

In the High Court of New Zealand  
Wellington Registry  
I Te Koti Matua O Aotearoa  
Tāmaki Makaurau Rohe

CIV 2019-485-676

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*Under:* Judicial Review Procedure Act 2016 and  
Part 30 of the High Court Rules 2016

*In the matter of:* an application for judicial review

*Between* **NEW ZEALAND COUNCIL OF LICENSED  
FIREARMS OWNERS INCORPORATED,**  
an incorporated society with its registered  
office at 21 Broderick Road, Wellington

*Applicant*

*And:* **MINISTER OF POLICE,**  
Parliament Buildings, Wellington

*First Respondent*

**GOVERNOR-GENERAL,**  
Government House, Wellington

*Second Respondent*

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STATEMENT OF CLAIM FOR JUDICIAL REVIEW

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Date: 8 November 2019



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## STATEMENT OF CLAIM

The Applicant by its solicitor says—

### Parties

1. The Applicant, New Zealand Council of Licensed Firearms Owners Incorporated, is an incorporated society registered in New Zealand.
2. The Applicant represents the interests of a range of sports organisations, sports people and others who use firearms for recreation, business or environmental purposes in New Zealand.
3. The First Respondent is the Minister of Police (**the Minister**) whose responsibilities includes oversight and other powers under or relating to the Arms Act 1983 (**the Act**).
4. The Second Respondent is the Governor-General of New Zealand.

### Background: Christchurch shooting and proposed law reform

5. On 15 March 2019, a mass shooting of people occurred in Christchurch.
6. In or around late March 2019, the Minister made several proposals in a paper titled “Arms Act 1983 Reforms – Paper 1” (**Paper 1**).
7. Paper 1 included the following propositions:
  - 7.1. The dual purpose of the reforms to the Act and its associated regulations was to cater for the safe and responsible use of firearms and to significantly mitigate the risk of harm in the misuse of firearms.
  - 7.2. The establishment of “a ban on military-style (e.g. armour piercing) ammunition to accompany the banning of assault rifles”.
  - 7.3. That “armour piercing, incendiary, tracer and similar types of military ammunition” are “designed primarily for combat use” and that there was “no justifiable reason for its civilian use in New Zealand”.
  - 7.4. That “given the wider policy to prohibit weapons that can cause mass casualties and harm”, “these forms of ammunition that can contribute to this harm” should be prohibited.

- 7.5. Ammunition would not be included in the buy-back scheme.
8. On 25 March 2019, following the Minister's Paper 1, Cabinet made several decisions. These included:
  - 8.1. To prohibit in regulations to the Act armour piercing, incendiary, tracer, and similar types of military ammunition for non-military use.
  - 8.2. To establish offences and penalties connected to newly prohibited ammunition.
9. The Minister then, in late March 2019, produced a paper seeking approval (**Approval Paper**) for the Arms (Prohibited Firearms, Parts and Magazines) Amendment Bill (**the Bill**), which included various amendments to the Act, to be introduced.
10. In the Approval Paper:
  - 10.1. The Minister proposed that a better process to give effect to a ban on prohibited ammunition would be to define prohibited ammunition to be any ammunition declared to be prohibited by the Governor-General by Order in Council.
  - 10.2. The Minister asserted that this was appropriate as the definition of prohibited ammunition is technically complex, requires flexibility in light of technological developments and required input from experts and key stakeholders.
11. On 1 April 2019, Cabinet agreed that instead of using regulations to prohibit ammunition, a better process to give effect to the ban was that suggested by the Minister and approved the Bill for introduction.

#### **Legislative change**

12. The Government introduced the Bill on 1 April 2019.
13. The Bill was then enacted into law in the next 10 days:
  - 13.1. 2 April 2019 – the Bill was read in Parliament for the first time.
  - 13.2. 8 April 2019 – the Select Committee, which was the Finance and Expenditure Committee, delivered its report on the Bill.

- 13.3. 9 April 2019 – the Bill was read in Parliament for the second time.
- 13.4. 10 April 2019 – the Bill was read in Parliament for the third time and passed into law as the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 (**the Amendment Act**).
- 13.5. 11 April 2019 – the Amendment Act received royal assent.
- 13.6. 12 April 2019 – the Amendment Act came into force.

#### **A new offence regarding prohibited ammunition**

14. As a result of the Bill inserting s 43AA into the Act, from 12 April 2019 it became an offence to, without reasonable excuse, possess, sell or supply prohibited ammunition.
15. Every person who commits an offence under s 43AA is liable on conviction to imprisonment for a term not exceeding two years.
16. The Act does not list which types of ammunition fall under “prohibited ammunition”.
17. Through s 2D, the Act defines prohibited ammunition to mean any ammunition declared by the Governor-General by Order in Council made under s 74A to be prohibited ammunition.
18. Section 74A(e) provides that the Governor-General may, by Order in Council made on the recommendation of the Minister of Police, declare any ammunition to be prohibited ammunition.

#### **The Minister’s Recommendations**

19. In or around June 2019, the Minister circulated a paper in his name seeking approval to submit the following to the Executive Council (**the June 2019 Paper**):
  - 19.1. The Arms (Prohibited Ammunition) Order 2019 (**the Order**).
  - 19.2. The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019 (**the Amendment Regulations**).
20. In the June 2019 Paper, the Minister proposed to recommend:

- 20.1. For the Order, that the following types of ammunition be prohibited: tracer, enhanced penetration, armour piercing, incendiary, explosive, multi-purpose ammunition that is armour piercing or incendiary, discarding sabot ammunition (excluding shotgun), multi-projectile ammunition (excluding shotgun cartridges), chemical or biological carrier ammunition, and flechettes (fin stabilised dart like projectiles) **(the Definition Recommendation)**.
  - 20.2. In respect of the Regulations, that prohibited ammunition should not be eligible for compensation, whether under the buy-back scheme or otherwise **(the No Compensation Recommendation)**. It was said that exemptions for legitimate use had been provided for in the Regulations and there was not considered to be any other legitimate civilian purpose for these types of ammunition.
21. Around the time of the June 2019 Paper, the Minister and the Police prepared a “Regulatory Impact Assessment”. That Assessment, among other things, stated:
- 21.1. The Order and the Regulations implemented the Government’s intention to increase the safety and security of New Zealanders by reducing the risk of death or injury from high risk ammunition.
  - 21.2. This was to be accomplished by declaring, through the Order, that certain types of ammunition with no valid civilian purpose were prohibited.
  - 21.3. There would be no compensation for prohibited ammunition.
  - 21.4. As part of developing the list of prohibited ammunition, Police engaged with the New Zealand Defence Force (NZDF), the Department of Conservation, the Wellington Zoo, key contacts in Fire and Emergency New Zealand, and some members of the firearms community including small arms ammunitions collectors.
  - 21.5. The key criteria used to assess whether a particular type of ammunition should be prohibited was whether, in the views of the Police and the NZDF, there was no valid civilian use.

- 21.6. The final list represented those types with no valid civilian use.
- 21.7. Police did not know the level of “high-risk ammunition” currently in New Zealand because these items did not need to be registered.
- 22. The Minister subsequently made the Definition Recommendation and the No Compensation Recommendation to the Executive Council and the Governor-General.

**The Order**

- 23. On 19 June 2019, acting on the Definition Recommendation from the Minister, the Governor-General made the Order, being the Arms (Prohibited Ammunition) Order 2019.
- 24. The Order declared various types of ammunition to be prohibited.
- 25. The ammunition declared as prohibited included, among the types listed above in the Definition Recommendation, the following (**the Challenged Ammunition**):

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

- 26. The Order came into force on 21 June 2019.

**Legitimate use of the Challenged Ammunition**

- 27. The Challenged Ammunition includes types of ammunition which have historically been used by members of the Applicant’s member organisations and other non-NZDF personnel (civilians) for legitimate purposes.
- 28. Some of the Applicant’s members and their members, and other civilians, have previously lawfully obtained and own Challenged Ammunition for legitimate use in their recreational, business or environmental purposes.
- 29. Such usages of Challenged Ammunition are not materially different from usages of ammunition that is not prohibited ammunition.
- 30. As regards “enhanced-penetration ammunition”, which the Order prohibits separately from armour-piercing ammunition:

- 30.1. “enhanced-penetration ammunition” is defined imprecisely by reference to an undefined “penetrator”; and
- 30.2. many ordinary forms of ammunition contain steel elements.

### **The Regulations**

- 31. On 19 June 2019, by Order in Council, the Governor-General made the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Regulations 2019 (**the Amendment Regulations**).
- 32. The Regulations did not provide for compensation in respect of prohibited ammunition, including the Challenged Ammunition.

### **The Applicant’s request to the Minister**

- 33. The Applicant’s solicitors wrote to the Minister on 9 October 2019 and expressed concerns regarding the prohibition of the Challenged Ammunition and the failure of the Regulations to provide for compensation to be paid for prohibited ammunition.
- 34. The Minister has not taken any steps in response to the concerns expressed in that 9 October 2019 letter other than to dismiss them, in a letter dated 24 October 2019. The Order was amended on 14 October 2019 by adding to its description of the multi-projectile category of prohibited ammunition, an exclusion of rimfire cartridges loaded with shot.

### **FIRST CAUSE OF ACTION: DECLARATION AS TO ENTITLEMENT TO COMPENSATION FOR PROHIBITION OF PROHIBITED AMMUNITION**

- 35. The Applicant repeats paragraphs 1 to 34, above.
- 36. The effect of the Order and the Regulations is to deprive lawful owners of their property rights in relation to the “prohibited ammunition” without express compensation rights.
- 37. Properly interpreted, the Order and the Regulations incorporate or leave intact the general common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to proper compensation for the deprivation of such rights.

## **Relief**

Accordingly, the Applicant seeks the following relief:

- (a) A declaration that the effect of the Order and the Regulations is to deprive lawful owners of property rights in relation to the “prohibited ammunition” without express compensation rights.
- (b) A declaration that the Order and the Regulations incorporate or leave intact the general common law principle that, if central government powers are used to deprive lawful owners of property rights, such owners are entitled to receive compensation for the deprivation of such rights.
- (c) A declaration that every person lawfully owning “prohibited ammunition” upon the commencement of the Order is entitled to full compensation for the value of such ammunition upon its provision to the Police or destruction or other disposal by or at the direction of the Police or otherwise to avoid liability under section 43AA of the Act, since the commencement of the Order.

## **SECOND CAUSE OF ACTION: JUDICIAL REVIEW OF THE DEFINITION RECOMMENDATION MADE BY THE FIRST RESPONDENT AND THE ORDER MADE BY THE SECOND RESPONDENT**

38. The Applicant repeats paragraphs 1 to 34, above.
39. The Minister exercised a statutory and public power in making the Definition Recommendation.
40. In exercising that power, the Minister was required to take all (but only) relevant matters into account, to only act for a proper purpose and to act rationally and reasonably.
41. The Governor-General exercised a statutory and public power in making the Order.

### **First ground of review: The Minister failed to take relevant matters into account**

42. In making the Definition Recommendation, the Minister failed to take relevant matters into account, including:



- 42.1. The purpose of the Act, namely to generally permit but regulate the sale, ownership and use of firearms and related items in New Zealand.
- 42.2. The principal purposes of the Amendment Act, namely to prohibit those firearms and related items which pose an extraordinary risk to the safety of the public (including through terrorism or mass shootings) and encourage the voluntary surrender of such prohibited items by the provision of full compensation.
- 42.3. The capacity of the Challenged Ammunition to do harm relative to the capacity of non-prohibited ammunition.
- 42.4. The non-harmful uses for which owners would be expected to use the Challenged Ammunition.
- 42.5. The criminalising effect of the Definition Recommendation on a substantial number of people that were in possession of Challenged Ammunition that had previously been lawfully acquired for non-harmful uses.
- 42.6. The need for clarity in the definition of conduct which is to become subject to significant criminal sanctions.
- 42.7. The views of key stakeholders, including the interests represented by the Applicant.

**Second ground of review: The Minister acted for an improper purpose / asked the wrong questions / had regard to irrelevant considerations**

43. In making the Definition Recommendation by reference to whether the type of ammunition was used by the military and whether it had a “valid civilian use”, the Minister acted for an improper purpose (i.e. other than those referred to above at paragraphs 42.1 and 42.2 and/or similarly asked himself the wrong questions and/or had regard to irrelevant considerations (i.e. other than those set out in paragraph 42, above).

**Third ground of review: The Minister's recommendation was irrational and/or arbitrary**

44. In making the Definition Recommendation, the Minister acted irrationally and/or arbitrarily because:
- 44.1. The Minister was not properly informed to make the Definition Recommendation because of his failure to consider the factors set out in paragraph 42, above.
  - 44.2. The Definition Recommendation was repugnant to the purposes of the enabling Act.
  - 44.3. The Definition Recommendation proposed to prohibit ammunition which civilians had lawfully acquired and posed no risk to safety relative to the capacity of non-prohibited ammunition.
  - 44.4. The Minister's understanding that the Challenged Ammunition had no valid civilian use was incorrect.
  - 44.5. The definitions in relation to the Challenged Ammunition, in particular "enhanced-penetration ammunition", were drafted in vague and uncertain terms.

**Fourth ground of review: The Order is invalid**

45. The order is invalid because for the reasons stated in paragraphs 39 to 44, above:
- 45.1. to the extent that it prohibits the Challenged Ammunition, it is repugnant to the enabling Act; and/or
  - 45.2. the Governor-General followed a flawed and invalid recommendation from the Minister.

**Relief**

Accordingly, the Applicant seeks the following relief:

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

- (b) A declaration that the Arms (Prohibited Ammunition) Order 2019 is invalid to the extent that it prohibits the Challenged Ammunition.
- (c) Costs.

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

- 46. The Applicant repeats paragraphs 1 to 34, above.
- 47. The Minister exercised a statutory and public power in making the No Compensation Recommendation.
- 48. In exercising that power, the Minister was required to take all (but only) relevant matters into account, to only act for a proper purpose and to act rationally and reasonably.

**First ground of review: The Minister failed to take relevant matters into account**

- 49. In making the No Compensation Recommendation, the Minister failed to consider relevant matters, including:
  - 49.1. The principal purposes of the Amendment Act, namely to prohibit those firearms and related items which pose an extraordinary risk to the safety of the public (including through terrorism or mass shootings) and encourage the voluntary surrender of such prohibited items by the provision of full compensation.
  - 49.2. The common law right to property and the common law principle that property rights must not be taken away without proper compensation and/or reasonable justification.
  - 49.3. Part 4 of Chapter 4 of the Legislation Design and Advisory Committee's Legislation Guidelines (2018 edition), which provides that central government powers should not take a person's property without good justification, that a rigorously fair procedure is required, that proper compensation should generally be paid, and that there must be a cogent policy justification if compensation is not to be paid.

- 49.4. The risk that nil or inadequate compensation for the surrender of prohibited ammunition would undermine the public safety related reasons for prescribing the prohibited ammunition.
- 49.5. Relevant international norms, including on the right to property and the requirement to pay reasonable compensation where property is taken.
- 49.6. Other avenues through which the Government could provide compensation in respect of prohibited ammunition outside of the process envisaged in Schedule One to the Arms Act 1983.

**Second ground of review: The Minister acted for an improper purpose / asked the wrong questions / had regard to irrelevant considerations**

- 50. In making the No Compensation Recommendation, the Minister failed to have regard to the purposes referred to in paragraph 49.1, above, but improperly and irrelevantly focused on recovering from civilian ownership any types of ammunition used by the military and/or similarly asked himself the wrong questions and/or had regard to irrelevant considerations (i.e. other than those set out in paragraph 49, above).

**Third ground of review: The Minister acted irrationally and/or arbitrarily**

- 51. In making the No Compensation Recommendation, the Minister acted irrationally and/or arbitrarily because:
  - 51.1. The Minister was not sufficiently informed to have any rational basis to make the No Compensation Recommendation because of the omission to consider the factors set out in paragraph 49, above.
  - 51.2. The Minister failed to recognise and/or give weight to the principle that private property should not be taken by the Government without paying reasonable compensation and/or having reasonable justification.

**Fourth ground of review: The Order is invalid**

- 52. The order is invalid because for the reasons stated in paragraphs 47 to 51, above:

- 52.1. to the extent that it prohibits the Challenged Ammunition, it is repugnant to the enabling Act; and/or
- 52.2. the Governor-General followed a flawed and invalid recommendation from the Minister.

**Relief**

Accordingly, the Applicant seeks the following relief:

- (a) A declaration that the No Compensation Recommendation is invalid.
- (b) A declaration that, by reason of the invalidity of the No Compensation Recommendation, the Arms (Prohibited Ammunition) Order 2019 is invalid.
- (c) Costs.

This document is filed by Stephen Leslie Franks, solicitor for the Applicant, of the firm Franks Ogilvie. The address for service of the Applicant is at the offices of Franks Ogilvie, Commercial & Public Law Ltd, Level 5, Wakefield House, 90 The Terrace, Wellington.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at PO Box 10388, Wellington; or
- (b) sent by email to [info@franksogilvie.co.nz](mailto:info@franksogilvie.co.nz), provided copies are also sent to [stephen.franks@franksogilvie.co.nz](mailto:stephen.franks@franksogilvie.co.nz) and [jack.hodder@chambers.co.nz](mailto:jack.hodder@chambers.co.nz).