

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURĀU ROHE**

**CIV-2020-404-1765
[2020] NZHC 2574**

UNDER	Part 30 of the High Court Rules 2016 and the Judicial Review Procedure Act 2016
BETWEEN	JAMI-LEE MATENGA ROSS and WILLIAM DESMOND TE KAHIKA First Applicants
AND	THE ADVANCE NEW ZEALAND PARTY Second Applicant
AND	MEDIAWORKS HOLDINGS LIMITED Respondent

Hearing: 30 September 2020

Appearances: HMZ Lanham, JK Grimmer and Y Wen for Applicants
JWJ Graham and TF Cleary for Respondent

Judgment: 1 October 2020

JUDGMENT OF WALKER J

*This judgment was delivered by me on 1 October 2020 at 12 midday
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Introduction

[1] In three of the last five general elections in New Zealand, a minor or small party has challenged its exclusion from a televised leaders' debate in the lead up to the Election. This Election to be held on 17 October 2020 is no different.

[2] Jami-Lee Matenga Ross is an Independent Member of Parliament. Together with Billy Te Kahika, he co-leads The Advance New Zealand Party (Advance NZ). Advance NZ is a new political party.

[3] Advance NZ, Mr Ross and Mr Te Kahika challenge a decision by the broadcasting arm of MediaWorks not to invite them to the Newshub Nation "Powerbrokers Debate" (the Debate).

[4] Newshub Nation is an in-depth news and current affairs show broadcast weekly by MediaWorks on Saturday mornings with repeat broadcasts on Sunday mornings and Monday evenings and also available on a digital platform.¹ Newshub Nation intends to pre-record the Debate at 7.00 pm tonight and broadcast it on 3 October 2020 on TV3 and its other platforms.

[5] The substantive challenge filed on 29 September 2020 is by way of a judicial review proceeding. The applicants seek a declaration that the decision not to invite Advance NZ to the Debate is unlawful and/or unreasonable. The applicants also seek an order quashing the decision and costs.

[6] Materially for present purposes, the applicants seek an urgent interim order restraining MediaWorks from staging and then broadcasting any Debate which excludes a co-leader of Advance NZ. The basis for interim relief is said to be the serious harm which will be suffered, and which cannot be adequately addressed by relief granted after the Debate has taken place.²

¹ The scheduled broadcast times are 9.30 am Saturday, 10.00 am Sunday and 11.00 pm Monday. I use the term broadcast in a broad sense without distinguishing between streaming and broadcast platforms.

² The applicants rely on s15 of the Judicial Review Procedure Act 2016, r.7.53 of the High Court Rules 2016 and the Court's inherent jurisdiction.

[7] With the proposed Debate recording just over 24 hours away from the hearing the application was heard on a “Pickwick” basis.³

Background

[8] Advance NZ was established in March 2020 to contest the 2020 election. In August 2020, several smaller parties became component parties of Advance NZ, including the New Zealand Public Party, which was led by Mr Te Kahika, Reset New Zealand Party, the New Zealand People’s Party and Direct Democracy NZ.⁴ Advance NZ, in this form, was registered as a political party on 6 August 2020.

[9] Mr Ross is currently a Member of Parliament for the Botany Electorate, having first been elected as an MP for Botany in a by-election in March 2011. He is not standing in the Botany Electorate at this election. At that time of his first election he was a member of the National Party, and he was re-elected in the November 2011, 2014 and 2017 elections. He left the National Party in October 2018 and has continued to sit as an Independent MP.

[10] MediaWorks is a free-to-air television and radio broadcaster, and an interactive media content provider in New Zealand. Included within its stable of media programming is “Newshub Nation”.

[11] Newshub Nation’s Debate is promoted as the “Newshub Nation Powerbrokers Debate”. It is to be filmed in front of a live audience comprising political commentators and political scientists. The executive producer of Newshub Nation, Hannah Brown, has deposed that the Debate is to focus on the parties who may be “key to the balance of power and deciding the next government” and “leaders who are most likely to influence the formation of the next government”. She states that the Debate is not and has not been styled as a minor parties’ debate.

[12] The Newshub Nation team developed criteria for which parties to approach in collaboration with in-house counsel. At the time of formulation, Advance NZ did not

³ The application is styled as a without notice application but notified to MediaWorks to enable it to respond in brief.

⁴ Advance NZ was registered as a political party on 6 August 2020.

exist. The criterion selected is described in evidence as an update of criteria used without challenge in the 2017 election, itself updated from 2014 following a legal challenge. The criterion adopted is:

Parties that have won a list or electorate seat within the last two Parliamentary terms.

[13] A senior producer of Newshub Nation reached out to the leaders of ACT, New Zealand First, the Greens and the Māori Party in early July 2020 to gauge interest. The pitch to those parties was a one-hour debate featuring leaders who might be “King or Queen-makers come September”. The promotional material provided by the Newshub Nation team to the MediaWorks publicity team repeated this descriptor. It specifically referenced the qualification criterion as “leaders whose parties have won seats in Parliament over the past two terms, and who could be King-or-Queen makers come September”.⁵

[14] Neither Mr Ross nor Mr Te Kahika received an invitation to participate in the Debate. I understand that the leaders of four parties are now scheduled to participate:

- (a) Marama Davidson, on behalf the Green Party;
- (b) David Seymour, on behalf of the ACT party;
- (c) John Tamihere, representing the Māori Party;
- (d) Winston Peters representing New Zealand First.

[15] On 24 September, Mr Ross contacted Ms Brown. This was some weeks after he learned that Advance NZ was not included in the Debate. Ms Brown advised him that Advance NZ and its leadership did not meet the Debate criterion which she provided to him on request.⁶ Mr Ross asked Ms Brown to reconsider. She declined to

⁵ There is no evidence of generated publicity on this basis. On the contrary, a Newshub online NZ election 2020 timeline entry for October 3 states “Newshub Nation presents Powerbrokers, a multi-party leaders’ debate...” September was the original date of the Election.

⁶ It appears that Ms Brown misstated the criterion as she advised that it was leadership of Parties that have won seats in the last two Parliamentary terms however nothing turns on this.

do so. There was a further request to reconsider a few days later which was again declined.

The respective arguments

[16] In the light of the urgency surrounding this application, I do not intend to canvas all of counsels' careful submissions. My focus in this judgment is on the primary arguments.

[17] Ms Lanham for the applicants argues that both the interpretation of the criterion, and the criterion itself, is unreasonable and arbitrary, although the former was only lightly touched on in oral argument. I apprehend there are really five related principal contentions.

[18] First, on a reading which most likely avoids an arbitrary result, Advance NZ should have been invited as Mr Ross has won a seat in one of the last two Parliaments and is co-leader of a party contesting the Election. (In fact, Mr Ross has been elected to Parliament four times, such that his profile is said to be a spring-board for the party's profile). This interpretation reasonably allows for consideration of events since the last election by permitting new parties and better reflects that minor parties are traditionally formed by Members of Parliament splitting from other parties. It is also an approach which is more consistent with Television New Zealand's approach to a minor party debate it is holding which does include Advance NZ.

[19] Second, a single criterion is inherently arbitrary. Ms Lanham draws on *Dunne v Canwest TVWorks Ltd*⁷ and *Craig v MediaWorks*⁸ to support this proposition.

[20] Third, Ms Lanham submits that there is no rational connection between the stated purpose of the debate and its selection criterion. If the Debate is intended to be a "Powerbrokers debate", pitting leaders of minor parties who might play a determinative role in forming a coalition against each other, there is a "real chance" Advance NZ might be a powerbroker. Reliance on historic metrics is arbitrary and

⁷ *Dunne v Canwest TVWorks Ltd* [2005] NZAR 577.

⁸ *Craig v MediaWorks Ltd* [2014] NZAR 973.

unreasonable whereas other metrics, such as Advance NZ's growing social media presence, should be a factor.

[21] Fourth, the criterion discriminates against new political parties by failing to take into account events since the last election. The consequence is that no new party, regardless of popularity, would ever be included. The discrimination argument is illustrated by the inclusion of New Zealand First despite the fact that it is polling at 1% - the equivalent level to Advance NZ. Similarly, the Māori party presently has no MPs in Parliament nor any current candidates who held positions in the 51st Parliament between 2014 and 2017.⁹

[22] Fifth, there are deleterious consequences for the MMP system, if this criterion is adopted. It means a narrower range of political views and policies will be presented to the public, with consequent diminution of diversity in Parliament.¹⁰

[23] Mr Ross has filed an affidavit. He confirms that Advance NZ is fielding 62 candidates in the 2020 general election, of which six are list candidates only. Mr Te Kahika is number one on the Advance NZ list. Mr Ross is number two on the List, and the first list-only candidate. Mr Te Kahika has put himself forward as a candidate for election in the Māori Electorate of Te Tai Tokerau. He is also standing as an Electorate candidate for the New Zealand Public Party, a component party of Advance NZ.¹¹

[24] Mr Ross' evidence refers to a number of poll results as follows:

- (a) The 1 News Colmar Brunton Poll for 23-27 September 2020 published on 28 September 2020 reporting that Advance NZ is polling at 1% of the party vote (rounded up to a whole number);

⁹ The Māori Party is polling the same as Advance NZ in the most recent 1 News Colmar Brunton poll, or 0.1% higher in the previous 1 News Colmar Brunton poll. The Newshub Reid Research poll places the Māori Party around 0.5% higher, but with a margin of error higher than the total percent of votes for the Māori and Advance NZ parties.

¹⁰ Affirmation of Professor Robinson at [30] and [33].

¹¹ Mr Ross deposes that a component party candidate winning an electorate enables the parent Party – Advance NZ – to meet the one seat threshold as if that candidate was standing in the name of the parent Party.

- (b) The 1 News Colmar Brunton Poll for 17-21 September 2020 published on 22 September 2020 reporting that Advance NZ is polling at 0.8% of the party vote;
- (c) The main results of the Newshub-Reid Research Poll conducted over 16-23 September 2020 released on 27 September do not refer to Advance NZ as no results for parties polling under 0.9% are published.

[25] There is also an affidavit in support from Professor Claire Robinson. Professor Robinson's primary areas of expertise include the communication of political leadership, media bias and New Zealand election campaigning.¹²

[26] Professor Robinson's evidence speaks at a high level to the importance of televised leaders' debates which she says serves many purposes in election campaigns, providing the opportunity for voters to be exposed to a range of leaders, and to listen, observe and compare arguments for rational, informed voting choices. She stresses the very high audience numbers historically for televised debates, which she maintains has not decreased despite growth of social media. Professor Robinson opines that televised debates are of particular assistance to late decision voters. She cites the example of United Future MP, Peter Dunne, whose presence in an election debate in 2002 saw a significant increase to his party poll results from 0.4% pre-debate to 6.9% at the time of the Election.

[27] Professor Robinson also describes the barriers for minor parties, which are heavily reliant on free media coverage because of limitations to their access to public funds for election advertising. She describes what she characterises as "a cycle of cumulative inequality", where minor parties have few opportunities to get their voice and vision out to the people. Thus, they remain starved of the media oxygen they need to reach the popularity levels which persuade broadcasters they are worthy of inclusion in debates. In Professor Robinson's opinion, broadcasters are in a special position to

¹² Professor Robinson is the author of *Promises Promises: 80 years of wooing New Zealand voters* (Massey University Press, Auckland, 2019) which looks at political advertising, and a frequent commentator on New Zealand politics. As an independent expert Professor Robinson has confirmed in her affidavit that she has read the Code of Conduct for Expert Witnesses contained in Schedule 4 of the High Court Rules 2016 and agrees to abide by it. Her independence is not challenged.

assist voters in making their voting decision. Any decision to exclude parties who have a serious chance of getting elected risks harming both voters and democracy.

MediaWorks' position

[28] MediaWorks opposes the application. It accepts that its decision not to invite Advance NZ is judicially reviewable. This is a responsible concession. Although the applicants have no legally enforceable private right to participate in the Debate, MediaWorks is clearly performing a public function in this particular context, with important consequences relevant to the functioning of New Zealand's democracy.¹³

[29] The main plank of Mr Graham's submission is that the threshold for interim relief is not satisfied on the evidence. He contends that there is a rational basis for MediaWorks' qualification criterion when regard is had to the stated purpose of the Debate. He stresses that the Debate is not intended to be a minor parties' debate, but rather focuses only on potential powerbrokers – the so-called 'King and Queen-makers' at the Election. Those are the parties who could realistically form a government with the major parties. For that reason, it is reasonable to focus on parties who have a track record of being in Parliament and are therefore likely candidates for forming a coalition.

[30] Further, while Mr Graham concedes that Advance NZ will suffer some disadvantage as a result of not being able to participate in the Debate, the disadvantage does not reach the level of serious harm. Chiefly, this is because Advance NZ is participating in other televised debates, such as the TVNZ debate on 8 October which is expected to have a far wider audience-reach because it is scheduled in primetime. It is also evidently reaching a large number of people over its social media platforms and has appeared on MediaWorks platforms many times in the last few weeks.

¹³ *Morgan v TVNZ* [2017] NZHC 2178 at [32]-[34]; *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) at [34].

Analysis

[31] It is common ground between the parties that the threshold test is whether there is a *prima facie* case rather than the lesser threshold of “serious question to be tried”. This is because any interim relief will be dispositive of the case.

[32] The first issue is whether there is a *prima facie* case that MediaWorks’ criterion is unreasonable, and arbitrary or irrational (or its application is so). If this threshold is met, the next issue is where the balance of convenience and overall justice lie. The balance of convenience is a descriptor for weighing the respective harm to the parties by making or declining the orders sought.

[33] To grant interim relief, I must also be satisfied that the order sought is reasonably necessary to preserve the position of the applicants. If it is reasonably necessary, then the Court has a wide discretion to consider all the circumstances, including the apparent strength or weaknesses of the claim for review, and/or the repercussions, both public and private, of granting interim relief.¹⁴

Is there a *prima facie* case that MediaWorks’ decision is unreasonable and/or arbitrary?

[34] I reject the submission that MediaWorks has arbitrarily interpreted and misapplied its own criterion. The criterion cannot be understood to include Mr Ross simply because he is a sitting MP, though not elected as a representative of Advance NZ. The proposition that the Court should adopt an interpretation to achieve a particular result has an air of unreality. The interpretation proposed by Ms Lanham ignores any reference to *parties* that have won seats. It reframes the criterion as “leaders that have won seats in the last two Parliamentary terms”. In short, Ms Lanham asks the Court to interpret the criterion as having an “either or” qualification. This interpretation is not readily available on the wording. More materially, such a strained interpretation is inconsistent with the qualification intended by MediaWorks.

[35] The weightier issue is whether the criterion is unreasonable and arbitrary. In response to a question from the Court, Ms Lanham submitted that the concepts of

¹⁴ *Minister of Fisheries v Antons Trawling Co. Limited* [2007] NZSC 101 at [8]. (footnote omitted).

unreasonableness and arbitrariness are inextricably linked. An arbitrary criterion, or one that leads to an arbitrary result, cannot be reasonable. Relying on the statements in *Dunne* and *Craig* that the inclusion of a sole criterion is a clear and persuasive indicator of unreasonableness and arbitrariness, Ms Lanham submits that use of a single criterion is inherently arbitrary. In *Craig*, Gilbert J held that “it is at least arguable that the decision cannot be made solely by considering whether a particular party was successful in gaining one or more seats in the last election”.¹⁵ And in *Dunne*, Ronald Young J considered that “it is clearly established that a single poll with small percentages and high levels of error provides little or no guidance on actual relative electoral support....a selection process might of course be based on a number or a variety of criteria”.¹⁶

[36] The crux of the contest is whether the criterion selected by MediaWorks has a rational basis. Or, to put it another way, whether there is a rational connection to the purpose of the Debate. The cited authorities do not, in my view, lay down a fixed standard that a single criterion will always be arbitrary or unreasonable. Rather, the factual context is critical to the analysis, and each case must be determined on its own facts.¹⁷

[37] In *Dunne*, the issue was that TV3 made its decision of who to include in a minor parties’ debate based on a single poll result.¹⁸ The Court stated that use of a “single poll with small percentages and high levels of error provides little or no guidance on actual relative electoral support.”¹⁹

[38] In *Craig*, the issue was that MediaWorks based its decision solely off whether parties gained a seat in Parliament in the last election.²⁰ While that is similar to the criterion MediaWorks has used for this Debate, there are important differences. It was a minor parties’ debate. The Conservative Party was polling higher than four of the invited parties at the relevant time. It was polling near the crucial 5 per cent threshold.

¹⁵ *Craig v Mediaworks Ltd* [2014] NZHC 1875 at [8].

¹⁶ *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 at [44]-[45].

¹⁷ *Morgan v Television New Zealand* [2017] NZHC 2178 at [62]; *Alp v Television New Zealand Ltd* HC Auckland CIV-2011-404-3586, 17 June 2011 at [33].

¹⁸ *Dunne and Anderton v CanWest TV Works Limited* [2005] NZAR 577.

¹⁹ At [44].

²⁰ *Craig v Mediaworks Ltd* [2014] NZAR 973 (HC).

One of the invited parties did not have a sitting MP and consequently there was no rational basis to invite that party to a minor party debate and not the Conservative Party.

[39] The purpose of the Debate informs the rational basis of the selection criterion. This makes the context different to the trilogy of cases relied on, where the debates were staged more broadly as minor party debates. The example cited by Mr Graham is that of a debate between the Prime Minister and Leader of the Opposition. That would necessarily exclude other leaders because the purpose is to compare and contrast the major parties. Similarly, this Debate has a fairly narrow compass. The focus is on potential powerbrokers who may become coalition partners to form a government.

[40] Ms Lanham submits that if the Debate intended to focus on powerbrokers, a much better criterion would have been who is likely to win a seat. She contended that this better aligns with the purpose of the Debate. On this criterion, she contends that Advance NZ should be allowed to participate as there is a real prospect Mr Te Kahika will win the Te Tai Tokerau Māori seat. The problem with this submission is two-fold: there is insufficient evidence presented to the Court to support the proposition, and it overlooks the second element - the role of Queenmaker. Winning a seat (or seats, by virtue of the coat-tailing provisions) does not necessarily translate to Queen-making potential.

[41] There is no polling in the Te Tai Tokerau electorate. I am told that electorate polling is not common because polling is expensive. Instead, Ms Lanham relied on what she describes as other indicators of popularity, such as Advance NZ's social media presence, to argue that Advance NZ had a "real chance" of winning Te Tai Tokerau. She pointed to the fact they have 43,000 likes on their Facebook page and have popular video content, some of which has been viewed over 256,000 times. She also relies on the fact Mr Te Kahika received 0.2 per cent in a nation-wide leader preferability poll.²¹

²¹ 1 News Colmar Brunton Poll "Preferred Prime Minister" in the period 17-21 September 2020. Cf 0.7% for the period 25-29 July 2020.

[42] Reliance on social media “popularity” is a blunt approach. First, the number of followers Advance NZ has on its social media accounts will not necessarily correlate with voters or votes. Second, it is impossible to ascertain whether those who engage with Advance NZ’s social media accounts are eligible, New Zealand-based voters. Third, social media may be susceptible to manipulation. It is therefore a poor gauge of electoral chances. Fourth, Ms Lanham is relying on social media statistics to argue that Mr Te Kahika has a good chance of winning a specific electorate seat. There is no evidence that people from his electorate are engaging with Advance NZ’s online content. Mr Graham referred to the current MP for Te Tai Tokerau, Kelvin Davis, winning by more than 20 per cent of the vote in the last election cycle to indicate the challenge facing Mr Te Kahika if he wishes to unseat the incumbent MP.

[43] Most telling is the fact that Mr Ross’ own evidence is that the ACT party have only 21,000 followers on Facebook compared to Advance NZ’s 43,000 followers, yet ACT is polling at around 6-8% compared to Advance NZ’s 1%. This suggests that social media popularity does not necessarily correlate even with polling success.

[44] The only objective evidence before the Court of Advance NZ’s electoral prospects are poll results. A One News Colmar Poll in the period 23–27 September 2020 reports that Advance NZ is polling at 1% of the party vote (with full, unrounded results not in evidence as they were not available). An earlier One News Colmar Brunton Poll for the period 17–21 September 2020 (and published on 22 September 2020) is also annexed to his affidavit. In that poll, Advance NZ received 0.8% of the party vote. And On 27 September 2020, the Newshub-Reid Research poll results were released. The poll covered the period between 16–23 September 2020. There is no reference in that poll to Advance NZ.

[45] While I accept that Advance NZ is not polling significantly differently from the Māori Party, which is included in the Debate, there are distinguishing features between Advance NZ and the Māori Party. Namely, the Māori Party is competitive in a number of Māori electorate seats and has a history of competing in and winning those seats. Further, the Māori Party has a history in Government, with previous members acting as Ministers in both Labour-led and National-led governments. They have some ‘form’ as coalition partners.

[46] Further, in my view, the performance of a party in the last two elections is rationally connected to the narrower compass of this debate: whether or not a minor party is likely to be a powerbroker in the 2020 election. It is an objective and public metric. At least, the plaintiff has not satisfied me that they are “not” connected, nor that the criterion is arbitrary. Past performance is one indicator of a party’s support level, and of how likely they are to be a key player in the formation of a coalition. Materially, all of the parties who will be participating in the Debate have been a ‘powerbroker’ in previous elections.

[47] Based on the necessarily limited evidence before the Court, I am satisfied that the criterion applied by MediaWorks for the Debate is neither unreasonable nor arbitrary. A line needs to be drawn somewhere; Ms Lanham rightly concedes there must be some basis for selection. After all, there are 17 parties contesting the 2020 New Zealand election and resources, including available broadcasting time, are limited. As Professor Robinson puts it, ultimately the issue is about where to draw the line in terms of small parties’ participation.

[48] I add by way of observation that the onus is not on the media to justify its selection criteria, but rather on the applicants to persuade the Court that there is a prima facie argument that there is no rational connection between the purpose of the Debate and selection criterion. Nor is the essential question whether other criteria might better serve the public interest in the democratic process. That is not the point of this judicial exercise. Courts will not lightly interfere with editorial decisions of media because an independent media, divorced from political influence, is critically important for a functioning democracy.

[49] Freedom of the media is an important adjunct of the rights affirmed in s14 of the New Zealand Bill of Rights Act 1990. Media have editorial discretion to choose how to run their debates, just as they have a “constitutional right” to determine what is newsworthy, “without having newsworthiness dictated to them by a court”.²²

[50] Of course, there are concomitant responsibilities. There must be reasonable limits to media freedoms where countervailing public interest considerations are at

²² *Alp v Television New Zealand Ltd* HC Auckland CIV-2011-404-3586, 17 June 2011 at [37]-[38].

stake. There are also statutory obligations. By way of example, s 4 of the Broadcasting Act 1989 requires broadcasters to ensure reasonable opportunities are given to present significant points of view. Materially, that section refers to presentation of significant points of view *either* in the same programme or in other programmes within the period of current interest.

[51] As Venning J noted in *Morgan*, “the Court is reluctant to effectively direct how a television programme is to be presented”.²³ The Court only interferes where the criteria used is clearly arbitrary and unreasonable, as was the case in *Dunne* and *Craig*.

[52] In conclusion, in the particular circumstances of this case, I am not satisfied that there is a prima facie case that MediaWorks’ selection criterion is unreasonable or arbitrary.

Where does the balance of convenience and overall justice lie?

[53] Although I have concluded that the threshold is not satisfied, I now turn to the second stage of the assessment.

[54] Ms Lanham submits that Advance NZ will suffer serious and irreparable harm if not allowed to participate in the Debate. In support, she points to affidavit evidence from Professor Robinson, who emphasises the importance of election debates to a party’s chances of being elected. Televised election debates have a wide reach; the TVNZ minor party debate in the last election was viewed by around one million households. Professor Robinson says election debates are particularly important for minor parties, who depend on votes from undecided voters. Because between 8-11 per cent of New Zealanders have reported that they are undecided voters in this election, the minor party debates play a pivotal role in giving minor parties the oxygen to win over those undecided voters.

[55] There can be no dispute that election debates are an important and effective way for parties to campaign and share their ideas before an upcoming election, but I consider the degree of harm posed in this case is overstated by the applicants. It is not

²³ *Morgan v Television New Zealand* [2017] NZHC 2178 at [63].

as impactful as in *Dunne* and *Craig*. Importantly, Professor Robinson’s evidence refers to prime-time debates, whereas this Debate is a more niche programming offering and not broadcast in prime-time. In addition, Advance NZ still has plenty of other opportunities to campaign.

[56] Advance NZ has been invited to participate in Television New Zealand’s Multi-Party Election Debate to be held on Thursday, 8 October 2020. Labour, National, New Zealand First, the Green Party, ACT, Advance NZ and the Māori Party have all been invited to participate in this debate. Advance NZ’s invitation was extended after TVNZ revised their criteria, allowing the leaders of registered parties to participate where the leader has been an MP, or the party has been represented, in either or both of the past two Parliaments.

[57] Mr Te Kahika also participated in another debate televised by MediaWorks – “The Hui Te Tai Tokerau Electoral Debate” on 29 September 2020. Māori Television is also covering the Election through its Waikato 2020 Programme and Mr Te Kahika will participate in the Te Tai Tokerau Electoral Debate on Thursday, 8 October 2020.

[58] Mr Ross explains that Mr Te Kahika’s participation in those Debates will focus on local issues relevant to that particular electorate rather than nationwide issues when it is the latter which Advance NZ is particularly keen to promote and disseminate. However, there are still ample broadcast opportunities.

[59] It hardly needs to be said that campaigns today are far removed from the way campaigns were run when *Dunne* was decided, where access to a broadcast platform was the be-all and end-all. There are many other ways for political parties to reach a large number of people and campaign for their vote. Mr Ross’ evidence of Advance NZ’s social media engagement is a ready example of this.

[60] Therefore, it is not likely that Advance NZ would suffer harm to the degree required to justify an interim remedy which in reality will determine the case.

[61] MediaWorks will also suffer some hardship if the relief sought was granted. The venue has been booked and paid for. If I granted the injunction and Advance NZ

was allowed to participate, there is a risk that the floodgates will open, and a number of other minor parties will seek to be added to the Debate. MediaWorks may struggle to accommodate even one more speaker in their venue. If the Debate cannot be recorded as scheduled, MediaWorks' evidence is that the Debate will not be able to go ahead at all, given scheduling constraints. That has implications for the New Zealand public.

[62] Finally, MediaWorks points to the applicants' delay in seeking a remedy from the Court. Advance NZ only brought this challenge two days before the Debate was scheduled to be filmed. Mr Ross, by contrast, approached TVNZ to seek inclusion to their minor party leaders' debate on 10 August, months before that debate was scheduled to go ahead. This does not play a significant part in my decision making but rather, supports the view I have already reached on the overall justice of the case.

Outcome

[63] Advance NZ has not persuaded me that there is a prima facie case that the criterion applied by MediaWorks is unreasonable or arbitrary. Even if the threshold was reached, I am not persuaded that the balance of convenience favours the grant of interim relief.

[64] Advance NZ's application for an interim injunction is therefore declined.

[65] The question of costs is reserved.

[66] I thank all counsel for their assistance in this urgent proceeding.

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Walker J