords addressed the interpretation of s 6(3)(b). In *Aston Cantlow*, a majority of the House of Lords held that in exercising a statutory power to enforce repair obligations in relation to a parochial church council, the church was not a public authority for these purposes. In *YL*, a majority of the House of Lords concluded that the decision of a rest home to cancel a residency agreement where that agreement is arranged through the local council is not subject to the Human Rights Act.

[44] In these cases the House of Lords confirmed that whether a body is performing a public function is a matter of considering various factors and that there can be "no single test of universal application".[54] A number of relevant, non-exhaustive, factors were identified, including the extent to which the body is publicly funded, is exercising statutory powers, taking the place of central or local government, or is providing a public service.[55] As in *Ransfield*, the Court said the emphasis is on the nature of the function rather than the body discharging it.[56]

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51 "Convention rights" are defined in s 1 of the Human Rights Act 1998 (UK) by reference to certain rights and freedoms set out in the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights].

52 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

53 *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

54 *Aston Cantlow*, above n 52, at [12] per Lord Nicholls. This statement was approved in *YL*, above n 53, at [5] per Lord Bingham, [64] per Baroness Hale and [91] per Lord Mance referring to the factors as stated by Lord Nicholls.

55 *Aston Cantlow*, above n 52, at [12] per Lord Nicholls. These factors were referred to in *YL*, above n 53, at [91] per Lord Mance. In *YL*, Lord Bingham also identified other relevant factors including the extent to which the state regulates, supervises and inspects the performance of the function in question; and extent of the risk that improper performance of the function might violate Convention rights: at [5]–[12]. Factors that Baroness Hale identified as relevant include whether the state has assumed responsibility for overseeing performance of the task; and the closeness of the connection between the service and the core values underlying the Convention rights: at [65]–[72].

56 *YL*, above n 53, at [6] per Lord Bingham, [61] per Baroness Hale and [105] per Lord Mance.

[45] The approach taken in both *Aston Cantlow* and *YL* has been the subject of some criticism.[57] Amongst other matters, criticism is directed to the requirement to consider the entity's administrative links with state institutions.[58] There has also been a criticism of the focus in *YL* on the presence of contract as prioritising "preservation of private contractual arrangements over protection of human rights".[59]

[46] In determining the correct approach, s 3(b) has to be read in the context of the section as a whole. The scope of s 3(a) will generally be clear cut. Section 3(b) is trying to ensure that acts of other bodies not within s 3(a), but which similarly carry out functions of a public nature, are caught by the Bill of Rights. There will always be a question of judgement involved in determining whether the functions, powers and duties exercised mean that the entity has the necessary "public" features.[60] And the application of s 3(b) will sometimes turn on quite fine margins meaning those judgement questions may be difficult.

[47] That said, in its application *Ransfield* does not appear to have caused any particular difficulties. The decision has recently been applied by the Court of Appeal in *Low Volume Vehicle Technical Assoc Inc v Brett*.[61] In that case, the Court of Appeal drew from *Ransfield* that, "in a broad sense the issue is how closely the particular function, power or duty is connected to or identifies with the exercise of the powers and responsibilities of the State".[62] That is consistent with the purpose attributed to

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57 Mark Elliot and Jason N E Varuhas *Administrative Law: Text and Materials* (5th ed, Oxford University Press, Oxford, 2017) at 156–158.

58 Thoms Yeon "Venturing through the Public-Private Divide under the Human Rights Act 1998: Section 6(3)(b) and the Concept of 'Functions of a Public Nature'" (2020) 5(1) Camb L Rev 79 at 86 says the minority in *YL* "focused correctly on the nature and purpose of the function" exercised, that is, "the provision of accommodation services". See also Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act: 9th report of session 2006–07* (Stationary Office, HL Paper 77, HC 410, March 2007) at 13.

59 Elliot and Varuhas, above n 57, at 157.

60 See, for example, Dean R Knight "Privately Public" (2013) 24 PLR 108 at 124; and Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 8. In the context of discussing the distinction between public and private law, Cane notes that "[nor] is publicness (or privateness) like redness — a characteristic that can be observed by the senses. Rather the classification of functions and activities as public or private is ultimately a matter of value-judgment and choice": at 8.

61 *Low Volume Vehicle Technical Assoc Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808. For examples of its application in the High Court, see *Ziegler v Ports of Auckland Ltd* [2014] NZHC 2186, [2014] NZAR 1267 at [34]–[38]; *Falun Dafa Assoc of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122 (HC) at [38]–[42]; and see also *Mangu v Television New Zealand Ltd* [2006] NZAR 299 (HC) at [17]–[19].

62 *Low Volume*, above n 61, at [25].

s 3 in the White Paper that preceded the Bill of Rights, namely, to "draw the appropriate line between public action and other [private] action".[63] The White Paper also made the point that the primary purpose of the proposed Bill was "to apply generally to public and governmental action".[64]

[48] In terms of the indicia in *Ransfield*, the way in which central government or local government functions are undertaken and the types of entities to which those functions are devolved may well continue to change over time.[65] That may eventually require some amendment to the factors identified. However, neither of the parties nor the intervener argued that we should depart from the *Ransfield* approach. Nor did they argue for the omission of or amendment to particular factors. In these circumstances, where the approach in *Ransfield* is consistent with the purpose of the section and has been applied for some time now, we consider the approach and, in particular, the *Ransfield* indicia should be seen as continuing to provide some guidance as to where the line is to be drawn. The indicia should not, however, be treated as the sole determinant, as Randerson J made clear.[66] Nor is it helpful to treat the indicia as a mechanical checklist as, arguably, the appellants here did in submitting that as eight of the 10 indicia were met, RFAL came within s 3(b).[67] It will always be necessary to step back and ask whether, overall, s 3(b) is engaged.

[49] Finally we note that we agree, as Brendan Orr suggests, "that there may be very little to distinguish, in the New Zealand context, between a functional s 3(b) rights-based analysis, and the functional test for amenability to judicial review".[68] However, there are some reasons for maintaining a separate focus. The availability of *Baigent* damages for a breach of the Bill of Rights marks out those claims from a

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63 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 69.

64 At 69. See also Ivor Richardson "The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce" (2004) 10 Canta LR 259 at 263–265; and see Paul Radich and Richard Best "Section 3 of the Bill of Rights" [1997] NZLJ 251.

65 Richardson, above n 64, at 265.

66 *Ransfield*, above n 39, at [70].

67 The only criteria the appellants say were not met are that it has no coercive powers analogous to those of the state (see [69(g)(viii)]) and it is not democratically accountable through the ballot box (see [69(g)(x)]).

68 Brendan Orr "Functions of a Public Nature and Judicial Review: *YL v Birmingham City Council*" (2009) 15(1) AULR 239 at 247. Orr refers here to the approach to amenability to judicial review in *Regina v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (EWCA).

judicial review proceeding.[69] And in a judicial review proceeding, cross-examination will be less common.[70] Further, as the Human Rights Commission submits, there may be occasions where the s 3(b) test captures a broader range of functions. Accordingly, while it may be that the two tests ultimately coalesce, at this point we prefer not to precipitate that development.

Application to the present facts

[50] There is no issue that RFAL in cancelling the contract was performing a function conferred by law. The issue is whether for these purposes, it is "public". On that question, as we have indicated, the appellants say RFAL meets the clear majority of the *Ransfield* indicia and that accordingly s 3(b) applies. RFAL takes issue with this assessment. Amongst other matters, RFAL emphasises the commercial nature of the contractual arrangements with Axiomatic and says there is no difference in quality between its acts and those of any privately owned venue providers. RFAL also says that there is no statutory source for any public power and no "governmental" element to RFAL's function. Finally, RFAL relies on the absence of coercive or regulatory powers in contrast to those of the regulator in *Low Volume Vehicle Technical Assoc Inc*.

[51] We agree with the Court of Appeal that RFAL comes within s 3(b) in respect of the decision to cancel the contract. That is because we agree RFAL effectively stands in the shoes of Auckland Council in providing a service that is intended for the social well-being of the community, and so there is a governmental aspect to its functions.[71] As Mr Hancock for the Commission put it, the Bruce Mason Centre is publicly owned property available for public hire for expressive activities. RFAL, a public body established for this purpose and with some public funding,[72] facilitates hire of the venue and so has an important role in providing facilities for expressive

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69 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

70 The resultant forensic limits of judicial review procedure were noted recently in *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [85].

71 *Ransfield*, above n 39, at [69(g)(v)].

72 At [69(g)(iv)].

activities.[73] Moreover, RFAL does not exist for private profit[74] and is subject to governance by Auckland Council.[75]

[52] To explain our conclusion on this aspect we note, first, we agree with the Court of Appeal that the effect of the legislative scheme, and the associated material such as the trust deed, is that the relevant functions of the Council have effectively been devolved to RFAL. In particular it is clear that, whatever terminology is used RFAL, when cancelling the contract with Axiomatic, was exercising functions in relation to the management of the venues which otherwise would have been Council functions.[76] RFAL was doing so within the policy framework set by the Council, as is apparent from the excerpts we have cited from the statement of intent for Regional Facilities Auckland and RFAL.

[53] Second, the Council's oversight of these matters is apparent in its governance role in relation to Regional Facilities Auckland. To emphasise the matters canvassed already in the description of the legislative scheme, we note the governance and reporting documentation describe the relationship between the Council and its council-controlled organisations as one of partnership.[77] These features of the statutory scheme provide something of a "governmental" flavour to the relevant functions of Regional Facilities Auckland and, it follows, to RFAL given the latter's responsibilities. The appellants are correct to describe RFAL as an important means by which the Council carries out its role to provide for the social well-being of Auckland residents and visitors.

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73 At [69(g)(vi)].

74 At [69(g)(i)].

75 At [69(g)(iii)].

76 As the Court of Appeal said, CA judgment, above n 2, at [46]–[48], the arrangements implemented by the legislative scheme we have discussed reflect the expectations of the Royal Commission on Auckland Governance which provided the basis for the reorganisation of the Auckland Council: see Peter Salmon, Margaret Bazely and David Shand *Royal Commission on Auckland Governance* (March 2009). Relevantly, the Commission saw CCOs as undertaking Auckland Council's "major commercial trading and infrastructure activities": at [21.45].

77 See, for example, Auckland Council *Governance Manual* at ch 11; Auckland Council *Long-term plan 2015–2025* at 305; and Auckland Council *Governance Manual for Substantive CCOs* (December 2015) at 60. Regional Facilities Auckland *Annual Report for the Year Ended 30 June 2017* at 4 also generally reiterates the description of the way in which it fulfils its role as set out in the excerpts in [21] above from the statement of intent.

[54] Third, we accept also the appellants' submission that it is relevant that RFAL controls assets which were established with public funds. The latter factor on its own may not be conclusive but it is a part of the equation and assists to distinguish RFAL's actions here from other, purely commercial, enterprises.

[55] Finally, we note that the effect of RFAL's submission is that the impact on freedom of expression does not alter the commercial, private, nature of its decision where none of its objectives require it to make venues available for any particular purpose. This is the high point of RFAL's case on this aspect. However, the wider context cannot be ignored. That wider context also means the fact the decision was governed and effected by contractual arrangements is not determinative.

[56] RFAL's arguments downplay the role the town hall, traditionally operated by local authorities, has historically played in providing a venue for political and other discourse. The Municipal Corporations Act 1933, for example, stated that in order to provide for the health, amusement, and instruction of the public, the Council may obtain and maintain land and buildings to be used for various purposes including "music and dance halls, libraries, museums, and art galleries".[78] Further, s 338 of the 1933 Act stated that the Council may provide and maintain town halls and public offices within its district for various uses including "for holding public meetings".[79] RFAL points to the absence of specific powers in relation to these matters in the current local government legislation. However, as was noted in *New Health New Zealand Inc v South Taranaki District Council* the approach in the current Local Government Act is to set out general powers of competence rather than a list of specific powers.[80] And this, at least relevantly to the present context, reflects a change in drafting style. The point is that RFAL has a role to play in assisting the Council in terms of functions which, historically, have had a link with the provision of venues to enable debate and discussion.

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78 Municipal Corporations Act 1933, s 308(1)(a).

79 See also in relation to the Local Government Act 1974, Kenneth A Palmer *Local Government Law in New Zealand* (2nd ed, Law Book Company, Sydney, 1993) at [14.1.1] and [15.2]. And, more generally in the context of privatisation of public functions, see also Cane, above n 60, at 26–28.

80 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [22] per O'Regan and Ellen France JJ and [148]–[149] per Glazebrook J.

[57] Obviously, the Bruce Mason Centre is in a different category from a town hall. (The town hall is not vested in RFAL.) For example, we accept it is unlikely that there would generally be questions about Auckland Live's ability, of the sort that have arisen here, to choose to accept a lucrative booking for a musical show for a six-week period at the Bruce Mason Centre in preference to a booking for a one-off event involving two speakers at any particular point on the political spectrum. RFAL also properly draws a distinction between the Centre and other community venues which are available for booking by the public on a "first come first served" basis. But we see that latter distinction as more relevant when it comes to determining the reasonableness of RFAL's actions.

[58] RFAL also argues that the Council similarly has no express duty, function or delivery obligation to make commercial large theatre-style venues available for people to meet and express and receive opinions.[81] These arguments do not avail RFAL here where the decision had been made to enter into a contract with Axiomatic. Cancellation on the facts before us plainly did raise issues about the balance to be struck between the rights of those interested to hear the two speakers express their opinions, and the health and safety concerns that arose.

[59] In summary then, the Commission's submissions capture the position well when they say that RFAL can be seen "as part of the legislative and regulatory fabric" enabling Auckland Council to undertake its business.[82] In addition, viewed overall, it is relevant that running this part of the Council's business engages freedom of expression. We agree with the Court of Appeal that RFAL's decision to cancel the contract was subject to the Bill of Rights.

[60] RFAL makes the point that this finding will have implications for a whole range of decisions made by RFAL including, for example, its conditions for hire, pricing, and preference for certain types of events. There will inevitably be factual issues about the application of the Bill of Rights to particular decisions and the

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81 We agree that there is no express duty but we make no comment on whether or not such a duty may arise in the context of a town hall event.

82 There are similarities with the position of New Zealand Post in *Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd* [1992] 3 NZBORR 339 (HC). McGechan J in that case saw mail handling as a public function which was carried out in the public interest albeit by an entity which was separately owned.

commercial context will be relevant. Other concerns can be addressed as necessary by the leeway given to RFAL's role and expertise in the area in a particular case.

The rights engaged

[61] Where the Bill of Rights applies, obviously RFAL will have obligations to protect the relevant rights in the Act. Of particular relevance is the right to freedom of expression in s 14. Section 14 states that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form". As we explain shortly, s 14 was engaged.

[62] Section 16 protects the right to freedom of assembly. We agree with the Court of Appeal that this right is also engaged.[83] But we do not see that as raising any different considerations from the claim based on freedom of expression in this case.

[63] The claim as pleaded also relies on breaches of the rights to freedom of thought, freedom of association and freedom from discrimination. Freedom of thought is protected by s 13 which provides that "[e]veryone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference". Freedom of association is protected in s 17. Section 19 protects the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. Those grounds include ethical belief and political opinion.[84]

[64] The Court of Appeal did not accept that the rights to freedom of thought and freedom of association were engaged.[85] Similarly, the Court found it was not necessary to consider whether the right to freedom from discrimination was engaged in light of the Court's earlier conclusions and the lack of development of the arguments.[86] In terms of freedom of thought, the Court made the point that those who may have attended the event could access the ideas and views the speakers advanced, given they "both had a substantial internet presence. People were free to form opinions about those ideas".[87] The Court did not consider that being deprived of the chance to

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83 CA judgment, above n 2, at [64] and [66].
84 Human Rights Act 1993, s 21(1)(d) and (j).
85 CA judgment, above n 2, at [112]–[113].
86 At [115].
87 At [112].

hear those ideas discussed in person breached the right to freedom of thought. As to freedom of association, the Court accepted the submissions of the Human Rights Commission that this right was "directed towards the right to form or participate in an organisation, to act collectively, rather than simply to associate as individuals".[88] The Court said that in this case the event may have involved the exchange of ideas between individuals but there was "no indication of a common associational or organisational aim".[89] The Court did not see this argument as, in any event, adding anything to the right to freedom of peaceful assembly which was engaged.

[65] The Human Rights Commission agrees with the Court of Appeal that neither the right to freedom of thought nor freedom of association are directly engaged. We are also inclined to agree these rights are not engaged, essentially for the reasons given by the Court, but these aspects were not particularly developed in oral argument and it is not necessary to determine them in order to resolve the case. In those circumstances, we consider it is preferable to leave consideration of the metes and bounds of these other rights to a case where it matters. Instead, we focus on the right to freedom of expression.

[66] Returning to freedom of expression, given the way in which the case has been argued, whether there has been a breach of s 14 raises the question about the nature of the right to freedom of expression in s 14 and whether it imposes positive duties on RFAL to provide a venue for this event.

The nature of the obligation to protect freedom of expression

[67] RFAL submits that the right to freedom of expression (and the right to peaceful assembly) is a negative right such that it only places a duty on the state to refrain from interfering with expression; it does not oblige the state to facilitate expression. In the absence of any positive obligation to provide a venue for expressive activities, RFAL says there can be no legal requirement to maintain the contract. RFAL's related argument is that there can be no incursion on the right where alternative venues for the speakers were available to Axiomatic. This is a reference to the fact that after the

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88 At [113].
89 At [113].

contract was cancelled Axiomatic booked another venue for the event, although the event did not ultimately proceed.

[68] Whether the right to freedom of expression is a negative right is a very broad question on which much has been written. It is also apparent that there are difficulties in the notion there is an immutable dichotomy between negative and positive dimensions to rights.[90] For present purposes it is sufficient to note, first, the view that the right is negative finds some support in writing on the philosophical underpinnings of the right to freedom of expression.[91] Second, there is early authority in New Zealand which provides some support for the view that the right to freedom of expression is a primarily negative obligation.[92]

[69] But, importantly, it is also acknowledged in the jurisprudence that there may be occasions in which the right to freedom of expression entails positive duties. In terms of the position in the United Kingdom,[93] Canada,[94] and the United States,[95] for example, while there is some support in the commentary for RFAL's argument that the focus of the right is on non-interference there are also indications that positive obligations may arise depending on the context. That positive obligations may arise

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90 See, for example, Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) vol 1 at 369; and Paul Rishworth "Interpreting and Applying the Bill of Rights" in Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 25 at 57.

91 See, for example, Isaiah Berlin "Two concepts of liberty" in Henry Hardy (ed) *Liberty* (2nd ed, Oxford University Press, Oxford, 2002) at 169; and Frederick Schauer *Free Speech: A Philosophical Inquiry* (Cambridge University Press, Cambridge, 1982) at 125–128. See by way of contrast, Andrew T Kenyon *Democracy of Expression: Positive Free Speech and Law* (Cambridge University Press, Cambridge, 2021); and Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008).

92 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14].

93 In the United Kingdom, the right to freedom of expression in art 10 of the European Convention on Human Rights is given effect to in domestic law through s 1(2) and sch 1 of the Human Rights Act 1998 (UK). For a general discussion, see Merris Amos *Human Rights Law* (2nd ed, Hart Publishing, Oxford, 2014) at 559 discussing cases such as *The Queen (on the application of Smeaton on behalf of the Society for the Protection of Unborn Children) v Secretary of State for Health* [2002] EWHC 886 (Admin), [2002] 2 FLR 146 and *Regina (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794.

94 Article 2(b) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK) [Canadian Charter] states that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". For a general discussion, see Robert J Sharpe and Kent Roach *The Charter of Rights and Freedoms* (6th ed, Irwin Law, Toronto, 2017) at 51. See also *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34, [2021] SCJ No 34.

95 Free speech is protected by the First Amendment in the United States. See generally Kenyon, above n 91, at 118–119.

must be so given the right to freedom of expression in s 14 includes the right to receive information. There will inevitably be situations where that aspect of the right includes a duty to impart the information. That view is confirmed by the approach taken under the International Covenant on Civil and Political Rights (ICCPR),[96] which is affirmed by the Bill of Rights.[97]

[70] Relevantly, for present purposes, art 2(1) of the ICCPR requires parties to "respect and to ensure to all individuals within its territory" the rights recognised in the Covenant. Those rights include the protection for freedom of expression in art 19. Where there is not already provision by existing legislation or other measures, art 2(2) provides that:

> … each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

[71] The "respect and ensure" obligations in art 2(1) are discussed in *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*.[98] The author defines an obligation to respect as meaning "the States parties must refrain from restricting the exercise of these rights where such is not expressly allowed".[99] The right to ensure, by contrast, is:[100]

> … a positive duty, which is inherent not only in economic, social and cultural rights but also in civil and political rights. States parties are obligated to take positive steps to give effect to the rights. The obligation to ensure consists of the obligation to protect individuals against interference by third parties (horizontal effect) and the obligation to fulfil, which in turn incorporates an obligation to facilitate the enjoyment of human rights and an obligation to provide services.

[72] In the context of the right of access to information, the Human Rights Committee in its General Comment has referred to the need for States to "proactively

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96 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], art 19(3).

97 New Zealand Bill of Rights Act 1990 [the Bill of Rights], long title.

98 William A Schabas *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd ed, NP Engel, Germany, 2019) at 42. The author also notes that "[t]he practice of the Human Rights Committee … demonstrates that rights can be effectively guaranteed only by a combination of negative and positive State obligations": at LXI.

99 At 42.

100 At 42 (footnotes omitted).

put in the public domain Government information of public interest".[101] The positive obligation under art 19, to proactively release information, applicable to States has been confirmed in a Human Rights Committee view.[102]

Implications for RFAL

[73] It is apparent from this brief discussion that there will be situations in which the right to freedom of expression imposes positive obligations. It may be, for example, that positive obligations could arise in relation to the hiring out of a community hall which is free for all comers. We do not need to resolve the extent to which the right encompasses positive aspects because, here, the right to receive information was engaged and was curtailed at least in relation to Mr Moncrief-Spittle as he had purchased a ticket to the event. For the same reason, we do not consider the availability of an alternative venue means there was no limit on the right. We do however accept that the availability of an alternative venue may be relevant to whether cancellation was a reasonable limit on the right.[103]

[74] RFAL's decision to cancel accordingly limited the appellants' rights under s 14. It follows that Mr Macrae could only lawfully cancel the contract if cancellation was a reasonable limit on freedom of expression in terms of s 5 of the Bill of Rights.

Was the Court of Appeal correct to conclude RFAL's decision was consistent with the Bill of Rights?

The approach in the Court of Appeal

[75] The Court of Appeal distinguished RFAL's decision from overseas cases on the basis that the venue hire agreement, under which RFAL was entitled to cancel, provided the immediate context for the cancellation decision. While this contractual

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101 Human Rights Committee *General Comment No 34 – Article 19: Freedoms of opinion and expression* UN Doc CCPR/C/GC/34 (12 September 2011) at [19].

102 Human Rights Committee *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2307/2013* UN Doc CCPR/C/126/D/2307/2013 (29 August 2019) at [7.3].

103 There was some discussion with counsel about the relevance of the availability of other forms of media on the approach to freedom of expression. Ultimately, we have not found it necessary to consider this issue and it is better left to a case where the issue arises directly.

context did not preclude the rights of freedom of expression and of peaceful assembly arising, the Court went on to identify a number of "countervailing considerations".[104]

[76] The countervailing considerations were, first, the fact that RFAL's structure meant it had to operate on the basis of enforceable contractual arrangements. It was necessary to give weight to those arrangements.[105] Secondly, Axiomatic had not indicated security was likely to be an issue at the time of making its booking. That omission had a number of practical consequences.[106] Third, Mr Macrae and the other RFAL personnel making the decision were experienced in managing the Centre and similar venues and had an internal security advisor.[107] The fourth consideration was the fact that the level of protest had "escalated significantly" over the first week of ticket sales and that could reasonably be expected to continue.[108] The Court referred also to the advice of Mr Kidd (Safety and Security Manager) that the fact the protesters could purchase tickets and thereby create a situation requiring evacuation led to a high security risk for staff, patrons and protesters alike. In addition there was RFAL's knowledge about the location of the Centre making it difficult and costly to manage protests requiring crowd and traffic control.

[77] The Court concluded its consideration of this point in this way:

> [127] It is apparent that most of the problems with this event arose from Axiomatic's decision not to share what it knew about the security risk associated with the event when it made the booking. Had it done so, the suitability of the venue and the real nature of the security risk could have been assessed and managed. The decision to cancel was not inevitable and another decision-maker in like circumstances may have made a different decision. But in the circumstances outlined it cannot be said that the decision was not a rational and reasonable response. We therefore consider that RFAL's decision to cancel the event was a justified limitation on the appellants' BORA-affirmed rights to freedom of expression and freedom of peaceful assembly.

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104 CA judgment, above n 2, at [122].
105 At [123].
106 At [124].
107 At [125].
108 At [126].

Submissions

[78] The appellants say that the Court of Appeal erred in applying a test of rationality. Instead, they say that in determining whether cancellation was a reasonable limit, the Court must exercise an independent mind and, effectively, apply a correctness standard. Further, the appellants say the reasonableness of the limit is to be determined applying the *Hansen*/*Oakes*[109] structured approach to proportionality.[110] Applying that test, the appellants argue the limit is not reasonable. Amongst other matters, the appellants submit the decision was not a proportionate limit because it condoned and gave effect to the "heckler's veto".[111]

[79] By contrast, RFAL says that it is not for the Court to come to its own assessment. Rather, the Court must assess the decision made by Mr Macrae on a basis that the issue is whether the decision was one within the reasonable range of decisions that could have been made. It was argued that this approach reflects the context within which Mr Macrae was operating and it enables the Court to avoid a "benefit of hindsight" approach to the circumstances as they evolved in front of Mr Macrae. The submission is that there is no one correct answer here.

[80] The Human Rights Commission submits that whether the limit is a reasonable one is a question for the Court but that a less formal balancing exercise may be appropriate.

Our view on the role of the Court

[81] We have found that RFAL was required to act consistently with the Bill of Rights. The first issue arising from the parties' submissions is whether, in a judicial review proceeding, the application of the Bill of Rights imposes a substantive

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109 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; and *R v Oakes* [1986] 1 SCR 103.

110 The Court of Appeal records that the appellants did not argue for a formal proportionality analysis in that Court: CA judgment, above n 2, at [118].

111 We address the arguments about procedural deficiencies which the appellants make in this context and in the judicial review context below at [122]–[131].

constraint on the decision-maker or simply a procedural obligation. This issue has been the subject of debate in academic commentary.[112]

[82] This Court's decision in *Zaoui v Attorney-General (No 2)* supports the view the correct approach is to treat the right as constraining the outcome the decision-maker may reach, rather than simply a mandatory relevant consideration.[113] That case, unlike the present, involved a right which the Court considered was not subject to the limits in s 5 but, for present purposes, we do not see that difference as material.[114] There is also support for this approach in the United Kingdom decisions in a similar context.[115] The Supreme Court of Canada in *Doré v Barreau du Québec* adopted an approach which, to some extent at least, merges consideration of both substantive and procedural issues.[116]

[83] The logic of an approach which treats the right to freedom of expression in the Bill of Rights as a substantive constraint on a decision-maker is hard to challenge given both the constitutional status of the Bill of Rights and the fact the effect of s 3(b) is that the Act "applies" to RFAL. We consider the result of doing so in this case is that Mr Macrae had to turn his mind to and engage with the question of whether it was reasonable to limit the free speech interest in play by cancelling the event, albeit what that required in that regard must reflect the context in which he was operating.

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112 See, for example, Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 123; Hanna Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZULR 866; Michael Taggart "Reinventing Administrative Law" in Nicholas Bamforth and Peter Leylands (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 311; Hanna Wilberg "Setting the Approach to Section 5 of the Bill of Rights in Administrative Law: Justification, Restraint and Variability" (2021) 19 NZJPIL 91 at 114–128; Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" (2008) NZ L Rev 377 at 394–408; and Janet McLean, Paul Rishworth and Michael Taggart "The Impact of the New Zealand Bill of Rights on Administrative Law" (paper presented to Legal Research Foundation seminar, Auckland, August 1992). Contrast the approach, for example, in Australia such as under s 38(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

113 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289. See also *New Health*, above n 80, at [175]–[176] per Glazebrook J.

114 Nor are we dealing here with a right, such as s 21, the right not to be subject to unreasonable search or seizure, which has its own, internal, limit. An illustration of the latter situation is provided by *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

115 *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin'* Ltd [2007] UKHL 19, [2007] 1 WLR 1420; and *Regina (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945.

116 *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

[84] It also logically follows that if the decision is challenged by way of judicial review, the Court must be satisfied that the decision was a reasonable limit.[117] The extent of any reasonable limits is a legal question. The correct application of that legal standard in any particular case will involve mixed questions of fact and law. In a case such as this one, we would expect to see evidence that Mr Macrae had identified and weighed the right, and gave consideration to whether the reasons to cancel (the security and safety concerns) were such as to outweigh the right. That will assist the court in its task.[118]

[85] Where the court is reviewing the application in a given case, the expertise of the decision-maker will be relevant — so too will be the nature of the decision and the decision-maker and the context in which the decision must be taken. The extent of any leeway accorded to that expertise will vary depending on the context. For example, it is a relevant part of the context here that Mr Macrae is not an adjudicator and his is a one-off decision made in an operational, not a policy, context.

[86] Further, while the Court must satisfy itself of the reasonableness of the limit, some regard may be had and respect given to where the decision-maker saw the balance as lying. The extent to which this is so will depend on the context.[119] It is accordingly not appropriate particularly at this, still relatively early, stage in the development of this aspect of the Bill of Rights jurisprudence to attempt to be more definitive on these matters. The range of decisions in issue and the nature and expertise of the decision-maker will vary considerably. The forensic limitations of our undertaking these types of factual inquiries in an application for judicial review where there has been no cross-examination of the deponents are also relevant.[120]

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117 See, for example, *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 at [130]–[131] per Lord Sales SCJ.

118 We leave for an occasion on which it arises the approach to be taken by the courts in the situation where the decision-maker does not engage with the effect of the Bill of Rights. That does not in any event affect the court's role.

119 See also, albeit in the context of a discussion of an approach adopting a "process dimension", Claudia Geiringer "Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 329 at 360.

120 See, for example, *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 at [173]; and *Four Aviation Security Service Employees*, above n 70, at [85].

The s 5 test

[87] The next issue that arises from the parties' submissions is as to the test that is to be applied to determine whether the limit is reasonable. In *Hansen*, which is relied on by the appellants, the Court was considering the compatibility of legislation with the Bill of Rights.[121] Although differently expressed in the judgments, the Court essentially adopted the approach that was taken in Canada in relation to s 1 of the Canadian Charter of Rights and Freedoms in *R v Oakes*.[122] That approach involves a fairly structured inquiry designed to identify whether the limitation was proportionate to the incursion into the right. This inquiry involves consideration of the objective of the legislative measure, whether the limit is rationally connected to that objective and impairs the right as little as possible, and proportionality between the limit and the objective.[123] Subsequent cases illustrate that in the context of a review of a discretionary power, such as that in issue here, a less structured inquiry may be appropriate. Indeed, that is now the position adopted in Canada.[124]

[88] To illustrate the New Zealand position, in the context of considering whether making an order that a child sex offender be placed on the Child Sex Offender Register, Winkelmann CJ and O'Regan J in *D (SC 31/2019) v New Zealand Police* said that it will not always be appropriate to go through all of the steps in *Hansen*.[125] That was because in *D* the statute in essence contained a statutory form of the analysis required. As we have noted, the Court of Appeal in this case adopted a less formal approach involving the balancing of rights against the countervailing considerations. The Court of Appeal in *Taylor v Chief Executive of the Department of Corrections* expressed the view that the *Hansen* formal inquiry was not mandatory.[126]

[89] We agree that it is necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context. As the Supreme Court of

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121 *Hansen*, above n 109.

122 *Oakes*, above n 109, and as subsequently developed, see for example *RJR-MacDonald Inc v The Attorney General of Canada* [1995] 3 SCR 199.

123 See, for example, Tipping J's description in *Hansen*, above n 109, at [104].

124 *Doré*, above n 116.

125 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101]. The various approaches to the proportionality test are discussed in Wilberg "Setting the Approach to Section 5", above n 108, at 102.

126 *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [84].

Canada said in *Doré*, a "more flexible administrative approach" to assessing the compatibility of an individual decision with rights, is "more consistent with the nature of discretionary decision-making".[127]

[90] The appellants' argument, that RFAL has not met the requirement in *Hansen* to show that the limit was a minimal impairment on the right, serves to illustrate the need for some flexibility in the test. The appellants say that RFAL adopted the most severe curtailment of the right because the event was cancelled. That aspect of the *Hansen/Oakes* analysis may more readily be applied where the legislature or a policy maker have a range of options to choose between. In the present case, as RFAL says, there was no real intermediate ground or range of available options. RFAL could either have let the contract continue to run, delayed making the decision to cancel for a period, or cancelled.

[91] A less structured approach may accordingly be more workable in assessing the reasonableness of a limit in cases involving the review of an administrative decision of the nature of that in issue here. There is however no immutable rule. We should also make it clear that not applying the *Hansen* structured approach does not entail a lesser threshold. The Supreme Court of Canada returned to the issue of the approach to s 1 of the Charter in the administrative context in *Law Society of British Columbia v Trinity Western University*.[128] The majority in that case made the point that the test in *Doré* was nonetheless a robust one.[129] There has been criticism of the *Doré* approach including by some members of the Court in *Trinity Western* itself,[130] and by some commentators.[131] Some of that criticism appears to be directed primarily to the focus in those cases on the values underlying the relevant right rather than a criticism of the adoption of a less structured test.

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127 *Doré*, above n 116, at [37].

128 *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293.

129 At [80] per Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.

130 At [304] per Côté and Brown JJ (dissenting) and [206] per Rowe J (concurring in the result).

131 See, for example, Paul Daly "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter of Rights and Freedoms*" (2014) 65 SCLR (2d) 249; and Audrey Macklin "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561.

[92] We consider that in the present case, a less structured test is appropriate as properly reflecting the nature of the decision-making involved whilst giving due regard to the importance of the rights.

A role for the heckler's veto?

[93] We need to address at this point the submission made by the appellants which relies on something akin to a heckler's veto. As the Court of Appeal said, the "heckler's veto", "describes the situation in which those wishing to exercise their free speech rights are prevented from doing so by actual or threatened protests, particularly threats of violence".[132] The Court of Appeal noted that the phrase, "the heckler's veto" is attributed to the American scholar Harry Kalven Jr.[133] Mr Kalven put it in this way:[134]

> If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve.

[94] The Human Rights Commission makes the point the concept was developed from a series of United States cases, a number from the post-war and civil-rights era, that generally involved the use of the criminal law or other coercive state power, to curtail rights or punish a speaker because of the prospect of, or actual, hostility by opponents of their speech.

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132 CA judgment, above n 2, at [97]. In *Santa Monica Nativity Scenes Committee v City of Santa Monica* 784 F 3d 1286 (9th Circ 2015), the Court described the heckler's veto doctrine as applying "in situations where a particular speaker is silenced because his speech invites opposition, disorder, or violence, …": at 1289.

133 CA judgment, above n 2, at [97], n 72. The Human Rights Commission in its submission records that the concept is recognised in the *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* UN Doc A/74/486 (9 October 2019). The Report states "there is no 'heckler's veto' in international human rights law" and, unless a speaker is advocating incitement to discrimination, hostility or violence, they are "not to be silenced": at [10]. Counsel for the Commission refers also to the recognition by the UN Human Rights Committee of the duty on States parties to put in place effective measures to protect against attacks aimed at silencing others from exercising their right to freedom of expression: Human Rights Committee *General Comment No 34*, above n 101, at [23]. See also *Vajnai v Hungary* [2008] 4 ECHR 171 at [57].

134 Harry Kalven Jr *The Negro and the First Amendment* (University of Chicago Press, Chicago, 1966) at 140.

[95] An example of a case involving a challenge to the use of the criminal law is *Edwards v South Carolina*.[135] The appellants in *Edwards* were part of a group of peaceful black protesters challenging laws of South Carolina discriminating against them. During their protest, a crowd of 200–300 onlookers gathered but there was "no violence or threat of violence on [the protesters'] part, or on the part of any member of the crowd".[136] When the protesters did not disperse after being told to do so by police, they were arrested, and subsequently convicted for breach of the peace. Their challenge to their convictions was ultimately successful. Stewart J, delivering the majority reasons of the United States Supreme Court, said that the restriction in the Fourteenth Amendment against making laws which abridge privileges or immunities of citizens (including First Amendment protections for free speech) did not allow "a State to make criminal the peaceful expression of unpopular views".[137]

[96] It is helpful also to discuss briefly, as a further illustration of the United States approach, the case of *Ovadal v City of Madison*.[138] Ralph Ovadal took part in a protest on a pedestrian overpass above a busy highway in Madison, Wisconsin. Drivers who were angry with his anti-gay message began driving erratically and causing congestion on the road. The police intervened and threatened Mr Ovadal with arrest if he did not stop his demonstration. He was ultimately banned from protesting on the particular overpass. He brought proceedings against the City, the police chief and the individual police officers claiming his rights had been breached and he suffered injury as a result.

[97] The Court addressed the issues arising using the framework of the United States public forum doctrine.[139] It was in this context that the Court addressed

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135 *Edwards v South Carolina* 372 US 229 (1963). The First Amendment to the United States Constitution provides that Congress shall make no law "abridging the freedom of speech, or of the press".

136 At 236.

137 At 237. See also *Cox v Louisiana* 379 US 536 (1965), a successful challenge to a breach of the peace conviction arising out of anti-segregation protest; and *Brown v Louisiana* 383 US 131 (1966), a successful challenge to a breach of the peace conviction arising out of entry by black protesters into a segregated area of a public library. For a more recent example of the use of the concept of the heckler's veto which arose in the context of a constitutional tort claim arising from policing actions to prevent harm to Christian evangelists (the Bible Believers) from a hostile Muslim crowd at an annual Arab Festival, see *Bible Believers v Wayne County* 805 F 3d 228 (6th Cir 2015), a case cited by the Human Rights Commission.

138 *Ovadal v City of Madison* 416 F 3d 531 (7th Cir 2005).

139 For further explanation of the public forum doctrine, see generally, Erwin Chemerinsky *The First Amendment* (Wolters Kluwer, New York, 2021) at ch 4.

whether the venue (the side-walk) was a traditional public forum which then would receive heightened constitutional protection. Having determined it was, the Court then moved on to consider whether the restriction was content neutral. It was against that background that the Court cited this passage from an earlier decision: "[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto."[140]

[98] The Canadian courts have, as the Court of Appeal noted, adopted a "cautious" approach to the possibility of applying "principles developed in the very different environment" of the United States.[141] As in New Zealand, once freedom of expression is engaged, the focus moves to s 1 of the Canadian Charter, the equivalent to s 5 of the Bill of Rights.

[99] As the Court of Appeal also said, the approach to the heckler's veto reflects particular aspects of the American jurisprudence on the protection of freedom of expression in the United States Constitution.[142] We agree with the Court of Appeal that underlying reliance on the doctrine of the heckler's veto as it has been applied in the United States are questions which, in New Zealand, would be addressed in considering the reasonableness of a limit on free speech. Like the Human Rights Commission, we see these concerns as better addressed in that context and do not see the concept of the heckler's veto as assisting directly in addressing the present question.

[100] We agree nonetheless that the American jurisprudence on the heckler's veto is a helpful reminder that free speech is not always easy and that fact should not diminish its protection. That jurisprudence also emphasises the point that, while there may be health and safety or other security related concerns arising from the exercise of free

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140 *Ovadal*, above n 138, at 537 citing *Hedges v Wauconda Community Unit School District No 118* 9 F 3d 1295 (7th Cir 1993) at 1299.

141 CA judgment, above n 2, at [101]. See, for example, *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 190 per L'Heureux-Dubé J; and *UAlberta Pro-Life v Governors of the University of Alberta* 2020 ABCA 1, (2020) 6 WWR 565 at [180].

142 CA judgment, above n 2, at [108]. The Human Rights Commission in its submissions refers to the American approach of taking particular forms of speech outside of the category of protected speech where it is seen to be harmful or have no value (for example, defamation, obscenity, or incitement to violence). For the United States approach, see generally, Chemerinsky, above n 139.

speech, that can sometimes obscure the reality that the resultant challenge to speech is not content neutral.

Conclusion on s 5

[101] The key question is whether the limit on the right effected by the cancellation of the venue hire agreement was a reasonable limit that could be justified in a free and democratic society. In terms of that question, we agree with the Court of Appeal that cancellation was a reasonable limit on the right to freedom of expression.

[102] Given the factual findings,[143] this aspect of the present case can be resolved simply by saying that health and safety issues could be relied on, freedom of expression having been given a heavy weighting.[144] Certainly, Mr Macrae was in a better position than we are to assess matters such as the ability to manage security concerns, the costs of that exercise, and how the features of the venue would affect risk.

[103] In any event, as we have discussed, we consider cancellation was almost inevitable once the option of not publicising the venue until late in the piece was lost. This is not to say that option must always be available. Rather, given the features of this venue, the relatively inexpensive nature of the tickets, and the likely costs to RFAL of ensuring it could meet its health and safety obligations, cancellation was a proportionate response. We add that it is relevant to the balancing exercise that the Bruce Mason Centre was not available to all members of the public, like the traditional town hall or community centre. Rather, those who wanted to hear the speakers had to pay. Finally, Axiomatic was able to hire an alternative venue.

[104] The appeal accordingly fails on this ground. We turn then to the other ground of review. There is a preliminary issue on this ground which focuses on the amenability to review and on the available grounds of review.

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143 See above at [33] and [76]–[77].

144 On this analysis, we do not need to consider the appellants' argument that the limit was not one "prescribed by law". Health and safety obligations are in any event set out in statute (Health and Safety at Work Act 2015) and therefore prescribed by law.

Is the decision amenable to judicial review?

[105] On this aspect, the appellants support the approach taken in the Court of Appeal. By contrast, in developing the submission that the decision was not the exercise of a public power, RFAL reiterates the points discussed above as to the absence of any "governmental" cast to the decision. RFAL's submission is that, when analysed, the High Court was correct to hold that the power being exercised is purely contractual. RFAL submits that the same approach applies to decisions by charitable trusts. That is, review of decisions of those bodies is limited to decisions involving the exercise of significant public functions or with substantial public effect.[145]

[106] As to the grounds of review, the argument is that the Court of Appeal, having accepted that the immediate context of the decision was "unquestionably commercial", needed to identify something compelling to "shift" to a broader scope of review. Absent that shift, review is limited to cases of fraud, corruption, bad faith and the like.[146]

[107] It is further submitted that there is no basis on which to expand the scope of judicial review to encompass this decision especially where there is an alternative remedy available under the Human Rights Act if the concern is as to discrimination based on political grounds.[147]

Our approach

[108] We agree with the Court of Appeal that the decision to cancel is amenable to judicial review. That is because we see RFAL's decision as having the necessary "substantial public interest component" identified as critical by this Court in *Ririnui v Landcorp Farming Ltd* in addressing the amenability to review of the

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145 Citing, for example, *Falun Dafa*, above n 61. The Court in that case said that judicial review was not available to challenge the trust board's decision to decline permission to participate in a parade. Hanna Wilberg "Administrative Law" (2019) 4 NZ L Rev 487 at 530 suggested the outcome in that case was "open to debate" because if public law obligations did not apply "to the administration of publicly owned events venues, … community groups could be excluded for improper purposes … and … protest rights would also not be available".

146 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

147 Human Rights Act, ss 21 and 44.

decision of Landcorp to sell former Crown land over which the plaintiff claimed mana whenua.[148]

[109] That public interest component largely stems from the factors we have discussed above in the context of considering the applicability of the Bill of Rights. In particular, we identify the following matters. First, RFAL's actions in this respect were inextricably linked with the Auckland Council and the implementation of its social objectives.[149] Second, RFAL's activities are not solely commercial, a point we will develop further shortly. Third, its assets were acquired with public funds. Fourth, as the Court of Appeal noted, whilst most of the Trust's operating revenue (some 70 per cent) is derived from commercial activities such as venue hire, the balance comes from funding from the Council. Finally, the decision to cancel plainly engages freedom of expression and,[150] in this respect, RFAL's functions, although expressed in different language, are derived from those formerly vested in territorial local government in relation to the holding and maintenance of land and buildings for purposes that include holding public meetings.

[110] As to the scope of review, the grounds of review are not limited to those identified in cases such as *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*.[151] We accept it is relevant to this issue that, as Mr Macrae said in his evidence, "the purpose of venue hire is predominately to generate revenue". When considering a potential booking, Mr Macrae said a "revenue yield management approach" is adopted. He explained this meant that when considering hiring out a venue, an internal assessment of the potential revenue impact of the booking is made.[152] But the approach required is not a purely commercial one and a contrast can be drawn in this respect to that applicable to the state-owned enterprise in *Mercury Energy*. Here, the Trust deed requires the assets to be administered in

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148 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [71] per Elias CJ and Arnold J. Glazebrook J agreed with [1]–[130] of the reasons of Elias CJ and Arnold J: at [147].

149 If, in referring to RFAL as the Council's agent, the Court of Appeal intended to refer to "agency" in its legal sense, we accept the submission that is incorrect.

150 We do not need to consider RFAL's submission about the availability of remedies under the Human Rights Act where the concern is about discriminatory conduct.

151 *Mercury Energy*, above n 146. See also *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [91] per Arnold and Ellen France JJ.

152 He gave as an example the situation where three promoters wanted to hire the venue to present "Swan Lake" over the same period. Having all three would negatively affect the market. Instead, RFAL would choose just the one.

accordance with a "prudent" commercial approach.[153] We add that we do not accept that it is necessary to identify a compelling reason to "shift" to a broader scope of review as the appellants suggest. Rather, it is a question, as illustrated by *Ririnui*, of analysing the particular factual context.

[111] It is also relevant that the requirement to adopt a prudent commercial approach operates along with the wider social objectives to which we have referred in discussing the legislative scheme. Nor are all venues "operated with the same degree of commerciality".[154]

[112] Finally, as the Court of Appeal said, unlike cases such as *Attorney-General v Problem Gambling Foundation of New Zealand*[155] relied on by RFAL, the decision to cancel has a broader impact beyond that of the decision-maker and the unsuccessful tenderer, as is illustrated by the interests of the two appellants.

[113] Accordingly, we agree with the Court of Appeal that RFAL's actions were amenable to judicial review on the pleaded grounds, namely, that the decision was not reasonable or rational and that there was a failure to act consistently with the Bill of Rights.[156] Having effectively disposed of the Bill of Rights ground of review, we are left with the ground based on reasonableness and rationality.

Was the decision to cancel unreasonable?

[114] With one qualification, the claim that the decision was unreasonable as irrational and perverse falls away given our conclusion that the decision to cancel was a reasonable limit on freedom of expression.[157] We do need to briefly address the argument focused on the allegations of failure of process. The appellants emphasise the pleading averring that, in making the decision to cancel:

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153 We note that in *Ririnui*, above n 148, the Court did not consider the presence of some commercial elements as necessarily precluding review: at [70].

154 CA judgment, above n 2, at [62].

155 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470.

156 As noted, above at n 33, another ground based on allegations about the role of the Mayor in the decision was not pursued in the Court of Appeal.

157 We do not therefore need to address the appellants' submission as to the need for "heightened scrutiny".

> … RFAL and the Council were and are required to facilitate rights to freely express lawful speech and opinions without these being denied or eroded by potential health and safety risks associated with possible physical protests against such speech and opinions where such risks are not founded on cogent and informed evidence following proper investigation and consultation.

The appellants accordingly argue that the first respondent did not ask the right question(s) or take reasonable steps to make an informed decision and therefore the decision to cancel the contract was not a rational one.

The weight to be given to freedom of expression in the decision-making process

[115] The appellants are right that RFAL was required to give freedom of expression a heavy weighting. We also agree with the appellants that there are limits on the ability to restrict freedom of expression in order to manage the disruptive actions of third parties. Both points flow from the importance attached to freedom of expression here and in comparable jurisdictions.[158] These points also reflect the relevant values protected by the right to freedom of expression. In a case relied on by the appellants, Douglas J, in an oft-quoted passage in *Terminiello v Chicago*, said that "a function of free speech under our system of government is to invite dispute".[159] Douglas J continued:[160]

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute … is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest.

[116] In the same vein, art 19(3) of the ICCPR records that the exercise of freedom of expression "carries with it special duties and responsibilities".[161] Further, art 19(3) allows only for restrictions to "respect … the rights or reputations of others" and to protect "national security or … public order (ordre public), or … public health or

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158 In the context of the Bill of Rights, the importance attached to freedom of expression is illustrated by the approach to interpretation of the offence provisions in issue in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 and in *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

159 *Terminiello v Chicago* 337 US 1 (1949) at 4. This passage was cited by Elias CJ in *Brooker*, above n 158, at [12].

160 *Terminiello*, above n 159, at 4.

161 ICCPR, art 19(3).

morals".[162] In both cases, the restrictions shall only be, relevantly, those "necessary" to achieve protection of those interests.[163]

[117] A good illustration of the importance attached to freedom of expression and the resultant limits on the ability to restrict the right, in a similar context to the present, is provided by *Whitmore v Palmerston North City Council*.[164] In that case, a group called Speak up for Women (SUFW) sought interim relief in judicial review proceedings arguing a breach of s 14 of the Bill of Rights. The claim followed the decision of the Palmerston North City Library to cancel SUFW's booking for a public meeting at the Library. SUFW was formed to oppose proposed legislation relating to sex self-identification.[165] SUFW had arranged various meetings in 2021 for SUFW members and members of the public to discuss the proposed legislation.

[118] In granting the interim relief SUFW sought, Nation J applied the Court of Appeal judgment in the present case. In determining whether the limits on freedom of expression and peaceful assembly were reasonable, the Judge identified a number of factual matters which distinguished the Library's cancellation decision from RFAL's. First, there was no suggestion the Library could have been in any doubt about the nature of the event or SUFW's stance from the outset.[166] Second, there was nothing to indicate the Library staff had any safety concerns.[167] Third, the Judge essentially saw the cancellation as a response to the content of the speech. Finally, the Judge was critical of the Council's insistence that the meeting could proceed at a later date but only on the basis those with the opposing point of view were present and persons invited or selected by the Council were also present.[168]

[119] We agree with the result in *Whitmore*.

[120] The Courts have grappled with similar issues in the United Kingdom in the context of consideration of s 43 of the Education (No 2) Act 1986 (UK) which protects

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162 Article 19(3)(a) and (b).
163 Article 19(3).
164 *Whitmore v Palmerston North City Council* [2021] NZHC 1551, (2021) 12 HRNZ 862.
165 Now the Births, Deaths, Marriages and Relationships Registration Act 2021, ss 24 and 25.
166 *Whitmore*, above n 164, at [40].
167 At [41].
168 At [48]–[49].

freedom of speech in various forms of tertiary education institutions.[169] Section 43(1) imposes a positive duty to "take such steps as reasonably practicable" to protect the freedom of expression of members, students, employees of the institution, and for visiting speakers. Section 43(2) limits the ability to deny the right based on the content of the speech.[170] In judicial review proceedings brought under these provisions challenging decisions by universities to cancel or postpone public meetings, the courts have undertaken a proportionality analysis weighing the various security risks against freedom of expression.[171]

[121] In conclusion, as we have said, RFAL was required to give freedom of expression a heavy weighting. We now address the process followed by RFAL.

The process followed by RFAL

[122] In developing their submissions on what they say was an inadequate process, the appellants highlight various factual matters. In particular, they refer to the short timeframe within which the decision was made. They emphasise the speed with which the move was made from a position where, on the afternoon of 5 July, Glen Crighton, the manager of Presenters Services of Auckland Live, saw the complaints received as the usual sorts of complaints.[172] But, by the next morning (6 July), the contract was cancelled. Further, they point out that cancellation took place well prior to the timeframe within which the health and safety plan was to be provided in terms of the contract and RFAL did not follow its own detailed health and safety procedures. In this respect, the appellants say there was no urgency to cancel. They are also critical of the failure to follow through on the request for advice from the police and say there was no reasonable consultation with Axiomatic about what they could do to assist.

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169 The term "deplatforming" is used in general parlance to refer to the body of cases discussing the removal of opportunities to present views by speakers at universities.

170 Section 43(2) prevents denial, "so far as is reasonably practicable", on any ground linked to beliefs or views or the body's policies or objectives.

171 *Regina v University of Liverpool, ex parte Caesar-Gordon* [1991] 1 QB 124 (QB); and *R (on the application of Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin), [2016] ELR 279. We note that in *Regina (Butt) v Secretary of State for the Home Department* [2019] EWCA Civ 256, [2019] 1 WLR 3873, the Court largely upheld guidance on s 43 issued by the Secretary of State. An appeal from this decision is pending.

172 Mr Crighton has an oversight role in relation to event bookings.

[123] In summary, then, the appellants say that where RFAL acted prematurely in a way which was decisive, the decision was perverse.

[124] There are limits to the extent to which we should now engage with the facts given the passage of time means the position is now moot. Further, there was no cross-examination on the evidence which was provided by means of affidavits and there have been factual findings in the Court of Appeal. With those caveats, we now briefly explain why we agree with the Court of Appeal that the process adopted did not lead to a perverse result. In reaching that view, we accept that the process followed by RFAL was not ideal. There was an element of panic in the response and it would certainly have been preferable to have obtained some advice from the police as to the assistance the police may have been able to provide. The latter would have assisted in determining where the balance between freedom of expression and the health and safety concerns appropriately lay.

[125] That said, Mr Macrae did turn his mind to freedom of expression. His evidence was that after determining there were health and safety concerns, he turned to consider freedom of expression. We say that because he explained that, on finding that RFAL did not have a policy governing the situation, he did some research to find "a policy that balanced the competing demands that came with a right to protest in a safe environment". He reviewed the University of Bristol and Nottingham Trent University's codes of practice on freedom of speech and was obviously aware of the need for balance.

[126] The appellants' concern is that Mr Macrae put too much weight on risks associated with the possible protest. Mr Macrae was however entitled to take into account the particular features of the venue and how they affected RFAL's ability to meet its health and safety obligations under the Health and Safety at Work Act 2015.[173] As we have noted, there was a concern over the location of the Bruce Mason Centre and its proximity to other businesses. These factors also had an implication in terms of the costs of ensuring the safety and security of patrons and others. We interpolate here that these aspects emphasise the fact this was not a meeting to be held in a public

[173] For example, s 36.

square but, rather, in an enclosed space in a busy part of the city. The Court of Appeal made these points:

> [82] … Mr Macrae considered that the road would need to be closed and barricades erected for crowd control. This would add an estimated $30,000 to the costs of the event for Auckland Live in terms of security staff, fencing, traffic management and provision for business disruption to local restaurants and other businesses. …
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> [83] Secondly, although only 68 tickets had been sold at that point, tickets could continue to be purchased prior to the event, including by protestors. Mr Macrae considered what would happen if there were between 100 and 500 ticket holders inside the venue, along with potentially hundreds of protestors outside the venue. This required consideration of what would happen if the venue had to be evacuated, for example in the event of a bomb threat or smoke alarms being triggered, and access for emergency vehicles. Mr Kidd [Manager, Safety and Security] was consulted; he considered there was a high degree of risk to safety in the event of evacuation.

[127] We add that Mr Macrae was in a position to know something of the reality of the threat of disruption given his past experience. He gave evidence about his earlier, relatively recent, experience with the protest blockade at the Viaduct Events Centre involving Auckland Peace Action.[174] It is relevant also that Mr Macrae's assessment of the security risks was backed up by the expert evidence of Marc Collins.[175]

[128] Further, once the option of adopting the approach taken in Australia that is, non-publication of the venues, was off the table there was an inevitability about the outcome. As the Court of Appeal notes, Mr Macrae took the view that the fact the venue had been publicised in New Zealand "had a direct, and limiting, effect on how we could manage the security concerns in relation to the Bruce Mason Centre".[176] It increased the likelihood of protesters buying tickets thereby potentially increasing the health and safety issues within the venue. The appellants dispute the relevance of Axiomatic's conduct in not alerting RFAL to the potential issue. But the practical effect of that non-disclosure was to remove options otherwise open to RFAL in terms of protective measures. In other words, from the outset, the ball was set rolling down

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174 As it subsequently transpired, the reality of this concern was borne out by the fact that there was a protest organised by Auckland Peace Action at the alternative venue secured by Axiomatic for the speakers even though that event was cancelled.

175 Mr Collins is a security consultant. He identified various aspects relevant to the security assessment including Axiomatic's failure to raise the potential concerns. He considered the security arrangements necessary to minimise the risk to venue staff, patrons, and members of the public. His opinion was that the decision to cancel was correct in the circumstances.

176 CA judgment, above n 2, at [84].

the wrong track. The impact of this omission on RFAL's options was therefore relevant in assessing the reasonableness of the course RFAL took.

[129] Axiomatic's non-disclosure also meant that RFAL did not ask for a bond. The appellants point to jurisprudence where the point is made that it is not permissible to use costs as a means of effectively preventing the exercise of freedom of expression.[177] It is apparent, however, that the extent to which a speaker or promoter, as here, may be required to cover security costs for example, will depend on the context. Here, as we have said while RFAL is not operating commercially in the sense considered in the *Problem Gambling* case, it is operating commercial venues and it does have an obligation to be commercially prudent. Mr Macrae's estimate was that the cost of additional security would be in the region of $30,000.[178] That figure can be contrasted with the venue hire fee of $5,000 plus GST.

[130] Finally, we note that although RFAL should have followed through on its inquiry to the police, the practical outcome of cancelling promptly did allow Axiomatic to book another commercial venue.[179]

[131] Accordingly, while the process followed could (and should) have been better, we are satisfied that in the circumstances the course adopted did not lead to an unreasonable decision. The appellants do not succeed on this ground of appeal.

New evidence

[132] The appellants sought to file new evidence in this Court. This new evidence is an affidavit of Dr Cumin which provides the Court with a copy of a recent, July 2020, review of Auckland Council's council-controlled organisations (Review)[180] and

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177 See, for example, *Forsyth County, Georgia v Nationalist Movement* 505 US 123 (1992) at 134–135; and see *UAlberta Pro-Life*, above n 141, at [182]–[188]. In *Forsyth County*, the underlying concern was that the fee was inevitably based on the content of the speech. In *UAlberta* the point was that the entire burden of costs was placed on the group. Neither case suggests fees will always be unconstitutional.

178 Melbourne police invoiced Axiomatic around $68,000 of the total cost of $230,000 incurred for services provided in relation to the event there albeit the evidence is that Axiomatic had not paid that amount.

179 See above at [67] and [103]. There is no evidence about why the event did not go ahead, as planned, at the alternative venue, the Powerstation.

180 *Review of Auckland Council's council-controlled organisations: Report of Independent Panel* (July 2020).

evidence of the merger of Regional Facilities Auckland with Auckland Tourism, Events and Economic Development (ATEED).[181] The merger of Regional Facilities Auckland and ATEED was recommended by the Review.

[133] The appellants advance this material as updating and rely on it as supporting the contention that council-controlled organisations like RFAL stand in the shoes of the Council.

[134] The respondents oppose admission on the basis it is distracting and irrelevant and maintain they have never contended the activities of RFAL are totally commercial.

[135] The short factual point in this material which is relevant, and truly updating, is that Regional Facilities Auckland and ATEED have amalgamated but there is no dispute about that.[182] The Review is not fresh as it was available prior to the hearing in the Court of Appeal. Nor do we see the detail of it as helpful where we have been able to determine the issues without reference to it.[183] The Review simply provides a perspective on the inter-relationship between Auckland Council and council-controlled organisations but, where this material has been provided late, we have preferred to rely on the instruments and related documents which form a part of the statutory context.

Result

[136] We decline to grant leave to adduce new evidence (the affidavit of 18 February 2022) of David Cumin.

[137] The appeal is dismissed.

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181 Minutes of the Auckland Council Governing Body meeting of 27 August 2020; and Auckland Unlimited *Statement of Intent 2021–2024* (1 August 2021).

182 We refer to the amalgamation above at [25], n 26.

183 *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650; and see *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.

Costs

[138] We are not aware of any reason why costs should not follow the event in the usual way. However, as we did not hear from the parties on costs, costs are reserved. Unless the parties are able to agree on costs, we seek submissions on that issue.

[139] Submissions for the respondents are to be filed and served by 8 February 2023. Submissions for the appellants are to be filed and served by 22 February 2023 and any submission for the respondents in reply by 1 March 2023.

Solicitors:
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