

MAY IT PLEASE THE COURT:

1. This memorandum is filed by counsel for the respondents.
2. Counsel was served with a copy of this application, as released by the Registry, at 10:03am on Wednesday 4 October. However, it is not clear to counsel what steps (if any) the applicant has taken to have the application placed urgently before Judge.
3. Given the electoral context in which this application arises, the respondents propose case management steps towards a prompt hearing, and respectfully request a teleconference at the Court's earliest convenience.

Background

4. The New Zealand Loyal Party (**NZ Loyal**) successfully nominated 33 constituency (electorate) only candidates, and three party list only candidates, to contest the 2023 General Election.¹
5. NZ Loyal asserts it intended to nominate some or all of its constituency candidates as party list candidates also.² However, this intention was not achieved.
6. Party lists were required to be submitted no later than noon on Thursday 14 September.³ A submitted party list could be withdrawn no later than noon on Friday 15 September.⁴ A withdrawn party list could be replaced by another party list — but only if the resubmission occurred no later than noon on Thursday 14 September.⁵

¹ For a total of 36 candidates. That is, none of NZ Loyal's constituency candidates successfully nominated as a party list candidate, and vice versa.

² Statement of claim dated 3 October 2023 at [24.1], [27]–[29].

³ That is, by noon on the day before nomination day: Electoral Act 1993 (**EA**), s 127(3)(a). "Nomination day" means the day appointed in the writ for as the latest day for the nomination of candidates: s 3(1), definition of "nomination day". The latest day appointed in the writ for the nomination of candidates was 15 September: "Writ for General Election" *New Zealand Gazette* (10 September 2023) No 2023-vr4258.

⁴ EA, ss 128C(1) and (2).

⁵ Sections 128C(3) and 127(3)(a). So in the 24 hours prior to noon on Friday 15 September, party lists could be withdrawn, but not amended or resubmitted.

7. NZ Loyal submitted a party list at approximately 11:56am on Thursday 14 September.
8. NZ Loyal asserts that after noon on Thursday 14 September, having realised it had not achieved its intention of nominating some or all of its constituency candidates as party list candidates also, it attempted to submit an amended party list. However, the Electoral Commission refused to accept an amended party list.
9. NZ Loyal now seeks an order that the Electoral Commission accept its amended party list (the **mandatory order**).⁶ It also seeks declarations.⁷

Timeframe for determining this application

10. The most pressing issue for determination is whether the Electoral Commission was (or now ought be) required to accept NZ Loyal's amended party list. It would be highly desirable for NZ Loyal's entitlement to this mandatory order to be determined before the candidates elected from party lists are declared (likely to be on Thursday 9 November).⁸
11. In addition, NZ Loyal asserts the Electoral Commission's refusal to accept its amended party list "has made it less likely that voters will give NZ Loyal their party vote".⁹ Voting has already commenced. As at the end of Wednesday 4 October, over 240,000 votes had been cast. If NZ Loyal's allegation is correct, the prejudice to it increases every day.
12. This suggests NZ Loyal's entitlement to the mandatory order should be determined as quickly as possible. Determining NZ Loyal's entitlement to declarations is less time-critical.

⁶ Statement of claim at [53.4].

⁷ At [53.1]–[53.3].

⁸ EA, s 193(5). An erroneous declaration can be amended: s 193A. However, the respondents respectfully submit that to promote public confidence in the administration of the electoral system, unnecessary reliance on the amendment power should be avoided.

⁹ Statement of claim at [50].

A prompt hearing should focus on the mandatory order, and questions of law

13. The respondents propose a prompt, half-day hearing at the first available opportunity, focused on NZ Loyal’s entitlement to the mandatory order.
14. The respondents also propose this hearing focus on questions of law raised by NZ Loyal’s application for judicial review. This would promote the just, speedy, and inexpensive determination of the essence of NZ Loyal’s application.¹⁰ It may also relieve the parties of the need to divert resources into preparing significant evidence, at a time when NZ Loyal presumably wishes to focus on campaigning, and the Electoral Commission is focused on delivering the election.

The second ground of review raises pure questions of law

15. The second ground of review asks whether s 146H(1) of the Electoral Act 1993 requires the Electoral Commission to accept a party list submitted after noon on Thursday 14 September, but before noon on Friday 15 September.¹¹
16. Alternatively, it asks whether s 128C requires the Electoral Commission to accept the withdrawal and resubmission of a party list, after noon on Thursday 14 September, but before noon on Friday 15 September.¹²

The third ground of review also raises pure questions of law

17. Those questions of law are:
 - 17.1 Did the Electoral Commission’s refusal to accept NZ Loyal’s amended party list engage its prospective party list candidates’ qualification for membership of the House of Representatives?¹³
 - 17.2 Was the Electoral Commission’s refusal to accept NZ Loyal’s amended party list “prescribed by law”?¹⁴

¹⁰ High Court Rules 2016 (HCR), r 1.2.

¹¹ Statement of claim at [45].

¹² At [46].

¹³ At [51]; New Zealand Bill of Rights Act 1990, s 12(b).

¹⁴ Statement of claim at [52]. Prescribed by law is presumably a reference to New Zealand Bill of Rights Act 1990, s 5.

The hearing should focus on a preliminary question of law underpinning the first ground of review

18. The first ground of review invites the Court to make factual findings as to the quality of support the Electoral Commission gave NZ Loyal during the nominations process. At a high level, the Electoral Commission refutes the allegation that it failed to meet its statutory objective in its dealings with NZ Loyal.¹⁵
19. To facilitate a prompt hearing, the respondents propose the Court determine a preliminary question of law underpinning the first ground of review, as it relates to the application for the mandatory order:
- If the facts pleaded by NZ Loyal are assumed to be true, can the Court make an order requiring the Electoral Commission to accept an amended party list that was submitted after noon on Thursday 14 September?
20. The respondents submit the answer is “no”. The Electoral Commission takes its responsibility to facilitate participation in the democratic process very seriously, and supports parties during the nominations process. However, it is fundamentally the responsibility of political parties, their officials and candidates to ensure they comply with all relevant statutory requirements.
21. The Electoral Commission is unable to extend deadlines imposed by statute. In addition, the Court does not have jurisdiction to make the mandatory order based on allegation as to the quality of support the Electoral Commission gave to parties during the nominations process.
22. If the Court answers the preliminary question “no”, NZ Loyal will be able to consider whether it wishes to pursue declarations as to the quality of support offered by the Electoral Commission, after the election. If it wishes to do so, all parties will be better placed to engage in the process of gathering evidence and preparing submissions, and the Court will not need to deal with the application under time constraints.

¹⁵ EA, s 4C.

23. It is only if the Court answers “yes” will some trial of NZ Loyal’s allegations of fact be required.
24. The Court has procedural mechanisms to enable this course of action. Section 14(2)(a) of the Judicial Review Procedure Act 2016 authorises a Judge to “settle the issues to be determined at the hearing”. High Court Rule 10.15 also provides for the Court to determine a separate question.

Proposed case management directions

25. If the Court is minded to proceed in this manner, the respondents respectfully propose the following case management directions.
 - 25.1 The application for judicial review is set down for a half-day hearing at the Court’s earliest convenience. In relation to the first ground of review, at this hearing the Court will only determine a preliminary question of law:

If the facts pleaded by NZ Loyal are assumed to be true, can the Court make an order requiring the Electoral Commission to accept an amended party list that was submitted after noon on Thursday 14 September?
 - 25.2 Until further order, the respondents are excused from filing a statement of defence, and the parties are excused from filing any evidence.
 - 25.3 The applicant is to file and serve submissions by 12noon on the day before the hearing.
 - 25.4 The respondents are to file and serve submissions by 4pm on the day before the hearing.
 - 25.5 In light of the expedited timetable, the parties may produce bundles of authorities at the hearing, or before.

Parties

26. Finally, no allegations of fact or law are pleaded against the Attorney-General. His presence before the Court is not necessary to determine the issues, nor does he need to be bound by any judgment.¹⁶ He ought be removed as a respondent.¹⁷

5 October 2023



D J Perkins / S Cvitanovich
Counsel for the respondents

TO: The Registrar of the High Court of New Zealand.

AND TO: The applicant.

¹⁶ HCR, r 4.1. The Electoral Commission acts independently of Government in performing its statutory functions and duties, and exercising its statutory powers: EA, s 7.

¹⁷ HCR, r 4.56(1)(a); Judicial Review Procedure Act 2016, s 14(2)(b).