

Introduction

[1] This appeal arises out of a dispute between two commercial competitors, both seeking to provide orthoses and related services to those who require the same. It turns in large part on a narrow point of statutory interpretation — do orthoses fall within the definition of the words “artificial limb” contained in s 4 of the Artificial Limb Service Act 2018 (the Act)?

The dispute

[2] The appellant, MoveMe Health Ltd (MoveMe), manufactures and provides orthoses¹ and related services. The respondent, Peke Waihanga | New Zealand Artificial Limb Service (the Service), has its own empowering Act and it has the various functions set out in that Act.² It has traditionally been involved in the manufacture and supply of artificial limbs and in the provision of rehabilitation and other services, primarily to amputees. In recent years it has started to supply orthoses and related services to a wider range of patients.

[3] MoveMe claims that the Service, in supplying orthoses and related services, is acting unlawfully. It argues that:

- (a) the Service’s statutory functions are, relevantly, limited to the supply of artificial limbs and the provision of rehabilitation and other services for persons in connection with artificial limbs;
- (b) the Act defines an artificial limb as a device that is an artificial arm, hand, leg, or foot, or “a similar device”; and
- (c) most orthoses do not fall within this definition. For example, orthoses include inserts for shoes or sandals intended to correct gait or provide comfort.

¹ Broadly, orthoses are external orthopaedic devices, such as braces or splints, that prevent or assist movement of the neuro-muscular or skeletal systems, for example, of the spine or limbs. Orthoses include insoles worn in shoes.

² Artificial Limb Service Act 2018.

[4] In response, the Service argues that the definition of the words “artificial limb” in the Act extends to orthoses and that, as a result, its statutory functions permit it to supply orthoses and provide orthotic services along with prosthetics and connected services.

[5] The dispute is commercially significant. Both the Service and MoveMe have responded to requests from district health boards (DHBs) to supply a range of devices, including orthoses and to supply services in relation to such devices. If MoveMe is correct, the Service cannot offer all of the devices which the DHBs require; nor can the Service offer all of the services the DHBs require. The Service would be confined to offering artificial limbs as defined in the Act and services associated with the provision of artificial limbs.

[6] In the High Court, Isac J found that some orthoses are similar devices to artificial limbs because they perform the same purpose or function as artificial limbs, namely restoring or promoting mobility in a missing or deficient limb.³ He held that MoveMe could not claim that orthoses that have a similar function, purpose or character to artificial limbs, are not artificial limbs as defined.⁴ He did not however accept the Service’s argument that its statutory functions permit it to supply any form of orthotic device or related service.⁵

[7] MoveMe had sought declaratory relief but there was some uncertainty at trial about the wording of the declarations it sought. The Judge was prepared to find that “a similar device”, for the purposes of the Act, includes an orthotic device that supports a limb and promotes mobility (whether the limb is missing, partly missing or impaired) but he declined to make a declaration to this effect until the parties had had the opportunity to address the appropriate relief.⁶

³ *MoveMe Health Ltd v New Zealand Artificial Limbs Service* [2022] NZHC 577 [substantive judgment] at [123].

⁴ At [125].

⁵ At [126].

⁶ At [138]–[139].

[8] After receiving further submissions from the parties, the Judge issued a final judgment declining to grant any declaration, either in the terms discussed in his substantive judgment, or in alternative terms as suggested by each party.⁷

[9] MoveMe has appealed both judgments and, before us, it sought declarations in rather different terms than were sought before the Judge. It sought declarations as follows:

- (a) that the words “a similar device” for the purpose of the Act include an orthotic device that supports a limb and promotes the mobility of an amputee or someone at risk of amputation (whether the limb of that person is missing, partly missing or impaired); and
- (b) that “a person at risk of amputation” is a person assessed by a registered health practitioner as having a medical condition that has a real risk of resulting in the amputation of a limb.⁸

[10] The Service sought to uphold the judgments and it was opposed to the amended declarations sought by MoveMe.

The parties

MoveMe

[11] MoveMe has been providing orthotic services in New Zealand since 1991. It specialises in the manufacture of orthotic solutions and the provision of orthotic services. It also provides podiatry services. It operates in most main centres and holds contracts for the provision of orthotic services with various DHBs and with the Accident Compensation Corporation. It also provides orthotic services to private clients. The contracts it has with DHBs and with the Accident Compensation Corporation comprise a very large part of its orthotics business.

⁷ *MoveMe Health Ltd v New Zealand Artificial Limb Service (No 2)* [2022] NZHC 839 [final orders judgment] at [11].

⁸ In closing, Mr Waalkens KC for MoveMe accepted that MoveMe did not require that this matter be covered in any declaration and that it had been suggested merely as a matter of guidance.

The Service

[12] The Service provides a wide range of services to patients in connection with the provision of artificial limbs and similar devices, including amputation prevention efforts, pre-amputation and post-amputation support, orthotic and prosthetic services, peer-support, rehabilitation planning, assessments, rehabilitation and therapy interventions, the fabrication and fitting of devices, community support and pro-active follow-up services. These various services are provided through six main service centres and 14 regional clinics.

[13] The establishment of the Service and its legislative history was summarised by the Judge in his substantive judgment.⁹ We discuss these matters in more detail below. At this stage we simply record that the Service's origins can be traced back to the Disabled Servicemen's Re-establishment League Inc, which was set up to assist disabled soldiers returning to New Zealand after the First World War. The League received legislative recognition in 1964 and its role was expanded to the provision of rehabilitative services to civilians. Its functions have expanded over the years as well.

The Act

[14] The Act came into force on 26 November 2018. Its purpose is to continue, state the functions of, and otherwise provide for the Service.¹⁰

[15] The Act sets out the Service's functions as follows:¹¹

- (a) to manufacture, import, export, market, distribute, supply, fit, repair, and maintain artificial limbs:
- (b) to provide rehabilitative and other services to persons in connection with artificial limbs:
- (c) to carry out research and development in relation to artificial limbs:
- (d) to advise the Minister on matters relating to artificial limbs.

⁹ Substantive judgment, above n 3, at [6]–[25].

¹⁰ Artificial Limb Service Act, ss 3 and 7.

¹¹ Section 8.

[16] The Act provides that the Service is a Crown entity for the purposes of s 7 of the Crown Entities Act 2004 and, except as otherwise provided by its governing legislation, that the Crown Entities Act applies to the Service.¹² In some respects the Service differs from other Crown entities. All of its operating revenues are generated from service contracts. It is not funded by Crown appropriation and it is exempt from paying income tax.¹³

[17] Every five years a review of the Service's operations must be carried out in order to consider whether the Service should be retained or abolished and whether any amendments to the Act are necessary or desirable. The findings of the review are required to be reported to the Minister responsible for the administration of the Act.¹⁴

The proceeding

The extension of the Service's functions into orthotics

[18] In 2014, the Service's board identified a need for a change in its then approach, given its limited revenue streams, Crown entity operational requirements, changes in technology and workforce requirements, and the direction of the Government's health strategies. The Service employed a new chief executive officer, Sean Gray, and set about what he describes as a "transformation journey". It broadened its focus and began providing orthotic services to its patients. It focused initially on the contralateral limbs of amputees, both to enable better function (through limb alignment) and more broadly in an attempt to prevent further amputations. It then expanded its prevention services to the prevention of amputation for non-amputees.

[19] In 2017 the Service responded to a request for proposals for the provision of orthotic services to the Waikato District Health Board. The Service's tender was successful and it was awarded the Waikato District Health Board Orthotic Service Contract (the Waikato Contract), together with Orthotic House, a provider of orthoses/orthotic services with centres in Hamilton and Hastings. Under the Waikato Contract the Service is responsible for providing services to diabetic and

¹² Section 9.

¹³ Section 13.

¹⁴ Section 14.

vascular clients. It provides its services under the name Waikato Orthotic Services, having incorporated a wholly owned subsidiary, Orthotic Service Waikato Ltd, for this purpose. Orthotic House is responsible for other patients. It provides orthotic services at its own clinics.

[20] The Waikato Contract was in place at the time the Act came into force.

[21] In 2021, the Service tendered for the Auckland Metro District Health Board Orthotic Services Contract (the Auckland Metro Contract). It was successful and it was appointed to a panel for the provision of orthotic services under the contract. It is providing personal health orthotic services and products (custom made and off the shelf products) for Auckland Metro DHB clients/patients.

MoveMe's response

[22] MoveMe was advised by the Service in early 2017 that the Service was intending to expand its services to provide orthoses and orthotic services to persons at risk of amputation.

[23] Both MoveMe and the Service had made a number of attempts to work together between 2015 and 2017. However, any collaboration was short-lived. When MoveMe became aware that the Service was tendering for the Waikato Contract, it took legal advice and lodged a complaint with the Ombudsman. The Ombudsman undertook an investigation and ultimately concluded that the dispute between the parties raised a legal issue, requiring resolution through the courts.

[24] MoveMe said that it came as a further shock to its board and executive team when it discovered, in July 2021, that the Service was tendering for the Auckland Metro Contract and when it found out that the Service was to be appointed as a panel provider. MoveMe had been the previous provider of these services under earlier contracts with the relevant DHBs.

[25] There were three other major DHB orthotic services contracts coming up for tender in late 2021 and early 2022. MoveMe considered that it was urgent that it seek to clarify the scope of the Service's statutory powers and, accordingly, it commenced

the judicial review proceedings which have resulted in this appeal. It invited the Service to agree not to seek to enter into any new orthotic services contracts, or to renew existing orthotic services contracts, until the proceedings were determined or any amendments to the Act had been put in place. The Service refused to agree either to cease actively seeking orthotic services contracts or to support an urgent hearing of MoveMe's proceeding.

MoveMe's statement of claim

[26] MoveMe's statement of claim is dated 9 September 2021. It alleges that from around 2017 the Service acted unlawfully by purporting to expand the scope of its activities to include activities unrelated to artificial limbs and services that are not in connection with amputees or artificial limbs. It refers to the Service's Statement of Intent for 2017–2021 and to its Statement of Performance Expectations for 2017–2018, asserting that both refer to the provision of services, including orthotic services, to those at risk of amputation. It also refers to the Service tendering for the Waikato Contract. It asserts that in November 2020 the Service indicated an intention to expand its activities to include the provision of orthotic services for persons with deteriorating health and disability conditions. It also refers to the Service's 2020 briefing report to its then incoming Minister, to the Service's website and to the Service responding to the Auckland Metro DHB's request for proposals for the appointment of providers to a panel for the supply of personal health orthotic services and/or products.

[27] Three grounds of review were initially raised. First, it was alleged that the Service was acting outside its statutory functions by offering and holding itself out as a supplier of orthotic products and services, and secondly, that the Service's Statement of Intent for 2021–2024 and its Statement of Performance Expectations for 2021–2022 were unlawful. The third ground of review was abandoned at trial.

[28] MoveMe initially sought declarations that:

- (a) the Service had acted outside its functions and unlawfully in undertaking its expanded activities;
- (b) the meaning of the words “similar device” in the definition of artificial limb in the Act is limited to devices that have a similar function to an artificial arm, hand, leg, or foot;
- (c) the provision of services to “persons in connection with artificial limbs” requires that the services are provided to persons who require or have an artificial limb; and
- (d) the Service’s Statement of Intent for 2021–2024 and its Statement of Performance Expectations for 2021–2022 were unlawful.

[29] As noted above at [9], the declarations sought before us were in rather different terms.

The High Court judgments

The substantive judgment

[30] The Judge summarised the dispute between the parties and then set out the Service’s origins and legislative history.¹⁵ He referred to the Act and to the Crown Entities Act.¹⁶ He then summarised the background to the dispute and discussed the affidavits filed by various experts in relation to the nature of prostheses and orthoses and the practices of prosthetics and orthotics.¹⁷ He recorded that he had found this evidence substantially helpful in determining the central issue.¹⁸ He noted that, while the term artificial limb does not appear to be a term of art, the question raised in the proceeding arises in a clinical setting, and that words and phrases used in

¹⁵ Substantive judgment, above n 3, at [3]–[4] and [6]–[18].

¹⁶ At [19]–[31].

¹⁷ At [32]–[54].

¹⁸ At [50]–[51].

technical legislation should be assumed to have been used in their technical sense if they have acquired one.¹⁹

[31] The Judge next focused on MoveMe’s grounds of review before turning to consider whether orthoses are similar devices to artificial limbs. He observed that the meaning of legislation must be ascertained from its text and in light of its purpose and context, and that legislation applies to circumstances as they arise.²⁰ He referred to the text of the Act and to the competing submissions for the parties. He recorded that it was uncontentious that orthoses are devices and the real question was whether they are similar devices to an artificial arm, hand, leg or foot.²¹ He observed that “similar” does not mean “the same” and recorded that counsel had agreed that the pairing of “similar” and “device” places the focus on the functionality rather than the form of the device.²² The Judge recorded that there is nothing to suggest that Parliament intended the meaning of “similar” to be restricted, or that a similar device is only a device to replace a missing limb or part of a limb.²³ He observed that the term is not expressed to be so qualified or limited and that, in ordinary usage, similar means “having a resemblance in appearance, character, or quantity, without being identical”. The Judge appended to this list of descriptors “function” and “purpose”.²⁴

[32] The Judge expressed the view that MoveMe’s interpretation — namely that the function of a prosthetic limb is only to replace a missing limb or part of limb — essentially equated a “similar device” to an artificial limb and in doing so, rendered the category of “similar device” redundant.²⁵ The Judge tested MoveMe’s interpretation by asking what kinds of device could fall within the similar device category. He noted that some devices, such as prosthetic blades used by athletes, and pylons and hooks, do not strictly fall within the category of an artificial arm, leg, hand or foot, but by implication, fall within the catch-all of “similar device”.²⁶ The Judge

¹⁹ At [51], citing P St J Langan *Maxwell on the Interpretation of Statutes* (12th ed, Sweet & Maxwell, London, 1969) at 28; *Jenkins v Inland Revenue Commissioners* [1944] 2 All ER 491 (CA) at 495; *Ancient Trees of New Zealand Ltd v Attorney-General* HC Wellington CP483/93, 29 April 1994 at 11; and *Holt & Co v Collyer* (1881) 16 Ch D 718 at 720.

²⁰ Substantive judgment, above n 3, at [62].

²¹ At [68].

²² At [69].

²³ At [70].

²⁴ At [70].

²⁵ At [71].

²⁶ At [72].

considered that such devices are intended to perform the function of a missing limb and that they are an artificial limb.²⁷

[33] The Judge preferred the Service's view that the real question was whether there was a similarity between orthotic and prosthetic devices in terms of their function and purpose, bearing in mind that inherent in the expression "similar" is the presence of difference.²⁸ He went on to refer to s 8 of the Act and in particular the words "in connection with" in s 8(b).²⁹ The Judge noted that these words were added in 1993 and that the amendment suggests a conscious expansion of the provision of rehabilitative and other services from people who already have an artificial limb to those who may be at risk of requiring one. The Judge considered that there was strength in the Service's submission that this function appears to extend the range of rehabilitative and other services to amputees in connection with prostheses, which might include orthoses, and orthotic services, for a contralateral limb.³⁰

[34] The Judge noted that there is no reference to amputees in the Service's statutory functions. He considered that this did not support a narrow interpretation focused on amputees or devices which replace missing limbs. The Judge considered that overall, the text of the legislation, to the extent it provides guidance, indicates that the meaning of "similar device" is wider than MoveMe had submitted and that the expression must have been intended to include devices that perform a similar function, or have a similar character to artificial limbs. He considered that some orthoses clearly meet this requirement.³¹

[35] The Judge next turned to the purpose of the Act. He discussed s 3, noting that it indicates the importance of the continuity of the Service and thus emphasises the relevance of its historical activity when considering the scope of its statutory functions.³² He discussed the Service's functions set out in s 8, noting that they are broad. He observed that the Act's purpose is not limited to dealing with amputees and that rather, its broad purpose is to support and enhance mobility and to assist the

²⁷ At [73].

²⁸ At [74].

²⁹ At [76].

³⁰ At [77]–[78].

³¹ At [79]–[80].

³² At [82].

rehabilitation of people with mobility difficulties.³³ The Judge considered that the purpose of the Act, with its focus on rehabilitation, research and services in connection with mobility, does not support the restrictive interpretation advanced by MoveMe.³⁴

[36] The Judge also took into account the context of the legislation. He discussed first the historical context, noting that the history of the Service suggested that its predecessors were involved in supplying a broader range of products than just prosthetic limbs. He considered that the activities of the Services' predecessors were concerned more generally with enhancing health, rehabilitation, and mobility, rather than having a narrow focus on prosthetic limbs and amputees.³⁵ He also considered the 1993 amendments. He considered that there was then a clear and deliberate broadening of the Service's functions from artificial limbs alone. He expressed the view that the change adding the words "similar devices" expanded the types of products which the Service could provide and that the change from "persons *with* artificial limbs" to "persons *in connection with* artificial limbs" extended the patient group to persons at risk of amputation, but who are not yet amputees.³⁶ The Judge also considered that, given that the Service was already engaged in the supply of some orthotic devices and services at the time the Act was passed, it is illogical that Parliament should be taken to have narrowed the scope of the Service's functions, without expressly doing so or making that intention clear in the accompanying parliamentary materials.³⁷

[37] The next contextual matter considered by the Judge was the clinical context. He noted that there were two key points in dispute between the expert witnesses — first, the overlap (or distinction) between orthoses and prostheses and the patient groups that use them, and secondly, the function and purpose of the two forms of device.³⁸ He discussed the evidence in detail, recording that the witnesses called by MoveMe had acknowledged that there was a degree to which the two forms of device overlapped.³⁹ The Judge considered that these concessions were consistent

³³ At [85].

³⁴ At [87].

³⁵ At [92].

³⁶ At [96] (emphasis original).

³⁷ At [101].

³⁸ At [103].

³⁹ At [106].

with the Service’s expert evidence, which, he commented, made “a compelling case that it is not possible to draw a bright line between orthoses and prostheses” and that instead, “they exist on a continuum”.⁴⁰ Overall the Judge preferred the expert evidence of the Service, which indicated that there is an overlap between orthoses and prostheses, in so far as they relate to missing or deficient limbs. The Judge considered that the evidence indicated that the interpretation of the words “similar device” advanced by MoveMe was out of step with the clinical context.⁴¹

[38] Finally in terms of context, the Judge considered the function and purpose of prosthetic and orthotic devices. He noted that a key prong of MoveMe’s case was that a “similar device” means a device with a similar function. The Judge observed that, while that might be the case, he could nevertheless not accept MoveMe’s view of functionality. He considered that MoveMe’s argument that the function of an artificial arm, hand, leg or foot is to replace a missing limb, focused more on the form and appearance of the device rather than its function, purpose or character. The Judge considered that a wider and more coherent view is that the function of prosthetic limbs is to support and promote mobility, and that, on this approach, orthotics that serve the same purpose or function qualify as similar devices.⁴²

[39] Finally in this regard, the Judge asked himself — are orthoses similar devices similar to prostheses? He answered this question by finding that some orthoses are similar devices to prostheses; they perform the same purpose or function in that they restore or promote mobility in a missing or deficient limb.⁴³ He concluded that MoveMe’s submissions sought to draw the line in the wrong place, but that the Service’s submissions sought to draw the line in the wrong place as well. He did not accept the Service’s submission that its statutory functions permit it to supply any form of orthotic or service.⁴⁴

[40] The Judge went on to consider whether the Court should grant declarations as sought. He summarised the declarations sought by MoveMe but he did not accept that

⁴⁰ At [109].

⁴¹ At [118].

⁴² At [122].

⁴³ At [123].

⁴⁴ At [125]–[126].

the application for review should be granted, or that declarations in the terms sought should be issued.⁴⁵ He accepted that there was a dispute between the parties as to the correct interpretation of the legislation, that the dispute arose from specific facts and that MoveMe’s claim was not a claim in the abstract. He also accepted that the dispute was live and had practicable implications for the parties.⁴⁶ Given these considerations, the Judge was prepared to find that a similar device “for the purposes of [the Act] includes an orthotic device that supports a limb and promotes mobility (whether the limb is missing, partly missing or impaired)”.⁴⁷ He considered that this conclusion was sufficient to determine the extent of the Service’s functions but noted that the parties had not had an opportunity to address this particular form of relief. He invited the parties to file further submissions on this issue.⁴⁸

The final orders judgment

[41] Having received further submissions from the parties, the Judge issued his final orders judgment on 27 April 2022. He concluded that it was not appropriate to make a declaration, either in the terms proposed by him in the substantive judgment, or as suggested by either party.⁴⁹ The Judge noted the difficulty that the case presented. He commented that it involved the application of an abstract and broad expression — a similar device — to a complex clinical and commercial setting.⁵⁰ He observed that, for a declaration to have utility, it should be fact-specific, efficacious, and capable of practicable application.⁵¹ He concluded that the substantive judgment had to speak for itself and that a declaration radically at odds with that sought by MoveMe and with the evidence and submissions filed by the parties, was not appropriate. He ventured that any such declaration would invite further dispute over new questions of interpretation and would not comprehensively address the scope of the Service’s functions. He also commented that it would create a risk of unfairness, given that the

⁴⁵ At [127]–[128].

⁴⁶ At [135]–[137].

⁴⁷ At [138].

⁴⁸ At [138]–[141].

⁴⁹ Final orders judgment, above n 7, at [11].

⁵⁰ At [12].

⁵¹ At [13], citing *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [80].

evidence and submissions filed sought to address the issues as MoveMe initially defined them.⁵² For these reasons, he declined to make a declaration.⁵³

The submissions

MoveMe's submissions

[42] Mr Waalkens KC, on behalf of MoveMe, submitted that the key issue is whether any declaration should refer to amputees or persons at risk of amputation. He argued that the Service's functions are explicitly limited to matters relating to artificial limbs and that the Service's history, as well as the legislative history and statutory context, reinforces the position that the Service's role is confined to artificial limbs and amputees. He argued that the words "a similar device" ought to be interpreted consistently with the ejusdem generis maxim and by reference to the specific words in para (a) of the definition of the words "artificial limb", namely "an artificial arm, hand, leg, or foot".⁵⁴

[43] Mr Waalkens further argued that, although the Act was introduced in 2018, its key provisions had been introduced in 1993 and that the 2018 amendments were of no real significance. He put it to us that an artificial limb is well understood to be a device that replaces or augments a missing limb or part of a limb and that the focus is on function. He submitted that an orthotic is different from a prosthetic, although he acknowledged that there can be an overlap. He put it to us that, in general terms, orthotics are not devices that are similar to artificial arms, hands, legs or feet, as they do not perform the function, or a function related to, the replacement or augmentation of a missing limb or part of a limb. Rather, orthotics perform a function in harmony with the function of an artificial limb. He argued that it is the function of the device which supplies the bright line, not necessarily the device itself. In his argument, the function of orthotics is not to replace a missing limb or part of a limb, but is rather to support, or immobilise, correct, or prevent injury to, an existing body part. Mr Waalkens acknowledged that there is an overlap with respect to patients who may be at risk of amputation because such patients may benefit from the provision of an

⁵² Final orders judgment, above n 7, at [13].

⁵³ At [14].

⁵⁴ Artificial Limb Service Act, s 4 definition of "artificial limb", para (a).

orthotic device. He accepted that when an orthotic device is used in this way, it is a similar device in accordance with the statutory definition.

[44] Turning to relief, Mr Waalkens submitted that the making of declarations to clarify issues between the parties is warranted in this case. He accepted, with hindsight, that MoveMe’s shifting submissions on the appropriate declarations had confused and complicated matters, but argued that given the existence of the dispute arising from specific facts in issue and with practical consequences, declarations ought to be made.

The Service’s submissions

[45] Mr Colson KC, on behalf of the Service, argued that MoveMe is seeking to place a singular interpretation on a broad expression — “a similar device” — that is used in a complex clinical setting. He submitted that context is everything, and that the historical, legislative and clinical contexts are key to the statutory interpretation exercise in issue. He referred to the functions with which the Service is tasked under s 8 of the Act and to the definition in s 4. He noted that the only reference to a patient group in these provisions is to persons generally and that there is no specific mention of amputees. He argued that a wide range of orthotics are “similar devices” under the Act and that providing orthoses, as well as prostheses, is within the Service’s statutory functions, both because they are similar devices and because they are part of “rehabilitative and other services to persons in connection with artificial limbs”, as those words are used in s 8.

[46] In relation to the proposed declarations, Mr Colson argued that MoveMe chose to focus its evidence and submissions on confining the meaning to be given to the words “similar device”. He submitted that the High Court was right to decline to make any declarations. He noted that the amended declarations proposed by MoveMe recast what it had sought in the High Court. He argued that they do not seek to draw a line between what is a similar device and what is not, and that instead, they focus on a certain patient group — amputees — which is not mentioned in the Act. He suggested that the declarations sought would simply invite further dispute over new questions of interpretation and would not address the scope of the Service’s functions.

Analysis

The Act — interpretation

[47] There are two key provisions in the Act.

[48] First, the words “artificial limb” are defined in the Act as follows:

4 Interpretation

In this Act, unless the context otherwise requires,—

artificial limb means a device that is—

- (a) an artificial arm, hand, leg, or foot; or
- (b) a similar device

[49] Secondly, the Act states the functions of the Service. Section 8, detailing those functions, has been set out above at [15].

[50] The meaning of the Act has to be ascertained from its text and in light of its purpose and its context.⁵⁵ Meaning should always be cross-checked against purpose and in determining purpose the court must have regard to both the immediate and general legislative context.⁵⁶ The legislative process and antecedents can supply context,⁵⁷ and the social, commercial or other objectives of the Act can be relevant.⁵⁸ If a word or phrase in an Act has a technical meaning in a particular area of expertise, and the word or phrase is used in relation to that area of expertise, the word should be given its technical meaning, unless a contrary intention appears.⁵⁹

Section 4

[51] We start with the definition.

⁵⁵ Legislation Act 2019, s 10(1).

⁵⁶ *Commerce Commission v Fonterra Co-operative Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

⁵⁷ *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [131].

⁵⁸ *Commerce Commission v Fonterra Co-operative Ltd*, above n 56, at [22].

⁵⁹ *Morais v Venis* [2022] NZHC 522 at [12], citing *Falkiner v Commissioner of Stamp Duties* [1973] AC 565 (PC); *Jenkins v Inland Revenue Commissioners*, above n 19, at 495; *Van Silfhout v Pathirannehelage* [2021] NZHC 2268 at [43]; aff'd *Van Silfhout v Pathirannehelage* [2023] NZCA 5 at [29] and [44]; and *Maunsell v Olins* [1975] AC 373 (HL) at 390–391 per Lord Simon dissenting, with whom Lord Diplock agreed, referring to Langan, above n 19, at 28.

[52] Section 4 of the Act provides that an artificial limb means a device which falls within either para (a) or (b). As a general rule, the word “means” introduces a complete and exhaustive definition.⁶⁰ Relevantly each of the other two words defined in s 4 also uses the word “means” to introduce the definition.⁶¹ In contrast, the word “including” is used in s 10 (dealing with the membership of the Service). We infer that Parliament intended to draw a distinction between the words “means” and “including” with the result that the definition given to the words “artificial limb” was intended to be a complete and exhaustive definition.

[53] The definition uses the words “a device”.⁶² The word “device” is an ordinary English word. It means a thing made or adapted for a particular purpose.⁶³

[54] The definition goes on to say that an artificial limb means a device that fits within para (a) “or” para (b). The component parts of the definition are disjunctive. This produces some difficulty, because the definition in para (b) repeats the word “device” and introduces the word “similar”. Read literally the extended definition in para (b) makes little sense. To define an artificial limb as a device that is a similar device is profoundly unhelpful. If para (b) is to have any meaning, it must refer back to para (a). This also follows from the use of the word “similar”.

[55] We agree with the Judge that the word “similar” does not mean “the same as”.⁶⁴ Rather, similar means having a material resemblance or likeness to; being of a like nature or kind.⁶⁵ Something that is similar to something else is not however identical to it. As the Judge succinctly noted, inherent in the word similar is the presence of difference.⁶⁶

⁶⁰ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 567. See also *R v Webb* [1924] NZLR 934 (CA) at 941 per Stringer J; and *Haynes v McKillop* (1905) 24 NZLR 833 (SC) at 837.

⁶¹ Artificial Limb Service Act, s 4 is the interpretation section. “Minister” and “Service” are also defined.

⁶² Section 4 definition of “artificial limb”.

⁶³ Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 296.

⁶⁴ Substantive judgment, above n 3, at [69].

⁶⁵ Lesley Brown (ed) *Shorter Oxford English Dictionary on Historical Principles* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 2840.

⁶⁶ Substantive judgment, above n 3, at [74]; and see *Mays v Roberts* [1928] SASR 217 at 219–220.

[56] The definition in para (a) uses the words “an artificial arm, hand, leg, or foot”. There is no difficulty with para (a). Arms, hands, legs and feet are all limbs. The word “artificial” is an ordinary English word. It simply means something made by human art or effort rather than something natural.⁶⁷ For the purposes of the para (a) definition, an artificial limb is a copy of an arm, hand, leg, or foot which seeks to replicate the form and/or function of the arm, hand, leg or foot. Devices which seek to replicate the form and/or function of other body parts do not fall within the definition contained in para (a).

[57] It does not however follow that a similar device referred to in para (b) is confined to a like device which copies or replicates the form and/or function of an arm, hand, leg or foot. Otherwise there would be little or no need for para (b). We agree with the Judge that there is nothing to suggest that Parliament intended that the meaning of the word “similar” should be restricted, or, in context, that a similar device is only some other kind of artificial device used in relation to the arm, hand, leg or foot.⁶⁸ The term is not expressed to be so qualified; there is no express reference in para (b) to any one or more of the limbs mentioned in para (a); nor is there any reference to amputees. The para (b) definition in our view extends to devices that are not artificial arms, hands, legs or feet, but are similar to such devices in that they copy or replicate the form and/or function of some other part or parts of the body.

[58] While the concept of similarity and the wording of para (b) indicate that the definition can include devices that seek to replicate the form and/or function of other body parts, for example, fingers, toes, ears or jaws, it does not extend to artificial devices that do not seek to replicate form and/or function — for example, insoles designed to correct gait and/or to provide support or comfort or, normally, to braces or splints intended to support or correct the neuromuscular or skeletal system. There may however be situations where orthotics and orthotic services will be needed by a patient because of difficulties caused by the fact that the patient has an artificial limb, or to avoid the need for the amputation of a limb. In such situations the required device may well fall within the para (b) definition. The similarity of the device falls, in our

⁶⁷ Deverson and Kennedy (eds), above n 63, at 56.

⁶⁸ Substantive judgment, above n 3, at [70].

view, to be determined by form and function; ultimately whether and why a device is needed in any given patient's situation is a matter for clinical judgment.

Section 8

[59] The Service's functions set out in s 8 assist and provide guidance to the meaning of the words "artificial limb". Artificial limbs are referred to in all four of the statutory functions.

[60] The Board's functions extend to the provision of rehabilitative and other services, the carrying out of research and the giving of advice to the Minister — either in connection with or in relation to artificial limbs. All broadly relate to the support of, and enhancement of mobility for, persons generally. That the Act's purpose is not limited to dealing with amputees is apparent. We agree with the Judge that, had Parliament intended to limit the functions of the Service to amputees, one would not have expected it to have extended the definition of artificial limb to include similar devices.⁶⁹

[61] Inter alia, the Service's functions include the provision of rehabilitative and other services to persons "in connection with artificial limbs". The Service's functions were expanded in 1993 from the provision of "rehabilitative and other services to persons with artificial limbs",⁷⁰ to the provision of such services to "persons in connection with artificial limbs and similar devices".⁷¹ We agree with the Judge that this amendment permits the Service to provide rehabilitative and other services to persons who do not have an artificial limb, but who might need one in the future.⁷²

⁶⁹ At [85]–[87].

⁷⁰ Social Welfare (Transitional Provisions) Act 1990, s 44.

⁷¹ Social Welfare (Transitional Provisions) Amendment Act 1993, s 6.

⁷² Substantive judgment, above n 3, at [77].

The purpose of the Act and its context

[62] The Act's purpose is set out in s 3. It provides as follows:

3 Purpose of this Act

The purpose of this Act is to continue, state the functions of, and otherwise provide for, a New Zealand Artificial Limb Service.

[63] We agree with the Judge that the statutory purpose indicates the importance of the continuity of the Service and thus emphasises the relevance of its historical activity.⁷³ That this is the case is also emphasised by s 7 of the Act.

[64] The Judge set out in some detail the Service's history and origins, and its evolving legislation. Neither party took issue with the Judge's recital in this regard and we gratefully adopt the same.⁷⁴

[6] The Service's origins can be traced back to before the establishment of the Disabled Servicemen's Re-establishment League, which was created in 1931 by the New Zealand Returned Soldiers' Association. The League provided training, employment and rehabilitation services to disabled soldiers returning from the First World War. At that time, most artificial limbs were manufactured by private firms.

[7] During the Second World War, Parliament established the Rehabilitation Board to promote and assist the reintegration and rehabilitation of returning servicemen and servicemen's widows into normal life in New Zealand. In 1942, the Board appointed the Disabled Servicemen's Re-establishment League as its agent responsible for the training of disabled servicemen in new trades and occupations. In 1943, the Rehabilitation Board took over a large artificial limb manufacturer in Wellington and entrusted it to the League. From then on, the League's factory provided the bulk of manufacturing and fitting services to returned servicemen.

[8] The first legislative recognition of the Services' direct predecessors appears to be in the Artificial Aids Notice 1964, which allowed the League to supply certain "artificial aids" for outpatients of public hospitals. Under cl 4(b) of the Notice, the League could supply a range of devices, including several that were not artificial limbs, such as crutches, permanent splints and limb socks.

[9] In 1969, the League's role was expanded when the government appointed it as a provider of rehabilitation services to civilians. The League established the New Zealand Artificial Limb Board as a delegated board to undertake its artificial limb activities. The Board was not a statutory body but

⁷³ At [82].

⁷⁴ Footnotes omitted, emphasis in original.

rather an agency authorised to exercise tasks on behalf of the Rehabilitation Board.

[10] In 1990, the Disabled Servicemen’s Re-establishment League and the Artificial Limb Board were [restructured] (as part of a wider health sector restructuring). The League was renamed Workbridge Incorporated, which still exists today as an employment service for people with disabilities. The Artificial Limb Board was established as an independent entity under s 43(1) of the Social Welfare (Transitional Provisions) Act 1990, and its functions were set out in statute for the first time. Those functions appear to have been narrowed from the provision of “artificial aids” prescribed by the Artificial Aids Notice to “artificial limbs” only. The functions were:

- (a) to manufacture, import, export, market, distribute, supply, fit, repair, and maintain artificial limbs:
- (b) to provide rehabilitative and other services to persons with artificial limbs:
- (c) to carry out research and development in relation to artificial limbs: and
- (d) to advise the Minister on matters relating to artificial limbs.

[11] In 1993, the Board’s functions were expanded. This was achieved through an amendment that inserted the [italicised] words below:

- (a) to manufacture, import, export, market, distribute, supply, fit, repair, and maintain artificial limbs *and similar devices*:
- (b) to provide rehabilitative and other services to persons *in connection* with artificial limbs *and similar devices*:
- (c) to carry out research and development in relation to artificial limbs *and similar devices*: and
- (d) to advise the Minister on matters relating to artificial limbs *and similar devices*.

[12] Neither the 1990 Act nor the 1993 amendments contained a definition of “artificial limb”. ... “[A]rtificial limb” was first defined in 2018.

[13] The explanatory note for the amending legislation noted the expansion of the statutory functions in general terms:

Clause 40 amends section 44 of the principal Act, relating to the functions of the New Zealand Artificial Limb Board. The first amendment empowers the Board to carry out its functions in relation to devices similar to artificial limbs *as well as* in relation to artificial limbs. The second amendment empowers the Board to provide rehabilitative and other services to persons “in connection with” artificial limbs and similar devices rather than to persons “with” artificial limbs and similar devices.

(emphasis added)

[14] The day after these amendments, the Health Sector (Transfers) Act 1993 was passed as part of wide-ranging health sector reforms. Schedule 5 of that Act repealed a great number of statutes, orders, notices and regulations, including the Artificial Aids Notice 1964.

[15] In 2004, the Artificial Limb Board was classified as an autonomous Crown entity following the enactment of the Crown Entities Act 2004.

[16] In 2013, the Board was renamed the New Zealand Artificial Limb Service.

[17] In 2018, the Service's empowering legislation was moved into a stand-alone Act, the Artificial Limb Service Act 2018. This occurred as part of an attempt to clarify New Zealand's social security legislation which had become outdated and confusing. The Minister for Social Development described the change as "policy neutral".

[65] A number of matters can be drawn from this recital:

- (a) The Artificial Aids Notice 1964 allowed the Service — then known as the Disabled Servicemen's Re-establishment League — to supply various "artificial aids" for outpatients of public hospitals. The League supplied a range of devices, including several that were not artificial limbs.
- (b) In 1969, the League's role was expanded. The Government appointed it as a provider of rehabilitation services to civilians.
- (c) The League and the New Zealand Artificial Limb Board (which the League had established) were restructured in 1990. The Artificial Limb Board was established as an independent entity and its functions were set out in statute for the first time. Its functions were narrowed from the provision of artificial aids to the provision of artificial limbs.
- (d) In 1993, the Artificial Limb Board's functions were expanded, by permitting it to manufacture and supply not only artificial limbs but also similar devices. It was also empowered to provide rehabilitative and other services to persons in connection with artificial limbs and similar devices.

[66] As noted above, the Service entered into the Waikato Contract in 2017. In the following year, in 2018, the Act came into force.

[67] The Service's chief executive, Mr Gray, has deposed that the Service and its predecessors have long supplied a broader range of mobility related devices than just artificial limbs. He says that the Service remains the sole supplier of limb socks for Manatū Hauora | the Ministry of Health. He claims that the 2018 Act came into force with the full knowledge and support of the Minister responsible for the Service, that the Minister signed off on the Service's accountability documents at the time, and that the documents were tabled in Parliament.

[68] In our view, the Service's history, and its antecedent legislation, supports the Service's argument that there is no bright line between orthoses and artificial limbs as defined. They also support our conclusion that a similar device is a device that is not an artificial arm, hand, leg or foot, but is similar to such a device in that it copies or replicates the form and/or function of some other part or parts of the body.

[69] There is further guidance found in the Act.

[70] As noted, the Act records that the Crown Entities Act applies to the Service, except to the extent that it (the Artificial Limbs Service Act) expressly provides otherwise.⁷⁵

[71] The Crown Entities Act does not replace the individual statutes under which Crown entities are established; rather it complements those statutes.⁷⁶ The Act sets out five categories of statutory or Crown Entity. The Service is an autonomous Crown entity, which is a type of statutory entity.⁷⁷ As such, it must have regard to government policy when directed to do so by its responsible Minister.⁷⁸

[72] The Crown Entities Act relevantly provides as follows:

⁷⁵ Artificial Limb Service Act, s 9; and Crown Entities Act 2004, s 4(2).

⁷⁶ See Crown Entities Act, s 4, which explains that the rules for the establishment, governance, operation and accountability of Crown entities are set out in various acts of Parliament, including the Crown Entities Act and the entity's own Act.

⁷⁷ Crown Entities Act, sch 1 pt 2.

⁷⁸ Section 7(1).

14 Functions

- (1) The functions of a statutory entity are—
- (a) the functions set out in the entity’s Act; and
 - ...
 - (c) any functions that are incidental and related to, or consequential on, its functions set out in paragraphs (a) ...
- ...

[73] Section 14(1)(c) is statutory recognition of the “reasonably incidental” doctrine developed at common law.⁷⁹ This doctrine was developed by courts to “facilitate the commercial functions of public utilities established under statute”.⁸⁰ It has general application to the exercise of public powers and it is applied liberally rather than narrowly.⁸¹ Crown entities can do whatever is reasonably incidental to or consequential upon the achievement of their authorised functions.⁸² While public acts not directed at a body’s primary or core functions are impeachable, other acts of an incidental or consequential nature are impliedly authorised and valid.⁸³ The subsection does not permit a Crown entity to perform functions which would otherwise be outside its powers.⁸⁴

[74] The Crown Entities Act also provides as follows:

16 Core things statutory entities can do

A statutory entity may do anything authorised by this Act or the entity’s Act.

⁷⁹ See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [19.3.3(3)] and [23.2.2(2)]; and *Attorney-General v Lower Hutt City* [1964] NZLR 438 (CA) at 456 per North P and at 462 per McCarthy J.

⁸⁰ Joseph, above n 79, at [19.3.3(3)].

⁸¹ At [8.6.1].

⁸² At [8.6.1].

⁸³ At [8.6.1]. See also [19.3.3(3)] and [23.2.2(2)].

⁸⁴ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL) at 31 per Lord Templeman; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [165] per Glazebrook J and at [219] and [282]–[283] per Elias CJ dissenting; and see New Zealand Law Society *Crown Entities Act 2004* (NZLS Papers, April 2005) at 68.

17 Other things statutory entities can do

- (1) A statutory entity may do anything that a natural person of full age and capacity may do.

...

Notwithstanding the width of these provisions, those acts of a Crown entity that are contrary to, or outside the authority of an Act, or that are done otherwise than for the purpose of performing the Crown Entity's functions, will be invalid.⁸⁵

[75] These various provisions again suggest that the definition of the words "artificial limb", and the Service's functions, should not be narrowly construed.

The evidence

[76] We now turn to the evidence, some of it expert. The Judge considered the evidence to be substantially helpful. He noted that while the term artificial limb might not appear to be a term of art, the question in the proceeding is raised in a clinical setting. He took the view that it was appropriate to have regard to that clinical setting.⁸⁶

[77] We agree, but we have some reservations about the approach taken by the various witnesses. The witnesses commented primarily on the differences, real or perceived, between orthoses and prostheses. The Act does not use either of these words. Rather it uses the words "artificial limb" and defines these words. The witnesses assumed that an artificial limb is a prosthesis.⁸⁷ We accept that it is but note that prostheses cover a much wider range of devices. A prosthesis is any artificial device that can be attached to the body as an aid. Prostheses include bridges, dentures, artificial parts of the face, artificial limbs, hearing aids and cochlear implants, implanted pacemakers and many other substitutes for parts of the body that are missing or non-functioning.⁸⁸ There are penile prostheses as well as cosmetic prostheses such

⁸⁵ Crown Entities Act, s 19(1) — note the exception in s 20.

⁸⁶ Substantive judgment, above n 3, at [51].

⁸⁷ At [18], the Judge recorded that it was common ground between the parties that artificial limbs in a clinical setting are referred to as prostheses.

⁸⁸ Elizabeth A Martin and Jonathan Law (eds) *Oxford Concise Colour Medical Dictionary* (7th ed, Oxford University Press, Oxford, 2020) at 632.

as artificial eyes, teeth, noses and breasts, all of which are in widespread use.⁸⁹ We are not persuaded that the witnesses have focused on the right question. The term prostheses has a wide meaning in clinical usage but it is only those prostheses that are artificial limbs as defined in the Act that are relevant to our enquiry. The issue is whether orthoses are artificial limbs as defined, not whether orthoses are prostheses. Nevertheless, we address the evidence briefly.

[78] MoveMe adduced expert evidence from Mr Zac Kleinhans and Mr Courtney Snyman, both orthotists and prosthetists. The Service adduced evidence from Mr Paul Sprague, an orthotist and prosthetist, Dr Cynthia Bennett, a physical medicine and rehabilitation physician (as well as a member of the Service's board), Professor Simon Fraser, a professor of industrial design, and Mr Alan Thurston, a retired associate professor, an orthopaedic surgeon and a former member of the Service's board.

[79] Mr Kleinhans and Mr Snyman deposed that prosthetics and orthotics are distinct categories of device, that can be easily and separately described both by professionals and lay persons. They asserted that the function of a prosthetic limb is to replace a missing body part, whereas the function of an orthotic is to support, mobilise, or prevent injury to an existing body part.

[80] Mr Kleinhans said that artificial limbs exist in various component types to make them functional for users so that they can perform everyday tasks, or to provide cosmetic resemblance to the missing body part. He said that in contrast, an orthotic is an "externally applied device used to modify the structural and functional characteristics of the neuromuscular and skeletal system". He gave a non-exhaustive list of examples, including an ankle/foot orthotic, resting hand or foot braces, a spinal brace, a knee brace and the like. He asserted that an orthotic is not an artificial limb or prostheses, as it is not designed or used to replace or augment the absence of a limb. In his view, orthotic services and devices are predominantly used by patients other than amputees, but he did acknowledge that there will be some circumstances where orthotic services might be provided to an amputee in connection with an artificial limb,

⁸⁹ Harvey Marcovitch (ed) *Black's Medical Dictionary* (43rd ed, Bloomsbury, London, 2017) at 543; and Martin and Law, above n 89, at 632.

for example, if the contralateral (or sound) limb develops issues or injury due to the strain caused by wearing an artificial limb. He also said that for a relatively small percentage of patients, orthotic services can reduce the risk of amputation.

[81] Mr Synman was clear in his view that an artificial limb, a prosthesis, is well understood in the medical profession to be a device that replaces or augments a missing limb and that the function of a prosthetic limb is the replacement of a missing body part, or a portion or segment of a body part. Orthotics is the support, immobilisation, correction or prevention of injury of an existing body part. He asserted that prosthetic limbs and associated services are provided to a very specific patient cohort, namely persons who have lost a limb through surgical removal or trauma, or who have a congenital limb deficiency; in contrast, orthotics are provided to a broad range of people across the general population for many and varied reasons and for different purposes. He accepted that, at the margins, there may be some orthotic devices that can be used to assist part of a missing limb, for example, half foot orthoses, but said that this is a very small subset of orthotics and that this subset could readily be described as an artificial limb substitute or a device performing the same function.

[82] The witnesses called by the Service considered that it is not possible to draw a bright line between orthoses and prostheses. It was broadly the view of these witnesses that both types of device exist on a continuum.

[83] Mr Sprague expressed the view that orthoses should be regarded as similar devices to prostheses. He considered that both types of device have a common subject matter and that a frequent patient goal when accessing either prosthetic or orthotic services is to restore safe and efficient walking. He considered that there is an overlap in the population who access orthotic and prosthetic services and commented that the majority of amputations are as a result of peripheral vascular disease, secondary to diabetes, and that the provision of orthotic services is an important part of the conservative management of this disease within a multidisciplinary team. He considered that the purposes of orthotic and prosthetic devices are very similar. He commented that the specific category of orthoses which could most readily be interpreted as being a similar device to an artificial limb is that which is fitted to limbs

rather than to the head or torso. He observed that the vast majority of such devices are used for ambulatory or weight-bearing purposes and that essentially such devices are designed to replace, augment or accommodate the structure and/or function of the neurological, muscular and/or skeletal systems, using passive, dynamic or powered materials and components. He considered that other devices, for example, for heads and torsos, might appear to be different from artificial limbs, but that they have exactly the same high-level aims of facilitating independence. He commented that such devices also employ the same fundamental concepts as artificial limbs to achieve those aims.

[84] Dr Bennett deposed that the practice of prosthetics and orthotics involves the provision of comprehensive services for individuals who benefit from prosthetics and/or orthotics to improve safety, function, independence and quality of life. She stated that “prosthetics” generally refers to a functional (moveable) artificial limb and that “orthotics” generally refers to a formed component of a limb, which may do any of a number of things, including to support improved alignment and joint function or maintaining position to improve comfort and safety of daily activities. She asserted that prosthetic and orthotic devices can be regarded as similar and that both are externally applied devices that are designed and fitted to the body to achieve one or more of a number of goals. She asserted that the differences between the two are often arbitrary and that there is an undeniable similarity between prosthetic and orthotic devices, their functions and their service provision.

[85] Professor Fraser commented on the research and development of orthotics and prosthetics and whether there is a similarity in the two types of devices from that perspective. He concluded that from a research and development point of view, orthotics and prosthetics have a direct connection to each other, both in terms of design and the materials used and in terms of the applicability of new and emerging technologies.

[86] Mr Thurston expressed the view that prosthetic and orthotic devices can objectively be regarded as similar devices, assisting with patient mobility and other purposes. He commented on the overlap between the two disciplines.

Conclusion

[87] Viewed in the round, we agree with the Judge that it is not possible to draw a bright line between orthoses and prostheses. Rather, they exist on a continuum.⁹⁰ Some orthoses are, in our view, similar to some prostheses and some fall within the definition of the words artificial limb contained in the Act. This view appears to be consistent with clinical usage. The word “orthotics” is defined in *Black’s Medical Dictionary* as being “[t]he speciality of designing, fitting and supervising the use of external skeletal aids, including splints and artificial limbs (collectively known as orthoses).”⁹¹

[88] In our judgment the Judge was correct when he concluded that some orthoses are similar devices to artificial limbs as defined.⁹² Some orthoses clearly have a similar function, purpose or character to artificial limbs, but it cannot be said that all orthoses are similar devices to artificial limbs and fall within the statutory definition of the words “artificial limb”.

A declaration or declarations?

[89] Declarations can be granted under the Judicial Review Procedure Act 2016.⁹³ Further, the High Court has an inherent jurisdiction to declare rights and obligations inter partes independently of any statutory authority.⁹⁴ The principal purpose of a declaration is vindication.⁹⁵ A declaration authoritatively states the legal position between the parties without granting any consequential relief.⁹⁶

[90] We agree with the Judge that the court cannot refuse to make a declaration where refusal would be inconsistent with the court’s essential function of interpreting the law and applying the law to the facts of a particular case.⁹⁷ We also agree with the

⁹⁰ Substantive judgment, above n 3, at [109].

⁹¹ Marcovitch, above n 89, at 480.

⁹² Substantive judgment, above n 3, at [118].

⁹³ Judicial Review Procedure Act 2016, s 16(1)(b).

⁹⁴ Joseph, above n 79, at [27.3.3(1)], referring to *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 676.

⁹⁵ Joseph, above n 79, at [27.3.3(2)], citing *Middeldorp v Avondale Jockey Club Inc* [2020] NZCA 13 at [30].

⁹⁶ Joseph, above n 79, at [27.3.3(2)].

⁹⁷ Substantive judgment, above n 3, at [130], citing *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [31].

Judge that where there is uncertainty about the meaning of legislation, parties need to be able to turn to the court for an authoritative ruling.⁹⁸

[91] As against this, the courts can and should in appropriate cases refuse to make a declaration. As the Judge noted, courts have typically been reluctant to make declarations which amount to advisory opinions.⁹⁹ Any declaration should be “fact-specific, efficacious and capable of practicable application”.¹⁰⁰ The court will not answer purely abstract or hypothetical questions,¹⁰¹ or questions raised in anticipation of an actual controversy.¹⁰²

[92] As the Judge observed in the present case, there is a dispute between the parties as to the correct interpretation of the Act. The dispute arises from the Service’s expansion into the general provision of orthotics and orthotics services, including under contracts with district health boards. Further, the dispute is live and it has consequences for the parties who are competitors in the orthotic services market.¹⁰³

[93] Nevertheless, we do not consider that declarations in the terms sought by MoveMe are appropriate.

[94] First, the declarations sought by MoveMe seek to introduce concepts which are not contained in the definition of the words “artificial limb” or elsewhere in the Act — for example “orthotic device”, “supports a limb”, “promotes the mobility of an amputee” and “person at risk of amputation”.

[95] Secondly, we agree with the Service that declarations in the terms sought would simply invite further dispute between the parties. They would introduce undefined terms into the mix and they would require that a registered health assessor determine whether or not a person is at risk of amputation and therefore whether or

⁹⁸ Substantive judgment, above n 3, at [131].

⁹⁹ At [132].

¹⁰⁰ *Department of Internal Affairs v Whitehouse Tavern Trust Board*, above n 51, at [80].

¹⁰¹ *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [45] per Blanchard, Tipping and Anderson JJ; and *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [141] per Hammond J dissenting in part.

¹⁰² *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85. See also Joseph, above n 79, at [27.3.3(3)]; and Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [75.10.6].

¹⁰³ Substantive judgment, above n 3, at [135]–[137].

not the Service can provide orthotic services to such a person. This would be impracticable.

[96] Thirdly, we cannot see that declarations in the terms sought would comprehensively address the Service's functions. As the Judge noted, the difficulty with the declarations sought in this case is that they involve the application of an abstract and broad expression — a similar device — in a clinical and commercial setting.¹⁰⁴ We cannot see that it is possible to frame a declaration that resolves the demarcation dispute between the parties in a satisfactory way without being able to refer to a specific device — whether an orthotic or an artificial limb.

[97] Finally, to make declarations in the terms sought would be unfair. The evidence and the submissions filed sought to address the matters put in issue by MoveMe in the High Court. The Service has not had the opportunity to fully respond to MoveMe's evolving case.

[98] Accordingly, we have concluded that the Judge did not err when he held that it was not appropriate to make declarations, either in the terms proposed by the Judge in his substantive judgment, or in the terms suggested by the parties when they filed further submissions.

Result

[99] The appeal is dismissed.

[100] We do not consider that an award of costs is appropriate. Both parties have had a measure of success on the appeal. While we have dismissed the appeal, we consider it likely that the Service is, at least to an extent, exceeding its statutory functions. In this sense, the Service is the unsuccessful party to the appeal. In our judgment, costs should lie where they fall.

¹⁰⁴ Final orders judgment, above n 7, at [12].

MILLER J

[101] The Service has extended its functions to reflect a patient-centric approach to care, the provision of multi-disciplinary services, and the commercial demands of DHBs. This may improve patient care and encourage competition. But to some extent it has led the Service to offer devices (and associated services) which are not confined to artificial limbs as defined.

[102] I agree that declaratory relief is inappropriate for the reasons given by French and Wylie JJ. I write separately in connection with the concept of “a similar device”.

[103] I agree with the findings and reasons of Isac J at [105]–[126] of his substantive judgment but would draw the line which delimits the Service’s functions at a different point. I also agree with his observations about the legislation at [96].

[104] In company with my colleagues, and contrary to the argument for MoveMe, I consider that an artificial limb, as defined in this legislation, is not confined to an artificial arm, hand, leg or foot supplied to a person who is missing such limb. It is not necessary that the person be at risk of amputation, or that their impairment be due to injury rather than disease or neurological impairment. The impairment need not be permanent.

[105] Rather, the words “a similar device” must be given a liberal interpretation that is consistent with the objects of the Act, which are not confined to amputees and have to do generally with promoting mobility in connection with the supply of artificial limbs and provision of rehabilitation services in connection with artificial limbs.

[106] I consider that “similar” relevantly means resembling an artificial arm, hand, leg or foot in function, character or appearance. The degree of resemblance required is a question of clinical judgement.

[107] The definition does not correspond to what the expert evidence tells us are the generally recognised but overlapping definitions of prosthetic and orthotic devices. An artificial limb may include a device which medical professionals would classify as

an orthosis. I agree with French and Wylie JJ that not all prostheses, as they have defined that term at [77] above, meet that definition.

[108] An artificial limb can be attached to a person who retains the natural limb but requires a device to perform the functions of that limb. That follows once it is recognised that the recipients of artificial limbs need not be amputees. An artificial limb might extend to a device fitted to a contralateral (sound) limb to support the function of the unsound limb.

[109] Following my purposive approach to the legislation, and respectfully differing from French and Wylie JJ and Isac J, the term “artificial limb” is also capable of extending to any artificial device used to replace or augment the structural and functional characteristic of the neuromuscular and skeletal system. For example, the term might include spinal braces used to support the mechanical functions of the spine.

Solicitors:

Wotton + Kearney, Wellington for Appellant

MinterEllisonRuddWatts, Wellington for Respondent