IN THE COURT OF APPEAL OF NEW ZEALAND
I TE KŌTI PĪRA O AOTEAROA

CA520/2020

BETWEEN	**ANDREW BORROWDALE** **Appellant**
AND THE	**DIRECTOR-GENERAL OF HEALTH** **First Respondent**
AND THE	**ATTORNEY-GENERAL** **Second Respondent**
AND THE	**NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA** **Intervenor**

SUBMISSIONS ON BEHALF OF NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA AS INTERVENOR

Dated 25 June 2021

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MAY IT PLEASE THE COURT:

A Introduction and summary of argument

1. This appeal concerns the lawfulness of certain orders made by the Director-General of Health under s 70 of the Health Act 1956 in response to the COVID-19 pandemic.

2. The orders in question are:

   (a) an order under s 70(1)(m) of the Health Act made on 25 March 2020 (**Order 1**);[1]

   (b) an order under s 70(1)(f) issued on 3 April 2020 (**Order 2**);[2] and

   (c) the Health Act (COVID-19 Alert Level 3) Order 2020 issued on 24 April 2020 pursuant to ss 70(1)(f) and (m) (**Order 3**).[3]

3. Dr Borrowdale's statement of claim raised three causes of action challenging the New Zealand Government's response to COVID-19. Only the second and third causes of action are now the subject of this appeal. In this regard:

   (a) The second cause of action alleged that the orders were ultra vires because they went beyond the powers conferred by ss 70(1)(f) and 70(1)(m) of the Health Act.

   (b) The third cause of action alleged that Orders 1 and 2 unlawfully delegated decision-making to the Ministry of Business, Innovation and Employment (**MBIE**) in the "essential businesses" exception to the nationwide closure of all premises that was otherwise effected by the order.

4. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) has been granted leave to participate in this appeal as an intervenor. The Law Society is grateful for the opportunity to do so. (The Law Society participated in the High Court proceeding as intervenor as well.)

5. These submissions focus on two topics that are additional to those raised by the parties:

   (a) Contextual factors that bear on the interpretation of s 70—which, the Law Society submits, are important in determining whether or not the orders were lawfully made under the section; and

   (b) The manner in which the High Court construed the "essential businesses" exception and the way in which effect was given to the exception by officials.

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1 [COA303.0554].

2 [COA304.0747].

3 [COA305.1101].

6. The Law Society broadly endorses the conclusions of the High Court in respect of the second cause of action. In terms of the contextual interpretation of s 70, the Law Society submits that the rule of law concerns to which emergency powers may give rise can be met by interpreting s 70 so as to include a temporal constraint on the exercise of the powers contained within it.

7. In this regard:

   (a) The question of how Health Act powers of an emergency character are properly interpreted includes consideration of context—in particular, the constitutional context and the peril to public health caused by infectious diseases. These matters, taken together with the statutory text and purpose, ought to be considered together in a way that balances the rights of the individual, the democratic principle, and the rule of law.

   (b) Interpreting s 70 in light of its context imports a temporal constraint to the s 70 powers. These powers are intended to facilitate an immediate short-term response to a public health crisis. The breadth of the powers in question is premised on the fact that they are not intended to provide the framework for a crisis response over the longer term, where difficult policy decisions will require trade-offs between health objectives and wider social and economic considerations. In the mid- to long-term, Parliament did not intend those trade-offs to be made solely by medical officers of health under the s 70 powers.

   (c) The democratic nature of our constitution means that there comes a point in the management of an ongoing crisis where it is incumbent on Parliament to pass bespoke legislation in order to ensure that critical policy decisions are made in accordance with ordinary democratic principles of decision-making. In New Zealand, Parliament can ordinarily be expected to meet that responsibility. Parliament did meet that responsibility in this case, with the enactment of the COVID-19 Public Health Response Act 2020 (**COVID-19 Act**).

8. In respect of the "essential businesses" exception, the Law Society submits:

   (a) The High Court's approach to construing the definition of "essential businesses" sits uneasily with the way the Court interpreted other statements from the Government (particularly in relation to the issue of the first nine days). The information on the COVID-19 website, which the Court found was merely advisory, was in fact written in mandatory terms and was likely to be understood by the public in that way at the time.

   (b) The record suggests that officials made adjudicative decisions from time to time about whether individual businesses were allowed to open and granted exemptions to businesses for non-health reasons outside the scope of the definition of "essential businesses". Those decisions were

given effect by being recorded on the COVID-19 essential businesses webpage. This also suggests that the webpage was being used for more than providing general guidance.

B Relevant contextual principles to interpreting s 70

Overview of the Law Society's position

9. The core issue in this appeal is the proper interpretation of the emergency powers conferred by s 70 of Health Act, set against the backdrop of a global pandemic.

10. The principal questions of construction are:

    (a) Does the Health Act allow the Director-General to exercise s 70 powers nationally?[4]

    (b) Can the powers in s 70(1)(m)—to require the closure of premises and prohibit congregating in outdoor places of amusement or recreation—be exercised in respect of all premises and places of amusement and recreation, subject to exceptions, or can they only be exercised in respect of premises of an expressly referred to or stated kind or description?[5]

    (c) Do the powers in s 70(1)(f) allow for orders requiring all persons in New Zealand to stay at home, subject to exceptions, or are they limited to requiring "specified individuals to be isolated, quarantined or disinfected"?[6]

11. Underlying these three questions are important matters of interpretative principle that lie at the heart of our constitutional system. The orders imposed extensive constraints on the daily lives of New Zealanders. However, they arose in an emergency context involving the Government's response to a global pandemic, and they were in place for a relatively short time before Parliament responded with bespoke legislation specifically for the COVID-19 crisis.

12. Because the orders placed significant limitations on various fundamental rights, the principle of legality and the Bill of Rights are engaged. In their written submissions, the appellant and the respondents focus on these matters and differ in the approach to be taken to them when determining the meaning of s 70.

13. An important aspect not addressed by either of the parties is that the meaning of s 70 must also be ascertained in light the constitutional context and the context of a public health emergency. In the Law Society's submission, the rule of law concerns to which emergency powers ordinarily give rise can be met by

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4 Third Amended Statement of Claim dated 1 July 2020 at [26] [COA101.0222].

5 Third Amended Statement of Claim at [23(a)] and [25(b)] [COA101.0222].

6 Third Amended Statement of Claim at [24(b)] and [25(a)] [COA101.0222].

interpreting s 70 so as to include a temporal constraint on the exercise of the powers contained within it.

14. At first instance, the High Court accepted the Law Society's submission to this effect. The Court held that the s 70 powers were intended to facilitate an immediate and urgent response to a public health crisis and could not sensibly be regarded as providing the framework for a longer-term response. When a public health crisis is ongoing, the democratic nature of our constitution means that there is a point at which Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making.[7]

15. Seen in this way, the Law Society submits that s 70 need not be read narrowly, nor need it be read widely. Rather, the history, scheme and purpose of the Health Act as it relates to infectious diseases, considered within the constitutional and emergency context, result in adequate constraints on the emergency powers conferred by s 70. The Law Society submits that this overcomes the appellant's argument that the orders exceeded s 70 and imposed unlawful limits on rights and freedoms.

Text, purpose, and context

16. Section 5 of the Interpretation Act 1999 makes text and purpose the focus of statutory interpretation. Central to the interpretative exercise is examination of the text of s 70, the scheme of the Health Act as it relates to infectious diseases, and the purpose of the provision and that scheme.

17. However, in addition to the statutory directive to ascertain meaning from the text and in light of its purpose, the meaning of an enactment must also be ascertained from its context. In *Agnew v Pardington*, the Court of Appeal noted that while reference to context was not included in the Interpretation Act, there is "no doubt that the text of a provision must be interpreted having regard to the Act as a whole and the legal system generally".[8] In the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*, Tipping J considered that when determining purpose "the Court must obviously have regard to both the immediate and the general legislative context".[9] The Law Commission noted in its 1990 report for a new interpretation act that "context" can either expand or constrain the apparent meaning of a statute.[10]

18. The requirement to consider context has recently been affirmed in s 10 of the Legislation Act 2019. That part of the Act is not yet in force, but the change was

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7 *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [102] [COA102.0288].

8 *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32].

9 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

10 New Zealand Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R 17, 1990) at [72].

made on the basis that including the reference to "context" did not reflect a substantive change to the law. It merely aligns s 5 of the Interpretation Act with existing law and practice.[11]

The constitutional context

19. Part of the interpretive context in construing a statute is the fundamental values of our legal system.[12] One of those values—the "underlying principle"—is the democratic character of our constitution.[13] In the present case, two features of the democratic character of our constitution assume particular importance.

20. First, a core responsibility of government in a democratic society—sometimes described as the "first responsibility"—is to protect and safeguard the lives of its citizens in the public interest.[14] This responsibility is reflected in the preamble to the World Health Organization's Constitution.[15] It is also recognised in the International Covenant on Civil and Political Rights:[16] in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", states may "take measures derogating from [certain of] their obligations" under the Covenant "to the extent strictly required by the exigencies of the situation".[17]

21. Protecting and safeguarding the lives of citizens must be balanced against protecting and safeguarding the rights of individuals. Nevertheless, when Parliament legislates in advance of any particular emergency to provide for

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11 Legislation Bill 2017 (275-1) (explanatory note) at 6–7.

12 See for example *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [206]; and *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [292] and [293] per Elias CJ.

13 Cabinet Office *Cabinet Manual 2017*, introduction by Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current form of Government" (1990, updated 2008 and 2017) at 2 and 3. Although this aspect of our constitution is not codified, the United Kingdom Supreme Court has recently stated "the courts have the responsibility of upholding the values and principles of our constitution and making them effective": *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [39]. In *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [35] Cooke J recently affirmed this passage as "accurately describ[ing] the operation of the New Zealand constitution".

14 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [99] per Lord Hope of Craighead.

15 Constitution of the World Health Organization 14 UNTS 185 (opened for signature 22 July 1946, entered into force 7 April 1948), preamble: "Governments have a responsibility for the health of their peoples" and 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".

16 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). The New Zealand Bill of Rights Act 1990 was enacted to affirm New Zealand's commitment to the Covenant: long title, para (b). New Zealand ratified the Covenant, subject to certain reservations, on 28 December 1978.

17 Article 4(1). Note derogation from some rights is not permitted—for example, the rights to life and religion, and to be free from torture and slavery: art 4(2). States that derogate are to inform other states by notifying the Secretary-General: art 4(3).

general emergency powers, it may properly intend to confer wide powers on the Executive in order to enable an immediate response, anticipating a range of possible emergency conditions, but not their precise nature and scope.

22. Secondly, the duty to safeguard and protect the lives of citizens must be balanced against the foundational democratic principle. As Sir Kenneth Keith explains, the "responsibility and power to take decisions" in a system of responsible government "results from the electoral process and the political contest".[18]

23. A key manifestation of the democratic principle is that important policy decisions should generally be taken by Parliament through an open and democratic process, and not delegated to the Executive.[19] Too much delegation, or delegated powers that are too broad or uncontrolled, undermine the transparency and legitimacy of the law.[20] The more significant the delegated power, the more likely it should be exercised by the Governor-General in Council, and the greater the degree of political accountability required in relation to that exercise.[21]

The need for a timely bespoke response in emergencies

24. The tension between the core responsibility of government in an emergency on the one hand, and the need to protect the foundational democratic principle on the other, is illustrated by the New Zealand Government's response to the COVID-19 crisis. So, too, is the appropriate solution—the need to transition from generic emergency powers to a bespoke legislative response.[22]

25. The Law Commission's 1991 report on emergencies set out a series of safeguards which ought to apply to emergency powers.[23] For example: such powers ought to have time and geographical limits,[24] they should be only those necessary to address the type of emergency envisaged;[25] adequate notice and information on their use should be given to the public;[26] the House of Representatives should be

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18 Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current form of Government", above n 13, at 3.

19 *Cabinet Office Manual 2017*, above n 13, at [7.82]; and Legislation Design and Advisory Committee *Legislation Guidelines* (2018 ed) at 65.

20 *Legislation Guidelines*, above n 19, at 65.

21 At 68.

22 This approach can be seen historically in several crisis mitigation and recovery periods, including the Bubonic Plague Prevention Act 1900 and, more recently, the various recovery Acts following the Canterbury earthquakes: the Canterbury Earthquake Response and Recovery Act 2010; Canterbury Earthquake Recovery Act 2011; and Greater Christchurch Regeneration Act 2016.

23 New Zealand Law Commission *Final Report on Emergencies* (NZLC R 22, 1991) generally at ch 5.

24 At [5.33]–[5.40].

25 At [5.64]–[5.90].

26 At [5.57]–[5.61].

informed and, where appropriate, ought to have special controls;[27] and exercise of the powers ought to be reviewable by the courts.[28]

26. The Law Commission's approach is reflected in the COVID-19 Act. This Act provides a bespoke response and, in doing so, addresses a number of rule of law concerns that would arise with the continued use of s 70 to manage the pandemic response in the longer term. It removes primary decision-making power from medical officers of health, who are institutionally ill-equipped (and not empowered by s 70) to weigh health issues against wider socio-economic factors. Rule of law concerns are also addressed by providing time, geographical and other limits, formalising offences and enforcement powers, and providing special controls and oversight to Parliament and elected officials.

Text, purpose and context point to a temporal dimension

27. The Health Act, read in light of its purpose and history, indicates that it was intended to enable a timely response to the outbreak or spread of an infectious disease by giving powers to technical experts without having to wait for Parliament to respond. For instance, the Health Act may be amended to cover a new infectious disease by Order in Council. Once that is done, the powers may be exercised as a result of ministerial action in the form of authorisation by the Health Minister, the Minister of Civil Defence declaring a state of emergency, or the Prime Minister issuing an epidemic notice.

28. There are also a series of textual indications that the powers are intended to facilitate the immediate short-term response to a public health crisis, rather than provide the framework for a response over the mid- to long-term. The management of an ongoing public health crisis will require the making of difficult policy decisions, where there are trade-offs between health objectives and wider social and economic considerations. Those trade-offs are likely to become more pronounced as the severity of restrictions imposed increases and the longer a public health crisis lasts.

29. It is submitted that the text and structure of the Health Act—and indeed the application of s 70 at the edges—make it clear that s 70 powers are not intended to provide the necessary framework to resolve those questions on an ongoing basis. Decisions about the exercise of the s 70 powers are made by health experts, who are appointed for their expertise in public health. There is no decision-making role for elected officials. The powers must be exercised for the purpose of "preventing the outbreak or spread of any infectious disease". They do not provide a sufficient framework for the balancing of other interests.

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27 At [5.62]–[5.63] and [5.100].

28 At [5.105]–[5.123]

30. In this respect, the provisions of the Health Act are quite unlike the COVID-19 Act, which provides a bespoke regime for an ongoing response over the mid- to long-term, and mediates the trade-offs implicit in balancing the competing health, social and economic considerations. The COVID-19 Act does this by:

    (a) having as one of its purposes supporting a health response that is "co-ordinated, orderly, and *proportionate*";[29]

    (b) giving the power to make decisions primarily to the Minister of Health, having regard to advice from the Director-General;[30] and

    (c) expressly allowing the Minister to have regard to a decision by the Government on the level of public health measures appropriate to COVID-19 taking into account non-health factors, specifically "any social, economic, or other factors".[31]

31. In the Law Society's submission, the High Court was correct to find that there is a temporal limit to how long s 70 powers may be exercised in an ongoing crisis before the purpose of the power is exhausted and bespoke legislation is required. That limit, implicit in the structure of the Health Act, may be reached in a number of ways.

32. First, the ongoing management of a public health crisis in the mid- to long-term is likely to require exercising powers for purposes other than those for which they were granted.

33. The Supreme Court in *Unison Networks Ltd v Commerce Commission* stated that powers granted for a particular purpose must be used for that purpose.[32] The Court stated that an exercise of such a power would not be invalid if the statutory purpose was pursued alongside other purposes, as long as the statutory purpose itself was not compromised.[33] However, importantly, *Unison* concerned the exercise of a broadly-framed discretion by an expert body, designed to achieve expansive economic goals. It was that feature that led the Court to reason that, in granting a broad discretion, Parliament contemplated that wider policy considerations could be taken into account.[34]

34. The situation under the Health Act is different. The purpose of s 70 is narrowly framed and expressly stated in subs (1): the power must be exercised "for the purpose of preventing the outbreak or spread of any infectious disease". This envisages a targeted health purpose, to be determined quickly by experts, when

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29 COVID-19 Public Health Response Act 2020, s 4(c) (emphasis added). Before making an order, the Minister must be satisfied that the order is appropriate to achieve the purpose of the Act: s 9(1)(d).

30 Section 9. Compare the Director-General's more limited power to make orders in s 10.

31 Section 9(1)(b).

32 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

33 At [53].

34 At [55].

needed. It does not reflect a provision designed to confer powers to address a complex balancing of health considerations against socio-economic and other issues, which would be needed for ongoing crisis management.

35. Secondly, the foundational democratic principle would be undermined if powers conferred by s 70 were able to be exercised to allow unelected health officials to control and manage substantial aspects of New Zealanders' lives on a long-term basis. Powers in the nature of s 70 are necessary in the short term to allow a timely public health response to exogenous events like the COVID-19 global pandemic. The longer those decisions rest solely with health officials under generic legislation like the Health Act (rather than being exercised with some formal decision-making role for elected officials under bespoke legislation), the greater the risk that "responsible government may be replaced by unaccountable government: the antithesis of the democratic model".[35]

36. An incident of the democratic nature of our constitution is that there comes a point in the management of an ongoing crisis where it is incumbent on Parliament to pass legislation in order to ensure that critical policy decisions are made in accordance with ordinary democratic principles of decision-making. In New Zealand, Parliament can ordinarily be expected to meet that responsibility and, it is submitted, Parliament did meet that responsibility with the enactment of the COVID-19 Act.

37. In the unlikely event that Parliament did not respond in a timely and bespoke manner, it is submitted there would come a point at which the ongoing exercise of s 70 powers by unelected officials is so incompatible with foundational democratic principles that further exercise of the power would be ultra vires either for that reason—or because the powers were no longer being exercised for their proper purposes.

38. The Law Society submits that recognising temporal limits on the exercise of s 70 powers appropriately balances:

    (a) the purpose of the powers, in particular the need for rapid solutions determined by experts in emergencies; with

    (b) the constitutional concerns that arise from ongoing restrictions being imposed in the mid- to long-term by medical officers of health under the Health Act framework.

A narrow, wide, or ordinary meaning?

39. It is submitted that a narrow meaning of s 70 is not appropriate because the section was intended to be used expansively, when it is necessary to do so. In the present case, the rights of every New Zealander were limited by the orders in

35 *R (Miller) v Prime Minister*, above n 13, at [48].

pursuit of safeguarding lives and protecting the health of everyone. Protecting rights in the circumstances of a pandemic—as distinct from protecting an individual's rights as a counter-majoritarian check—are likely best served not by reading down the provision via the principle of legality or some other means, but by ensuring the appropriate balance is met between effective emergency powers and the democratic principle.

40. There are strong textual, purposive and contextual indications that point away from reading s 70 narrowly. For instance, to suggest s 70(1)(f) ought to apply only to specified individuals is to thwart the intention of the provision. The confinement of all people in New Zealand to their homes with certain exceptions is undoubtedly an extraordinary use of the power. Nonetheless, if the circumstances are such that the statutory preconditions are met, and all New Zealanders ought to isolate or quarantine for the relevant purpose, the Law Society submits that s 70(1)(f) supplies the necessary power to confine them in this way. Otherwise, the section would be rendered ineffective in the precise circumstances that Parliament intended it to operate to safeguard citizens.

41. Similarly, the ability to take necessary and urgent action is thwarted if, for instance, medical officers of health must always specify each and every kind of premises, or place of amusement or recreation, in a s 70(1)(m) order. The term "any stated kind or description" cannot, in the context of powers conferred to cater to an emergency, preclude a description that encompasses all premises with specified exceptions. Such a description may, in certain public health emergencies, be the only practicable and effective way to ensure the relevant premises are closed. Again, s 70(1)(m) can encompass that approach.

42. Historical exercises of similar powers are necessarily coloured by the provisions in force at the time; yet, it is notable that the approach to describing the types of premises taken under Order 1 is reflected in actions taken, for example, in Christchurch in 1918 in respect of influenza.[36] Similarly, during influenza and polio epidemics, precursor powers were used not to isolate or quarantine specified individuals, but to prevent congregation and movement of entire populations of school children defined only by district.[37]

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36 See "Public Notices" Press (18 November 1918) where the list of building for closure included "All places of business, shops, offices, and factories, excepting the premises of chemists wholesale and retail, newspaper printing offices, and marble bars, refreshment rooms, and tea rooms". The Public Health Act 1908, s 18 did not have an equivalent of s 70(1)(m). The District Health Officer may have relied on ss 18(a) and/or 18(f)—the equivalent of ss 70(1)(a) and (f) of the Health Act 1956.

37 See for example "Health Department's Order" Evening Post (14 January 1925); "Order Under Section 76 of the Health Act 1920" Nelson Evening Mail (24 January 1925); "Health Order" Otago Daily Times (11 December 1947); and "Order Under Section 76 of the Health Act, 1920, to Shipping Companies and the Public generally" (24 August 1947) 73 New Zealand Gazette 1879 at 1886.

43. It is acknowledged that the most recent use of s 70 is unprecedented in scale, but precursors to s 70 have been used in comparable ways. In enacting the Health Act, Parliament can be taken to have intended that s 70 powers conferred the ability to isolate or quarantine the entire population of New Zealand, and to define premises by exception, if that were necessary for the prevention of the outbreak or spread of infectious disease.

44. Consequently, in the Law Society's submission, this is not a case where the principle of legality or Bill of Rights concerns support the provision being read down on the basis that Parliament did not squarely confront the full implications of an unqualified meaning. Yet, nor is it a case where a "wide" meaning needs to be adopted. The ordinary meaning, derived from the text in light of purpose and context, is sufficient.

C The approach to "essential businesses"

The High Court's approach

45. The appellant's third cause of action alleged that Orders 1 and 2 unlawfully delegated decision-making to MBIE through the "essential businesses" exception to the nationwide closure of all premises that was otherwise effected by the orders.

46. Order 1 defined "essential businesses" as:[38]

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

47. Order 2 provided that "essential businesses" had "the same meaning as in" Order 1.[39]

48. The COVID-19 website contained a page headed "Essential businesses". Under the heading "What are essential businesses?", it contained a list of services considered essential, followed by a list of "additional decisions and exemptions", and a series of questions and answers for businesses, workers and consumers.[40] The website was updated frequently over time.[41]

49. The High Court found that there was no unlawful delegation because the italicised words should not "be regarded as forming part of the core definition".[42] The definition of "essential businesses" was limited to the opening words of the definition: "businesses that are essential to the provision of the necessities of life

38 [COA303.0556] (emphasis added).
39 [COA304.0749].
40 [COA303.0591].
41 Stocks at [40] and [47] [COA201.0196] and [COA201.0197].
42 *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [268] [COA102.0331].

and those businesses that support them". The Court found that the reference to the COVID-19 website was merely advisory.[43] The Court acknowledged that this was "not a model of good drafting", but noted the situation of great urgency in which the order was prepared.[44]

50. In reaching these conclusions, the High Court considered that it was appropriate for the Director-General to determine, given the health risk posed by COVID-19, that it was necessary to close all businesses, other than those required to meet the countervailing public health demands.[45] The Court went on to find that it would have been "entirely inappropriate" for him to engage in the "operational" side of that determination.[46] It was therefore necessary and lawful to leave the operational detail of assessing which businesses were essential to lead agencies in other sectors.[47]

51. The High Court concluded that the work undertaken by other agencies was "not defining what was an 'essential business'; they were assessing whether the businesses in question met the criteria defined by the Order".[48]

The Law Society's position

52. The Law Society accepts that:

    (a) it was open to the Government to develop and publish general guidance setting out its view of what fell within the "essential businesses" exception in Order 1; and

    (b) such general guidance did not need to be developed by the Director-General; the task of working out how the Government considered the definition applied in practice could be carried out by other officials.

53. However, the Law Society has two related concerns with the High Court's approach:

    (a) The Court's conclusion that the reference to the COVID-19 website in Order 1 was properly interpreted as being merely advisory sits uneasily with the way the Court interpreted other statements from the Government (particularly in relation to the issue of the first nine days). It is also inconsistent with the fact that the information on the website was written in mandatory terms and was likely to be understood by the public in that way at the time.

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43 At [268] [COA102.0331].
44 At [274] [COA102.0333].
45 At [270] [COA102.0332].
46 At [270] [COA102.0332].
47 At [271] [COA102.0332].
48 At [277] [COA102.0334].

(b) The record suggests that officials made adjudicative decisions from time to time about whether individual businesses were allowed to open, and also granted exemptions to businesses for non-health reasons outside the scope of the Order. Those decisions were given effect by being recorded on the COVID-19 essential businesses website. This also suggests that the website was being used for more than providing general guidance.

The website was expressed in mandatory terms and was likely understood that way at the time

54. In the first cause of action, the High Court had been required to decide whether various statements made by government officials were (as the respondents submitted) merely guidance or (as the appellant contended) intended as commands.

55. The Court concluded that the statements in issue conveyed commands, not guidance.[49] This was for the following reasons:

(a) The statements were replete with commands: frequent use of the word "must", backed up with references to the possibility of enforcement action for those that did not follow the "rules".[50]

(b) The Prime Minister's role in conveying information.[51]

(c) The wider context, being the factual reality that the country then faced. In this context, the Court found the proposition that the Government was simply asking for public buy-in did not sit easily with the evidence.[52]

(d) The need for national consistency for the Government's strategy to succeed.[53]

56. Against that backdrop, the Court had "no doubt" that the statements conveyed that there was a legal obligation on New Zealanders to comply. They created the overwhelming impression that compliance was required by law, and this was the way the members of the Court had interpreted them at the time.[54]

57. However, when it came to the third cause of action, the Court adopted quite a different approach in interpreting the definition of "essential businesses". The Court concluded that only half of the definition "should be regarded as forming part of the core definition". The rest—being the reference to the COVID-19 website—was merely advisory.[55]

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49 At [185] [COA102.0312].
50 At [184] [COA102.0311].
51 At [186]–[187] [COA102.0312].
52 At [188] [COA102.0312].
53 At [189]–[190] [COA102.0312]–[COA102.0313].
54 At [191] [COA102.0313].
55 At [268] [COA102.0331].

58. Rather than considering how the Order and website referred to would have been understood by the public at the time, the Court read the definition as "stopping at the comma"[56] for a combination of reasons that were both textual and related to the relative expertise of the Director-General and other public officials.[57]

59. The Law Society submits that this approach sits uneasily with the Court's approach to analysing the statements in the first cause of action. It is respectfully submitted that the end result is that the Court has come to a surprising conclusion: only half of the stated definition defined the term. Mid-way through a single-sentence definition there is a change from legal rule to guidance.

60. It is submitted that this is not the way Order 1 or the website would likely have been understood by New Zealanders—for similar reasons to those given by the Court in relation to the first cause of action.

61. The COVID-19 essential businesses website advised the public that a business was essential if it was included in the list of essential services on that site:[58]

> **How can businesses find out if they are essential?**
>
> A list of essential services is available above.
>
> The list may be updated by the Government.

62. The site expressly said that if a business was not listed on the essential businesses website, it must close:[59]

> **Do I need to shut my business if it isn't on the list of essential services?**
>
> At Alert level 4, you must close your premises, but you may operate your business remotely (eg with workers working from home) if you are able to do so.

63. It is difficult to reconcile that clear statement with the Court's conclusion that the list was merely advisory. That is particularly so when the website went on to advise users that if their business was not listed as an essential service, but the user thought it should be, they should contact officials for a decision on whether the activity counted as an essential service:[60]

> **What should I do if I think my business should be an essential service, but isn't on the list?**
>
> There are designated lead government agencies in each sector who are responsible for deciding whether specific activities count as essential services. The list of essential services may be amended by government over time as our response to COVID-19 evolves.

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56 At [275] [COA102.0333].

57 At [269]–[274] [COA102.0332].

58 [COA303.0599].

59 [COA303.0600].

60 [COA303.0600].

> If you think your business should be an essential service, ring 0508 377 388 or email essential@mbie.govt.nz.

64. It is submitted that the need to seek a decision, resulting in an amendment to the essential services list, conveyed the impression that the list was authoritative and prescriptive, rather than setting out general guidance to be interpreted by users.

65. The website also stated that actions would be taken to stop businesses that ignored official advice:[61]

> **What do I do if I work for a business that is not an essential service but my employer requests I come into work?**
>
> We will work with businesses to make sure they are complying with the Alert Level 4 restrictions.
>
> If a business chooses to ignore official advice and continues to trade, there will be actions taken to stop this.

66. Given the language of the definition and the mandatory and prescriptive way the list of essential services on the website were described, the Law Society submits that it is likely that the public understood the information on the website had legal force and was not simply guidance.

The record indicates that officials made decisions about the scope of the exception

67. In addition, the contemporaneous documentary records also suggest that officials other than the Director-General made decisions about the scope of the exception from time to time. In particular, there are examples of officials making:

    (a) adjudicative decisions about whether individual businesses were allowed to open; and

    (b) decisions about what the scope of the exception should be, or whether additional exemptions should be made, as a matter of policy.

68. These decisions were given effect by being recorded as "additional decisions and exemptions" under the list of essential businesses on the website.

Adjudicative decisions about individual businesses

69. There were occasions when officials made adjudicative decisions directed to specific businesses.

70. For example, after the move to Alert Level 4 was announced, but before the Director-General made Order 1, The Warehouse Group announced it was able to keep operating at Level 4.[62] On 24 March 2020, Paul Stocks was asked by the media for clarity on The Warehouse being open. He responded that the

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61 [COA303.0602].

62 [COA303.0494] at [26].

Government had not yet made a decision about The Warehouse and that it needed to be cautious about its status before it received "an adjudication from the Government":[63]

> So the Government has not decided that The Warehouse will be open. We are working through those firms that will be required or allowed to remain open. I would caution firms from leaping to judgments about what their status will be before they have received an adjudication from the Government.

71. The same day, the COVID-19 Ministerial Group met at 4.30 pm and confirmed a decision by officials that The Warehouse was required to close.[64]

72. At 7 pm on 25 March 2020 (the following day), the COVID-19 website was updated with "additional decisions and exemptions" appearing directly underneath the list of essential services. The update set out a series of bullet points, most of which addressed whether particular types of businesses were considered essential or non-essential. However, the list also provided:[65]

> The Warehouse must close.

73. This appears to have been the adjudication Mr Stocks referred to. Decisions about other individual businesses—Tiwai Point smelter, NZ Steel and Methanex—were also confirmed by Ministers at the same meeting[66] and communicated on the website on the evening of 24 March.[67]

74. This tends to indicate that the website did not operate simply as a source of general guidance. Rather, officials, as well as Ministers, made decisions about whether individual businesses met the definition of essential services. These decisions were communicated via the website in mandatory terms. The decisions were not phrased as general guidance but as direct commands: "The Warehouse must close." Given the mandatory nature of the language, the Law Society submits it is more likely that the decision would, at the time, have been understood as directly binding on The Warehouse, not simply guidance.

75. The Law Society accepts that the Director-General, or a medical officer of health, could have made orders under s 70 directing individual businesses to close. But no such orders were made. The functional equivalent of such orders appears to have been achieved in practice by noting decisions made by officials on the website. But this occurred without, it appears, any decision on the particular cases being made personally by the Director-General or another medical officer of health.

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63 [COA303.0529].
64 [COA303.0501] at [3.4].
65 [COA303.0565].
66 [COA303.0501] at [5].
67 [COA303.0565].

Decisions to widen the scope of the exception

76. The record also suggests that decisions were taken by officials to expand the scope of the exception, or make additional exemptions, for reasons of public policy. Officials decided that certain businesses or activities should be exempt from the requirement to close, for reasons other than because the business provided an essential service. In doing so, officials were engaged in setting the scope of the exception, not applying the "essential businesses" test.

77. Three examples are illustrative:

    (a) *Tiwai Smelter*: The update to the COVID-19 essential businesses website on 25 March 2020 at 7 pm provided that: "The Tiwai Point smelter is exempt from closure."[68] This exemption appears to have been confirmed by Ministers the previous day. The paper to Ministers noted that there were a number of large scale industrial plants not directly involved in providing what would be considered an essential service that required specific consideration.[69] It recommended that Tiwai Smelter be exempt from closure because it "would incur significant and irreversible costs if it were to shut and it would be a people intensive and long process".[70] In response, Ministers decided that: "Tiwai Point smelter should be exempt from closure".[71] The language of the recommendation and decision suggests that Tiwai Smelter was being granted an exemption, on economic grounds, from the requirement to close.

    (b) *Other large scale industrial plants*: Other large scale industrial plants were also provided with exemptions. Order 1 required all premises to close from 11.59 pm on 25 March 2020, unless they fell within one of the exceptions listed in Appendix 1. Officials recognised that NZ Steel, Methanex and pulp and paper plants (except in relation to production of essentials like toilet paper) were unlikely to be essential services.[72] However, they recommended for economic reasons that NZ Steel and pulp and paper plants be granted limited exemptions in relation to the time of shutting down. That is, they were not required to close immediately in order to ensure production could "recommence easily".[73] Methanex was granted an exemption to continue operating, with scaled back operations, in order to avoid a risk of "gas supply instability".[74] These recommendations were accepted by Ministers[75] and the COVID-19 website was updated

68 [COA303.0565].
69 [COA303.0495] at [31].
70 [COA303.0495] at [32].
71 [CA303.0501] at [5.1].
72 [COA303.0495] at [31], [33], [34] and [35].
73 [COA303.0495] at [33] and [34].
74 [COA303.0495] at [35].
75 [COA303.0501] at [5.2] and [COA303.0502] at [5.3] and [5.4].

accordingly at 7 pm on 25 March 2020 with these noted as further "additional decisions and exemptions".[76]

(c) *Maintenance of biological assets*: MBIE decided not to recognise the maintenance of stadium turfs, bowling greens, golf courses and nurseries as essential services.[77] However, on 9 April 2020 this decision was overturned by Ministers. The Ministry of Health's review of the process and criteria for recognising essential businesses recorded its understanding that this decision was made because "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".[78] A press release announcing this decision was apparently issued by the Minister of Sport and Recreation on 9 April 2020[79] and guidance was uploaded to the essential businesses website on 14 April 2020.[80]

78. In this way, the record tends to suggest that officials and Ministers operated on the basis that there was scope for them to grant exemptions to non-essential businesses for economic or other public policy reasons. That was not provided for in Order 1. However, such exemptions were granted and given effect to by being recorded on the COVID-19 website.

The effect of the Government's approach

79. The position would appear to be that either that:

(a) Decisions about individual businesses and exemptions were intended to have legal effect as they were recorded on the COVID-19 website as "additional decisions and exemptions" and thereby incorporated into the definition of "essential businesses" under Order 1. If that is the case, the issue of unlawful delegation arises.

(b) Alternatively, if the COVID-19 website was not incorporated into the definition of "essential businesses" in Order 1, the position would be similar to the situation that applied to the first nine days of the lockdown. The Government made mandatory statements to the public about the scope of the requirement for businesses to close when, in fact, those statements were either guidance only (in the case of the command to The Warehouse to close) or lacked a legal basis (in the case of the exemptions purportedly granted for economic or other public policy reasons).

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76 [COA303.0565].

77 As at 1 April 2020, the COVID-19 essential businesses website advised that: "Turf maintenance is not considered an essential service and should not be undertaken at this time." [COA304.0730].

78 [COA304.0828].

79 [COA304.0827].

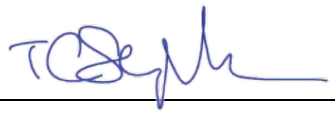
80 [COA304.0937] and [COA304.0943–304.0944].

D Admissibility of historical documents

80. The notice of appeal at [1(f)] takes issue with historical documents filed by the Law Society at first instance. The point is not addressed in submissions. The Law Society assumes the point is no longer taken, but nonetheless records its submission that the High Court was correct to grant leave for the documents to be referred to at the hearing.[81]

81. These documents were tendered (not only by the Law Society but also by the respondents) as the best available record of orders made under the Public Health Act 1908 and the Health Act 1920, neither of which required such orders to be published in the Gazette or promulgated as regulations. In the Law Society's submission, these documents form part of the legislative history of the Health Act 1956 and precursor provisions. The High Court correctly accepted that they are relevant to ascertaining the meaning of the Health Act because they help determine Parliament's intention in re-enacting provisions similar to those used in precursor legislation.[82]

Date: 25 June 2021



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81 *Borrowdale v Director-General of Health* CIV-2020-485-194, 23 July 2020 (Minute of Thomas J—applicant's objection to intervener's materials) [COA102.0256].

82 At [6]–[7] [COA102.0257]. See also *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [46].