IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-194
[2020] NZHC 2090

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	ANDREW BORROWDALE Applicant
AND	DIRECTOR-GENERAL OF HEALTH First Respondent
	ATTORNEY-GENERAL Second Respondent
	NEW ZEALAND LAW SOCIETY Intervener

Hearing:	27–29 July 2020
Court:	Thomas, Venning and Ellis JJ
Counsel:	T Mijatov for Applicant V E Casey QC, V McCall and E M Jamieson for Respondents T C Stephens, J B Orpin-Dowell and M R G van Alphen Fyfe for Intervener
Judgment:	19 August 2020

JUDGMENT OF THE COURT

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[1] At the time of finalising this judgment, COVID-19 had infected over 21,500,000 people world-wide and killed over 760,000.[1] Responding to the pandemic has tested the powers, resources and resolve of governments across the globe. Public health measures of varying degrees of restrictiveness have been officially imposed by different states; their relative appropriateness and effectiveness have been hotly debated. But even as this country returns to a state of semi-lockdown, there is one thing on which most commentators are agreed. The decisions taken by the New Zealand government in March this year to "go hard and go early" were the right ones.

[2] Even in times of emergency, however, and even when the merits of the Government response are not widely contested, the rule of law matters. So in these proceedings, Mr Andrew Borrowdale has challenged the lawfulness of the restrictions imposed by the New Zealand Government on all people present in this country from 11.59 pm on Wednesday 25 March 2020 until 11.59 pm on Wednesday 13 May 2020, in response to COVID-19.[2] Those restrictions — by which the New Zealand people were, effectively, confined to their homes for the better part of two months — were

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1 World Health Organisation *Coronavirus disease (COVID-19) Situation report – 250* (17 August 2020).

2 The proceedings are not concerned with the very recent return to Alert Levels 2 and 3; the legal lockdown landscape is now materially different from what it was in March and April.

referred to more colloquially as the "Alert Level 3" and "Alert Level 4" restrictions and, in respect of Level 4, the "Lockdown".

[3] There is no dispute that restrictions of the kind inherent in the Alert Levels limited rights and freedoms which are affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA) including, most relevantly, the rights to freedom of assembly, association, and movement.[3] The essential question raised by Mr Borrowdale is whether the limits on those rights were authorised by law at the time of the Lockdown.

[4] Mr Borrowdale's challenge takes form in three separate causes of action.

[5] The first relates only to the first nine days of the first Lockdown, beginning on 26 March. Although on that day a restrictive order was made by the Director-General of Health under s 70 of the Health Act 1956 (the 1956 Act), Mr Borrowdale says that the public announcements made by the Prime Minister and others unlawfully directed more extensive restrictions.

[6] The second cause of action challenges the lawfulness of the three s 70 health orders made by the Director-General of Health on 25 March, 3 April, and 27 April (the Orders). Essentially, the lawfulness of the Orders is challenged as exceeding the reach of the emergency powers conferred by the 1956 Act, particularly when they are interpreted consistently – or as consistently as possible – with the NZBORA.

[7] The third cause of action is, in effect, a subset of the second. It relates to a specific aspect of Order 1. Mr Borrowdale says that Order 1 involved an unlawful delegation of the Director-General's s 70(1)(m) power to determine what premises needed to be closed. This is because, he says, decisions about what businesses (and therefore premises) were "essential" were left to be determined and published by unnamed members of the public service, and these decisions were regularly altered.

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3 New Zealand Bill of Rights Act 1990 [NZBORA], ss 16–18.

[8] Given the public importance of these proceedings and the issues they raise about the rule of law, the New Zealand Law Society/Te Kāhui Ture o Aotearoa was given leave to intervene.[4]

[9] Although the first cause of action involves events that were the earliest in time, we will deal with the second cause of action before it. That is because if Mr Borrowdale wholly succeeds on the second cause of action the result would be that none of the restrictions during Levels 3 and 4 were lawfully imposed. Moreover, consideration of that claim requires an overview of the relevant factual and legal contexts, which provides useful background for the first and third causes of action. Those matters of background and context, then, are where we begin.

FACTUAL CONTEXT: THE SPREAD OF COVID-19 AND NEW ZEALAND'S RESPONSE

An emerging threat

[10] Viruses spread quickly – COVID-19 was no exception. On 30 January 2020, there were 7,818 cases worldwide. The Director-General of the World Health Organisation (the WHO) declared the outbreak of the novel coronavirus, later named "COVID-19",[5] to be a Public Health Emergency of International Concern.

[11] Two days later, Cabinet gave powers to a group of Ministers: the Prime Minister, and the Ministers of Foreign Affairs, Tourism, Finance, Education, Health, and Trade and Export Growth. The powers allowed them to decide on New Zealand's COVID-19 outbreak response and proposed border restrictions. By the next morning, there were 14,554 cases reported globally. New Zealand implemented border restrictions for travellers arriving from mainland China.

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4 Under s 65 of the Lawyers and Conveyancers Act 2006, the New Zealand Law Society [NZLS] regulates all lawyers in legal practice in New Zealand. As at 5 June 2020, there were some 15,023 lawyers holding practising certificates. Membership of the NZLS is voluntary, but presently 98 per cent of practising certificate holders (both in New Zealand and overseas) are members. Under s 66 of the Lawyers and Conveyancers Act, the representative functions of the NZLS are to represent its members and to serve their interests.

5 Short for "coronavirus disease 2019".

[12] By the end of February, the number of global confirmed cases had jumped to 83,381. The WHO raised its COVID-19 risk assessment to its highest alert level. And New Zealand confirmed its first case.

[13] On 2 March, the Prime Minister advised Cabinet of her intention to establish an ad hoc Cabinet Committee to respond to COVID-19. New Zealand extended the temporary border restrictions to 10 March and extended the categories of countries affected.

[14] A few days later, the world had 106,812 confirmed cases. The WHO released interim guidance on preparedness, readiness, and response actions. The WHO Director-General urged each country to assess its risk and to rapidly take action to reduce COVID-19 transmission and impacts. New Zealand had five confirmed cases.

[15] On 10 March, the Infectious and Notifiable Diseases Order (No 2) 2020 was announced, coming into force the next day. It amended the 1956 Act by:

(a) adding COVID-19 to the list of infectious diseases notifiable to a Medical Officer of Health;[6] and

(b) adding both COVID-19 and "novel coronavirus capable of causing severe respiratory illness" to the list of quarantinable infectious diseases.[7]

[16] Over the next couple of days, the National Crisis Management Centre was activated. The Covid19.govt.nz website launched. And the WHO declared COVID-19 a global pandemic.

[17] On 16 March, an order was made under s 70(1)(f) and (h) of the 1956 Act. It required persons arriving in New Zealand after 1.00 am on 16 March to be isolated or quarantined for 14 days. The Government told event organisers to cancel gatherings of more than 500 people.

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6 Schedule 1, pt 1.
7 Schedule 1, pt 2.

[18] Two days later, New Zealand had 20 confirmed cases. The ad hoc Cabinet Committee agreed that the Government should follow a "suppression" response: "Go hard, Go early". This strategy required border restrictions, intense testing, aggressive contact tracing, and stringent self-isolation and quarantine.

[19] Shortly after this decision, the Government told event organisers to cancel indoor events with more than 100 people. And, for all but citizens and permanent residents, New Zealand's borders were closed.

[20] As at 21 March, there were 266,073 confirmed cases worldwide, with 11,183 deaths. New Zealand's confirmed cases had more than doubled, to 52.

[21] On that day, the Government announced the National Four-Stage Alert System for COVID-19. New Zealand was then at Alert Level 2. People over 70 and people with certain medical conditions were advised to stay at home. Workplaces were advised to implement working from home measures. And people were advised to limit non-essential travel.

[22] Over the next two days, New Zealand's COVID-19 cases doubled again.

New Zealand locks down

[23] This next part of the factual narrative will be the subject of closer scrutiny later in this judgment, particularly in the context of the first cause of action. But for now, we merely give an overview of the key events.

[24] On Monday 23 March 2020, the Government announced that New Zealand had moved to Alert Level 3. And at 11.59 pm on 25 March, the country would move to Alert Level 4. This was to last at least four weeks.

[25] The next day, the Prime Minister issued an Epidemic Notice under s 5 of the Epidemic Preparedness Act 2006 that would take effect on 25 March. A State of National Emergency was declared under s 66 of the Civil Defence Emergency Management Act 2002 the following day.

[26] Then, on Wednesday 25 March 2020, the Director-General of Health issued an order under s 70(1)(m) of the 1956 Act (Order 1), effective from 11.59 pm that day and continuing until further notice. It required all premises to be closed, except (among other things) private dwelling houses, and forbade people from congregating in outdoor places of amusement or recreation.

[27] So from 26 March, New Zealand entered Lockdown. But case numbers continued to grow. The next day, New Zealand had 368 cases. The day after that, 451. And on 29 March, New Zealand reported its first COVID-19 death.

[28] By 31 March, New Zealand had 647 cases. The State of National Emergency was extended for a further seven days, until 8 April.

[29] On Friday 3 April 2020, the Director-General of Health issued an order under s 70(1)(f) of the 1956 Act (Order 2). Order 2 was said to be operative from 6 pm that day until 22 April, unless otherwise revoked or extended.[8] It required all persons to be isolated or quarantined by remaining at their current place of residence, except as permitted for essential personal movement, and to maintain physical distancing. Mobile residences had to remain in the same general location.

[30] Over the next couple of weeks, as the Lockdown continued, New Zealand's daily new cases began to lessen. On 19 April, there were only nine new cases. By this point, the global combined total of confirmed cases was 2.29 million, with 163,110 deaths; New Zealand's combined total was 1,431, with 11 deaths.

A cautious easing

[31] In response to the deceleration of daily cases, Cabinet agreed to move the country down to Alert Level 3, effective from 11.59 pm on 27 April.

[32] On Monday 24 April 2020, the Director-General issued the Health Act (COVID-19 Alert Level 3) Order 2020 (Order 3), which came into force at 11.59 pm on 27 April, as the country entered Alert Level 3.

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[8] An order was made amending and extending Order 2 on 21 April 2020. It expired when Order 3 commenced, on 27 April 2020.

[33] On 4 May – for the first time in 49 days – New Zealand had no new cases.

[34] On 13 May, the COVID-19 Public Health Response Act 2020 was enacted, and New Zealand moved down to Alert Level 2.

[35] And on 9 June, New Zealand moved to Alert Level 1. Global cases totalled over 7 million, with 406,381 deaths; New Zealand's cases totalled 1,504, with 22 deaths.

THE INTERNATIONAL LEGAL CONTEXT: PUBLIC HEALTH, PANDEMICS AND HUMAN RIGHTS

[36] Another key contextual consideration is the international legal framework dealing with the protection of public health.

Early international engagement with public health issues

[37] The idea of a united international effort to combat infectious diseases can be traced back (at least) to the International Sanitary Conferences of the 19th century. In 1920, the work of these conferences was then largely absorbed into the Health Organization of the League of Nations.

[38] Next, after the end of the Second World War, came the 1945 United Nations Conference on International Organization. A declaration calling for an international conference on health under the auspices of the United Nations was passed. Then on 22 July 1946, the Constitution of the WHO was signed by all 51 countries of the United Nations, and by 10 others. The Constitution formally came into effect on 7 April 1948; its governing body, the World Health Assembly (the WHA), first met on 24 July that same year.

[39] The preamble to the WHO's Constitution relevantly provides that:[9]

> THE STATES Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

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9 Emphases added.

> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.
>
> The enjoyment of the highest attainable standard of health *is one of the fundamental rights of every human being* without distinction of race, religion, political belief, economic or social condition.
>
> The health of all peoples is fundamental to the attainment of peace and security and *is dependent upon the fullest co-operation of individuals* and States.
>
> The achievement of any State in the promotion and protection of health is of value to all.
>
> …
>
> *Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.*
>
> *Governments have a responsibility for the health of their peoples* which can be fulfilled only by the provision of adequate health and social measures.

[40] Article 1 of the Constitution states that the WHO's objective is: "the attainment by all people of the highest possible level of health".

[41] Article 21 provides for the adoption of regulations "designed to prevent the international spread of disease". And it was pursuant to art 21 that the International Health Regulations (the IHR) were adopted by the WHA in 1969.[10] The IHR are binding on New Zealand, without reservation.[11]

[42] The stated purpose of the IHR is:

> to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

[43] They thus form the principal international framework for preventing and controlling the spread of disease between countries. States parties are required to strengthen, develop, and maintain core surveillance and response capacities; this

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10 The IHR succeeded the International Sanitary Regulations adopted by the Fourth WHA in 1951, which, in turn, dated back to the European sanitary conferences mentioned earlier.

11 Initially, the IHR covered six "quarantinable diseases" but were later amended (in 1973 and 1981) to reduce these from six to three (yellow fever, plague and cholera). The IHR were more substantially revised in 2005, in the aftermath of the outbreak of severe acute respiratory syndrome (SARS) in 2003. The application of the 2005 version of the IHR is no longer limited to specified diseases.

enables them to detect, assess, notify, and report public health events to the WHO and to respond to public health risks and emergencies.

[44] The WHO Constitution's acknowledgment of health itself as a fundamental right was an important stepping-off point for the further elaboration of a right to health in several human rights documents. These include art 12 of the United Nations International Covenant on Economic, Social and Cultural Rights (the ICESCR), which relevantly provides:[12]

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
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> …
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
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> …

The tension between health and other rights

[45] The potential tension between the right to health and other human rights is, perhaps, obvious. Indeed, it is recognised in art 3(1) of the IHR, which states that their implementation "shall be with full respect for the dignity, human rights and fundamental freedoms of persons". The IHR themselves recognise and emphasise the importance of human rights protection during public health emergencies.

[46] On the other hand, the international instrument on which the NZBORA is based – the International Convention on Civil and Political Rights (ICCPR) – contains limitation and derogation provisions reflecting the equal and opposite pull:

(a) Article 4(1) of the ICCPR provides that in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" States may "take measures derogating from

[12] New Zealand ratified the ICESCR on 28 December 1978.

[certain of] their obligations" under the Convention "to the extent strictly required by the exigencies of the situation". Certain rights may not, however, be derogated – for example, the rights to life and religion, and to be free from torture and slavery.[13]

(b) The rights to freedom of movement (art 12), to be free to manifest religion or belief (art 18), to freedom of assembly (art 21), and to freedom of association (art 22) are each expressly made subject to restrictions or limitations that are provided by law and are necessary in the interests of protecting public health or the rights and freedoms of others.

COVID-19 and States parties' rights and obligations

[47] Much more recently, on 30 April 2020, the United Nations Human Rights Committee issued a statement on derogations from the ICCPR in connection with the COVID-19 pandemic.[14] In it, the Committee acknowledged the possibility of States parties confronting the threat of "widespread contagion" by resorting to exceptional emergency powers on a temporary basis, provided that such powers are required to protect the life of the nation. After reminding States parties of the pre-requisites to, and limits on, their ability to derogate, the Committee set out a number of requirements and conditions that States must observe when exercising emergency powers. These include that, where possible, States' attainment of public health objectives should be achieved by restricting rights rather than derogation:

> States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of movement), article 19 (freedom of expression) or article 21(right to peaceful assembly), in conformity with the provisions for such restrictions set out in the Covenant, or by invoking the possibility of introducing reasonable limitations on certain rights, such as article 9 (right to

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13 Article 4(2).

14 Article 4(3) requires States that derogate to inform other States by notifying the Secretary-General. A number of States have notified the Secretary-General of derogations from the Convention for the purposes of curbing the spread of COVID-19: United Nations Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* CCPR/C/128/2 (24 April 2020) at [1]. As of 1 May 2020, ten States had derogated from the ICCPR in relation to measures adopted to combat COVID 19: Armenia, Chile, Colombia, Ecuador, El Salvador, Estonia, Georgia, Guatemala, Latvia, Peru, and Romania.

personal liberty) and article 17 (right to privacy), in accordance with their provisions;

THE DOMESTIC LEGAL CONTEXT: PUBLIC HEALTH, PANDEMICS AND HUMAN RIGHTS

[48] Next, we consider the domestic legal context.[15] New Zealand's legal framework for dealing with infectious diseases also dates back to the mid-19th century. Today, the special powers contained in s 70 of the 1956 Act – including the two centrally at issue in these proceedings – form the centrepiece of that framework. It is the exercise of those powers in March and April this year that are at the heart of the second cause of action, in particular. In the section which follows we will say something about how those special powers originated, developed, and have been used in the past to respond to public health crises. As well as forming part of the wider legislative context, aspects of the history assist in understanding and interpreting of the provisions today.

The history of the s 70 powers and their use

[49] Initially, special executive powers for preventing the spread of infectious diseases focused solely on maritime quarantine at ports.[16] Wider measures first found form in the Public Health Act 1872. That Act, and its 1876 successor, provided that the Governor could, by notification in the *Gazette*, activate certain provisions – including provisions allowing the Central Board of Health to issue directions and regulations as it saw fit for the "prevention as far as possible, or mitigation, of epidemic endemic or contagious disease".[17]

[50] Those directions and regulations could include specific matters such as "cleansing" of streets, regulating the number of occupants of a building, and interment of the dead. More generally, they could also provide for the guarding against or mitigation of epidemic, endemic, or contagious diseases in such manner "as to such Central Board may seem expedient".[18] The directions and regulations also had to be

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15 We are grateful to counsel for the Crown and to the NZLS for their comprehensive and enlightening survey of the relevant legislative history here.
16 Regulation of Harbours Ordinance 1842 7 Vict 15, cls 3–6.
17 Section 21.
18 Section 21.

published in the *Gazette* and could extend to the places indicated by the Governor in the "activating" order. An activating order was finite in duration but could be renewed.

[51] In early 1900, a case of bubonic plague was identified in New South Wales, following the spread of a pandemic originating in 1855, in China.[19] The Bubonic Plague Prevention Act 1900 was passed by the New Zealand Parliament under urgency in June that year. It contained drastic, discretionary, and unreviewable emergency powers. That Act was, however, deemed repealed at the end of the parliamentary session, during which more general legislation, the Public Health Act 1900 (the 1900 Act), was enacted. The 1900 Act established a Minister of Health and associated Department, a Chief Health Officer, and District Health Officers (DHOs) for six districts.[20]

[52] While the 1900 Act retained some of the earlier Governor's powers in relation to infectious disease,[21] s 18 also gave powers in "cases of special emergency" to DHOs, who were the "sole judge" of whether a case of special emergency existed, but who could act only with the Minister's approval. DHOs could then perform any function or power of a local authority for the purpose of "doing anything to prevent or check the spread of any dangerous infectious disease".

[53] And s 19 of the 1900 Act provided that, when authorised by the Governor, DHOs could use "special powers" for the general purpose of "more effectually checking or preventing the spread of any dangerous infectious disease". It is these powers that quite closely resemble those now contained in s 70. For example:

(a) s 19(6) included the ability to "require persons, places, buildings, ships, animals, and things to be isolated, quarantined, or disinfected as [the DHO] thinks fit"; and

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19 Over 15 million people died during the pandemic, mainly in India.

20 Auckland, Hawkes Bay, Wellington, Westland, Canterbury, and Otago.

21 For instance, the Governor was responsible for issuing notice in the *Gazette* declaring a disease to be infectious or dangerously infectious for the purposes of the Act, and for making regulations to prevent and check the spread of disease, which were to be published in the *Gazette* and brought to the House of Representatives within 14 days.

(b) DHOs could exercise their s 19 powers over their district or any part thereof, and the Chief Health Officer could exercise the same powers over any part of New Zealand.[22]

[54] The 1900 Act was consolidated and largely replicated in the Public Health Act 1908.[23] The special powers were exercised during a smallpox outbreak of 1913 and again during the influenza epidemic of 1918, which killed nearly 9,000 New Zealanders in the space of two months.

[55] Influenza was notified in the *Gazette* as a dangerous infectious disease, under s 12 of the 1908 Act, by the Governor-General in November 1918. The notification authorised DHOs in Auckland, Wellington, Christchurch, and Dunedin to exercise their powers. And in a *Gazette Extraordinary*, the Governor-General empowered the DHOs to close hotels, bars, or other places. Both the Chief Health Officer and the various DHOs issued multiple notices exercising these powers between November 1918 and April 1919. For example, the acting Chief and DHOs variously:

(a) ordered the closure of:

(i) all shops in a city;

(ii) all places and buildings within the Canterbury-Westland area in accordance with a scheduled list of building purposes, including "any place not included in the above schedule which is, or may be used for public meetings or gatherings";

(iii) all buildings in a metropolitan area, save for a specified list including chemists and newspaper printing offices; and

(iv) all places of amusement, churches for internal services, schools, trotting clubs and licensed premises;

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22 Section 11.

23 Section 17 reflected the "cases of special emergency", and s 18 provided the "special powers" of District Health Officers. Section 10 provided that the Chief Health Officer could exercise the same functions.

(b) requested the courts not to schedule jury trials; and

(c) prohibited public meetings.

[56] The approach overall, however, was haphazard and highly criticised, as a result of multiple bodies having conflicting or overlapping powers. Responses across the country were inconsistent, in part due to the "extreme complexity and diffuseness" of the legislative framework at the time.[24] In 1919, the Influenza Epidemic Commission recommended urgent reform.

[57] On the back of those recommendations, and in light of smaller outbreaks of smallpox, polio, and diphtheria, the Health Act 1920 (the 1920 Act) was enacted. The Chief Health Officer became the Director-General of Health;[25] District Health Officers became Medical Officers of Health.[26] The Director-General retained the functions of Medical Officers.[27] Under the 1920 Act, the special powers found form in s 76. This similarly provided that a Medical Officer of Health could, if authorised by the Minister, use these powers for the "purpose of preventing the outbreak or spread of any infectious disease". Many of these powers replicated those in the earlier statutes. And it is these powers that find their present form in s 70 of the 1956 Act. Indeed, s 76(1)(f) of the 1920 Act is replicated in the present s 70(1)(f). Section 76(1)(m), however, was in different terms from the present s 70(1)(m).

[58] The special s 76 powers were used to respond to the polio epidemic in 1925, which has been described as the "first major attempt" to control the movement of large parts of the population in response to an epidemic.[28] Rather than isolating and quarantining specific buildings and people, something approaching a nationwide quarantine was imposed.

[59] After poor public compliance with the Health Department's directions that parents must keep children away from crowds and public transport, a proclamation

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24 *Report of the Influenza Epidemic Commission* (H-31, 1919) at 36.
25 Section 5.
26 Section 16.
27 Section 19.
28 Jean C Ross "A History of Poliomyelitis in New Zealand" (MA thesis, University of Canterbury, 1993) at 28–29.

under s 76 was published on 15 January 1925. This proclamation forbade children from Wellington to Napier from attending schools, theatres, music halls, sports and recreation grounds, and any place of public assembly.[29] Two days later, these "drastic restrictions" were extended to the whole of the North Island.[30] Inter-island travel for children was forbidden from 21 January. And all schools were formally closed nationwide from the end of January, even though many regions had not yet recorded any cases.[31] The restrictions were not lifted until mid-April 1925.

[60] In the subsequent polio outbreak in 1947, schools were again closed.[32] But this time there was more public health messaging that discouraged gatherings, and compliance was generally voluntary. By the time of the outbreaks in the 1950s, schools were not closed. This reflected the evolving medical understanding of how the virus spread, as well as public concerns about the economic and social impact of closing schools, in particular.

The Health Act 1956

[61] On 1 January 1957, the Health Act 1956 came into force. Its long title states that its purpose is to "consolidate and amend the law relating to public health". The reference to consolidation here reflects that many parts of the Act – including s 70 – were derived from the earlier public health statutes already mentioned.[33] Public health is defined in the 1956 Act as: "the health of all of (a) the people of New Zealand, or (b) a community or section of such people".[34]

[62] The Act deals with a range of public health matters, including sanitary works, building sanitary requirements, offensive trades, drinking water, the national cervical screening programme, and artificial tanning services. Originally it was pts 3

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29 It was, of course, children who were the principal victims of poliomyelitis.

30 "Infantile Paralysis" *The New Zealand Herald* (Auckland, 15 January 1925).

31 The restrictions were enforced, with at least one child being convicted for attending a place of entertainment, priests facing prosecution for allowing children to attend church, and parents of children found at tangi, racecourses and picture theatres being fined.

32 The Director-General closed schools in the North Island in November, and in the South Island in December. Children were prohibited from travelling the Cook Strait after 13 December, and a 14-day quarantine period applied to children who interacted with anyone who was hospitalised with the disease.

33 We set out s 70 in its present form at [71] of this judgment.

34 Section 2(1) and New Zealand Public Health and Disability Act 2000, s 6(1). Public health can therefore be contrasted with "personal health", defined as "the health of an individual".

(Infectious Diseases) and 4 (Quarantine) that, collectively, contained provisions potentially relevant to managing an epidemic or pandemic. Section 70 is within pt 3.

[63] Central to the performance of public health functions under the 1956 Act are Medical Officers of Health, who are appointed (designated) as required by the Director-General – now under s 7A.[35] Medical Officers of Health must be medical practitioners who are suitably qualified and experienced in public health medicine. The Director-General must also determine the health district or districts within which each medical officer's powers and duties may be exercised or performed.[36]

[64] By virtue of s 22(1), the Director-General has and may exercise all the functions of a Medical Officer of Health "in any part of New Zealand" where he is, himself, appropriately qualified.[37]

[65] In 2016, the 1956 Act was amended by the insertion of pt 3A, entitled "Management of Infectious Diseases". It seems that pt 3A was designed to respond to situations where an individual has an infectious disease and does not voluntarily comply with measures meant to limit the risk to the community.[38] So pt 3A is designed to operate in "ordinary" times rather than during a public health emergency, when the more historic powers contained in pt 3 (including s 70) come into play.[39]

Extension of the s 70 triggers

[66] Under the 1920 Act, the exercise by Medical Officers of Health of the special s 76 powers could be activated only with the authorisation of the Minister. That trigger was carried through to s 70 in the 1956 Act. But in 1964, s 70 was amended to allow

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35 Section 7A was enacted in 1993 and replaced earlier delegation provisions. The Director-General is the chief executive of the Ministry of Health in terms of the State Sector Act 1988.

36 Sections 7A and 19. There are presently 23 health districts and 43 Medical Officers of Health.

37 Where he is not so qualified, s 22(2) requires him to designate the nation-wide function to a medical practitioner who is.

38 The example brought up several times in parliamentary debates was a person who is HIV-positive continuing to have unprotected sex with unknowing people and ignoring all health advice to stop.

39 At the first reading of the Bill, the Minister of Health Dr Jonathan Coleman discussed the relationship between new Part 3A and the existing special powers under Part 3. He said the new Part 3A regime does not amend those special powers but "provides for a greater range of intermediate but still potentially significant interventions to assist with the day-to-day management of endemic infectious diseases in the community". He described the special powers in Part 3 as "the Act's emergency powers".

the powers to be alternatively triggered by the declaration of a "state of national major disaster". That was then further amended in 1983 to refer to "a state of national civil defence emergency or a state of regional civil defence emergency" and again in 2002, with the passage of the Civil Defence Emergency Management Act (CDEMA). The words "a state of national civil defence emergency or a state of regional civil defence emergency" were replaced by "state of emergency".

[67] The CDEMA allows for a state of emergency to be declared over the whole or part of New Zealand.[40] Once a state of national emergency is declared, Parliament must meet within seven days.[41]

[68] Next, in 2006, there was growing international concern about a potential outbreak in humans of avian influenza (H5N1). In New Zealand this saw – most notably – the enactment of the Epidemic Preparedness Act 2006 (the EPA). This Act provides that, when an "epidemic notice" is in force, immediate modification orders may be made to modify other legislation in order to respond to a pandemic quickly, without the need for parliamentary intervention.[42]

[69] As part of the wider 2006 reforms, s 70 of the 1956 Act was also reviewed and again amended. The giving of an epidemic notice under the EPA was added as a third "trigger" for the exercise of the special powers under that section. Powers to require medical testing were added. And the terms of other powers were clarified and modernised, including those relating to the closure of premises, which were modified to allow premises to remain open, and gatherings of people to take place, if infection control measures were put in place. The publication requirements for a s 70(1)(m) order were also amended to permit an order under that subsection to be broadcast, rather than published in a newspaper. There was no substantive change to the scope of s 70(1)(f).

[70] The EPA and the amendments to s 70 were passed unanimously. During the parliamentary debate, members noted that protecting human health was "the goal at

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40 Sections 66 and 68.
41 Section 67.
42 Section 14.

the crux of New Zealand's pandemic preparedness" and that failing to protect human health would also likely lead to a loss of social cohesion and to severe economic and social consequences. A "lesser priority on individual rights" during an epidemic was thought to be justified by measures ensuring community protection from infectious disease.[43]

The special powers today

[71] Although there are only two paragraphs of s 70(1) directly engaged by Mr Borrowdale's claim, it is useful to end our overview of the statutory context by setting the section out in its entirety, as it now is:

> **70 Special powers of medical officer of health**
>
> (1) For the purpose of preventing the outbreak or spread of any infectious disease, the Medical Officer of Health may from time to time, if authorised to do so by the Minister or if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002 or while an epidemic notice is in force,—
>
> (a) declare any land, building, or thing to be insanitary, and prohibit its use for any specified purpose:
>
> (b) cause any insanitary building to be pulled down, and the timber and other materials thereof to be destroyed or otherwise disposed of as he thinks fit:
>
> (c) cause insanitary things to be destroyed or otherwise disposed of as he thinks fit:
>
> (d) cause infected animals to be destroyed in such manner as he thinks fit:
>
> (e) require persons to report themselves or submit themselves for medical examination at specified times and places:
>
> (ea) if the spread of the disease would be a significant risk to the public, require people to report, or submit themselves for medical testing, at stated times and places:
>
> (f) require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit:
>
> (fa) if the spread of the disease would be a significant risk to the public, require people, places, buildings, ships, vehicles, aircraft, animals, or things to be tested as he or she thinks fit:

[43] (4 May 2006) 630 NZPD 2805.

(g) forbid persons, ships, vehicles, aircraft, animals, or things to come or be brought to any port or place in the health district from any port or place which is or is supposed to be infected with any infectious disease:

(h) require people to remain in the health district or the place in which they are isolated or quarantined until they have been medically examined and found to be free from infectious disease, and until they have undergone such preventive treatment as he may in any such case prescribe:

(i) forbid the removal of ships, vehicles, aircraft, animals, or things from the health district, or from one port or part thereof to another, or from the place where they are isolated or quarantined, until they have been disinfected or examined and found to be free from infection:

(j) prohibit the keeping of animals or of any species of animal in any specified part of the health district:

(k) forbid the discharge of sewage, drainage, or insanitary matter of any description into any watercourse, stream, lake, or source of water supply:

(l) use or authorise any local authority to use as a temporary site for a special hospital or place of isolation any reserve or endowment suitable for the purpose, notwithstanding that such use may conflict with any trust, enactment, or condition affecting the reserve or endowment:

(la) by written order to the person appearing to be in charge of the premises concerned, do either or both of the following:

(i) require to be closed immediately, until further order or for a fixed period, any premises within the health district (or a stated area of the district):

(ii) require to be closed immediately, until further order or for a fixed period, any premises within the health district (or a stated area of the district) in which infection control measures described in the order are not operating:

(m) by order published in a newspaper circulating in the health district or by announcement broadcast by a television channel or radio station that can be received by most households in the health district, do any of the following:

(i) require to be closed, until further order or for a fixed period, all premises within the district (or a stated area of the district) of any stated kind or description:

(ii) require to be closed, until further order or for a fixed period, all premises within the district (or a stated area of the district) of any stated kind or description in

which infection control measures described in the order are not operating:

(iii) forbid people to congregate in outdoor places of amusement or recreation of any stated kind or description (whether public or private) within the district (or a stated area of the district):

(iv) forbid people to congregate in outdoor places of amusement or recreation of any stated kind or description (whether public or private) within the district (or a stated area of the district) in which infection control measures described in the order are not operating.

(1A) An order under paragraph (la) or (m) of subsection (1) does not apply to—

(a) any premises that are, or any part of any premises that is, used solely as a private dwellinghouse; or

(b) any premises within the parliamentary precincts (within the meaning of section 3 of the Parliamentary Service Act 2000); or

(c) any premises whose principal or only use is as a courtroom or judge's chambers, or a court registry; or

(d) any premises that are, or are part of, a prison (within the meaning of section 3(1) of the Corrections Act 2004).

(1B) An order under paragraph (la) or (m) of subsection (1) may exempt people engaged in necessary work in the premises to which it relates.

(1C) If the medical officer of health publishes an order under subsection (1)(m) in a newspaper circulating in the health district, he or she must also make reasonable efforts to have the contents or gist of the order published by announcement broadcast by a television channel or radio station that can be received by most households in the health district.

(1D) The medical officer of health may publish in any other manner he or she thinks appropriate an order under paragraph (la) or (m) of subsection (1) or its gist.

(2) The medical officer of health, and any environmental health officer or other person authorised in that behalf by the medical officer of health, may at any time, with or without assistants, enter on any lands, buildings, or ships, and inspect the same and all things thereon or therein; and may do, with respect to any persons, places, lands, buildings, ships, animals, or things, whatever in the opinion of the medical officer of health is necessary or expedient for the purpose of carrying out the foregoing provisions of this section.

(3) In no case shall the medical officer of health, or any environmental health officer or assistant or other person, incur any personal liability

by reason of anything lawfully done by him under the powers conferred by this section.

(4) If satisfied that it is desirable in the circumstances to do so, the Director-General may authorise a medical officer of health to operate in a stated area outside his or her district; and in that case, this section and section 71 apply as if the area is part of both his or her district and the district of which it is in fact part.

[72] Relevant enforcement powers are contained in ss 71 and 71A. Section 72 is the relevant offence provision.

[73] With those relevant factual and legal contexts established, we now turn to the second cause of action.

THE SECOND CAUSE OF ACTION

[74] The focus of the second cause of action is on the lawfulness of Orders 1, 2, and 3. We summarise the material parts of the Orders below.

The three health Orders

Order 1

[75] Order 1 was said to be made under s 70(1)(m) of the 1956 Act, and relevantly:

(a) required the closure of all premises within all districts of New Zealand, except those listed in the Appendix to the Order, until further notice; and

(b) forbade people to congregate in outdoor places of amusement or recreation of any kind or description (whether public or private) in all districts of New Zealand, until further notice.

[76] As for the closure of premises, the Appendix provided that the Order did not apply to any premises that were specifically excepted by s 70(1A) (including private dwelling houses) or to "any premises necessary for the performance or delivery of essential businesses", which were defined as:

> … businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government.

[77] And the prohibition on congregation did not include "people maintaining at all times physical distancing", defined in the Appendix as:

> … remaining two (2) metres away from other people, or if you are closer than two (2) metres, being there for less than 15 minutes.

Order 2

[78] By Order 2, the Director-General required all persons within all districts of New Zealand to be isolated or quarantined:

(a) by remaining at their current place of residence, except as permitted for essential personal movement; and

(b) by maintaining physical distancing, except—

(i) from fellow residents; or

(ii) to the extent necessary to access or provide an essential business; and

(c) for those with mobile residences, by keeping their residence in the same general location, except to the extent they would be permitted (if it were not mobile) to leave the residence as essential personal movement.

[79] Order 2 specified what was permitted as "essential personal movement": accessing or providing essential businesses, limited recreation purposes, shared bubble arrangements, emergencies, court orders, and authorised travel. Order 2 adopted the same meanings of "essential businesses" and "physical distancing" as Order 1.

Order 3

[80] Order 3 was issued under both s 70(1)(m) and (f) of the 1956 Act. Order 3 is different in form from Orders 1 and 2. It is like Regulations or Orders in Council: it has a title, commencement clauses, extensive background and purpose clauses, and a schedule of definitions. Order 3 revoked the two previous Orders and relevantly required, in cl 6, all persons in all regions to be isolated or quarantined by remaining at their current place of residence, except for essential personal movement and maintaining physical distancing, and with exceptions of essentially the same kind as under Order 2. But cl 7 stipulated a number of further and more specifically defined instances of essential (and therefore permitted) personal movement.[44]

[81] Clause 9 required the closure of "restricted premises", with exceptions where necessary work (such as maintaining the condition of the premises, plant or goods) was being undertaken.

[82] Clause 11 prohibited congregating in outdoor places of amusement or recreation, but not venues where infection control measures were operating.

[83] Order 3 did not contain a sunset clause, which would make its duration finite. But it was revoked in less than three weeks by the COVID-19 Public Health Response (Alert Level 2) Order 2020 on 14 May.

Mr Borrowdale's challenges to the Orders

[84] Mr Borrowdale claims that, in making Orders 1, 2, and 3, Dr Bloomfield exceeded his powers under s 70(1)(f) and (m) of the 1956 Act, and so the Orders were ultra vires and unlawful. In particular he says that:

(a) the s 70 powers could not be exercised by Dr Bloomfield at all, because s 22 confers on the Director-General only the functions (and not the powers) of a Medical Officer of Health;

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[44] Clause 7 also permitted personal movement in the cases of extended bubble and shared caregiving arrangements, relocating a home or business, and compassionate grounds for urgent child care or supporting a person in a critical or terminal condition.

(b) the s 70 powers cannot be properly exercised on a national (rather than a district by district) basis;

(c) the power to require quarantine and isolation under s 70(1)(f) can be exercised only in relation to individuals, rather than to the population as a whole;

(d) the power under s 70(1)(m) to close premises of "any stated kind or description" does not permit all premises to be closed, subject only to specified exceptions; and

(e) the power to prohibit "congregation" under s 70(1)(m) does not allow exceptions for "social distancing".

[85] These challenges are based on the wording of s 70(1)(f) and (m), interpreted in light of their purpose and statutory context, and also in light of the relevant NZBORA rights.

[86] Before we analyse each of those challenges, we must first consider two questions. The first is the role properly played by the NZBORA in statutory interpretation. And the second is the general approach we should take to interpreting these provisions.

What is the role properly played by the NZBORA in statutory interpretation here?

[87] Mr Borrowdale says that s 70(1)(f) and (m) engage a number of the rights confirmed in the NZBORA, namely:

(a) the s 14 right to freedom of expression;

(b) the s 15 right to manifest religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and in public;

(c) the s 16 right to freedom of peaceful assembly;

(d) the s 17 right to freedom of association;

(e) the s 18 right to freedom of movement; and

(f) the s 22 right not to be arbitrarily detained.

[88] We agree with the Crown that freedom of expression and the right not to be arbitrarily detained were not engaged by the Orders.[45] We do not, however, agree that freedom of association was not engaged because it is concerned solely with the ability to form and belong to associations such as trade unions or professional societies.[46] Rather, we favour the assessment of the learned authors Butler and Butler that s 17 encompasses an individual's right to associate with any other individual:[47]

> … it is consistent with the broad ambit of the closely related rights of free expression (s 14 of BORA) and free assembly (s 16 of BORA). Secondly, in other human rights systems a narrow view of the ambit of free association is acceptable since the right to associate with other individuals in an informal, disorganised way would likely be protected by a right to privacy or autonomy. The absence of such rights from BORA means it is legitimate for the right of free association to occupy the field that its ordinary meaning suggests.

[89] Beyond those observations, however, we do not need to consider the content of the relevant rights in any detail here. No issue can sensibly be taken with the proposition that the powers conferred by s 70(1)(f) and (m) engage a number of rights. Plainly (for example) the s 70(1)(f) concepts of quarantine and isolation contemplate restrictions on movement and assembly. And so too does the closure of premises and the limitation of "congregation" under s 70(1)(m).

[90] But Mr Borrowdale's central point is that the NZBORA context here requires s 70(1)(f) and (m) to be construed in a way that is consistent – or least inconsistent – with the rights and freedoms engaged. Such a construction required the Director-

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45 Whether the requirement to self-isolate constitutes detention has already been considered and rejected by the Court of Appeal in *Nottingham v Ardern* [2020] NZCA 144. In light of our conclusions under the first cause of action, the right may yet be engaged in relation to any arrest during the first nine days of Lockdown for failing to self-isolate. But that is not something with which this judgment is concerned.

46 We do not consider that the right should be so restrictively interpreted, although acknowledge that, despite the Orders/Lockdown, people were still free to communicate and participate in associative behaviour in ways other than in person.

47 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd edition, LexisNexis, Wellington, 2015) at 778.

General, and requires the Court, to favour a restricted interpretation of the powers. By way of example only, Mr Borrowdale would say that an interpretation of s 70(1)(f) would be "least inconsistent" with the right to freedom of movement if the power was not able to be exercised nationally.

[91] In support of this point, reliance is particularly placed on the Supreme Court's decision in *Cropp v Judicial Committee*.[48] Based on that decision, it was submitted that s 6 of the NZBORA – which requires an interpretation consistent with that Act to be preferred – should be applied to limit the scope of s 70(1)(f) and (m) *before* any consideration is given to justified limits in terms of s 5.[49]

[92] But we see several difficulties with that approach.

[93] First, and as a matter of law, we consider the approach in *Cropp* is inapplicable here. In that case the question before the Court was whether a (relatively) general rule-making provision could authorise the imposition of a requirement that (marginally) engaged the s 21 right to be free from *unreasonable* search and seizure. As the Court made clear, there was no question of s 5 coming into play because, in the event of a finding that s 21 had been breached, the question of any justified limit would necessarily have been disposed of. Section 5 could not be used to render a search reasonable, if it had already been found not to be so.[50] In other words, there was no need to use s 5 separately to determine reasonable limits because the s 21 right itself is already qualified by the word "unreasonable".

[94] By contrast, in the present case, the engaged rights are not already specifically qualified in that way. So adopting the *Cropp* approach and limiting s 70(1)(f) and (m) to their "least rights infringing" meanings at the outset would render s 5 all but otiose. And that cannot be right, for the reasons that follow.

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48 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

49 Reliance was also placed on the Chief Justice's dissent in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

50 At [33].

[95] As others have notably said, the NZBORA is a "Bill of reasonable protection for rights".[51] The rights presently in issue are not absolute and "must accommodate the rights of others and the legitimate interests of society as a whole",[52] including the wider interest in protecting public health. This is confirmed by the express framing of the equivalent provisions of the ICCPR, discussed above. So the critical question must be what limitations on those rights can be justified in light of the public health interests in play – that is what s 5 requires to be asked and demands to be answered. Section 5 thus remains central to our inquiry, and s 6 must be read subject to it. That is the continued effect of the *R v Hansen* majority decisions, which are binding on us.

[96] The second and related difficulty with Mr Borrowdale's approach is that if s 5 remains squarely at front and centre – as we consider it does – then the focus on interpreting s 70 itself in isolation is ultimately the wrong one, in terms of NZBORA compliance. As we have said, subs (1)(f) and (m) plainly contemplate limits on various NZBORA rights and freedoms when those powers are exercised. But the extent of those limits is not specified or capable of justification in advance of whatever crisis activates their exercise.

[97] So the relevant NZBORA question here is whether the limitations of rights resulting from the actual exercise of the s 70(1)(f) or (m) powers were necessary, reasonable, and proportionate.[53] And that assessment depends on the particular (public health emergency) circumstances to which the exercise of power responds. Mr Borrowdale very properly accepts that – subject to the question of legality – the measures effected by the Orders *were* a necessary, reasonable, and proportionate response to the public health emergency posed by COVID-19 in March and April 2020.

[98] For these reasons, the second cause of action essentially comes down to an orthodox vires challenge. Its merits will depend on whether Mr Borrowdale is right when he says that Orders 1, 2, and 3 went beyond the permissible limits of s 70(1)(f)

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51 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) at 277; and *Hansen*, above n 49, at [186] per McGrath J.

52 *Hansen*, above n 49, at [186].

53 As assessed under s 5, using the proportionality test from *R v Oakes* [1986] 1 SCR 103, confirmed in *Hansen*, above n 49, at [104].

and (m). That assessment requires us to construe those provisions based on their text, in light of their purpose and statutory context, and on the basis that they are to be applied to circumstances as they arise.[54] It does not require a prior reading down of those provisions in a way that is at odds with their text and purpose.

[99] Before turning to consider the challenges to the health Orders based on the text of s 70(1)(f) and (m), it is useful to make some general observations about the interpretive approach we intend to take.

What is the proper interpretive approach here?

[100] To start with the obvious, the powers conferred by s 70 are, indeed, "special" powers – powers for use only in a public health emergency. They largely precede, but nonetheless reflect and give effect to, the New Zealand Government's international obligations to protect the health of its people and to take measures to prevent the spread of infectious disease both within and beyond our national borders. As is expressly recognised by the relevant international instruments, individual rights may have to yield to the greater good in circumstances where s 70 is in play. And as we have said, the s 70 powers themselves also contemplate that yielding.

[101] Importantly, though, there are inbuilt limits to the exercise of the s 70 powers. Their exercise is permitted only for the purpose of preventing the outbreak or spread of infectious disease – a situation that is assessed by a public health expert, not by Cabinet or the Prime Minister. And their exercise is permitted only after the activation of one of the three "triggers": Ministerial authorisation, a state of emergency, or an epidemic notice.

[102] As well, the powers have temporal limits, albeit partly unspecified. For example, where the relevant trigger is an epidemic notice, the powers are only exercisable while the notice is in force. But as a matter of wider principle, the s 70 powers are intended to facilitate an immediate and urgent response to a public health crisis. They cannot sensibly be regarded as providing the framework for a longer term response. When a public health crisis is ongoing, the democratic nature of our

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[54] Interpretation Act 1999, s 6.

constitution means that there comes a point when Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making. That is, in fact, exactly what happened here, when Parliament enacted the COVID-19 Public Health Response Act 2020 on 13 May.

[103] All of this is important for the purposive interpretive exercise required by s 5 of the Interpretation Act 1999. It is, of course, important to acknowledge that the exercise of the s 70 powers may well limit NZBORA rights and freedoms. But while that might, ordinarily, dictate a more narrow and literal approach to the text, we think the matters just mentioned all point in the other direction. A fair, liberal, and remedial construction better recognises the fact that the powers are exercisable only in an emergency of a kind that, as a matter of international law, justifies restrictions on individual rights. And the internal restrictions and temporal limits on the exercise of the powers gives further assurance that it is safe to adopt such a construction, by limiting the potential for abuse.

[104] Lastly, s 6 of the Interpretation Act is relevant here, too. The idea that "an enactment applies to circumstances as they arise"[55] (or that the law "shall be considered as always speaking"[56]) assumes particular significance when the statutory provisions in question date back over 100 years and yet are called upon to respond to entirely modern events. Here, those events involved the emergence of a novel, highly contagious disease, in a time when the speed and ubiquity of both domestic and international travel is unimaginably greater than it was in 1900. We consider that the s 6 "ambulatory" approach is both available and suitable to assist us in resolving any issues when applying the relevant paragraphs of s 70 in a 21st century context.

[105] Having set the interpretive stage in that way, we turn now to the specific challenges raised by Mr Borrowdale. We will address them in the order they are set out above at [84].

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55 Section 6.

56 Acts Interpretation Act 1924, s 5(d).

Analysis of each challenge

Could Dr Bloomfield exercise the s 70 powers?

[106] Mr Borrowdale's submission is that the Orders could not be made by Dr Bloomfield under s 70 at all, because s 22 only confers on him (as the Director-General of Health) the "functions" of a Medical Officer of Health, without any reference to "powers".[57]

[107] It is true that in some parts of the 1956 Act "powers" and "functions" are referred to separately.[58] For example, s 69ZN expressly provides that the "functions" of designated officers (in a drinking water context) include the exercise of the "powers" of those officers. In other parts, "functions, duties and powers" are referred to collectively.[59]

[108] Prior to s 70, however, the only reference to the functions of Medical Officers of Health is in s 22, which makes no reference at all to their powers. And although the heading to s 70 refers to "special powers", the section itself does not use that word. But all the actions that may be taken by the Medical Officer of Health under s 70 are of a similar kind: he or she may variously "declare", "cause", "require", "forbid" or "prohibit". We do not consider there is any obvious or sensible basis on which these actions could be further subcategorised as either powers *or* functions – they encompass both.

[109] Importantly, ss 71A and 72 suggest that taking action under s 70 involves the exercise of both powers *and* functions. For example:

(a) s 71A(1)(a) provides that a constable may do anything reasonably necessary (including the use of force):[60]

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57 If this contention were correct, that would effectively be the end of both the second and third causes of action.

58 See for example s 3D(2) and s 21.

59 See for example s 7A(6), which provides that a person designated by the Director-General to be a Medical Officer of Health shall exercise his or her functions, duties, and powers in accordance with any direction of the Director-General.

60 Emphasis added.

> to help a medical officer of health or any person authorised by a medical officer of health in the exercise or performance of *powers or functions under section 70* or 71;[61]

(b) similarly, s 72(a) provides that a person commits an offence who in any way:[62]

> threatens, assaults, or intentionally obstructs or hinders a medical officer of health or any person authorised by a medical officer of health in the exercise or performance of *powers or functions under section 70* or 71; or

[110] When pressed as to whether there was any provision in the 1956 Act that conferred a *function* on a Medical Officer of Health without some corollary power, Mr Borrowdale's counsel, Mr Mijatov, was able only to point us to the general functions referred to in s 3A. But these functions are conferred on the Ministry, not a Medical Officer of Health. So s 3A does not assist.

[111] The short point is that in the present case the Director-General was qualified to act as a Medical Officer of Health under s 22. There is no conceivable policy basis suggesting that his ability to act in that role should be confined only to functions. As a matter of practical reality, it would be an empty and pointless gesture to confer on the Director-General the functions of Medical Officers of Health without also conferring on him the powers necessary to fulfil those functions, particularly in the "emergency" context of s 70. The logical and purposive interpretation is that a Director-General acting as a Medical Officer of Health pursuant to s 22(1) has the same statutory powers.

Could the s 70 powers be exercised nationally?

[112] The second general challenge here is whether the s 70 powers can be exercised nationally, as they were in this case. Mr Borrowdale says they cannot. He says that Dr Bloomfield exceeded his powers by collectively exercising the powers of individual Medical Officers of Health in their respective health districts, without considering the needs of each health district separately. He points out that the

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61 Section 71 confers requisitioning powers on a Medical Officer of Health in the event of an outbreak of infectious disease.

62 Emphasis added.

descriptions of some of the s 70(1) powers – in particular those in paras (g)–(j), (la), and (m) – specifically reference "the health district", and that Medical Officers of Health are (generally) appointed on a district by district basis.

[113] We acknowledge that, given the historic origins of the 1956 Act, it might once have been expected that the s 70 powers and their predecessors might be exercised locally and on a district by district basis. But our overview of the earlier provisions' historical use makes it clear that that was not always so. Indeed, the need for a less fractured and more co-ordinated approach was a particular concern sought to be addressed as long ago as 1920.

[114] Moreover, we think that when the 1956 Act is read dynamically, and in light of its purpose, it becomes plain that the s 70 powers cannot be viewed as requiring only regional responses. Almost from the outset in New Zealand, there were clusters of COVID-19 cases at the bottom of the South Island (in Bluff) and in Auckland. There were cases in Northland prior to the Lockdown. It was known that the virus spread rapidly and exponentially, aided and abetted by domestic air travel. The suggestion that the public health response to it should have been regionally based has no grounding in reality.

[115] And even without the general point that the provisions must be construed as responsive to the circumstances as they arise, there are contextual signposts that a national approach is contemplated and permitted. For example:

(a) s 3A confers on the Ministry the function of improving, promoting, and protecting "public health", which is defined in both national and local terms ("the health of all of the people of New Zealand or a community or section of such people");[63]

(b) s 22 provides that the Director-General may exercise the functions of a Medical Officer of Health "in any part of New Zealand";

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63 Health Act 1956, s 2(1); New Zealand Public Health and Disability Act, s 6(1).

(c) when appointing a Medical Officer of Health, the Director-General may determine whether the person should exercise or perform their powers and duties within multiple health districts;

(d) a national effect could, in any event, be achieved (albeit in an administratively absurd way) by Medical Officers of Health in each district issuing materially identical orders; and

(e) two of the three "triggers" for the exercise of powers under s 70 (namely the existence of an epidemic or a national state of emergency) are potentially national (or even international) in scale.

[116] We can therefore discern no difficulty with the nationally-based response here.

Can s 70(1)(f) be used to quarantine or isolate the whole nation?

[117] To reiterate, s 70(1)(f) empowers the Medical Officer of Health to "require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit." And here, under Order 2 (and as also applicable under Order 3), Dr Bloomfield required all persons in all districts of New Zealand to be isolated or quarantined by remaining at their current place of residence, with limited exceptions for defined "essential personal movement".

[118] There are three related limbs to Mr Borrowdale's challenge to this aspect of the Order. The first is that the word "persons" in s 70(1)(f) must refer to individuals, not all New Zealanders. The second is that the omission from para (f) of the express ability to make an "order" (as compared with s 70(1)(m), for example) suggests that it contemplated a more targeted (individual) "requirement". And the third is that effectively separating all individuals in New Zealand from all other individuals (subject only to "bubbles") goes far beyond the ordinary meaning of the words "isolated" or "quarantined". We consider each in turn.

[119] As to the first limb, we think that several textual, purposive, and contextual factors point away from Mr Borrowdale's position. Paragraph (f) itself refers to "persons", without any obvious restriction in meaning. Nor do we think that the words

"*any* persons" would have been used had a more expansive meaning been intended. Rather, we are inclined to the opposite view. While s 70(1)(b), for example, refers to "any unsanitary building", we consider this suggests that the *particular* unsanitary building (or buildings) needs to be identified. The absence of the qualifier "any" in s 70(1)(f) points away from the need for such particularity.

[120] Also relevant by way of context is the distinction between pt 3 (which includes s 70) and pt 3A within the broader scheme of the 1956 Act. As noted earlier, pt 3A – by contrast with pt 3 – seems specifically designed to apply to specific "individuals"[64] (being the word repeatedly used in pt 3A) with infectious diseases who pose a public health risk. These textual factors indicate a meaning wider than that suggested by Mr Borrowdale.

[121] As to the second limb, Mr Borrowdale's reasoning is that an "order" is necessary under s 70(1)(m) because that provision contemplates a requirement that affects – and so needs to be notified to – the general public (or a section of the public). So, he says, it follows that s 70(1)(f) must be concerned with requirements placed on individuals.

[122] Again, we are unpersuaded. A requirement under s 70(1)(f) to isolate or quarantine might be individually focused or might not. If it is, then any kind of published order would be inapt – and potentially an unwarranted intrusion on privacy. Conversely, some sort of published order under s 70(1)(m) might be appropriate because that paragraph is largely concerned with requirements relating to *public* places. And an order given under s 70(1)(m) – unlike an order under s 70(1)(la), for example – need not be in written form.

[123] The signal point is that the exercise of any of the s 70(1) powers requires appropriate notification to those affected. Where the power is exercised on a national basis and directed at the population at large, a written order with at least a degree of formality is plainly apt. This is so irrespective of whether the power refers to an "order" or "requirement".

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[64] For example, s 92C states that individuals must be treated with respect when any powers are exercised in relation to them under pt 3A.

[124] As to the third limb – concerning limits implicit in the words "isolation" and "quarantine" – we note that they are not defined terms in the 1956 Act. But the wider context of the Act and the history of the provisions make it tolerably clear that:[65]

(a) isolation involves keeping separate those who are in fact infected with a disease and those who are not; and

(b) quarantine involves keeping separate those people (and vehicles on which they have travelled) who *might* be infectious or contagious (due to their potential exposure) and those in the general population.

[125] Both terms potentially require the person or persons concerned to stay in a specified or suitable place for the duration of the period of quarantine or isolation.[66]

[126] These interpretations are consistent with the definitions in the IHR:[67]

(a) "isolation" means:

> separation of ill or contaminated persons … from others in such a manner as to prevent the spread of infection or contamination;

(b) "quarantine" means:

> the restriction of activities and/or separation from others of suspect persons who are not ill … in such a manner as to prevent the possible spread of infection or contamination;

[127] Mr Borrowdale says that the effect of the s 70(1)(f) Order was that healthy people were separated from healthy people, which goes beyond the scope of either term. We do not agree.

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65 In practice, the terms seem more recently to be used in New Zealand in almost the opposite way: "managed isolation" for returnees who may or may not have COVID-19, and "quarantine" for those returnees with a positive diagnosis who are moved to a quarantine facility.

66 That specific requirement continues to find form in s 70(1)(h), which provides that the Medical Officer of Health may "require people to remain in the health district or the place in which they are isolated or quarantined until they have been medically examined and found to be free from infectious disease, and until they have undergone such preventive treatment as he may in any such case prescribe".

67 Article 1.

[128] First, it is not difficult to interpret "quarantine", in particular, as incorporating the separation of seemingly healthy people from other seemingly healthy people. The term's traditional use involved separating those who *might* be infected from those who were (almost certainly) not, in order to prevent the possible spread of disease. And in a COVID-19 context, we accept that – as a matter of fact – the nature of the virus is such that it is not always possible to know who is infected and who is not. We accept that at Level 4 the medical assumption was, and had to be, that *anyone* might be infected.[68] It follows that in order to achieve the purpose of s 70(1) – to prevent the spread of COVID-19 – it was necessary to "quarantine" the entire country.

[129] Secondly, while we acknowledge that this use of s 70(1)(f) is extraordinary in its reach, the historical survey we have set out above indicates that it is not wholly unprecedented. The predecessors to s 70 were, in fact, used to similar effect over large portions of the country. In the influenza and polio epidemics during the first half of the 20th century, similar powers were used to isolate or quarantine not individuals, but entire populations of school children, limited only by district. Accordingly, in enacting the 1956 Act, Parliament can be taken to have understood and endorsed the potential use of the powers in such a widespread way, if necessary to prevent the outbreak or spread of infectious disease in New Zealand.

[130] We conclude that s 70(1)(f) can be used to quarantine or isolate the wider population.

Did Order 1 fail to properly close premises of a stated kind or description?

[131] To reiterate, under Order 1 Dr Bloomfield required all premises in all districts of New Zealand to be closed except those listed in the Appendix to the Order, which included "essential businesses" as defined and as further advised on the COVID-19 website.

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[68] We also note that s 79 of the 1956 Act (repealed in 2017) made it clear that in order to be isolated under that section the relevant Medical Officer of Health (or health protection officer) only needed reason to believe or suspect that any person was *likely* to cause the spread of any infectious disease – regardless of whether the person was, himself, suffering from an infectious disease. This is consistent with the expansive approach that we prefer.

[132] Mr Borrowdale challenges the legality of Order 1 (and Order 3[69] as far as it relied on s 70(1)(m)) on the grounds that it failed to state or refer to premises, or outdoor places of amusement or recreation, of "any stated kind or description".

[133] There is no dispute that the "premises" covered by Order 1 were defined in a negative or exclusive way. We acknowledge that a very narrow reading of the words "any stated kind or description" suggests that a positive or inclusive definition is contemplated. And we have no doubt that in many circumstances in which s 70(1)(m) might be used it would be possible to adopt such a definition.

[134] Again, however, context and purpose are everything. The ability to take urgent and decisive action would be thwarted if a s 70(1)(m) order was required to specify each and every kind of premises and place required to be closed. The risk of accidental omissions – with potentially serious consequences – is too great. Moreover, the nature and extent of the public health risk here required that the starting point, or default position, would be that *all* public premises here were closed. So the ability to define premises by a list of exceptions is not only reasonable, but necessary, for the purpose of preventing the spread of COVID-19. It follows that a purposive and contextual construction of the term "any stated kind or description" cannot preclude a description that encompasses all premises, with specified exceptions.

[135] As with s 70(1)(f), the determinative point here must be about clarity and notice. In other words, the "any stated kind or description" requirement is to ensure that the intended reach of the s 70(1)(m) power being exercised is clearly communicated. As long as that end is achieved, it does not matter whether the relevant premises are described positively or negatively.

Did Order 1 define "congregate" in a way that improperly changed its meaning?

[136] Finally, Mr Borrowdale challenges Order 1 (and Order 3 as far as it relied on s 70(1)(m)) on the grounds that it defined "congregate" in a way that purported to vary the meaning of the term as used in the 1956 Act.

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[69] Under Order 3, Dr Bloomfield required the closure of premises of the kinds to which infection control measures applied unless those measures were operating.

[137] That is, Mr Borrowdale says the Order is defective because it alters the ordinary meaning of "congregate" by excepting congregation with "physical distancing", which was defined as remaining two metres away from other people or, if closer than two metres, being together for less than 15 minutes.

[138] The word "congregate" is not defined in the 1956 Act and does not appear in it, apart from in s 70(1)(m). But we acknowledge that its ordinary meaning is to gather together. Although a more restricted meaning was adopted in Order 1, in a context where congregation was being *prohibited*, a narrower meaning of the word is in fact *more* rights consistent. In other words, permitting people to gather together when following the rules of physical distancing impinges *less* on freedom of movement, assembly and association than an unqualified ban on congregation. There is therefore little merit in this point.

Conclusion: second cause of action

[139] In our view Orders 1, 2, and 3 were each authorised by either s 70(1)(f), (m), or both when those provisions are interpreted in light of their purpose and context. The second cause of action fails, accordingly.

THE FIRST CAUSE OF ACTION

[140] The focus of the first cause of action is on the first nine days of Lockdown beginning on 26 March[70] and concluding on 3 April, when Order 2 came into effect. It centres on public announcements made by the Prime Minister and others, and the allegation that they had the effect of unlawfully limiting New Zealanders' rights. We note that while some of the announcements began from 23 March, they did not purport to limit New Zealanders' rights until the move to Alert Level 4 – that is, from 26 March.

[141] The context for those public announcements is explained by Dr Bloomfield in his affidavit:

> The timeline of what happened was almost like a wave coming in: we could see it emerging in the distance during January and started watching carefully.

[70] Technically at 11.59 pm on 25 March, but effectively from 26 March.

> In February the wave grew bigger and came closer: we started putting in place border protections and preparing the health system to deal with outbreaks. By March we were realising that this threat was unprecedented, and if the virus got established in New Zealand it would be catastrophic …
>
> Then came a tipping point around the weekend of 21–22 March: modelling coming in from experts, both in New Zealand and around the world, was showing that once community transmission took hold, we would lose our window to stamp out the virus, that there would only be one shot at this. At the same time, we were getting our first confirmed community transmission cases. We realised that "go early" had changed to "go right now", and there was no time left. What we thought could be done in two weeks or two days had to happen now: it was quite literally now or never. Hard decisions were required, and we made them, as it was now clear that this was the best – in fact the only – way to protect the health and well-being of New Zealanders, prevent our health system being overwhelmed, and avoid prolonged damage to our economy.
>
> The absolute priority was to get the lockdown in place and that drove every aspect of what we did over that period: we needed to move, and had no time to sort out the exact details. Some things would have to get sorted out later.

The Statements

[142] By way of background, on Saturday 21 March 2020, the Prime Minister addressed the nation from her office in the Beehive, flanked by the New Zealand flag. She said she was speaking directly "to all New Zealanders today to give you as much certainty and clarity as we can as we fight COVID-19". She outlined the rapidly escalating global health crisis and explained "how we will know what to do and when". And she announced an alert system for COVID-19 that could apply either to the whole country or to specific areas.

[143] That alert system had four levels of alert (the Alert Levels):

(a) Alert Level 1 – *Prepare*. This recognises a situation where the disease is contained in New Zealand: the risk assessment is that COVID-19 is uncontrolled overseas and that isolated household transmission could be occurring in New Zealand.

(b) Alert Level 2 – *Reduce*. This recognises a situation where the disease is contained but the risk of community transmission remains: the risk assessment is that household transmission and single or isolated cluster outbreaks could be occurring.

(c) Alert Level 3 – *Restrict*. This recognises a situation where there is a high risk that the disease is not contained: the risk assessment is that community transmission might be happening, and that new clusters may emerge but can be controlled through testing and contact tracing.

(d) Alert Level 4 – *Lockdown*. This recognises a situation where it is likely that the disease is not contained: the risk assessment is that community transmission is occurring and that there may be widespread outbreaks and new clusters.

[144] A key measure of Level 4 was that the population would be told to stay at home: the Lockdown. This was made clear in the 20 March Cabinet paper, which stated:

> The next 2-3 weeks is critical to New Zealand's COVID-19 response. Our ability to stamp it out depends on ramping up testing to identify cases, scaling up contact tracing and *enforcing self-isolation*. We are acting rapidly on all three fronts.

[145] The paper identified the key features of Level 4 as:[71]

- State of local or national emergency declared
- *Population instructed to stay at home*
- Domestic travel restrictions imposed depending on areas of outbreak and risk
- Businesses closed except for essential services (supermarkets, pharmacies, clinics) and lifeline utilities
- Rationing of supplies and requisitioning of facilities possible
- Public transport severely limited
- Major reprioritisation of healthcare services
- Triaging of patients to "COVID clinics" or home, who otherwise would be hospitalised

[71] Emphasis added.

[146] The New Zealand Government's COVID-19 website, "Unite against COVID-19", provided an overview of the Alert Levels, explaining that it listed the measures to be taken against COVID-19 at each level. The website stated:

> The alert system was introduced in March 2020 to manage and minimise the risk of COVID-19 in New Zealand. The system helps people understand the current level of risk and the restrictions that must be followed.

[147] Mr Borrowdale's claim relies on statements beginning on 23 March from the Prime Minister and others in Government, which were communicated via press statements, televised conferences, media interviews, social media, and text message alerts. We set out the key passages of those statements (the Statements) in chronological order, with emphasis added.

23 March

[148] At a post-Cabinet press conference on Monday 23 March, the Prime Minister said:[72]

> … Now is the time to act. That's why Cabinet met today and agreed that, effective immediately, we will move to alert level three nationwide; after 48 hours—the time required to ensure essential services are in place—*we will move to level four*. *These decisions will place the most significant restrictions on New Zealanders' movements in modern history.* This is not a decision taken lightly, but it is our best chance to slow the virus and to save lives.
>
> … If you do not have immediate needs, do not go to the supermarket. It will be there for you today, it will be there for you tomorrow, and the day after that. We must give time for supermarkets to restock their shelves. …
>
> … Non-essential business in New Zealand must now close. …
>
> … All indoor and outdoor events cannot proceed. In short, we are all now preparing as a nation to go into self-isolation, in the same way that we have seen many other countries do. *Staying at home is essential.* It's a simple but highly effective way to constrain the virus. …
>
> People must work from home …
>
> Schools will be closed from tomorrow, except to the children of essential workers such as doctors, nurses, ambulance drivers, police …
>
> *To be absolutely clear: we are now asking all New Zealanders who are outside essential services to stay at home and to stop all interaction with others*

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[72] In the Statements we set out in the following paragraphs, we have italicised the passages upon which Mr Borrowdale would particularly rely.

> *outside of those in your household.* … We are asking you: only spend time with those you are in self-isolation with, and, if you are outside, keep your distance from others. …
>
> *Travel around New Zealand will also change. Over the next 48 hours, people will need to go home, be it locally or throughout the country.* …
>
> Together we do have an opportunity to contain the spread and to prevent the worst. I cannot stress enough the need for every New Zealander to follow the advice I've laid out for you today. As a Government, we will—and I hope you have seen this—we will do everything in our power to protect you. Now I'm asking you to do everything you can to protect all of us. None of us can do this alone. Your actions will be critical to our collective ability to stop COVID-19. *Failure of anyone to play their part in coming days will put the lives of others at risk, and there will be no tolerance for that. We will not hesitate to use our enforcement powers if needed. We are in this together. I'm in no doubt that the measures I've announced today will cause unprecedented economic and social disruption, but they are necessary.*
>
> *… But we—we will play the role of enforcer.* …

[149] The Prime Minister reiterated the message the same day on her Facebook page.

[150] Police Commissioner Mike Bush appeared on the AM Show[73] and was quoted on the Newshub website:

> We have numerous powers. We have powers under the Health Act, we may in fact have powers under the Civil Defence Emergency Act. But we also have our power under the Summary Offences Act.
>
> So if we're asking people to comply there is authority we can use. We hope not to use it, but we will. …
>
> *The way I put it is, you're better to stay on the comfort of your own couch of your own home than be cooling yourself on a very cool bench in a police cell.* …
>
> But what I can say is that if people don't do as they're directed, we'll be out there and we'll be ensuring that people are complying – because they need to be. This is about saving lives.

[151] The Government's Unite against COVID-19 website stated:

> This is a COVID-19 announcement. Please read all of the following: To increase everyone's protection we have moved to Alert Level 3. We will be moving to Alert Level 4 within 48 hours. This means unless delivering essential services, *you must now stay at home*. …

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[73] A New Zealand morning news and talk show on television and radio.

24 March

[152] At a press conference, the Prime Minister said that reducing contact was the underlying principle of Lockdown and that the Lockdown was unprecedented:

> The first statement I'd make is that the underlying principle for alert level 4 is to reduce down contact between people to the bare minimum—essential services contact only. That means the simplest thing New Zealanders can do to stop the spread of this virus is to stay at home. That's how we will save lives. Isolation and physical distancing from other people is key to our response at this level. …
>
> … I would reiterate what I said yesterday: this event is unprecedented in New Zealand's history. Never before have we sought to shut down our country in the space of 48 hours.

[153] And on her Facebook page she again stressed the need to stay at home in self-isolation:

> Gatherings of any kind are also cancelled, and, as much as possible, we are asking you to move towards fully self-isolating. …
>
> So, if you do not need to leave your home, please don't. …
>
> I cannot stress enough the need for every New Zealander to follow the advice I have laid out today. We're in this together and must unite against COVID-19.

[154] At an All of Government team press conference, the All of Government Controller, John Ombler, set out these requirements:[74]

> From midnight—one minute before midnight—tomorrow night, on Wednesday, *everyone must stay at home unless they're working in essential services, … This means that people must stop interactions with others outside of their households. … You must spend time just with those with whom you are in self-isolation*, and keep your distance from everyone else at all times … keep 2 metres away from others at all times.

[155] He emphasised:

> We absolutely need everyone across society to observe these requirements, so that we can protect New Zealanders and slow down this disease, and *we will have to take enforcement action if that does not happen*.

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[74] The All of Government Controller coordinated the overall Government response to the COVID-19 pandemic. The All of Government leadership team comprised the Director-General of Health, the Director of Civil Defence and Emergency Management Sarah Stuart-Black, MBIE official Dr Peter Crabtree, and Police Commissioner Mike Bush.

25 March

[156] At a press conference, the Prime Minister again explained the need to stay at home and noted the possibility of Police enforcement:

> I have one simple message for New Zealanders today as we head into the next four weeks: stay at home. It will break the chain of transmission and it will save lives. … Breaking the rules could kill someone close to you, and that is why it is so important. … I cannot repeat this enough: staying at home will save lives.
>
> *If someone is outside and has no explanation, [Police] will remind them of their obligations, and if they believe they need to, they can take other enforcement actions.*

[157] Then, in a speech to the House, she referred again to the need for enforcement:

> From midnight tonight, we bundle down for four weeks to try and stop the virus in its tracks, to break the chain. …
>
> *These moves will be enforced. And we will be the enforcer. …*
>
> *There will be no tolerance for that. We will not hesitate to use our enforcement powers if needed. …*
>
> The restrictions in place on New Zealanders' movements are the most significant in our modern history. I do not underestimate the gravity of what is being asked of you. But we have a limited window of opportunity and we must use every weapon we have. …
>
> As Police Commissioner Mike Bush said, the Police and the Military will be working together and there is assistance at the ready as required. *If people do not follow the message here today, then the police will remind people of their obligations. They have the ability to escalate if required. They can arrest if needed, they can detain if needed.*
>
> But these are tools of last resort, in a time when I know New Zealanders will rally. Because that is what we do.

[158] Police Commissioner Mike Bush was a guest on Newstalk ZB and said:

> So the highest level – everyone apart from essential services, essential workforce and those needing to go to get essential food supplies ah need to stay home. …
>
> *If people don't comply then we'll be using the authority that we have um either under our own legislation (or under other law) ah to ensure that people do comply. …*

[159] When questioned by the interviewer how the Military would play a part, he replied:

> Well I hope they never have to play a part but they are standing by … they have the same approach that we do. We really want to encourage and educate as a first step.
>
> …
>
> … You only go out um, in your vehicle if you need to go and get food, essential medical supplies, essential food supplies or medical treatment. Otherwise you stay at home.

[160] At an All of Government press conference, Sarah Stuart-Black, Director of Civil Defence Emergency Management, re-emphasised the call to stay at home:

> As you know, from 11.59 tonight, we will be in national alert level 4, our national elimination phase. *This means everyone must stay home* and all businesses must close unless they are essential services.
>
> …
>
> I'd like to reinforce the critical importance of everybody doing their part to make sure that we can save lives and beat COVID-19. Each of you has a role in helping to save a life. *Self-isolation means people must stop all interactions with others outside of their households*, and, as the Prime Minister said, the importance of us all being able to create that circle—and the bubble—to be able to make sure that we can stay together, self-isolated, having no contact with people outside of that.

[161] The following were variously posted on the Government's Unite against COVID-19 website or its relevant Facebook page:

> The latest updates from the Prime Minister:
>
> - Self isolation is the best tool for us to defeat the virus. Staying at home will save lives.
>
> - If you're not sure about something, apply this simple rule: Act like you have Covid-19. Every move you make could be a risk to someone else.
>
> - *The Government now has the tools in place to help combat the spread of Covid-19 with the legislative changes today. …*
>
> Be calm, be kind and stay at home.
>
> …

> The best thing everyone can do to stop the spread of COVID-19 is to stay at home. This includes parents with shared custody and arrangements, and their children.
>
> …
>
> Alert Level 4 measures include:
>
> - Anyone not involved in essential work, needs to stay at home.
> - Educational facilities are now closed.
> - Business are closed, except for essential services like supermarkets, pharmacies and clinics, and lifeline utilities.
> - *Where you stay tonight (Wednesday 25 March) is where you must stay from now on.*
>
> Thank you to each and every person, for doing their bit. Stay home. Save lives. Unite against COVID-19.

[162] At 6.30 pm, the Civil Defence National Emergency Management Agency issued the following alert to all capable mobile phones:[75]

> **Emergency Alert**
>
> NATIONAL EMERGENCY MANAGEMENT AGENCY ALERT: From 11:59pm tonight, the whole of New Zealand moves to COVID-19 Alert Level 4.
>
> This message is for all of New Zealand. We are depending on you.
>
> Follow the rules and STAY HOME. Act as if you have COVID-19. This will save lives.
>
> Remember:
> * *Where you stay tonight is where YOU MUST stay from now on.*
> * You must only be in physical contact with those you are living with.
>
> It is likely LEVEL 4 measures will stay in place for a number of weeks.
>
> Lets all do our bit to unite against COVID-19.
>
> Kia kaha.
>
> Issued 25 March 2020 6:30pm.

[75] The Crown says the text alert was a warning under s 9(2)(e) of the CDEMA.

26 March

[163] At an All of Government press conference, the Commissioner of Police advised that if people breached the "requirement to stay home", they would be warned. If they refused to comply, Police would "take them to our place, and put them somewhere that will allow them to contemplate the impact of their decisions". Serious breaches and "prolific" breaches, he said, would be prosecuted.

[164] The Government's Unite against COVID-19 website advised that the country was in Alert Level 4, saying that "enforcement measures may be used to ensure everyone acts together". It stated that Alert Level 4 meant, among other things:

> *Everyone must now stay home, except those providing essential services…*
>
> [If people went out for a walk, run, or bike ride] it must be solitary, or with those [they] live with". …
>
> People are expected to stay local when leaving the home. …
>
> *Do not go hunting or hiking, and especially not on overnight trips.*

27 March

[165] At her press conference, the Prime Minister said:

> However, if we keep to the lockdown rules and limit our contact with others, we should start to see the impacts of that—if we follow the rules.
>
> …
>
> Of course, the best chance we have of limiting the time that we're all in this lockdown is if we obey the rules while we're in it. …

[166] When asked for clarity on whether people could drive to the park or beach for a walk, the Prime Minister responded that they were asking people to stay local and to stay apart:

> Look, I will receive, no doubt, over the course of these four weeks, as I already have, very specific examples, very specific questions, which is why I'll always come back to the principles people can apply for almost any situation. We're asking people to stay local. So, yes, people will need to use their cars for trips to things like the supermarket, maybe their GP, but we are asking whenever they do that, keep it local. … So stay local and stay apart.

[167] At an All of Government press conference, Dr Bloomfield referenced the legal underpinning of the Lockdown and the special powers that were now available:[76]

> Three days ago, on 24 March, the Prime Minister, with the agreement of the Minister of Health, issued an epidemic notice under the Epidemic Preparedness Act 2006. Now, that notice unlocks the use of special powers by medical officers of health under the Health Act 1956 to prevent the outbreak and spread of COVID-19. That's the legal underpinning for the lockdown. And, in addition to that, I've issued a national notice to activate section 70 of the Health Act 1956, and since Wednesday night that has prohibited large gatherings and required premises to be closed, with the exception, of course, of our essential businesses. There is more information on this on the ministry's website, and more special powers may be used as the situation progresses. The page on our website will be updated when they are.

[168] And Ms Stuart-Black advised that the public were only allowed to drive for the purpose of exercising if they stayed "local" and did not undertake activities like surfing where they may need to be rescued.

28 March

[169] At an All of Government press conference, Mr Ombler pointed people to the Police 105 number for Lockdown breaches and again reemphasised the limited reasons for leaving home:

> If people believe that others are not complying with the restrictions, I suggest the first port of call is to talk politely with them and discuss it. *If it's necessary, and people are clearly [flouting] the rules that we want, you may wish to call the police on 105.* If it's urgent, there's always 111, but let's leave that for real emergencies.
>
> This weekend is very different from usual. It's important for everyone to stay home and save lives, New Zealanders and visitors alike. You might be tempted to leave the house, *but you can only leave home for essential reasons and for physical exercise by yourself or with the other people in your house.* Stick to your bubble. …

30 March

[170] At a post-Cabinet press conference, the Prime Minister said:

> Unfortunately, there are some people who are failing to act responsibly, and I want to say very clearly: *the police are geared up around enforcement*, and they have been and will continue to act. This is not a time to look for ways

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[76] We will discuss the Director-General's public statements in more detail later.

> out. *It is not a time to bend the rules. This is a time to stay at home and to save lives.*

[171] The Commissioner of Police then repeated that message at the All of Government press conference and referred to examples of people being taken into custody:

> … We have, for example, tourists who think it's OK to drive around the country in their campervans. It's not OK. Stay absolutely put. Stay in place.
>
> We have, over the last few days, had cause to arrest three people, for persistent breaches. Now, two of those people were taken into police custody but later released without charge; one person remains in police custody—mainly because they had other outstanding matters in front of them. *But again, we will be out there ensuring people do comply, because—we can't say it enough —staying home saves lives.*

1 April

[172] The Prime Minister reiterated the same messaging again at a post-Cabinet press conference:

> So I'll repeat, as I always do: *stay at home. Only go out if you need to. When you do, stay local. Keep 2 metres apart from others. Stick only to your bubble* …

[173] The Government continued this messaging in press conferences and interviews up until the date Order 2 came into effect.[77]

The pleaded claim and responses

[174] Mr Borrowdale claims that Statements of the kind set out above entailed directions requiring all New Zealanders to be confined to their homes and to stop all interactions with others outside an individual's immediate household or "bubble" (the Restrictive Measures). The home confinement was for all purposes other than accessing or providing essential services, or partaking in limited, solitary exercise. He says the Prime Minister and others in Government directed that Police would enforce compliance with the Restrictive Measures. But, for the period from 23 March to the

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[77] The messaging continued afterwards but Order 2 legitimised the requirements, as we have found in the second cause of action.

date of Order 2 (3 April), he says that those directions went beyond Order 1[78] and therefore had no legal basis – they were not prescribed by law.

[175] Mr Borrowdale says that the Restrictive Measures imposed by the Statements therefore unlawfully limited rights affirmed by the NZBORA. As with the second cause of action, the relevant rights and freedoms are: to manifest religion and belief, freedom of assembly, freedom of association, and freedom of movement.[79]

[176] And Mr Borrowdale says that the Restrictive Measures constituted the exercise of a pretended power of suspending or execution of laws (namely the rights affirmed by the NZBORA) and were accordingly illegal by virtue of s 1 of the Bill of Rights 1688.

[177] As before, however, Mr Borrowdale accepts that had the Restrictive Measures been prescribed by law then they would have been reasonable limits on those rights that were demonstrably justified in a free and democratic society, in accordance with s 5 of the NZBORA.

[178] The Crown says that the Statements were only informative: guidance, not commands. And the Crown says that any limitation of rights was here in accordance with statutory powers contained in the 1956 Act or the CDEMA.

[179] The Law Society says that there was a disjunct between the Restrictive Measures and the restrictions imposed by Order 1. Because of this disjunct, the Statements were problematic in light of the rule of law. Though the disjunct was corrected when Order 2 was issued, that Order was presented as simply providing clarity and further guidance.

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78 The effect of Order 1 was that people could not go to any premises other than private dwelling houses (or other exempted premises) and, if with others in outdoor places of amusement or recreation, could not be within two metres of another person for 15 minutes or more. Order 1 did not include the Restrictive Measures. They were specified in Order 2. While Mr Borrowdale is correct to say that Order 1 included a definition of physical distancing, the detail of which was not always referred to in the Statements, the definition of physical distancing was always publicly available via Order 1 and we take this no further.

79 NZBORA, ss 15, 16, 17 and 18. We have footnoted earlier why we do not consider the right not to be arbitrarily arrested or detained is engaged here.

Did the Statements convey guidance, or command?

[180] One of the core functions of the Ministry of Health (of which the Director-General is the Chief Executive) is to improve, promote and protect public health.[80] And we accept – as the Crown submissions contend and the affidavit evidence shows – that the public health regime operates primarily through education and community engagement, with a strong focus on voluntary cooperation: coercive powers are regarded as backstop measures of last resort. That approach is endorsed by the provisions in the WHO Constitution set out earlier in this judgment: "the health of all peoples … is dependent upon the fullest co-operation of individuals" and "informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people."[81]

[181] These guiding principles were rightly regarded as having a critical part to play in the Government response to the COVID-19 crisis. Their importance is reflected, for example, in the minute recording the Cabinet meeting on 23 March, where Cabinet:

> **noted** that the only realistic way to ensure a comprehensive response to the measures in Level 3 and Level 4 is through community-endorsed compliance, backed with strong communications and clear guidance …

[182] Critically, however, the minute then immediately went on:

> … backed up by regulators who are willing and able to enforce using strong sanctions.

[183] It is this dichotomy – the importance of encouraging voluntary compliance but also the threatened use of coercive powers – that lies at the heart of the first cause of action.

[184] It follows that we accept, for example, that the Statements contain much "soft messaging" focusing on the "Unite" campaign and the concept of a "Team of 5 million". They repeatedly emphasise the importance of collective action and commitment. On numerous occasions New Zealanders are "asked" to stay home, just as they are asked to be kind and to wash their hands. Equally, however, the Statements

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80 Health Act 1956, s 3A.
81 See [39] above.

are replete with commands: the frequent use of the word "must", backed up by reference to the possibility of enforcement action for those who did not follow the "rules".

[185] Standing together with that imperative language are other contextual matters that support our view that the Statements conveyed commands, not guidance.[82]

[186] First, we think the significance and effect of the Prime Minister's role at this time cannot be overstated.[83] Early on, responding to rumours that the Government was set to announce a total lockdown, the Prime Minister said:

> We will continue to be your single source of truth. Everything else you see, a grain of salt.

[187] And then, it was in her address at the press conference on 25 March that she gave "one simple message" to New Zealanders: "stay at home" … "Breaking the rules could kill someone close to you". That address – and those statements – carried with them the full authority of her office and the State.

[188] Secondly, there is the matter of wider context: the factual reality that the country then faced. The evidence was clear, and it was clearly communicated, that New Zealand was facing an unprecedented challenge and risk and that, by the weekend of 21–22 March, "there was no time left" and "hard decisions were required". The proposition that the Government was simply asking for public buy-in or would enforce it on a case by case basis does not sit easily with that evidence.

[189] Thirdly, although the Alert Levels themselves may have been intended as only informative, the evidence suggests an awareness that enforcement of them would be required. Dr Bloomfield does not say in his affidavit that public statements on Level 4 were made only for the purpose of encouraging voluntary compliance. He simply

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82 Similarly, in *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [280], the Supreme Court treated Government statements not as merely providing information to the public but as messages that were expected to be complied with, even though no direct compulsion was adopted.

83 In this respect there are parallels with *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC), a decision to which we return later, where announcements made by the then Prime Minister Muldoon led Wild CJ to observe that "it was implicit in the statement, coming as it did from the Prime Minister, that what was being done was lawful and had legal effect", at 623.

explains that the Lockdown strategy would work only if the entire population committed to it:

> … [Level 4] had to involve the whole country or it would not work. This required absolute consistency: we all had to be in lockdown under the same conditions for the same period … anything less than a nationwide lockdown, applying to everyone, would not have got the job done.

[190] It is difficult to see how national consistency could be achieved by merely relying on educating the public.

[191] In short, we have no doubt that the Statements conveyed that there was a legal obligation on New Zealanders to comply: to stay home and remain in their bubble. We do not accept Ms Casey QC's submission for the Crown that Mr Borrowdale needed to have called evidence from individuals confirming that this is how they interpreted them before we could draw that conclusion.[84] The Statements created the overwhelming impression that compliance was required by law – indeed, that is how we interpreted them at the time.

[192] We turn now to address the two limbs of Mr Borrowdale's claim under the first cause of action.

Were the Restrictive Measures an unlawful limit on NZBORA rights?

Did the Restrictive Measures limit affirmed rights and freedoms?

[193] We have already accepted, in relation to the second cause of action, that Order 2 did limit certain NZBORA rights and freedoms – albeit in a justified way that was prescribed by law. Since the Restrictive Measures had, in essence, the same effect as Order 2, it follows that the same NZBORA rights were engaged.

[194] The Crown, however, submits that the Restrictive Measures did not engage or limit these rights in cases because New Zealanders voluntarily complied with them.[85]

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[84] By and large, New Zealanders complied with the Restrictive Measures. But while the Crown suggests that the widespread public compliance could equally be seen as a high level of community engagement and commitment rather than a response to an implied threat of criminal sanctions, the number of complaints to the Police of others not observing "the rules" somewhat undermines that contention.

[85] Relying on *McCallum v Police* [2014] NZHC 1135 at [26]–[30].

There is a material difference between voluntary compliance with an instruction and enforced compliance.[86]

[195] But, for the reasons we have already given, we think that it would quite unreal to interpret the Statements as requests for voluntary compliance. Even though the enforcement powers did not exist in respect of a breach of the Restrictive Measures prior to Order 2,[87] it is not possible to conclude sensibly that the achieved compliance was truly voluntary.

[196] The Crown also submits that a protected right is only limited if and when purported enforcement action is taken. It says the limit would become unlawful if that enforcement action was not, itself, authorised by law.

[197] We are unable to agree with that proposition, either. It underplays the authority of the Statements, which, in effect, limited New Zealanders' freedom of movement, assembly and association. People stayed home and in their bubbles because they believed they had to. It was the threat of enforcement – not actual enforcement – that gave rise to that belief.

[198] Were it otherwise, for example, a government proclamation forbidding attendance at church would not breach the right to religion and belief until a worshipper was arrested on a church doorstep. That cannot be right. Statements by those in power that require rights-restrictive actions, coupled with threats of enforcement, are sufficient to constitute a limit on those rights.

[199] We therefore conclude that the Restrictive Measures limited affirmed rights and freedoms. The next question is whether they were nevertheless prescribed by law, as they were under Order 2.

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86 As confirmed recently by the Court of Appeal in *Coleman v Chief Executive of the Department of Corrections* [2020] NZCA 210 at [29], citing with approval *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2020] 2 WLR 418 at [27], where the Court described the difference in the context of a curfew order as "crucial".

87 Discussed further at [217]–[225] below.

Were the limits prescribed by law?

[200] The ambit of the term "prescribed by law" is not in dispute. As McGrath J said in *R v Hansen*:[88]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

[201] It is also not disputed that Order 1 did not require people to stay home and in their bubble. And Order 2 had not yet been made. So any legal basis for the Restrictive Measures must lie elsewhere. The Crown proposes two alternative sources.

[202] First, it says that if the Statements were *not* coercive in nature, then they were authorised by the Ministry's general public health functions under s 3A of the 1956 Act. But because we have found that the Statements were intended to be, and were interpreted as, coercive, we need not consider this source further.[89]

[203] Secondly – and if the Statements *were* coercive – then they could be viewed as a "requirement" imposed under the authority of s 70(1)(f) of the 1956 Act. The Crown says that the Statements did, as a matter of fact, constitute a requirement under s 70(1)(f) and were therefore prescribed by law. Putting to one side that this cuts across the prior Crown theory of the case (that the Statements merely encouraged voluntary compliance), this proposition warrants further discussion.

[204] The starting point is that we have found in the second cause of action that s 70(1)(f) was available to authorise the Restrictive Measures.[90] And the exercise of that power does not require the issuing of a formal or written order.[91]

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88 *Hansen*, above n 49, at [180] (footnotes omitted).

89 For completeness, however, we do not think the very general words of s 3A carry with them the implied power to impose limits on protected rights such as freedom of movement. Section 3A expressly provides that it does not limit any other enactment or rule of law (which must include the NZBORA).

90 As was the case when Order 2 was made.

91 Even though Order 2 was issued formally and in writing.

[205] But only Dr Bloomfield possessed the authority to make requirements or orders under s 70.[92] So it is his contemporaneous public statements and subsequent evidence that must be looked at, to see whether they somehow reveal a requirement by him that New Zealanders self-isolate under s 70(1)(f) before Order 2 was made.

[206] We begin with his press conference on 23 March. It was then put to him that there was an increasing number of New Zealand scientists pushing to move to Level 4. Dr Bloomfield replied that this was a matter for Government to decide:

> So that's a Government decision and we continue to provide advice to the Government about the alert level. And, as I've hinted at, at, the Prime Minister will be talking about the alert level actually within the next hour.
>
> …
>
> Even if we advise something, of course Cabinet has to discuss and make a decision.

[207] Although we accept that the move to Level 4 would obviously need to be discussed by Cabinet due to its significant social and economic implications, the statement here is still a clear indicator that Level 4 decision-making was not thought to be Dr Bloomfield's.

[208] Consistent with that is the Prime Minister's post-Cabinet press conference announcing the move to Level 4. It was she who told New Zealanders to stay home and to stop interactions with others outside their household. Again, that is entirely understandable in the context of communicating a matter of such importance to the nation. The Prime Minister had the mana to announce the Lockdown and to tell people what would be required of them. But there is no evidence that the decision about the Restrictive Measures had been made by Dr Bloomfield and was merely being conveyed by the Prime Minister with his agreement.

[209] The evidence also shows that Dr Bloomfield did not himself think he was requiring the Restrictive Measures under the s 70(1)(f) power. At the press conference the day after the Prime Minister's Level 4 announcement, Dr Bloomfield only strongly urged compliance:

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[92] Putting to one side the power of individual Medical Officers of Health.

> … we are preparing to move to alert level 4. There is a clear consensus amongst public health professionals, scientists, and a wide range of health professionals that it is better to do this sooner rather than later, and doing so gives New Zealand the best chance of breaking the chain of community transmission. This will require all our efforts, and I strongly urge all New Zealanders to play their part.

[210] Similarly, Dr Bloomfield "encouraged" New Zealanders to stay home to break the chain and save lives at the All of Government press conference on 25 March. This is not the language of a "requirement".

[211] And on 27 March at another press conference, Dr Bloomfield clearly did not think he had invoked s 70(1)(f) – only s 70(1)(m):

> Three days ago, on 24 March, the Prime Minister, with the agreement of the Minister of Health, issued an epidemic notice under the Epidemic Preparedness Act 2006. Now, that notice unlocks the use of special powers by medical officers of health under the Health Act 1956 to prevent the outbreak and spread of COVID-19. That's the legal underpinning for the lockdown. And, in addition to that, I've issued a national notice to activate section 70 of the Health Act 1956, and since Wednesday night that has prohibited large gatherings and required premises to be closed, with the exception, of course, of our essential businesses.

[212] In his paper to the Minister of Health giving background about Order 2, Dr Bloomfield makes clear that he thought Order 2's effect was only to clarify self-isolation and to ensure that Police had enforcement powers. There was no suggestion that Order 2 was simply confirming a s 70(1)(f) direction he had already made:

> The New Zealand Government's approach to date has focused on community-endorsed compliance, supported with strong communications and clear guidance, backed up by regulators who are willing and able to enforce using strong sanctions [in the business sector]. This notice will not fundamentally change that approach. Instead it aims to provide greater clarity around what is meant by self-isolation and to ensure that New Zealand Police have the necessary powers to clarify and enforce those rules, should that be required.

[213] Lastly, nothing in Dr Bloomfield's affidavit supports a different conclusion. He explained the circumstances of his decision to make a s 70(1)(f) direction:

> We knew to be effective we needed people to understand clearly what was required of them. We were also concerned that compliance would be compromised if there was seen to be inconsistency in the "bubble" rules, and

> we were worried that people were getting anxious about whether other people were following the same rules as they were. All of these potentially compromised public commitment to the lockdown and jeopardised its effectiveness.
>
> I decided that it would be appropriate to issue a formal Order under s 70(1)(f) specifying in more detail what was required of everyone in terms of the directions to "stay home" and "stay in your bubble", and importantly what the parameters of allowable personal movement were going to be. This was issued on 3 Apri1.

[214] These excerpts suggest that Dr Bloomfield did not think he had issued a requirement under s 70(1)(f) for the Restrictive Measures but that they were already in place, with Order 2 necessary only to add clarity and shore up enforcement powers.

[215] It is clear to us that Dr Bloomfield's advice was critical to the Government's decision-making before and after Lockdown. He had advised Cabinet that Lockdown was required. He had the power under s 70(1)(f) to impose the Restrictive Measures, and he later exercised that power. And while we acknowledge that Dr Bloomfield would, no doubt, have exercised the power earlier if it were thought necessary for Lockdown, there is no evidence that he either intended to do so or thought that he had done so before making Order 2.[93]

[216] But the s 70(1)(f) power cannot be exercised retrospectively or by implication. Making such a requirement carries with it a statutory power to enforce it with criminal sanctions. It follows that – even if not recorded in writing – a s 70(1)(f) power must be exercised unequivocally, and the requirement must be articulated precisely. That is what the rule of law requires. So it cannot be said that the Restrictive Measures were imposed pursuant to s 70(1)(f).

[217] For completeness, it is necessary to say something about the scope of the enforcement powers that were possessed by Police during those first nine days. That is because if there was some other basis upon which the directions to stay at home

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[93] We are unable to accept the suggestion that the information on the COVID-19 website might somehow have constituted a s 70(1)(f) requirement. While the website recorded the public health message that people should stay home, it did not record any requirement to that effect imposed by Dr Bloomfield.

could have been enforced, then that might go some way to providing the otherwise missing legal authority for them.[94]

[218] Mr Peoples, the National Manager of Legal Services at New Zealand Police, filed evidence describing the Police understanding of their powers during the first part of the Lockdown. He deposed that these powers had three sources:[95]

(a) the general powers conferred on Constables under s 71A of the 1956 Act in relation to the enforcement of Order 1;

(b) the powers conferred on Constables (or "Controllers") exercisable under s 91 of the CDEMA; and

(c) the powers conferred on Constables under s 71A and exercisable on a case by case basis, where a Medical Officer of Health imposes a specific, individual "requirement" under s 70(1)(f), which is not complied with.

[219] The first requires no further discussion here: it bears no relationship to the Restrictive Measures.

[220] The second is a power of direction, in the following terms:[96]

> (1) While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—
>
> (a) direct any person to stop any activity that may cause or substantially contribute to an emergency:
>
> (b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.

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94 During the nine-day period, there were 15 charges relating to offences under the 1956 Act and ten relating to offences under the CDEMA. We do not know whether the alleged offences under the 1956 Act involved not complying with the Restrictive Measures.

95 These are also reflected in the Police Instructions dated 27 March 2020.

96 Failure to comply with such a direction is an offence, under s 102 of the CDEMA.

[221] We think it unlikely that a failure of an individual or group of individuals to stay at home would constitute an activity "that may cause or substantially contribute to an emergency".

[222] The third is the suggestion that, to enforce specific instances of non-compliance, the Police could call upon a Medical Officer of Health to issue an individual requirement under s 70(1)(f). Then, if that requirement was not complied with, the Police could take enforcement action.

[223] But on a practical level this could only occur if Police had been alerted to a particular problem (for example, a house party). The prospect of Police being able to use this indirect enforcement power in the case of more routine and common breaches – such as where two "bubbles" socialised together – seems remote.

[224] In any event, this is hardly a satisfactory means of enforcement. It makes enforcement a matter that is contingent on many prior steps, on a case by case basis. And more importantly, it lends no real strength to the proposition that the Restrictive Measures were, in fact, grounded in legal authority. That is because enforcement through this route is only available after additional legal obligations over and above the Restrictive Measures are first imposed on an individual (or group of individuals) by a Medical Officer of Health.

[225] In summary, prior to Order 2 there was in fact no legal obligation for compliance with the Restrictive Measures. And that is not what was conveyed by the Statements that articulated them. It follows that any limits on rights that were implicit in the Restrictive Measures were not prescribed by law.

[226] It is important, however, to keep our conclusion in perspective. The situation lasted for nine days. And it occurred when New Zealand was in a state of a national emergency fighting a global pandemic. The Restrictive Measures could have been lawfully imposed had the Director-General's powers under s 70(1)(f) been exercised sooner – and he would have done so, if he thought it necessary. These are matters we return to later, when we address the question of relief.

Was there a breach of the Bill of Rights 1688?

[227] There is no dispute that s 1 of the Bill of Rights 1688 (BOR 1688) forms part of the laws of New Zealand.[97] As the preamble to the Act makes clear, s 1 falls within a suite of responses by Parliament to King James the Second's endeavours to "subvert and extirpate … the laws and liberties of this kingdom" by (among other things):

> … assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

[228] Section 1 therefore contains express prohibitions on "dispensing with" and "suspending" laws, as follows:

> **1 No dispensing power**
>
> That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal:
>
> **Late dispensing illegal**
>
> That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it has been assumed and exercised of late, is illegal:

[229] This part of s 1 reflects the fundamental principle of Parliamentary sovereignty: the Executive has no right to suspend, dispense with, override or ignore the legislation passed by Parliament, without Parliament's consent.

[230] Mr Borrowdale submits that s 1 was breached here because the Restrictive Measures were not prescribed by law and so constituted either:

(a) the unlawful suspending of law, namely rights affirmed in the NZBORA, which may only be subject to limits that are "prescribed by law"; or

(b) the unlawful "execution" of law by public announcement, of the kind impugned in *Fitzgerald v Muldoon*.

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[97] By virtue of s 3 of the Imperial Laws Application Act 1988.

Fitzgerald v Muldoon

[231] As is tolerably well known, in *Fitzgerald v Muldoon* the Court was concerned with the then Prime Minister's alleged suspension of the Superannuation Act 1974 requirement for compulsory employer contributions.[98] The Prime Minister's announcement (after his election) that "the compulsory requirement for employer contributions will cease as from today" was challenged for breaching s 1. Mr Fitzgerald sought a declaration:[99]

> … that his announcement and instruction of 15 December 1975 constitute the exercise of a *pretended power of suspending of laws or of the execution thereof* and are accordingly illegal by virtue of s 1 of the Bill of Rights …

[232] Explaining why s 1 was engaged, Wild CJ said that the Prime Minister's inherent authority meant that his statements caused officials to act in accordance with them:[100]

> The question whether "the pretended power of suspending" was "by regall authority" within the meaning of s 1 of the Bill of Rights is, I think, to be determined by reference to the powers of the Prime Minister and the position occupied by him, which are of fundamental importance in our system of government. He is the Prime Minister, the leader of the government elected to office, the chief of the executive government. He had lately received his commission by royal authority, taken the oaths of office, and entered on his duties. In my opinion his public announcement of 15 December, made as it was in the course of his official duties as Prime Minister, must therefore be regarded as made "by regall authority" within the meaning of s 1. The authority accorded it by the officials concerned is abundantly evident from the resolution of the Superannuation Board, and the decision of the State Services Co-ordinating Committee and the various branches of the state services. While I reject the allegation that the Prime Minister gave instructions to these officials I think it is perfectly clear that they acted because of his public announcement of 15 December. Had it not been made they would have continued as before.

[233] In concluding that the announcement did breach s 1, the Chief Justice reaffirmed the principle of Parliamentary supremacy:[101]

> The Act of Parliament in force required that those deductions and contributions must be made, yet here was the Prime Minister announcing that they need not be made. I am bound to hold that in so doing he was purporting to suspend the law without consent of Parliament. Parliament had made the

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98 *Fitzgerald v Muldoon*, above n 83.
99 At 618 (emphasis added).
100 At 622–623.
101 At 622.

> law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament.

This case: unlawful suspension?

[234] Here, the law said by Mr Borrowdale to have been unlawfully suspended is s 5 of the NZBORA, because s 5 required the Restrictive Measures to be prescribed by law.

[235] We have already found that, for the first nine days of Lockdown, the Restrictive Measures were not prescribed by law. But this was not a "suspension" of s 5. The Statements did not make or purport to make the requirements of s 5 inoperable. Section 5 is a provision of general application: it applies to all legislation. Nothing in the Statements suggested that s 5 had no continued application; they cannot sensibly be interpreted to mean that "from now on, limits on rights can be effected by way of ministerial statement".

[236] In any event, we consider that the analogy with *Fitzgerald* is misplaced. In that case the Prime Minister purported to suspend a law that could only be changed by Parliament. Here (in light of our conclusions on the second cause of action), the Executive *had* the power under s 70(1)(f) of the 1956 Act to impose the Restrictive Measures but (as we have found) omitted to exercise those powers for the first nine days of Lockdown.

[237] The short point is that the s 70(1)(f) power was always there to be used. All the pre-requisites for its use were met. On 25 March, the Epidemic Notice issued by the Prime Minister under s 5 of the EPA took effect. The Director-General issued Order 1, which was expressly predicated on the Epidemic Notice. All that was required to make the Restrictive Measures "prescribed by law" was a requirement issued by the Director-General pursuant to s 70(1)(f). Mr Borrowdale does not dispute that any such direction would have constituted a reasonable limit on protected rights and demonstrably justified in a free and democratic society.

This case: unlawful execution?

[238] As we understood this aspect of Mr Borrowdale's argument, it is predicated on the contention that "execution of laws" in s 1 means "promulgation of laws". From that, he says that the Statements here therefore offend s 1 because they purported to "promulgate" a law without legislative authority.

[239] In our view, however, that is not what this part of s 1 is about. The words "pretended power of suspending" qualify both "laws" and "the execution of laws". And suspending the "execution" of laws involves suspending the *operation* of laws – by leaving them intact but rendering them impotent. This seems to us quite clear when the "no dispensing" provision is read together with the "late dispensing" provision (as set out at [228] above), where the "pretended power of dispensing" plainly refers both to "laws" and "the execution of laws".[102] Accordingly, the Statements cannot be said to have involved a pretended "execution" of law in terms of s 1.

Conclusion: first cause of action

[240] In our view, the Restrictive Measures imposed on New Zealanders by way of the Statements for the nine days between 26 March and 3 April went beyond the terms of Order 1. The Restrictive Measures were therefore limitations on NZBORA rights that were not prescribed by law. They did not, however, constitute a suspension of either laws or their execution in terms of the BOR 1688.

[241] We consider the question of relief at the end of this judgment.

THIRD CAUSE OF ACTION: UNLAWFUL DELEGATION

[242] The focus of the third cause of action is on a particular aspect of Order 1. Order 1 required to be closed, until further notice, "all premises within all districts of

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[102] That is also the meaning which appears to have been adopted by this Court in *Alan Johnston Sawmilling Ltd v Governor-General* [2002] NZAR 129 (HC); and in *Aviation Industry Association of New Zealand (Inc) v Civil Aviation Authority of New Zealand* HC Wellington CP289/00, 24 August 2001 (HC). Jeffries J in *Professional Promotions & Services Ltd v Attorney-General* [1990] 1 NZLR 501 (HC) appears to have taken a different approach. We prefer the former.

New Zealand except those listed in the Appendix". The Appendix then listed a number of specific exemptions, including:[103]

> (e) any premises necessary for the performance or delivery of essential businesses as defined further below;
>
> …
>
> For the purposes of this order:
>
> - "**essential businesses**" means businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government.

[243] Mr Borrowdale alleges that this aspect of Order 1 involved an unlawful delegation of the Director-General's power to determine what was an "essential business" to the Ministry of Business, Innovation, and Employment (MBIE).[104] He seeks a declaration that Order 1 was therefore unlawful for lack of compliance with s 41 of the State Sector Act 1988.[105]

The competing contentions

[244] It is important to be clear as to the source and nature of the power that is in issue here. Section 70(1)(m) relevantly empowers the Director-General, acting as a Medical Officer of Health, to "require to be closed, until further order or for a fixed period, all premises within the district (or a stated area of the district) of any stated kind or description". It is that power – the power to specify what premises are to be closed – that is said to have been delegated.

[245] On Mr Borrowdale's interpretation, the effect of Order 1 was to leave it to others to specify which businesses were essential and, so, which premises were to be closed. In other words, the Director-General effectively delegated his s 70(1)(m) power to close premises of a stated kind or description to MBIE, which administered

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103 Items (a) to (d) were specific statutory exemptions under s 70(1A).

104 The focus of argument was on the wording of Order 1, but because the list of "essential businesses" was fluid, the issue continues throughout the currency of Order 1, during Levels 4 and 3.

105 Section 41(1) provides that a Public Service chief executive (such as the Director-General) may:
> either generally or particularly, delegate in writing to a person described in subsection (1A) or (2A) any of the functions or powers of the chief executive under this Act or any other Act …

the scheme. And in practice, there was a further potential sub-delegation to individual officers at MBIE.

[246] For its part, the Crown does not contend that s 70 permits delegation or that there was a delegation – either lawful or unlawful – here. It says that, for sound policy reasons, the powers contained in s 70 are to be exercised only by a Medical Officer of Health,[106] as the Crown maintains they were in this case. It follows that the Crown accepts that, if we find there was any delegation here, it was unlawful.

[247] So, on the Crown's analysis, the Director-General exercised the s 70(1)(m) power by exempting premises used for conducting essential businesses, which he defined as those businesses that were essential to the provision of the necessities of life (and those businesses that support them). The Crown says that the reference in the Appendix to the list of essential services on the COVID-19 website was merely advisory.

[248] The Law Society approached the issue slightly differently. Its concern was that the definition of essential services changed frequently as the list on the COVID-19 website was updated. It was, and is, difficult to ascertain what the list contained at any given time. The Society says that this therefore put the rule of law at risk: it offends the principle that the law should be accessible, clear, and predictable.[107]

[249] It seems to us that this "rule of law" issue is linked to the "delegation" question. If we favour Mr Borrowdale's interpretation, that Order 1 delegated the definition of essential businesses to MBIE, then it might more readily be accepted that the law, in the form of the website list, was unclear due to its dynamic nature. But if we favour the second interpretation, that the Director-General defined essential businesses in Order 1 and then let MBIE interpret and apply that definition by reference to specific businesses, then the law – the Order 1 definition – was clear, albeit very generally expressed.

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106 This can be compared with other provisions in the 1956 Act, such as s 2(1) and s 112K, where delegation is expressly permitted.

107 A similar concern was raised by the Regulations Review Committee in a report of 20 April to the Director-General. The Committee noted that while s 137A of the 1956 Act permitted incorporation of the website list by reference, that permission could only apply to the list as it stood on the date of Order 1.

[250] Before turning to consider the competing contentions in more detail, it is useful to say a little more about the facts and the authorities that were cited to us.

What happened?

[251] As noted earlier in this judgment, at 5.00 pm on 20 March, Cabinet agreed to the Alert Level system. Key aspects of Level 3 were that alternative ways of working would be strongly encouraged and non-essential businesses would be encouraged to consider closing. And a key aspect of Level 4 was that businesses, except for essential services (such as supermarkets, pharmacies, clinics) and lifeline utilities, were to close.

[252] Mr Paul Stocks, the Deputy Chief Executive of the Labour, Science and Enterprise branch of MBIE, filed an affidavit explaining what happened next. He deposed that at the time the Alert Levels were announced no detailed cross-agency work had identified the scope of essential services (and so essential businesses and workers) in the context of the Alert Levels. At that point it would have been assumed that there would be two weeks at Level 2 to do that work. But during the weekend immediately following, it became apparent that there would need to be a move to Level 4 almost straight away.

[253] Mr Stocks' evidence was that over that weekend an initial list of essential services was first drawn up by a group of senior government officials from the Department of Conservation, Treasury, MBIE, Ministry of Social Development, and Ministry of Health. The list was initially informed by reference to essential services in the context of strikes and lockdowns under the Employment Relations Act 2000 and by reference to lifeline utilities under the CDEMA. Mr Stocks said that this was only a very high-level outline and that details would need to be worked out on a case by case basis:

> The draft list was very high level and identified 12 sectors of which the entities and their workers carrying out the listed services were considered to be essential, including their supply chains. It was impossible to be more specific: not only was there the question of time, there was no way that a fully comprehensive list of essential services or businesses could be prepared given the vast array of entities that were involved and the huge variety of how different industries and businesses structured their supply chains. We could only provide an outline of the services that in our view should be considered

> essential, which in turn would allow the identification of the businesses and their supply chains. The details of how this was to be applied would always need to be worked out on the ground on a case-by-case basis.

[254] It was proposed that each sector be allocated a lead government agency that would work with that sector, answering queries from employers, workers, and the public. For example, the Ministry of Transport was the lead agency for the transport and logistics sector, and the Ministry of Primary Industries was the lead agency for the primary industries sector, which included food and beverage production and processing.

[255] The list was then agreed by the All of Government Group (including Dr Bloomfield) and was approved by Cabinet on 23 March. The list (which now listed 15 services sectors) was published on the covid19.govt.nz website later that day, concurrent with the Prime Minister's announcement of the moves to Levels 3 and 4. The website also recorded that more specific information for each sector would be published and that the list may evolve over time, as indeed it did.

[256] On 24 March, Mr Stocks emailed the contacts for the lead government agencies appointed for each sector. The email set out the process for how essential businesses and services were to be designated:

Step One	Businesses in your sector will call a NZ Govt call centre and be referred to you. (The Call Centre will be live from 5pm 24 March). Or they will contact you directly (or be referred to you by someone else)	You will make a decision: is this business or service essential in your sector? You are responsible for setting up a process for reaching this decision.
Step Two	If you cannot make a decision: it is too difficult based on the guidance you have, or it will be precedent-setting	Forward your query to Paul Stocks via essentialservices@mbie.govt.nz and cc Paul.Stocks@mbie.govt.nz Include in the title: Essential Services Decision Sought
Step Three	Once you have made a decision	Make a record of that decision using the attached log, and send it to essentialservices@mbie.govt.nz

		We need to know: what was your determination, and why.

[257] The email included reference to a number of considerations:

> 1) Public health is paramount, so we need to minimise the risk to public health - this means there is a presumption that businesses close unless they need to be open;
> 2) We must continue and scale up our response to Covid-19 – if a business is needed to continue or scale up our response, it should be able to operate appropriately;
> 3) We must maintain the necessities of life for everyone in New Zealand – this means supplying essential goods and services for the next four weeks; and
> 4) We must maintain public health, safety and security – we need to be thinking about the impact for providing the necessities of life for the following 6-8 weeks.
>
> The intention is to keep the list of essential businesses fairly tight at first. It is easier to expand the list of essential businesses later than it is to contract it.

[258] Mr Stocks explained that MBIE's role throughout was to provide guidance as to what met the stated definition of an essential business, namely "businesses that are essential to the provision of the necessities of life and those businesses that support them". Mr Stocks said that those at MBIE understood their role and did not think they could change the essential services definition:

> We [MBIE] were well aware of our role, which was providing guidance on what was or was not within the meaning of 'essential business'. We were not exercising any delegated authority from the Director-General of Health — the language used in our communications and internal documents was sometimes variable, but we did not consider that we were 'defining' the scope of essential services, rather we were assisting businesses to understand whether or not they were essential. We had no power to change the definition of essential services: that could only be done through an amendment to the Health Act Order.

[259] Importantly, Mr Stocks also explained that when it was considered necessary to change the scope of Order 1, a recommendation was made to Dr Bloomfield to approve and issue an amendment. He said that on 20 April, he recommended to Dr Bloomfield that the definition of an essential service under the remainder of Level 4 be amended to include an entity or individual (including contractors and external providers) required to prepare an education site for operation at Level 3. This

recommendation was accepted and, in fact, expanded to allow other preparations for the upcoming transition to Level 3.[108]

Relevant case law

[260] There are two relevant authorities that were drawn to our attention and that deserve mention here. One is relevant to Mr Borrowdale's delegation argument; the other to the Law Society's rule of law concerns.

[261] First is the decision in *F E Jackson & Co Ltd v Collector of Customs*.[109] In that case, the Governor-General had power under the Customs Act 1913 to make regulations that prohibited the importation of any goods if that prohibition was, in his opinion, in the public interest. He made a regulation prohibiting the importation of all goods, except those later authorised by the Minister in a licence.

[262] The Court held that the regulation was ultra vires and invalid. The effect of the regulation was to hand over the whole of the "vital topic" to a single Minister without the formulation of any principles to guide them.[110] That is what Mr Borrowdale says has happened here.

[263] Second is the Supreme Court's decision in *Cropp v Judicial Committee*, to which we have already referred in the context of the second cause of action. There, rules authorising random drug testing of jockeys were made under a general provision about safety at race meetings. The rules did so without specifying time, place, or circumstances in which the testing should occur. The Court was required to determine whether those rules were so lacking in particularity as to be invalid.[111]

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108 On 21 April, the Director-General of Health amended Order 1 to add an exemption in accordance with s 70(1B) of the 1956 Act. The amendment stated that the closures in clause (1) of the Order did not prevent a person from accessing any premises for the purposes of carrying out necessary work between 11:59 pm on 20 April and 11:59 pm on 27 April. The amendment included a definition of "necessary work", which included work required to prepare the premises for opening from 11:59 am on 27 April as well as minimum basic operations required to maintain or clean premises, plant, equipment, or goods, or required to care for animals, acquire additional stock, or to enable workers to work remotely from their homes.

109 *F E Jackson & Co Ltd v Collector of Customs* [1939] NZLR 682 (SC).

110 At 729.

111 *Cropp v Judicial Committee*, above n 48.

[264] The Court said they were not. It held that such rules are valid where they are clear enough – interpreted in light of their authorising purposes – to be given an ascertainable and reasonable meaning:[112]

> [40] As we have said, the impugned rules must be read as authorising such random drug testing only in relation to safety at race meetings. Read in that way, the rules cannot be said to be either conceptually uncertain or unreasonable in their application merely because they do not attempt particularity. They are not, as a consequence, so ambiguous that Parliament cannot have meant the rule-making power to cover them, to adapt the words of Cooke J in *Transport Ministry v Alexander*. We accept that greater particularity might be difficult to achieve if NZTR is to preserve the flexibility needed to achieve its important purpose of race safety. … A rule, like a bylaw, is to be treated as valid unless it is so unclear in its effect as to be incapable of certain application in any case. This is but an aspect of the requirement that the rule must be authorised. The power conferred in the authorising legislation does not permit the creation of a rule which cannot be given an ascertainable and reasonable meaning.

[265] With those cases in mind, we can turn now to the issues themselves.

Discussion

[266] There is no dispute that the delegation issue arises because of the way in which the definition "essential businesses" contained in the Appendix was drafted. We set it out again for convenience:

> "**essential businesses**" means businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government.

[267] The issue here essentially arises because of the words after the comma: "as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government". It is only those words that, at least arguably, suggest that it was left to others to determine the parameters of the definition.

[268] But we do not think that those words should be regarded as forming part of the core definition. Rather, we agree with the Crown that the reference to the COVID-19 website was advisory, for the following reasons.

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[112] Footnotes omitted.

[269] First, in making Order 1, the Director-General was exercising a public health function in emergency circumstances. He was acting as a Medical Officer of Health and determining what businesses could remain open following the issue of the Epidemic Notice. As in *Cropp*, the Order falls to be interpreted in those circumstances and in light of the Director-General's functions and s 70's purpose.

[270] It was entirely appropriate for the Director-General to determine that, given the health threat posed by COVID-19, it was necessary to close all businesses, other than those required to meet the countervailing public health demands (ensuring that New Zealanders had continued access to the necessities of life). But it would have been entirely inappropriate for him to also engage with what we will call the "operational" side of that determination.

[271] As the Crown submits, the assessment of precisely which businesses in New Zealand are "essential" is not a public health issue. Nor is the Director-General, or the Ministry of Health officials advising him, in any position to undertake that assessment.[113] It was necessary, and lawful, to leave that kind of operational detail to the lead agencies operating in the relevant sectors. For example, the Ministry of Primary Industries was responsible for providing guidance to businesses supporting New Zealand's food supply chain. There is simply no way that the Director-General could be expected to know which particular businesses in those complex and multi-faceted supply chains were essential, or, indeed, even what types of businesses were involved.

[272] Secondly, there is the fact noted at [259] that the core part of the definition was formally amended by Dr Bloomfield (on the advice of Mr Stocks). That signifies a delineation of functions that was understood and acted upon, which is inconsistent with Mr Borrowdale's "delegation theory". Setting the core parameters around what businesses were essential remained a matter for the Director-General. Operational matters, or giving effect to the definition, lay with officials.

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[113] Except in the context of the provision of health and disability services, where they took the position of "lead agency" in that regard.

[273] Thirdly, we observe that the "essential businesses" definition has some structural parallels to the definition of "physical distancing", which immediately followed it. The first sentence of that definition described what was meant by physical distancing. But the following sentences explained why physical distancing was important: "Physical distancing is important to help protect you and others from COVID-19, which spreads via droplets from coughing and sneezing. Staying 2 metres away from others is an effective measure." Quite plainly, that explanation was not part of either the definition or of the public health decision that underlay it: it was advisory. That is how the website reference should be interpreted.

[274] Lastly, although the use of "as described" after the comma was not a model of good drafting, we also bear in mind that the Order was prepared in a situation of great urgency, in the eye of a global pandemic, when the crisis was escalating rapidly. That is reflected in other drafting inconsistencies within the Order, such as the apparently interchangeable references to essential "services" and essential "businesses". And if we were to be especially pedantic, there was no need to refer to the first four categories of exempted premises in (a) to (d) in the Appendix as those premises were exempted already by s 70(1A).

[275] If the definition can be regarded as stopping at the comma, as we think it can, then it simply provides that essential businesses "means businesses that are essential to the provision of the necessities of life and those businesses that support them". Such a definition would comfortably fall within the empowering terms of s 70(1)(m): requiring the closure of premises of a stated kind or description.[114] As we have said, that broad definition can clearly be linked to the overarching public health purpose with which s 70 is fundamentally concerned. And it is this definition, too, that distinguishes this case from *F E Jackson & Co Ltd*. Unlike the Governor-General there, who handed his whole discretion over to the Minister, here the Director-General has determined the core of his decision in Order 1 – no "vital topic" was handed over.

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[114] We think that "kind" in this context means: "[the] essential quality or fundamental character as determining the class or type to which a thing belongs; character, nature". And "description" means: "a statement or account which describes something or someone by listing characteristic features, significant details, etc": Oxford English Dictionary (3rd ed, December 2015) (online ed).

[276] This leads us to the Law Society's concern that the definition's generality offended the rule of law's requirement for reasonable certainty. The definition is certainly broad, but we think it has parameters and was capable of being given an ascertainable and reasonable meaning in any individual case. Although we accept that there may have been particular instances in which businesses were unsure about whether they fell within it, there is force in the submission that if a particular business had to ask the question, then it was probably excluded. And the very fact that Mr Borrowdale feels able to critique certain interpretations adopted under this process[115] in a sense shows that the general definition has discernible limits.

[277] And those boundary calls were not public health assessments. MBIE (and the other agencies involved) were not defining what was an "essential business"; they were assessing whether the businesses in question met the criteria defined by the Order. That definition did not change, except when authorised by the Director-General.

[278] Finally, the essential services list on the website was not comprehensive. A business not listed on the website could still meet the definition of an essential business if it met the definition in Order 1. If MBIE or others suggested that it was not essential, judicial review would have been available. The issue was always whether it met the Order 1 definition: being a business essential for the provision of the necessities of life (or a business that supports them).

Conclusion: third cause of action

[279] The definition of "essential businesses" was set by Order 1 and was at all times clear and fixed. It did not alter with the various changes and extensions to the list of essential services on the website from time to time. There was no delegation here and no breach of the rule of law. The third cause of action is dismissed.

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115 For example the decision that the Tiwai Point Aluminium smelter was an essential business.

RELIEF AND RESULT

[280] Our conclusion on the first cause of action was that the effect of the Statements was that New Zealanders believed they were required by law to stay home and in their bubble when – for the nine-day period from 26 March to 3 April – that was not the case. We have found that those Restrictive Measures were therefore a limit on rights and freedoms affirmed in the NZBORA that were not — during that period — prescribed by law.

[281] We hasten to add that Mr Borrowdale does not suggest that the Statements were deliberately misleading. Nor could such a suggestion properly be made. Although the Crown theory of this part of the case was not entirely clear,[116] our own view of the matter is that the various makers of the Statements may have believed they were only giving guidance[117] or – more likely – that they were simply mistaken about either the ambit of Order 1 or the extent of the available enforcement powers. We have no doubt that Dr Bloomfield captured the position precisely when he said:

> The absolute priority was to get the lockdown in place and that drove every aspect of what we did over that period: we needed to move, and had no time to sort out the exact details. Some things would have to get sorted out later.

[282] But what, then, of the question of relief? Given our conclusion, should a declaration be granted and, if so, on what terms?

Relief

[283] Mr Borrowdale says it should, although he has not clearly articulated what the declaration would look like.[118] He submits that the Restrictive Measures formed part of the most substantial suite of restraints on individual liberty in New Zealand's history. If they were not lawfully imposed, the Court should grant a remedy unless there are "extremely strong reasons not to do so".[119] And here, it is a declaration that is the appropriate remedy. As Professor Phillip Joseph has said:[120]

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116 No doubt due to its denial that the Statements implied legal obligations at all.

117 Although this is somewhat belied by the wording used.

118 In his pleading he simply seeks a declaration that "reflects" certain paragraphs from the statement of claim.

119 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61].

120 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1180.

> Where an applicant establishes the substantive basis for a declaration, it is difficult to envisage a valid reason to decline the order.

[284] The Crown urges that no declaratory relief be granted. While acknowledging that the context of this claim is of significant public importance, it says the questions of law raised are in a real sense academic, and the matters to which they relate are now past. The Crown says it is relevant to the exercise of the Court's discretion that the Restrictive Measures were superseded by Order 2 (which we have found was lawful) and that Order 2 has, itself, since been revoked. Parliament has since enacted legislation to give effect to the current restrictions and to authorise possible future ones: the issues ventilated in this proceeding will not arise again.[121] Reference is made to *Fowler and Rodrique Ltd v Attorney-General*, where relief was declined on the basis that the unlawful decision was no longer operative because the statutory scheme under which it had been made had been replaced. The Court there declined to make a declaration:[122]

> Events have overtaken this application, rendering any order that the Court may now make of academic interest only. Remedies under the Judicature Amendment Act are discretionary and whether or not it would ever have been appropriate to make a declaration of invalidity … it cannot be justified now.

[285] As well, Ms Casey submits that the formal admission by Mr Borrowdale that the Restrictive Measures could – without exception – be demonstrably justified in a free and democratic society is significant. She characterises any success he might have as being on the basis of "technical" errors that would not have made any difference to the substantive outcome. She says: "It is absolutely clear that the lockdown was necessary and had to be implemented urgently, and a way would have been found to do that."

[286] Further, the Crown warns that the Court should be cognisant of the potential implications of any declaration, given the paramount importance of not endangering public safety or increasing risk to future public health.

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[121] Ms Casey referred us to a recent decision of the England and Wales High Court on a challenge to those countries' COVID-19 response, where the Court declined leave to commence a judicial review on the grounds that it would serve no practical purpose: *Dolan v Secretary of State for Health* [2020] EWHC 1786. But we do not find that case of any assistance. There the applicant was seeking orders that the regulations be quashed, not a declaration. And at the time of the hearing, those regulations had already been replaced.

[122] *Fowler and Rodrique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78.

[287] Mr Stephens, for the Law Society, says that the Government should not have directed the public in mandatory terms when those directions were not backed up by the force of law. He says the Statements overstated the extent of the legal requirements, leaving the impression that lawful activities were unlawful. The Law Society says that the rule of law will be vindicated if the judgment simply affirms that clarity is required in government communications of the kind at issue here. The distinction between actions that are legally proscribed and actions that are, though lawful, discouraged should be obvious to members of the public. The Statements failed to meet that standard.

Relevant principles

[288] The principal purpose of a declaration is vindication. Professor Joseph explains that:[123]

> Declarations perform the critical constitutional function of vindicating legal rights and promoting the ideals of the rule of law. They announce to the world at large breach of the applicant's rights and operate as vindication for the prejudice or loss suffered.

[289] As Professor Joseph goes on to explain, a declaration will not (or might not) be issued where:

(a) it will not achieve a useful purpose;[124]

(b) a formal order is unnecessary, for example where there was sufficient vindication in the absence of an order;[125]

(c) the decision-maker will abide the decision of the court without need of formal orders;[126] or

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123 Joseph, above n 120, at 1180.

124 *Turner v Pickering* [1976] 1 NZLR 129 (SC) at 141–142; *Banks v Grey District Council* [2004] 2 NZLR 19 (CA) at [19]–[20]; *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC); *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [141]; and *Deliu v Office of the Judicial Conduct Commissioner* [2012] NZHC 356 at [55]–[56].

125 *Wilson v New Zealand Parole Board* HC Christchurch CIV-2010-409-459, 22 April 2010 at [16]; and *Wilson v New Zealand Parole Board* HC Christchurch CIV-2010-409-2933, 20 May 2011 at [24].

126 *Right to Life New Zealand Inc v Abortion Supervisory Committee (No 2)* HC Wellington CIV-2005-485-999, 3 August 2009 at [12].

(d) the declaration sought relates to purely abstract or hypothetical questions, either in anticipation of an actual controversy or where the controversy has passed.[127]

[290] We find this question to be finely balanced. Although we have concluded that there was for nine days an unlawful limitation of certain rights and freedoms, that must be seen in the context of the rapidly developing public health emergency the nation was facing. We agree with Mr Borrowdale that – although not prescribed by law – the limits were nevertheless reasonable, necessary and proportionate. Moreover, they were limits that could have been imposed lawfully by the Director-General at the time, simply by issuing an order. And the unlawfulness has long since been remedied. We think these matters militate against making a declaration here.

[291] But there are, of course, weighty rule of law considerations that point the other way. The rule of law requires that the law is accessible and, so far as possible, intelligible, clear and predictable. As Lord Bingham has explained extrajudicially, if individuals are "liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty".[128] The required clarity was lacking here. Although the state of crisis during those first nine days goes some way to explaining what happened, it is equally so that in times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance. For these reasons we conclude that it would be appropriate to make a declaration.

Result

[292] The second cause of action and the third cause of action fail and are dismissed. The first cause of action succeeds in part, and we make the following declaration:

> By various public and widely publicised announcements made between 26 March and 3 April 2020 in response to the COVID-19 public health crisis, members of the executive branch of the New Zealand Government stated or implied that, for that nine-day period, subject to limited exceptions, all New Zealanders were required by law to stay at home and in their "bubbles"

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127 *Turner*, above n 124, at 141–142.

128 Tom Bingham *The Rule of Law* (Penguin, London, 2010) at 37.

> when there was no such requirement. Those announcements had the effect of limiting certain rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 including, in particular, the rights to freedom of movement, peaceful assembly and association. While there is no question that the requirement was a necessary, reasonable and proportionate response to the COVID-19 crisis at that time, the requirement was not prescribed by law and was therefore contrary to the New Zealand Bill of Rights Act.

[293] Costs are reserved. If the parties cannot agree, submissions are to be filed and served within four weeks of the date of this decision.

Thomas, Venning and Ellis JJ

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