IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2019-485-676
[2020] NZHC 1456

UNDER	the 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 OF LICENSED FIREARMS OWNERS INCORPORATED Applicant
AND	MINISTER OF POLICE First Respondent
	GOVERNOR-GENERAL Second Respondent

Hearing: 4 and 5 May 2020

Appearances: J E Hodder QC and T Nelson for the Applicant
A Powell and C Tocher for the Respondents

Judgment: 25 June 2020

JUDGMENT OF COOKE J

Table of Contents

[1] On 15 March 2019 a gunman entered two mosques in Christchurch and engaged in a mass shooting. He was apprehended and subsequently charged with 51 counts of murder, 40 counts of attempted murder, and one count of committing a terrorist act.[1]

[2] The reaction to this event was one of national shock. There was widespread disbelief that an event of this kind could happen in New Zealand. The response of the Government, and the community at large, was immediate. There was a widespread expression of concern for, and solidarity with the Muslim communities of New Zealand. The day following the shooting the Prime Minister announced that New Zealand's firearms laws would need to change. Two days later the Cabinet made several in principle decisions to amend the Arms Act 1983 (the Act). On 21 March 2019 certain military style semi-automatic firearms were banned by Order in Council as an interim measure.[2] On 2 April 2019 the Arms (Prohibited Firearms, Magazines and Parts) Amendment Bill was then introduced to the House of Representatives. The Bill was reported back from the Finance and Expenditure Committee six days later. It received its second reading the following day, and the third reading the day after. It was passed almost unanimously. It received the Royal assent on 11 April 2019 (the Amendment Act). This was a significant legislative response enacted within a month of the shooting.

[3] The Amendment Act introduced a prohibition on semi-automatic and similar firearms, together with associated parts. Offences were introduced for processing such

---

1 At the time of this judgment he has entered guilty pleas to this offending, and awaits sentencing.
2 Arms (Military Style Semi-Automatic Firearms) Order 2019.

firearms and parts. It introduced an amnesty period, and a buy-back scheme for such firearms and parts under which those who owned them could hand them in and receive compensation. At the same time the Amendment Act created a prohibition on certain types of ammunition, described as "prohibited ammunition" which was to be identified by an Order in Council subsequently made. Unlike the firearms and associated parts, the measures concerning ammunition did not involve a buy-back scheme, but did contemplate an amnesty period.

[4] These proceedings challenge aspects of the measures that have been introduced in relation to prohibited ammunition. It is alleged that they involve depriving those who lawfully owned property of that property without compensation in breach of fundamental common law rights. There are also judicial review challenges to the Order in Council that prescribes what prohibited ammunition is, and to the decision not to provide compensation to the owners of that ammunition.

[5] As Mr Hodder QC emphasised in advancing the submissions for the applicant, the Court provides an important role in cases of this kind. The measures described above were adopted with extreme haste in the context of community outrage given the mass murder of innocent New Zealanders. The applicant represents a minority group adversely affected by these measures. The Court must ensure that the rights of the members of the community that are part of this minority, and the rule of law, have been properly respected in the face of these circumstances.[3]

THE CLAIMS

[6] The applicant is a well-established incorporated society made up of 12 organisations involved in the use, ownership and regulation of firearms. It has a Board of 10 members. It advances three principal claims:

(a) That the measures implemented by the Crown deprived the owners of prohibited ammunition of their property without compensation in breach of the common law right to such compensation. It seeks

---

[3] Reliance was placed on the powerful words of Lord Atkin in his dissent in *Liversidge v Anderson* [1942] AC 206 (HL) at 244–245.

declarations, including declarations that such compensation now be paid.

(b) That the decision leading to the Order in Council defining "prohibited ammunition" was invalid on judicial review grounds. It seeks declarations that both the relevant decision and consequential Order in Council are invalid.

(c) That the decision made by the Minister of Police not to recommend that no compensation be paid in relation to prohibited ammunition was invalid on judicial review grounds. It seeks declarations that the recommendation was invalid, and that the Order in Council is consequently invalid.

[7] The claim is supported by affidavit evidence from:

(a) Mr Michael Dowling, the Chair of the applicant who gives evidence of its nature and role, and the limited consultation undertaken before the new measures were introduced.

(b) Ms Nicole McKee, the applicant's secretary, and experienced competitive shooter who gives evidence of the prior civilian use of categories of prohibited ammunition, and the adverse financial impact arising from the measures.

(c) Mr Rodney Woods, an experienced gunmaker and collector who gives expert evidence on the difficulties with the definition of prohibited ammunition, the legitimate civilian uses and the capacity of the categories of prohibited ammunition for doing harm.

(d) Professor Michael Reade, a professor of military medicine and surgery at the University of Queensland, Australia who gives expert evidence on the capacity for types of prohibited ammunition to do harm compared with other ammunition.

[8] The evidence from the respondents is provided by:

(a) The Honourable Stuart Nash, the Minister of Police (the Minister) who describes the implementation of the measures, and the reasons for them.

(b) Mr Andrew Coster, now Commissioner of Police, who was involved on behalf of the Police in providing recommendations and information for the decision-making processes.

(c) Ms Amy Pullen, a research engineer and recognised expert in firearms with the New Zealand Defence Force who gives evidence on the input into the definition of prohibited ammunition, and expert evidence on the topics addressed by the applicant's expert evidence.[4]

THE LEGISLATION

[9] The regulation of firearms in New Zealand has received ongoing attention over the years. There have been three principal firearms Acts; the Arms Act 1920, the Arms Act 1958, and the present Act enacted in 1983.

[10] After the enactment of the Act concerns in relation to firearms control developed due to criminal activity in New Zealand. In 1990 the then Police Commissioner sought to introduce a ban on the importation of military style semi-automatic weapons by administrative means. But this initiative was set aside by the High Court in *Practical Shooting Institute (NZ) Inc v Commissioner of Police* as inconsistent with what was contemplated by the Act.[5]

[11] Following the Aramoana tragedy in the same year, when 13 people were shot by a gunman, further consideration was given to changing the law and amendments

---

4 Some of the affidavit evidence was received by the Court following exercise of the Court's power under r 9.73(5) of the High Court Rules 2016 as amended by the High Court (COVID-19 Preparedness) Amendment Rules 2020. In doing so I did not apply an exacting approach to whether the usual requirements for formalising affidavits would cause unacceptable delay or endanger the health and wellbeing of any person given the apparent purpose of the amended rule.

5 *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC). The Court held that the Commissioner's new policy unlawfully fettered the discretion contemplated by the Act.

were introduced by the Arms Amendment Act 1992. The amendments did not prohibit military style semi-automatic weapons but tighter controls were introduced.[6] Then in 1996 the Minister of Police sought an independent review. This was conducted by retired High Court Judge Sir Thomas Thorp, whose findings were presented on 30 June 1997.[7] One of the matters considered by him was whether there should be a complete ban on military style automatic firearms, and a buy-back of those weapons of the kind as had been introduced in Australia. Sir Thomas concluded that there should be such a ban, and that there should also be a buy-back scheme.[8] That recommendation was not followed, however.

[12] Approximately 10 years later the Law and Order Committee of Parliament began an inquiry into issues relating to the illegal possession of firearms in New Zealand. Its report was completed in April 2017.[9] The focus of the inquiry was a concern about the potential number of unlawfully held firearms in New Zealand, particularly by gangs. The Committee again considered the question of introducing a buy-back scheme for military style semi-automatic firearms and decided "on balance it appears that the risks and costs of implementing a buy-back programme outweigh the identifiable benefits".[10] Apart from a reference to the Aramoana tragedy there was no reference in the report to the issue of mass shootings.

[13] This background shows that mass shootings of a kind that had occurred overseas were not judged to warrant a ban on semi-automatic firearms in New Zealand prior to the shocking events of 15 March 2019. In essence the Amendment Act made it unlawful to possess a particular category of firearms and associated equipment, as well as certain ammunition. Under the Act as it stood there was a power to declare weapons as restricted weapons by Order in Council under s 4. This statutory pathway was not used, however.[11] Rather as a consequence of the amendments semi-automatic

---

6 See *Kiwi Party Inc v Attorney-General* [2020] NZHC 1062 at [7]–[15].

7 Thomas Thorp *Review of Firearms Control in New Zealand: Report on an Independent Inquiry commissioned by the Minister of Police* (GP Print, June 1997).

8 Recommendation 4.1.

9 Law and Order Committee *Inquiry into Issues relating to the illegal possession of firearms in New Zealand* (April 2017, 1.8A).

10 At 21.

11 Prior to the passage of the Amendment Act, on 21 March 2019 certain military style semi-automatics could not be possessed as a temporary measure under the Arms (Military Style Semi-Automatic Firearms) Order 2019.

firearms and certain pump-action shotguns were prohibited by the legislation itself. They were defined in a new s 2A with further definitions of prohibited magazines and prohibited parts contained in ss 2B and 2C.

[14] The Amendment Act also introduced a prohibition on certain ammunition. That ammunition was not identified by the Act itself. The section said:

> **2D Meaning of prohibited ammunition**
>
> In this Act, prohibited ammunition means any ammunition declared by the Governor-General by Order in Council made under section 74A to be prohibited ammunition for the purposes of this Act.

[15] The new s 74A provided:[12]

> **74A Order in Council relating to definitions of prohibited firearm and prohibited magazine, and declaring prohibited ammunition**
>
> The Governor-General may, by Order in Council made on the recommendation of the Minister of Police,—
>
> (a) amend the description in section 2A of a semi-automatic firearm (except a pistol) or pump-action shotgun that is a prohibited firearm:
>
> (b) amend the description in section 2B of a magazine that is a prohibited magazine:
>
> (c) declare any semi-automatic firearm (except a pistol) or pump-action shotgun of a stated name or description to be a prohibited firearm for the purposes of this Act:
>
> (d) declare any magazine of a stated name or description to be a prohibited magazine for the purposes of this Act:
>
> (e) declare any ammunition to be prohibited ammunition for the purposes of this Act.

[16] In this way the Act defined the prohibited firearms magazines and parts, albeit that these definitions could later be amended by Order in Council. But the definition of prohibited ammunition was to be given by Order in Council later promulgated. The need to subsequently identify, or amend such definitions may reflect the difficulty with

---

[12] Under s 74B the Order in Council made under these provisions was determined to be a confirmable instrument under s 47B of the Legislation Act 2012. This did not give the Order in Council legislative force, but simply prevented the Order lapsing if confirmed.

dealing with technical matters of this kind within the very tight timeframes contemplated for the passage of the Amendment Act.

[17] The Amendment Act introduced new offences. Under s 44A it is an offence to sell or supply a prohibited firearm or prohibited magazine, and under s 44B it is an offence to sell or supply a prohibited part. Under ss 50A–50C offences were created for possessing prohibited firearms, magazines and parts. Other related offences were created. In relation to prohibited ammunition the following new offence was introduced:

> **43AA Possessing, selling, or supplying prohibited ammunition**
>
> Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 2 years who, without reasonable excuse,—
>
> (a) possesses prohibited ammunition; or
>
> (b) sells or supplies prohibited ammunition.

[18] The legislation also recognised that there would need to be transitional arrangements for bringing into effect the new regime. They had three aspects: the creation of an amnesty period; the introduction of a buy-back scheme under which the Crown acquired prohibited items; and the introduction of a discretion in relation to prosecution.

[19] The discretion in relation to prosecution was set out in the following terms:

> **59B Voluntary delivery to Police of firearms, etc**
>
> (1) If any firearm, airgun, restricted weapon, prohibited item, or prohibited ammunition is delivered to the Police by a person who is not authorised to be in possession of it, it is affirmed that the Police have the discretion not to prosecute where the offence is considered to be one of possession only and there is no public interest in proceeding with the prosecution.
>
> (2) *See also* Schedule 1 (which contains amnesty provisions).

[20] The amnesty and buy-back aspects were dealt with in the Act in introductory terms only. Section 3A provided:

> **3A Transitional, savings, and related provisions**
>
> The transitional, savings, and related provisions set out in Schedule 1 have effect according to their terms.

[21] Schedule 1 then set out certain provisions in relation to "prohibited items", including the temporary amnesty under cl 6, and a regulation making power concerning compensation under cl 7. The amnesty period was defined to last from 21 March 2019 until six months after the regulations were promulgated, or at a later date prescribed by Order in Council.[13] Clause 7 provided:

> **7 Regulations establishing compensation for delivery of prohibited items to Police**
>
> (1) The Governor-General may, by Order in Council made on the recommendation of the Minister of Police, make regulations establishing 1 or more schemes for the purpose of paying compensation in respect of prohibited items that, during the amnesty period or any other specified period or periods, are delivered or otherwise surrendered to a member of the Police.
>
> …
>
> (4) To avoid doubt, regulations made under subclause (1) need not include compensation for—
>
> (a) any economic loss; or
>
> (b) any consequential loss; or
>
> (c) any loss for business interruption; or
>
> (d) any loss attributable to intrinsic or sentimental value.

[22] The fact that the details of the amnesty and compensation scheme were to be set by new regulations may again reflect the potential difficulty of dealing with the more technical issues in the condensed timeframe contemplated for passing the Act.

[23] Significantly the Act defined "prohibited item" in the following way:

> **prohibited item** means a prohibited firearm, a prohibited magazine, a prohibited part, or any or all of those things, as the case requires.

---

13 Clause 1 of Schedule 1.

[24] This definition excluded prohibited ammunition from the scope of prohibited items. This meant that the amnesty and compensation provisions set out in the Schedule did not apply in relation to prohibited ammunition. The only transitional protection granted to those who possessed such ammunition under the Act was under s 59B — they could be the beneficiary of a decision by the police not to prosecute if the ammunition was surrendered to police.

[25] The Arms (Prohibited Firearms, Magazines and Parts) Amendment Regulations 2019 (the Regulations) were promulgated on 19 June 2019. They provided details on the amnesty and compensation regime. Importantly these regulations introduced an amnesty in relation to the possession of prohibited ammunition of the same kind introduced in the Act for prohibited items (r 28Z).

[26] On the same day the Arms (Prohibited Ammunition) Order 2019 (the Order in Council) was promulgated providing the definition of prohibited ammunition as contemplated by ss 2D and 74A(e) of the Act. It defined 10 categories of prohibited ammunition which were described in the Schedule to the Order. Two such categories are challenged in this proceeding by the applicant — Tracer Ammunition described in the Schedule as "projectiles containing an element that enables the trajectory of the projectiles to be observed", and Enhanced-Penetration Ammunition described as "projectiles that have a steel or tungsten carbide penetrator intended to achieve a better penetration".

[27] As indicated, the Amendment Act introduced the kind of buy-back scheme for prohibited items that had previously been recommended in the 1997 Thorp Report, but not recommended in the 2017 Law and Order Committee Report. By way of completeness, however, it should be noted that the Act had pre-existing compensation provisions that could apply in certain circumstances. These were not changed by the amendments and the new Regulations. Under s 13 any member of the police authorised by the Commissioner could seize "all or any firearms, ammunition, airguns, pistols, prohibited items, or restricted weapons" in the possession of a licensed dealer. There were no statutory prerequisites for that seizure. Under s 13(4) such seized material could be detained for such as period as the Commissioner thought fit or could "become the property of the Crown" free of any encumbrances as described. Under

s 13(5) the person was entitled to compensation if the seized material became the property of the Crown.

[28] Further under s 28 compensation was payable whenever there was a revocation or surrender of a firearms licence and a delivery of the firearms and associated equipment to police. In addition under s 37 a person who surrendered a weapon that had been defined as a restricted weapon by Order in Council under s 4 was entitled to compensation under s 37(3) if they surrendered the weapon within one month and had lawfully acquired the weapon in the first place. Under s 63 there is a right of appeal to a District Court Judge in respect of any issue of compensation provided for under the Act. Similar statutory provisions contemplating compensation can be found in both the earlier statutory regimes — the Arms Act 1958, and the Arms Act 1920.

FIRST CLAIM: BREACH OF COMMON LAW RIGHTS TO PROPERTY

[29] The applicant seeks declarations that there has been a breach of the common law right not to be deprived of property without compensation. It seeks declarations that the rights have been infringed, and effectively requiring the Crown to provide compensation.

[30] In order to address the arguments advanced in relation to this claim three matters need to be addressed:

(a) What is the nature and scope of the right in question?

(b) Was this right engaged by the actions taken by the Crown here?

(c) Did Parliament exclude that right?

The common law right to property

[31] The common law right relied on by the applicant is addressed in a number of decisions. The leading consideration of the principle in New Zealand is in the decision

of the Supreme Court in *Waitakere City Council v Estate Homes Limited*.[14] The Supreme Court described the principle in the following terms:[15]

> 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.

[32] The Supreme Court concluded that this right was not engaged as a consequence of a condition of a resource consent that the applicant surrender land for the purposes of creating a road that would be vested in the Council.

[33] The right has considerable pedigree. Its origins can be found in the writings of Grotius, who referred to it as the right of "eminent domain".[16] It is within the Magna Carta in relation to interests in land.[17] It is also reflected in the written constitutions of other countries, including in the Fifth Amendment to the United States Constitution, and s 51(xxxi) of the Constitution of the Commonwealth of Australia. Article 1 Protocol 1 of the European Convention on Human Rights also contains a version of the right. And it is also recognised as a common law principle in decisions of the Courts of the United Kingdom, such as the decision of the House of Lords in *Burmah Oil Ltd v Lord Advocate*,[18] and of Canada, such as the decision of the Supreme Court of Canada in *Manitoba Fisheries Ltd v R*.[19]

[34] The right can properly be described as a constitutional principle. The way in which such common law principles operate in New Zealand's constitution was described by the United Kingdom Supreme Court in *R (Miller) v Prime Minister* in relation to their equivalent constitutional arrangements:[20]

> [39] Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further

---

14 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

15 At [43] quoting from the Court of Appeal judgment *Estate Homes Ltd v Waitakere City Council* [2006] NZLR 619 (CA) at [128].

16 See *Burmah Oil Company (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 (HL) at 108 [*Burmah Oil*], citing Hugo Grotius *De Jure Belli ac Pacis* (Carneige ed, 1913) at 807.

17 Magna Carta (1297) 25 Edw 1, cl 29; and Imperial Laws Application Act 1988, sch 1.

18 *Burmah Oil*, above n 16.

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

20 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

> development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.
>
> [40] The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with an Act of Parliament, and that the Government cannot search private premises without lawful authority. Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public (*Scott v Scott* [1913] AC 417), and the principle of the separation of powers between the executive, Parliament and the courts: *Exp Fire Brigades Union* [1995] 2 AC 513, 567-568. In their application to the exercise of governmental powers, constitutional principles do not apply only to powers conferred by statute, but also extend to prerogative powers. For example, they include the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation: *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

[35] This list of relevant principles and cases may have been a little different in New Zealand precisely because we engage in our own flexible and pragmatic constitutional development. For example, a New Zealand list would likely require some reference to the principles of the Treaty of Waitangi. But otherwise it seems to me that the passage accurately describes the operation of the New Zealand constitution.

[36] The reference to the property right principle as outlined in *Burmah Oil* in the concluding words of this passage concerned the exercise of prerogative powers. But it is equally applicable to the exercise of discretionary powers, such as those under statute or regulation. In that context there is a presumption of statutory interpretation that Parliament must legislate clearly if it is to remove the right.[21]

[37] Mr Powell for the respondents made reference in his written submissions to the observations of Baragwanath J that this right was of a "lower echelon" compared with other rights recognised in the New Zealand Bill of Rights Act 1990 (NZBORA) and

---

[21] See *Waitakere City Council v Estate Homes Ltd*, above n 14, at [43] and [46].

the common law.[22] I respectfully do not agree that this can be treated as some lower form of right. The right is not one of those set out in NZBORA. But that does not mean it does not exist, or that it has a lower status. Section 28 of NZBORA makes it clear that an existing right or freedom will not be held to be abrogated or restricted by reason only that it is not included within it. This reflects the fact that there are some fundamental rights that do not depend on legislative recognition, as the United Kingdom Supreme Court effectively said in *Miller*.[23] Indeed it is strongly arguable that there are some principles of the unwritten constitution that even Parliament could not override.[24] For example it is questionable whether an Act which purported to abolish Parliament, or abolish the Courts would be regarded as lawful. New Zealand's constitutional system of checks and balances has at its apex the rule of law as well as the sovereignty of Parliament.

[38] But as McGechan J observed in *Westco Lagan Ltd v Attorney-General* the right to property is not within the ambit of any such limits on any extreme exercises of Parliamentary power.[25] This is recognised in some formulations of the right, which refer to it as a right to compensation only to the extent that Parliament has not clearly abrogated it. Contrary to Mr Powell's written submissions the right accordingly falls within what is referred to as the "principle of legality", described by Lord Hoffmann in *R v Secretary of State for the Home Department, ex-parte Simms*.[26] As Elias CJ has indicated, this was a long-standing principle of interpretation before this particular label was attached to it.[27] As she formulated it:

> [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. …

---

22 *Mihos v Attorney-General* [2008] NZAR 177 (HC) at [93].

23 *R (Miller) v Prime Minister*, above n 20.

24 See *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [102] per Lord Steyn, [104] per Lord Hope, and [159] per Baroness Hale; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; and *L v M* [1979] 2 NZLR 519 (CA) at 527. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [15.7.4].

25 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91]. See also [39] and [95].

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

27 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [293], citing Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017) at 718–719.

[39] In any event in his oral submissions Mr Powell accepted that there was a relevant principle concerning the right to property resulting in a common law presumption of interpretation. His main argument focused on the identification of the scope of that principle, which he contended was limited to the principle of eminent domain.

The extent of the right

[40] The main contest between the parties on this issue concerns the scope of the right. In particular Mr Powell argued that the right was not engaged in the present circumstances as the measures involved a prohibition on the possession of particular items of property, with an offence enacted for possessing that property. That did not involve the compulsory acquisition or confiscation of property, but rather the State exercising governmental functions to decide what property could be lawfully possessed.

[41] Identifying the true scope of the right, and its limits, is not straightforward. The authorities have used differing language to describe it. Mr Powell relied on those that appear to limit the principle to cases of compulsory acquisition. For example *Attorney-General v DeKeyser's Royal Hotel Ltd* involved the Crown taking possession of a hotel as a military headquarters.[28] Here Lord Atkinson said that the principle was that the Crown must pay for property that it "takes from one of its subjects" or which is "confiscation".[29] Similar language was used by the Supreme Court in *Waitakere City Council* where the Court held that the principle applied "only if there is actually a taking".[30] In that case, however, the true contest was whether the requirement to transfer the land for the road was a "forced acquisition", with the Court concluding that the developer "was not required to transfer its land" as it retained the choice whether to proceed with the development with that condition or not.[31]

---

28 *Attorney-General v DeKeyser's Royal Hotel Ltd* [1920] AC 508 (HL).
29 At 542.
30 *Waitakere City Council v Estate Homes Ltd*, above n 14, at [46].
31 At [51]–[53].

[42] The jurisprudence from Australia in relation to the provisions of its Constitution also supports Mr Powell's argument. In *Mutual Pools and Staff Pty Ltd v the Commonwealth* Deane and Gaudron JJ stated:[32]

> [Section] 51(xxxi) is directed to "acquisition" as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an "acquisition of property", there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the property rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as the result.

[43] Those observations were nevertheless made in the context of the formulation of the right in the Australian Constitution, which directly uses the word "acquisition". When the right has been adopted in written instruments there are subtly different formulations. No one instrument can be identified as the true version.

[44] In advancing his argument Mr Hodder referred to the concept of "deprivation" rather than acquisition, and there is also support for that approach. For example in *Burmah Oil* the appellant's stocks of crude oil and oil products in what was then known as Burma were destroyed by the Crown on the outbreak of war between the United Kingdom and Japan because of a fear that they would fall into enemy hands.[33] The House of Lords held that the principle applied. Furthermore in *British Columbia v Tener* the Supreme Court of Canada applied the principle when the province of British Colombia prohibited any new exploitation of underground minerals over which the applicant had rights in order to preserve the natural features of a provincial park.[34] The Supreme Court accepted that the principle was concerned with deprivation and not "injurious affection". But it rejected the argument that the measures imposed were injurious affection or regulation which did not amount to deprivation, and it distinguished the situation from land zoning which it saw as regulatory.[35]

---

32 *Mutual Pools and Staff Pty Ltd v the Commonwealth* [1994] HCA 9, (1994) 179 CLR 155 at 185 (footnotes omitted). See also *J T International SA v Commonwealth* [2012] HCA 43, 291 ALR 669 for a more recent analysis involving similar issues.

33 *Burmah Oil*, above n 16.

34 *British Columbia v Tener* [1985] 1 SCR 533.

35 Per Wilson J at 549–550, and Estey J at 564–565.

[45] Both sides advanced factors they contended were decisive. Mr Hodder proposed that the complete elimination of the property interest identified the relevant dividing line. But that does not appear to be so — in *DeKeyser's Hotel*, for example, the owner of the hotel was to get the hotel back after its period of use.[36] Mr Powell argued that there had to be some transfer of benefit to the Crown before the principle was engaged. But that can occur even in the case of prohibition — as the Supreme Court held in *Tener*, depriving the owner of the ability to exploit the underground minerals added considerably to the public benefit associated with the park. And in the present case the very reason for prohibiting possession of the firearms and ammunition is overtly for the wider public benefit.

[46] So the authorities have used differing language and concepts to identify the principle. No one verbal formulation can be treated as the touchstone.[37] Nevertheless I accept the principle is not limited to cases of confiscation, compulsory acquisition or similar transfers. At its heart the principle recognises a fundamental principle of individual liberty. It does not exist to prevent unjust enrichment by the Crown. So in the borderline situations when the scope of the right is in issue the focus should be on the impact on the person being deprived of property by the Crown.

[47] More recent authority has elaborated on the situations where governmental measures having adverse impacts on property interests do, and do not engage the principle. Considering these cases perhaps provides the most guidance. In *R (British American Tobacco UK Ltd) v Health Secretary*, the Court of Appeal of England and Wales rejected the argument that regulatory restrictions requiring the plain packaging for tobacco products deprived the tobacco companies of the intellectual property rights either under Article 1, Protocol 1 to the European Convention on Human Rights, or the common law principle.[38] The decision is instructive in identifying a series of decisions recording measures that did and did not engage the principle set out in the

---

36 *Attorney-General v DeKeyser's Royal Hotel Ltd*, above n 28.

37 I note that the authors of a proposal for a written constitution in New Zealand formulate the right so that "deprivation by way of expropriation" requires compensation – Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal, Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 302. See also 167-168.

38 *R (British American Tobacco UK Ltd) v Health Secretary* [2016] EWCA Civ 1182, [2018] QB 149.

Convention.[39] The Court explained that the European Court of Human Rights, and the domestic courts regarded "one of the critical distinctions" as being between "deprivation on the one hand and control of use on the other".[40]

[48] That distinction was applied by the European Court of Human Rights in *Ian Edgar (Liverpool) Ltd v United Kingdom*.[41] Here the Court held that the right in the European Convention did not apply when a prohibition on handguns was introduced following the Dunblane massacre in Scotland. This had deprived the applicant of its business as a wholesale distributor of firearms. This is clearly the most factually comparable of the authorities. The Court held:[42]

> … In the present case, the Court considers that to the extent that any loss of business suffered by the applicant results from the prohibition on handguns, this interference with the applicant company's possessions amounts to a "control of use" rather than a de facto "deprivation of possessions".
>
> As to that "control of use", the Court recalls that the aim of Article l of Protocol No. l is to achieve a fair balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights, and that this concern to achieve a balance applies also to the second paragraph of Article 1 of the Protocol. There must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued …
>
> The overriding aim of the 1997 Amendment Acts, as expressed by the Government in their observations to the Court, was to seek to ensure public safety. They submit, further, that the judgment made by the Parliament of the United Kingdom was that both of the 1997 Amendment Acts were required for this purpose. The Court observes that the applicant company accepts that the prohibition on handguns enacted by the 1997 Amendment Acts is capable in principle of constituting a public interest within the meaning of the third sentence of Article 1 of Protocol No. 1. The Court concludes that the 1997 Amendment Acts were enacted in furtherance of an important public interest.

[49] That decision concerned the goodwill of the wholesale firearms business rather than the property interest in firearms themselves, and the Court noted that there had

---

39 So in *Pinnacle Meat Processors Co v United Kingdom* (1998) 27 EHRR 217 a ban on the sale of certain meat product following the BSE crisis, and in *R v Secretary of State for Health*, *Ex p Eastside Cheese Co* [1999] 3 CMLR 123 (CA) an order prohibiting dealing cheeses thought to be unsafe which destroyed two cheese producers businesses, were held not to engage the right. But in *NA v Turkey* (2005) 45 EHRR 9 the cancellation of title and the demolition of a hotel, and in *Papamichalopoulos v Greece* (1993) 16 EHRR 440 the use of land owned by the appellant by the Greek government as a holiday resort for naval officers, even though title was not taken, were held to engage the right.

40 At [93]. See also [125]–[129].

41 *Ian Edgar (Liverpool) Ltd v United Kingdom* [2000] 1 ECHR 465 (ECHR).

42 At 476–477.

been "no formal expropriation of any assets of the applicant company" or "de facto expropriation".[43] The decision also records there had been compensation to private owners and dealers in relation to the prohibited handguns themselves.[44] Moreover the particular formulation of the principle in the Convention required this line of analysis. But the analysis is nevertheless significant as it identifies that the ultimate contest is between governmental measures and the protection of private property rights. The verbal formulation of the principle referred to by the Supreme Court in *Waitakere City Council* likewise distinguishes between "expropriation" and the impact of the "general law".[45]

[50] It nevertheless remains difficult to identify a bright line test that distinguishes between what does, and does not engage the principle. Mr Hodder referred to a comprehensive review of the authorities by Professor Kevin Gray who has said:[46]

> The precise location of the threshold where regulation shades into confiscation (ie effects a "regulatory taking") is one of the most difficult questions of modern law.

[51] Ultimately there is a continuum with governmental regulation and controls having adverse effects on property interests at one end (which do not engage the principle) and compulsory acquisition or confiscation of property on the other (which does). The quest for a precise dividing line captured in a single verbal formulation is a fruitless one. I agree with the view of Viscount Simmons in *Belfast Corporation v O D Cars Ltd* who said:[47]

> My Lords, the distinction drawn between "regulating" and "taking" of "regulatory" and "confiscatory" will at once bring to mind the controversy to which … section 51 of the Australian Constitution has given rise … But, having … fully recognised the distinction that may exist between measures that are regulatory and measures that are confiscatory, and that the measure which is ex facie regulatory may in substance be confiscatory, I must add that … the question is one of degree and the dividing line is difficult to draw, yet I have no doubt that [the measure in that case] falls well on the regulatory side of it …

---

43 At 476.
44 At 469.
45 *Waitakere City Council v Estate Homes Ltd*, above n 14. See [31] above.
46 Kevin Gray "Can Environmental Regulation constitute a taking of property at common law?" (2007) 24 EPLJ 161 at 175.
47 *Belfast Corporation v O D Cars Ltd* [1960] AC 490 (HL) at 519-520.

[52] That decision concerned planning law limitations which are treated at the governmental end of the spectrum.

[53] Whilst it is ultimately a question of degree, the distinctions drawn in the cases and the factual matters regarded as central remain relevant to identifying whether the principle applies in a particular case. But there is not one single point that is decisive. All relevant factors referred to by the authorities can be relevant.

The present case

[54] In the present case there are three closely related features that suggest that the measures are regulatory, and do not engage the principle. In particular:

(a) The ownership, possession and use of firearms and related equipment is a heavily regulated activity.[48] There are detailed rules that control ownership and use, with those rules changing with changing circumstances, including developments with firearms, and evolving social expectations. There is nothing unusual about categories of firearms and associated equipment being prohibited as part of that regulatory scheme.

(b) Here a decision has been made that the possession of this particular type of property should be treated as an offence. That is a classic example of regulatory activity. I am unaware of any previous authority that has found that the principle is engaged when an offence is created to possess the property.[49]

(c) This category of property is inherently dangerous. Firearms have been created for causing harm, or at least obviously can do so. The exercise of controls over such a category of property might be said to be

---

48 In *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [32] the Court of Appeal said that "… in an area of business which has always been very closely regulated there cannot be an expectation that the regulatory regime will not change in the future" when finding the principle was not engaged by changes to gambling laws.

49 Note however in *Ian Edgar (Liverpool) Ltd v United Kingdom*, above n 41, at 469 the Court recorded that the 1997 legislation prohibiting possession of handguns also provided for a complementary regime for the payment of compensation to private individuals and dealers.

obviously regulatory, and not engage fundamental property ownership rights.

[55] There are, however, three significant countervailing considerations:

(a) Firearms and related equipment are items of tangible personal property. The property is not intangible intellectual property created by business operations, such as goodwill. They are personal possessions rather than property interests derived from such property.

(b) The close regulatory regime previously identified the property as authorised personal property, provided certain conditions were complied with. The removal of that categorisation for previously authorised firearms and associated equipment has retrospective effect. Retrospective removal of a right to own particular items of personal property can be regarded as particularly unfair.

(c) In order to give effect to such retrospective prohibition it has become necessary for the prohibited property to be surrendered to the authorities. The Crown takes ownership and possession. That is effectively a compulsory acquisition, or confiscation of that property.

[56] It seems to me that, on balance, by themselves those considerations would likely lead to the conclusion that the principle was duly engaged by the measures here. The Crown has a choice when seeking to prohibit previously authorised firearms. It can limit the measures to prohibiting new sales, but this will still leave the existing stock of those firearms in circulation. If the Crown wants to prohibit possession of the existing stock it will have little choice but to acquire that stock – it would be difficult to prohibit possession without providing a means by which the holders can dispossess themselves. That effectively leads to confiscation or compulsory acquisition. For these reasons the principle is engaged.

[57] There is then a related consideration that in my view clinches the issue in favour of the applicant. New Zealand's firearms legislation, and the policy

assessments of the design of that legislation, have over time contemplated that compensation should be given to those whose firearms and related equipment are retrospectively determined to be unlawful, or is otherwise to be handed in. There are provisions in the present Act that duly require compensation to be paid to such persons. They are found in s 13 (which authorises the police to seize and take ownership of any such property), s 28 (when there is a surrender of a firearms license), and s 37 (the surrender of a weapon that has been determined to be a restricted weapon). A careful regime for the availability of that compensation is prescribed, including a right to appeal the question of compensation to the District Court (s 63).

[58] This is true of the legislative predecessors of the Act. Both the 1958 Act, and the 1920 Act provided for compensation being paid to the owners of firearms that were to be delivered to the Crown.[50] For example the Arms Act 1920 made it unlawful to possess an automatic pistol from a prescribed date, with provision made for delivery to the police.[51] The Governor-General was also empowered to declare additional unlawful weapons, which also could be delivered to the police.[52] The Minister for Finance was then authorised to pay compensation out of the consolidated fund "for the value of all weapons in a serviceable condition, and for all ammunition or parts" (s 3(5)). Similar provisions were carried through into the 1958 Act, and then the 1983 Act. The New Zealand Parliament has accordingly recognised the appropriateness of providing compensation whenever it has determined that firearms lawfully held by a person were now to be surrendered to police, and has provided for compensation.

[59] That is true with respect to the initiatives imposed by the Amendment Act after the mosque shootings. There is a buy-back scheme for the newly prohibited semi-automatic firearms and other firearms, together with associated equipment introduced in the new regime. That regime has not, however, been applied to prohibited ammunition. Whilst the buy-back scheme might be thought necessary to make the new prohibition effective, it can also be seen as a matter of fairness given that legitimately held property was now to be prohibited.

---

50 See Arms Act 1958, ss 5(3) and 12(3); and Arms Act 1920, ss 3 and 4 (as inserted by Arms Amendment Act 1934).

51 Arms Act 1920, s 3.

52 Section 2, definition of "unlawful weapon".

[60] This is also true of the various policy assessments that have been made in relation to firearms laws. The Thorp Report recommended the prohibition of semi-automatic firearms, and when it came to implementing that policy Sir Thomas said:[53]

> Considering next the form of any ban, the view which prevailed in both Australia and the United Kingdom that justice requires that the banning of property previously lawfully acquired should be accompanied by a buy-back to compensate owners for their loss, seems equally valid in New Zealand.

[61] Then when the Law and Order Select Committee addressed the matter 10 years later, they also appeared to proceed on the basis that such a policy would necessarily involve a buy-back scheme.[54]

[62] I accept Mr Powell's point that it is possible that these legislative measures, and policy assessments, could have proceeded on a more generous basis than what the common law principle provides. But the common law principle is based on notions of individual liberty, and fairness, and so are these assessments. When the common law is developed, the courts seek to do so in a manner that is consistent with community values, and it can look to statute law for evidence of those values.[55] Here there has been an enduring principle found in the firearms legislation dating back to 1920 recognising that holders of firearms that need to be surrendered should be compensated, particularly if this was a consequence of a change in the regime. As Sir Thomas recognised, that has also been a feature internationally.[56] Rather than this reflecting Parliament going further than the common law principle, it seems to me to be a reflection of community values and accordingly evidence of the content of that principle.

[63] For these reasons it seems to me that it is clear that the principle is engaged. The exclusion of prohibited ammunition from the scope of the compensation provided for in the Amendment Act seems to be an anomaly. Indeed, one way of describing the applicant's challenge is that there is an arbitrary exception to the decision that those

---

53 Thomas Thorp *Review of Firearms Control in New Zealand*, above n 7, at 137.

54 Law and Order Committee, above n 9, at 21.

55 See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 298. See also Ross Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington) at 555–562.

56 This was also recorded by the European Court of Human Rights in relation to the United Kingdom in *Ian Edgar (Liverpool) Ltd v United Kingdom*, above n 41, at 469.

being disposed should be compensated. I accept that there is no real basis to draw a distinction between prohibited firearms and prohibited ammunition in the application of the common law principle, and I accept that the principle is engaged.

Was the right excluded?

[64] The final issue is whether Parliament has clearly excluded the operation of the right. As I have already indicated, there is no doubt that the right is subject to the will of Parliament, and that the right manifests itself solely as a presumption of interpretation in relation to statutory measures. The Courts have again used different language when describing the clarity, or certainty, with which Parliament must express the exclusion of the right. Mr Hodder referred to a number of formulations which demonstrate the significance of the underlying right, and the need for Parliament to clearly exclude it. In particular he referred to the following:

(a) The requirement for a "plain expressions of such a purpose" — Bowen LJ in *London and North Western Railway Co v Evans*.[57]

(b) That the "words of the statute clearly so demand" — Lord Atkinson in *Attorney-General v DeKeyser's Royal Hotel Ltd*.[58]

(c) That the intention of Parliament must be "expressed in unequivocal terms" — Viscount Simonds in *Belfast Corporation v O D Cars Ltd*.[59]

(d) That there must be "the presence of the most explicit words" — Lord Radcliffe in *Belfast Corporation v O D Cars Ltd*.[60]

[65] In *Canterbury Regional Council v Independent Fisheries Ltd* the Court of Appeal was more recently dealing with the same requirement for Parliament to clearly exclude a fundamental right.[61] A decision of a Minister under statutory powers had

---

57 *London and North Western Railway Co v Evans* [1893] 1 Ch 16 (CA) at 28.
58 *Attorney-General v DeKeyser's Royal Hotel Ltd*, above n 28, at 542.
59 *Belfast Corporation v O D Cars Ltd*, above n 47, at 518.
60 At 523.
61 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57.

the effect of removing the right of access to the Court.[62] The Court of Appeal held that the decision accordingly did interfere with a fundamental common law right, and the question was whether Parliament had excluded that right sufficiently clearly. In doing so the Court relied on Lord Hoffman's words in *R v Secretary of State for the Home Department* that legislation would be interpreted consistently with fundamental rights in the absence of express language "or necessary implication to the contrary".[63] The Court then adopted the approach to necessary implication set out by Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* which required the implication to follow from the express provisions as a matter of express language and logic rather than any broader considerations.[64] The Court of Appeal concluded that Parliament had so excluded the right of access to the Court by necessary implication.

[66] It seems to me that this issue should not be approached in a formalistic way. The principle that underlies the question was fully expressed by Lord Hoffman in the following way:[65]

> … the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of the unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality that little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

[67] This suggests to me that the ultimate question is whether Parliament has directly confronted and addressed the question of the abrogation of fundamental rights in its enactment. Asking the question in that way ensures that it is addressed as a matter of substance rather than form. As in all situations when interpreting the

---

62 That right arose because a party's right to pursue an appeal to the Environment Court in relation to Resource Management Act 1991 measures limiting its property development rights was being removed. So the case involved the right of access to the Court to challenge planning law restrictions on property rights.

63 At [140], citing *R v Secretary of State for the Home Department ex parte Simms*, above n 26, at 131.

64 At [143], citing *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at 45.

65 *R v Secretary of State for the Home Department ex parte Simms*, above n 26, at 131.

intention of Parliament, in addition to the enactment itself the Court can consider wider material, such as Select Committee reports or the record of Parliamentary debates.

[68] Approached in those terms it seems to me that there is no uncertainty in the present case. There is little in the wider material to show the truncation of fundamental rights was directly addressed. The provisions introducing the regulation making power for schemes of compensation in relation to prohibited items but not prohibited ammunition were introduced by Supplementary Order Paper on the day of the third reading.[66] But the terms of the enactment itself are clear. The provisions themselves demonstrate that Parliament has directly considered the question of compensation to be paid by those affected by its new measures. It has set up a buy-back scheme. The provisions clearly identify those property owners who will, and those who will not receive such compensation and on what basis. In particular, only those in the possession of a "prohibited item" as defined would receive the compensation. It is limited to those having a prohibited firearm, magazine or part. Questions of economic loss, consequential loss, loss for business interruption, or loss of intrinsic or sentimental value were not included.[67] It is clear that "prohibited ammunition" was expressly excluded from the compensation regime. That is apparent from the express words of the statute, not just in the definition of "prohibited item" but by virtue of the fact that there are provisions that address "prohibited ammunition" in a different way. The different treatment is not accidental, but is obviously the product of design, albeit speedy design.

[69] Another way of describing the approach consistently with the formulation expressed by the Court of Appeal in *Independent Fisheries*, is that it is a necessary implication from the provisions providing compensation in relation to prohibited firearms and associated parts that compensation was not available in relation to prohibited ammunition.[68] It follows as a matter of logic.

---

66 Supplementary Order Paper (201) Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (155-1).

67 Schedule 1, Clause 7(4). Interestingly there is also no compensation for any ammunition handed in with the newly prohibited firearms and parts.

68 *Canterbury Regional Council v Independent Fisheries Ltd*, above n 61.

[70] For these reasons it seems to me clear that Parliament has expressly legislated in a manner inconsistent with the fundamental right relied upon by the applicants.

Conclusion on first claim

[71] For these reasons I accept that the measures enacted by Parliament involved an abrogation of the right of the owners of prohibited ammunition not to be deprived of their property by the Crown without compensation, but conclude that Parliament clearly decided to do so.

[72] For these reasons the applicant's first claim for declarations is dismissed.

SECOND CLAIM: JUDICIAL REVIEW OF ORDER IN COUNCIL PRESCRIBING PROHIBITED AMMUNITION

[73] The applicant's second claim is a judicial review challenge to the Order in Council defining prohibited ammunition.

[74] A number of grounds of judicial review are set out in the statement of claim. Four grounds were focussed on in the written submissions:

(a) That the Minister's recommendations leading to the Order in Council failed to take into account relevant matters.

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

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

(d) That the resulting Order in Council was invalid.

[75] There are a number of overlapping arguments, and each of the above grounds subsumed other grounds. For example the grounds in (a) and (b) above included an argument that there had been an unlawful failure to engage in consultation.

Relevant evidence

[76] The evidence filed by the parties summarised at [7]–[8] above covered matters relevant to these grounds of challenge. For present purposes it may be sufficient to refer to two factual matters of significance.

[77] First the evidence establishes that the two categories of military ammunition in issue could be considered to be less harmful than standard ammunition. Standard ammunition, such as ammunition used for hunting, is designed to expand on impact maximising the chance of lethal damage to a target such as an animal. Military ammunition is designed in accordance with the laws of war, and it does not so expand and therefore create superfluous injury or unnecessary suffering. For this reason it can be seen as less harmful. An offender, including one engaged in a mass shooting, would not likely use military ammunition. Law enforcement and anti-terrorism agencies also use conventional rather than military ammunition precisely because they wish to effectively disable their target. Neither is there any connection between the firearms now prohibited under the Amendment Act and prohibited ammunition as the prohibited firearms use standard ammunition. The one complication is that Enhanced Penetration Ammunition may be seen to be more harmful than conventional ammunition on the basis that it could be used against police and other law enforcement agencies wearing protective armour, such as Kevlar.

[78] The second feature of the evidence is that it can also be said that there is some legitimate civilian use of the two categories of prohibited ammunition in question. The evidence referred to a list of possible uses, but perhaps the most significant evidence came from Ms McKee, who is an experienced competitive shooter. She has purchased World War II .303 Tracer Ammunition as a cheaper source of high quality brass casings that can be re-used to make standard ammunition.[69] This involved significant cost saving for competitive shooting activities. These casings can be re-used up to seven times, and her family had nearly 5,000 rounds of this ammunition when the measures were introduced. The other suggested civilian uses raised by the applicant's evidence seemed more hypothetical in nature, or at least seem uncommon

---

[69] Tracer Ammunition involves the projectile having an element that burns so that it can be seen as it travels towards the target.

(such as casual target shooting or pest control) and focussed on military ammunition more generally. I also note that I had no evidence of the quantities of prohibited ammunition in issue. It appears the Police did not know how much there would have been in the community at the time the measures were introduced, and there is no evidence before the Court now on the quantities of prohibited ammunition that were handed in.

[79] It is apparent from the Minister's affidavit, and the contemporaneous materials, that the Minister was not provided with an analysis of the harmfulness of the proposed categories of prohibited ammunition compared to conventional ammunition. Rather the Minister proceeded on the basis that ammunition designed for military purposes was "intended to hurt people and they had no place in civil society" and that he saw "no apparent need for military ammunition to be available" and that his general view was military ammunition should be prohibited "unless it also had a genuine civilian use". It is also apparent that the Minister, on the basis of advice, concluded that categories of ammunition set out in the Order in Council had no legitimate civilian use.

Standard or intensity of judicial review

[80] Before addressing the particular claims advanced by the applicant, it is also necessary to address the submissions advanced by the parties on the standard or intensity of judicial review that should be adopted.

[81] The applicant's written submissions contended that the Court should adopt an "anxious scrutiny" or "hard look" approach. In his oral submissions Mr Hodder referred to views expressed in *De Smith's Judicial Review* that public law was moving from a "culture of authority" to a "culture of justification" which required decisions to be justified.[70] He also referred to the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[71] in which the Court reconsidered the standard that should apply to judicial review of administrative decisions. The Supreme Court did so because its earlier decisions had led to a need to

---

70 Lord Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [1-037].

71 *Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65.

"simplify the standard of review labyrinth we currently find ourselves in".[72] After hearing from the parties and 27 intervenors "representing the breadth of the Canadian administrative law landscape"[73] the Court concluded that the relevant standard of review was normally reasonableness. The Court's judgment supports Mr Hodder's argument as the Court said that the application of reasonableness standard meant that a decision needed to be justified by its reasoning.[74] Here Mr Hodder argued the Minister's decision to prohibit the categories of ammunition in issue had not been properly justified in light of the evidence referred to above.

[82] In his submissions Mr Powell suggested that reference to the Canadian law on the standard of judicial review created unnecessary complexity, as the Canadians themselves had recognised. He referred to the criticisms of Canadian administrative law, including by members of the judiciary writing extra judicially.[75] Rather closer to home Professor Joseph refers to "the rush to embrace the varying intensities of judicial review [that has] excited a frenzy of terminologies, causing unnecessary complication" and that the "terminological overload can only result in distracting formalism and obfuscation of administrative law principles".[76]

[83] Resisting such lines of analysis can be seen as central to the struggle for simplicity in New Zealand administrative law. For my part I do not think analysis of the intensity or standard of review is of assistance. I addressed these issues in *Patterson v District Court, Hutt Valley* in the following way:[77]

> [14] … At its heart judicial review involves the Court exercising a supervisory jurisdiction to ensure that powers are exercised in accordance with law. Usually those powers will be contained in statute or delegated legislation, where the limits of the power are identified as a matter of statutory interpretation. But the legal limits of discretionary powers may also arise from other sources, such as common law requirements. An example is the rules of natural justice, albeit in the present case such requirements are also to be found in the statute. Most judicial review involves the Court assessing whether a decision is made in accordance with the express and implied requirements of

---

72 At [9] referring to *Wilson v Atomic Energy of Canada Ltd* [2016] SCC 29, [2016] 1 SCR 770 at [19] per Abella J.

73 At [6].

74 At [86].

75 David Stratas *The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency* (2016) 42 QLJ 27; and Beverley McLachlin *Administrative Law is Not for Sissies: Finding a Path Through the Thicket* (2016) 29 CJLAP 127.

76 Joseph *Constitutional and Administrative Law in New Zealand,* above n 24, at [22.8.4].

77 *Patterson v District Court, Hutt Valley* [2020] NZHC 259.

> the empowering instrument, both in terms of the substantive decision and the procedures followed to reach it. …
>
> [15] The first and second respondents' written submissions referred to the view that judicial review concerns the procedure by which decisions are reached, rather than the substance of those decisions.[78] Whilst I accept that judicial review can be described in this way, doing so can be misleading. In ensuring that a decision is made lawfully there can be substantive as well as procedural requirements.[79] The substantive requirements of the law can also be closely related to the ultimate outcome of a decision such that, as a matter of law, the decision-maker cannot make the decision, or was obliged to make a different decision.[80] The extent of the decision-making freedom given by particular powers ultimately depends on how the statute, or other instrument bestows them. In some cases the legal limits can be quite restrictive, but in others they are not.
>
> [16] Whilst some commentators, and some decisions refer to the intensity of judicial review, or variable standard review, these can also be misleading concepts.[81] In every judicial review case the Court's role is to review whether a decision is made in accordance with law. In all cases it does so in the same dispassionate way. The intensity with which it performs that task does not change. But the extent to which powers are substantively or procedurally controlled by legal limits varies considerably. It is the nature and extent of the legal controls that vary between cases, not the intensity with which the Court assesses compliance with them.

[84] Restrictions on discretionary powers arise in respect of decisions that involve fundamental rights such as those in the NZBORA, and it is in those cases where intensity of review analysis frequently arises. But reference to Wednesbury unreasonableness as the usual standard can also be a distraction. Wednesbury unreasonableness is not an overall standard of review. It is a residual ground that potentially applies when other grounds of review might not be clearly established, and where the Court infers that the decision-maker must have misunderstood their powers, or otherwise erroneously applied them, as a consequence of the unreasonableness of the decision.[82] Success on Wednesbury unreasonableness grounds alone is rare. It is

---

78 With reliance on *Aorangi School Board of Trustees v Ministry of Educatio*n [2010] NZAR 132 (HC) at [8]. See also *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397.

79 The main grounds of review, such as improper purpose, taking into account irrelevant considerations, failure to take into account relevant considerations and error of law all tend to turn on questions of interpretation.

80 To take but one example, the Supreme Court's findings in *Hawke's Bay Regional Investment Company Ltd v Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041 meant that the Minister of Conservation was not lawfully able to reclassify certain conservation land, and then swap it to enable the Ruataniwha Dam Scheme to proceed. It did not proceed as a result.

81 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 24, at [22.8.4].

82 See Palmer J's analysis in *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [22]–[32].

only an alternative forensic technique. It will also usually be possible for the Court to be able to identify an error without depending solely on drawing such inferences. It is not the case that Wednesbury unreasonableness is a usual standard — it has never been necessary to show that the decision is capricious or absurd in addition to establishing a conventional ground of judicial review in order to succeed.

[85] The complications involved in variable standard review, and in identifying the standard or intensity to be applied in a particular case, can lead a Court into error. It distracts from the key questions which are directed to the nature and extent of the power given to the decision-maker, and whether the decision-maker has acted in accordance with that power together with any other requirements or limits imposed by law. Judicial review begins and ends with those questions notwithstanding the occasional case where it can be said the unreasonableness of the decision itself evidences material error.

The challenge here

[86] Here we are dealing with an Order in Council promulgated under a statutory provision (s 74A) in order to define categories of "prohibited ammunition" as required by s 2D. The Order in Council was promulgated as a consequence of the decision made on the recommendation of the Minister.

[87] As with all judicial review the analysis begins with the proper interpretation of the empowering instrument. Whilst challenges to orders in council, or the promulgation of regulations, can be seen as a discrete category of judicial review, it still turns on the same fundamental questions — what is the proper interpretation of the power given by the statute, and was that power exercised lawfully. In *Commercial Fishers Whanau Inc v Attorney-General* Dobson J described the position by reference to regulation making powers, in a way equally applicable to other orders in council:[83]

> **Judicial review of regulations**
>
> [15] The law in relation to challenging the validity of regulations is well settled.[84] The first step involves construction of the Act under which the

---

83 *Commercial Fishers Whanau Inc v Attorney-General* [2019] NZHC 1204.

84 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [58]–[59], citing *Carroll v Attorney-General* [1933] NZLR 1461 (CA).

> regulation purports to be made. This requires analysis of the scope of the authority conferred by Parliament in light of the purposes for which those powers were conferred.[85] Where Parliament has given the Executive a broad power to regulate, it is a power to carry out the purposes of the empowering legislation and the Executive's discretion is constrained by those purposes.[86]
>
> [16] The second step is to determine the meaning of the regulations, and the third step is to decide whether the regulations comply with the empowering Act.

[88] The requirement that the delegated legislation be consistent with the purposes of the Act is frequently the focus of such challenges. But this is not the only basis upon which such delegated legislation can be found to be unlawful. The ultimate question remains whether the statutory power of decision has been lawfully exercised.

[89] In the present case the power to define prohibited ammunition by the Order in Council is not controlled by express legislative requirements. But it is indirectly controlled by legal restraints. It is essentially a power to define what ammunition is to be covered by the new statutory provisions. It is not an open ended power. The definition provided must be consistent with the legislative purposes in the manner summarised in *Commercial Fishers Whanau Inc*. The Amendment Act only prohibited particular categories of firearms and associated equipment, and it follows that the definition of prohibited ammunition should also be provided with equivalent particularity. Moreover given the abrogation of the right to be compensated for the effective confiscation of this ammunition, the decision on the definition would need to be rational and not arbitrary. These requirements are close, or perhaps even equivalent to the formulation advanced by Mr Hodder — that the exercise of the power must be justified. These are the legal limits on an apparently open ended power arising as a matter of interpretation given the significance of the common law principle. Compliance with them should be apparent from the reasons for the decision as revealed in the contemporaneous materials, and any affidavits from the decision makers[87] — here the Minister on behalf of the deciding Ministers, and the Commissioner of Police on behalf of those providing the advice.

---

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

86 *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA) at 242, citing *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039 at 1063.

87 See *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 553–554, 561–562, 567–568; *Canterbury Regional Council v Independent Fisheries Ltd*, above n 61, at [91].

[90] In advancing his oral submissions Mr Hodder focussed on whether the identification of the disputed categories of prohibited ammunition in the Order in Council fulfilled the purposes of the Act. He argued that the identification was not in line with Act's purpose because the disputed categories of prohibited ammunition were not more harmful than normal ammunition, there had been no analysis of that question, there were legitimate civilian uses of it, and the definition was imprecise and not able to be applied by ordinary users notwithstanding the criminalising effect of the measure. In developing that submission he argued that the Minister had failed to ask himself whether the challenged categories enhanced public safety by reducing risk, and that the evidence demonstrated that these categories were not unsafe or more risky than conventional ammunition.

[91] Consideration of this argument requires an assessment of the scheme and purpose of the Act. The Act's long title is:

> 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.

[92] Long titles are only a summary, and are not necessarily a comprehensive statement of the purposes of the particular legislation. But the key difficulty with Mr Hodder's argument is shown by the long title. Whilst the promotion of safety is clearly a purpose of the Act, the Act is not confined to the imposition of measures that are individually demonstrated to increase that safety. It is also an Act that imposes an overall regime for "the control of firearms and other weapons". That is unsurprising as firearms are inherently dangerous, particularly when they fall into the wrong hands. The Act overall involves a series of measures to closely control the availability and use of firearms. The Amendment Act that introduced the power to define prohibited ammunition can also be seen to involve a general tightening of controls.

[93] Whilst the safety of the public is an overall objective of this regime, it is not correct to say that measures can only be imposed under the Act once each measure has been demonstrated by some evidential foundation to so improve safety. It is equally consistent with the purposes of the Act to achieve safety in a broader or more indirect sense. A precautionary approach is plainly open. The Minister did not conduct a relative safety analysis between the categories of ammunition that were to be

prohibited, and conventional ammunition. But he did not need to do so in order to fulfil the purposes of the Act. His approach was at a higher level, and involved the application of a policy view. As he said in his affidavit:

> My principle concern following the events of 15 March 2019 was prohibiting access to semi-automatic weapons and the parts that could be used to convert firearms to that use. In my view, and the Government's view, these were primarily designed to be military weapons, rather than weapons primarily designed for sporting purposes or civilian use. At the same time, I formed the view that military ammunition should in principle also be prohibited. Following the reform of the Arms Act the use and possession of firearms was confined to those appropriate for genuine civilian uses; recreational and commercial. I saw no apparent need for military ammunition to be available for those firearms.

[94] He also recorded that the Police had advised him soon after he had taken office in October 2017 that "there was too much ammunition coming into the country and much of it was army surplus ammunition coming in from overseas". This is a permissible approach to the changes that he wished to make to the overall regime.

[95] As Mr Powell submitted, a very similar argument was advanced and rejected by the Court of Appeal in *R v Foox*.[88] The appellant had been convicted of purchasing two air-powered automatic weapons in breach of an Order in Council made under s 4 of the Act. He argued that the Order in Council was invalid because the weapons in question were not sufficiently harmful or potentially harmful to qualify for a restriction pursuant to s 4. The Court held:

> [17] … The objective of the Act, as indicated by the Long Title, is to promote both the safe use and the control of firearms and other weapons. To that end, the Governor-General may by Order in Council declare any particular weapons to be restricted weapons. Any such Order in Council has the force of a regulation (subs (3) of s 4). For the Court to then qualify what weapons can properly be declared restricted weapons on the basis of their potential to cause harm would be contrary to the scheme of the Act. It cannot be the function of this Court to determine the harmfulness – or harmlessness – of weapons for the purpose of the Act. Nor is it equipped to do so. That question is one which must be left to the proper and expert authorities.

[96] The same reasoning applies to the promulgation of the Order in Council under s 74A to provide the definition contemplated by s 2D. For that reason I reject Mr Hodder's principal argument.

---

88 *R v Foox* [2000] 1 NZLR 641 (CA).

The other grounds of challenge

[97] For similar reasons the other formulations of the argument advanced by the applicant also do not succeed. I address them in light of the analysis undertaken in [89] above.

[98] It is argued that the Minister failed to consider a mandatory relevant consideration concerning the relative safety of the proposed prohibited ammunition.[89] But as I have already found it was not mandatory for the Minister to conduct a relative harm analysis comparing types of ammunition before the definition could be legitimate. The Minister was entitled to proceed at a more general level.

[99] The applicant further contends that there was a failure to consider civilian uses of the prohibited ammunition, and the decision made was arbitrary. The Police Commissioner explains in his affidavit that following the Minister's view outlined in [93] above consideration was given to what was to be considered to be "military ammunition". He explains that early in the process legitimate civilian uses of some ammunition potentially in that category were excluded, particularly "full metal jacket" ammunition. That led to the more specific definition ultimately adopted in the Order in Council. This shows that legitimate civilian use was the subject of reasonably careful consideration. Whilst the applicant contends that some of the prohibited categories still have legitimate civilian uses, those generally involve adapting the military ammunition for that use (for example by re-using casings) or using it for purposes other than for which it was designed (for example using tracer ammunition for starting fires in remote locations). I do not accept that the definition ultimately adopted involved a failure to address civilian uses, or that it was irrational, arbitrary, or unjustified.

[100] The applicant also argued that the prescribed definitions were unclear, and that ordinary firearms users would not be able to tell whether ammunition in their possession was prohibited ammunition or not. This was said to be inconsistent with the need for certainty in the criminal law. As the United Kingdom Supreme Court said

---

[89] Adopting the distinction between mandatory and permissible considerations outlined in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

in *R v Copeland* 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 may do without attracting criminal liability."[90]

[101] I accept that the evidence demonstrates that there are uncertainties. But the evidence also establishes that would be the case even if the alternative means of defining prohibited ammunition suggested by the applicant's evidence — which focuses more on the various elements of ammunition — were used. This is a technical area, and the difficulties with definition do not mean that the legislation can only define ammunition in one specific way. It also seems to me that the principle referred to in *Copeland* should be addressed as a matter of substance, and realistically. There are protections built into the legislation that address any concerns in this respect. The offence of possessing, selling or supplying prohibited ammunition under s 43AA is only committed if the acts are done "without reasonable excuse". An amnesty period was established for handing in the ammunition under r 28Z of the Regulations. Under s 59B Parliament has also "affirmed that the Police have the discretion not to prosecute where the offence is considered to be one of possession only and there is no public interest in proceeding with the prosecution". These measures protect individuals from any unjustified reach of the criminal law.

[102] For similar reasons I reject the applicant's further argument that the measures were unlawful for a failure to engage in consultation. I accept that there has been a practice of engaging in consultation with key stakeholders, including the Firearms Community Advisory Forum. I also accept that the haste with which the measures were implemented here involved more confined consultation than might otherwise have taken place. The consultation here still remained significant, however. It involved obtaining the views of ballistics experts at Devonport Naval Base, and telephone consultation with other parties, including the chair of the applicant.

[103] An obligation to consult can arise as a consequence of past practice.[91] But as the Court of Appeal said in *Lab Tests Auckland Ltd v Auckland District Health Board*

---

90 *R v Copeland* [2020] UKSC 8, [2020] 2 WLR 681 at [28].

91 *New Zealand Association of Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC).

"there is a distinction between consultation undertaken as a matter of good practice and consultation undertaken in accordance with an obligation to undertake it, enforceable through judicial review".[92] Here such consultation has been traditionally engaged in for sound policy reasons, and as a matter of good practice. Such consultation has largely been directed to the design of legislative changes rather than the exercise of reviewable powers, however. It does not lead to a legal obligation to engage in such consultation before a measure imposed by, or under the legislation, can be lawfully introduced.[93] There is none prescribed in the legislation itself, and the past practice does not give rise to an implicit obligation to do so enforceable as a matter of law.

[104] As I have previously indicated, judicial review turns on the proper understanding of the impowering instrument, and any other legal requirements. Perhaps the strongest point that can be advanced by the applicant in this case is that the measures concerning prohibited ammunition are different from those concerning prohibited firearms and associated equipment. The applicant can say it makes little sense to prohibit the firearms and provide compensation, whilst at the same time prohibit ammunition without providing compensation, particularly when the prohibited ammunition is not the kind of ammunition used in criminal offending such as the mosque shooting, and has no association with it.[94] The different treatment of prohibited ammunition can be seen as arbitrary. Applying the Supreme Court of Canada's approach in *Vavilov* there is nothing much in the materials that properly justifies that different treatment.[95]

[105] But the Court is only concerned with whether the decisions have been made lawfully. The decision not to provide compensation has been made by Parliament. The decision to prohibit certain categories of ammunition even though they have no association with the mosque shooting, or otherwise demonstrated to be used in this

---

92 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [314], citing *R v Devon County Council, ex p Baker* [1995] 1 All ER 73 (CA) at 85 per Dillon LJ.

93 See *New Zealand Association for Migration and Investments Inc*, above n 91, at [190]–[192].

94 I note, however, that one paragraph of the Police advice to the Minister dated 3 May records that the Christchurch gunman sought pre-approval from police for online sales of military style ammunition from multiple suppliers. This was not stated to be ammunition in the prohibited categories, however.

95 *Canada (Minister of Citizenship and Immigration) v Vavilov*, above n 71.

kind of criminal offending or the cause of harm to the public, does not mean it is outside the purposes of the Act or the empowering clause. It was open for the Minister to recommend to the Governor-General an Order in Council that prohibited particular military ammunition as part of a general desire to tighten firearms related controls in New Zealand. That was consistent with the purposes of the Act.

[106] It is always necessary for arguments of this kind to be based on the particular decision, and the particular power in question. Here the power is to promulgate an Order in Council providing a definition of prohibited ammunition. The criticisms just referred to do not demonstrate that this power was exercised unlawfully. The materials before the Court show that proper consideration was given to what categories of military ammunition would, and would not be so prohibited.

[107] I am satisfied that none of the grounds advanced by the applicant demonstrate that this power was unlawfully exercised. The second claim is accordingly dismissed.

THIRD CLAIM: JUDICIAL REVIEW CHALLENGE TO NO COMPENSATION RECOMMENDATION

[108] The applicant's third claim is a challenge to the Minister's recommendation not to provide compensation to the owners of prohibited ammunition.

[109] Again the statement of claim and the applicant's written submissions advance a number of grounds of review in support of this claim, including: failure to take into account relevant considerations; acting for an improper purpose; asking the wrong questions; having regard to irrelevant considerations; and acting irrationally or arbitrarily. But in advancing his oral submissions Mr Hodder focused on two allegations:

(a) That the Minister proceeded on the basis that providing compensation for prohibited ammunition would require legislative amendment, and that this was wrong as it could have been implemented by the promulgation of regulations under the Act.

(b) That the Minister proceeded on the basis that there was no legal obligation to provide compensation for property that was being prohibited, and that this was wrong in law.

Is there a reviewable decision?

[110] There is an initial difficulty with the applicant's challenges to the alleged no compensation recommendation. The relevant recommendation does not appear to have been made by the Minister in connection with any statutory power of decision. Rather it is a recommendation made by him in the course of the Cabinet deciding the content of the proposed legislation that would be placed before Parliament. Moreover Parliament effectively agreed with that recommendation by its enactment. Given that there appears to be no statutory power of decision capable of review to which the alleged recommendation related.

[111] In advancing the claim the applicant relied on the Minister's June 2019 paper to the Cabinet Legislation Committee seeking Cabinet's approval to the then proposed Regulations and the Order in Council. The applicant contends that this paper also contained a recommendation not to provide compensation for prohibited ammunition. It refers to one paragraph of the paper which stated:

> 20 The regulations do not provide for any compensation for prohibited ammunition, exemptions for legitimate use have been provided for in the regulations and there is considered to be no other legitimate civilian purposes for these types of ammunition. Police understands that most of this ammunition has been obtained cheaply from international army surplus disposal, with importers generally meeting a freight cost only, anyone importing this type of ammunition would also be aware of the limited legitimate demand for this ammunition.

[112] This paper clearly provided advice for the purposes for the statutory power of decision exercised for both the promulgation of the Regulations, and the promulgation of the Order in Council. The Regulations did not provide compensation for prohibited ammunition. But that was because the empowering provision, cl 7 of Schedule 1 of the Act, only permitted the promulgation of regulations establishing a scheme of compensation for "prohibited items" which was defined to exclude "prohibited

ammunition".[96] So this was not the decision that excluded compensation for prohibited ammunition, and neither was the Minister making a recommendation leading to that decision in this paper.

[113] The relevant decision had been made earlier in the legislative design process. In the Minister's earlier March 2019 memorandum to the Cabinet in relation to the proposed reforms it is recorded that the Cabinet had earlier formed a group comprising the Prime Minister, the Deputy Prime Minister and the Ministers of Finance, Police, Justice and Defence to "make decisions on the development of a buy-back initiative". At that stage the paper records officials' advice that "no legislation is required for the buy-back scheme" but that if that position changed the group of Ministers would be empowered to make the decisions as to what would be included in the Bill. In a later paragraph of this paper the Minister advised that he did "not propose to include ammunition in the buy-back scheme". The Cabinet made decisions on this paper at its meeting on 25 March.

[114] It is apparent that there must have been a change of view, and that a decision was made to address the buy-back scheme by legislative measures. Further documents provided at the Court's request following the hearing show that initially only the newly prohibited firearms would be covered by the compensation schemes, but that a decision was then made to extend this to include associated equipment (but not prohibited ammunition). The provisions were introduced late in the piece by Supplementary Order Paper.[97] As enacted the legislation took the form of a clause empowering regulations to be promulgated to establish "one or more schemes for the purposes of paying compensation in respect of prohibited items" (cl 7(1), Schedule 1 of the Act). It is also clear that any decisions that were so made by the Ministers were decisions with respect to what would be included in the Bill to be put before the House of Representatives. Such decisions are not reviewable.[98]

[115] Furthermore the decisions as to the scope and extent of the compensation to be paid were decisions ultimately made by Parliament. The Act as passed did not include

---

96 Arms Act 1983, s 2, definition of "prohibited item".

97 Above n 66.

98 See, for example, *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [62].

a scheme of compensation for "prohibited ammunition" but only for "prohibited items", and the scope of the compensation for "prohibited items" did not include certain categories of compensation outlined in cl 7(4) of Schedule 1. The applicant's challenge is substantively an impermissible challenge to an enactment.

Power to regulate

[116] Mr Hodder sought to address the above issue by contending that it was open to the Governor-General on the advice of the Ministers to promulgate further regulations providing for compensation for prohibited ammunition. He argued that the Minister's recommendation in the June 2019 paper on the content of the regulations to be promulgated was a reviewable decision, as it involved a decision not to promulgate regulations providing for this compensation.

[117] Mr Hodder relied on two regulation making powers in advancing this argument. First he pointed out that under the new s 74(1)(ra) regulations could be promulgated for the orderly implementation of orders in council made under s 74A, and for "any other transitional or savings matters". Secondly he pointed out that under the new s 74C(1)(a) regulations could be promulgated providing for additional transitional and saving provisions to those set out in Schedule 1. He argued that either power was sufficiently broad to deal with the question of compensation for prohibited ammunition surrendered during the transitional period.

[118] I do not accept these arguments. The difficulty is that Parliament has itself addressed the question of the scope of compensation scheme, and enacted a specific regulation making power in cl 7 of Schedule 1. Clause 7 only provides for schemes of compensation for prohibited items as defined, and provides that the scheme need not provide compensation for the matters set out in cl 7(4). To utilise the less specific regulation making powers relating to the transitional period to introduce compensation regulations inconsistent with the regulations contemplated by cl 7 seems to me to be contrary to Parliament's intent.

[119] I accept that the point is not beyond argument, and it can be said that these regulating making powers could be utilised to add to, or expand upon the transitional provisions. A related example of this is the amnesty period. The Amendment Act as

enacted by Parliament did not include an amnesty period for prohibited ammunition under cl 5 of Schedule 1. Such an amnesty was introduced for prohibited ammunition under r 28Z of the Regulations. The applicant can say that this involves the same technique to expand upon what Parliament had decided. But it is difficult to see regulations providing compensation for prohibited ammunition as complementary, rather than inconsistent with Parliament's intent.

[120] But even if I am wrong on this point, and regulations could have been promulgated creating a compensation regime for prohibited ammunition, I do not accept that the Minister's June 2019 paper involved a recommendation not to promulgate such regulations. As a matter of evidence the recommendations and consequential decisions on what would and would not be compensated for had already been made by the group of Ministers when deciding what would be included in the Bill. A failure to exercise a statutory power of decision can be a reviewable decision.[99] But in my view this cannot extend to a decision that neither addressed by a decision-maker, sought by an affected person, or otherwise clearly engaged. Here it is unrealistic to say a decision was made not to promulgate regulations providing compensation or prohibited ammunition as a consequence of the June recommendations.

The grounds of challenge

[121] The above conclusions mean that the applicant's third claim should be dismissed. It may be appropriate to nevertheless briefly address the two key arguments advanced by Mr Hodder.

[122] The first is that the Minister erroneously thought that an amendment to the Act was required to introduce compensation for prohibited ammunition. No such view is outlined in the June paper, but earlier advice from the Police to the Minister dated 3 May stated:

> Note that the Amendment Act did not envisage that prohibited ammunition would be compensated for so if compensation were to be considered this would require an amendment to the Act.

---

[99] See, for example, the definition of "application for judicial review" in s 4 of the Judicial Review Procedure Act 2016.

[123] I accept that this advice was likely accepted. But for the reasons already addressed that advice was probably correct. Moreover, even if it was technically possible to introduce such compensation by regulations it may still have been regarded as highly desirable for the matter to be addressed by Parliament given the provisions that had been enacted. At the very least new regulations to this effect would have appeared to be attempting to get around a limitation decided upon by Parliament. So an amendment may still have been required as a matter of sound administration, and been thought to be required for this reason.

[124] I see more merit in the applicant's second key argument. That is that the Minister proceeded on the erroneous view that there was no legal obligation to provide compensation. The Minister said in his affidavit:

> 20 The Government decided not to offer a buy-back regime to persons who were in possession of what had become prohibited ammunition. They would have an amnesty only. I confirm that in this respect 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.

[125] It is certainly true that there is no such obligation in the sense that Parliament can always legislate inconsistently with the right to receive compensation for a deprivation of property. But on its face the Minister's view goes further, and suggests that because the measures involved prohibiting possession of the property no such right to compensation arose.

[126] For the reasons already addressed at some length, that view is not correct.[100] Moreover, had this been a view formed in relation to a statutory power of decision, there would have been an expectation that the decision-maker would have addressed the common law right more directly. For this reason I see some merit in the applicant's criticism. It also gains force given that prohibited ammunition has been treated differently from prohibited firearms without apparent justification. The Minister's statement that there was no legal obligation to compensate for prohibiting possession of the property does not provide a justification. That is because compensation was provided for those who possessed the newly prohibited firearms. So the Minister's

---

[100] See [40] to [63] above.

rationale rather highlights the arbitrary treatment. What is more, unlike prohibited firearms and related equipment, prohibited ammunition has no apparent association with the dreadful events of 15 March 2019, or indeed the criminal use of firearms more generally.[101] Prohibiting this category of ammunition appears to be a product of a more general tightening of controls over firearms and related equipment.

[127] But none of these criticisms ultimately have significance for this judicial review challenge. That is because these views were not formed in connection with a reviewable statutory power of decision. They did not manifest themselves in the exercise of any discretionary powers. Rather they reflect policy decisions made by the Government that subsequently resulted in the provisions of the Bill, which ultimately led to the passage of the Amendment Act in the terms enacted.

CONCLUSION

[128] For these reasons the applicant's challenges are dismissed. By way of summary I accept that the common law right not to be deprived of property by the Crown without compensation was duly engaged by the measures introduced under the Amendment Act prohibiting categories of military ammunition. But this common law right, whilst a fundamental one, is subject to Parliament's intent. Here Parliament plainly intended not to provide compensation to those possessing prohibited ammunition, and to only provide compensation for those who held the newly created categories of prohibited firearms and associated equipment. The applicant's claims for declarations are accordingly dismissed.

[129] I have also dismissed the applicant's judicial review challenge to the Minister's recommendation that no such compensation for prohibited ammunition should be paid. His recommendation did not form the basis of a statutory power of decision that can be challenged by way of judicial review. His view in March 2019 was expressed in the context of the Government's assessment on what should be included in the new Bill to be placed before Parliament. That view was then adopted by Parliament itself. His later advice in June 2019 concerned the content of the Regulations, and of the Order in Council defining "prohibited ammunition", and it did not involve a

---

[101] Subject to what is noted at the end of [77] above.

recommendation not to provide compensation for prohibited ammunition. That issue had already been addressed by Parliament itself.

[130] I have also dismissed the applicant's challenge to the Order in Council defining prohibited ammunition. I accept that the categories of prohibited ammunition in question were not assessed in terms of their relative harm compared with conventional ammunition, and that the evidence establishes that the categories of prohibited ammunition in issue can be seen as not more harmful. But there was no requirement for the Minister to conduct such an analysis before the categories of prohibited ammunition were determined by way of Order in Council. It was consistent with the purposes of the Act to take a more general view that particular ammunition designed for specific military purposes should not be permitted to be possessed for civilian use under New Zealand's firearms legislation.

[131] I accept that there does not appear to be much justification for the different treatment of prohibited firearms and equipment for which compensation was payable, and the prohibited ammunition, which was not. That is particularly so given that there is no association between the newly defined prohibited ammunition and criminal activity, let alone the mosque shooting. But ultimately these decisions were made by Parliament rather than through discretionary decision-making subject to judicial review. The criticisms do not provide a basis for a successful judicial review challenge.

[132] The applicant's claims are accordingly dismissed. The respondent is entitled to costs. I direct the parties to seek to discuss and settle the question of costs. If they cannot be resolved a memorandum seeking costs may be filed and served which is to be responded to by memorandum filed and served within 10 working days thereafter. Both memoranda are to be a maximum of 10 pages plus accompanying schedules.

Cooke J