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MORE TO *MONCRIEF-SPITTLE?*

A Critique of the Judgment in *Moncrief-Spittle v Regional Facilities Auckland Limited*

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Abstract

Moncrief-Spittle v Regional Facilities Auckland Limited appeared to be a case that was going to give rise to issues regarding free speech but in fact was centred around the limits of judicial review. The primary issues raised in this case were publicness and standing. With reference to relevant case law and literature, this paper puts Jagose J's conclusions on these two issues into question. When determining publicness, the focus should be on the substance rather than the source. This paper argues that Jagose J erred in his decision that Regional Facilities Auckland Limited did not exercise a public function in cancelling an event to be held at the Bruce Mason Centre. His Honour placed too much weight on the source and distinction between Regional Facilities Auckland Limited and the Auckland Council, rather than on substance such as the public interest and public consequences that are engaged in Regional Facilities Auckland Limited's decisions. Moreover, although standing can serve as a valuable tool to avoid unnecessary claims, the case law and literature manifests that New Zealand takes a relaxed, generous, and liberal approach to standing. This paper argues that Jagose J failed to give effect to this well-established approach in disregarding that both applicants had sufficient standing to bring the proceeding. In addition, this paper asserts that the unique underlying issue of free speech supports that both publicness and standing were met.

Keywords: 'Publicness', 'Standing', 'Judicial review', '*Moncrief-Spittle v Regional Facilities Auckland*'.

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I Introduction

Moncrief-Spittle v Regional Facilities Auckland Limited (Monrief-Spittle)[1] concerned an application for judicial review in the High Court. Malcolm Moncrief-Spittle (Mr Moncrief-Spittle) and David Cumin (Mr Cumin) sought review of Regional Facilities Auckland Limited's (RFAL) decision to cancel an event scheduled to be held at the Bruce Mason Centre (the Centre) citing health and safety considerations.[2] Jagose J heard and dismissed the claim.[3] For the purposes of this paper, the relevant conclusions reached by his Honour were that RFAL did not exercise a public function in cancelling the event[4] and that both applicants lacked standing to bring the claim.[5]

The issues pleaded in this case are of significant importance, in particular because a council-controlled organisation (CCO) has never been judicially reviewed in New Zealand before and also due to the underlying issue regarding free speech.[6] The decisions on these issues create precedent for how this circumstance applies and is to be dealt with within the context of judicial review in New Zealand. However, the conclusions reached by Jagose J on publicness and standing can be considered unusual and the overall confusing and unstructured approach causes this judgment to be worthy of further analysis.

With support from the case law and literature, both conclusions reached by Jagose J can be challenged. This paper argues that the Judge fails to adequately consider the public interests and public consequences engaged in RFAL's decision to cancel the event. In addition, upon a consideration of the applicants' interests, this paper argues that Jagose J's decision regarding standing is contrary to New Zealand's relaxed, generous, and liberal approach.[7] The judgments lack of structure and reasoning is also reflected on

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1 *Moncrief- Spittle v Regional Facilities Auckland Limited* [2019] NZHC 2399.

2 At [2-3].

3 At [5].

4 At [46].

5 At [66].

6 At [27].

7 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62 at [91]; *Ye v Minister of Immigration* [2008] NZCA 291 at [322]; *Great Christchurch Buildings v Church Property Trustees* [2012] NZHC 304 at [74]; and Philip Joseph *Constitutional and Administrative Law* (4th ed, Brookers Ltd,

throughout this paper. In particular, his Honour fails to succinctly discuss publicness and unusually merges the publicness analysis into the consideration of the substantive grounds of review. An alternative approach would be to wholly discuss publicness in a separate section first before diving into the consideration of the other grounds. Ultimately, this paper concludes that Jagose J erred in both decisions on publicness and standing.

This paper is structured as follows. In section one a brief overview of the case is provided. Section two outlines the case law and literature on publicness. The factual context is discussed in more detail as it applies to publicness in section three. In section four the case law and literature on standing is provided, followed by a discussion of the factual context in more detail as it applies to standing. The case law and literature is from both New Zealand and other jurisdictions.

A Overview

On 13 June 2018 Axiomatic Media Pty Limited (Axiomatic), an Australian events promoter contacted RFAL exploring options for a venue to host a priced engagement with two speakers.[8] The speakers, Stefan Molyneuz and Lauren Southern were described by Axiomatic as "a renowned philosopher and author" and "a documentary and best-selling author".[9] RFAL notified Axiomatic that two venues were available and Axiomatic chose and secured a "pencil booking" for the Centre.[10] On 15 June 2018, a venue hire agreement was signed by Axiomatic and returned to RFAL on the same day.[11] This agreement required Axiomatic to provide a health and safety plan for the event that addressed all hazards to RFAL's reasonable satisfaction by a particular date.[12] On 18 June 2018 RFAL countersigned the agreement.[13] The event was publicly announced and ticket sales began on 29 June 2018.[14]

Wellington, 2014) at 1225.

8 *Moncrief- Spittle v Regional Facilities Auckland Limited,* above n 1, at [5].

9 At [5].

10 At [5]; and Nikki Preston "High Court rules Auckland Council within rights to cancel Lauren Southern, Stefan Molyneux event" (30 September 2019) NZ Herald <www.nzherald.co.nz >.

11 At [6].

12 At [6].

13 At [6].

14 At [7]; and Nikki Preston "High Court rules Auckland Council within rights to cancel Lauren

In response to the announcement, both the Council and RFAL began receiving complaints about the event including a petition for its cancellation.[15] One theme drawn from the complaints was the speakers' racial discord.[16] RFAL anticipated that the event may present larger security issues than comprehended and began to enquire into the speakers' substance.[17] RFAL consulted with the New Zealand Police to see whether they were aware of the event and enquired into any threats it carried.[18] On 5 July 2018 a representative of Auckland Peace Action (APA) requested that RFAL cancel the event and reinforced its claim with the Council[19] which was then referred to RFAL.[20] Contemporaneously, APA publicly announced their intention to "blockade entry to the speaking venue".[21]

RFAL's management called a meeting to address the management of protest at the Centre and eventually reached a preliminary view that the event be cancelled.[22] RFAL's decision was based on both the location of the Centre and the "high degree of risk to safety" that would arise in the instance of a protest.[23] On 6 July 2018 the deciding manager, a director of RFAL's operational division, reflected on the situation and decided to cancel the event[24] deeming engagement with police as no longer necessary.[25] The director attempted to balance "the competing demands that came with a right to protest in a safe environment" whilst acknowledging that health and safety concerns were paramount for

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Southern, Stefan Molyneux event", above n 10.

15 At [7]; and James Meager "Judicial review of council-controlled organisations – can they or can't they?" (2 October 2019) Simpson Grierson <www.simpsongrierson.com>.

16 At [7].

17 At [8].

18 At [8].

19 At [9].

20 At [9].

21 At [9].

22 At [10].

23 At [10].

24 At [11-12].

25 At [11-12].

RFAL.[26] The cancellation was communicated to Axiomatic on the same day.[27] Four days later formal notice was provided along with an explanation for the cancellation and that Regional Facilities Auckland (RFA), the charitable trust of whom RFAL is trustee, was not comfortable with allowing the event to continue at an RFA venue.[28]

Against a background obligation to "facilitate rights to freely express lawful speech and opinions", the applicants sought review and declarations stating that RFAL:[29]

(a) acted irrationally in concluding the event posed an unacceptable security risk, without consideration of police or organiser's assessments of such risk or the means by which it may be avoided or mitigated;
(b) disproportionately responded to that risk by cancelling the event, unreasonably restricting the applicants' representative exercise of freedoms of thought and expression, of association and peaceful assembly, and from discrimination on grounds of political opinion, which exercise RFAL and the Council is to facilitate in granting or terminating licences to their venues; and
(c) unlawfully was directed in its actions by the third respondent, Auckland's Mayor, Phil Goff.

II Publicness

The first conclusion made by Jagose J as a reason for declining the application was that RFAL did not exercise a public function in the cancelling of the event.[30] The concept of publicness therefore requires investigation. Although the word 'publicness' appears simple, the nature of the system does not deem it as such. Upon an examination of the case law and literature, it appears that publicness is required for judicial review however what constitutes as publicness is variable.

A Publicness as a Requirement for Review

The leading New Zealand cases on whether publicness is required for review are contradictory. In *Hopper v North Shore Aero Club Incorporated (Hopper)*[31] Mr Hopper, a member of the North Shore Aero Club (the Club) sought judicial review of the Club's

26 At [11].

27 At [13-14].

28 At [13-14].

29 At [3].

30 At [46].

31 *Hopper v North Shore Aero Club Incorporated* [2007] NZAR 354.

decision to refuse to allow him to park his plane at the Club's airfield.[32] The Court of Appeal (CA) did not address amenability squarely but dismissed the appeal partly on the basis that the Club was not exercising a public-like function.[33] This suggests that a public aspect is essential for review of a private incorporated society's power.

Knight favours the view taken in *Hopper*[34] and argues that judicial review is inherently public and that publicness is grounded in the common law.[35] Knight justifies the requirement of publicness on the basis that if it were otherwise, private law bodies would be drawn into the domain of public law without an assessment of whether it is appropriate for their actions and accountability to be founded in public law.[36]

In *Reay v Attorney-General*[37] the Attorney-General applied to review a decision made by the Institution of Professional Engineers New Zealand Incorporated (IPENZ) that IPENZ did not have jurisdiction to continue a disciplinary proceeding against Doctor Alan Reay (Dr Reay) as he was no longer a member of IPENZ.[38] Dr Reay's engineering firm designed the Canterbury Television Building that collapsed causing loss of life during the 22 February 2011 Christchurch Earthquake.[39] When discussing amenability, the CA held that the public interest is a relevant consideration[40]and that the public interest in maintaining professional engineering standards is incorporated into IPENZ's Rules.[41] The Rules gave IPENZ's activities a public aspect/dimension causing them to be susceptible to review.[42] Rodriguez-Ferrere concurs that for a decision to be amenable it must have a "public law element".[43]

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32 At [1].

33 At [12].

34 *Hopper v North Shore Aero Club Incorporated,* above n 31.

35 Dean Knight "Privately Public" (2013) 24 PLR 108 at 109.

36 At 110.

37 *Reay v Attorney-General* [2019] NZCA 475.

38 At [7].

39 At [2].

40 At [41].

41 At [42] in particular Rule 18.2.

42 At [39].

43 Marcello Rodriguez-Ferrere, "Judicial Review of Charitable Trusts" [2013] NZLJ 107 at 109.

Conversely, the CA in *Stratford Racing Club v Adlam*[44] held that publicness is irrelevant for review.[45] Membership applications were blackballed and the nomination of the alternative president was rejected resulting in Mr Adlam filing for review.[46] Stratford Racing Club argued that they were a private entity with private activities and therefore not subject to review.[47] The CA held that where a club is motivated by an improper purpose, judicial review is available deeming the decision to blackball applicants amenable.[48] The CA based their decision on the obiter dicta in *Hopper*[49] without any attempt to address the publicness requirement promoted by the same court.[50]

In *Middeldorp v Avondale Jockey Club Incorporated*[51] the Committee suspended Mr Middeldorp, a member of the Avondale Jockey Club for causing distress.[52] Ongoing conflict led to Mr Middeldorp filing for review.[53] Although the Avondale Jockey Club argued that the court should refrain from intervening in the affairs of non-public bodies that do not perform public functions,[54] the CA decided that due to the subject matter of the allegations intervention was appropriate.[55]

Elliott and Varuhas propose that there has been an inherent struggle experienced by the courts to govern "publicness" and that this reflects that the distinction between 'public' and 'private' is an unsound way to determine amenability.[56] The authors claim that judicial review principles and their application being limited to 'public' decisions is

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44 *Stratford Racing Club v Adlam* [2008] NZAR 329.

45 At [56].

46 At [8-10].

47 At [53].

48 At [55].

49 *Hopper v North Shore Aero Club Incorporated,* above n 31.

50 At [54].

51 *Middeldorp v Avondale Jockey Club Incorporated* [2020] NZCA 13.

52 At [7].

53 At [1].

54 At [8].

55 At [9].

56 Mark Elliott and Jason Varuhas *Administrative Law Text and Materials* (5th ed, Oxford University Press, 2017) at 146.

wrong-headed.[57] This argument suggests that judicial review ought to serve both public and private decisions. However, I find this argument less persuasive than the comments made by Knight[58] as it contradicts the purpose of judicial review and the principles that have developed over time.

B What Counts as Publicness?

Assuming publicness is required, the following cases and literature illustrate what is required for publicness and when functions may be seen as exercising powers of a public nature.

In *Dunne v CanWest TVWorks Limited (Dunne)*[59] the plaintiffs were leaders of minor political parties.[60] The defendant, TV3, selected the leaders from the six most popular political parties for a political debate which excluded the plaintiffs causing them to file for judicial review.[61] The plaintiffs asserted that when determining publicness, the test is not whether the body is a public body, but whether it is performing the public function of exercising powers of a public nature.[62] The plaintiffs suggested that by choosing to hold a leaders debate shortly before an election, TV3 thrusted itself into the public arena and by choosing who will participate are exercising powers of national importance and of a public nature.[63] The CA was satisfied that TV3 performs public functions or exercises public powers and did so in its election coverage.[64]

In *Royal Australasian College of Surgeons v Phipps* (*Phipps)*[65] the CA confirmed that the attention of the court should be on the substance of the matter rather than the decision-maker source.[66] Although the body may not have appeared as one that can be reviewed,

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57 At 146.

58 Dean Knight "Privately Public", above n 35, at 109.

59 *Dunne v CanWest TVWorks Limited* [2005] NZAR 577.

60 At [1].

61 At [5].

62 At [24].

63 At [22].

64 At [28].

65 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1.

66 At 11.

the Court determined that powers which in substance are public or have public consequences can be reviewed.[67]

Great Christchurch Buildings Trust v Church Property Trustees (Great Christchurch Buildings Trust)[68] concerned the Christchurch Cathedral which suffered significant damage from the earthquakes that occurred in Canterbury in 2010 and 2011.[69] Chisholm J stated that there is a genuine public interest in decisions relating to the Cathedral's future[70] and cited *Wilson v White*[71] for the proposition that the courts are more prepared than ever to treat any power with public consequences as reviewable even if that power is exercised by a private organisation.[72] Taylor claims that judicial review is not restricted to government entities and in agreement with Rodriguez-Ferrere cites *Great Christchurch Buildings Trust*[73] as an example of how charitable trusts may be subject to review if the actions at issue have public consequences and are genuinely in the public arena.[74] Joseph supports this proposition and believes that any decision that is "in substance public" or has "important public consequences" is potentially reviewable.[75]

The United Kingdom have taken a similar approach, where in *R v Panel on Takeovers and Mergers, ex p Datafin Plc (Datafin)*[76] it was held that the City Panel on Takeovers and Mergers was a private body but that its actions were amenable to review because it performed an important public duty and some quasi-judicial functions.[77] Likewise in *R v Criminal Injuries Compensation Board, ex p Lain (Lain)*[78] the Board's action was

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67 At 11.

68 *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7, at [1].

69 At [28].

70 At [84].

71 See *Wilson v White* [2005] 1 NZLR 189.

72 At [89].

73 *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7.

74 GDS Taylor *Judicial Review A New Zealand Perspective* (3rd ed, LexisNexis New Zealand Limited, Wellington 2014) at 9; and Marcello Rodriguez-Ferrere, "Judicial Review of Charitable Trusts", above n 43, at 109.

75 Philip Joseph *Constitutional and Administrative Law in New Zealand,* above n 7, at 881.

76 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815.

77 At 119; see Peter Cane *Administrative Law* (5th ed, Oxford University Press, 2011) at 266.

78 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864.

amenable because it performed a function analogous to a public function.[79] Cane claims that *Datafin*[80] accompanied by *Lain*[81] demonstrates that amenability of a public or private entity depends on the nature it performs not the body's identity/status.[82] Conversely, Costello states that the "public element" relating to judicial review is generally tested at two levels.[83] Firstly, the institution must be public and secondly, the activity in question must be public.[84]

C Review of State-Owned Enterprises

Numerous bodies owned by the government have a public aspect about them whilst operating for a commercial purpose.[85] *Mercury Energy Limited v Electricity Corporation of New Zealand Limited (Mercury Energy)* established the default position that a state-owned enterprise (SOE) is a public body and that entering into or determining a commercial contract to supply goods or services is unlikely to be the subject of review in the absence of fraud, corruption, or bad faith.[86] *Lab Tests Auckland Limited v Auckland District Health Board (Lab Tests)*[87] adds that anything analogous to this behaviour will suffice for review.[88] *Lab Tests* accompanied by *Attorney-General v Problem Gambling Foundation of New Zealand (Problem Gambling)*[89] also indicates circumstances where we may depart from this default position. The nature of the decision being made, the body

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79 See Peter Cane *Administrative Law,* above n 77, at 267.

80 *R v Panel on Takeovers and Mergers, ex p Datafin Plc*, above n 76.

81 *R v Criminal Injuries Compensation Board ex p Lain,* above n 78.

82 Peter Cane *Administrative Law,* above n 77, at 267.

83 Kevin Costello "The "public element" test for amenability to judicial review: R. (on the application of Holmcroft Properties Ltd) v KPMG LLP" [2020] P.L at 229.

84 At 229.

85 *Mercury Energy Limited v Electricity Corporation of New Zealand Limited* [1994] 2 NZLR 385 (PC) at 388.

86 At 386.

87 *Lab Tests Auckland Limited v Auckland District Health Board* [2009] 1 NZLR 776 (CA).

88 *Mercury Energy Limited v Electricity Corporation of New Zealand Limited,* above n 85, at 391; and *Lab Tests Auckland Limited v Auckland District Health Board,* above n 87.

89 *Attorney-General v Problem Gambling Foundation of New Zealand* [2017] 2 NZLR.

making the decision, the statutory setting in which the decision is being made[90] and the nature of the interests sought to be protected should be considered.[91]

In *Ririnui v Landcorp Farming Limited (Ririnui)*[92] a decision by Landcorp Farming Limited, an SOE was reviewable on a broader basis than what was posed in *Mercury Energy*.[93] Although the Supreme Court acknowledged that there are some exercises of public power that are not appropriate for review due to their subject matter,[94] the decision at issue had a substantial public interest component to it deeming it more than simply commercial in nature.[95] The Ministers' decision to intervene and not to intervene on behalf of Ngāti Mākino and Ngāti Whakehemo respectively involved the exercise of a public power.[96] Ultimately, the overlay of Treaty of Waitangi concerns suggested that a broader scope of review should be preferred.[97] Taylor supports the proposition that SOEs can be subject to judicial review in New Zealand.[98]

D Summary

Despite the duelling case law and literature,[99] the view that publicness is required for judicial review is arguably established as without it the doors are left open for commercial based decisions to be reviewed.[100] It is well established that private institutions can be subject to review in New Zealand and that the focus should be on the substance rather than the source.[101] The default position posed by *Mercury Energy*[102] for SOEs and the

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90 *Lab Tests Auckland Limited v Auckland District Health Board,* above n 87, at [58].

91 *Attorney-General v Problem Gambling Foundation of New Zealand,* above n 89, at [42].

92 *Ririnui v Landcorp Farming Limited*, above n 7.

93 At [75].

94 At [89].

95 At [74].

96 At [91].

97 At [75].

98 GDS Taylor *Judicial Review A New Zealand Perspective*, above n 74, at 17.

99 *Stratford Racing Club v Adlam,* above n 44; *Middeldorp v Avondale Jockey Club Incorporated,* above n 51; and Elliott and Varuhas *Administrative Law Text and Materials,* above n 56.

100 Dean Knight "Privately Public", above n 35, at 110.

101 *Dunne v CanWest TVWorks Limited*, above n 59; and *Royal Australasian College of Surgeons v Phipps,* above n 65.

102 *Mercury Energy Limited v Electricity Corporation of New Zealand Limited,* above n 85, at 386.

extension from *Lab Tests/Problem Gambling*[103] and *Ririnui*[104] adds a gloss on when commercial based decisions may or may not be reviewed. The authority that sheds light on publicness as a requirement for judicial review will be used to analyse the case in question.

III Application of Publicness in Moncrief-Spittle

A Are Regional Facilities Auckland Limited's Decisions Susceptible to Judicial Review?

The first step in any judicial review case is to establish whether a decision is amenable to review. The institutional context helps inform whether RFAL's decision to cancel the event should have been subject to review.

RFAL is a trustee of the charitable trust, RFA.[105] RFAL administers regional facilities within the Council's area including the Centre.[106] At the time of RFA and RFAL's establishment, the purpose of a local government included "to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future."[107]

Both RFA and RFAL are "council-controlled organisations" under the Act.[108] Their principle objective is to "achieve the objectives of [their] shareholders, both commercial and non-commercial, as specified in the statement of intent"[109] and to:[110]

> … 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.

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103 *Lab Tests Auckland Limited v Auckland District Health Board,* above n 87, at [58]; *Attorney-General v Problem Gambling Foundation of New Zealand,* above n 89, at [42].

104 *Ririnui v Landcorp Farming Limited*, above n 7.

105 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [18].

106 At [18].

107 Local Government Act 2002, s 10.

108 Section 6.

109 Section 59(1)(a).

110 Section 59(1)(c).

RFA's objectives include supporting the vision of Auckland and promoting "the social, economic, environmental, and cultural well-being of its communities by engaging those communites" as well as continuing to develop "a range of world class arts, culture, heritage leisure, sport, and entertainment venues" that are attractive to Auckland residents and visitors.[111]

RFAL's objectives as trustee include ensuring that RFA is administered for the purposes set out in the deed of the trust and "to undertake any activities, in accordance with the deed of trust, that further those purposes."[112] The trust is said to have been established and maintained "to promote … the development and operation of Regional Facilities" in Auckland "for the benefit of Auckland and its communities".[113] Purposes set out in the deed of trust include:[114]

> (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 … in daily in arts, culture, heritage, leisure, sport and entertainment activities: and
> (b) Providing World Class Regional Facilities: develop and maintain, … a range of world class arts, culture, heritage, leisure, sport, and entertainment venues that are attractive both to residents of and visitors to Auckland;
>
> …
>
> (c) Development and Operation of Regional Facilities: to promote, operate, develop and maintain, and to hold and manage interests and rights.
> (d) Provision of High Quality Amenities: to provide, and to promote the provision of, high quality amenities at Regional 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

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111 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [18]; and Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 9(7).

112 At [19].

113 At [20].

114 At [20].

> (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.

The applicants' claims focus on RFAL as the decision-maker.[115] The applicants argued that RFAL's grant and/or termination of licences to use Council venues such as the Centre is an exercise of a 'public function' in which both RFAL and the Council are subject to "public law obligations" including making appropriately informed decisions.[116] The applicants also contended that in making such decisions both RFAL and the Council were required to facilitate rights such as free speech.[117] The respondents argued that RFAL only engages in commercial arrangements for the hire of trust venues to generate revenue for trust purposes and that the Council plays no role in entry or termination of RFAL's trust venue hire agreements.[118]

Jagose J acknowledges that judicial review has not previously been sought of a decision by a CCO but that the text on judicial review in New Zealand indicates that such decisions are nonetheless reviewable, drawing an analogy with SOEs.[119] His Honour states that any exercise of 'public' power, powers relevant to the public interest or with public consequences is within the court's jurisdiction to review,[120] and that the charitable nature of RFAL's powers may engage review particularly because the trust is established by public-interest legislation.[121] The recognition of these factors suggests that the Judge believes that a public aspect is relevant in determining whether RFAL's decisions are subject to review.

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115 At [33].

116 At [16].

117 At [3].

118 At [17].

119 At [27].

120 At [28].

121 At [30].

In accordance with the case law,[122] Jagose J asserts that the better focus is on the substance rather than the source[123] and that RFAL's decisions are not excluded from judicial review by its status of trustee of a charitable trust alone.[124] It is well established that private bodies can be subject to judicial review in New Zealand.[125] The conclusion that RFAL is not immune from review based on their identity is therefore in line with the authority.[126]

His Honour proceeds to discuss whether the cancellation entitled his intervention. RFAL's counsel argued that as a charitable trust RFAL's decisions are only reviewable if they exercise significant public functions that have substantial effects which "does not arise on venue hire decisions".[127] The applicants argued that the cancellation engaged "broader public interests" in the provision of a public forum and drew on the trust's objective to promote cultural well-being.[128]

Jagose J states that the trust's establishment specifies its objectives as 'supportive' of a "vision of Auckland" by engaging Aucklanders and visitors in activity as reflected in its deed for RFAL's administration.[129] His Honour claims that the 'vision' confers promotion of community well-being and that 'promotion' is what is achieved by the trust's establishment but not a task for the trust.[130] However, RFAL's objectives are to ensure that the Centre is held for the purposes set out in the deed of the trust and to undertake any activities in accordance with the deed.[131] The terminology "to promote" is

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122 *Dunne v CanWest TVWorks Limited*, above n 59; *Royal Australasian College of Surgeons v Phipps,* above n 65; and *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7.

123 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [31].

124 At [31].

125 *Dunne v CanWest TVWorks Limited,* above n 59; and *Royal Australasian College of Surgeons v Phipps,* above n 65.

126 *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7, at [89]; and *R v Panel on Takeovers and Mergers, ex p Datafin Plc*, above n 76, at 266.

127 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [30].

128 At [32].

129 At [34-35].

130 At [36].

131 At [19].

used multiple times under the purposes contained in the deed.[132] This terminology can be interpreted as delegating the task of promotion to the trust rather than serving as a mere consequence of the trust's establishment as claimed.

Jagose J contends that at the time of the trust's and trustee's establishment the promotion of community well-being was the purpose of local government.[133] His Honour admits that as a CCO, RFAL's principal objective may be read as to permit the trust to action some of the Council's objectives it seeks to achieve, but that in doing so would be to disregard the careful explanation between Council and trust in their constituent documents.[134] The trust's statement of intent identifies its purpose to be enriching life in Auckland by "engaging people in the arts, environment, sports, and events in which its role includes advancing the social and cultural well-being of Aucklanders".[135] The statement of intent also identifies the Council's objective of "making funding decisions ... to support cultural and social activities" and that the trust is "responsible for the sale and delivery of events as well as ensuring that these venues are fit-for-purpose".[136]

Jagose J asserts that the 'deciding' entity for the promotion of community well-being is for the Council and that the separation between the Council and the trust is reinforced in the Council's statement of intent which indicates that the Council's objective is to provide community facilities and that the trust's intention is to manage them.[137] However, the objectives of a CCO include obligations such as achieving non-commercial objectives of their shareholders, exhibiting a sense of social responsibility, and endeavouring to accommodate or encourage community interests.[138] These obligations can be read as the Council giving RFAL responsibilities that speak to the promotion of community well-being. It is hard to believe that community well-being being vested in the purpose of the Council bars RFAL's actions from being understood as also aiming to promote community well-being. RFAL plays a role in engaging Auckland citizens and advancing

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132 At [20].

133 At [37].

134 At [38].

135 At [22].

136 At [22].

137 At [39].

138 At [21]; and Local Government Act, above n 107, s 59(1)(a) and (c).

their social and cultural well-being, in turn actioning some of the Council's overall objectives including the promotion of community well-being.

Jagose J claims that the trust's statement of intent is aspirational[139] and that "the trustee's intent accordingly is facilitative".[140] It is unclear what point the Judge is trying to make here. A facilitative intent could be understood as having more of a practical impact than an aspirational intent, supporting that RFAL's functions have an impact on the community or at least aim to do so.

Notwithstanding these points raised by Jagose J, his Honour concludes that they do not affirm that RFAL's decision to cancel is immune from judicial review.[141] Accordingly, the Judge states that an analysis into what public power RFAL or the Council may be said to have exercised in deciding to cancel the event is necessary.[142] The prompting of a public power analysis again indicates that Jagose J believes that this is important for amenability of RFAL's decisions. However, in an unclear fashion, the Judge jumps straight into an analysis of the first ground of review, strangely merging the publicness analysis into the determination of the substantive grounds. Consequently, no definitive ruling on publicness is reached in this initial section.

B First Ground of Review- Alleged "Irrationality/Perversity"

The applicants' first ground of review was that RFAL's "public law obligations" include "the duty to act rationally and not perversely or arbitrarily when making decisions about the grant and/or cancellation of licences".[143] The applicants believed that this behaviour was engaged when RFAL held that the event "posed an unacceptable security risk" on the basis that RFAL did not obtain or have regard for relevant information about this issue from police, Axiomatic or Australian venues to justify the cancellation.[144] Underpinning this claim was RFAL's obligation to facilitate freedom of expression and free speech.[145]

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139 At [39].

140 At [22].

141 At [39].

142 At [39].

143 At [40].

144 At [40].

145 At [40].

Jagose J emphasises his finding that the trust is functional in its "provision, development and operation" of the Centre and that there is no evidence that the Council decided that the trust should have anything more than a facilitative role in accelerating their purposes.[146] His Honour states that, even when interpreted broadly, the term 'public services' did not extend to the outcome sought and that the Centre's contribution was not to be in promotion of community well-being but in provision of good-quality public services in a cost-effective way.[147] His Honour claims that it was not for the trust to proactively pursue the Council's activities[148] and asserts that there is nothing in the trust's documents to suggest that the Council has put any direct responsibility for community well-being within the trust.[149] RFAL's responsibility is claimed to be providing services on the Council's behalf with only a discretionary obligation to have regard for community interests.[150] Consequently, the Judge holds that RFAL did not exercise a public power in cancelling the event and that their decision is not subject to review for contended irrationality or perversity.[151]

C Substance over Source

Jagose J essentially claims that the separation between the Council's objective to provide facilities for the community and the CCO's intention being to manage those facilities is an important factor when determining whether a CCO is exercising a public power.[152] However, the Judge's approach is formalistic and places too much reliance on the distinction between the Council and RFAL rather than the substance and nature of the power at issue. The judgment lacks any sufficient consideration of factors such as public

146 At [42].

147 At [43].

148 At [45].

149 At [45].

150 At [45]; and James Meager "Judicial review of council-controlled organisations – can they or can't they?", above n 15.

151 At [46].

152 At [45]; and James Meager "Judicial review of council-controlled organisations – can they or can't they?" above n 15.

interests and consequences that flow from RFAL's decisions. This directly conflicts with established propositions in the case law and literature.[153]

The public interest is a relevant consideration[154] and can give a private decision a public law element.[155] Powers that have public consequences can also be reviewed.[156] The applicants have a strong claim in that there is sufficient public interest and public consequences in the cancellation of events at the Centre, particularly due to the underlying issue of free speech.[157] The very existence of the trust is based on public interest. The trust's establishment is to maintain and promote "the effective provision, development, and operation of Regional Facilities throughout Auckland" for the benefit of Auckland and its communities.[158] Moreover, the trust's statement of intent includes enriching life in Auckland by "engaging" people and the Auckland community.[159] This supports that RFAL's powers aim to engage public interests, in turn impacting the public. Importantly, RFAL's management gathered for a meeting and addressed the management of protests at the Centre, eventually concluding that the event should be cancelled.[160] The holding of a meeting focused on the managing of protest is indicative of the fact that RFAL considers what is best for the public and therefore the public interest. The purposes in the deed[161] that were arguably overlooked by the Judge also help shed light on RFAL as a

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153 *Dunne v CanWest TVWorks Limited*, above n 59; *Royal Australasian College of Surgeons v Phipps,* above n 65; *Reay v Attorney-General,* above n 37; GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74; Philip Joseph *Constitutional and Administrative Law,* above n 7; *R v Panel on Take-overs and Mergers, ex p Datafin plc*, above n 76; and Peter Cane, *Administrative Law,* above n 77.

154 *Reay v Attorney-General,* above n 37, at [41]; and *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7, at [84].

155 Marcello Rodriguez-Ferrere, "Judicial Review of Charitable Trusts", above n 43, at 109.

156 *Royal Australasian College of Surgeons v Phipps,* above n 65, at 11; *Great Christchurch Buildings Trust v Church Property Trustees,* above n 7, at [89]; *Wilson v White,* above n 71, at [89]; GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74, at 9; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 881.

157 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [3].

158 At [20].

159 At [20].

160 At [10].

161 At [20].

body and what their tasks and functions are. The terminology of "support",[162] "to provide"[163] and "to promote"[164] is mentioned numerous times indicating that RFAL functions for the community and must do so with public interests in mind.

Although the Judge claims that there is only a discretionary obligation to have regard for community interests, the principal objective of a CCO directly states that RFAL must have regard for the interests of the community.[165] In addition, the terminology in the trust's purposes can be interpreted as the Council placing direct responsibility for community well-being within the trust alongside the obligation to have regard for community interests. Nevertheless, even a mere discretionary obligation to have regard for community interests should be sufficient for amenability as it attaches a public dimension/aspect to RFAL's functions and decisions.[166]

RFAL's decision to cancel events has obvious consequences both for the speakers and the attendees. Cancellation of particular events reflect what events may be at risk of being cancelled and/or what speakers may not be permitted to use the Centre drawing in broader issues for the wider community. It is arguable that when RFAL exercises the power to grant or decline licences they are thrusting themselves into the public arena and by specifically choosing who can use the Centre they are performing the public function of exercising powers of a public nature.[167]

All of these examples serve as substance reinforcing that RFAL engages and/or involves public interests and public consequences in the execution of their functions. This alongside the underlying claim of facilitating free speech supports that RFAL's decision should have been seen as an exercise of a public power and subject to review. Jagose J was too rigid in his analysis and took advantage of an opportunity to vindicate the rule of law and uphold the affected parties' interests.

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162 At [20].

163 At [20].

164 At [20].

165 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [21].

166 *Reay v Attorney-General,* above n 37, at [39].

167 *Dunne v CanWest TVWorks Limited,* above n 59, at [22].

Notably, earlier in the judgment Jagose J raised that the decision in this case was one analogous to those of SOEs, citing *Mercury Energy*[168] and *Problem Gambling*.[169] It is beyond the scope of this paper to conduct a full analysis of the case on this basis, however, the Judge failed to address and give direction on what the governing question on publicness is when you have a formally private incorporated body that is also functionally a CCO similar to an SOE. It is unclear whether the approach in *Dunne*[170] and *Phipps,*[171] or the *Lab Tests/Problem Gambling*[172] and *Ririnui*[173] exception to *Mercury Energy*[174] should be followed. I would suggest that it is at least arguable that due to the underlying issue regarding free speech this case could be analogised with *Ririnui*[175] supporting a broader scope of review,[176] and/or that the nature of the interest here ought to be protected.[177] Perhaps Jagose J's unclear judgment demonstrates the struggle that the distinction between 'public' and 'private' is an unsound way to determine the application of judicial review.[178]

D Summary

Although Jagose J was correct in holding that RFAL's decisions were not excluded from the ambit of judicial review based on being a trustee of a charitable trust alone,[179] the conclusion that RFAL did not exercise a public power can be challenged. His Honour emphasises that RFAL's foundational documents help determine whether the Council has allocated any responsibility for achieving a public purpose,[180] but fails to consider

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168 *Mercury Energy Limited v Electricity Corporation of New Zealand Limited,* above n 85.

169 *Lab Tests Auckland Limited v Auckland District Health Board,* above n 87; and *Attorney-General v Problem Gambling Foundation of New Zealand,* above n 89.

170 *Dunne v CanWest TVWorks Limited*, above n 59.

171 *Royal Australasian College of Surgeons v Phipps,* above n 65.

172 *Lab Tests Auckland Limited v Auckland District Health Board,* above n 87, at [58]; *Attorney-General v Problem Gambling Foundation of New Zealand,* above n 89, at [42].

173 *Ririnui v Landcorp Farming Limited,* above n 7.

174 *Mercury Energy Limited v Electricity Corporation of New Zealand Limited,* above n 85.

175 *Ririnui v Landcorp Farming Limited,* above n 7, at [75].

176 At [75].

177 *Problem Gambling Foundation of New Zealand,* above n 89, at [42].

178 Elliott and Varuhas, *Administrative Law Text and Materials*, above n 56, at 146.

179 At 146.

180 James Meager "Judicial review of council-controlled organisations – can they or can't

relevant substance such as the engagement of public interests and public consequences. Even if the trust is to operate venues efficiently on the Councils behalf, why does deciding whether to hold and cancel events in a public forum fail to constitute as a public power? One could query whether the Council can contract out of public law obligations by shifting only its commercial functions to the trust, whilst retaining all policy functions itself. In addition, the Judge does not address the SOE avenue that was raised. Ultimately, due to the substance engaged in the granting and/or cancelling of licences for events to be held at the Centre, the decision by RFAL should have been seen as an exercise of a public power and subject to review.

IV Standing

Jagose J held that Mr Moncrief-Spittle and Mr Cumin lacked standing to bring the proceeding.[181] However, although Mr Moncrief-Spittle's claim may be stronger than Mr Cumin's, both applicants' appear to have met New Zealand's relaxed, generous, and liberal threshold towards standing.[182]

A Relaxed, Generous, and Liberal Approach

The New Zealand Supreme Court in *Ririnui*[183] held that because of judicial review's constitutional importance the courts have gradually taken a more relaxed attitude to standing.[184] Similarly in *Ye v Minister of Immigration,*[185] the CA held that New Zealand takes a generous approach to standing based on the constitutional principle that the courts should be prepared to ensure that public bodies comply with the law.[186] In *Great Christchurch Buildings Trust*[187] Chisholm J acknowledged that in contemporary New Zealand a 'liberal' approach to standing is adopted and that issues of genuine public

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they?", above n 15.

181 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [66].

182 *Ririnui v Landcorp Farming Limited,* above n 7, at [91]; *Murray v Whakatane District Council* [1999] 3 NZLR 276 at 307; *Ye v Minister of Immigration,* above n 7, at [322]; *Great Christchurch Buildings v Church Property Trustees,* above n 7, at [74]; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1225.

183 *Ririnui v Landcorp Farming Limited,* above n 7.

184 At [91]; see also Philip Joseph *Constitutional and Administrative Law*, above n 7, at 1225.

185 *Ye v Minister of Immigration,* above n 7.

186 At [322].

187 *Great Christchurch Buildings v Church Property Trustees,* above n 7.

concern can arise in a variety of situations.[188] Chisholm J added that without the intervention of the applicant, an issue about the lawfulness of the decision cannot be tested.[189]

In *Egan v Commissioner of Police*[190] Collins J accepted that the issues of standing in judicial review have moderated to the point where it is difficult to challenge the standing of an applicant.[191] Collins J cited the propositions from Tipping J in *O'Neill v Otago Area Health Board (O'Neill)*[192] where he affirmed that it will generally be necessary to examine the substantive issues before a decision on standing can be made.[193] Tipping J stated that the only circumstance where a plaintiff should be declined standing is where the defendant can show that the plaintiff lacks good faith or the complaint is clearly frivolous, vexatious, or otherwise untenable.[194] Importantly, Tipping J stated that citizens who are honestly concerned about the legality of activities in the public arena should not be easily shut out by the courts.[195] Taylor claims that the favoured formulation for standing in New Zealand is Tipping J's statement in *O'Neill*.[196] However, Taylor suggests that *O'Neill*[197] may have to be relied on only in cases where the simpler test stated in *Oggi Advertising Limited v Auckland City Council*[198] of whether a plaintiff is "affected beyond the norm" does not result in standing.[199]

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188 At [74].

189 At [79].

190 *Egan v Commissioner of Police* (2013) 10 NZELR 409.

191 At [37]; see also Peter Cane *Administrative Law* above n 77, at 288

192 At [37] see *O'Neill v Otago Area Health Board* HC, Dunedin, CP50/91 10 April 1992 per Tipping J.

193 At [37] see *O'Neill v Otago Area Health Board,* above n 192; see also *Murray v Whakatane District Council*, above n 182, at 307.

194 At [37] see *O'Neill v Otago Area Health Board,* above n 192.

195 At [37] see *O'Neill v Otago Area Health Board,* above n 192; see also *Murray v Whakatane District Council*, above n 182, at 307.

196 *O'Neill v Otago Area Health Board*, above n 192.

197 *O'Neill v Otago Area Health Board*, above n 192.

198 *Oggi Advertising Limited v Auckland City Council* [2005] NZAR 451 (HC).

199 At [12]; See GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74, at 207.

Similarly to Collins J, Joseph argues that it would be unusual for a court to deny a strong claim on the basis of lack of standing.[200] However, Cane discusses standing as a separate question from the substance of the claim and emphasises that determining whether someone is entitled to argue their claim based on whether their claim is a strong one is flawed.[201] Cane asserts that the outcome should only impact the question of standing if failure is certain.[202] This assumes that there is value in separating the issue of entitlement for review from the entitlement to a remedy.[203]

Joseph claims that the relaxation of the rules relating to standing[204] is based on the protection of individuals and the vindication of the rule of law.[205] The preservation of standards of administration and resolving of wrongs has to be balanced up against the public interest and ensuring citizens have access to judicial resources.[206]

Finnigan v New Zealand Rugby Football Union Incorporated[207] importantly established that standing to claim that an incorporated association who controls a sport has acted beyond its powers may be accorded to someone who is affected even if they are not a member or in a contractual relationship with the body.[208] The CA provides further support for the notion that all of the circumstances must be considered in order determine standing and outlined factors that carried weight in the case.[209] The relevant factors included that there was a chain of contracts, the decision concerned rugby which is a national sport, the national importance deemed the case similar to one with public law issues supporting a wider standing test, the decision was going to affect the New Zealand community, there was no reason to suppose that the plaintiffs' views were held only by a minority, there was no one better to bring the claim, and there was no way of knowing if

200 Philip Joseph *Constitutional and Administrative Law*, above n 7, at 1229.

201 Peter Cane *Administrative Law,* above n 77, at 284.

202 At 284.

203 At 284.

204 Philip Joseph *Constitutional and Administrative Law*, above n 7, at 1225.

205 Philip Joseph "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73 at 507.

206 At 507.

207 *Finnigan v New Zealand Rugby Football Union Incorporated* [1985] 2 NZLR 159 (CA).

208 At 177.

209 At 178-179.

the New Zealand Rugby Football Union acted within their powers without granting standing.[210] Joseph cites *Finnigan*[211] as an example of when the courts have granted interest groups standing on the basis of an important issue related to the community.[212]

Interestingly in *Jeffries v Attorney-General (Jeffries),*[213] Chambers J held that the issue of standing is complex and best left to a case where its resolution would affect the outcome.[214] Baragwanath J believed it was unnecessary to determine the issue of standing due to the failure of Mr Jeffrie's first part of appeal.[215] Baragwanath J acknowledged that standing can serve as a valuable tool to avoid unnecessary claims[216] and can restrict litigation where the plaintiff has no personal interest at stake and where there is a lack of public interest.[217] Equally, standing allows a party who may lack personal interest to pursue their claim if they can satisfy the ultimate test of whether leave is warranted by the public administration in serving justice and vindicating the rule of law.[218]

The position of standing in other jurisdictions tends to differ. In *AXA General Insurance Limited v H M Advocate*[219] the United Kingdom Supreme Court brought the standing rule broadly in line with the flexible English test of "sufficient interest".[220] Lord Reed in *Walton v Scottish Ministers*[221] held that there would be cases where an individual was granted standing "simply as a citizen",[222] reflecting an even more relaxed approach to

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210 At 178-179.

211 At 179.

212 Philip Joseph *Constitutional and Administrative Law*, above n 7, at 1231.

213 *Jeffries v Attorney-General* [2010] NZCA 38 at [33].

214 At [68-69].

215 At [70].

216 At [70].

217 At [70].

218 At [70] per Baragwanath J.

219 *AXA General Insurance Limited v H M Advocate* [2011] UKSC 46, [2012] 1 AC 868; See also Jason Varuhas "JUDICIAL REVIEW: STANDING AND REMEDIES" (2013) 72(2) CLJ 243 at 244.

220 At [62]; At 244.

221 *Walton v Scottish Ministers* [2012] UKSC 44, [2012] All ER (D).

222 At [94]; See also Jason Varuhas "JUDICIAL REVIEW: STANDING AND REMEDIES", above n 219, at 244.

standing than the New Zealand position. However, the United Kingdom Government Legal Department[223] maintains that to apply for judicial review the person must have a "sufficient interest" in the decision[224] and that a person is not entitled to challenge a decision that does not affect them personally.[225] In an Australian context, Justice Pritchard states that if the plaintiff can show a 'special interest' in the subject matter of the action[226] beyond that of any other member of the public they will have standing.[227]

Cane articulates that the purpose for which people believe standing has matters.[228] Standing has been viewed as a method to limit review or to protect bodies and courts from those with no real interest in the matter.[229] If judicial review aims to protect individuals, standing should require that the claimant have a special interest or be specially affected by the matter.[230] Conversely, if judicial review is seen as protecting groups and individuals, standing should only require that the claimant have some interest commonly shared by others.[231] If judicial review is about providing remedies against unlawful behaviour, the requirement of personal interest should be abolished.[232] When considering these comments in light of New Zealand's approach to standing,[233] the relaxed nature supports that judicial review aims to accommodate all of these purposes.

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223 Government Legal Department *The judge over your shoulder- a guide to good decision making* (5th ed, Government Legal Department, United Kingdom, 2018) at 19.

224 At 19; and Peter Cane *Administrative Law* above n 77, at 282.

225 At 19.

226 Janine Pritchard "Standing requirements in judicial review applications" (2017) 90 AIAL Forum 90 65 at 68.

227 At 68.

228 Peter Cane *Administrative Law* above n 77, at 295.

229 At 295.

230 At 295.

231 At 295.

232 At 295.

233 *Ririnui v Landcorp Farming Limited,* above n 7, at [91]; *Murray v Whakatane District Council*, above n 182, at 307; *Ye v Minister of Immigration,* above n 7, at [322]; and *Great Christchurch Buildings v Church Property Trustees,* above n 7, at [74]; *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1225.

B Summary

Although the position of standing in the context of judicial review differs across jurisdictions, the case law and literature manifests that New Zealand takes a relaxed, generous, and liberal approach.[234] This appears to be based on vindicating the rule of law and facilitating an opportunity for those who are concerned about activities in the public realm to use the court and judicial resources to challenge their decisions.[235]

V Application of Standing in Moncrief-Spittle

Jagose J firstly states that given judicial review's constitutional importance, New Zealand takes a generous and relaxed approach to standing that goes to the sufficiency of applicants' interest in the subject matter and is determined on the totality of the facts.[236] There is ample authority to support that it is necessary to examine the substantive issues before standing to enable all circumstances to be considered in the assessment.[237] If the applicants fail on the substantive grounds standing will be academic.[238] In this respect, Jagose J is correct in his approach of addressing standing last. However, the Judge's analysis shows that he fails to follow New Zealand's established approach, deeming his conclusion that neither applicants had standing subject to challenge.

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234 *Ririnui v Landcorp Farming Limited,* above n 7, at [91]; *Murray v Whakatane District Council*, above n 182, at 307; *Ye v Minister of Immigration,* above n 7, at [322]; and *Great Christchurch Buildings v Church Property Trustees,* above n 7, at [74]; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1225.

235 *Jeffries v Attorney-General,* above n 213, at [70] per Baragwanath J; Philip Joseph "Exploratory Questions in Administrative Law", above n 205, at 507; *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J; see also *Murray v Whakatane District Council*, above n 182, at 307.

236 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [62].

237 *Murray v Whakatane District Council*, above n 182, at 307; *Finnigan v New Zealand Rugby Football Union Incorporated,* above n 207, at 178-179; *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J; and see GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74, at 205.

238 *Murray v Whakatane District Council*, above n 182, at 307; *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192ui per Tipping J; see GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74, at 205; and *Finnigan v New Zealand Rugby Football Union Incorporated,* above n 207, at 178-179.

Jagose J states that an applicant may still have standing even if they lack a personal interest in the subject matter if "warranted by the public interest in the administration of justice and the vindication the rule of law".[239] This statement falls in line with the ultimate test for standing posed in *Jeffries*.[240] However, when applying this proposition to the case, it appears that both applicants had a personal interest at stake and that if not, the public interest warranted standing acting in conflict with Jagose J's decision.

Mr Cumin's interest is founded on the fact that he is a member of the Jewish community.[241] Mr Cumin expected that venues are to be made available without discrimination as to who uses them or the characteristics of their event despite threats of protest or violence arising out of this use.[242] Pursuing his claim based on an expectation that the Centre encourages the use of the venue free from discrimination can be understood as a personal interest and concern.

Mr Moncrief-Spittle's claim to standing is arguably more direct than Mr Cumin's. Mr Moncrief-Spittle paid to attend the event, and his affidavit emphasised the importance of being able to hear and engage with the speakers and the other attendees.[243] He found the cancellation "quite emotionally upsetting"[244] and as a consequence of the cancellation was stripped of this valued opportunity to attend the event.

It has been suggested that standing should only be declined in exceptional cases where the public interest opposes the exposure of the issue.[245] The Free Speech Coalition stated that their goals in relation to this case included preventing the "health and safety" claim from becoming a tool for "public bodies to abandon their duties in protecting freedom of speech and association", and to encourage a precedent for "courts to use to criticise public

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239 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [61].

240 *Jeffries v Attorney-General*, above n 213, at [70] per Baragwanath J.

241 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [63].

242 At [63]; and Nikki Preston "High Court rules Auckland Council within rights to cancel Lauren Southern, Stefan Molyneux event", above n 10.

243 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [63].

244 At [63].

245 Philip Joseph *Constitutional and Administrative Law,* above n 7, 1229.

bodies who abuse their powers".[246] Aside from the risk of protest, this example from the Free Speech Coalition demonstrates that not only is there an absence of opposing public interest, but because of the underlying issue of free speech the public interest is in favour of RFAL's decision being subject to challenge. RFAL should encourage and support that priced events and engagements at the Centre continue to run without discrimination. By failing to consider the public interests engaged as a result of the cancellation, Jagose J erred in executing the balancing act of weighing up the preservation of standards of administration and resolving of wrongs against the public interest and availability to judicial resources.[247] The cancellation of the event at a public forum presents an issue similar to public law issues where the New Zealand community may be to some extent affected supporting a wider standing test.[248] Importantly, both applicants' interests are claimed to represent the same interests as likeminded people whose rights to freedoms are proposed to have been rejected due to RFAL's cancellation of the event.[249] Standing should therefore have been warranted by the public interest in the administration of justice to vindicate the rule of law and protect affected parties' rights.[250]

Jagose J states that standing is most important in the exercise of discretion to grant relief but admits that it plays an important role in preventing inappropriate interruption in the affairs of those decisions susceptible to review.[251] The notion that standing can serve as a valuable tool in avoiding unnecessary claims by those who have no real interest in the matter is well established.[252] However, citizens who show an interest in a public issue and are concerned about the legality of activities in the public arena should not be easily shut out by the courts.[253] In only narrow circumstances should a plaintiff be declined

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246 Jordan Williams "From the free speech coalition" (1 September 2019) Waikanae Watch- issues of relevance to Waikanae people <https://waikanaewatch.org>.

247 Philip Joseph "Exploratory Questions in Administrative Law", above n 205, at 507.

248 *Finnigan v New Zealand Football Rugby Union Incorporated,* above n 207, at 178-179.

249 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [63].

250 Philip Joseph *Constitutional and Administrative Law*, above n 7, at 1227.

251 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [62].

252 *Jeffries v Attorney-General,* above n 213, at [70] per Baragwanath J; and Philip Joseph "Exploratory Questions in Administrative Law", above n 205, at 507.

253 *Murray v Whakatane District Council*, above n 182, at 307; and *Egan v Commissioner of Police,* above n 190, at [37] see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J.

standing, for instance where the defendant can show that the plaintiff lacks good faith or the complaint is clearly frivolous, vexatious, or otherwise untenable.[254] The Judge states that the applicants have legitimate interests genuinely held by them.[255] This statement alone supports that both applicants satisfy the threshold.[256] Although the consequences are more direct for Mr Moncrief-Spittle, Mr Cumin equally has an honest interest and is clearly concerned with the cancellation and its consequences. Neither applicants demonstrate a lack of good faith nor do their complaints seem untenable.

Notwithstanding the statement that the applicants have genuine legitimate interests, Jagose J proceeds to say that the applicants' interests are not the subject matter for review.[257] The Judge states that the matter for review is RFAL's decision to cancel the event and that the values that the applicants propose do not improve their standing to challenge this.[258] His Honour claims that Mr Moncrief-Spittle's interest is contractual only and that Mr Cumin's is in the policymaking of the Council which is an issue for participative democracy,[259] concluding that neither has standing to bring the proceeding.[260]

Jagose J fails to reason why Mr Moncrief-Spittle's interest being contractual and Mr Cumin's being related to participative democracy does not support their claim to standing.[261] Mr Moncrief-Spittle's readiness to hear and engage with the speakers and the other attendees can be reasonably interpreted as more than a mere contractual interest. Nevertheless, standing can be accorded to someone affected even if they are not a member or in a contractual relationship with the body.[262] This proposition not only strengthens

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254 *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J.

255 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [64].

256 *Murray v Whakatane District Council*, above n 182, at 307; and *Egan v Commissioner of Police,* above n 190, at [37], see *O'Neill v Otago Area Health Board,* above n 192 per Tipping J.

257 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [64-65].

258 At [65].

259 At [66].

260 At [66].

261 At [66].

262 *Finnigan v New Zealand Football Rugby Union Incorporated,* above n 207, at 177.

Mr Moncrief-Spittle's claim by virtue of his contract to attend the event in return for payment, but also asserts that Mr Cumin's claim to standing is not ruled out.

A factor in favour of Jagose J's conclusion may be that it should have been Axiomatic or the speakers to bring the proceeding.[263] However, the speakers did not seem willing to bring the claim. This narrows the question down to whether it is about if particular people can bring a claim, or whether they are willing to bring a claim.

Moreover, it has been suggested that standing is unlikely to be rejected in the presence of a strong claim[264] and that standing ought not to be rejected unless it is certain that the applicants' claim will not succeed.[265] Similarly to the opinion of Chambers and Baragawnath JJ in *Jeffries,*[266] perhaps because Jagose J decided that RFAL did not exercise a public function the decision that the applicants lacked standing is acceptable as it was not going to impact the outcome. However, Cane proposes a competing view that standing should not depend on the strength of the claim[267] and that there is value in separating standing from entitlement to a remedy.[268] I find this approach convincing. Allowing the strength of the claim to influence the analysis of a separate legal question is untenable particularly when considering the purpose of judicial review in vindicating the rule of law and protecting affected individuals' interests.[269] If Jagose J relied on the fact that RFAL did not exercise a public power in coming to his conclusion, this raises the possibility that he failed to undertake a proper analysis deeming the decision flawed. In any event, based on my above publicness analysis it does not appear certain that the applicants' claim would be unsuccessful.

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263 At 178-179.

264 Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1229.

265 GDS Taylor *Judicial Review A New Zealand Perspective,* above n 74, at 205; Peter Cane *Administrative Law,* above n 77, at 284.

266 At [68-70].

267 Peter Cane *Administrative Law,* above n 77, at 284.

268 At 284.

269 *Jeffries v Attorney-General,* above n 213, at [70] per Baragwanath J; and Philip Joseph "Exploratory Questions in Administrative Law", above n 205, at 507.

When considering all of the circumstances and adhering to New Zealand's established approach, standing should have been granted otherwise the lawfulness of RFAL's decisions are left unaddressed.[270] Perhaps Mr Moncrief-Spittle and Mr Cumin should have been granted standing "simply as a citizen".[271]

C Summary

In light of New Zealand's relaxed, generous and liberal approach to standing,[272] Jagose J's conclusion that the applicants did not have standing is questionable. The statement that the applicants had "legitimate interests genuinely held by them"[273] is directly contrary to the decision reached. Additionally, the authority and evidence supports that although Mr Moncrief-Spittle's claim is stronger and more direct than Mr Cumin's, both applicants' claims appear to have met the threshold and are nothing but reinforced by the underlying issue of facilitating free speech.

VI Overall Conclusion

Although there are aspects of *Moncrief-Spittle*[274] that are sound, this paper argues that a significant part of the judgment can be brought into question. The publicness analysis is unclear, disregards an important argument raised and is based on a formalistic approach that focuses on the source and the distinction between RFAL and the Council rather than substance such as the engagement of public interests and consequences engaged in RFAL's decisions. In regards to standing, the case law and literature establishes that New Zealand takes a relaxed, liberal and generous approach.[275] The evidence supports that

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270 *Great Christchurch Buildings Trust v Church Property Trustees* above n 7, at [79]; and *Finnigan v New Zealand Football Rugby Union Incorporated,* above n 207, at 179.

271 Jason Varuhas, "JUDICIAL REVIEW: STANDING AND REMEDIES", above n 219, at 244; See also *Walton v Scottish Ministers,* above n 221, at [94].

272 *Ririnui v Landcorp Farming Limited,* above n 7, at [91]; *Murray v Whakatane District Council*, above n 182, at 307; *Ye v Minister of Immigration,* above n 7, at [322]; *Great Christchurch Buildings v Church Property Trustees,* above n 6, at [74]; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1225.

273 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1, at [64].

274 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1.

275 *Ririnui v Landcorp Farming Limited,* above n 7, at [91]; *Murray v Whakatane District Council,* above n 182, at 307; *Ye v Minister of Immigration,* above n 7, at [322]; *Great*

both applicants had viable genuine concerns in the matter and that the public interest and consequences involved supported a wider standing test, acting in conflict with the conclusion reached by the Judge. This paper advocates that there is more to *Moncrief-Spittle*[276] than what was held and that the conclusions and the analysis undertaken, including the inadequate consideration of free speech, is an insufficient reflection of how publicness and standing should be dealt with in this circumstance within the context of judicial review in New Zealand.

Christchurch Buildings v Church Property Trustees, above n 6, at [74]; and Philip Joseph *Constitutional and Administrative Law,* above n 7, at 1225.

276 *Moncrief-Spittle v Regional Facilities Auckland Limited,* above n 1.

VII Word Count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 8,115 words.

VIII Bibliography

A Legislation

Local Government Act 2002.

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

B Cases

1 New Zealand

Attorney-General v Problem Gambling Foundation of New Zealand [2017] 2 NZLR.

Dunne v CanWest TVWorks Limited [2005] NZAR 577 (HC).

Egan v Commissioner of Police [2013] NZHC 550.

Finnigan v New Zealand Rugby Football Union Incorporated [1985] 2 NZLR 159 (CA).

Great Christchurch Buildings Trust v Church Property Trustees [2012] NZHC 3045.

Hopper v North Shore Aero Club Incorporated [2007] NZAR 354 (CA).

Jeffries v Attorney-General [2010] NZCA 38.

Lab Tests Auckland Limited v Auckland District Health Board [2009] 1 NZLR 776 (CA).

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

Middeldorp v Avondale Jockey Club Incorporated [2020] NZCA 13.

Moncrief- Spittle v Regional Facilities Auckland Limited [2019] NZHC 2399.

Murray v Whakatane District Council [1999] 3 NZLR 276.

Oggi Advertising Limited v Auckland City Council [2005] NZAR 451 (HC).

O'Neill v Otago Area Health Board HC, Dunedin, CP50/91 10 April 1992.

Reay v Attorney-General [2019] NZCA 475.

Ririnui v Landcorp Farming Limited [2016] NZSC 62.

Royal Australasian College of Surgeons v Phipps [1999] 3 NZLR 1 (CA).

Stratford Racing Club Incorporated v Adlam [2008] NZAR 329 (CA).

Wilson v White [2005]1 NZLR 189.

Ye v Minister of Immigration [2008] NZCA 291.

2 United Kingdom

AXA General Insurance Limited v H M Advocate [2011] UKSC 46, [2012] 1 AC 868.

R v Criminal Injuries Compensation Board, ex p Lain [1967] 2 QB 864.

R v Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815.

Walton v Scottish Ministers [2012] UKSC 44, [2012] All ER (D).

C Articles

1 New Zealand

Dean Knight "Privately Public" (2013) 24 PLR 108.

Jason Varuhas "JUDICIAL REVIEW: STANDING AND REMEDIES" (2013) 72(2) CLJ 243.

2 Australia

Janine Pritchard "Standing requirements in judicial review applications" (2017) 90 AIAL Forum 90 65.

3 United Kingdom

Kevin Costello "The "public element" test for amenability to judicial review: R. (On the application of Holmcroft Properties Ltd) v KPMG LLP" [2020] P.L.

Marcello Rodriguez-Ferrere, "Judicial Review of Charitable Trusts" [2013] NZLJ 107.

Philip Joseph "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73.

D Textbooks

1 New Zealand

GDS Taylor *Judicial Review A New Zealand Perspective* (3rd ed, LexisNexis New Zealand Limited, Wellington, 2014).

Philip Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014).

2 United Kingdom

Government Legal Department *The judge over your shoulder- a guide to good decision making* (5th ed, Government Legal Department, London, 2018).

Mark Elliott and Jason Varuhas *Administrative Law Text and Materials*, (5th ed, Oxford University Press, 2017).

Peter Cane *Administrative Law* (5th ed, Oxford University Press, 2011).

E Online Sources

James Meager "Judicial review of council-controlled organisations – can they or can't they?" (2 October 2019) Simpson Grierson <www.simpsongrierson.com>.

Jordan Williams "From the free speech coalition" (1 September 2019) Waikanae

Watch- issues of relevance to Waikanae people < www.waikanaewatch.org>.

Nikki Preston "High Court rules Auckland Council within rights to cancel Lauren Southern, Stefan Molyneux event" (30 September 2019) NZ Herald <www.nzherald.co.nz >.