IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA520/2020
[2021] NZCA 520

BETWEEN	ANDREW BORROWDALE Appellant
AND	DIRECTOR-GENERAL OF HEALTH First Respondent
	ATTORNEY-GENERAL Second Respondent
	NEW ZEALAND LAW SOCIETY Intervener

Hearing:	6–7 July 2021
Court:	French, Cooper and Collins JJ
Counsel:	J A Farmer QC and L C A Farmer for Appellant U R Jagose QC and V McCall for Respondents T C Stephens, J B Orpin-Dowell and M R G van Alphen Fyfe for Intervener
Judgment:	2 November 2021 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Collins J)

PART I

INTRODUCTION

Questions addressed by this appeal

[1] Two questions are addressed in this judgment. The first asks whether s 70(1)(f) and (m) of the Health Act 1956 (the Act) allowed the Director-General of Health (the Director-General) to issue three Orders that required:

(a) all premises in New Zealand to be closed except those referred to as "essential businesses";[1]

(b) people not to congregate in outdoor places unless they maintained "physical distancing";[2]

(c) all people to remain at their place of residence except as permitted.[3]

[2] The second question asks whether the Director-General unlawfully delegated to other officials the decisions concerning what businesses could remain open pursuant to the Orders he made under s 70(1)(m) of the Act.

[3] The Orders in question came into force on 25 March, 3 April and 27 April 2020 and were an integral part of New Zealand's effort to prevent the outbreak and spread of COVID-19.

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1 This was contained in the First Health Act Order. We explain how "essential businesses" were defined at [6] and [72(d)] below.

2 This was contained in the First Health Act Order. We explain how "physical distancing" was defined at [7] and [72(e)] below.

3 This was contained in the Second and Third Health Act Orders. We explain the exceptions at [8]–[9] and [78] below.

The statutory powers

[4] We shall examine s 70(1)(f) and (m) of the Act in Parts II and III of this judgment. At this juncture we set out the key parts of those subsections in order to provide context to the two questions we have explained at [1] and [2]:

> **70 Special powers of medical officer of health**
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> (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,—
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> …
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> (f) require persons, … to be isolated, quarantined, … as he thinks fit:
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> …
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> (m) by order …
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> (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:
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> …
>
> (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):
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> …

The Orders

[5] In the following four paragraphs we shall provide a summary of the three Health Act Orders in issue. A more detailed explanation of the Orders is provided at [72] to [80].

[6] The First Health Act Order, which cited s 70(1)(m) of the Act, required the closure of all premises in New Zealand except for those that were listed in the appendix to the Order. Included in the appendix were "essential businesses", which were said to be businesses that were essential to the provision of the "necessities of life" and

those businesses that supported them, "as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government".

[7] The First Health Act Order also prohibited people from congregating in outdoor places of amusement or recreation throughout New Zealand. Congregation did not, however, include people practising "physical distancing", which was 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".

[8] The Second Health Act Order, which cited s 70(1)(f) of the Act, required, until further notice, all persons in New Zealand to be isolated or quarantined by remaining in their current place of residence, except as permitted for essential personal movement. It also required all persons to maintain physical distancing, except from their fellow residents or to the extent that was necessary to access or provide an essential business.

[9] The Third Health Act Order cited s 70(1)(f) and (m) of the Act. That Order revoked the two previous Orders and required all persons in all regions to be isolated or quarantined by remaining at their current place of residence and to maintain physical distancing, with exceptions that were in all material respects the same as under the Second Health Act Order. Clause 7 of the Third Health Act Order also specified instances of permitted essential personal movement. Clause 9 of the Third Health Act Order required the closure of "restricted premises" with exceptions where "necessary work" was being undertaken. Clause 11 prohibited congregating in outdoor places of amusement or recreation.

The High Court proceedings

[10] In his third amended statement of claim dated 1 July 2020, Dr Borrowdale pleaded three causes of action.

First cause of action

[11] The first cause of action focused upon statements made by the Prime Minister and other officials prior to and during the first nine days of lockdown. Those first nine

days refer to the period between 25 March 2020 when the First Health Act Order came into effect and 3 April 2020 when the Second Health Act Order came into effect. We need not reiterate in this judgment the statements referred to in the first cause of action.[4] Suffice to say they were to the effect that New Zealand citizens needed to stay at home and that enforcement action would be taken against those who breached the Government's directions. Thomas, Venning and Ellis JJ, sitting as a Full Bench of the High Court, held that the First Health Act Order did not go as far as to require New Zealanders to stay at home, so the statements were made without lawful authority and unlawfully limited the rights affirmed by ss 16, 17 and 18 of the New Zealand Bill of Rights Act 1990 (the NZBORA).[5] The High Court issued a declaration to that effect.[6] There has been no cross-appeal by the Crown from that aspect of the High Court judgment.

Second cause of action

[12] The second cause of action challenged the lawfulness of the three Health Act Orders we have summarised at [6] to [9] on the basis that the Director-General exceeded his powers under s 70(1)(f) and (m) of the Act. The allegation in the second cause of action was that the three Health Act Orders were *ultra vires*.

[13] There were five elements to the second cause of action, namely:

(a) The powers in s 70 could not be exercised by the Director-General because s 22 only conferred on the Director-General the functions (and not the powers) of a Medical Officer of Health.

(b) The special powers contained in s 70 of the Act cannot be properly exercised on a national basis.

(c) The power to require quarantine and isolation in s 70(1)(f) can only be exercised in relation to individuals rather than the entire population.

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4 These statements are set out in the High Court judgment. See *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 [High Court judgment] at [148]–[173].

5 At [197]–[199] and [225]. We explain all relevant sections of the New Zealand Bill of Rights Act 1990 (the NZBORA) below at [104]–[120].

6 At [291].

(d) The power in s 70(1)(m) of the Act to close premises of "any stated kind or description" does not permit all premises to be closed subject only to specified exceptions.

(e) The power to forbid people to "congregate" in s 70(1)(m) does not allow exceptions for social distancing.

[14] Dr Borrowdale accepted, however, that had the restrictive measures been prescribed by law, then they would have been reasonable limits on the relevant NZBORA rights that were demonstrably justified in a free and democratic society in accordance with s 5 of the NZBORA.

[15] The High Court held that all three Health Act Orders were authorised by either s 70(1)(f) or (m) of the Act and therefore dismissed Dr Borrowdale's application for a declaration that the three Orders were *ultra vires*.[7]

Third cause of action

[16] The third cause of action focused upon the exception to the First Health Act Order. As we have noted at [6], that Order required the closure, until further notice, of all premises within New Zealand except those that were used for "essential businesses", defined by reference to businesses that provided the necessities of life.

[17] Dr Borrowdale argued that this aspect of the First Health Act Order involved an unlawful delegation by the Director-General of his powers to determine what were "essential businesses" because, he argued, the determination as to what businesses provided the necessities of life was made by other government officials and not by the Director-General.

[18] The High Court concluded that only part of the definition of essential businesses "should be regarded as forming part of the core definition" in the Order.[8] The part of the definition that referred to the COVID-19 Government website was said

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7 At [139].
8 At [268].

by the High Court to be merely "advisory".[9] From this position the High Court reasoned that only the Director-General had determined what constituted essential businesses and that "[t]here was no delegation … and no breach of the rule of law".[10]

[19] Dr Borrowdale appeals the findings in relation to the second and third causes of action. The first ground of appeal reiterates in slightly different ways the arguments that we have summarised at [13(c)–(e)]. The second ground of appeal contends the High Court erred when it decided the Director-General did not unlawfully delegate his powers to determine what constituted necessities of life for the purposes of assessing whether or not premises needed to be closed.

[20] The New Zealand Law Society (the Law Society), which appeared as an intervener, supports the High Court's conclusion in relation to the first ground of appeal but argues in relation to the second ground of appeal there may have been an unauthorised delegation by the Director-General.

[21] Before engaging with the two grounds of appeal, we shall set out the background and explain the relevant legislation.

PART II

BACKGROUND

The emerging pandemic

[22] Between late 2019 and early 2020, a new highly contagious and potentially lethal respiratory virus was detected in Wuhan, China. Initially health officials called it "novel coronavirus". On 11 February 2020 the World Health Organisation (WHO) announced from that day forward the virus would be called COVID-19.

[23] Dr Bloomfield, the Director-General, has explained in an affidavit that New Zealand's response to COVID-19 reached a critical juncture on the weekend of

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9 At [268].
10 At [279].

21–22 March 2020. At that time there were 292,142 confirmed cases of COVID-19 in the world and 12,783 people had died from the virus.

[24] The unprecedented public health, social and economic challenge faced by New Zealand officials during the first months of COVID-19 has been described in the following way by the Director-General:

> 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. 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 – there would be many cases and deaths, the health system would be overwhelmed and the impact on society and the economy would be appalling. We made the call that we did not have the option of "coping" with the virus as envisaged in the "manage it" phase of our pandemic plan:[11] our only option was a prolonged effort to keep it out and stamp it out. Furthermore it was clear that decisions needed to be made quickly and pre-emptively, hence the "go hard, go early" approach.
>
> 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.

[25] At [26] to [83] we shall provide an overview of the COVID-19 crisis as it emerged in New Zealand and the steps taken between January and 13 May 2020 to try and eliminate the virus in this country. It is not necessary for us to refer in any detail to the events after 13 May 2020 because the Third Health Act Order was revoked when new orders were issued pursuant to the COVID-19 Public Health Response Act 2020 which came into force that day.

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[11] Explained below at [34].

The New Zealand response to COVID-19

[26] To place in context New Zealand's response to COVID-19, it is helpful to briefly summarise the epidemiological evidence that emerged between 5 January and 25 March 2020, which was the day on which the First Health Act Order was issued.

The epidemiological evidence from 5 January to 25 March 2020

[27] On 5 January 2020, the WHO issued a disease outbreak notification, which alerted the international community to a cluster of pneumonia cases of unknown origin that was being investigated in Wuhan. The following week the WHO confirmed that a novel coronavirus was the cause of the respiratory illness detected in Wuhan. By 21 January, it was reported that four people in Wuhan had died from the virus and that it could be transmitted from person to person. It was not until 30 January, however, that the WHO declared a Public Health Emergency of International Concern. By then, 170 people had died from the virus and the number of cases in the world had grown exponentially to 7,818. By the end of January, the virus had been detected in 18 countries outside of China.

[28] As at 14 February 2020, there were 49,053 confirmed cases of COVID-19 in the world, of which 1,383 had resulted in deaths. By then, cases of COVID-19 had been reported in 24 countries outside of China. On 28 February 2020, the WHO raised the threat level posed by COVID-19 to "very high at a global level". By that day, 83,652 cases of COVID-19 had been reported around the world, of which 2,858 had resulted in deaths. Health officials were carefully monitoring the spread of COVID-19 in Italy, where 650 cases and 17 deaths had been reported by 28 February. The 28th of February was also a salutary day for New Zealand because on that day, the Minister of Health announced the country's first case of COVID-19.

[29] Epidemiological advice provided to the Ministry of Health (the Ministry) in late February 2020 predicted that if there was a substantial and uncontrolled spread of COVID-19 in New Zealand, 65 per cent of the population would contract the virus and up to 336,000 people would require hospitalisation. It was estimated that the death rate under this scenario would be between 12,600 and 33,600 people, with the elderly,

Māori and Pasifika populations comprising a disproportionate share of hospitalisations and deaths.

[30] In early March 2020, the global warning signs were becoming extremely alarming. In Italy for example, from 1 March to 3 March 2020, the total number of COVID-19 cases went from 1,128 to 2,036, and the total number of deaths went from 29 to 52. On 4 March 2020, New Zealand confirmed its second COVID-19 case. On 11 March 2020, WHO declared COVID-19 to be a global pandemic. The number of COVID-19 cases in New Zealand began to slowly increase so that by 18 March there were 20 confirmed cases in this country. By that day, 191,127 cases of COVID-19 had been reported in the world, of which 7,807 had resulted in deaths from the virus.

[31] In mid-March the Ministry received a WHO report, which contained modelling data from the United Kingdom and the United States. The report set out two options for managing COVID-19, namely, mitigation and suppression. The WHO report explained that mitigation strategies were unlikely to prevent hundreds of thousands of deaths in the United Kingdom and the United States. That report complemented a report that the Ministry received from Professors Wilson and Baker from the University of Otago, whose modelling predicted significant rates of death in New Zealand from COVID-19.

[32] By 20 March 2020, the number of COVID-19 cases in New Zealand had increased to 39. On the following day, the number of COVID-19 cases had increased to 53. It was also on this day that New Zealand reported two cases of likely community transmission. From 22 March to 23 March 2020, New Zealand witnessed a 50 per cent increase in COVID-19 cases from 66 to 102. On the same day, Professors Wilson and Baker provided another report to the Ministry in which they explained that if New Zealand failed to eliminate COVID-19 the country would suffer a major public health catastrophe. The following day, the University of Otago team who had been advising Ministry officials revised their earlier estimates of the adverse consequences of New Zealand not eradicating COVID-19. The new "worst case" scenario suggested up to 36,000 New Zealanders would require ICU admission and that 27,600 could die.

[33] By 25 March, there were 205 confirmed and probable cases of COVID-19 in New Zealand and the number of cases of the virus in the world had reached 413,467, of which 18,433 had resulted in deaths.

New Zealand Government's response

[34] On 23 January 2020, the Ministry established an Incident Management Team. The following day, the New Zealand Government's Interagency Pandemic Group was convened. As its name suggests, that group comprised representatives from a range of government departments and agencies and was formed pursuant to the New Zealand Influenza Pandemic Plan that had been drafted in 2010 and revised in 2017. That plan involved a four-stage response to pandemics namely, "plan for it", "keep it out", "stamp it out", and "manage it". At the same time, the Ministry established a group of technical advisers, including epidemiologists and virologists whose role was to provide expert advice and guidance to Ministers and other officials.

[35] On 28 January 2020, the Ministry recommended that the Governor-General by Order in Council designate the novel coronavirus as a notifiable disease under sch 1 of the Act.

[36] By late January 2020, the Ministry was taking a number of measures to alert frontline health workers, border officials, airlines and laboratories to the risks posed by the virus and the measures that would need to be taken to mitigate those risks. On 28 January 2020, the Ministry activated its National Health Coordination Centre to take over from the Incident Management Team.

[37] On 1 February 2020, Cabinet established a group of Ministers to take measures to respond to the virus. The name of that group of Ministers changed throughout the period covered by this judgment. We shall refer to it as the COVID Ministers Group. The Director-General provided advice to those Ministers on 2 February 2020, which resulted in temporary measures being put in place at New Zealand's border to try to prevent the virus entering New Zealand.

[38] On 14 February 2020 when it became apparent that COVID-19 was spreading globally, the COVID Ministers Group extended the border restrictions that had been

put in place on 2 February 2020. During this time, the Director-General and his officials were becoming increasingly concerned about the risks of COVID-19 entering New Zealand from travellers arriving in this country.

[39] In late February 2020, information from China provided Ministry officials with a more detailed appreciation of the infection and fatality rates associated with COVID-19. At the same time, the Ministry was communicating with DHBs concerning the establishment of local assessment centres and with the Pharmaceutical Management Agency (PHARMAC) to ensure medical supplies were secure.

[40] On 28 February 2020, in response to the WHO raising the COVID-19 threat level, New Zealand intensified its public health campaign to remind people of what they needed to do to keep themselves and their families safe.

[41] In early March 2020, Mr John Ombler, a retired senior public servant and a former Deputy State Services Commissioner, was appointed to lead the "All of Government Response" (AOGR) to COVID-19. His appointment recognised that the Government's management of COVID-19 would impact upon all aspects of New Zealand society and would require significant assistance from the wider public service.

[42] The leadership team of the AOGR group comprised Mr Ombler, Dr Bloomfield, Mr Mike Bush (the then Commissioner of Police), Ms Sarah Stuart-Black (the Director of Civil Defence and Emergency Management) and Dr Peter Crabtree, a senior official from the Ministry of Business, Innovation and Employment (MBIE). The AOGR group worked closely with Ministry officials to provide the COVID Ministers Group with a strategy on 10 March 2020 that addressed the epidemiological evidence about the transmissibility of COVID-19 and the decisions that would soon need to be made to manage the virus in New Zealand. The AOGR group recommended that New Zealand "go early, go hard, stay the course" in order to reduce the peak numbers of any outbreak and spread the burden on the health system and economy.

[43] Mr Ombler has explained in an affidavit the extraordinary steps that officials needed to take in order to provide advice to Ministers and to give effect to decisions:

> Policy advice was being formulated and decisions were being made almost at the same time as they were being operationalised and communicated to the public. We as officials were providing advice directly to the Ministers Group, and would generally be in attendance at all the Cabinet meetings. These meetings were usually held at 10.30 in the morning through to about midday, following which there were a few hours in which to set in train the decisions taken that morning and work on the issues that needed to be taken to Ministers the next day. The agenda for the next day's Cabinet committee meeting would close at 4 pm with papers going out to Ministers at that point, though frequently there were a number of oral items and updates as well.

[44] On 11 March 2020, the same day the WHO declared COVID-19 to be a global pandemic, New Zealand added COVID-19 to pt 3 of sch 1 of the Act as a quarantinable infectious disease. This in turn released the powers under the Act to quarantine travellers arriving into New Zealand.

[45] On 12 March 2020 the AOGR group warned Ministers the country was rapidly approaching "a tipping point, where [Ministers'] decisions [concerning] the border will either put New Zealand on a trajectory that: manages the public health risk effectively … or isolates New Zealand from the world and results in a shock to our economy which has deep and long lasting adverse impacts".[12]

[46] A further paper was prepared for Cabinet on 14 March 2020, in which Ministers were warned that "[o]ther countries have seen a few initial cases rapidly escalate into very high peaks of cases in a matter of days" and that New Zealand officials were seeing "an unprecedented increase in the number of cases throughout the world with significant spikes in developed and comparable countries".[13]

[47] Cabinet agreed on 14 March 2020 to extend the temporary border measures so that most New Zealanders and foreign nationals arriving in New Zealand over the coming weeks would be expected to self-isolate for 14 days. It was also announced that mass gatherings would be restricted and that rules would be announced on 16 March 2020 concerning cancellations and regulation of public gatherings.

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12 Affidavit of Dr Ashley Robin Bloomfield, 13 July 2020 at [147].
13 At [151].

[48] On 16 March 2020, the Minister of Health authorised the Director-General and Medical Officers of Health to use the special powers contained in s 70(1) of the Act. Later that day, the Ministry issued a notice saying that it would use s 70(1)(f) to require persons entering New Zealand to face mandatory quarantine if it considered self-isolation measures to be inadequate.

[49] Also on 16 March 2020, Cabinet agreed to prohibit outdoor and indoor gatherings of more than 500 people. Two days later, that prohibition was extended to indoor gatherings of more than 100 people. The Government also resolved to detain and deport temporary visa holders if they failed to comply with instructions from a Medical Officer of Health.

[50] By this time "[i]t was becoming very clear [to the Director-General] that managing the virus through 'flattening the curve' was not the best option: if community transmission became established, our health system would be overwhelmed. Even a flattened curve would involve numbers that were unmanageable. It was now clear that the only appropriate option was suppression, if we could achieve it".[14]

[51] On 19 March 2020, following urgent advice to Cabinet, New Zealand's border was closed to everyone except New Zealand citizens, permanent residents, their partners and dependent children.

[52] During this phase of New Zealand's response to COVID-19, the AOGR group developed a system of four alert levels. The restraints and degrees of response intensified with each escalating level:

(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.

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[14] At [187]. By "flattening the curve" the Director-General meant reducing the incidence of COVID-19 as distinct from eliminating it.

(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.

[53] On 20 March 2020, Ministry officials prepared a paper for the Prime Minister explaining the proposed alert level system and recommended New Zealand move to Alert Level 2 as soon as practicable and remain there for up to 14 days.

[54] The COVID Ministers Group agreed to the Alert Level framework on 20 March 2020 and that New Zealand would move to Alert Level 2 as soon as possible.

[55] On 21 March 2020, the Prime Minister announced the Alert Level system and that New Zealand was at Alert Level 2. At that time, it was thought New Zealand would remain in Alert Level 2 for two weeks.

[56] During the ensuing two days, it became clearer to the Director-General and the leaders of the AOGR group that it was likely there were cases of community transmission of COVID-19 in New Zealand and that it was becoming increasingly imperative that the Government rethink how quickly New Zealand should move to Alert Levels 3 and 4. The Director-General has said that based upon the experience of New South Wales, "[i]f community transmission became established [in New Zealand] the number of cases would double every five days".[15] The

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15 At [221].

Director-General thought it was no longer appropriate for New Zealand to remain at Alert Level 2 and that "New Zealand was at a critical moment" because it risked experiencing an exponential growth in cases.[16]

[57] A paper was prepared over the weekend of 21–22 March 2020, which contained a recommendation to Cabinet for New Zealand to move to Alert Level 4. The paper explained:

> *Essential services*
>
> 81 In the case of a move to Levels 3 or 4, there is a need to maintain certain services. In deciding which services need to continue, we have been guided by the following principles:
>
> 81.1 Public health is paramount, so we need to minimise risks to public health.
>
> 81.2 We must continue our response to COVID-19.
>
> 81.3 We must ensure the necessities of life for everyone in New Zealand.
>
> 81.4 We must also maintain public health, safety and security.

[58] The task of identifying "essential businesses" started on 22 March 2020 when Mr Paul Stocks, a senior official in MBIE, met with other officials from a range of government departments, including the Ministry, to devise a system for determining what would constitute essential businesses. That group of officials prepared a draft list of the services they considered would be essential during Alert Levels 3 and 4.

[59] The draft list identified 12 sectors that covered both public services and private enterprises and the entities within those sectors that had been identified by officials as providing essential services. In addition to those 12 sectors, the draft list also included the "lifeline utilities" listed in sch 1 of the Civil Defence Emergency Management Act 2002, and the "essential services" in sch 1 of the Employment Relations Act 2000.

[60] The Director-General has said in his affidavit that, to the best of his recollection, he reviewed the draft list. Mr Stocks used firmer language in his affidavit. He said the "draft list was agreed by the [AOGR] group (including the

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16 At [223].

Director-General of Health and [Mr Ombler])".[17] The draft list was then included in the appendix to the paper that went to Cabinet.

[61] At the same time as the Cabinet paper was prepared, the Chief Executive of the Department of the Prime Minister and Cabinet informed heads of government departments and other government agencies that Mr Ombler would be "responsible for administering and enforcing" the list of essential businesses but that government departments and agencies would need to assist in addressing questions about what entities were essential services and in liaising with the sectors listed in the appendix to the Cabinet paper.

[62] Cabinet accepted the recommendations in the paper at its meeting on 23 March 2020.

[63] Also on 23 March, the Director-General recommended the Prime Minister issue an epidemic notice under the Epidemic Preparedness Act 2006. The paper recommending this course of action explained why the Epidemic Preparedness Act was relevant:

> 10 The Epidemic Preparedness Act 2006 has powers to facilitate the management of epidemics or quarantinable diseases. These include giving an Epidemic Notice, and Epidemic Management Notices.
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> 11 Giving an Epidemic Notice provides a platform to activate additional changes, or modify existing legislation, as the situation around COVID-19 continues.

[64] Following the Cabinet meeting on 23 March, the Prime Minister announced that New Zealand had now moved to Alert Level 3 with effect from 1.00 pm that day and that the country would move to Alert Level 4 at 11.59 pm on 25 March 2020. At her press conference the Prime Minister explained that the rapid escalation to Alert Level 4 was necessary to give New Zealand the best opportunity to break the chain of community transmission.

[65] At approximately 3.00 pm on 23 March, the New Zealand Government COVID-19 website was updated. The website explained that New Zealand was at

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[17] Affidavit of Paul Gerard Stocks, 13 July 2020 at [16].

Alert Level 3. The website set out the following under the heading of "[e]ssential businesses":

> Essential businesses, and those that support them, will continue to provide the necessities of life for everyone in New Zealand.
>
> This means food, medicine, healthcare, energy, fuel, waste-removal, internet and financial support will continue to be available.

[66] Under the heading of "[w]hat are essential businesses?", the website explained that the list may evolve over time but at the time the list was posted it comprised 15 sectors. The website identified entities within those sectors that were deemed "essential services" and that more specific information for each sector would soon be published.

[67] Later that day, the Minister of Finance announced a number of measures to support those people whose livelihoods would be disrupted by the measures that were being taken to prevent the spread of COVID-19 in New Zealand.

[68] On 24 March 2020, the Prime Minister issued an Epidemic Notice in accordance with the advice received by Cabinet at its meeting on 23 March 2020.

[69] Also on 24 March, Dr Bloomfield, Mr Ombler and Ms Iona Halsted, the Secretary of Education, spoke to the public about the implications of New Zealand moving to Alert Level 4. During that press conference the concept of the "bubble" was introduced to the public to describe the physical distancing and isolation that would be required during Alert Level 4.

[70] A state of emergency was declared on 25 March 2020. That state of emergency was extended on six occasions through to 13 May 2020. The declaration of a state of emergency was in addition to the Prime Minister having issued an Epidemic Notice and the Minister of Health having authorised the use of the special powers in s 70(1) of the Act.

[71] On 25 March 2020, Parliament passed the COVID-19 Response (Urgent Management Measures) Legislation Act 2020. That legislation (among other things):

(a) made changes to the Local Government Act 2002 to enable members of local government bodies to attend meetings by audio or visual links;

(b) amended the Residential Tenancies Act 1986 by placing a freeze on rent increases and tenancy evictions; and

(c) amended the Education Act 1989 to enable the Secretary of Education to direct educational facilities to open or close and to direct the ways in which education could be delivered and education entities controlled and managed.

First Health Act Order

[72] It was also on 25 March 2020 that the Director-General issued the first of the three Orders that are the focus of this appeal. The First Health Act Order was said to be made pursuant to s 70(1)(m) of the Act. The following five provisions of that Order are of key importance:

(a) The Order required the closure until further notice of "all premises within all districts of New Zealand except those listed in the Appendix to [the Order]".

(b) The Order forbade people to "congregate in outdoor places of amusement or recreation of any kind or description … in all districts of New Zealand" until further notice.

(c) The Order said that "congregate" does not include people maintaining at all times "physical distancing as defined in the Appendix".

(d) The appendix to the Order said it did not apply to "any premises necessary for the performance or delivery of essential businesses". "[E]ssential businesses" were defined to mean:

> … 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.

(e) "[P]hysical distancing" was also defined in the appendix to the Order to mean:

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

[73] Changes were made to the COVID-19 internet site between 23 and 25 March. The key changes relating to essential businesses concerned exemptions that were made to the list of businesses that were required to close. The COVID-19 website on 25 March 2020 said, "The Tiwai Point smelter is exempt from closure". The website recognised that NZ Steel, Methanex and pulp and paper plants were unlikely to provide essential services (except to the extent that pulp and paper plants produced essential products), but the website explained that NZ Steel and non-essential pulp and paper plants had been granted an opportunity to close gradually, and Methanex was granted an exemption to continue operating with scaled back operations in order to avoid a risk of gas supply instability.

[74] The businesses that qualified as essential businesses were reviewed during the duration of the First Health Act Order. An example of a change made to the list of essential businesses occurred on 9 April 2020, when Ministers apparently decided to include in the list of essential businesses the maintenance of stadia turfs, bowling greens, golf courses and nurseries. It appears Ministers determined the economic impacts of not tending to these assets outweighed the public health risks, which could be adequately managed through public health measures.

[75] The essential business list was maintained and updated on the covid19.govt.nz website until 2 April 2020 when the list was transferred to the MBIE website. From that date onwards the covid19.govt.nz website business page contained a link to the MBIE list of essential businesses. That list, and the process for reviewing and updating the list was itself reviewed by the Ministry on 9 April 2020. Following that review the Director-General satisfied himself that "the MBIE decision making process and criteria for recognising essential businesses remain[ed] fit for purpose".

[76] New Zealand's first death from COVID-19 was reported on 29 March 2020. Two days later, the community saw the highest daily increase in COVID-19 cases.

Thereafter however, the number of new cases of COVID-19 started to decrease in accordance with the modelling projections that had been relied upon by officials when recommending New Zealand move into Alert Level 4.

Second Health Act Order

[77] The Second Health Act Order issued by the Director-General came into effect on 3 April 2020. That Order was said to have been made under s 70(1)(f) of the Act. The key provisions of the Second Order 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.

[78] The Second Health Act Order specified what was permitted as "essential personal movement". That concept included:

> (a) accessing essential businesses;
>
> (b) providing essential businesses;
>
> (c) limited recreational purposes;
>
> (d) shared bubble arrangements;
>
> (e) emergencies and complying with court orders; and
>
> (f) authorised travel.

The Second Health Act Order adopted the same meanings of "essential businesses" and "physical distancing" as in the First Health Act Order.

Third Health Act Order

[79] On 20 April 2020, Cabinet agreed to move New Zealand from Alert Level 4 down to Alert Level 3 with effect from 11.59 pm on 27 April 2020. At that time, the Third Health Act Order, which was said to have been issued pursuant to both s 70(1)(f) and (m) of the Act, came into force. That Order remained in force until 14 May 2020.

[80] As we have noted at [9], the Third Health Act Order revoked the two previous Orders and required all persons in all regions to be isolated or quarantined by remaining at their current places of residence. The Third Health Act Order also required all people to maintain physical distancing with the exceptions that were essentially the same as those set out in the earlier Orders. The Order specified instances of essential personal movement that were permitted and required the closure of "restricted premises" with certain exceptions. The Order also continued the prohibition on congregating in outdoor places of amusement or recreation.

[81] By the time Alert Level 4 ended on 27 April 2020, New Zealand had reported 1,469 confirmed and probable cases of COVID-19, and 19 people had died from the virus. By 4 May 2020, when New Zealand was in Alert Level 3, there were no new cases of COVID-19 in the country.

[82] On 13 May 2020, the COVID-19 Public Health Response Act came into force. We explain the key provisions of that legislation at [101] to [103]. The new legislation rendered it unnecessary for further notices to be issued in reliance upon the special powers contained in s 70(1) of the Act.

[83] For completeness, we note in this overview that New Zealand moved from Alert Level 3 to Alert Level 2 on 14 May 2020. By that stage New Zealand had reported no COVID-19 cases during the previous three days. New Zealand moved to Alert Level 1 on 8 June 2020 and aside from some further occasions in which higher Alert Levels were imposed, New Zealand remained at Alert Level 1 up until the

hearing of the appeal in July 2021, by which time New Zealand had reported fewer than 2,800 cases of COVID-19 and 26 deaths from the virus.

Legislative framework

[84] In explaining the provisions of s 70(1) of the Act, it is helpful to first explain the public health provisions that preceded the key provisions of the Act. The history of public health legislation shows that generally, officials have responded to pandemics by relying on general provisions such as those contained in s 70(1) of the Act. Bespoke legislation has only been invoked on the rare occasions that general powers, such as those in s 70(1), have proven to be inadequate.

[85] The first efforts in New Zealand to manage the spread of infectious diseases can be traced to the Harbour Regulations Ordinance 1842.[18] More wider measures were incorporated into the Public Health Acts of 1872 and 1876, which authorised a Central Board of Health to issue regulations to guard against the spread of disease.[19]

[86] In 1900, the Bubonic Plague Prevention Act 1900 was passed. It conferred upon the Governor a wide range of powers "to promptly and effectively deal with bubonic plague".[20] That Act was repealed by the Public Health Act 1900.

[87] The Department of Public Health was created by the Public Health Act 1900. The same Act established the roles of the Chief Health Officer and District Health Officers and authorised the making of regulations for "preventing or checking the spread of infectious disease",[21] including regulations "[f]or the isolating or disinfecting of persons, houses, buildings, places, and things".[22] District Health Officers were, if authorised by the Governor to do so, able to exercise special powers, including the ability to "forbid persons to leave the … place in which they [were] isolated or quarantined until they [had] been medically examined and found to be free from dangerous infectious disease".[23]

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18 Harbour Regulations Ordinance 1842 5 Vict 15, cls 3–6. This is also referred to as the Harbours Act 1842.
19 Public Health Act 1872, s 21; and Public Health Act 1876, s 20.
20 Bubonic Plague Prevention Act 1900, s 4(8).
21 Public Health Act 1900, s 14.
22 Section 14(5).
23 Section 19(8).

[88] The relevant provisions of the Public Health Act 1900 were consolidated into the Public Health Act 1908. The powers conferred on District Health Officers were invoked during the smallpox outbreak in 1913 and during the 1918 influenza pandemic, commonly referred to as the "Spanish Flu" which caused the deaths of approximately 9,000 New Zealanders between October and December 1918.

[89] Concerns about the way the powers conferred by the Public Health Act 1908 were exercised during the 1918 influenza pandemic led to the establishment of a Royal Commission of Inquiry in 1919 called the Influenza Epidemic Commission that was chaired by Sir John Denniston, a retired Supreme Court Judge.[24] The terms of reference of the Commission included that it report on the best methods of preventing or dealing with another pandemic and of administering public health services.

[90] The Commission was concerned by the fractured nature of public health laws in New Zealand. In particular, the Commission said there were unnecessary overlaps between the powers conferred upon local bodies under the Municipal Corporations Act 1908 and those vested in District Health Officers under the Public Health Act 1908. The Commission described public health laws as being extremely complex and diffuse and recommended that there be consolidation and reform of those laws. The Commission recognised that preventing and managing future pandemics required a unified community response and adopted language that echoed the sentiments of utilitarian philosophers such as John Stuart Mill.[25] The Commission said:[26]

> Just as the war called for general recognition of responsibility on the part of all who wished for the preservation of justice and liberty, so does the warning of a great and devastating epidemic call upon all who desire the great benefits of health and well-being to bear their share ungrudgingly in any work that is necessary for the protection of the lives of our people.

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24 As a High Court Judge was then known.

25 John S Mill *On Liberty* (4th ed, Longmans, Green, Reader and Dyer, London, 1869) at 21–22: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".

26 Influenza Epidemic Commission "Report of the Influenza Epidemic Commission" [1919] II AJHR H-31A at 13.

[91] The Commission's recommendations led to Parliament passing the Health Act 1920 under which the Chief Health Officer became the Director-General of Health and District Health Officers became Medical Officers of Health.[27]

[92] Section 76 of the Health Act 1920 contained provisions that carried over some sections in the 1908 Act and created other new special powers. Section 76 of the 1920 Act contained many of the provisions that can now be found in s 70 of the Act that are relevant to this proceeding. For example, under s 76 of the Health Act 1920, the Minister of Health could authorise a Medical Officer of Health to exercise a number of special powers for the purpose of preventing the outbreak or spread of any infectious disease. Those special powers included the authority to:

> (f) … require persons, places, buildings, ships, animals, and things to be isolated, quarantined, or disinfected …
>
> …
>
> (n) … prohibit until further order or for any fixed period, … the congregation of people at any racecourse, recreation-ground, or other place within the health district …

[93] The special powers contained in s 76 of the Health Act 1920 were invoked in response to the polio pandemic of 1925 and were used, for example, to prohibit children throughout the North Island attending "Theatres … Schools … Recreation and Sports Grounds … Racecourses and all other places of public assembly, including public picnics".[28]

[94] In 1948, Parliament responded to the spread of tuberculosis by passing the Tuberculosis Act 1948 which empowered Medical Officers of Health to require persons suspected of having tuberculosis, and who refused or failed to undergo medical examination, to undergo an examination.[29] The Tuberculosis Act also authorised Medical Officers of Health to apply to a Magistrate for orders compelling sufferers of tuberculosis who were in an infectious condition to be detained for up to

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27 Health Act 1920, s 5.
28 "Order under s 76 of the Health Act 1920" *Northland Age* (Kaitāia, 15 January 1925) at 5.
29 Tuberculosis Act 1948, s 9.

three months in an "institution or some other suitable place" where they could be "properly attended and treated".[30]

[95] The Tuberculosis Act, like the Bubonic Plague Prevention Act, was a bespoke statute designed to address a specific public health crisis. Unlike the Bubonic Plague Prevention Act, however, the Tuberculosis Act remained in force for many years. It was not repealed until 2017.

Health Act 1956

[96] The Act, which came into force on 1 January 1957, aimed to "consolidate and amend the laws relating to public health". The Act deals with a wide range of public health matters, including drinking water, sanitation and the national cervical screening programme. Medical Officers of Health are appointed to health districts by the Director-General of Health.[31] Section 22(1) of the Act enables the Director-General to exercise all of the functions of a Medical Officer of Health "in any part of New Zealand".

[97] At [4] we have set out the essential parts of s 70(1)(f) and (m) of the Act. We now set out those paragraphs in full:

> **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,—
>
> …
>
> (f) require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit:
>
> …
>
> (m) by order published in a newspaper circulating in the health district or by announcement broadcast by a television channel

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30 Section 16(1).
31 Health Act 1956, s 7A.

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.

…

[98] Section 70(1) of the Act identifies three possible prerequisites to the exercise of the special powers by a Medical Officer of Health or the Director-General:

(a) an authorisation from the Minister of Health to exercise the powers in s 70(1) of the Act; or

(b) a declaration of a state of emergency under the Civil Defence Emergency Management Act; or

(c) the existence of an epidemic notice.

[99] The reference to an epidemic notice in s 70(1) of the Act is to a notice issued under the Epidemic Preparedness Act. That Act was passed at a time when there were growing concerns about the spread of the Human Avian Influenza (H1N1). The Prime Minister is authorised under s 5 of the Epidemic Preparedness Act to issue epidemic notices in circumstances where specific criteria are satisfied.

[100] All three prerequisites we have referred to at [98] were in place at the time the First Health Act Order was issued.

COVID-19 Public Heath Response Act 2020

[101] The COVID-19 Public Health Response Act was passed in order to provide further powers to prevent and limit the outbreak and spread of COVID-19. The types of orders that can be made under that Act include requiring people to:[32]

> …
>
> (i) stay in any specified place or refrain from going to any specified place:
>
> (ii) refrain from associating with specified persons:
>
> (iii) stay physically distant from any persons in any specified way:
>
> (iv) refrain from travelling to or from any specified area:
>
> (v) refrain from carrying out specified activities (for example, business activities involving close personal contact) or require specified activities to be carried out only in any specified way or in compliance with specified measures:
>
> (vi) be isolated or quarantined in any specified place or in any specified way:
>
> (vii) refrain from participating in gatherings of any specified kind, in any specified place, or in specified circumstances:
>
> (viii) report for and undergo a medical examination or testing of any kind, and at any place or time, specified and in any specified way or specified circumstances:
>
> (ix) provide, in specified circumstances or in any specified way, any information necessary for the purpose of contact tracing:
>
> (x) satisfy any specified criteria before entering New Zealand from a place outside New Zealand, which may include being registered to enter an MIQF on arrival in New Zealand:

[102] Orders may also be made in relation to, amongst other things, "places … or other things" in order to:[33]

> …

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32 COVID-19 Public Health Response Act 2020, s 11(1)(a).

33 Section 11(1)(b).

(i) require things to be closed or only open if specified measures are complied with:

(ii) prohibit things from entering any port or place, or permit the entry of things into any port or place only if specified measures are complied with:

(iii) prohibit gatherings of any specified kind in any specified places or premises, or in any specified circumstances:

(iv) require things to be isolated, quarantined, or disinfected in any specified way or specified circumstances:

(v) require the testing of things in any specified way or specified circumstances.

…

[103] Section 12(1) of the COVID-19 Public Health Response Act makes clear that orders issued under s 11 may apply generally to all people in New Zealand or to any specified class of people in New Zealand and may apply generally throughout New Zealand or to any area in New Zealand.

Rights instruments

[104] In his third amended statement of claim, Dr Borrowdale said six rights in the NZBORA were breached by the three Health Act Orders in issue. The rights identified by Dr Borrowdale were:

(a) Section 14 — Freedom of expression.

(b) Section 15 — Manifestation of religion and belief.

(c) Section 16 — Freedom of peaceful assembly.

(d) Section 17 — Freedom of association.

(e) Section 18(1) — Freedom of movement.

(f) Section 22 — Liberty of the person.

[105] The High Court held that the rights affirmed by ss 14 and 22 of the NZBORA were not engaged in this case and preferred to focus on ss 16, 17 and 18.[34] We do not understand Dr Borrowdale to be challenging that aspect of the High Court's judgment. In any event, we agree with the approach taken by the High Court and will proceed on the basis that it is the rights affirmed by ss 16, 17 and 18 of the NZBORA that are engaged in this case.

[106] Those three rights reflect arts 12, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR).[35] Those rights are also affirmed in provisions in comparable instruments to the NZBORA, such as ss 2(c) and (d) and 6 of the Canadian Charter of Rights and Freedoms 1982.

[107] Articles 12, 21 and 22 of the ICCPR contain provisions that say those rights may be restricted by law in circumstances where it is necessary to do so in the interests of protecting public health or the rights or freedoms of others.

[108] Article 4(1) of the ICCPR also acknowledges that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

[109] Certain rights may not be derogated. The rights in the ICCPR that are treated as being sacrosanct include the rights to life, religion, and freedom from torture and slavery. On the other hand, the rights to freedom of movement, assembly and association in arts 12, 21 and 22 of the ICCPR may be derogated.

[110] For completeness, we record the rights contained in the NZBORA include the right in s 8 not to be deprived of life. No counsel suggested the NZBORA right not to

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34 High Court judgment, above n 4, at [88]–[89].

35 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 12, 21 and 22.

be deprived of life was engaged in this case. The position taken by counsel accurately reflects the narrow meaning that has been given to s 8 of the NZBORA.[36]

[111] There are, however, broader "rights to health" contained in international instruments that are relevant to the issues raised by this appeal.

[112] The first such instrument can be found in the Constitution of the WHO.[37] That Constitution was signed by New Zealand and 60 other countries in 1946.

[113] The preamble to the WHO Constitution provides that:

> 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:
>
> > 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.
>
> (emphasis added)

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[36] *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA); *AR (India) v Attorney*-General [2021] NZCA 291; *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC); and *S v Midcentral District Health Board* HC Wellington CP237/02, 18 March 2003. See also *Soobramoney v Minister of Health (Kwazulu-Natal)* (1998) 1 SA 765 (ZACC).

[37] Constitution of the World Health Organization 14 UNTS 185 (opened for signature 22 July 1946, entered into force 7 April 1948).

[114] Article 1 of the WHO Constitution provides that the objectives of the WHO include "the attainment by all peoples of the highest possible level of health". This is supplemented by the International Health Regulations (IHR) adopted by the World Health Assembly in 1969.[38]

[115] 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.

[116] The IHR are binding on New Zealand and, as noted by the High Court, "form the principal international framework for preventing and controlling the spread of disease between countries".[39]

[117] We also note that art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out the right to the "highest attainable standard of physical and mental health",[40] and it says that full realisation of this right requires states to take necessary steps for the prevention, treatment and control of diseases, including epidemic diseases.

[118] When Parliament's Justice and Law Reform Committee reported on the White Paper that proposed the Bill of Rights, the Committee recommended that any Bill of Rights drafted by the Government should include some of the major social and economic rights in the ICESCR.[41] The Government, however, rejected this recommendation. As a consequence, when the Bill that became the NZBORA was introduced in 1989 its explanatory note stated:[42]

> The rights and freedoms set out in the Bill are confined to civil and political rights … The Bill does not cover social, economic, and cultural rights. In this respect it departs from the recommendations of the Justice and Law Reform

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38 International Health Regulations (2nd ed, World Health Organization, Switzerland, 2005).

39 High Court judgment, above n 4, at [43].

40 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

41 Justice and Law Reform Select Committee "Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand" [1987–1990] XVII AJHR I8c at 4.

42 New Zealand Bill of Rights Bill 1989 (203-1) (explanatory note) at i and ii.

> Committee, which recommended that certain social and economic rights be included in the Bill:

It therefore follows that, by themselves, the rights in art 12 of the ICESCR concerning the attainment of the highest standards of health and protection from epidemic diseases carry less weight than may otherwise have been the case when assessing the rights affirmed by the NZBORA.

Interpretation provisions of the NZBORA

[119] The appeal also engages to varying degrees ss 5 and 6 of the NZBORA. For convenience we shall set out those sections:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[120] For completeness, s 4 of the NZBORA also provides:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[121] We discuss the approach to applying these provisions of the NZBORA at [134]–[141].

PART III

FIRST GROUND OF APPEAL

DID THE ORDERS EXCEED THE SCOPE OF THE STATUTORY POWERS?

[122] The gravamen of the first ground of appeal is that the Director-General exceeded the powers conferred upon him by s 70(1)(f) and (m) of the Act when he issued the three Health Act Orders we have described at [72] to [80].

[123] Mr L Farmer, who argued this aspect of the appellant's case, submitted that the types of measures put in place by the Health Act Orders could have been implemented but only with the authority of bespoke legislation, such as the COVID-19 Public Health Response Act.

[124] In this Court, the specific challenges to the Health Act Orders were distilled to four points of statutory construction.

[125] First, in relation to the Second and Third Health Act Orders, it was submitted that s 70(1)(f) can be invoked only in relation to an identifiable person or class of persons. It does not permit orders to be made to a very wide range of people or the public in general. To support this submission, it was argued that s 70(1)(f) uses the word "persons" instead of "people" to give it a narrower scope. To further support this submission, a contrast was drawn between s 70(1)(f) and (m). The latter provides that orders are to be communicated via media, which shows it was intended to apply to a wide range of people. Absent similar language in s 70(1)(f), it was submitted that s 70(1)(f) was not intended to apply to wide groups of people.

[126] Second, in relation to the Second and Third Health Act Orders, it was argued that s 70(1)(f) did not authorise the Director-General to order people to stay at home in their "bubbles". Rather, s 70(1)(f) could only be used to require individuals to be isolated, quarantined or disinfected and any order under s 70(1)(f) had to be confined to one of those narrow objects. Mr Farmer also submitted the language of s 70(1)(f)

of the Act requires the person issuing the order to actively facilitate isolation, or quarantine, or to administer disinfectants. From that proposition it was argued that orders under s 70(1)(f) were *ultra vires* if the person making the order did not actively facilitate isolation, quarantine or the administration of disinfectants.

[127] Third, in relation to the First and Third Health Act Orders, it was submitted that they failed to comply with s 70(1)(m) of the Act because those Orders required all premises to be closed except those in a list of exceptions. It was argued that by drafting the First and Third Health Act Orders in negative terms (by referring to all premises with exceptions), the Orders failed to engage with the necessary assessment of the kind of characteristics that could be identified in premises that were to be closed in order to prevent the outbreak or spread of infectious disease.

[128] Fourth, in relation to the First and Third Health Act Orders, it was submitted that they failed to comply with s 70(1)(m) of the Act because they contained an exception to congregation for "physical distancing". It was contended that this exception was outside the scope of s 70(1)(m).

The High Court approach to interpretation

[129] In its judgment, the High Court said that determining whether the three Health Act Orders went beyond the permissible limits of s 70(1)(f) and (m) of the Act "[did] not require a prior reading down of those provisions in a way that [was] at odds with their text and purpose".[43] By this the Court meant that it was not necessary to construe s 70(1)(f) and (m) of the Act in a way that was most consistent with the rights and freedoms contained in the NZBORA if that produced a meaning that was at odds with the text and purpose of those provisions. Two reasons underpinned this part of the Court's reasoning.

[130] First, the relevant rights and freedoms in the NZBORA "are not absolute and 'must accommodate the rights of others and the legitimate interests of society as a whole', including the wider interest in protecting public health".[44]

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43 High Court judgment, above n 4, at [98].

44 At [95], citing *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [186].

[131] Second, s 70(1)(f) and (m) of the Act plainly contemplate limits on various NZBORA rights and freedoms when those powers are exercised, "[b]ut the extent of those limits is not specified or capable of justification in advance of whatever crisis activates their exercise".[45] The Court reasoned that the real question was whether the "actual exercise of the s 70(1)(f) or (m) powers were necessary, reasonable and proportionate", an assessment which the Court said "depends on the particular (public health emergency) circumstances to which the exercise of power responds".[46] Because Dr Borrowdale had accepted 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", any limits to NZBORA rights were justified.[47]

[132] This approach led to the Court saying that the second cause of action was essentially confined to an "orthodox vires challenge".[48]

[133] Mr J Farmer QC, senior counsel for Dr Borrowdale, relied in part upon criticisms from Professor P A Joseph concerning the approach to interpretation taken by the High Court in this case. Professor Joseph has said that Dr Borrowdale's proceeding "drew an unexpected judicial response" from the High Court. Instead of opting for the least rights infringing meaning to s 70(1)(f) and (m) of the Act, the High Court "did the opposite: it engaged a s 5 analysis and held that the lockdown restrictions [contained in the Health Act Orders] were 'a necessary, reasonable and proportionate response to the public health emergency'". Professor Joseph has expressed his concern that the High Court "discounted the rights-context under the [NZBORA]" and "read 'up' rather than 'down' the scope of the empowering legislation".[49]

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45 At [96].
46 At [97].
47 At [97].
48 At [98].
49 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1217–1218.

Our approach to interpretation

[134] Before we discuss the interpretation of s 70(1)(f) and (m) of the Act, we consider it useful to set out the following interpretation principles. The meaning of an enactment must be ascertained from its text, in light of its purpose and context.[50] This can allow for considering the Act as a whole, the relevant legislative history, and rights at common law and in instruments such as the NZBORA.[51]

[135] When the interpretation of an enactment potentially engages NZBORA rights, the interpretation provisions in ss 4–6 of the NZBORA may also be engaged. The approach to applying these provisions was discussed by Tipping J in *R v Hansen*, with whom the majority of the Supreme Court agreed.[52] Tipping J said:

> [89] The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament. Once the resulting meaning, which I will call Parliament's intended meaning, has been identified, the next step is to determine whether there is any inconsistency between that meaning and the Bill of Rights. If there is none, the matter rests there. If there is an inconsistency, and this can conveniently be called apparent inconsistency, the question which then arises is whether the court's next step is to examine whether a consistent or less inconsistent meaning can be given to the statutory language to accord with the s 6 preference; or rather, whether the next step is to examine the apparent inconsistency to see whether it is nevertheless reasonable and a demonstrably justified limit and thus permitted by s 5 of the Bill of Rights. I say "permitted" in the sense that by enacting a provision with that meaning Parliament is not acting inconsistently with the Bill of Rights of which s 5 forms an integral part.
>
> [90] I consider the latter is the appropriate course. The court does not move straight from an apparently inconsistent meaning to look for another meaning. The court first examines the apparently inconsistent meaning to see whether it constitutes a justified limit on the right or freedom in question. If it does not constitute a justified limit, the court goes back to s 6 to see if a consistent or more consistent meaning is reasonably possible. If, however, the apparently inconsistent meaning does constitute a justified limit, the apparent inconsistency is overtaken by the justification afforded by s 5. …

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50 Interpretation Act 1999, s 5; Legislation Act 2019, s 10(1); and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

51 See generally Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 286–287; *Commerce Commission v Fonterra Co-operative Group Ltd*, above n 50, at [22]; *Hansen*, above n 44, at [89]; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [27], citing *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL); and *D v Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [75]–[76].

52 *Hansen*, above n 44.

[136] Tipping J also provided a concise summary which he and the majority of the Court endorsed. We set out that summary here:[53]

> Step 1. Ascertain Parliament's intended meaning.
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[137] Tipping J acknowledged in *Hansen* that this approach would not necessarily be the most appropriate in every case.[54] As a matter of fact, not every case since *Hansen* has followed the same approach.

[138] One such case was *Cropp v Judicial Committee*.[55] That case concerned the Racing Act 2003, which contained a provision for making rules relating to race safety. The issue was whether this allowed the making of rules that required random drug testing. The interpretation of the empowering provision potentially engaged the right against unreasonable search and seizure in s 21 of the NZBORA. However, the Supreme Court held that the *Hansen* approach did not apply, as, if a search and seizure was unreasonable, it could not be justified under s 5.[56] Ultimately, the Supreme Court found that the empowering provision did allow for the rules.[57]

[139] More recently, the interpretation provisions of the NZBORA were considered by the Supreme Court in *Fitzgerald v R*, whose judgment was delivered while we were

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53 At [92].
54 At [93]–[94].
55 *Cropp v Judicial Committee*, above n 51.
56 At [33].
57 At [41].

deliberating on our decision.[58] Counsel for Dr Borrowdale drew our attention to the Supreme Court's judgment, but we did not think it necessary to call for further submissions. *Fitzgerald* concerned the "three strikes" sentencing regime, the effect of which was to breach Mr Fitzgerald's right against disproportionately severe punishment in s 9 of the NZBORA. The issue was whether s 86D of the Sentencing Act 2002 could be interpreted as subject to a limit so that it would not breach s 9. The majority of the Supreme Court decided that the *Hansen* approach did not apply, as disproportionately severe punishment could not be justified under s 5. The majority therefore started with s 6 by considering if a rights consistent interpretation of the provision was possible,[59] ultimately concluding that it was.[60]

[140] Although *Cropp* and *Fitzgerald* did not apply the *Hansen* approach, they did not doubt the continued application of *Hansen*. Rather, they show that the most appropriate approach will depend on the issues raised on a case by case basis.

[141] In this case, we consider the *Hansen* approach to be appropriate. We say this because, unlike in *Fitzgerald*, this case involves rights that can be justifiably limited under s 5 of the NZBORA. We shall therefore begin our analysis by ascertaining Parliament's intended meaning in accordance with general interpretation principles. In any event, we consider the rights consistent approach we are taking to be in line with the approach taken by the majority in *Fitzgerald*.

Parliament's intended meaning

[142] At a general level, we are satisfied that when Parliament enacted s 70(1)(f) and (m) of the Act, it intended to confer on the Director-General and Medical Officers of Health wide-ranging powers to prevent the outbreak of infectious disease. Subject to the constraints we discuss at [143], the powers in s 70(1) can be exercised whenever the Director-General deems it necessary to do so for the purposes of preventing the outbreak or spread of an infectious disease. The breadth of the statutory language and

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58 *Fitzgerald v R* [2021] NZSC 131.
59 At [46]–[48] per Winkelmann CJ, [175] per O'Regan and Arnold JJ and [244] per Glazebrook J.
60 At [139] per Winkelmann CJ, [219] per O'Regan and Arnold JJ and [250] per Glazebrook J. Young J dissented at [324]–[329].

the context in which the powers fall to be exercised weigh against a narrow construction of those powers.

[143] The key constraints to the exercise of the special powers are found in s 70(1) of the Act, which limits the use of the special powers to circumstances in which the Minister has authorised the use of the s 70 special powers, or a state of emergency has been activated, or an epidemic notice is in place. These criteria provide degrees of political oversight in relation to the exercise of the special powers, while the second criterion carries the additional assurance of independent assessments having been made by those responsible for declaring a state of emergency. As we have noted at [100], all three of these criteria were in place when each of the Health Act Orders were issued.

[144] The breadth of the authority conferred upon the Director-General and a Medical Officer of Health by s 70(1) of the Act reflects Parliament's appreciation that the special powers in s 70(1) are exercised by highly qualified health experts and that the circumstances in which the special powers may be exercised will cover a wide range of scenarios, some of which cannot be fully anticipated.

Section 70(1)(f) — "persons"

[145] The text of s 70(1)(f) enables the Director-General and a Medical Officer of Health to require persons to be isolated. Mr L Farmer submitted that the term "persons" was directed at individuals or groups of individuals rather than the public in general.

[146] We do not accept that submission. Parliament used the plural of person in s 70(1)(f). Its decision to do so means that orders under s 70(1)(f) may apply to multiple people without limitation.

[147] The breadth of the term "persons" is entirely consistent with the way the predecessor to s 70(1)(f) was applied to very large segments of New Zealand's population during the polio pandemic in 1925. When it re-enacted s 70(1) in the Act,

Parliament must have intended that the powers in that subsection would continue to be applied to broad populations.[61]

[148] We are also not attracted to the distinction that Mr L Farmer endeavoured to make between the requirement to notify individuals affected by s 70(1)(f) as opposed to the wide publication mechanisms contained in s 70(1)(m). We agree with the Solicitor-General when she submitted that an order can only be enforced if those to whom the order applies know or should reasonably know of its existence. Whether that is done by notifying an individual or through mass publication of the terms of the order is immaterial.

Section 70(1)(f) — "isolated" and "quarantined"

[149] It was also argued that the terms "isolated" and "quarantined" could not extend to requiring healthy people to remain in their homes and in their social "bubbles" because the transitive verbs "isolated" and "quarantined" applied to persons who are or may be affected by an infectious disease.

[150] Mr L Farmer drew support for this interpretation from the IHR in which "isolation" and "quarantine" are defined in the following way:[62]

> "isolation" means separation of ill or contaminated persons or affected baggage, containers, conveyances, goods or postal parcels from others in such a manner as to prevent the spread of infection or contamination.
>
> …
>
> "quarantine" means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination;

[151] We find it sufficient to rely on the term "isolated". The IHR has given an epidemiological meaning to the term "isolation", which was used in its ordinary sense in New Zealand's public health Acts for many decades before the IHR was adopted. In applying a rights consistent approach to statutory interpretation, we prefer to

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61 See generally *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [56].

62 International Health Regulations, above n 38, art 1.

continue to rely upon the natural and ordinary meaning of the term "isolated". The term "isolate" normally means the separation of a person from others or placing them apart. When, however, a rights consistent approach is taken to the meaning of the term "isolated" in s 70(1)(f), we are satisfied it can be construed so as to allow families or small groups of people to be isolated together but separate and apart from other families or small groups of people for the purpose of preventing the spread of disease. This approach produces a less demanding form of isolation than one that requires each individual to be isolated on their own and leads to a more rights consistent and compassionate outcome.

[152] Nor do we see merit in the proposition that the terms "isolated" and "quarantined" in s 70(1)(f) require some form of affirmative action by the Director-General or a Medical Officer of Health beyond the issuing of an order. That approach stretches the natural and ordinary meaning of the words "require persons … to be isolated [or] quarantined". All that the person making the order needs to do is require those who are subject to the order to isolate or quarantine themselves.

Section 70(1)(m) — "premises"

[153] We are not persuaded by Mr L Farmer's submission concerning the purpose of s 70(1)(m) of the Act. We can see nothing wrong with interpreting s 70(1)(m) as applying to the closure of all premises except those that are excluded. This approach to construction recognises that when it conferred the special powers to close premises in s 70(1)(m), Parliament referred to "all premises … of any stated kind or description". Those words convey that Parliament wished to ensure those exercising the special powers under s 70(1)(m) could close a wide range of premises. We think the power is validly exercised by an order that closes all premises with stated exceptions, provided the terms of the order are clear.

Section 70(1)(m) — "congregate"

[154] Similarly, the text of s 70(1)(m) permits the Director-General or a Medical Officer of Health to forbid people to "congregate in outdoor places … of any stated kind or description". This is also a very broad power that is not limited to particular kinds of premises or outdoor places. We are satisfied that this power is

flexible enough to allow an exception for "physical distancing", which is more rights consistent than prohibiting all congregation.

[155] Our approach to the text of s 70(1)(f) and (m) of the Act is reinforced when regard is had to the broad purposes that underpin those provisions. As we have noted earlier, s 70(1)(f) and (m) can be traced to the Health Act 1920, which was passed in response to the report of the Royal Commission that was established following the catastrophic public health crisis caused by the 1918 influenza pandemic. As we have already observed, the Commission recommended a revision of New Zealand's public health laws, and while some of the language of s 76 of the 1920 Act was adopted from earlier public health legislation, the overall objectives of the new Act were to achieve a unified and comprehensive approach to public health in New Zealand. The Health Act 1920 was passed at a time when Parliament understood that all members of society needed to "share ungrudgingly in any work that [was] necessary for the protection of the lives of [New Zealanders]".[63] Section 70(1) of the Act, like its predecessor provisions, reflects the social objective that the rights of individuals to freedom of movement, assembly and association may, in times of dire emergency, need to be temporarily suspended for the greater good.

Apparent inconsistency with NZBORA

[156] While we have been able to apply a more rights consistent meaning to the term "isolated" we cannot distort the text and purpose of s 70(1)(f) and (m) so as to achieve meanings that are consistent with the rights and freedoms contained in ss 16, 17 and 18 of the NZBORA.

[157] This reflects the stark reality that when Parliament enacted s 70(1)(f) and (m) of the Act, it deliberately intended to authorise the issuance of orders that would curtail the rights of New Zealand citizens to engage in peaceful assembly, association and freedom of movement.

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63 Influenza Epidemic Commission, above n 26, at 13.

Justified limitation

[158] Having reached that conclusion, we need to briefly complete the *Hansen* analysis by explaining why Parliament's intended meanings of s 70(1)(f) and (m) constitute a justified limitation to the rights and freedoms affirmed by ss 16, 17 and 18 of the NZBORA. We can be brief in this part of our judgment because of the responsible approach Mr J Farmer took in relation to this issue.

[159] Dr Borrowdale's third amended statement of claim acknowledged that, provided the Health Act Orders were *vires*, they were justifiable under s 5 of the NZBORA. That acknowledgment applied to the terms of the Health Act Orders which, we have found, were issued in accordance with s 70(1)(f) and (m) of the Act.

[160] Dr Borrowdale has not sought to argue that s 70(1)(f) and (m) constitute unjustifiable limitations under s 5 of the NZBORA. There are two reasons why Dr Borrowdale would have faced an insurmountable hurdle had he tried to argue that the limits were not justifiable.

[161] First, as we have explained at [107]–[109], the ICCPR allows limiting and derogating from the rights to freedom of movement, association and assembly.[64] The ability to limit and derogate from rights in the ICCPR has been relied upon by New Zealand courts to interpret the strength of the equivalent rights in the NZBORA.[65]

[162] Second, the present limits are clearly justified in a free and democratic society in order to protect the health and wellbeing of members of society by preventing and limiting the impact of contagious diseases, such as COVID-19.

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64 The ability of states to limit rights may not give as much flexibility as derogating from those rights. See Paul M Taylor *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, Cambridge, 2020). We need not resolve that issue because in accordance with New Zealand's constitutional arrangements, Parliament has through s 70(1)(f) and (m) of the Act placed limitations upon the rights and freedoms affirmed by ss 16, 17 and 18 of the NZBORA.

65 *R v Poumako* [2000] 2 NZLR 695 (CA) at [3]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at footnote 6; *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [13]; *Hansen*, above n 44, at [36] per Elias CJ; and *Fitzgerald*, above n 58, at [116] per Winkelmann CJ.

Conclusions: First ground of appeal

[163] Our conclusions in relation to the first ground of appeal are:

(a) Applying all relevant construction principles, we are satisfied that Parliament intended s 70(1)(f) and (m) of the Act to be broad enough to authorise the three Health Act Orders.

(b) Parliament's intended meaning of s 70(1)(f) and (m) of the Act limits the rights and freedoms affirmed by ss 16, 17 and 18 of the NZBORA, but these limits are justified in a free and democratic society.

PART IV

SECOND GROUND OF APPEAL

WAS THERE AN UNLAWFUL DELEGATION OF STATUTORY POWER?

[164] The second ground of appeal focuses on the part of the First Health Act Order that allowed "essential businesses" to stay open. According to Dr Borrowdale, the Director-General delegated the decision on what businesses were "essential businesses" to officials at MBIE and other departments. This, it was argued, offended the Latin maxim *delegatus non potest delegare* — a person vested with a statutory power must exercise that power personally and not sub-delegate that power to another person.

[165] The gravamen of the second ground of appeal is that the Director-General could not delegate the task of deciding what the necessities of life were. Dr Borrowdale's counsel acknowledged that, if the Director-General had decided what the necessities of life were, it would have been open to the Director-General to delegate to other officials the decision as to which businesses provided those necessities of life.

[166] It is convenient at this juncture to briefly restate the relevant evidence, which may be distilled to the following points:

(a) The task of drafting a list of essential businesses was undertaken by Mr Stocks and his team.

(b) A draft list of essential businesses was "reviewed" and "agreed" to by the Director-General and other members of the AOGR group on 22 March 2020, before the paper containing that draft list was presented to Cabinet on 23 March.

(c) The list of essential businesses was posted on the covid19.govt.nz website at about 3.00 pm on 23 March with a warning the list would likely change over time. The website said essential businesses were those that would continue to provide the necessities of life for everyone in New Zealand:

> This means food, medicine, healthcare, energy, fuel, waste-removal, internet and financial support will continue to be available.

Beneath the heading as to what were "essential businesses" was a list of 15 public and private sectors and entities that provided essential services (including their supply chains).

(d) The Director-General issued the First Health Act Order on 25 March, which, as we have explained, adopted the list of essential businesses on the covid19.govt.nz website.

(e) It is also apparent that changes were made to the schedule of essential businesses during the ensuing days. Exemptions were granted to allow, for example, Tiwai Point and Methanex to keep operating.

[167] The task of compiling the schedule of essential businesses was a mammoth undertaking. It is not surprising that changes needed to be made to the schedule of essential businesses that were permitted to stay open. Nor is it surprising that the task of preparing and reviewing the schedule of essential businesses needed to be done by a team of suitably qualified people from across the public sector.

[168] As we have previously noted, on 9 April 2020 two developments occurred concerning the schedule of essential businesses:

(a) The Ministry of Health completed a review of the work that had been done by Mr Stocks and his team concerning the schedule of essential businesses. The Director-General satisfied himself at that point that the work completed by Mr Stocks' team was "fit for purpose".

(b) Ministers decided to exempt from businesses that needed to be closed those that were involved in the maintenance of stadia turfs, bowling greens, golf courses and nurseries.

[169] There is no evidence that directly addresses whether or not the Director-General reviewed the list of essential businesses that evolved between 25 March when he issued the First Health Act Order and 9 April 2020, which was the day the Ministry completed its review of the work that had been undertaken by Mr Stocks and his team.

Delegatus non potest delegare

[170] The rationale for *delegatus non potest delegare* rests upon:[66]

(a) "The presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself."

(b) "The 'rule of law' … since the common law recognizes no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so."

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[66] John Willis "Delegatus Non Potest Delegare" (1943) 21 Can Bar Rev 257 at 259–260. See generally Enid Campbell "Ostensible Authority in Public Law" (1999) 27 F L Rev 1.

(c) The desire to ensure effective accountability for the exercise of public power.

[171] In his thoughtful article, "Subdelegation of the Legislative Power",[67] Professor Colin Aikman illustrated how *delegatus non potest delegare* used to be invoked on a regular basis in judicial review proceedings in this country. Unfortunately, however, early New Zealand references to the Latin maxim may have failed to fully appreciate important qualifications to its scope. For example, in *Geraghty v Porter*, there can be found the following statement concerning the lawfulness of delegated powers and regulations made pursuant to the Motor Regulation Act 1908:[68]

> Such a delegated authority must be exercised strictly in accordance with the powers creating it … and in the absence of express power to do so the authority cannot be delegated to any other person or body. The rule on the subject is expressed in the maxim *Delegatus non potest delegare* and is of general application …

Professor Aikman observed this statement of the law was "not quite as straight-forward as appears on first reading".[69] The unqualified embrace of the Latin maxim in some earlier New Zealand cases may go some way towards explaining why the authors of *De Smith's Judicial Review* describe as "conflicting" New Zealand decisions concerning the validity of delegated decision-making powers.[70]

[172] *F E Jackson and Co Ltd v Collector of Customs* was cited by Mr J Farmer in support of his argument that the Director-General unlawfully sub-delegated his decision-making powers when he issued the First Health Act Order.[71] That case concerned the validity of import control regulations in 1938. The regulations were made by the Governor-General in Council and prohibited the importation into New Zealand of any goods except in accordance with a licence granted by the Minister of Customs. The regulations also purported to confer on the Minister the power to delegate to any licensing officer the Minister's powers to grant, revoke and modify

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67 Colin Aikman "Subdelegation of the Legislative Power" (1960) 3 VUWLR 69.
68 *Geraghty v Porter* [1917] NZLR 554 (SC) at 556.
69 Aikman, above n 67, at 72.
70 Harry Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [5-182].
71 *F E Jackson and Co Ltd v Collector of Customs* [1939] NZLR 682 (SC).

licences. The regulations were silent as to who qualified for a licence. The regulations were made pursuant to both the Customs Act 1913 and the Reserve Bank of New Zealand Amendment Act 1936. The latter statute authorised the Governor-General in Council to make regulations that, amongst other matters, regulated "credit" so as to promote and maintain the "economic and social welfare of New Zealand".[72]

[173] In the Supreme Court, Callan J recognised that the "pith and substance" of the regulations in issue was:[73]

> … to hand over the whole of this vital topic to a single Minister without the formulation of any principles to guide him in the performance of duties which might be of far-reaching and long-enduring importance, because Parliament, when it authorized any Government to impose exchange control, placed no limit on the amount of exchange control that might be imposed.

The Judge referred to the passage from *Geraghty v Porter* we have quoted at [171] and said that the regulation-making power in the Reserve Bank of New Zealand Amendment Act authorised the Governor-General in Council to make rules of general application concerning the way licences might be issued.[74] The powers, however, could not be sub-delegated to the Minister:[75]

> Delegated legislative power cannot be sub-delegated except in so far as Parliament, which created the power, has said that it might be sub-delegated.

[174] *F E Jackson and Co Ltd v Collector of Customs* can be compared to *Mackay v Adams*,[76] which established that where a power to regulate is sub-delegated, that conferment may be valid if the regulating authority lays down the principles or standards upon which the sub-delegate is to exercise his or her authority. The distinction has sometimes been drawn between the sub-delegation of mere "administrative" powers, which is more likely to be valid, and the sub-delegation of the delegator's original "legislative" powers, which is less likely to be valid.[77] This distinction was reinforced in comments made by Turner J in the then Supreme Court in *Hookings v Director of Civil Aviation*,[78] and by this Court in *Hawke's Bay*

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72 Reserve Bank of New Zealand Amendment Act 1936, s 10(1) and (2).
73 *F E Jackson and Co Ltd v Collector of Customs*, above n 71, at 729.
74 At 733.
75 At 733.
76 *Mackay v Adams* [1926] NZLR 518 (SC).
77 Aikman, above n 67, at 79–83; and Woolf and others, above n 70, at [5-163]–[5-164].
78 *Hookings v Director of Civil Aviation* [1957] NZLR 929 (SC).

Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board,[79] in which it was held the Milk Amendment Act 1951 did not authorise the sub-delegation by the Governor-General of the power entrusted to him by that Act, namely, the power to fix town milk producer prices.

[175] Common law jurisprudence concerning *delegatus non potest delegare* now recognises that it is a prima facie rule for the construction of statutes.[80] Accordingly, the scope of the presumption of statutory construction embodied by the Latin maxim should not be overstated. Professor Forsyth explains:[81]

> The maxim *delegatus non potest delegare* is sometimes invoked as if it embodied some general principle that made it legally impossible for statutory authority to be delegated. In reality there is no such principle; the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label. In the case of statutory powers the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates that this is not normally allowable.

[176] Factors that may help in deciding if there has been a valid sub-delegation of powers pursuant to legislative authority include:

(a) The exact nature of the powers that the sub-delegate purports to exercise.[82] Thus, as recognised by Dr Borrowdale in the present case, the Director-General could have lawfully sub-delegated to other officials, decisions about whether particular businesses satisfy the criteria for being classified as essential businesses provided the Director-General set out sufficient direction as to what those criteria were.

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79 *Hawke's Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218 (CA).

80 Mark Aronson, Matthew Groves and Greg Weeks *Judicial Review of Administrative Action and Government Liability* (6th ed, Law Book Co, Sydney, 2017) at [6.20].

81 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 260. See also Paul Craig *Administrative Law* (9th ed, Thomson Reuters, London, 2021) at [18–002].

82 *Mackay v Adams*, above n 76.

(b) Whether the sub-delegate exercises his or her authority autonomously or whether the delegator continues to exercise some control over the sub-delegate and, if so, the degree of that control.[83]

(c) The breadth of the powers delegated may also be relevant. The delegator should identify with sufficient precision what the sub-delegate's authority is, instead of leaving it to the sub-delegate to determine the boundaries of his or her authority.[84]

(d) Where the exercise of a discretionary power is conferred upon a named official, courts will be reluctant to allow another official to exercise those powers in the absence of legislative indications to the contrary.[85]

(e) The impact of the powers in question may also be a critical factor. Courts can be expected to look more critically where the sub-delegation involves interference with NZBORA and other common law rights.[86]

[177] A valid sub-delegation of powers should not, however, be conflated with situations where the law considers there to have been no sub-delegation at all. Two such situations have been recognised in the law. First, Ministers and other public officials are frequently asked to make decisions based upon recommendations that have been prepared by other officials. The Minister or public official who reads an executive summary and ticks the recommendation "has neither delegated nor failed personally to take relevant considerations into account, if he or she in fact read and considered the department's summary, and if that summary contained all the salient material facts, however briefly".[87]

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83 *Provident Mutual Life Assurance Assoc v Derby City Council* [1981] 1 WLR 173 (HL) at 181, where there was a right of appeal.

84 *Ratnagopal v Attorney-General* [1970] AC 974 (PC).

85 *R v Solicitor Complaints Bureau, ex parte Curtin* (1994) 6 Admin LR 657 (CA).

86 *Melbourne Corp v Barry* (1922) 31 CLR 174 at 200.

87 Aronson, Groves and Weeks, above n 80, at [6.80], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; and *Sita Queensland Pty Ltd v Beattie* [2000] 2 Qd R 433 (QSC) at 438–439.

[178] Second, there is the *Carltona* agency principle.[88] This holds that statutory powers may be exercised by departmental agents, and the agent's acts will be deemed to be the acts of the power-holder on the basis that "[t]he agent is the principal's ghost writer". Although the *Carltona* agency principle normally applies to the powers given to Ministers, it may also apply "to office-holders within the public service structure [who are] accountable to Ministers".[89]

Analysis

The High Court approach

[179] We disagree with the High Court when it bifurcated the definition of essential businesses and concluded:

(a) the definition of "essential businesses" was contained in the words "businesses that are essential to the provision of the necessities of life and those businesses that support them"; and that

(b) the balance of the sentence, "as described on the Essential Services list on the covid19.govt.nz internet site …" was merely advisory.[90]

[180] While those two parts of the sentence were separated by a comma, we do not think the sentence can be split into two disconnected parts. The definition is contained in the entire sentence. Furthermore, when the definition of "essential businesses" is read in the context of other information on the website, it is apparent the public was being told that a business was essential if it was included in the list of essential services on the website. The website expressly said that if a business "isn't on the list of essential services" then it "must close". This conclusion is reinforced when regard is had to the threats of enforcement contained on the website. Through the website the Government said that "[e]nforcement measures may be used" to stop non-essential businesses from operating.

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88 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

89 Aronson, Groves and Weeks, above n 80, at [6.130] and [6.140], citing *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [58].

90 High Court judgment, above n 4, at [268].

[181] The text of the definition of essential businesses and the prescriptive and mandatory way in which essential businesses were identified on the website are difficult to reconcile with the view that the words after the comma were merely advisory.

[182] Our conclusion the High Court erred when it said half of the definition of "essential businesses" was advisory does not, however, determine the second ground of appeal.

[183] There are two limbs to the second ground of appeal that we shall address:

(a) was there a delegation of statutory powers by the Director-General? If so;

(b) was that delegation unlawful?

Was there a delegation of statutory powers by the Director-General?

[184] The question posed at [183(a)] requires consideration as to whether or not the Director-General made the decision as to what constituted essential businesses within the meaning of the First Health Act Order when he adopted the recommendations prepared by other officials.

[185] The answer to this question requires a careful evaluation of the affidavit evidence and the drawing of reasonable inferences. Following that approach we draw the following conclusions:

(a) The Director-General turned his mind to the draft list of essential businesses when he considered and agreed to that draft list on 22 March.

(b) Even if the Director-General's consideration of the draft list of essential businesses was not sufficient for him to have retained control over deciding what would constitute essential businesses, any deficiencies at that stage in the Director-General's decision-making were remedied

when, on 25 March, he adopted the definition of essential businesses and the list of those businesses that had been posted on the covid19.govt.nz website on 23 March.

[186] The Director-General was entitled to rely on the advice prepared by Mr Stocks and his team concerning the meaning and scope of "essential businesses". The fact others, including Cabinet Ministers, also agreed to the list of essential businesses does not detract from the fact that the Director-General retained control over what constituted essential businesses. He exercised that control when he adopted the recommendations of other officials when he issued the First Health Act Order. We emphasise the following three points:

(a) The definition of essential businesses in the First Health Act Order is crucial and takes precedence over the draft definitions that preceded the signing of the First Health Act Order.

(b) It is reasonable to infer, and there is no reason to doubt, the Director-General fully appreciated and agreed with the terms of the First Health Act Order when he signed that Order on 25 March.

(c) The fact Ministers and other officials previously agreed with the definition of essential businesses reflected the reality that the Director-General needed to ensure Cabinet and other officials were aware of and fully supported the terms of the First Health Act Order before it was issued on 25 March.

Was there an unlawful delegation in any event?

[187] The approach we have explained at [184] to [186] disposes of the second ground of appeal. There is, however, an alternative reason why we believe the second ground of appeal cannot succeed. That reason focuses upon the actual guidance given to Mr Stocks' team by the Director-General and others for them to take into account when compiling the draft list of essential businesses. The paper that was presented to Cabinet on 23 March explained four principles that were to guide decisions as to what constituted essential businesses:

(a) Public health was paramount.

(b) The Government's response to COVID-19 must continue.

(c) The Government "must ensure the necessities of life for everyone in New Zealand".

(d) Public health, safety and security needed to be maintained.

A draft list of essential service providers was set out in annex 5 of the Cabinet paper.

[188] While the guidelines were cast in broad terms, the criteria the Director-General approved were sufficient for other officials to carry out the administrative task of identifying what businesses were essential. This places the circumstances of this case in a vastly different category from the facts of *F E Jackson and Co Ltd v Collector of Customs*, in which the terms of the purported delegation provided absolutely no guidance on who could qualify for an import licence.[91] Rather, the circumstances with which we are dealing are more closely aligned to those in *Mackay v Adams* and *Hookings v Director of Civil Aviation*, in which standards and principles were given to the sub-delegate.[92]

[189] The Supreme Court's judgment in *Cropp v Judicial Committee* was also referred to in the High Court judgment and relied upon by counsel in relation to the delegation issue.[93] As we have stated, that case concerned the interpretation of the Racing Act 2003 and did not engage questions of delegation. However, the Supreme Court also held that rules made under a statutory power do not have to be detailed provided the rules are sufficiently clear that Parliament would have intended the statutory power to authorise the rules in question.[94]

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91 *F E Jackson and Co Ltd v Collector of Customs*, above n 71.
92 *Mackay v Adams*, above n 76; and *Hookings v Director of Civil Aviation*, above n 78.
93 *Cropp v Judicial Committee*, above n 51. See High Court judgment, above n 4, at [263]–[264].
94 At [40].

[190] We are also reinforced in our approach by the fact that the special powers in s 70(1) of the Act are emergency powers that may be exercised at very short notice and in circumstances where the full magnitude of the emergency is not appreciated.

Exemptions

[191] We agree with the Law Society that the evidence tends to show that the Director-General did not appear to be involved in the decisions concerning the exemptions provided to the Tiwai Point Smelter, other large industrial plants and the maintenance of stadia turfs, bowling greens, golf courses and nurseries. Those decisions appear to have been made by Ministers on the recommendations of advice that probably came from Mr Stocks' committee.

[192] It is possible that the decision to exempt those businesses from the non-essential businesses that had to be closed was made without the approval of the Director-General, or without any other lawful authority. If that was the case, then the exemption decisions were likely to have been *ultra vires*.

[193] While there is frequently a close link between an unlawful delegation of a statutory power and decisions that are *ultra vires*, the two concepts should not be conflated. Unlawful delegation occurs where a statutory power that is conferred upon A is unlawfully delegated to B. In the context of this case, the decisions that are likely to have been *ultra vires* occurred when C assumed authority to create exemptions in circumstances where those exemptions, if they were to have been made, should have been made by A.

[194] We do not think any unlawful decision to exempt non-essential businesses from closure could be retrospectively authorised when the Director-General satisfied himself on 9 April 2020 that the decisions made by Ministers in response to recommendations from Mr Stocks and his team were "fit for purpose".[95]

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[95] The High Court found that the Director-General's powers under s 70(1) could not be exercised retrospectively. See High Court judgment, above n 4, at [216]. This is consistent with the presumption against retrospectivity. See *Pora v R* [2001] 2 NZLR 37 (CA) at [40]; and *Official Assignee v Petricevic* [2011] 1 NZLR 467 (HC) at [31].

[195] This case has been argued on the narrow basis that the Director-General (A) unlawfully delegated his powers under s 70(1)(m) of the Act to other officials (B). The case has not been argued on the basis that Ministers (C) made exemption decisions that were beyond their lawful powers although it does appear that Ministers and other officials probably acted *ultra vires* when directing that certain businesses be exempt from those that were required to close.

Conclusions: Second ground of appeal

[196] Our conclusions in relation to the second ground of appeal are:

(a) The Director-General did not unlawfully delegate decisions concerning what businesses were essential businesses.

(b) The subsequent exemptions to the First Health Act Order that allowed some businesses to remain open were probably *ultra vires*.

Result

[197] The appeal is dismissed.

Costs

[198] Normally costs would be awarded to the respondents. We are, however, departing from the usual practice in this case because the issues raised by the appeal engage matters of significant public importance. Dr Borrowdale and his counsel have provided an important service to the community by presenting the Court with the issues that we have addressed. In those circumstances we decline to make any order for costs.

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