IN THE HIGH COURT OF NEW ZEALAND **CIV 2019-485-676**
WELLINGTON REGISTRY

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

Under:	Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
In the matter of:	An application for judicial review
Between:	**NEW ZEALAND COUNCIL FOR LICENSED FIREARMS OWNERS INCORPORATED** Applicant
And:	**MINISTER OF POLICE** First Respondent
And*:*	**GOVERNOR-GENERAL** Second Respondent

APPLICANT'S SUBMISSIONS
Dated: 22 April 2020

Next event date: 4–5 May 2020

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APPLICANT'S SUBMISSIONS

May it please the Court –

1. INTRODUCTION

1.1 Very significant aspects of the rule of law are at the heart of this proceeding. First, that those whose private property rights are removed in the wider public interest should be properly compensated. Second, that exercises of public power must be properly informed, transparent, intelligible and justifiable. Third, that great clarity is required if delegated powers are deployed to criminalise otherwise lawful conduct.

1.2 The fact that this proceeding involves ammunition and the legislative and regulatory amendments initiated shortly after the 2019 Christchurch massacre serves to highlight these aspects of the role of the law – and the important [role] of the Court's judicial review position.[1]

1.3 The first cause of action engages the fundamental common law right to compensation for the deprivation of property rights through the exercise of central government powers. The entitlement to compensation in these circumstances is grounded in fairness and justice. It serves as an essential guarantee of individual liberty in a democratic society. And the authorities are clear: this entitlement persists unless Parliament has clearly excluded it.

1.4 The prohibition on the possession, sale and supply of a range of ammunition has effectively deprived previously lawful owners of all property rights in such ammunition. Compensation has been provided for some firearms, magazines and parts through the buy-back scheme, but the legislation and relevant instruments are silent on compensation for ammunition. The Applicant's case is that in these circumstances the common law entitlement to compensation is left intact. In the first cause of action, it seeks declaratory relief to that effect.

1.5 The second cause of action also challenges the Minister of Police's recommendation to prohibit two types of ammunition and the related Order in Council. The essence of this challenge is that the Minister asked the wrong question and that he did not have adequate evidence to make a reasonably informed decision. This led to the Minister failing to consider relevant matters,

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[1] See further at [7.31] below.

considering irrelevant matters and reaching an irrational/unreasonable decision. Declarations of invalidity are sought accordingly.

1.6 The evidence shows that the Minister's guiding focus was whether ammunition was used by the military and whether it had a valid civilian use. The Applicant's case is that this frustrated the purposes of the relevant legislation, which required the Minister to focus on the risk ammunition posed to safety, as well as the general policy to permit but regulate. The Applicant's expert evidence establishes that military ammunition (due to international law rules on warfare) may pose less of a risk than civilian ammunition and that the Minister was mistaken about (previously lawful) civilian use of the prohibited ammunition.

1.7 The third cause of action (alternative to the first) invokes conventional judicial review grounds in relation to the failure to provide compensation for the prohibition of ammunition.

2. FACTS

2.1 This section outlines the relevant facts. A chronology of key events is also attached as an appendix.

Christchurch shooting and legislative response

2.2 On 15 March 2019, a mass shooting of people occurred in Christchurch. This has been widely and consistently reported and understood as involving one individual using one or more semi-automatic firearms.

2.3 Three days later, on 18 March 2019, Cabinet made several in-principle decisions to amend the Arms Act 1983 (**the Act**).[2]

2.4 Then, in or around late March 2019, the Minister made proposals in a paper titled "Arms Act 1983 Reforms – Paper 1" (**Paper 1**). Paper 1 included the following propositions:[3]

(a) The dual purpose of the reforms to the Act and its associated regulations was to cater for the safe and responsible use of firearms and to significantly mitigate the risk of harm in the misuse of firearms: [2].

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2 Cabinet Minute of 25 March 2019 at [1] **[CB2-036, tab 3]**.

3 Minister of Police Paper: Arms Act 1983 Reforms – Paper 1 (undated) **[CB2-001, tab 1]**.

(b) The establishment of "a ban on military-style (e.g. armour piercing) ammunition to accompany the banning of assault rifles": [4.4].

(c) That "armour piercing, incendiary, tracer and similar types of military ammunition" are "designed primarily for combat use" and that there was "no justifiable reason for its civilian use in New Zealand": [37].

(d) That "given the wider policy to prohibit weapons that can cause mass casualties and harm", "these forms of ammunition that can contribute to this harm" should be prohibited: [38].

(e) Ammunition would not be included in the buy-back scheme, but it would be included in the amnesty from prosecution to enable people to hand it over to Police: [38].

2.5 The Minister then, in late March 2019, produced a paper seeking approval (**Approval Paper**)[4] for the Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill (**the Bill**),[5] which included various amendments to the Act, to be introduced.

2.6 In the Approval Paper:[6]

(a) The Minister proposed that a better process to give effect to a ban on prohibited ammunition would be to define prohibited ammunition to be any ammunition declared to be prohibited by the Governor-General by Order in Council: [9].

(b) The Minister asserted that this was appropriate as the definition of prohibited ammunition is technically complex, requires flexibility in light of technological developments and required input from experts and key stakeholders: [35].

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4 Minister of Police Paper: Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill: Approval for Introduction (undated) **[CB2-039, tab 4]**.

5 Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (125–1).

6 Minister of Police Paper: Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill: Approval for Introduction (undated) **[CB2-039, tab 4]**.

2.7 On 1 April 2019, Cabinet agreed that instead of using regulations to prohibit ammunition, a better process to give effect to the ban was that suggested by the Minister and approved the Bill for introduction.[7]

2.8 The Government introduced the Bill on 1 April 2019. It was enacted under urgency and came into force on 12 April 2019 as the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 (**the Amendment Act**).[8]

Offence regarding prohibited ammunition

2.9 Pursuant to the new s 43AA of the Act, it became an offence to, without reasonable excuse, possess, sell or supply prohibited ammunition.

2.10 Every person who commits an offence under s 43AA is liable on conviction to imprisonment for a term not exceeding two years. A temporary amnesty from prosecution was later introduced for anyone possessing prohibited ammunition if certain conditions were complied with.[9]

2.11 The Act does not list which types of ammunition fall under "prohibited ammunition". Rather, through the new s 2D, the Act defines prohibited ammunition to mean any ammunition declared by the Governor-General by Order in Council made under s 74A to be prohibited ammunition.

2.12 Section 74A(e), also new, provides that the Governor-General may, by Order in Council made on the recommendation of the Minister of Police, declare any ammunition to be prohibited ammunition.

The Minister's recommendations

2.13 In or around June 2019, the Minister circulated a paper in his name seeking to submit the following to the Executive Council (**the June 2019 Paper**):[10]

(a) The Arms (Prohibited Ammunition) Order 2019 (**the Order**).

(b) The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019 (**the Amendment Regulations**).

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7 Cabinet Minute of 1 April 2019 at [3] **[CB2-047, tab 5]**.

8 Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019.

9 Arms Regulations 1992, r 28Z.

10 Minister of Police Paper: Paper seeking approval to introduce the Order and the Amendment Regulations (undated) **[CB2-134, tab 8]**.

2.14 In the June 2019 Paper, the Minister proposed to recommend:

(a) For the Order, that the following types of ammunition be prohibited: tracer, enhanced penetration, armour piercing, incendiary, explosive, multi-purpose ammunition that is armour piercing or incendiary, discarding sabot ammunition (excluding shotgun), multi-projectile ammunition (excluding shotgun cartridges), chemical or biological carrier ammunition, and flechettes (fin stabilised dart like projectiles) (the Definition Recommendation).

(b) That prohibited ammunition should not be eligible for compensation (the No Compensation Recommendation). It was said that exemptions for legitimate use had been provided for in the Regulations and there was not considered to be any other legitimate civilian purpose for these types of ammunition.

2.15 Around the time of the June 2019 Paper, the Minister and the Police prepared a "Regulatory Impact Assessment".[11] That Assessment, among other things, stated:

(a) The Order and the Regulations implemented the Government's intention to increase the safety and security of New Zealanders by reducing the risk of death or injury from high risk ammunition: p 1.

(b) This was to be accomplished by declaring, through the Order, that certain types of ammunition with no valid civilian purpose were prohibited: p 1.

(c) There would be no compensation for prohibited ammunition: p 3.

(d) As part of developing the list of prohibited ammunition, Police engaged with the New Zealand Defence Force (NZDF), the Department of Conservation, the Wellington Zoo, key contacts in Fire and Emergency New Zealand, and some members of the firearms community including small arms ammunitions collectors: p 5.

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[11] Police Regulatory Impact Assessment (7 June 2019) [CB2-107, tab 7].

(e) The key criteria used to assess whether a particular type of ammunition should be prohibited was whether, in the views of the Police and the NZDF, there was no valid civilian use: p 15.

(f) The final list represented those types with no valid civilian use: p 15.

(g) Police did not know the level of "high-risk ammunition" currently in New Zealand because these items did not need to be registered: p 12.

2.16 The Minister subsequently made the Definition Recommendation and the No Compensation Recommendation to the Executive Council and the Governor-General.

The Order

2.17 On 19 June 2019, acting on the Definition Recommendation from the Minister, the Governor-General made the Order, being the Arms (Prohibited Ammunition) Order 2019.

2.18 The Order declared various types of ammunition to be prohibited.

2.19 The ammunition declared as prohibited included, among the types listed above in the Definition Recommendation, the following (**the Challenged Ammunition**):

Ammunition	Description
Tracer ammunition	Projectiles containing an element that enables the trajectory of the projectiles to be observed
Enhanced-penetration ammunition	Projectiles that have a steel or tungsten carbide penetrator intended

2.20 The Order came into force on 21 June 2019.

Legitimate use of the Challenged Ammunition

2.21 The Challenged Ammunition includes types of ammunition which have historically been used by members of the Applicant's member organisations and other non-NZDF personnel (civilians) for legitimate purposes. These purposes have been addressed in the Applicant's evidence and are expanded on below.

2.22 A preliminary point, however, is that the Respondents appear to deny that these uses were legitimate notwithstanding their legality.[12] The Applicant's position is that there is no distinction to be drawn between lawful and legitimate uses in this regard. It is fundamental to our legal system that everything is permitted unless expressly constrained by common law or statute.[13]

The Regulations

2.23 On 19 June 2019, by Order in Council, the Governor-General made the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019 (the Amendment Regulations). The Regulations did not provide for compensation in respect of prohibited ammunition, including the Challenged Ammunition. Nor has compensation been provided in any other manner in relation to the prohibited ammunition.

3. THE APPLICANT'S EVIDENCE

3.1 The Applicant has provided expert evidence from Rodney Woods and Professor Michael Reade, as well as factual evidence from Michael Dowling and Nicole McKee. This section summarises the key aspects of their evidence with paragraph references to the respective affidavits.

Rodney Woods – ammunition and ballistics expert[14]

3.2 Mr Woods is a semi-retired gunmaker and approved gunsmith. He has collected cartridges and studied ammunition history, characteristics and ballistics for 61 years: [4]. He has considerable experience in competitive shooting and commercial ammunition reloading: [7]–[8]. Mr Woods has also provided assistance to the NZESR (the government laboratory that does the forensic work for the Police) and has experience in many court cases concerning ammunition characteristics and ballistics: [9]–[10].

Definitions of the Challenged Ammunition unclear and difficult to apply

3.3 Both types of the Challenged Ammunition are defined by reference to the projectiles within the cartridge: [15]. While the term "penetrator" has an accepted technical definition, Mr Woods considers this term is not widely

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12 See, for example, statement of defence at [27] and [28] [CB1-017, tab 2].

13 *R v Copeland (AP)* [2020] UKSC 8 at [28].

14 Affidavit of Rodney Woods affirmed 26 February 2020 [CB1-049, tab 6]; and reply affidavit of Rodney Woods dated 22 April 2020 (final but unsworn) [CB1-190, tab 11].

known within the licensed firearms community: Reply [17]. He says that, without a clear definition in the Order, most people would not know whether it referred to the core of the projectile or the jacketing outside it: Reply [17].

3.4 Further, Mr Woods considers that a layperson would not be able to tell whether ammunition is one of the two types of ammunition that are challenged on this application: [18]–[33].

3.5 As regards enhanced penetration ammunition, Mr Woods says that:

(a) A layperson would not know whether a projectile has a hardened steel core without cutting the bullet apart: [18]. Even then, they would probably not be able to tell: [18].

(b) A layperson would not be able to tell what the intention behind the use of steel is: [19]. Manufacturers have different reasons for using steel in projectiles: [19]. Some are used for specific weight distribution or accuracy, rather than enhanced penetration: [19].

(c) While some enhanced penetration ammunition has a green lacquered tip or an identifiable headstamp, this is not universal, and a layperson may not know what these indications mean: [21].

(d) This type of ammunition is usually sold as "full metal jacket" rather than a more specific designation, as the supplier may not be aware of all the exact details: [25].

3.6 As regards tracer ammunition, Mr Woods says that a layperson would need specialist knowledge to tell whether their ammunition is tracer ammunition. This is because variety of colours are used to indicate this (including red, orange, white, green and yellow): [33].

Legitimate civilian uses for the Challenged Ammunition

3.7 Enhanced penetration and tracer ammunition previously reached the civilian market through the disposal of government stock (including the New Zealand government): [25] and [35]. This ammunition was sold at greatly reduced prices compared to commercial sporting ammunition: [25].

3.8 Licensed firearms owners usually purchased enhanced penetration ammunition for the following purposes target shooting, plinking (casual target

shooting), pest control, collecting and cheap bullet parts: [26]. And because it is considerably cheaper than conventional sporting ammunition: [26].

3.9 Tracer ammunition was commonly used for collecting, curiosity plinking, cheap bullet parts and fire control by starting back-burning in areas of difficult access: [36].

Capacity of enhanced penetration ammunition to do harm relative to non-prohibited ammunition

3.10 Mr Woods explains that the penetration ability of "enhanced penetration ammunition" is not necessarily greater than regular "soft point" ammunition. This is because some types of the latter may be capable of being fired at a greater velocity, which increases its penetration ability: [24]. A non-prohibited sporting bullet travelling at a higher velocity than enhanced penetration ammunition will have more penetrative effect: [30]. Including in relation to protective equipment worn by Police: Reply [12]–[13].

3.11 Further, the protective equipment worn by Police only provides a limited level of protection in the thoracic area, the head, neck, armpits, arms, and everything below the waist remaining unprotected: Reply [14]. In those areas, high velocity sporting bullets (and military ball ammunition) tend to fragment upon contact with major bone structures and the resulting shards can (and do) cause fatal injuries some distance within the body from the impact point: Reply [14]. This is a less common (although not unheard of) result with "enhanced penetration ammunition": Reply [15]. Therefore, in these hypothetical police situations, it is reasonable to expect conventional sporting ammunition to be significantly more lethal than the challenged ammunition: Reply [15]. But while surviving multiple full-penetration body hits with "enhanced penetration" bullets is far from uncommon, even in New Zealand, it is possible that an "enhanced penetration" bullet can turn sideways as it passes through and cause significant damage: Reply [16].

3.12 Further, there is a focus on penetration for military bullets because these are designed to comply with the Hague Convention of 1899, Declaration III: [29]. Military bullets are designed to not expand when penetrating to ensure better survivability from wounds: [29]. In other words, military ammunition is designed to pass cleanly through the target: [31].

3.13 Conventional sporting soft point or hollow point bullets, on the other hand, are designed to kill quickly by expanding as the bullets pass through the target: [29]. Most sporting ammunition is illegal for military use: [29].

Capacity of tracer ammunition to do harm relative to non-prohibited ammunition

3.14 Tracer ammunition is designed to enable observation of the bullet path: [34]. In the military, it has been used for anti-aircraft fire but only in machine guns where observing the tracer in continuous fire enables the shooter to "walk" rounds onto the target: [37]. This was not effective in shooting down aircraft with small arms and, when this happened, it was the result of massed fire from a unit rather than from an individual shooter: [37].

3.15 It is highly unlikely that tracer ammunition can be used to "walk" towards the target in a non-prohibited firearm (i.e. manually operated with a 5-round magazine): [38]. It is also less accurate than conventional ammunition and there would be limited ability to "trace" with precise accuracy at short range (200m or less): [34] and [39].

3.16 Mr Woods notes that there is a risk of fires being ignited by tracer ammunition, which is greater in dry environments and worsened by a concentration of shots into a small area: [34].

Professor Michael Reade – military medicine and surgery expert[15]

3.17 Professor Reade is a professor of Military Medicine and Surgery at the University of Queensland in Australia: [1]. He has been deployed with the Australian Defence Force nine times, including twice to Afghanistan and three times to Iraq: [2]. During those deployments, he treated many patients who had been shot with military rifle bullets and a smaller number shot with military pistol bullets: [2]. He has also worked for two and a half years at a major trauma centre in Pittsburgh, USA, where he treated numerous patients shot with civilian firearms: [2].

3.18 Professor Reade has provided expert evidence on the wounding potential of various projectiles: [4]. The general effect of his evidence is that military ammunition may have less wounding potential and be less lethal than civilian

[15] Affidavit of Michael Reade sworn 26 February 2020 **[CB1-039, tab 4]**.

ammunition. He also identifies the characteristics of ammunition that should be focused on when assessing the lethality of ammunition.

Factors affecting the wounding potential of ammunition

3.19 The wounding potential of a projectile depends on the body part that is hit, the wound track and the kinetic energy deposited by the projectile: [5]. Which body part is affected is usually the greatest determinant of lethality: [5].

3.20 Beyond that, the wounding potential of a projectile passing through a particular region of the body will be determined by the amount of kinetic energy it deposits: [6]. While all bullets can kill, some do this more effectively by depositing a greater proportion of their kinetic energy in the tissue struck: [13].

3.21 Deformability of the bullet is only one characteristic that determines the kinetic energy deposited in a wound, and hence the lethality: [13]. Other characteristics, primarily the kinetic energy of the bullet at the point of impact, and its propensity to fragment and tumble, also affect lethality and may be more important characteristics than the particular type of ammunition: [13].

3.22 It is noteworthy that given developments in modern bullet designs, revision of the Hague Convention of 1899, Declaration III is proposed that would determine the "legality of a bullet" by "its pattern of energy deposit and not necessarily by its construction": [11].

Wounding potential of military ammunition relative to non-prohibited ammunition

3.23 Military ammunition is regulated by the Hague Convention of 1899, Declaration III, which requires the contracting parties "to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions": [7].

3.24 A bullet that does not expand on impact, or which does not fragment or tumble, will often deposit less kinetic energy than one that does any of these things: [10]. Military bullets accordingly create less trauma than ammunition which fragments or tumbles, and patients struck by such bullets would be expected to be, on average, less affected: [13]. If they survive, they could be expected to do so with less extensive permanent damage to muscle, nerves and blood vessels: [13].

3.25 In a wound exclusively within a lower density tissue such as muscle (for example), a bullet that passes through the tissue without deformation or tumbling will (in comparison to one that does not deform or tumble) have deposited less kinetic energy, and so will have smaller zones of necrosis, extravasation and concussion: [10].

3.26 In contrast to military bullets, hunting rifle bullets typically have a soft lead or polymer tip that causes deformation of the bullet earlier in the wound track, increasing the deposition of kinetic energy: [9]. This is to increase the chance of killing the animal quickly and so reduce its suffering: [9].

Michael Dowling – factual evidence[16]

3.27 Mr Dowling is the Applicant's Chair: [1]. He is a qualified Territorial Forces Small Arms Shooting Coach and Range Compliance Officer and continues to serve in the military: [4]. Additionally, he was a technical advisor to the lead negotiator for the United Nations Review Conference of the Program of Action to eradicate illicit small arms in New York in 2012 and served as technical advisor to the New Zealand disarmament Ambassador at the United Nations Final Arms Trade Treaty Conference in 2013: [6].

3.28 The Applicant is a member of the Firearms Community Advisory Forum (FCAF): [7]. The role of the FCAF is to use the practical experience and knowledge of the firearms community to test Police proposals to ensure they will achieve the desired outcome: [8]. Normally, FCAF is in close contact with Police about changes to firearms law and policy and meets with police 2-3 times per year.

Consultation with Police

3.29 Two full day meetings were held in urgency between the FCAF and Police after the events of 15 March 2019: [11]. These meetings were to discuss changes to the Arms Act: [11]. But the attendees were not allowed to discuss the contents of the meetings with anyone, including their members: [11].

3.30 It was indicated in one of these meetings that there would be a position on ammunition: [12]. But the attendees were not asked for feedback on ammunition reform at this point: [12].

3.31 Sometime after the FCAF meeting, a Policy Analyst from the Police called Mr Dowling and asked him how he would define certain types of ammunition,

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16 Affidavit of Michael Dowling sworn 27 February 2020 [CB1-063, tab 7].

including tracer and enhanced penetration ammunition: [14]. Mr Dowling questioned the meaning of enhanced penetration ammunition and told the analysis that he was not the best person to advise on technical definitions: [14]. Mr Dowling did, however, advise various members of the Police that ammunition should be defined by reference to its four components: case, projectile, primer and powder: [16].

3.32 Mr Dowling also asked the analyst why they were concerned with tracer ammunition: [15]. The analyst told him this was due to NZ Fire Service complaints about having to respond to a large number of rural fires: [15]. Mr Dowling says this did not line up with his experience of dealing with tracer in the military: [15].

Nicole McKee – factual evidence[17]

3.33 Ms McKee is the secretary of the Applicant and an active member of the New Zealand firearms community: [1]–[2]. She is also a member of the New Zealand Police Firearms Community Advisory Board, a New Zealand Police approved Firearms Safety instructor and an accomplished competitive shooter: [3]–[6].

3.34 The key points from Ms McKee's evidence are:

(a) Competitive shooting requires a significant quantity of ammunition, up to 300 rounds per competitor for one competition: [7].

(b) Ms McKee reloads her own ammunition because it would be very expensive to use fresh ammunition for each competition: [8]–[9].

(c) For reloading, before the Order, Ms McKee bought WWII .303 tracer ammunition in boxes of 1,200 to 1,400 rounds for approximately 35 cents per round and reused the ammunition's cases: [10]. Now, a modern brass case would cost her $1.70: [10].

(d) The WWII cases were generally of a better quality than that used today: [11]. Tracer brass can be reused 5–7 times, whereas modern brass can often only be used 2–3 times: [12].

(e) Ms McKee's family had nearly 5,000 rounds of tracer ammunition, which they had collected over the last two decades for competition and hunting: [15]. She then spent significant time during the amnesty

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17 Affidavit of Nicole McKee sworn 26 February 2020 **[CB1-044, tab 5]**.

period to dismantle her tracer ammunition: [14]. Because she had to rush, about seven out of 10 cases were damaged during the reloading process and rendered unusable: [14]. This many cases would not normally be lost: [14].

(f) Ms McKee estimates previously her family had more than $2,600 worth of tracer ammunition: [15]. She says it would now cost them about $8,500 to replace the stock: [15].

4. THE RESPONDENTS' EVIDENCE

4.1 As at the date of these submissions, the Respondents have provided the Applicant only with draft and unsworn affidavits from the Minister, Amy Pullen (ammunition expert), and someone described as senior police personnel.

Minister of Police – factual evidence[18]

4.2 The following broad two-fold policy substantially guided all the Minister's actions in respect of the relevant law reform ([4]–[5]):

(a) Military weapons and military ammunition were intended to hurt people and they had no place in civil society.

(b) The firearms and ammunition necessary for legitimate civilian purposes such as hunting, pest control and target shooting should continue to be available.

4.3 To the extent that expertise in firearms was required, the Minister relied on advice from the New Zealand Police: [6].

The Definition Recommendation

4.4 The Minister's "principal concern" following the events 15 March was to prohibited access to semi-automatic weapons (and the parts that could be used to convert firearms to that use) as those were primarily designed to be military weapons: [11]. At the same time, he formed the view that military ammunition should in principle also be prohibited: [11].

4.5 The Minister saw "no apparent need for military ammunition to be available" for firearms that remained lawful to use and possess, i.e. those appropriate for genuine civilian uses: [11]. He also said that the Police had expressed concern

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[18] Affidavit of Hon. Stuart Nash (draft and unsworn) provided on 8 April 2020 **[CB1-100, tab 8]**.

to him (soon after he took office) that there was "too much" ammunition coming into the country and much of it was army surplus ammunition imported from overseas: [10].

4.6 Following consultation with the Police, the Minister indicated his general view that military ammunition should be prohibited unless it also had a genuine civilian use: [12]. He left it to the Police to do the policy work necessary to create a workable definition of military ammunition, including consultation with experts and key stakeholders: [13]. A Police briefing paper, of which a copy is annexed to his affidavit, was provided to the Minister on 3 May 2019: [14].

4.7 The Minister was satisfied the "definition of military ammunition" proposed in the briefing paper was consistent with the policy objective he had outlined: [15]. He made the Definition Recommendation accordingly: [16]–[19].

The No Compensation Recommendation

4.8 The Government "decided not to offer a buy-back regime to persons who were in possession of what had become prohibited ammunition": [20]. The Government "did not see any case for compensation" for those persons: [22]. The value of ammunition is much smaller by comparison to firearms and "significant economic disadvantage would only occur for persons who had stockpiled military ammunition that had no civilian use": [22].

4.9 In adopting this position, the Government "proceeded on the understanding that there is no legal obligation to provide compensation from public funds for property that becomes prohibited by law": [20]. This understanding of the law was also reflected in the Police briefing paper, which stated at [270] that an amendment to the Act would be required to provide compensation for ammunition.

Amy Pullen – factual evidence and ammunition expert[19]

4.10 Ms Pullen is a Research Engineer within the Ballistics and Personal Protection Section at the Defence Technology Agency (DTA), New Zealand Defence Force.

4.11 Ms Pullen was part of the DTA team that provided advice to the Police: [8]. DTA's directive was to identify all current ammunition types that have no valid civilian use (which DTA took to mean ammunition where there was no valid

[19] Affidavit of Amy Pullen (draft and unsworn) provided on 8 April 2020 [CB1-166, tab 9].

argument for its applied use in a civilian environment): [8]. The advice DTA provided to the Police is reflected in the report (DTA Report) annexed to Ms Pullen's affidavit: [8].

4.12 Ms Pullen has also provided expert evidence in this proceeding on the differences between ammunition used by the military and civilians, and how a firearms owner would be able to identify whether their ammunition would fall within the definition of enhanced penetration: [6].

Differences between military and civilian ammunition

4.13 The basic constitution of ammunition is the same whether they are for civilian or military use: [10]. Ammunition is made up of several components: the cartridge case, primer, propellant, and projectile (commonly referred to as the bullet): [11]. Some projectiles are made of a single material (monolithic), some are "jacketed", and some have hard cores (specifically designed to penetrate hard materials): [13]. Ms Pullen described other projectiles too.

4.14 Projectiles used in sporting ammunition are designed to expand on impact with the animal's body, maximising the chance of lethal damage to critical organs rather than passing through the animal's body: [16]. This is more humane as "it is better to kill the animal quickly": [17]. Typical projectiles use in standard rifle cartridges for sporting purposes are jacketed and have a soft core, commonly lead: [16]. The jacket may have a hollow point or may not fully enclose the core and expose the core to form a soft point: [16].

4.15 Military combat is governed by the Hague Convention, which prohibits the use of "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.": [18]. Military ammunition is accordingly designed not to produce a superfluous injury or unnecessary suffering: [19].

4.16 Law enforcement and domestic counter-terrorism agencies are not bound by the Hague Convention: [20]. They use expanding ammunition rather than full metal jacket ammunition because they are using lethal force as a last resort and there is a risk that a projectile passing through the body of a target may hit an innocent person: [20].

4.17 Ms Pullen agrees that standard full metal jacket military ammunition can also be used for civilian purposes, as described in [26] of Mr Woods's affidavit: [21].

4.18 NZDF has previously used contractors to break down small arms ammunition who have then been able to sell on components: [22].

Enhanced penetration ammunition

4.19 Enhanced penetration can be achieved in different ways: by changing the velocity of the projectile, through increasing the hardness or thickness of the jacket, or by utilising a hardened core or embedding a hardened steel or tungsten penetrator: [26]. A penetrator is an added element to the core of the projectile that is added to achieve greater penetration: [28]. It could not be understood to refer to the coating of a projectile: [28].

4.20 For most military ammunition, enhanced penetration is achieved using a hardened core or penetrator: [26] and [28]. The purpose of this is to enable the bullet to penetrate helmets and Kevlar body armour: [26]. The general availability of this ammunition increases danger to the police: [27].

4.21 Some military ammunition includes a mild steel core that is not inserted for the purpose of enhanced penetration, but which does have enhanced penetration simply because steel is harder than lead: [29]. Some countries have produced ammunition with a mild steel core with the dominant purpose to save cost: [30]. This can be contrasted with hardened steel (or tungsten) which is used solely for enhanced penetration and do not save cost: [31].

4.22 A person firing at a target, shooting pests or hunting does not require ammunition to have enhanced penetration: [27]. Most civilian rifle ranges in New Zealand do not permit steel-cored bullets due to the excessive damage caused to targets: [30].

Tracer ammunition

4.23 Tracer ammunition projectiles include an element that burns after firing: [33]. Its sole purpose is to enable its trajectory to be observed and therefore assist the firer in focusing fire on the target: [33]. Its most common application in combat is where it is interspersed with other rounds in the magazine of a machine gun: [33]. There is no equivalent use for tracer ammunition in civilian shooting; it is a military application only: [35].

4.24 There is an obvious danger of causing fires, which is a secondary matter in combat situations but will likely be a primary consideration (and in some cases a paramount concern) in civilian situations: [34].

Identifying military ammunition

4.25 Ms Pullen agrees with Mr Woods that a firearm owner lacking specialist knowledge of ammunition could not always be sure of the internal construction of the ammunition they have purchased: [55].

4.26 Prohibited ammunition may appear as standard lead core ammunition: [57]. For example, military ammunition produced by NATO countries often has a green lacquered tip where other countries may not: [56].

4.27 In the absence of a reliable stamp or mark from the manufacturer, or you are purchasing from a supply chain that can guarantee a high level of provenance, then the nature of the projectile cannot be conclusively determined unless it is dismantled: [59]. This is an issue for both civilian and surplus military ammunition: [59].

4.28 Any person sourcing military ammunition, for sale or use that does not have clear marking will need to ensure its provenance and if necessary have samples of the ammunition batch tested to establish whether it has any of the prohibited characteristics: [62].

Beyond the Challenged Ammunition

4.29 Ms Pullen also commented on the other types of ammunition banned by the Order: [32] and [35]–[54].

Senior police personnel witness – factual evidence[20]

4.30 As at the date of these submissions, a draft affidavit from a member "senior police personnel" has been provided to the Applicant. This is intended to be sworn by a Police employee that was tasked with providing ministerial support to the Minister of Police on the amendment to the Arms Act: [1].

4.31 The Minister articulated his (and the Government's) view that "military ammunition that did not have any valid civilian use should be prohibited": [3].

4.32 The primary tasks for the Police were then to undertake research and consultation with the Government (and outside stakeholders where appropriate), and to come up with an appropriate definition for the military

[20] Affidavit of "senior police personnel" (draft and unsworn) provided on 8 April 2020 **[CB1-186, tab 10]**.

ammunition that the Government indicated it wanted to prohibit: [4]. This work would then be put in the form of a briefing paper to the Minister: [4].

4.33 The Police consulted internally with its own arms expert but the key source of expertise on military ammunition was the NZDF: [7]. The Police also consulted the Chairman of COLFO by phone (in his capacity as a collector and as a member of the Firearms Community Advisory Forum), Ordnance Developments Limited (a manufacturer and importer of ammunition, also a supplier to NZ Police and NZ Defence Force), and Wellington Zoo: [7].

4.34 It became clear early in the consultation that a standard full metal jacket ammunition used by the military could have a valid civilian use: [8]. The consultation focused on the NZDF personnel in order to positively define the various types of military ammunition that did not have a valid civilian use: [8].

4.35 The consultation with the NZDF was principally by telephone and email: [9]. There was not enough time for a formal report to be prepared before the Police had to provide the briefing paper to the Minister: [9]. But the DTA Report prepared subsequently conforms in all respects with the information the DTA provided to the Police by telephone and email: [9].

4.36 The Police provided a briefing paper to the Minister on 3 May 2019, which contained definitions of military ammunition based substantially on the Police's understanding of the advice they had received from the DTA: [10]. The Minister agreed with the recommendations in the briefing paper so far as the Order was concerned: [11].

5. APPLICATION FOR JUDICIAL REVIEW: THE PLEADINGS AND ISSUES

5.1 The Applicant advances three causes of action in this application for judicial review.

5.2 First, it seeks declarations confirming the common law's presumptive entitlement to compensation when central government powers are used to deprive lawful owners of property rights. This cause includes the following issues:

(a) Is there a common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to receive compensation for the deprivation of such rights?

(b) Is the effect of the Act, Order and Regulations to deprive lawful owners of their property rights in relation to the "prohibited ammunition" without express compensation rights?

(c) If so, is the common law entitlement to compensation left intact?

(d) Should the Court exercise its discretion to make declarations (including as to entitlement to compensation) in accordance with its conclusions on the above issues?

5.3 Second, the Applicant seeks to judicially review the Definition Recommendation made by the Minister and the Order made by the Governor-General. This raises the following issues:

(a) In making the Definition Recommendation, did the Minister fail to consider relevant matters?

(b) In making the Definition Recommendation, did the Minister act for an improper purpose / ask the wrong questions / have regard to irrelevant considerations?

(c) In making the Definition Recommendation, did the Minister act irrationally and/or arbitrarily?

(d) Is the Order invalid?

5.4 Third, in the alternative to the first cause of action, the Applicant seeks to judicially review the No Compensation Recommendation made by the Minister and the Order made by the Governor-General. This raises the following issues:

(a) In making the No Compensation Recommendation, did the Minister fail to consider relevant matters?

(b) In making the No Compensation Recommendation, did the Minister act for an improper purpose / ask the wrong questions / have regard to irrelevant considerations?

(c) In making the No Compensation Recommendation, did the Minister act irrationally and/or arbitrarily?

(d) Is the Order invalid?

6. ANCILLARY MATTERS: REVIEWABILITY, STANDING AND THE COURT'S DECLARATORY JURISDICTION

Reviewability

6.1 The Judicial Review Procedure Act 2016 (**the JRPA**) provides jurisdiction to review the exercise of a "statutory power". The meaning of a statutory power includes a power or right under any Act to make any regulation or order, or to exercise a statutory power of decision.[21]

6.2 In addition to the JRPA, judicial review remains available under the common law and Part 30 of the High Court Rules 2016 in respect of any power that can be classified as "public". The exercise of the power must be "in substance public" or have "important public consequences".[22]

6.3 This application for judicial review is targeted at:

(a) The Definition and No-Compensation Recommendations made by the Minister. These recommendations involved the exercise of a statutory power under s 74A of the Arms Act as that section requires any Order in Council to be made on the recommendation of the Minister of Police.[23] Additionally, the Minister's power was in substance public and had important public consequences.

(b) The Order made by the Governor-General. That is an exercise of statutory power under s 5(2)(a) of the JRPA. The Governor-General is commonly joined in proceedings of nature.[24] This is to ensure that the form of the proceedings does not prevent the validity of the Order and Regulations being challenged. But it should be noted that the actions of Her Excellency the Governor-General personally are of course not called into question. Additionally, the making of the Order was in substance public and had important public consequences.

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21 Judicial Review Procedure Act 2016, s 5.

22 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11; and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1] and [89].

23 Judicial Review Procedure Act 2016, s 5(2)(b); and *Slipper Island Resort Ltd v Minister of Works and Development* [1981] 1 NZLR 136 (CA) at 139.

24 See, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); *North Shore City Council v Governor General* HC Auckland M1847/97, 3 December 1997; and *Alan Johnston Sawmilling Ltd v Governor-General* [2002] NZAR 129 (HC).

Standing

6.4 The Applicant must have a sufficient interest in the matter to which the application relates.[25] There is a liberal approach to standing given the constitutional importance of judicial review.[26] The sufficiency of the applicant's interest must be assessed together with the legal and factual context of the application.[27]

6.5 The Applicant has standing. It represents the interests of a range of sports organisations, sports people and others who use firearms for recreation, business or environmental purposes in New Zealand. Those interests have been directly affected by the subject-matter of this application.

Declaratory jurisdiction

6.6 The High Court's jurisdiction to make declarations is based on the Declaratory Judgments Act 1908,[28] the Judicial Review Procedure Act 2016[29] and the Court's inherent jurisdiction.[30] A declaration usefully defines the legal position between the parties without stipulating sanctions.[31]

7. FIRST CAUSE OF ACTION: DECLARATIONS AS TO DEPRIVATION OF PROPERTY RIGHTS AND ENTITLEMENT TO COMPENSATION

There is a common law principle that compensation is to be paid for the deprivation of property rights through central government powers

7.1 The common law has long regarded property rights as fundamental. William Blackstone wrote that "there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property".[32]

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25 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL) at 630.

26 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [91](a).

27 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL) at 630; and *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) at 419.

28 Declaratory Judgments Act 1908, ss 2 and 10.

29 Judicial Review Procedure Act 2016, ss 8 and 16.

30 *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [10].

31 PA Joseph *Laws of New Zealand* Administrative Law (online ed) at [211].

32 William Blackstone *Commentaries on the Laws of England* (Philadelphia, JB Lippincott Co, republished 1893) at book 2, chapter 1.

7.2 This is reflected in a common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to proper compensation for the deprivation of such rights.

7.3 This principle is fundamentally grounded in notions of "fairness"[33] and "justice".[34] It is an "inherent rule of justice"[35] and an "important guarantee of individual liberty".[36] But, beyond that, the Applicant relies on two key points to establish the existence of this principle:

(a) First, it is a well-established rule of construction that, unless the contrary intention is clearly expressed, the courts will not interpret legislation as taking private property without compensation.

(b) Second, this rule of construction is based on an underlying common law principle (or right) that provides the targets of such taking with an entitlement to compensation.

Rule of construction: presumption against taking without compensation

7.4 The first facet of this cause of action is firmly established by appellate authority. In *Waitakere City Council v Estate Homes Ltd*, the Supreme Court said that "the Courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid"[37] and that there is a presumption for compensation in respect of takings of property.[38]

7.5 Several New Zealand Court of Appeal decisions provide further support:

(a) In *New Zealand Kiwifruit Marketing Board v Kiwi Harvest Ltd*, the Court of Appeal said that a statute is to be interpreted on the footing that full compensation will be assumed to have been intended unless the words of the Act clearly indicate the contrary.[39]

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33 Philip Joseph "Property Rights and Environmental Regulation under the Resource management Act 1991" (Commissioned by the Ministry of the Environment, 1999) at [7.5]; and *Rock Resources Inc v British Columbia* 2003 BCCA 324, 229 DLR (4th) 115 at [136].

34 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL) at 149 and 156; and *Birmingham Corp v West Midland Baptist (Trust) Association Inc* [1970] AC 874 (HL) at 909.

35 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL) at 149 and 156.

36 *Belfast Corp v OD Cars Ltd* [1960] AC 490 (HL) at 523.

37 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [45].

38 At [53].

39 *New Zealand Kiwifruit Marketing Board v Kiwi Harvest Ltd* CA59/90, 20 September 1990 at 13 per Somers J.

(b) In *SMW Consortium (Golden Bay) Ltd v Chief Executive of the Ministry of Fisheries*, the Court referred to the "well-established principle that clear statutory language will be required before the court will permit property to be taken, especially without compensation".[40]

(c) In *Nicholas v Commissioner of Police,* the Court said that the courts will be particularly vigilant of the interests of ordinary citizens in the field of compulsory acquisition of private property.[41]

7.6 The English cases establish this interpretative approach as well.[42] Most notably, in *Attorney-General v De Keyser's Royal Hotel*, Lord Atkinson said that "the recognised rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation".[43] This principle has been "scrupulously defended by the courts".[44]

7.7 The Supreme Court of Canada applied this principle in *Manitoba Fisheries v R*.[45] There, the Act provided a monopoly to a Crown corporation. This effectively destroyed Manitoba Fisheries' business. The Court declared that Manitoba Fisheries was entitled to compensation in an amount equal to the fair market value of its business as a going concern (i.e. for the taking of its goodwill) despite the Act not providing for compensation from the Crown.[46] It was key that nothing in the Act provided that the government could take property without compensation.[47] The Supreme Court of Canada subsequently referred to the "longstanding presumption of a right to compensation" in this context.[48]

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40 *SMW Consortium (Golden Bay) Ltd v Chief Executive of the Ministry of Fisheries* [2013] NZCA 95 at [31].

41 *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172 at [40].

42 *London and North Western Railway Co v Evans* [1893] 1 Ch 16 (CA) at 28; *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744 (HL) at 752; *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 (HL) at 542; ; *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 (PC) at 498–499; *Belfast Corp v OD Cars Ltd* [1960] AC 490 (HL) at 523; and *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL) at 167.

43 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 (HL) at 542.

44 *Belfast Corp v OD Cars Ltd* [1960] AC 490 (HL) at 523.

45 *Manitoba Fisheries v R* [1979] 1 SCR 101.

46 At 109 and 118.

47 At 118.

48 *British Columbia v Tener* [1985] 1 SCR 533 at [12]. See further *Dell Holdings Ltd v Toronto Area Transit Operating Authority* [1997] 1 SCR 32 at [20] and *Canadian Pacific Railway Co v City of Vancouver* [2006] 1 SCR 227 at [30] for subsequent (and positive) citations of *Manitoba Fisheries* by the Supreme Court of Canada.

Rule of construction is based on an underlying common law principle / right

7.8 The second facet of the first cause of action is that the rule of construction (discussed above) is based on an underlying common law principle or right that requires compensation to be paid for the taking of property by the government. Three interrelated reasons support this.

Reason one: the operation of the rule supports this approach

7.9 First, the way in which this "rule of construction" operates indicates it is based on an underlying common law principle of right. The base position is there is an entitlement to compensation, which exists unless Parliament has clearly abrogated it. That entitlement must have a source. Possible explanations are:

(a) Parliament intended to positively provide compensation by statute. However, the entitlement will be present even if the statute is silent on compensation; it must be expressly displaced. The discussion above shows this and *Manitoba Fisheries* is an example. It would be artificial to attribute a positive intention to provide compensation to Parliament in such circumstances.

(b) Alternatively, the common law provides the entitlement as a matter of principle or right. The rule of construction is explicable on the basis that Parliament did not intend to change the common law. In the absence of such an intention, the common law remains intact. The Applicant submits this is the preferred explanation.

7.10 This rule of construction is a manifestation of what is now known as the principle of legality. That is, in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words were intended to be subject to the basic rights of the individual.[49] Elias CJ made this point in *New Health New Zealand Inc v South Taranaki District Council*:[50]

> [292] Encroachment on rights requires clear legislative authority. **There is a common law presumption of interpretation that Parliament legislates consistently with fundamental rights, both at common law and, more recently, under the New Zealand Bill of Rights Act**. So, in *Cropp v Judicial Committee*, this Court accepted that there is a presumption that "general words in legislation were intended to be subject to the basic

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49 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

50 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [292]–[293].

> rights of the individual" and that the courts are "slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out". Blanchard J, writing for the Court, said "[t]here is nothing new in this: it is a well-established interpretative principle". The Court held "[t]hat presumption naturally applies to words which authorise subordinate legislation". If the presumption applies to "words which authorise subordinate legislation", it is clear that it applies equally to words which authorise the actions and decisions of public bodies.
>
> [293] Similar presumptions of interpretation to achieve compliance with fundamental values in the legal order are applied in the United Kingdom, Australia and Canada. **The presumption of conformity with fundamental rights was expressed by Lord Hoffmann in terms of a "principle of legality", but was a long-standing principle of interpretation before that label was attached to it.** ….
>
> (emphasis added; citations omitted)

7.11 As Professor Joseph has written, these presumptions of interpretation, in truth, operate as constitutional principles or rights.[51] Along similar lines, Sir Rupert Cross observed that these "constitutional principles … operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts".[52] And the leading New Zealand text on statutory interpretation provides that presumptions of this type form "a kind of judicially created Bill of Rights" and "many of them existed long before there was talk of a New Zealand Bill of Rights".[53]

Reason two: support for the underlying right

7.12 Second, there is strong support for the existence of an underlying right in the authorities and commentaries.

7.13 The courts have employed language that indicates there is an underlying common law principle or right. In *Estate Homes Ltd v Waitakere City Council*, the Court of Appeal said that, subject to inconsistent legislation and compliance with the general law, "it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes".[54] The Court cited several authorities to the effect that "justice requires that

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51 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [26.5.11].

52 J Bell and G Engle (eds) *Cross on Statutory Interpretation* (3rd ed, Butterworths, London, 1995) at 166. See *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) at 470.

53 RI Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 335.

54 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [128].

compensation should be paid for such taking".[55] The Supreme Court allowed the appeal but did not question the operation of this principle.[56]

7.14 The Supreme Court of Canada awarded compensation in the absence of statutory provision in *Manitoba Fisheries*.[57] The Privy Council subsequently interpreted the decision as holding that "the company was entitled to compensation at common law".[58]

7.15 In *British Columbia v Tener*, the Supreme Court of Canada referred to the "longstanding presumption of a right to compensation".[59]

7.16 And in *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd*, Lord Atkinson referred to the "legal right to compensation".[60] His Lordship said he used this phrase "advisedly" as he thought "authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given ex gratia, it cannot be so confined".[61]

7.17 The writings of leading public law scholars provide further support:

(a) Professor Joseph has referred to the "right to compensation" as a "universal or international constitutional norm".[62] He considered that the principle evolved "not to make reparations for the exercise of eminent domain would offend the basic notion of fairness embodied in the concept of 'law of the land' / 'due process of the law' (Magna Carta)".[63]

(b) Professor Russell Brown (now Justice of the Supreme Court of Canada) referred to "the common law rule regarding compensation – that is, … compensation for a taking must be paid absent clear statutory

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55 At [128]–[134], including Magna Carta, ch 29.

56 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [43]–[54].

57 *Manitoba Fisheries v R* [1979] 1 SCR 101.

58 *Société United Docks v Government of Mauritius* [1985] AC 585 (PC) at 602.

59 *British Columbia v Tener* [1985] 1 SCR 533 at [12].

60 *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744 (HL) at 752. On the facts of the cases, there was an entitlement under another Act. But Lord Atkinson framed the principles generally.

61 At 752.

62 Philip Joseph "Property Rights and Environmental Regulation under the Resource management Act 1991" (Commissioned by the Ministry of the Environment, 1999) at [7.1].

63 At [7.5].

language to the contrary".[64] He has said elsewhere that as "a matter of positive Canadian law, courts will, absent express legislative language directing otherwise, order compensation to owners of property that has been taken by the state" and observed (citing Blackstone) that "the common law accepted the state's power to acquire or regulate private property (in a forcible manner) for a public purpose, such power could be exercised only on payment of compensation to the property holder".[65]

(c) Professor Gray said that "Together, the interpretive aids … comprise the core of an historic and freestanding common law doctrine relating to takings".[66] The "source of this doctrine is … long established notions of justice that can be traced back at least to the guarantee of Magna Carta against the arbitrary disseisin of freehold".[67]

(d) The learned authors of *De Smith's Judicial Review* listed the right not to be deprived of one's property without compensation as a constitutional "right" in this context.[68]

7.18 The Legislation Guidelines (2018) published by the Legislation Design and Advisory Committee are also instructive. In the section titled "Constitutional Issues and Recognising Rights", Part 4 of the chapter "Fundamental constitutional principles and values of New Zealand law" provides:

> *New legislation should respect property rights.*
>
> People are entitled to the peaceful enjoyment of their property (which includes intellectual property and other intangible property). The law actively protects property rights through the criminalisation of theft and fraud and through laws dealing with trespass, and other property rights. **The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be**

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64 Russell Brown "Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections, and the Canadian Regime of Legal Protection Against Takings" in Susy Frankel (ed) *Learning from the Past Adapting to the Future: Regulatory Reform in New Zealand* (LexisNexis, 2011) at 163–164.

65 Russell Brown "Legal incoherence and the extra-constitutional law of regulatory takings" (2009) 3 IJLBE 179 at 182–183.

66 Kevin Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 EPLJ 161 at 166.

67 At 166–167.

68 Lord Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at 614–618.

> cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated).
>
> The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991).
>
> (emphasis added)

Reason three: entitlement to compensation under royal prerogative

7.19 Third, the fact that compensation is payable for takings under the royal prerogative supports the existence of an underlying principle or right. In *Burmah Oil Co Ltd v Lord Advocate*, the House of Lords held that the owners of property taken under the royal prerogative were entitled to compensation.[69] It was not a matter of construction because there was no statute dealing with or regulating any right to compensation.[70] Notions of justice and equity were key to the Court's decision.[71]

The Act, Order and Regulations amount to deprivation of property

7.20 Whether a law or exercise of administrative power amounts to a deprivation of property depends on the substance of the matter rather than the form of the law.[72] Destruction of property is equivalent to its taking for use.[73] While property may be regulated without engaging the principle,[74] if regulation goes too far it may be recognised as a taking.[75]

7.21 In the present case, the combined effect and purpose of the Act and Order is to prohibit the possession, sale and supply of the prohibited ammunition. Aside from the limited exceptions for museums, collectors and researchers,[76] the substantive effect of this has been to deprive previously lawful owners of all property rights in prohibited ammunition. Ms McKee's evidence illustrates this. The Respondents have also admitted that the effect of the Order and

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69 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL).

70 At 98.

71 At 149, 157 and 169.

72 *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 (PC) at 583. See further Kevin Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 EPLJ 161 at 176–177.

73 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL) at 103, 161–162 and 166.

74 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [46].

75 *Pennsylvania Coal Co v Mahon* (1922) 260 US 393 at 415. See also *Belfast Corp v OD Cars Ltd* [1960] AC 490 (HL) at 520 and 525 and Kevin Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 EPLJ 161 at 169.

76 Arms Regulations 1992, r 28Y.

Regulations has been to deprive any person who previously possessed prohibited ammunition of their property rights in relation to it.[77]

7.22 While there was a temporary amnesty period (which expired on 30 September 2019), amnesty only applied if the person in possession of prohibited ammunition (a) notified a member of the Police of their possession; and (b) complied with any direction from a member of the Police relating to the delivery of the ammunition to a member of the Police.[78] In this regard, property passed to the Crown.[79] And it is noteworthy that the temporary amnesty only applied if the person in possession of the prohibited ammunition did not use it and kept it in secure storage at all times.[80]

The Act, Order and Regulations leave intact the common law principle that compensation must be paid for the deprivation of property rights

7.23 Common law principles of this kind will only yield where Parliament specifically and purposively overrides them.[81] Express language or necessary implication is required.[82] Parliament must use "dedicated statutory language to displace the presumption in favour of basic rights".[83]

7.24 This approach applies in the present context given the common law right to compensation. The authorities (discussed above) are clear on this. Parliament will not be taken to have intended expropriation without compensation in the absence of (to use some examples from the cases): "clear words showing such

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77 Statement of Defence at [36.1] **[CB1-019, tab 2]**.

78 Arms Regulations 199, r 28Z.

79 Although see Kevin Gray "Can environmental regulation constitute a taking of property at common law?" (2007) 24 EPLJ 161 at 172–176 and the authorities discussed there. Professor Gray wrote at 172 that "the term 'taking' carries no necessary implication that, in relation to what is 'taken', there must be some transfer to, or acquisition by, another party. The overriding emphasis in this context is on the 'takee' (rather than the taker) and there is no requirement that a common law 'taking' should involve the conferment of some entitlement or benefit on anyone else". See also the comment at FN 88 by Professor Gray that a statement to the contrary in *Canadian Pacific Railway Co v Vancouver (City)* "seems wholly contrary to the tenor of the historic doctrine of common law takings". Such a requirement would, of course, also be inconsistent with the statements in *Burmah Oil Co Ltd v Lord Advocate* that the destruction of property is the equivalent to taking for use.

80 Arms Regulations 199, r 28Z(3)(b).

81 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [21.2.4] and the authorities cited therein.

82 *R v Secretary of State of the Home Department, ex parte Simms* [2000] 2 AC 428 (HL) at 131.

83 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [21.2.4].

intention",[84] "unequivocal terms",[85] "the most explicit words",[86] "clear statutory language"[87], and the "words of the statute clearly so demand".[88]

7.25 Parliament cannot be taken to have intended to exclude the principle above. There is no express language in the Act, Order or Regulations which provides that compensation will not be paid in relation to the prohibited ammunition. Rather, the Act is silent in respect of compensation for ammunition. The Respondents have admitted that the Order and Regulations do not provide for compensation in respect of prohibited ammunition.[89] But that refers to the express scheme for "prohibited items" (excluding ammunition). In these circumstances, it is submitted that the common law principle discussed above remains intact.

7.26 The Minister's affidavit establishes that the relevant decisionmakers were unaware of the existence of this principle. He confirmed that the Government proceeded on the understanding that there is no legal obligation to provide compensation from public funds for property that becomes prohibited by law: Nash [20]. The Minister's approach reflects the advice he received from the Police that compensation for ammunition would require an amendment to the Arms Act.[90]

7.27 The Respondents, in their statement of defence, assert that the Order and Regulations could not lawfully have provided for prohibited ammunition to be eligible for compensation as it was not a "prohibited item". This may well be correct in relation to the buy-back scheme under the Act and Regulations.[91] But this is irrelevant to the first cause of action. The Applicant is not asking the Court to add ammunition to the buy-back scheme.

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84 *London and North Western Railway Co v Evans* [1893] l Ch 16 (CA) at 28.

85 *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd* [1919] AC 744 (HL) at 752.

86 *Belfast Corp v OD Cars Ltd* [1960] AC 490 (HL) at 523.

87 *SMW Consortium (Golden Bay) Ltd v Chief Executive of the Ministry of Fisheries* [2013] NZCA 95 at [31].

88 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 (HL) at 542.

89 Statement of Defence at [36.2] **[CB1-019, tab 2]**.

90 Police Briefing Paper for the Minister of Police at [270] **[CB2-095, tab 6]**.

91 The empowering provision of the Act (Arms Act, Sch 1, Pt 1, cl 7) and the Regulations (Arms Regulations, r 28L) made under that power, create buy-back a scheme for compensation for "prohibited items". "Prohibited items" are defined to mean all or any of the following: (a) a prohibited firearm; (b) a prohibited magazine; or (c) a prohibited part (Arms Act, s 2; and Arms Regulations, r 28H). None of the sub-definitions include ammunition (Arms Act, ss 2A, 2B and 2C).

7.28 To the extent that the Respondents seek to rely on a form of *expressio unius est exclusio alterius* reasoning (that a list of a specifics is exhaustive)[92] to show that the common law entitlement was excluded by necessary implication, this must fail. The standard of necessary implication is high:[93]

> A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

7.29 It simply does not follow as a matter of "express language and logic" that the provision of compensation for the taking of some property through the buy-back scheme necessarily abrogates the common law entitlement to compensation for the taking of other property. The Crown could honour its obligation to compensation in respect of ammunition through a different regime or affected individuals could be left to resort to the courts in order to enforce their rights. Both avenues could legally sit alongside the statutory buy-back scheme which relates to other property.

7.30 *Manitoba Fisheries* is analogous. There, the Act provided a mechanism for the provinces to pay compensation in relation to "plant and equipment".[94] So, as in the present case, provision had been made for compensation in relation to some property. But this was insufficient to exclude the common law principle in relation to other property (despite the property being related). The Supreme Court ordered the central government to pay compensation in relation to lost goodwill.

7.31 The tragic events of 15 March 2019 and the legislative response under urgency should not detract from the above principles. As Lord Hope said in *A v HM Treasury*, "Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as a careful to guard against unrestrained encroachments on personal liberty."[95]

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92 *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC) at [57]: "express mention of one thing by implication excludes another". See further RI Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 320.

93 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45]; and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26].

94 *Manitoba Fisheries v R* [1979] 1 SCR 101 at 115.

95 *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 at [6] p 612.

7.32 Lord Atkin's "famously powerful protest"[96] dissent in *Liversidge v Anderson* is illustrative:[97]

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. …
>
> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. …
>
> I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. They are used with that meaning in statements of the common law and in statutes.

7.33 Lord Bingham, after noting that subsequent authority had vindicated Lord Atkin's dissent, commented extra-judicially that:[98]

> … in a much more important sense his judgment has been triumphantly vindicated. At one of the lowest moments of our national history, it was no doubt easy to feel that exceptional circumstances called for exceptional remedies, that it was no time for legal niceties, that it was expedient to intern one man that the whole nation perish not, that the safety of the people was the supreme law. But we are entitled to be proud that even in that extreme national emergency there was one voice-eloquent and courageous-which asserted older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom.

The Court should make the declarations sought

7.34 The Applicant seeks the following declarations:

(a) The effect of the Order and Regulations is to deprive lawful owners of property rights in relation to the "prohibited ammunition" without express compensation rights.

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96 *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 at [6] p 611.

97 *Liversidge v Anderson* [1942] AC 206 (HL) at 244–245.

98 Lord Bingham "The Case of Liversidge v Anderson: The Rule of Law Amid the Clash of Arms" (2009) 43 The International Lawyer 33 at 38.

(b) The Order and Regulations incorporate or leave intact the general common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to receive compensation for the deprivation of such rights.

(c) Every person lawfully owning "prohibited ammunition" upon the commencement of the Order is entitled to full compensation for the value of such ammunition upon its provision to the Police or destruction or other disposal by or at the direction of the Police or otherwise to avoid liability under s 43AA of the Act, since the commencement of the Order.

7.35 While relief in judicial review is ultimately discretionary,[99] it is submitted that if the Applicant succeeds in establishing the legal basis for any of the declarations sought, the making of the related declarations naturally follows.[100] In particular, there is actual controversy between the parties, and individuals' rights and interests are affected. The declarations sought would authoritatively state the legal position and serve the "critical constitutional function of vindicating legal rights and promoting the ideals of the rule of law".[101]

8. SECOND CAUSE OF ACTION: JUDICIAL REVIEW OF THE DEFINITION RECOMMENDATION AND ORDER

8.1 While the first cause of action is founded on common law principle, the second cause of action (and the third) involves the validity of the exercise of statutory powers – here, under the Arms Act (in particular, by virtue of the Amendment Act 2019).

8.2 As is well settled, decisions made by those exercising statutory powers must be within the proper limits of the relevant statute, and are subject to judicial

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99 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [59]; and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] and [147].

100 None of the usual grounds for declining declaratory relief would be present. These grounds include, among others, the lack of a useful purpose and the question being purely hypothetical. See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1179–1180.

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

review.[102] This goes to ensuring that exercises of public power are properly justified – indeed, are transparent, intelligible and justified.[103]

8.3 The Applicant advances four grounds of review under the second cause of action. Specifically, regarding the Definition Recommendation:

(a) The Minister failed to take relevant matters into account.

(b) The Minister acted for an improper purpose / asked the wrong questions / had regard to irrelevant considerations.

(c) The Minister's recommendation was irrational and/or arbitrary.

(d) The resulting Order in Council is invalid.

Grounds one and two: The Minister failed to consider relevant matters / had regard to irrelevant matters / acted for an improper purpose

8.4 In making the Definition Recommendation, the Minister was required to take into account relevant considerations and to disregard irrelevant considerations.[104] As no criteria were stated for the exercise of the Minister's recommendatory power, relevant considerations had to be construed from the subject-matter, scope and objects of the Act, "as ascertained from the whole of its provisions".[105] The more general and the more obviously important the consideration, the readier the Court must be to hold that the Minister was required to take it into account.[106]

8.5 The Minister was also required to abstain from using his power for a purpose that is not within the contemplation of the enabling statute.[107] It must be exercised to promote the policy and objects of the Act.[108] These too are to be

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102 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [51]–[53].

103 Lord Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [1–037] and [11–100]–[11–103]; and *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 at [14]–[15].

104 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 196–197; and *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [34].

105 *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at 327; and *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [50].

106 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

107 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50]–[54].

108 At [53].

ascertained from reading the Act as a whole.[109] As Lord Reid said in *Padfield v Minister of Agriculture, Fisheries and Food*:[110]

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

8.6 At a general level, the question for the Court is: Did the Minister ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?[111] Therefore, it is necessary to consider what the Minister asked himself before turning to the specific grounds of challenge.

8.7 The Minister's guiding focus was whether ammunition was used by the military and whether it had a legitimate civilian use. The Minister has confirmed in his affidavit (at [4]–[5]) that all actions he took in relation to the matters with which this proceeding is concerned was guided by a two-fold policy:

(a) Military weapons and military ammunition were intended to hurt people and they had no place in civil society.

(b) The firearms and ammunition necessary for legitimate civilian purposes such as hunting, pest control and target shooting should continue to be available.

8.8 The documentary evidence makes this clear as well. A paper circulated under the Minister's name stated that "the Amendment Act introduced a prohibition on the possession of military-style ammunition that has no legitimate civilian

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109 At [53].

110 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030.

111 *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 (HL) at 1065.

use".[112] Other documents indicate the same understanding of the prohibition.[113]

8.9 The essence of the Applicant's case is that this was the wrong question. For the reasons outlined below, it led to the Minister failing to consider relevant matters, considering irrelevant matters and acting for an improper purpose.

The purposes of the legislation

8.10 The Minister appears to have approached the Act (or Amendment Act) as itself imposing a ban on "military ammunition" (as explained above). In fact, he was briefed that the Amendment Act had "provided for a prohibition to apply to military style ammunition that has no legitimate civilian use" but that "the new legislation did not define military-style ammunition".[114]

8.11 The relevant legislation, however, makes no mention of "military ammunition". It prohibits ammunition that the Governor-General declares to be prohibited on recommendation of the Minister but does not state criteria for the exercise of that power.

8.12 In recommending ammunition for prohibition, the Minister should have had regard to the purposes of the Act and the Amendment Act, which are to be construed from the Acts.[115] These purposes are as follows:

(a) The purpose of the Arms Act is to generally permit but regulate the sale, ownership and use of firearms and related items in New Zealand. This can be seen in the long title: "An Act to consolidate and amend the law relating to firearms and to promote both the safe use and the control of firearms and other weapons". It is also consistent with the

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112 Minister of Police Paper: Paper seeking approval to introduce the Order and the Amendment Regulations (undated) at [17] **[CB2-140, tab 8]**.

113 The briefing paper prepared for the Minister stated that the Amendment Act had "provided for a prohibition to apply to military style ammunition that has no legitimate civilian use", that "the new legislation did not define military-style ammunition" and generally referred to effecting the "prohibition on military style ammunition": Police Briefing Paper at [262] **[CB2-094, tab 6]**. Similarly, the DTA Report prepared for the Police recorded that "DTA's mandate was to identify ammunition categories that have no valid civilian use, rather than identifying categories where a specific danger or threat has been identified": DTA Report at [2] **[CB2-186, tab 14]**.

114 Police Briefing Paper at [262] **[CB2-094, tab 6]**.

115 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030. See further *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at 327; and *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [50].

general scheme of the Act, which is one of regulation in respect of ammunition.

(b) The principal purpose of the Amendment Act is to prohibit those firearms and related items which pose an extraordinary risk to the safety of the public (including through terrorism and mass shootings). The Explanatory note provided the aim of the Bill is to "[tighten] gun control to increase the safety and security of New Zealanders by reducing the risk of death or injury from guns".[116] And as the Minister said at the first reading, the reform was "driven by the need to ensure public safety is as strong as it can be".[117]

8.13 The Minister's affidavit makes no reference to these purposes, nor does it expound any analysis aimed at ascertaining the purposes of the relevant legislation.

8.14 In fact, not only did the Minister fail to consider these purposes, his approach frustrated them:

(a) The Minister's approach effectively presumed that ammunition should be prohibited unless there was some valid civilian use for it. This presumption of prohibition is contrary to the purpose of the Act, which is to generally permit but regulate.

(b) The Minister's approach also frustrated the purpose of the Amendment Act. Instead of focusing on safety and risk, the Minister focused on whether ammunition was used by the military. He said in his evidence that "military ammunition" is "intended to hurt people": Nash [4]. But this does not engage with the statutory purpose: military ammunition does not pose an extraordinary risk to people relative to civilian ammunition simply because it is ordinarily used by the military. This point is addressed in the expert evidence and discussed in more detail below.

8.15 The Minister also acted for an improper purpose as he failed to promote the policy and objects of the Acts. The Minister's focus should have been on safety and risk to life. Instead, he acted for the improper purpose of prohibiting

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116 Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (125–1) Explanatory note, at 1.

117 (24 September 2019) 741 NZPD 10118.

ammunition that was used by the military and which he considered had no valid civilian use.

Capacity of the Challenged Ammunition to do harm relative to non-prohibited ammunition

8.16 The purpose of the Amendment Act is to increase safety and security by reducing the risk of death. This implicitly required the Minister to consider capacity of the Challenged Ammunition to do harm relative to the capacity of non-prohibited ammunition, as this information would have been key to determining the risk posed by any given type of ammunition.

8.17 The Minister, however, had very little information about the capacity of the Challenged Ammunition to do harm.[118] The DTA Report noted specifically that DTA's mandate was to identify ammunition categories that have no valid civilian use, rather than identifying categories where a specific danger or threat had been identified.[119] So, the Minister could not have considered this information as he did not have it.

8.18 While the Minister asserts in his evidence that military ammunition is intended to hurt people ([4]), this is not the right question. It could equally be said that civilian sporting ammunition is intended to hurt animals. But these propositions do not illuminate any distinction of the relative capacities for harm.

8.19 This approach caused the Minister to fail to consider the following matters relevant to the capacity of enhanced penetration ammunition relative to non-prohibited ammunition:

(a) The wounding potential of a projectile passing through a person's body, and accordingly the risk it poses to safety, is determined by the amount of kinetic energy it deposits: Reade [6]. This is the greatest determinant of lethality aside from the body part hit: Reade [5]. So, ammunition

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[118] Aside from a note in the DTA Report at [5.5] **[CB2-188, tab 14]** that the use "the use of enhanced penetration ammunition for hunting as it can cause undue pain and suffering to the animal, as this nature will typically pass through the animal without expansion, or the ability to deliver the lethal energy effects seen in traditional hunting rounds", no information of this nature has been disclosed or introduced in evidence.

[119] DTA Report at [2] **[CB2-189, tab 14]**.

that kills more effectively do so by depositing a greater proportion of their kinetic energy: Reade [13].

(b) Hunting rifle bullets typically have a soft lead or polymer tip that causes deformation of the bullet earlier in the wound track, increasing the deposition of kinetic energy: Reade [9]. This is to increase the chance of killing the animal quickly: Reade [9] and Pullen [17]. As Ms Pullen said, projectiles used in sporting ammunition are designed to expand on impact with the animal's body, maximising the chance of lethal damage to critical organs: Pullen [16]. In this way, ammunition without a hardened core may be more lethal.

(c) Military ammunition is regulated by the Hague Convention of 1899, Declaration III, which requires the contracting parties "to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions": Reade [7] and Pullen [18]. The purpose of this was to eliminate the unnecessary injury and suffering associated with very large bullet wounds.[120]

(d) Ammunition that does not expand on impact or fragment (i.e. military ammunition), will often deposit less kinetic energy than ammunition that does: Reade [10]. Such ammunition accordingly creates less trauma than those that do, and patients stuck by such bullets would be expected to be, on average, less affected: Reade [13].

(e) Accordingly, the kinetic energy of ammunition at the point of impact and its propensity to fragment and tumble may be more important characteristics than deformability: Reade [13]. Deformability of the bullet is only one characteristic that determines the kinetic energy deposited in a wound, and hence the lethality: Reade [13].

8.20 The Minister further included tracer ammunition in the Definition Recommendation because it posed a fire risk.[121] While fire presents some risk of harm generally, general fire control is not at all what was contemplated by

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120 See Robin Coupland and Dominique Love "The 1899 Hague Declaration concerning expanding Bullets" (2003) 85 International Review of Red Cross 135 at 135 and generally.

121 Police Briefing Paper at [263] **[CB2-094, tab 6]**.

the reforms to the Arms Act. This is a completely different kind of harm to that which prompted the reforms.

Non-harmful uses of the Challenged Ammunition

8.21 It is submitted that the Minister was further required to consider non-harmful uses for which owners could be expected to use the Challenged Ammunition. Information about how people use the ammunition is relevant to the actual risk to safety posed by the ammunition and it was required to make an informed decision in a system that is generally intended to permit but regulate.

8.22 The relevant documents show that aside from the exceptions included in the Regulations (for researchers, collectors and museums), the Minister did not consider there to be any legitimate civilian purpose for the Challenged Ammunition.[122] The Minister's evidence further shows that he "saw no apparent need for military ammunition to be available" for firearms that remained lawful to use and possess, i.e. those appropriate for "genuine civilian uses": Nash [11].

8.23 The Minister was wrong about this. The ammunition he considered to be "military ammunition", including the Challenged Ammunition, previously had lawful and non-harmful uses. The Minister failed to consider:

(a) Military ammunition can generally be used in non-prohibited firearms. Ms Pullen referred to a recommendation against this for NATO ammunition due to increased chamber pressure: [15]. But Mr Woods has explained in reply that this exception is narrow and that the NATO pressure parameters fall within the parameters allowed by the Small Arms Ammunition Manufacturers Institute (SAAMI, the organisation which governs the manufacture of sporting ammunition in North America, the principal source for World consumption): Woods Reply [4]–[9].

(b) The Challenged Ammunition was formerly available on the civilian market through the disposal of government stock (including the New Zealand government): Woods [25] and [35]; Pullen [22]. It was

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122 Minister of Police Paper: Paper seeking approval to introduce the Order and the Amendment Regulations (undated) at [20] **[CB2-140, tab 8]**.

considerably cheaper than conventional sporting ammunition: Woods [26].

(c) Licensed firearms owners usually purchased enhanced penetration ammunition for the following purposes: target shooting, plinking (casual target shooting), pest control, collecting and cheap bullet parts: Woods [26] (but explaining the definitional problems [17]–[23]); Pullen agrees: [21]. It is noteworthy that on the Minister's evidence he considered target shooting a "legitimate civilian purpose": Nash [4].

(d) Tracer ammunition was commonly used for: collecting, curiosity plinking, cheap bullet parts and fire control by starting back-burning in areas of difficult access: Woods [36]. Ms McKee's evidence explains the process through which such ammunition is reloaded for its casings as an affordable alternative to sporting ammunition.

8.24 The Minister also noted in his affidavit that the Police had expressed concern to him (soon after he took office) that there was "too much" ammunition coming into the country and much of it was army surplus ammunition imported from overseas: Nash [10]. It is not clear by what standard there was "too much" of something which was (1) lawful to own; and (2) used by law abiding citizens in non-harmful ways. This was an irrelevant consideration.

The criminalising effect of his recommendation

8.25 The effect of the Minister's power was (in substance) to criminalise previously lawful conduct. "Decision-makers may need to consider any special effects their decisions might have on sectional or private interests".[123] Accordingly, the Minister should have considered its criminalising effect.

8.26 There is nothing to indicate that the Minister considered the criminalising effect of the Definition Recommendation on a substantial number of people that were in possession of Challenged Ammunition that had previously been lawfully acquired for non-harmful uses. In fact, the Police did "not have information about the level of newly prohibited ammunition".[124] To the extent that the Minister considered the effect on these people, he focused only on economic disadvantage: Nash [22]. (The Minister seemingly considered

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123 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 952.

124 Police Regulatory Impact Assessment at p 3 **[CB2-109, tab 7]**.

economic disadvantage acceptable because the only people affected would be those that had "stockpiled" military ammunition with no civilian use: Nash [22]. This is wrong because of the reasons explained above.)

The need for certainty in the criminal law

8.27 The purpose and effect of the Minister's recommendation was to define the boundaries of a criminal offence. Accordingly, the Minister should have taken into account the fundamental principle that the criminal law must be predictable.[125] There is a general requirement that the criminal law should be clear and give fair notice to an individual of the boundaries of what he or she may do without attracting criminal liability.[126] This is so that every person can know in advance whether their conduct is illegal.[127]

8.28 There is no evidence that the Minister or his advisers turned their minds to this fundamental principle. He does not refer to it in his evidence and it is not referred to in the relevant documents.

8.29 The definition of "enhanced penetration ammunition" illustrates this failure. To a handful of experts, "penetrator" may be a meaningful technical ammunition term: Pullen [28]; Woods Reply [17]. However, Mr Woods considers that civilians would not be able to determine whether ammunition in their possession met this definition and whether this term referred to the core of the projectile or its jacketing: Woods Reply [17]. Ms Pullen considers it could not be understood as to the jacketing: Pullen [28].

8.30 Importantly, the experts agree that a layperson would likely not be able to tell whether ammunition in their possession is now prohibited: Woods [18]–[33] and Pullen [55].

The Minister failed to consider the views of key stakeholders

8.31 The Minister failed to consider the views of key stakeholders, including the interests represented by the Applicant. This submission is based on (1) breach of a duty to consult; and (2) failure to consider relevant information. Breach of the Minister's duty to consult could be viewed as an independent ground of judicial review. It is, however, well established that judicial review grounds can be expressed in different ways, and when expressed separately, often

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125 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [38].

126 *R v Copeland* [2020] UKSC 8 at [28].

127 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [38].

overlap.[128] The substantive case under a free-standing ground would have been that same as that advanced here in respect of failure to consider relevant matters.

8.32 A duty of consultation may arise from a legitimate expectation of consultation derived from an established practice of consultation.[129] It is submitted that the Minister owed a duty to consult the interests represented by the Applicant because of a legitimate expectation to that effect. This is because:

(a) There was a prior (unambiguous and well-established) practice of consultation about policy changes with the Firearms Community Advisory Forum. The Police policy is that "Forum meetings will only take place when Police is dealing with specific policy issues relating to the administration of the Arms Act. Police anticipates the Forum will meet one or two times a year".[130]

(b) The practice of consultation was at the level of a commitment or undertaking on the part of Police. The Police policy provides that the purposes of the FCAF are to "provide a formal mechanism for representatives from the firearms community to input to the Police on policy relating to the Arms Act 1983 or the Arms Regulations 1992" and to "review and make recommendations for consideration by Police on firearms-related matters".[131]

(c) The Applicant represents interests and individuals who were, by reasons of their expertise, in a position to express an informed view on the topic of ammunition. In fact, per the Police policy, the reasons why non-police members were selected for the FCAF included the following:[132]

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128 See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [36] and, in particular, at [55] where the Court noted "the particular ground of judicial review on which this finding is made is secondary to the finding itself". See also *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 229 and *Edwards v Bairstow* [1956] AC 14 (HL) at 29 and 35–36.

129 *Re Westminster City Council* [1986] AC 668 (HL) at 692; *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 369–370; and *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [187]–[193].

130 Police Website Information on the FCAF **[CB2-193, tab 15]**.

131 Police Website Information on the FCAF **[CB2-193, tab 15]**.

132 Police Website Information on the FCAF **[CB2-193, tab 15]**.

i Broad skills, knowledge and understanding of firearms and issues/legislation relating to firearms.

ii Relevant practical experience and networks within the firearms community.

(d) The proposed changes significantly affect the interests represented by the Applicant. Again, the reasons why the non-police members were selected for the FCAF support this:[133]

i Ability to represent a diversity of perspectives within the firearms community.

ii Being a representative of an incorporated group (who can represent the views of the group rather than their individual view).

8.33 Consultation must be meaningful: it requires the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done.[134] In the present case, it is submitted that there was no meaningful consultation because:

(a) While two meetings were held following the Christchurch shooting, the attendees were not allowed to discuss the contents of the meetings with their members: Dowling [11]. The ability to draw on their members perspectives and expertise was, as explained, a key reason for including non-police members on the FCAF.

(b) It was indicated that there would be a position on ammunition at the meeting(s) but the attendees were not asked for feedback: Dowling [12]. So, in essence, there was no consultation about ammunition at the meetings.

(c) A police representative subsequently called Mr Dowling and asked him questions about ammunition: Dowling [14]. Mr Dowling advised that

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133 Police Website Information on the FCAF **[CB2-193, tab 15]**.

134 *West Coast United Council v Prebble* (1988) 12 NZTPA 399 (HC) at 405; and *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].

he was not the best person to advise on technical definitions: Dowling [14].

8.34 The Court of Appeal explained in *Air Nelson Ltd v Minister of Transport* that given the obligation to consult, "it can hardly be said that this does not carry with it an obligation on the part of the decision-maker to take into account information gained as a result of the consultation which is relevant to the decision".[135] Had the Minister complied with his duty of consultation, the Applicant would (through its members) most likely have brought the other matters discussed above to his attention. The breach of the Minister's duty accordingly contributed to his failure to consider relevant considerations.

Ground three: The Minister's recommendation was irrational/arbitrary

8.35 Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable (also termed irrational).[136] That may be because the decision did not have an adequate evidential foundation or because the only reasonable conclusion contradicts the decision.[137] The enquiry involves examining the merits and reasoning of the decision.[138]

8.36 There has never been a single, universal standard of unreasonableness.[139] The standard of review varies with context.[140] It is submitted the context of this case requires what has been termed "anxious scrutiny" or a "hard look".[141] Such an approach is less differential and looks at the impugned decision with

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135 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [33](d).

136 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2] and [28]–[31].

137 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2] and [28]–[31]. See also *Edwards v Bairstow* [1956] AC 14 (HL) at 36; and *Auckland City Council v Ministry of Transport* [1990] 1 NZLR 264 (CA) at 303. As recently explained by the Supreme Court of Canada, reasoned decision-making is the lynchpin or institutional legitimacy: *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 at [74].

138 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2], [23] and [31].

139 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1004.

140 *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 (HL) at 531; and *Waitakere City Council v Lovelock [*1997] 2 NZLR 385 (CA) at 402 and 420.

141 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66; *A v Chief Executive of the Department of Labour* HC Auckland CIV-2004-404-6314, 19 October 2005 at [29]–[33]; *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [303]; and *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [32]. See further the authorities discussed in Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thompson Reuters, Wellington, 2016) at 523–525.

great care. This is justified as the Minister's recommendation affected fundamental rights: it defined the boundaries of a criminal offence punishable by imprisonment; and it interfered with private property rights.

8.37 It is submitted that the Definition Recommendation was irrational/unreasonable in two key aspects.

8.38 First, the Minister did not have an adequate evidential foundation for the Definition Recommendation. In other words, he lacked "sufficient information to allow a reasonably informed decision".[142] This is because:

(a) The Minister did not have evidence about the capacity of the Challenged Ammunition to do harm relative to non-prohibited ammunition. The evidence shows that the Minister did not ask for such information nor did anyone provide it to him.[143] For example, the Minister has made no reference to the Hague Convention and it is not referred to in the relevant documents, even though it is a key reason for the differences between civilian and military ammunition. Instead, as explained above, the Minister focused on whether ammunition was used by the military and whether it had valid civilian uses.

(b) The Minister did not have adequate evidence about the characteristics of ammunition to enable clear, certain and predictable definitions of "enhanced penetration ammunition". Mr Woods has explained it would not be clear to the average members of the licensed firearms community whether the term "penetrator" refers to the core of the projectile or its jacketing: Woods [17]; Woods Reply [17]; Pullen disagrees [28]. Mr Woods also explained the various components of ammunition, which could have been used to create clear and certain definitions: Woods [15]. See also Pullen at [11].

(c) The Minister further had no evidence about (1) how many people lawfully possessed the Challenged Ammunition; and (2) the level of Challenged Ammunition in New Zealand.[144] Such evidence was required to properly assess the effects of the Definition

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142 *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 18.

143 The DTA Report specifically noted at [2] that the DTA was not asked to identify categories where a specific danger or threat has been identified: DTA Report at [2] **[CB2-189, tab 14]**.

144 Police Regulatory Impact Assessment at p 3 **[CB2-109, tab 7]**.

Recommendation on peoples' property rights, as well as its criminalising effect.

8.39 Second, when considering the logical and factual bases for the choices made, the only reasonable conclusions contradict the Definition Recommendation. In other words, the primary facts do not justify the conclusion reached by the Minister.[145] This is because:

(a) The recommendation of the Challenged Ammunition for prohibition is not consistent with prohibiting ammunition which poses an extraordinary risk to safety. To the contrary, the evidence shows that military ammunition does not necessary pose any greater risk to safety than sporting or hunting ammunition (see generally the evidence of Professor Reade, but in particular [9]–[13]). This is because, as military ammunition does not expand or tumble upon impact, it deposits less kinetic energy in the target (which is one of the key determinants of lethality). International law rules relating to warfare prohibit such expansion.

(b) The Minister's conclusion that there were no other legitimate civilian uses (aside from those provided for in the Regulations: museums, researchers and collectors)[146] for the Challenged Ammunition is insupportable by the evidence. Aside from not being sufficiently informed about the other civilian uses explained in the evidence of Mr Woods and Ms McKee, this aspect of the Minister's reasoning (which is reflected in the respondents' pleadings) appears to be based on some distinction between lawful and legitimate uses. In the Applicant's submission, no distinction can be drawn between lawful and legitimate uses in this regard. This is because everything is permitted (i.e. both lawful and legitimate) unless expressly constrained by common law or statute.[147] It was not open to the Minister to claim that some previously lawful uses were not "legitimate" on some basis other than the law.

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145 To paraphrase Viscount Simonds in *Edwards v Bairstow* [1956] AC 14 (HL) at 29.

146 Minister of Police Paper: Paper seeking approval to introduce the Order and the Amendment Regulations (undated) at [20] **[CB2-140, tab 8]**.

147 *R v Copeland* [2020] UKSC 8 at [28].

(c) The definition of enhanced-penetration ammunition is vague and uncertain. The Minister should have defined the ammunition by reference to the fundamental characteristics of ammunition (see Woods [15]–[17]; Pullen [11]): the cartridge (bullet which fires out of the firearm and hits the target); the primer (at the base of the cartridge which ignores the powder charge); the case (which holds the cartridge); and the jacketing if applicable (the cartridge's coating, if any). Instead, the Minister defined enhanced penetration as projectiles that have a steel or tungsten penetrator intended to achieve better penetration. Mr Woods has explained it would not be clear to the average members of the licensed firearms community whether the term "penetrator" refers to the core of the projectile or its jacketing: Woods [17]; Woods Reply [17]; Pullen disagrees [28].

Ground four: the Order is invalid

8.40 It is submitted that the Order is invalid to the extent that it prohibits the Challenged Ammunition. The Applicant's submissions under this ground are relatively brief as the substantive reasons overlap significantly with those outlined under the first three grounds, above.

8.41 To the extent that the Order prohibits the Challenged Ammunition, it is repugnant to the purposes of the Arms Act. The inclusion of the Challenged Ammunition is not within the objects and intention of the Act. Accordingly, even if it may appear reasonable or necessary, it is ultra vires and void.[148]

8.42 Additionally, to the extent that any of the above grounds in relation to the Minister's recommendation succeeds, it is submitted that the Order must be invalid as the Governor-General followed a flawed and invalid recommendation.[149] This is because the Governor-General is not required to address his or her mind independently to the issues which have already been considered by the Minister.[150]

8.43 *Air Nelson Ltd v Minister of Transport* is analogous in this regard.[151] There, the Court of Appeal quashed the Minister's decision because it was based on a

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148 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [56]–[62].

149 *Hawkins v Minister of Justice* [1990] 3 NZLR 486 (HC) at 496.

150 *Crawford v Securities Commission* [2003] 3 NZLR 160 (HC) at [50].

151 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.

flawed recommendation.[152] The Court noted the paper containing the recommendations did not "provide the Minister with a fair and accurate picture".[153] The particular ground of judicial review on which this finding was made was "secondary to the finding itself.[154]

The Court should make the declarations sought

8.44 The Applicant submits that the Court should exercise its discretion to make the following declarations:

(a) The Definition Recommendation is invalid to the extent that it included the Challenged Ammunition as prohibited ammunition.

(b) The Arms (Prohibited Ammunition) Order 2019 is invalid to the extent that it prohibits the Challenged Ammunition.

8.45 It is submitted that the making of these declarations naturally follows if the Applicant succeeds under any of the grounds of review advanced under this cause of action. In support of this, the Applicant refers to the discussion above at [7.35].

9. THIRD CAUSE OF ACTION (ALTERNATIVE TO FIRST): JUDICIAL REVIEW OF NO COMPENSATION RECOMMENDATION MADE BY THE FIRST RESPONDENT AND ORDER MADE BY THE SECOND RESPONDENT

9.1 This cause of action, in the alternative to the first, challenges the No Compensation Recommendation made by the Minister. As a result, the Order had the effect of depriving previously lawful owners of property rights in the prohibited ammunition without compensation. The Applicant's submissions are relatively brief here given the significant overlap with the matters discussed above.

9.2 As a preliminary matter, it is noted that the Respondents have pleaded in defence that provision of compensation for prohibited ammunition outside of the process envisages in Schedule One to the Arms Act 1983 would have been unlawful, and contrary to that Act, which only allowed for compensation for "prohibited items". It is, however, not the Applicant's case that ammunition

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152 At [55]–[56] and [76].

153 At [40].

154 At [55].

should have been included in the buy-back scheme made under in Schedule One to the Arms Act 1983.

9.3 Rather, the Applicant challenges various aspects of the Minister's decision not to recommend the provision of compensation for the prohibited ammunition outside of the process envisaged in Schedule One to the Arms Act 1983. See Nash [20]–[22]. Other avenues were available for compensation, including:

(a) Section 74(1)(ra)(ii) of the Arms Act, which allows for regulations to be made in respect of "any other transitional or savings matter" for the purposes of the orderly implementation of any Order in Council made under s 74A.

(b) Section 74C(1)(a) or (b)(iii), which allow for further regulations to be made in respect of transitional and savings matters, in addition to the transitional and savings provisions in Schedule One.

Ground one: The Minister failed to take relevant matters into account

9.4 In making the No Compensation Recommendation, the Minister failed to consider relevant matters, including:

(a) The principal purposes of the Amendment Act, namely to prohibit those firearms and related items which pose an extraordinary risk to the safety of the public (including through terrorism or mass shootings) and encourage the voluntary surrender of such prohibited items by the provision of full compensation. The latter purpose is key to giving effect to the former, as nil or inadequate compensation for the surrender of prohibited ammunition would undermine the public safety related reasons for prescribing the prohibited ammunition. The Minister overlooked this risk.

(b) The common law right to property and the common law principle that property rights must not be taken away without proper compensation and/or reasonable justification. In this regard, the Applicant relies on the law outlined under the first cause of action, above. The Minister has confirmed in his evidence that he and the Government proceeded on the understanding that there is no legal obligation for provide compensation from public funds for property that becomes prohibited by law: Nash [20]. And he was briefed (wrongly, in the Applicant's submission) that an amendment to the Act would be required to

provide compensation for ammunition.[155] So, as he apparently believed this principle did not exist, he failed to take into account.[156]

(c) Part 4 of Chapter 4 of the Legislation Design and Advisory Committee's Legislation Guidelines (2018 edition), which provides that central government powers should not take a person's property without good justification, that a rigorously fair procedure is required, that proper compensation should generally be paid, and that there must be a cogent policy justification if compensation is not to be paid. There is nothing to indicate that the Minister specifically considered this aspect of the Guidelines, nor is there any indication of a "cogent policy justification" for not paying providing compensation generally in relation to the prohibited ammunition. The Minister's reasons for not offering compensation appears to have been that the value of ammunition is much smaller by comparison to firearms and "significant economic disadvantage would only occur for persons who had stockpiled military ammunition that had no civilian use": Nash [22].

(d) Relevant international norms,[157] including on the right to property and the requirement to pay reasonable compensation where property is taken. Professor Joseph notes that "the embrace of international human rights values is a universal one throughout the common law world".[158] The Applicant relies on art 17 of the Universal Declaration of Human Rights, which provides that:

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155 Police Briefing Paper for the Minister of Police at [270] **[CB2-270, tab 6]**.

156 The Applicant considers that this would also justify a separate judicial review ground based on an error of law as, if the principle is accepted by this Court, the Minister was not properly directed in law. It is, however, well established that judicial review grounds can be expressed in different ways, and when expressed separately, often overlap. See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [36] and, in particular, at [55] where the Court noted "the particular ground of judicial review on which this finding is made is secondary to the finding itself". See also *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 229 and *Edwards v Bairstow* [1956] AC 14 (HL) at 29 and 35–36.

157 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266 and 516. See further Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [22.12] and the authorities discussed therein.

158 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [22.12]. See further *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 658–661.

i Everyone has the right to own property alone as well as in association with others.

ii No one shall be arbitrarily deprived of his property.

The preamble of the Declaration proclaims the Declaration as a "common standard of achievement for all peoples and all nations". It is further noteworthy that New Zealand, in fact, played a key part in the creation of the Universal Declaration.[159] There is nothing to indicate the Minister considered this in recommending (what is in the Applicant's submission) the arbitrary deprivation of property.

(e) Other avenues through which the Government could provide compensation in respect of prohibited ammunition outside of the process envisaged in Schedule One to the Arms Act 1983. In this regard, the Minister was wrongly advised that an amendment to the Arms Act would be required to provide compensation in respect of ammunition.[160]

Ground two: The Minister acted for an improper purpose / asked the wrong questions / had regard to irrelevant considerations

9.5 In making the No Compensation Recommendation, the Minister failed to have regard to the purposes referred to in [9.4(a)], above, but improperly and irrelevantly focused on recovering from civilian ownership any types of ammunition used by the military and/or similarly asked himself the wrong questions and/or had regard to irrelevant considerations (i.e. other than those set out in [9.4], above).

Ground three: The Minister acted irrationally and/or arbitrarily

9.6 In making the No Compensation Recommendation, the Minister acted irrationally and/or arbitrarily because:

(a) The Minister was not sufficiently informed to have any rational basis to make the No Compensation Recommendation because of the omission to consider the factors set out in [9.4], above.

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159 See Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1.

160 Police Briefing Paper for the Minister of Police at [270] **[CB2-270, tab 6]**.

(b) The Minister failed to recognise and/or give weight to the principle that private property should not be taken by the Government without paying reasonable compensation and/or having reasonable justification. This principle is discussed in detail under the first cause of action, above.

Ground four: The Order is invalid

9.7 The Order is invalid because for the reasons stated in [9.4]–[9.6], above:

(a) The Minister's recommendation against compensation is flawed for the various reasons traversed. This tainted the Order, which practically brought the Minister's recommendation into effect by prohibiting the prohibited ammunition, crystallising the government's failure to provide compensation.

(b) The Governor-General followed a flawed and invalid recommendation from the Minister.

9.8 The Applicant submits essentially that the Minister

The Court should make the declarations sought

9.9 The Applicant submits that the Court should exercise its discretion to make the following declarations:

(a) The No Compensation Recommendation is invalid.

(b) By reason of the invalidity of the No Compensation Recommendation, the Arms (Prohibited Ammunition) Order 2019 is invalid.

9.10 It is submitted that the making of these declarations naturally follows if the Applicant succeeds under any of the grounds of review advanced under this cause of action. In support of this, the Applicant refers to the discussion above at [7.35].

10. CONCLUSION

On the basis of the preceding submissions and on any one or more of the grounds pleaded, the Applicant respectfully seeks the following relief:

10.1 Under the first cause of action, declarations that:

(a) The effect of the Order and Regulations is to deprive lawful owners of property rights in relation to the "prohibited ammunition" without express compensation rights.

(b) The Order and Regulations incorporate or leave intact the general common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to receive compensation for the deprivation of such rights.

(c) Every person lawfully owning "prohibited ammunition" upon the commencement of the Order is entitled to full compensation for the value of such ammunition upon its provision to the Police or destruction or other disposal by or at the direction of the Police or otherwise to avoid liability under s 43AA of the Act, since the commencement of the Order.

10.2 Under the second cause of action, declarations that:

(a) The Definition Recommendation is invalid to the extent that it included the Challenged Ammunition as prohibited ammunition.

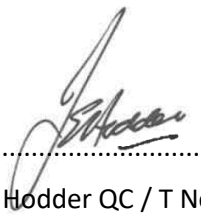
(b) The Arms (Prohibited Ammunition) Order 2019 is invalid to the extent that it prohibits the Challenged Ammunition.

10.3 Under the third cause of action (alternative to first), declarations that:

(a) The No Compensation Recommendation is invalid.

(b) By reason of the invalidity of the No Compensation Recommendation, the Arms (Prohibited Ammunition) Order 2019 is invalid.

10.4 An order as to costs.



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JE Hodder QC / T Nelson
Counsel for the applicant

11. APPENDIX – CHRONOLOGY OF KEY EVENTS

Date[161]	Event	Common bundle
15.03.2019	Mass shooting occurs in Christchurch. - This has been widely and consistently reported and understood as involving one individual using one or more semi-automatic firearms.	–
18.03.2019	Cabinet makes several in-principle decisions to amend the Arms Act 1983.	CB2-036
–	Minister of Police Paper: Arms Act 1983 Reforms – Paper 1 (**Paper 1**). This paper included the following propositions: - The dual purpose of the reforms to the Act and its associated regulations was to cater for the safe and responsible use of firearms and to significantly mitigate the risk of harm in the misuse of firearms: [2]. - The establishment of "a ban on military-style (e.g. armour piercing) ammunition to accompany the banning of assault rifles": [4.4]. - That "armour piercing, incendiary, tracer and similar types of military ammunition" are "designed primarily for combat use" and that there was "no justifiable reason for its civilian use in New Zealand": [37]. - That "given the wider policy to prohibit weapons that can cause mass casualties and harm", "these forms of ammunition that can contribute to this harm" should be prohibited: [38]. - Ammunition would not be included in the buy-back scheme, but it would be included in the amnesty from prosecution to enable people to hand it over to Police: [38].	CB2-001
25.03.2019	Cabinet Minute of Decision.	CB2-036
–	Minister of Police Paper: Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill: Approval for Introduction (**Approval Paper**). - The Minister proposed that a better process to give effect to a ban on prohibited ammunition would be to define prohibited ammunition to be any ammunition declared to be prohibited by the Governor General by Order in Council: [9]. - The Minister asserted that this was appropriate as the definition of prohibited ammunition is technically complex, requires flexibility in light of technological developments and required input from experts and key stakeholders: [35].	CB2-039
01.04.2019	Cabinet Minute of Decision.	CB2-047

[161] Some documents are undated. Where this is the case, the chronological position has been approximated based on context.

Date[161]	Event	Common bundle
	- Approves introduction of the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (125–1). - Cabinet agreed that instead of using regulations to prohibit ammunition, a better process to give effect to the ban was that suggested by the Minister and approved the Bill for introduction.	
02.04.2019	First reading: Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill.	–
05.04.2019	Police provides Interim Report to the Finance and Expenditure Committee.	–
08.04.2019	Finance and Expenditure Committee Report on the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill.	–
09.04.2019	Second reading: Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill.	–
10.04.2019	Third reading: Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill.	–
11.04.2019	Royal assent: Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019.	–
12.04.2019	Into force: Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019.	–
03.05.2019	Defence Technology Agency advice to Police (email and telephone calls).	–
03.05.2019	Police Briefing Paper for the Minister of Police. Among other things, the Paper stated that: - An amendment to the Act would be required to provide compensation for ammunition: [270]. - The Amendment Act had "provided for a prohibition to apply to military style ammunition that has no legitimate civilian use" and that "the new legislation did not define military-style ammunition": [262].	CB2-050
–	Minister of Police Paper: Paper seeking approval to introduce the Order and the Amendment Regulations (June 2019 Paper). The Minister sought approval to submit the following to the Executive Council: - The Arms (Prohibited Ammunition) Order 2019 (the Order). - The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019 (the Amendment Regulations).	CB2-134
07.06.2019	Police Regulatory Impact Assessment. That report, among other things, stated: - The Order and the Regulations implemented the Government's intention to increase the safety and security of New Zealanders by reducing the risk of death or injury from high risk ammunition: p 1. This was to be accomplished by	CB2-107

<table>
<tr><th>Date[161]</th><th>Event</th><th>Common bundle</th></tr>
<tr><td></td><td>declaring, through the Order, that certain types of ammunition with no valid civilian purpose were prohibited: p 1.
- There would be no compensation for prohibited ammunition: p 3.
- The key criteria used to assess whether a particular type of ammunition should be prohibited was whether, in the views of the Police and the NZDF, there was no valid civilian use: p 15.
- The final list represented those types with no valid civilian use: p 15.
- Police did not know the level of “high-risk ammunition” currently in New Zealand because these items did not need to be registered: p 12.</td><td></td></tr>
<tr><td>11.06.2019</td><td>Cabinet Legislation Committee Minute of Decision. The Committee considered the June 2019 Paper.</td><td>CB2-150</td></tr>
<tr><td>17.06.2019</td><td>Cabinet Minute of Decision. Cabinet considered the June 2019 Paper and authorised the submission of the Regulations and the Order to the Executive Council.</td><td>CB2-151</td></tr>
<tr><td>–</td><td>The Minister made the Definition Recommendation and the No Compensation Recommendation to the Executive Council and the Governor-General.</td><td>–</td></tr>
<tr><td>19.06.2019</td><td>Arms (Prohibited Ammunition) Order 2019. The Governor-General made the Order in Council on the Minister’s recommendation.
The Order declared various types of ammunition prohibited, including the Challenged Ammunition:
<table><tr><th>Ammunition</th><th>Description</th></tr><tr><td>Tracer ammunition</td><td>Projectiles containing an element that enables the trajectory of the projectiles to be observed</td></tr><tr><td>Enhanced-penetration ammunition</td><td>Projectiles that have a steel or tungsten carbide penetrator intended to achieve better penetration</td></tr></table></td><td>CB2-154</td></tr>
<tr><td>19.06.2019</td><td>Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019. The Governor-General made the Regulations by Order in Council on the Minister’s recommendation.</td><td>CB2-157</td></tr>
<tr><td>21.06.2019</td><td>The Arms (Prohibited Ammunition) Order 2019 came into force.</td><td>–</td></tr>
<tr><td>27.08.2019</td><td>Defence Technology Agency Technical Memorandum.</td><td>CB2-186</td></tr>
<tr><td>14.10.2019</td><td>Arms (Prohibited Ammunition) Amendment Order 2019.</td><td>CB2-194</td></tr>
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