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PART IV

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Unlawful Activity or Lawful Activity Conducted in an Unlawful Manner? Comparing Regimes for Forfeiture of the Proceeds of Corporate Crime

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In 2024, Salters Cartage Ltd, a waste recovery company, agreed to pay \$4 million to settle a novel claim brought by the Commissioner of Police for forfeiture of company assets that were alleged to represent the unlawful proceeds of health and safety violations. This case raised concern in the New Zealand business community as to the extent to which regulatory infringements could result in forfeiture actions under the Criminal Proceeds (Recovery) Act 2009. This article conducts a comparative analysis of the regimes for the forfeiture of the proceeds of corporate crime in New Zealand, England and Wales and the United States. Specifically, it considers the extent to which a line can be drawn between a company's legitimate income and the proceeds of crime, where legal infringements occur within business activity. This question in large part turns on whether a business is conducting truly unlawful activity or lawful activity conducted in an unlawful manner.

I Introduction

Alarm spread through the New Zealand business community when, in 2019, the Commissioner of Police commenced proceedings for forfeiture of various assets held by a waste recovery company, Salters Cartage Ltd, and its chief executive in relation to a range of health and safety violations.¹

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1 *Commissioner of Police v Salter* [2021] NZHC 1531.

Concern was raised that the country's civil forfeiture regime was moving away from its usual focus on "gang members and drug dealers" and that the revenues of a wide range of businesses convicted of regulatory offences could be at stake.² This novel case, which contained particularly aggravating circumstances, was settled for \$4 million on 21 October 2024.³ It left open the question of where the line should be drawn between criminal proceeds and legitimate income, particularly in a corporate context.

Although regimes providing for the forfeiture of the proceeds of crime are well established in many jurisdictions, aspects of their application to corporate crime remain uncertain. Consider the following three scenarios: (a) first, where criminal activity lies at the heart of a business such that any income it makes can be fairly considered the proceeds of crime; (b) second, where a company conducts a discrete criminal act largely superfluous to the running of its business and resulting in a clearly defined benefit which can be readily isolated from the company's legitimate revenue streams; and (c) third, where criminal conduct enhances a business's economic position but, absent the criminality, the company would still earn legitimate revenue. This article focuses on the third scenario, where legitimate and illegitimate economic activity meet. How is such a company's unlawful benefit to be defined and what mechanisms exist to protect its otherwise legitimate income?

This article conducts a comparative analysis of the forfeiture regimes in New Zealand, England and Wales and the United States' federal system to identify key principles in common law jurisdictions guiding the delineation of criminal proceeds in the context of corporate crime. While various types of forfeiture are provided for, the present analysis is concerned with *value-based forfeiture* of the ill-gotten gains of criminal activity to the state.⁴ Different regimes label this type of action differently and may or may not require it to be tied to a criminal prosecution, although such features are not pivotal to the issues addressed by this article. In New Zealand, the Criminal Proceeds (Recovery) Act 2009 (CPRA) provides for "profit forfeiture orders" which recover the "unlawful benefit" from a respondent's criminal activity in civil proceedings.⁵ The United Kingdom's Proceeds of Crime Act 2002 (POCA) provides for "confiscation orders" to recover the "benefit" of

2 See, for example, Nikki Mandow "Corporates warned their 'quasi-crimes' carry same penalties as drug lords" (13 February 2022) Newsroom <<https://newsroom.co.nz>>.

3 *Commissioner of Police v Salter* [2024] NZHC 3069.

4 This form of forfeiture focuses on the benefit obtained from criminal activity, which might induce individuals into illegal activity, rather than any resulting harm or loss. Many regimes also provide for forfeiture of contraband, forfeiture of instruments of crime (for example, firearms) and forfeiture to restore assets to victims.

5 Criminal Proceeds (Recovery) Act 2009 [CPRA], s 55. The CPRA also provides for "assets forfeiture orders" over specific tainted property. As these orders are not value-based, they fall outside the scope of this article.

a defendant's "criminal conduct" as part of criminal proceedings.⁶ Various United States statutes provide for *in personam* criminal forfeiture and *in rem* civil forfeiture, both of which can be used for the purpose of recovering value-based proceeds of crime.

Part II summarises the types of offences that can be subject to forfeiture proceedings in each jurisdiction. The heart of the article lies in part III which surveys the cascading measures of a company's criminal benefit with reference to the nature of its offending. Part IV considers the availability of back-end measures to mitigate the magnitude of a value-based forfeiture order and part V concludes.

II Qualifying Offending

One element of the case against *Salters Cartage Ltd* that caused alarm was that it targeted offending in breach of health and safety regulations by an otherwise legitimate enterprise. This contrasted with traditional exercises of New Zealand's forfeiture regime against wholly criminal enterprises.⁷ It is therefore helpful to start with an outline of what type of offending qualifies as producing "criminal proceeds" in each jurisdiction. The nature of the underlying offending will necessarily impact how the benefit derived from it is defined.

New Zealand's CPRA provides for "the restraint and forfeiture of property derived as a result of significant criminal activity without the need for a conviction".⁸ Section 6(1) of the CPRA defines "significant criminal activity" as:

6 Proceeds of Crime Act 2002 (UK) [POCA], s 6. The United Kingdom's regime also provides, in pt 5 of the POCA, for civil recovery of property obtained through unlawful conduct via civil proceedings *in rem*. Unlike the value-based approach of New Zealand's profit forfeiture orders and the United Kingdom's confiscation orders, civil recovery orders are not tied to the concept of an unlawful "benefit". Government guidance provides that criminal proceedings are the preferred course and civil recovery is to be used only in specified circumstances (such as where it is not feasible to secure a conviction). Attorney General's Office "Asset recovery powers for prosecutors: guidance and background note 2009" (29 November 2012) GOV.UK <www.gov.uk>. The use of civil recovery as a method of tackling corporate criminality has largely been abandoned in favour of Deferred Prosecution Agreements. Practical Law *Serious Fraud Office approach to civil recovery orders* (online ed, Thomson Reuters). Accordingly, this article focuses on confiscation as the primary form of forfeiture in the United Kingdom.

7 See Phil Pennington "Police use of proceeds of crime laws in health and safety case 'staggering'" (23 February 2020) Radio New Zealand <www.rnz.co.nz>.

8 CPRA, s 4(1)(a).

... an activity which ... if proceeded against as a criminal offence would amount to offending—

- (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
- (b) from which property, proceeds, or benefits of a value of the threshold amount [currently \$30,000] or more have, directly or indirectly, been acquired or derived.

Pursuant to the second limb, any type of offending can be caught by this broad definition. Although prosecutorial discretion has tended to be exercised against wholly criminal enterprises, such as those importing and supplying illegal drugs, the drafting of the CPRA since its inception has provided for actions to be taken in respect of corporate crime as well.

The United Kingdom's POCA takes a similarly unrestricted approach to the types of offending that may warrant confiscation. This legislation was enacted to "allow the recovery of property which is or represents property obtained through unlawful conduct"⁹ and, pursuant to s 6, a prosecutor can seek a confiscation order in relation to any defendant convicted of "an offence" in proceedings before the Crown Court.¹⁰ A confiscation order will be made in relation to a defendant's benefit from their "criminal conduct", being conduct that constitutes an offence in England and Wales, or would do if it occurred in England or Wales.¹¹ As in New Zealand, the United Kingdom's confiscation regime is not confined to offending of any particular nature.

The position in the United States is more complex. There is no single definition of offending that can be subject to a forfeiture action. Various discrete provisions provide for forfeiture in different contexts and statutes. The most consolidated forfeiture provisions are the United States Criminal Code (18 USC) §§ 981 and 982 which provide for civil and criminal forfeiture respectively in relation to a long list of applicable offences. Both §§ 981 and 982 provide for civil and criminal forfeiture of the proceeds of offences relating to bribery, forgery of securities, counterfeiting offences, entry of goods into commerce by false statements, various types of fraud and others. Section 981 includes a wider range of offences than § 982 and provides, for example, for civil forfeiture of the proceeds of various environmental

9 POCA, introductory text (what once might have been labelled the long title or preamble).

10 Section 6(2) also provides for defendants convicted of an offence in a magistrates' court to be committed to the Crown Court for confiscation.

11 Section 76(1).

crimes. Further statutes relating to specific offences provide for forfeiture in relation to those offences.¹²

These provisions illustrate the breadth of forfeiture regimes across jurisdictions such that they may be applied to most types of corporate offending, including fraud, bribery, tax evasion, breach of environmental laws and other regulations. Corporate wrongdoing tends to be financially motivated and can be considered a form of economic crime, much like those of an illegal enterprise.

III Determination of Illegal Benefit

There are several ways in which a company's benefit from criminal activity might be conceptualised. At the uppermost end, a company's entire gross revenue could be considered to be the proceeds of crime, particularly if its business model was intrinsically linked to criminal activity. A more measured approach would be to categorise a company's net profits as its benefit to give credit for its costs. Even more constrained, would be to view a company's marginal benefit, such as the overcharge it obtained from setting a price higher than that which it otherwise would have, as its benefit from criminality. Under any of these approaches, a company's benefit could either be confined to a particular revenue stream linked to the criminality or determined with reference to its total receipts. A further type of benefit, where the "proceeds" of crime are widely construed, could be the costs savings or enhanced competitive position that a company obtains via criminality. This part surveys how each jurisdiction determines a company's illegal benefit and the extent to which this calculation isolates this benefit from legitimate income.

A New Zealand

The scope of proceeds captured by New Zealand's regime is broad. Section 7 of the CPRA provides that:¹³

12 For example, 21 USCS § 881(a)(6) provides for forfeiture of proceeds exchanged for a controlled substance.

13 (Emphasis in original). Although the CPRA does not define "benefit" (other than to say it includes proceeds and property), obtaining a "material benefit" from significant criminal activity, for the purposes of the provisions relating to organised criminal groups, is defined in subs 5A(4) as "obtaining any privilege, pecuniary advantage, property, or other valuable consideration of any kind". It is inconceivable that the meaning of "benefit" could have a definition any narrower than that given for a "material benefit".

... a person has **unlawfully benefited from significant criminal activity** if the person has knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in the significant criminal activity).

The High Court has held that the term “benefit” must be read consistently with its ordinary meaning which is “pecuniary advantage, profit or gain”.¹⁴ It is well established that a person’s benefit is to be determined with reference to “gross proceeds/receipts” of criminal activity rather than profits.¹⁵ Expenses and outgoings are to be disregarded for this purpose.¹⁶ Courts have held that parliamentary intent was not for the judiciary to be required to “engage in a complex accounting exercise, in order to determine the profits of a criminal enterprise”.¹⁷ It is perhaps striking then that the determination of a respondent’s benefit precedes the making of a *profit* forfeiture order when this might be better referred to as a *revenue* forfeiture order.

The conceptualisation of a criminal *benefit* as any pecuniary advantage, profit or gain encompasses more types of rewards than under a strict view of the direct *proceeds* of crime. In *Commissioner of Police v Nabawi*, the respondent argued that the CPRA could not apply to offences such as tax evasion that did not generate a benefit in terms of any positive acquisition of property or wealth, but simply avoided a liability.¹⁸ The respondent sought to distinguish between a tax offence which yields a net increase in wealth (such as a tax refund obtained through fraud) and non-payment of taxes owed under law “which merely avoids or postpones a decrease in a person’s net wealth”.¹⁹ The High Court firmly rejected this argument, finding that “all forms of fiscal benefit flowing from significant criminal activity are capable of being caught by the Act’s provisions”.²⁰ The Court acknowledged that there was no suggestion that the income underlying the tax evasion was earned illegally and that, given the fungible character of money, it would not be possible to distinguish specific sums of money for which no tax payments were made. However, it held that the retaining of more legitimately earned funds than the respondent should have done, by evading tax liability, was

Accordingly, any privilege or pecuniary advantage would most certainly qualify as a benefit for the purposes of the CPRA.

14 *Commissioner of Police v Snook* [2018] NZHC 2537 at [61] citing the *Oxford English Dictionary* (online ed, Oxford University Press, 2018).

15 *Commissioner of Police v Tang* [2013] NZHC 1750 at [25].

16 At [24].

17 At [21].

18 *Commissioner of Police v Nabawi* [2021] NZHC 2413 at [15].

19 At [16].

20 At [24].

capable of being regarded as a benefit for the purposes of the CPRA.²¹ This suggests that costs saved, which may be the primary benefit derived from non-compliance with corporate regulations, are likely to be readily captured by New Zealand's forfeiture regime.

B England and Wales

The New Zealand position on the gross assessment of a criminal "benefit" was, at least in part, based on the United Kingdom's position in *R v May* where the House of Lords stated that, under the POCA, the benefit gained by a defendant "is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators".²² Confirming that costs savings fall within the scope of the regime, the House of Lords also noted that a defendant ordinarily obtains a pecuniary advantage if "he evades a liability to which he is personally subject".²³ This is consistent with s 76(4) of the POCA which states that "A person benefits from conduct if he obtains property *as a result of or in connection with* the conduct".²⁴ Such wide wording has been described by English courts as providing for a "loose causal test" between a defendant's conduct and their benefit rather than a restrictively technical or artificial approach to causation.²⁵

In recent years, a line of case law has shown the willingness of the English Court of Appeal to distinguish between cases in which a company provides goods or services legitimately but "the transaction is tainted by associated illegality" and cases in which the entire business is conducted

21 At [36]–[38]. In *Commissioner of Police v Cheng* [2023] NZHC 606, [2024] NZAR 234 at [160] the High Court declined to make the order sought (in a case of tax evasion), but the decision was reversed on appeal, reaffirming that retention of funds, although not amounting to a net increase, can constitute an unlawful benefit: *Commissioner of Police v Masonic Ltd* [2025] NZCA 205 at [62]–[64].

22 *Commissioner of Police v Tang*, above n 15, at [19] citing *R v May* [2008] UKHL 28, [2008] AC 1028 at [48].

23 *R v May* [2008] UKHL 28, [2008] AC 1028 at [48(6)]. See also *R v Dimsey* [2000] 3 WLR 273 at [16]–[18] where the Court of Appeal held that the ordinary and natural meaning of pecuniary advantage includes the case where a debt is evaded or deferred.

24 Emphasis added. Section 6 of the POCA introduced the principle of "criminal lifestyle", based on the nature and duration of offending, which allows for the benefit to be based on a defendant's "general criminal conduct" if found to have a criminal lifestyle or "particular criminal conduct" otherwise. The primary implication of a finding that a defendant has a criminal lifestyle is evidentiary, as the court is afforded assumptions under s 10 as to a defendant's accumulation of assets and expenditure being derived from their general criminal conduct.

25 *R v Asplin* [2021] EWCA Crim 1313, [2021] All ER (D) 57 (Aug) at [23] and [47].

illegally.²⁶ In 2017, the Court of Appeal stated that “where the court is concerned with what is no more and no less than a criminal enterprise, turnover (the gross proceeds received) will provide the proper measure of the wrongdoer’s benefit” but “where legitimate goods or services are supplied but the business or transaction in question is otherwise tainted, it *may* be appropriate to make a confiscation order in the amount of the wrongdoer’s profits”.²⁷ The Court has cautioned that “this divide is not necessarily determinative” but is a relevant factor when deciding whether to confiscate the gross takings of the business.²⁸

The following examples illustrate the extent of a company’s revenue that may be subject to confiscation with reference to the centrality of its criminality to the business:

1. *Turnover of a wholly illegitimate enterprise*: In *R v Beazley*, the gross takings of a business selling wheel trims in breach of trade mark law were subject to confiscation as the business was “founded entirely on the infringement of other people’s property rights”.²⁹
2. *Turnover of a particular revenue stream*: In *R v King*, the defendant was in the business of buying and selling used cars and falsely sold 58 cars as a private seller to avoid providing a guarantee or warranty. He argued that his underlying activity of trading in cars was lawful such that the confiscation order should be for a lesser amount than turnover, such as the profit gained.³⁰ The Court considered that it did not matter that selling cars was a legitimate undertaking as the transactions were inherently unlawful because of the manner in which they were conducted.³¹ However, the relevant turnover in this case was only that of the 58 vehicles for which misrepresentations were made, indicating the Court’s implicit willingness to isolate this illicit revenue stream from those generated by the defendant’s honest transactions.³²
3. *Profit and pecuniary advantage of an otherwise legitimate business*: In *R v Sale*, the defendant obtained valuable contracts for his company from Network Rail through bribery.³³ On the broad wording of “benefit” and “pecuniary advantage” in s 76(4)–76(5) of the POCA, the Court

26 *R v King* [2014] EWCA Crim 621, [2014] 2 Cr App R (S) 54 at [32].

27 *R v Reynolds* [2017] EWCA Crim 1455, [2018] 4 WLR 33 at [58] (emphasis in original).

28 *R v King*, above n 26, at [32].

29 *R v Beazley* [2013] EWCA Crim 567, [2013] 1 WLR 3331 at [17].

30 *R v King*, above n 26, at [12].

31 At [33].

32 At [7].

33 *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663. Although the company itself was not charged (it could have been charged as a co-defendant), the Court of Appeal considered at [40]–[41] that, as both the defendant and the company were acting together

of Appeal considered that the whole value of the contracts (about £1.9 million) could be considered the benefit resulting from or in connection with the conduct.³⁴ However, considerations of proportionality (discussed further in part IV below) weighed against confiscation of the whole amount given that, apart from the corruption, the contracts had been properly carried out with full value given to Network Rail and the expenses incurred were those that would have been incurred in the performance of any legitimately obtained contract (other than the expenses of the bribes themselves).³⁵ Accordingly, a proportionate confiscation order would reflect (i) the profit gained under the contracts and (ii) the company's pecuniary advantage in obtaining a stronger market position at the expense of legitimate competitors.³⁶ A similar position was taken in the sentencing of a company called Petrofac Ltd for failing to prevent bribery, where a confiscation order was imposed representing the company's profits on the relevant contracts plus its financial advantage from not having in place adequate procedures.³⁷

4. *Pecuniary advantage based on costs savings by an otherwise legitimate business*: In *R v Moran*, the defendant had understated his income when making tax returns.³⁸ The Crown argued that the whole of Mr Moran's undeclared profits were available for confiscation on the basis that the systematic and persistent non-disclosure of profits rendered his whole enterprise as fraudulent and the proceeds liable to forfeiture.³⁹ The Court of Appeal rejected this argument, finding that profits which are the product of lawful trading could not be said to represent a pecuniary advantage resulting from or in connection with the offending. The

in the corruption, it was the company's benefit that was relevant for the purposes of the POCA.

34 At [45]–[46].

35 At [48] and [60].

36 At [57]. However, because no analysis to quantify the pecuniary advantage of increased market share was available to the Court, the confiscation order ultimately imposed had to be limited to the company's profits.

37 Petrofac was sentenced on 4 October 2021 to a £22.8 million confiscation order. The sentencing decision is not publicly available but has been reported on by the SFO and others. Serious Fraud Office "Petrofac Limited" (29 November 2024) GOV.UK <www.gov.uk>; and Herbert Smith Freehills "Petrofac Ltd ordered to pay £77 million following a guilty plea to bribery offences" (19 October 2021) <www.hsfkramer.com>.

38 *Attorney-General's Reference (No 25 of 2001) (R v Moran)* [2001] EWCA Crim 1770, [2002] 1 WLR 253. Although brought under the predecessor to the POCA, the Criminal Justice Act 1988 (UK), the relevant provisions relating to a defendant's benefit being that obtained "as a result of or in connection" with the criminal conduct are the same.

39 At [8].

pecuniary advantage took the form of the underpayment of tax and any interest accrued or investment returned upon that sum.⁴⁰

These cases illustrate that the degree to which criminality forms part of the revenue-generating functions of a business will be key to whether revenues, profits or other quantifiable benefits are subject to forfeiture. In many cases where a company's business is otherwise legitimate, such as where it has failed to comply with a specific regulation, its benefit may be confined to the pecuniary advantage gained from its offence, such as cost savings or an enhanced market position.

C *United States*

The United States' federal civil forfeiture regime distinguishes between (i) unlawful activities, illegal goods and illegal services, and (ii) lawful goods and services which are sold in an illegal manner. Whether gross proceeds or net proceeds are to be subject to forfeiture will depend on this categorisation of the underlying conduct.

The United States Criminal Code (18 USC) § 981(a)(2) defines "proceeds" as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

The category of offences falling within "unlawful activities" for the purposes of § 981(a)(2)(A) is defined in the federal money-laundering statute, 18 USC § 1956(c)(7), which lists various offences that Congress carved out

40 At [8].

for broader treatment “to deter those whose money-transferring activities are integral to the success of certain specified crimes”.⁴¹

Several appellate courts have interpreted the second category of lawful activity conducted in an illegal manner as relating to illegally provided services that could have “hypothetically” been provided in a legal manner.⁴² Activities that are inherently unlawful and cannot be conducted lawfully will fall within § 981(a)(2)(A), whereas activities that were operated in an illegal manner but could have been provided legally because the underlying activity is itself legal will fall within § 981(a)(2)(B).⁴³ For example, embezzlement has been held to be a discrete misappropriation of government resources rather than a provision of the related services in an illegal manner, whereas wire fraud arising out of misrepresentations in the advertising and running of a business has been held to be an illegal operation of a legal service.⁴⁴ This distinction may depend on how the underlying activity is framed and the Fifth and Seventh Circuits have cautioned against adopting such a narrow definition of the underlying activity that it is always reduced only to the underlying crime and the definition in § 981(a)(2)(B) becomes superfluous and meaningless.⁴⁵

The narrower criminal forfeiture provisions do not provide the same detailed distinction between gross and net proceeds as the civil forfeiture provisions. The term “proceeds” is not defined in 18 USC § 982, although some subsections directly provide for forfeiture of “gross proceeds” in relation to specified offences. Most circuits have defined proceeds in this context to mean gross proceeds, although the question has largely arisen in relation to unlawful activities.⁴⁶ The Seventh Circuit has defined proceeds as net proceeds.⁴⁷

There is limited case law regarding forfeiture of other types of pecuniary advantages that a company might derive from criminal activity, such as

41 *United States v All Funds on Deposit in United Bank of Switzerland* 188 F Supp 2d 407 (SD NY 2002) at 410.

42 *United States v Davis* 53 F 4th 833 (5th Cir 2022) at 854.

43 At 853.

44 *United States v Carpenter* 941 F 3d 1 (1st Cir 2019) at 7–8.

45 *United States v Davis*, above n 42, at 853 referring to *United States v Balsiger* 910 F 3d 942 (7th Cir 2018) at 957.

46 Karen Straus *Business Crime: Criminal Liability of the Business Community* 4 Business Crime P 14A.08 (2024).

47 *United States v Genova* 333 F 3d 750 (7th Cir 2003). At 761 the Seventh Circuit acknowledged its split from the other circuits in a case where the defendant provided kickbacks in exchange for business received by his law firm but other lawyers and staff at the firm were not involved in the criminality. This context reflects a lawful service provided in an unlawful manner.

costs savings.⁴⁸ The primary authority dealing with this issue is the decision of the District Court for the Eastern District of Tennessee in *United States v Tyson Foods Inc*, where the defendant company was charged in relation to its employment of workers whom it knew were not legally permitted to work in the United States.⁴⁹ The Government sought criminal forfeiture of costs saved by Tyson Foods Inc by paying lower wages to illegal workers. The defendant argued that any alleged costs savings are not “proceeds” subject to forfeiture under 18 USC § 982(a)(6)(A)(ii)(I).⁵⁰ The Court noted that “proceeds” is not defined in 18 USC § 982 but that, given the term’s ordinary, natural meaning, the Government’s theory of costs savings falls within this definition of “proceeds”.⁵¹

The notion of costs savings as proceeds was disapproved by the Florida Middle District Court in *United States v Maali* and by the 11th Circuit on appeal.⁵² However, this case related to a money-laundering prosecution, creating a significant distinction between the application of criminal forfeiture under 18 USC § 982 (a)(6)(A)(ii)(I) to property “that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission” of the underlying offence and the narrower application of the money-laundering statute to “proceeds of specified unlawful activity”.⁵³ Indeed, it can be considered entirely justifiable that money laundering should relate only to the positive acquisition of “dirty” money while forfeiture may apply to pecuniary advantages more broadly, including costs savings and the avoidance of liabilities (the distinction discussed in *Nabawi* above). Accordingly, the authority of *Tyson Foods* in a forfeiture context holds, although this theory of costs savings is yet to be applied to wider types of corporate offending.

D *Emerging themes*

Across these three jurisdictions, there is precedent for forfeiture of corporate revenue, profits, costs saved/liabilities avoided and other pecuniary advantages. While both the United Kingdom and the United States have

48 See Richard C Alexander “Cost Savings as Proceeds of Crime: A Comparative Study of the United States and the United Kingdom” (2011) 45 *Int’l Law* 749 at 778.

49 *United States v Tyson Foods Inc* No 4:01-CR-061, 2003 US Dist LEXIS 26385 (ED Tenn 4 February 2003).

50 At 15.

51 At 16.

52 *United States v Maali* 358 F Supp 2d 1154 (MD Fla 2005) at 1158–1159; and *United States v Khanani* 502 F 3d 1281 (11th Cir 2007) at 1296.

53 *United States v Catapano* No CR-05-229 (SJ), 2008 US Dist LEXIS 121693 (ED NY 22 May 2008) at 83.

recognised all of these types of benefit in some capacity and tied their application to the legality of the underlying enterprise, the New Zealand regime is yet to accept net profits as a measure of criminal benefit. New Zealand's position may be attributable to the forceful purpose and mandatory nature of the profit forfeiture provisions in the CPRA.⁵⁴ These provisions are draconian in that they allow for the value of the benefit to be presumed to be that which is stated by the Commissioner of Police and prescribe that the High Court "must" make a profit forfeiture order if satisfied that the respondent has unlawfully benefited from significant criminal activity and has interests in property.

(1) Optionality to forfeit revenue or profits

Whether New Zealand ought to follow suit by introducing the option of forfeiting either an enterprise's revenues or profits is ultimately a policy question. The discretion to choose between these two measures depending on the legitimacy of the underlying enterprise would not result in the relevant benefit being identified with any greater financial accuracy. Indeed, accurate accounting does not appear to be the basis upon which this election has been adopted elsewhere. The optionality of profits or revenues has only been tied to the calculation process to the extent that some courts have suggested that expenses lawfully incurred, and which would have been incurred absent the illegality, warrant credit.⁵⁵ It is not clear why the legality of expenses should be determinative. Regardless of the nature of the underlying offending, to the extent that it is revenue-generating, the benefit of criminality to both a white-collar criminal and an illicit drug supplier is, in any practical sense, their profits. Whether a criminal operates within an enterprise that could or could not, in theory, operate legally does not in principle change the nature of their costs as liabilities.

The discretionary position taken by the United Kingdom and United States is likely to guard against the risk of overdeterrence when severe forfeiture powers are exercised against enterprises that are legitimate in part. When an enterprise is entirely illegitimate, the risk of overdeterrence is low, as there is no commercial activity the state wishes to protect. This may form the basis of a more punitive sanction. However, when an enterprise operates some legitimate functions, there is a risk of deterring genuine business activity. These considerations may also play into assessments of the proportionality of forfeiture (which the United Kingdom has particular regard to, as discussed below). However, from a financial perspective, credit for legitimate income would be more accurately granted by delineating

⁵⁴ See CPRA, ss 3 and 53–55.

⁵⁵ See *R v Sale*, above n 33, at [31] and [48].

between legitimate and illegitimate streams of revenue and forfeiting the profits only of the latter. Neither looking to the profits of an entire enterprise with an underlying lawful activity nor the entire revenue of an enterprise operating an unlawful activity will necessarily produce an accurate account of the relevant criminal benefit. The approach of the United Kingdom and the United States may therefore result in arbitrary outcomes based on irrelevant factors, such as the profitability of the business. Basing the forfeiture of revenues or profits on the legality of the underlying enterprise also risks disproportionately favouring those who commit savvy crimes within an enterprise with some legitimacy.

The New Zealand position (which does not adopt profits as an available measure) is based on the parliamentary intention to “make proceeds of crime recovery *more* effective” and to avoid courts engaging in a “complex accounting exercise, in order to determine the profits of a criminal enterprise”.⁵⁶ If New Zealand were to adopt the option of forfeiting only net profits for otherwise legitimate enterprises, the latter justification would not hold. It would not be sustainable that white-collar criminals be credited their costs on account of better record-keeping. In any event, a standardised discount to reflect typical profit margins for categories of criminal enterprise would offer an efficient mechanism to provide some acknowledgement of the potential disproportion in forfeiting criminal revenue, without being based on the legitimacy of the underlying enterprise. To the extent that accounting concerns can be overcome, concerns may still remain as to whether forfeiture of a company’s profits will satisfy the CPRA’s firm purpose to “eliminate the chance for persons to profit” from criminal activity.⁵⁷ Again, the use of the term “profit” rather than “revenue” is telling. Arguably, the question should not be whether forfeiture of profits should be an available option in New Zealand but rather whether forfeiture of revenues should be an available option.

(2) Alternative types of benefits

As the application of forfeiture regimes to corporate crime continues to develop, the quantification of unlawful benefits in the form of costs savings is likely to be increasingly relevant. To date, costs savings have been most readily adopted as the appropriate measure in cases of tax evasion. However, for a wide range of regulatory violations (such as in environmental and health and safety contexts) by otherwise legitimate businesses, this is likely to be the most appropriate measure of a company’s unlawful benefit. Where a company primarily operates lawfully but has failed to

⁵⁶ *Commissioner of Police v Tang*, above n 15, at [21] (emphasis in original).

⁵⁷ CPRA, s 3(2)(a).

take necessary compliance measures to meet regulatory standards and this amounts to a relevant offence, costs savings and any associated market pecuniary advantage are likely to constitute the extent of the company's benefit. However, it will be a matter of prosecutorial discretion as to whether forfeiture action is warranted at all in such cases as forfeiture tends to target revenue-generating criminality.

As the extent of a company's criminality becomes more egregious and forms a greater part of its business structure, the tipping point into forfeiture of profits and revenues draws closer. This will largely be a fact-based determination. In the case of *Salters Cartage Ltd*, the company provided several services, including collecting and processing waste oil into fuel oil, providing a response service to major spills, and transporting and storing hazardous substances.⁵⁸ The Commissioner's case was that *Salters Cartage Ltd* was systematically non-compliant with health and safety regulations and operated dangerously for at least seven years.⁵⁹ Forfeiture was sought of revenue unlawfully derived from the production and sale of recycled oil and the storage of hazardous substances.⁶⁰ In a case like this and without the benefit of the full suite of evidence to be adduced at trial, the blurring of illegality and legitimate enterprise gives rise to arguments in relation to all types of measures of benefits:

1. *Turnover of a wholly illegitimate enterprise*: The Commissioner could have argued that *Salters Cartage Ltd* was essentially operating an unlawful enterprise given its egregious health and safety breaches. *Salters Cartage Ltd* operated a recycled oil plant in breach of a specific prohibition notice and failed to obtain legally required test certificates for a number of locations where hazardous substances were held on its site.⁶¹ Arguably these violations rendered the performance of these very services illegal (similarly to the United Kingdom Supreme Court's direction in *Andrewes*, discussed below, that a person appointed as a surgeon without necessary qualifications provides entirely illegal services), such that forfeiture of the business's revenue was appropriate.
2. *Turnover of a particular revenue stream*: *Salters Cartage Ltd's* case is complicated by the business providing multiple services. If it could demonstrate that, for example, its response service to major spills operated legally and produced a discrete and quantifiable revenue stream, it could argue for exclusion of that income from forfeiture.

58 *Commissioner of Police v Salter*, above n 1, at [3].

59 At [47(a)].

60 At [47(a)].

61 At [9] and [13].

3. *Profit of an otherwise legitimate business*: Although not an available option in New Zealand, under either the United Kingdom or United States model, Salters Cartage Ltd could have argued that it provided lawful services in an illegal manner. Applying the United States' test of whether the services could hypothetically have been provided in a legal manner, the answer is evidently yes, as Salters Cartage Ltd itself may even have been able to prove that, outside its relevant period of criminality, it did so. Regarding the United Kingdom's considerations of proportionality, Salters Cartage Ltd could have sought to demonstrate that it gave full-value services in exchange for the revenue it received such that forfeiture should be limited to its profits.
4. *Pecuniary advantage based on costs savings by an otherwise legitimate business*: Salters Cartage Ltd could also have argued that none of its illegalities were revenue-generating but were only costs-saving, such that its pecuniary advantage from non-compliance should have been quantified (being the costs that would have been incurred for the business to be law-abiding) and forfeiture restricted to that discrete benefit.⁶²

The case of Salters Cartage Ltd illustrates the complexity of value-based forfeiture in the context of a mixed legitimate and illegitimate enterprise. The extent of a company's liability is likely to depend on the centrality of its criminality to its business model. Where a company's criminal activity is revenue-generating and inextricably linked to its underlying business, its entire revenue may be at risk. If, however, a company's criminal activity does not itself produce revenue but only a pecuniary advantage that can be discretely quantified, a company may be able to narrow its forfeitable benefit accordingly.

Further, prosecutorial discretion to pursue forfeiture is more likely to be exercised in the former case, where proceeds can be directly attributed to criminal activity and may be of greater magnitude, depending on the size of the company. The latter scenario, regarding a benefit taking the form only of a pecuniary advantage, may also be vulnerable to scrutiny regarding quantification of that benefit. Measuring a pecuniary advantage, particularly where the advantage depends on how the company would have behaved in a lawful counterfactual, can be complex. Companies may exploit this uncertainty by arguing for a benefit less than that alleged or arguing that the benefit cannot be established at all.⁶³

62 A complication of this type of benefit is that Salters Cartage Ltd could have argued that it did not retain the full costs saved but passed some of its savings on to customers in the form of lower prices. This could warrant quantification and forfeiture of the pecuniary advantage the company obtained via market distortion, as in *R v Sale*, above n 33.

63 See Alexander, above n 48, at 786–787.

IV Ancillary Mechanisms for Retaining Revenue

Once a benefit figure has been provisionally determined, the liable parties will be anxious to know what secondary mechanisms exist to potentially reduce that sum, particularly where the figure represents gross revenue. This part summarises some of the measures available to companies to push back against the magnitude of a value-based forfeiture order.⁶⁴

A New Zealand: undue hardship

The primary back-end measure available to reduce a respondent's unlawful benefit under the CPRA is an application on the grounds of undue hardship. Pursuant to s 56 of the CPRA, a court may exclude certain property from a profit forfeiture order if undue hardship is likely to be caused. The circumstances the court may have regard to, without limitation, include: (a) the use ordinarily made of property; (b) the nature and extent of the respondent's interest in the property; and (c) the circumstances of the significant criminal activity to which the profit forfeiture order relates.⁶⁵ The threshold for *undue* hardship is high as there will always be some hardship to a respondent and sometimes to a third party when a forfeiture order is made.⁶⁶ Undue hardship must be more than ought properly to be due in giving effect to the relevant purposes of the CPRA.⁶⁷ As the Court of Appeal stated in *Nicholas v Commissioner of Police*:⁶⁸

In such a regime, as the cases consistently show, those who have profited from significant criminal activity will expect to lose their major assets including land and home even where these have enormous economic and emotional value for the owner. The level of disproportion required to be "undue" must be greater than that. As the authorities have consistently said in this Court and the High Court, the level of hardship must be so disproportionate as to require the objectives of recovery and deterrence to be subordinated to the particular needs of the wrongdoer (s 56) or other interested parties (ss 61 and 62).

Accordingly, undue hardship will be a high bar for any company to meet.

64 All three of the regimes discussed in this article also allow for third parties who were not involved in the criminality to apply for property in which they have an innocent interest to be excluded from forfeiture.

65 CPRA, s 56(2).

66 *Lyall v Solicitor-General* [1997] 2 NZLR 641 (CA).

67 *Nicholas v Commissioner of Police* [2017] NZCA 473, [2018] NZAR 172 at [57].

68 At [57].

B *England and Wales: proportionality*

The primary limitation on the magnitude of confiscation orders under the United Kingdom's regime is found in s 6(5) of the POCA which provides that a court is only to make a confiscation order "if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount".⁶⁹ Courts may consider proportionality as part of the overall assessment of a criminal's benefit or may do so subsequently. The Supreme Court stated in *R v Waya* that whether any confiscation order is disproportionate is to be tested against the legitimate aim of the legislation.⁷⁰ A proportionate confiscation order may require a defendant to pay the gross revenues of crime without offsetting expenses as this is consistent with the POCA's objective.⁷¹

The Supreme Court considered a confiscation order is likely to be disproportionate where the benefit obtained by a defendant has been wholly restored to their victim or would otherwise serve as double recovery such that confiscation would not achieve the object of removing from the defendant their proceeds of crime.⁷² Proportionality may require consideration of confiscation on the basis of profits rather than revenue in scenarios involving otherwise legitimate exchanges of valuable consideration.⁷³ This was the basis upon which the confiscation order in *Sale* was reduced accordingly.

The "loose causal test" between offending and its benefit may also be "tempered by the requirement that a confiscation order must not be disproportionate".⁷⁴ In *R v Andrewes*, the Supreme Court accepted that confiscation of a defendant's full salary where he had fraudulently obtained employment would constitute double recovery as he had given full value for the remuneration received. However, if the performance of the services was illegal (such as where a person is appointed as a surgeon without necessary qualifications), there would be no lawful market for the performance of those services and the entire earnings should be confiscated.⁷⁵ The "middle way" adopted was to confiscate the difference between the higher earnings

69 This limitation is also necessary to ensure compliance with the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 262 (opened for signature 20 March 1952, entered into force 18 May 1954), art 1 (to which New Zealand is not a party).

70 *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 at [12] and [22].

71 At [26]. The Court also noted at [25] that, to the extent a confiscation order is based on the assumptions applicable to lifestyle cases, it would be very unusual for the order to be disproportionate.

72 At [28]–[33].

73 At [34].

74 *R v Asplin*, above n 25, at [23]–[24].

75 *R v Andrewes* [2022] UKSC 24, [2023] 1 All ER 443 at [41]–[42].

obtained as a result of the fraud and those that would have been obtained absent the fraud.⁷⁶

The Crown Prosecution Service confiscation guidelines now state that where a defendant's benefit comprises property received in return for the provision of legitimate goods and services, it is necessary to consider whether it is legitimate to base confiscation on turnover, or profit, or other pecuniary advantages.⁷⁷ This guidance provides three examples of where such consideration is applicable: (i) where a defendant, by deception, induces a party to trade in a manner otherwise lawful;⁷⁸ (ii) where a defendant dishonestly overcharges in the course of business;⁷⁹ and (iii) where a contract to perform services is obtained through corruption.⁸⁰

C *United States: excessive fines clause*

The proportionality of forfeiture orders in the United States is protected by the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. In *United States v Bajakajian*, the Supreme Court recognised that criminal forfeiture is a form of punishment and noted that both civil and criminal forfeiture could be considered a “fine” for the purposes of the Eighth Amendment if it constitutes punishment, even in part. The Court held that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offence.⁸¹ It has since been provided for in 18 USC § 983(g) that a claimant can petition the court to determine whether a civil forfeiture was constitutionally excessive by a preponderance of evidence. The court may reduce or eliminate the forfeiture as necessary.

76 At [45]. See also at [48]: this did not involve a “detailed or precise evidential or accounting exercise” but rather a “broad-brush basis” would compare the defendant's salary in the new job to that in his prior job.

77 Crown Prosecution Service “Confiscation Proceedings — Guidance for prosecutors on the discretion to instigate” (11 September 2020) <www.cps.gov.uk>.

78 The Supreme Court identified this scenario as warranting consideration of limiting confiscation to profits in *R v Waya*, above n 70, at [34].

79 This scenario derives from *R v Shabir* EWCA Crim 1809, [2009] 1 Cr App R (S) 84 where a pharmacist dishonestly inflated some claims for the cost of prescriptions. The Court, at [30], considered that a confiscation order over the payments could be oppressive when considering the disparity between that sum and the small excess that had been added.

80 This scenario derives from *R v Reynolds*, above n 27, at [58]–[62] where the Court of Appeal considered that, as products or services provided by the contractor were of good value, a confiscation order based on profits and the pecuniary advantage obtained by market distortion was justified, rather than turnover.

81 *United States v Bajakajian* 524 US 321 (1998) at 328, 334 and n 6.

To determine the proportionality of a forfeiture, a court is to consider the nature and extent of the criminal activity, its relation to other crimes, its penal ties and the harm it caused.⁸² Findings that a forfeiture order is grossly disproportionate tend to be rare, with courts sometimes citing the relevant maximum terms of imprisonment in support of declining a petition.⁸³ Accordingly, the threshold for reduction of a forfeiture order on this basis is high.

D *Emerging themes*

In the United Kingdom, proportionality is closely tied to the calculation of a defendant's unlawful benefit and can dictate the methodology for calculating it, particularly where confiscation risks capturing proceeds derived from trade that is legitimate in part. In New Zealand and the United States, the prospects of establishing undue hardship and gross disproportion respectively appear to be much lower and of less certain impact on the unlawful benefit calculation. Even if such standards are met, a discrete discount, rather than a reconfiguration of the benefit, may be the result.

Whether a company's forfeiture sum will be reduced on any of these bases will be fact-dependent. The potential collateral consequences of forfeiture to the wider business, shareholders and employees who were not involved in the criminality, particularly where the criminality was confined to one part of a legitimate business, may weigh in favour of limiting forfeiture.

The settlement approval decision in the case of *Salters Cartage Ltd* makes reference to relief on "hardship grounds" having been sought. However, it does not provide any factual description of the anticipated hardship to the company other than an assertion made by the respondents that there would be "catastrophic impacts" for it.⁸⁴ It is notable that one asset subject to the Commissioner's forfeiture action was a commercial property where *Salters Cartage Ltd* processed waste oil and to which a processing plant was affixed.⁸⁵ Evidence was given that it would not be commercially realistic for the business to operate without this property and that it would, at least, require a long-term lease of the land and fixtures.⁸⁶ These circumstances

82 *United States v Bollin* 264 F 3d 391 (4th Cir 2001) at 417 citing *United States v Ahmad* 213 F 3d 805 (4th Cir 2000) at 813.

83 Matthew Bender & Company, Inc *Comprehensive Tax Guides* § 8:36.01 (2024).

84 *Commissioner of Police v Salter*, above n 3, at [14]. It is also likely that some of the hardship grounds argued would relate personally to the CEO of *Salters Cartage Ltd* and his family, given he was also a named respondent, along with his wife, and various personal property was subject to the forfeiture action.

85 *Commissioner of Police v Salter* [2024] NZCA 6 at [2], [12], [75] and [88].

86 At [75].

may have provided a compelling basis upon which to advance an application to exclude the commercial property from forfeiture on grounds of undue hardship. However, as provided for in s 56(2) of the CPRA, the use of the property may also weigh against such an application. Much of the company's criminal activity took place at this property. Notably, *Salters Cartage Ltd* operated the plant at the property in breach of a prohibition notice that had been issued in response to a fatal incident resulting from the company's health and safety breaches.⁸⁷ Such a direct connection between the property and the criminality may call in question whether any hardship to the company resulting from forfeiture is "undue".

Under a United Kingdom approach, the focus would likely be less on the use of the property and rather on the overall sum subject to forfeiture. Specifically, the United Kingdom considers the extent to which a defendant's benefit has been obtained in exchange for otherwise legitimate valuable consideration and the strength of causation between the criminality and that benefit. Although not explicitly provided for, these factors may also be relevant to New Zealand's test of undue hardship. Subsection 56(2)(c) of the CPRA provides broadly for consideration of the "circumstances of the significant criminal activity to which the profit forfeiture order relates". *Salters Cartage Ltd* could have argued that it provided some legitimate value in exchange for its unlawful benefit and that New Zealand should follow the United Kingdom by crediting this consideration. In this way, the lawfulness of the underlying business activity may be relevant not only to the initial calculation of the benefit accrued but also to relief from forfeiture.

The United States' position places greater emphasis on the gravity of the defendant's offending and the punitive extent of forfeiture. Again, these considerations could be caught by the broad reference to the circumstances of the relevant criminal activity in s 56(2)(c) of the CPRA. *Salters Cartage Ltd* could have referenced the relatively low maximum fines for its offences under the Health and Safety in Employment Act 1992 and the Hazardous Substances and New Organisms Act 1996, compared to the large forfeiture sums sought by the Commissioner.⁸⁸ However, this is a blunt comparison which would likely be countered by the particularly aggravating circumstances of *Salters Cartage Ltd's* offending and the harm caused, including a fatality.

87 At [18]–[23].

88 See Health and Safety in Employment Act 1992, s 49(3)(b): maximum fine of \$500,000 for offences "likely to cause serious harm"; and see also Hazardous Substances and New Organisms Act 1996, s 114(1): maximum fine of \$500,000 and, if the offence is a continuing one, a further fine not exceeding \$50,000 for every day or part of a day during which the offence has continued.

V Conclusion

Corporate crime can risk subjecting a business to forfeiture actions, in much the same way as an illegal trade. The proportion of a company's income and assets that could be in jeopardy will largely depend on any connection between the criminality and the company's revenue-generating functions. The United Kingdom and the United States both distinguish unlawful activity from lawful activity conducted in an unlawful manner. This distinction can be determinative of whether a business's revenue or only its profits will be on the line. The United Kingdom has also illustrated how proportionality considerations relating to double recovery and causation may guide how the proceeds of crime are calculated. New Zealand's regime is particularly severe in its hostility to an unlawful benefit being confined to net profits, even where the underlying enterprise is legitimate. Where the Commissioner considers a company's conduct egregious enough to warrant forfeiture action under the CPRA, its revenue is likely to be at stake.

However, corporate non-compliance is often distinct from an entirely unlawful enterprise in that it increases profits by costs savings rather than being the means upon which revenues are realised. In such cases, companies may argue that value-based forfeiture should correspond to the pecuniary advantage derived from the conduct. By drawing a comparison to liability-avoiding offences such as tax evasion, businesses may be able to establish that none of their revenue is the *proceeds* of crime. This may be particularly relevant to regulatory offending. Yet, the foregoing of compliance costs or superior market position obtained via the illegality may constitute a substantial benefit.

The case of *Salters Cartage Ltd* serves both as a warning and an illustration of the complex matrix of factors that will determine a company's liability in circumstances where legitimate and illegitimate business activity meet. These include the strength of causation between the criminality and the company's revenue or other pecuniary advantages, the extent to which discrete legitimate revenue streams exist, and the impact of forfeiture upon the business in light of the gravity of its offending. A limited failure to meet regulatory standards by an otherwise legitimate business may only result in forfeiture equating to the cost of enacting adequate procedures. More egregious breaches, such as *Salters Cartage Ltd's* operations in violation of a specific prohibition notice, will put into question the legitimacy of the business at its core and the security of its revenue as a whole.

Partially Valuing Trust Powers as Relationship Property: A Coherent Post-Clayton Doctrine

NATHAN PINDER*

Discretionary trusts pose a significant challenge for the just division of relationship property under the Property (Relationships) Act 1976 (PRA). Clayton v Clayton marked a turning point, but subsequent cases have neglected two distinct findings in that case. The first is that the PRA is “social legislation”, and the second is that “worldly realism” is appropriate in the relationship property context. Instead, courts have tended to find that trust powers can only be relationship property when the donee of the power would not be constrained by fiduciary duties or the proper purpose rule when appointing all the trust property to themselves. Under that approach, a constrained power cannot be property. This article argues that a partial value approach to valuing trust powers is more coherent with Clayton and the PRA than the existing approach. A partial value approach would hold constrained powers to be property for the purposes of the PRA. The value of the power would merely be reduced to reflect the extent of the constraint. By adopting this partial value method, courts could balance respect for trust structures with the PRA’s dual purposes of obtaining a just division of relationship property and recognising each partner’s equal contribution to the relationship.

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I Introduction

Few legal constructs confound as much as the elusive nature of relationship property interests in discretionary trusts. The long-standing oversimplification “that trust property is not relationship property as a matter of law” has remained compelling.¹ Under that view, when partners separate, property in a trust that would otherwise be relationship property is exempt from the equal sharing regime in the Property (Relationships) Act 1976 (PRA). A trust vests legal ownership in the trustees. Since neither partner personally owns property in the trust, trust property cannot be relationship property.

This formal approach can lead to unjust division of partners’ assets upon separation. Individuals might intentionally or mistakenly dispose of relationship property to a trust and defeat their partner’s claim. In *Sutton v Bell*, for example, Mr Sutton anticipated a looming de facto relationship, so unilaterally disposed of his valuable assets to a trust.²

To prevent such unfairness, the PRA offers two remedies for spouses or de facto partners deprived of relationship property by their partner’s dispositions to a trust. Courts may set a disposition aside or order compensation to the affected partner.³ But the thresholds for engaging these remedies are prohibitively high and the remedies themselves are limited.⁴

One approach the courts have taken to uphold the purposes of the PRA has been to read widely the PRA’s definition of property. In *Clayton v Clayton*, the Supreme Court found Mr Clayton’s extensive powers as a trustee were “rights” which, when coupled with his beneficial “interest” in the trust property, were sufficient to constitute property for the purposes of the PRA.⁵ Because Mr Clayton had acquired his powers during the relationship, the powers were deemed relationship property for which Mrs Clayton could be compensated.⁶

Since *Clayton*, lower courts have grappled with the implications and limitations of this widened conception of property.⁷ The central questions

1 *Lindsay v Lamb* [2023] NZFC 8072 at [15].

2 *Sutton v Bell* [2023] NZSC 65, [2023] 1 NZLR 150.

3 Property (Relationships) Act 1976 [PRA], ss 44 and 44C.

4 Law Commission *Dividing relationship property — time for change?* (NZLC IP41, 2017) [NZLC IP41] at ch 21. See also the discussion below in part II.

5 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [80]. See also the definition of property in s 2(e) of the PRA, which includes “any other right or interest”.

6 *Clayton*, above n 5, at [86].

7 See, for example, *Brkic (as trustees of the Madeg Trust) v White (as trustees of the Awhitu Trust)* [2021] NZCA 670, [2021] NZFLR 840; *Da Silva v Da Silva* [2016] NZHC 2064; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529; and *Lindsay*, above n 1.

are: what kind of “right” or “interest” in a trust does the PRA engage, and what remedies might attach?

A Argument

What is missing from the extensive New Zealand literature on *Clayton* is an analysis of the implications of coherently reconciling the PRA’s statutory scheme with the *Clayton* approach to trust property. To date, there has been only limited examination of which additional interests in trusts might be captured by the interpretation in *Clayton*.⁸ Nor has any New Zealand court attempted to state the law in any broad sense, perhaps because “the law is in the early stages of development ... and should be allowed to continue to develop by application in individual cases”.⁹ Nevertheless, the Supreme Court’s recent decisions in *Legler v Formannoij* and *Cooper v Pinney* provide a useful opportunity, nine years on from *Clayton*, to advocate for a more coherent approach.¹⁰

This article aims to clarify the implications of the finding in *Clayton* that the PRA is “social legislation”, which enabled the Court to find that trust powers could be property for the purposes of the PRA.¹¹ It evaluates how far the definition of property accepted in *Clayton* may extend, and whether it opens the door to the recognition of other interests in trusts as property.¹² Ultimately, this article rejects the existing approach — broadly followed in *Cooper* — that for a power to constitute relationship property, the holder of the power must be able to appoint themselves *all* the trust property unconstrained by meaningful fiduciary duties or the proper purpose doctrine.¹³ The all-or-nothing nature of the existing approach does not apply the worldly realism necessary to recognise the equal contribution of both

8 The most compelling attempt has been Jesse Wall “Taking the Bundle of Rights Seriously” (2019) 50 VUWLR 733. See also Jack Davies “Are the Floodgates Open? A Brief Analysis of the Supreme Court’s Decision in *Clayton v Clayton [Vaughan Road Property Trust]*” (2016) 22 Auckland U L Rev 383; Rhonda Powell “Variations on a theme by Clayton” [2020] NZLJ 6; and Joel Nitikman “*Clayton v Clayton* in the New Zealand Supreme Court: it’s hard to keep a good court down” (2016) 22 Trusts & Trustees 1049.

9 Helen Winkelmann “The Supreme Court: A View from the Top” in Michael Littlewood and Janet McLean (eds) *The New Zealand Supreme Court: The Second Ten Years* (LexisNexis, Wellington, 2024) 503 at 518–519.

10 *Cooper v Pinney* [2024] NZSC 181, [2024] 1 NZLR 935; and *Legler v Formannoij* [2024] NZSC 173, [2024] 1 NZLR 710.

11 *Clayton*, above n 5, at [38].

12 At [80], n 81.

13 See, for example, *Da Silva*, above n 7, at [53].

partners to the relationship.¹⁴ While constraints might limit the *value* of the power, the fact that the PRA is social legislation aimed at the “just division” of relationship property on separation supports a finding that a constrained power is property.¹⁵ In other words, a more coherent doctrine would employ a “partial value” approach to valuing trust powers as property.

Conceptualising property interests in this way retains sufficient deference to trust structures. The PRA does not enable courts to “bust” trusts to facilitate equal sharing.¹⁶ In that respect, interests in trusts still should not ground an application to distribute trust capital, or an occupation order to enable the disadvantaged partner to continue living in the home.¹⁷ Legislative reform — as the Law Commission has proposed — is necessary to enable these kinds of remedies.¹⁸ But in the meantime, more can and should be done by courts to enable the just division of relationship property upon separation and to recognise the equal contribution of both partners to the relationship. Coherence with the PRA regime and the conception of property developed in *Clayton* requires it.

B *Structure*

This article has five parts.

Part II outlines why the available legislative remedies to address trust-held property do not uphold the purposes of the PRA. Part III introduces the coherence theory this article uses to assess the possible approaches to classifying “property” under the PRA scheme.

Part IV evaluates what “property” might mean for the purposes of the PRA. First, it evaluates possible conceptions of property that the wording of the PRA supports, distinguishing between “formal” and “functional” theories. It then clarifies the key findings in *Clayton* — that the PRA is “social legislation”, and that “worldly realism” is appropriate in the relationship

14 PRA, s 1M(b).

15 Section 1M(c).

16 *Clayton*, above n 5, at [84] accepting that coherence with ss 44 and 44C precludes the court having a “trust-busting” power.

17 The current position relating to occupation orders is conveniently summarised in Bill Atkin “Case note: Possession of home and trusts — *Lindsay v Lamb*” (2024) 11 NZFLJ 97. But see Nicola Peart “Occupation orders under the PRA” [2011] NZLJ 356 for a persuasive argument that occupation orders merely grant possessory rights, rather than ownership rights, and therefore occupation orders should be available in respect of trust-held property.

18 Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) [NZLC R143].

property context. Both findings enabled the Court to reject the conventional notion that powers are distinct from property. After evaluating how the law has evolved post-*Clayton*, it argues the limitations commonly imposed on the *Clayton* doctrine — that the donee of the power must not owe fiduciary obligations to a beneficiary or be limited by the proper purpose rule — are in tension with the wider conception of property under *Clayton*.

Finally, part V argues for a partial value approach to valuing trust powers as property. The existing approach imposes an unjust all-or-nothing dilemma that is difficult to reconcile with the bundle of rights conception of property applicable under the PRA. The existing approach also does not reflect the often partial nature of constraints on trust powers, which the Supreme Court accepted in *Legler*. Using a hypothetical, this part shows the partial value approach upholds the purposes of the PRA better than the existing approach. Part V concludes with an analysis of the Supreme Court's recent judgment in *Cooper*, arguing that a partial value approach remains viable post-*Cooper*.

II Existing Remedies

The PRA provides two remedies for dispositions wrongfully made to a trust: ss 44 and 44C.

Section 44 enables a court to set aside a disposition of property where it is satisfied that the disposition was made “in order to defeat the claim or rights of any person” under the PRA. The party making the disposition only requires a sufficiently “clear and present intention” of entering the relationship and an intent that the disposition should defeat their future partner's rights.¹⁹ If such intention can be shown, s 44(2) enables a court to order compensation or to set aside the disposition and order that the property be transferred to any person, including the partner.

While s 44 applies to dispositions generally, s 44C provides a remedy for property disposed of to a trust. However, s 44C(1) requires that the disposition must: (a) have been made after the marriage, civil union or de facto relationship began, by either or both of the parties to the relationship; and (b) have had the effect of defeating the claim or rights of the affected partner; and (c) not be a disposition to which s 44 applies. Even if these requirements are met, s 44C(2) only enables a court to order compensation to the affected partner — there is “no power to order that property be recovered from the trust's capital”.²⁰

¹⁹ *Sutton*, above n 2, at [72].

²⁰ *NZLC R143*, above n 18, at [11.10].

A Limitations

The limited remedies available under the PRA, and the difficulty of enabling a remedy to apply, inevitably leaves space for anomalous cases. As the Law Commission has noted, determining when a de facto relationship begins for the purposes of s 44C is an “inexact science”.²¹ It is often both arbitrary and difficult to establish. On the test established in *Sutton*, dispositions made any time before the parties form a clear and present intention to form a qualifying relationship that have the effect of defeating the affected partner’s claim or rights will not attract a remedy.²² The lack of remedy under s 44C to order that property be recovered from trust capital also creates other difficulties. Partners in a qualifying relationship might *agree* to place property in a trust — for example, the family home — ultimately prejudicing one partner who might have less power to control the trust if the relationship breaks down.²³

These issues, among others, prompted the Law Commission’s June 2019 *Review of the Property (Relationships) Act 1976*, which recommended wide-ranging legislative reform. The Law Commission suggested amending s 44C to apply in a broader range of situations,²⁴ providing broader powers to courts once s 44C applies to enable affected partners to directly access trust property,²⁵ removing the automatic legislative status of the family home as relationship property,²⁶ and repealing s 182 of the Family Proceedings Act 1980.²⁷ Those proposed amendments represent a substantial shift in the right direction and would assist in achieving a more just division of relationship property. However, unless and until those reforms are enacted, the gaps in the legislation remain and a coherent conception of property that upholds the purposes of the PRA must be applied.

III Coherence

Coherence is often cited as a necessary, but not sufficient, condition of a comprehensive theory of judicial method.²⁸ It is particularly relevant when considering conflicting legislative purposes and principles. In *Clayton*, “any other right or interest” in s 2(e) of the PRA was interpreted contextually and

21 At [11.78].

22 *Sutton*, above n 2, at [69].

23 *NZLC IP41*, above n 4, at [21.6(b)]–[21.6(c)].

24 *NZLC R143*, above n 18, at [R59].

25 At [R60].

26 At [3.69].

27 At [R66].

28 See, for example, Winkelmann, above n 9, at 517.

broadly due to the PRA's purpose as "social legislation",²⁹ and the need for "worldly realism" in the relationship property context.³⁰ Thus, powers could be property for the purposes of the PRA. This broad interpretation prevailed even though it conflicted with the historical doctrine that powers were not property under the Property Law Act 1952, which defined property in the same conventional way as the PRA.³¹ The fact that these interpretations conflict raises questions of coherence.

A full exploration of coherence-based theories is beyond the scope of this article, but some clarification is necessary.³² As a starting point, this article accepts that coherence requires the "multitudinous rules of a developed legal system" to "make sense" when taken together.³³ It is a "requirement which allows for judicial 'innovation' in 'novel' or 'hard' cases but which eschews judicial 'power to legislate'".³⁴ Coherence in judicial method therefore enables the development of the common law, but only to a limited extent.

Ronald Dworkin's interpretive theory of adjudication is a useful tool to analyse how far the law can coherently develop. In New Zealand, judges ensure coherence through interpreting legislation, ascertaining the meaning of a provision "from its text and in the light of its purpose and its context".³⁵ For Dworkin, interpretation requires two stages.³⁶ Judges must ascertain the interpretations that may "fit" the legal tradition,³⁷ and those interpretations must be justified.³⁸ If competing interpretations "fit" the legal tradition to an adequate degree, the "justification" requirement will distinguish between them.³⁹ The preferred interpretation will be the one with the better justification. Thus, in relation to the question of what constitutes "property" for the purposes of the PRA, there are two questions:

- Does the relevant conception of property interests "fit" the legal tradition and statutory context to an adequate degree?
- Which of the available conceptions has the better justification?

29 Clayton, above n 5, at [38].

30 At [79].

31 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279. That Act has now been replaced by the Property Law Act 2007. See discussion below at part IV.

32 For an in-depth exploration see Kate Roff "A Question of Coherence? Property in Discretionary Trusts for the Purposes of Family Law in Australia" (PhD Thesis, Australian National University, July 2024).

33 Neil MacCormick *Legal Reasoning and Legal Theory* (Oxford University Press, Oxford, 1994) at 152.

34 Roff, above n 32, at 37 citing MacCormick, above n 33, at 187–188.

35 Legislation Act 2019, s 10(1).

36 Ronald Dworkin "Law's Ambition for Itself" (1985) 71 Va L Rev 173 at 177.

37 At 177.

38 At 178.

39 At 178.

IV Defining Property

This part uses the coherence framework to evaluate what might constitute “property” for the purposes of the PRA. It begins by identifying the PRA’s broad and inclusive definition of property. It then traverses various theoretical foundations of property rights. While some have argued that the PRA definition is conventional and implicates a formal conception of property, *Z v Z (No 2)* and *Clayton* extended the conception of property beyond conventional notions. The issue now is how to limit the extended definition.

Post-*Clayton* cases — including the Supreme Court’s decision in *Cooper* — have tended to neglect the finding in *Clayton* that the PRA is “social legislation”. Instead, post-*Clayton* cases have given undue weight to the proposition that only a combination of powers analogous to a general power of appointment may be “tantamount to ownership”. By limiting the application of the *Clayton* doctrine to only those cases where the donee has no constraints of any practical significance on their power, the courts have not upheld the purposes of the PRA. Moreover, that limitation is difficult to reconcile with the bundle of rights theory of property on which the *Clayton* doctrine is based.

A *An inclusive definition*

Section 2 of the PRA defines “property” as including:

- real property;
- personal property;
- any estate or interest in any real property or personal property;
- any debt or any thing in action; and
- any other right or interest.

This definition differs from the definition in s 4 of the Property Law Act 2007, which defines property as “everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property”. The Property Law Act therefore attempts to define property exhaustively, whereas the PRA definition is inclusive.⁴⁰ The difference is particularly stark in s 2(e) of the PRA, which provides that property includes “any other right or interest”. An inclusive definition of property is open to widening. At the heart of the *Clayton* debate is whether the conception of

40 *Clayton*, above n 5, at [27].

property in the PRA should be confined to a conventional notion of property or extended to include other rights or interests.

B *Theories of property law*

The theoretical grounding of “property” is notoriously difficult to pin down. This sub-part provides a brief overview of two of the major theories to situate the *Clayton* approach within the wider theoretical debate.

(1) The right to exclude

One account of property rights is the exclusionary theory. The exclusionary theory holds that a property right is “the right of the owner to act as the exclusive gatekeeper of the owned thing”.⁴¹ Under this view, a person’s “right to exclude all others from an object, asset or resource” wholly explains the legal form of their “ownership” of property.⁴²

Jesse Wall has called the exclusionary theory “an account of the juridical *form* of property rights”.⁴³ It exhibits a “particular legal structure”: the person’s exclusionary right is a right in rem — enforceable against the world; actionable per se; and imposes “correlative duties of non-interference”.⁴⁴ Wall contrasts the exclusionary theory with the bundle of rights theory, which he argues accounts for the functions property law enables, rather than its form.

(2) The bundle of rights

While the exclusionary theory confines the foundation of property rights to one right, the bundle of rights theory recognises a person’s ownership of property might be comprised of “an open-ended set” of privileges.⁴⁵ These may “include the ability to possess, consume, derive income from, control, manage, transfer, exchange, sell, borrow against, or otherwise use, the object, asset or resource”.⁴⁶ On this theory, some combination of privileges amounts to ownership of property.

The benefit of the bundle of rights theory over the exclusionary theory is that it “can account for the privileges and entitlements ... that ‘sit behind’

41 Thomas W Merrill and Henry E Smith “The Morality of Property” (2007) 48 *Wm & Mary L Rev* 1849 at 1850.

42 Wall, above n 8, at 735.

43 At 735 (emphasis added).

44 At 735.

45 At 735.

46 At 735.

the form and structure of property rights”.⁴⁷ It also explains the *value* of property rights where the exclusionary theory cannot — the right merely to exclude someone from a thing is of no intrinsic value to the property owner.⁴⁸ On Wall’s account, the value of property rights in society can be understood in two ways. The first is monistic — property rights allow diverse rights holders to satisfy their own preferences in relation to their property.⁴⁹ The second is pluralistic — property rights structure social relations to achieve “a pluralistic set of liberal values: autonomy, utility, labour, personhood, community, and distributive justice”.⁵⁰ Both present a wider, functional view of property that the bundle of rights captures better than an exclusionary theory focused on the form of property rights.

But the bundle of rights theory is not a silver bullet. The difficulty lies in identifying at what point the combination of “the powers and rights making up the bundle equate to property”.⁵¹ In that respect, the exclusionary theory provides a conceptual clarity that the bundle of rights theory does not.

(3) Situating the theory in the common law

The conventional approach of the common law has been to uphold the *form* of property rights. This formal approach manifested in two ways.

The first is that courts tended to uphold the conceptual distinction between powers and property. As early as the mid-19th century, judges have held that powers over property were not property.⁵² It was considered the “most elementary proposition”.⁵³ The theoretical basis for this doctrine was that “a power is correlative to a liability”, whereas “a right ... is correlative to a duty”.⁵⁴ In simpler terms, trustees must exercise powers consistent with the trust deed — and are liable for any breach. By contrast, a beneficiary has only an obligational right enforceable against the trustee. Even if the trustee is also a beneficiary, their proprietary interest cannot crystallise until the power is exercised.⁵⁵

47 At 736.

48 Henry E Smith “Property as the Law of Things” (2012) 125 *Harv L Rev* 1691 at 1705.

49 Wall, above n 8, at 737.

50 At 738 citing Hanoach Dagan “Pluralism and Perfectionism in Private Law” (2012) 112 *Colum L Rev* 1409 at 1412–1413.

51 Jessica Palmer “Controlling the Trust” (2011) 12 *Otago L Rev* 473 at 490.

52 *Re Armstrong* (1886) 17 *QBD* 521 (CA) at 531–532 per Fry LJ.

53 At 531.

54 Roff, above n 32, at 255 citing Wesley Newcomb Hohfeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 *Yale LJ* 710 at 710.

55 *Nation v Nation* [2004] *NZCA* 288, [2005] 3 *NZLR* 46 (CA).

The second is the refusal to recognise a discretionary beneficiary's "mere expectation" as a proprietary interest.⁵⁶ Seen this way, the beneficiary's interest is not a right in rem. They have no interest directly in the trust property, but rather an obligational interest against the trustee. And, as with the distinction between powers and property, their proprietary interest does not manifest until the power has been exercised in their favour.

C *The Clayton approach*

Clayton explicitly diverted from the conventional and formal understanding of property. It conceived of property interests as part of a bundle of rights.⁵⁷ Its reasoning is plainly inconsistent with the conventional approach to property rights. Mr Clayton had not yet exercised the power in his own favour. He was still arguably subject to obligations as a trustee. The Supreme Court even explicitly stated that it preferred a "substance over form" approach.⁵⁸

What contemporary accounts of *Clayton* often overlook is that *Clayton* has the potential to change comprehensively the understanding of property under the PRA. To ascertain how this PRA-specific conception of property may be developed, this sub-part analyses the justifications given in *Clayton* for diverging from conventional notions of property and the implications that follow.

(1) Social legislation

The most important finding in *Clayton* was that the PRA is "social legislation".⁵⁹ It was only in the context of the PRA as social legislation that the Supreme Court was willing to "see the reference to 'any other right or interest' ... as broadening traditional concepts of property".⁶⁰ This broadening of traditional concepts of property means that the PRA definition is "potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests".⁶¹

Such a notion *explicitly* diverges from conventional notions of property. It recognises that the PRA implicates messy social considerations in family law to a greater extent than trust law generally. The effect of this finding

56 *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) at 607 and 615.

57 *Clayton*, above n 5, at [4].

58 At [75].

59 At [38].

60 At [38].

61 At [38].

is that case law under the PRA should not restrict itself only to formal or conventional notions of property.

In *Clayton*, the Court also considered the approach in *Z v Z (No 2)* and the consistency of the PRA definition of property with other enactments.⁶² The PRA definition mirrors the definition in the now-replaced Property Law Act 1952 (PLA 1952). In *Z v Z (No 2)*, the Court of Appeal found the similarity of the PRA definition with the PLA 1952 definition “strongly indicate[d] that the conventional understanding of ‘property’” was being referenced in the PRA.⁶³ Nevertheless, the Court of Appeal went on to conclude that the meaning of property was “fluid” and influenced by the statutory context — the Matrimonial Property Act 1976 — and its wider context (including “changing social values, economic interests, and technological developments”).⁶⁴ Similarly, the Supreme Court in *Clayton* characterised the PRA definition as “inclusive” compared to s 4 of the Property Law Act 2007, which replaced the definition of property under the PLA 1952.⁶⁵ It found that the differences between the PLA 2007 definition and the PRA definition imply that the PRA definition constitutes “an extension of the normal conception of property to include a ‘right’ or an ‘interest’, even if it is not a right or interest *in property*”.⁶⁶

Clayton therefore extended the principle in *Z v Z (No 2)*. The statutory context of the PRA as social legislation influences the meaning and scope of “property”. Together, the *Z v Z (No 2)* and *Clayton* decisions *squarely confronted* the decision to diverge from the conventional notion of property for the purposes of the PRA. That decision to diverge was not, as some might argue, a judicial misstep taken to enable just outcomes in difficult factual situations. Rather, it was explicit and intended. The key limitation — which may allay trust practitioners’ greatest concerns — is that the extended notion applies only to PRA cases, not trusts generally.

As Wall argues, there is a coherent theoretical basis for this divergence from the conventional formal approach.⁶⁷ The manner in which property is referenced in legislation “can necessitate a shift in focus from the formal to the functional”.⁶⁸ Where formal approaches confine courts to limited conceptions of property like the exclusionary theory, functional approaches recognise that the “institution of property engages a plurality of values”.⁶⁹ If

62 At [27].

63 *Z v Z (No 2)*, above n 31, at 279.

64 At 279.

65 *Clayton*, above n 5, at [27].

66 At [27] (emphasis in original). See also the Court’s references to *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [35]–[38], [71] and [73]–[74].

67 Wall, above n 8.

68 At 743.

69 At 746.

property engages a plurality of values, “[I]n legislation may seek to reallocate or redistribute ‘property’ in order to pursue a moral vision of the type of social relationships that ought to be fostered”.⁷⁰

The PRA can be seen, therefore, as social legislation “that seeks to reallocate or redistribute ‘property’”, in a manner that ensures the “just division” of relationship property and recognises the “equal contribution” of both partners to the relationship.⁷¹ In that way, the PRA arguably necessitates applying the functional bundle of rights theory. The finding in *Clayton* that the PRA is “social legislation” — necessitating a broader understanding of property — has a coherent theoretical foundation.

(2) Worldly realism

A related — but distinct — finding in *Clayton* is that “worldly realism” is appropriate in the relationship property context, and therefore that “strict concepts of property law may not be appropriate”.⁷² In making that finding, the Supreme Court affirmed the principles in several cases from the England and Wales Court of Appeal and the Hong Kong Court of Final Appeal.⁷³ Those jurisdictions have different statutory contexts that enable courts to consider factors like “the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future” — often collectively termed “future financial resources”.⁷⁴ Even though New Zealand lacks an equivalent legislative direction, the Court considered it sufficiently relevant to reference favourably those cases and their wide approach to finding relationship property interests in trusts.

Much has been written about worldly realism alone.⁷⁵ Doctrinally, realism can be attractive. Family law practitioners might appreciate a court’s ability to use realism to provide a remedy on the basis of “what is really going on”, skating over complicated legal pretences like trust structures.⁷⁶ However,

70 At 746.

71 At 746; and PRA, s 1M(b)–(c).

72 *Clayton*, above n 5, at [79].

73 *Kan Lai Kwan v Poon Lok To Otto* [2014] HKCFA 65, (2014) 17 HKCFAR 414; *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053 [*Charman*]; *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 [*Charman (No 4)*]; and *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FLR 735.

74 *Clayton*, above n 5, at [76].

75 See, for example, Joshua Oliver “Separation and separate legal entities: a case for reforming the Property (Relationships) Act 1976” (2022) 10 NZFLJ 191.

76 See, for example, the analysis of the Family Court in *Cooper v Pinney* [2018] NZFC 9120.

opponents of worldly realism may cite floodgates concerns.⁷⁷ They might suggest worldly realism must not be used to look through legitimate trusts just because one party's conduct has been reprehensible in some manner. This concern is not unfounded — worldly realism may place few clear limits on a court's ability to value a donee's power over a trust as relationship property. By itself, the doctrine could extend too far.

However, the social legislation finding — on which comparatively little has been written — might provide an acceptable avenue by which to limit realist practice. Worldly realism is said to be only appropriate “in a relationship property context”.⁷⁸ As Wall notes, it is only the social legislation context of the PRA that necessitates the shift from a formal conception of property to the functional.⁷⁹ Thus, applying *Clayton*, judicial use of realism is only justified insofar as it adheres to the functional purposes of the PRA as social legislation.

(3) Powers similar to general powers of appointment may be property

In *Clayton*, the Court limited the application of the realism and social legislation findings through reliance on another common law doctrine that: “A general power of appointment is usually viewed as tantamount to ownership and can be treated as property for particular purposes.”⁸⁰ Citing *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch (TMSF)*, the Court suggested that a power to revoke a trust would be “tantamount to ownership” of the trust assets.⁸¹ But it went on to find that Mr Clayton did not have a power analogous to a power to revoke the trust.⁸² The reasoning in *TMSF* could not apply directly.

What followed was a detailed analysis of the constraints on Mr Clayton's power. Three provisions of the trust deed enabled Mr Clayton to self-deal notwithstanding that such distributions would conflict with his position as a trustee.⁸³ Together, the Court found these meant that he was “not constrained by any fiduciary duty when exercising the [trust] powers in his own favour to the detriment of the Final Beneficiaries”.⁸⁴ Even though the powers he may have exercised as a trustee were fiduciary powers, the Court found the trust deed excluded the normal fiduciary constraints to such an extent

77 Davies, above n 8, at 390.

78 *Clayton*, above n 5, at [79].

79 Wall, above n 8, at 743.

80 *Clayton*, above n 5, at [61] citing *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman)* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF*].

81 At [61] citing *TMSF*, above n 80.

82 At [49].

83 At [56]–[57].

84 At [58].

that such constraints would not be “of any practical significance ... to his powers as trustee”.⁸⁵ Thus, the “combination of powers and entitlements of Mr Clayton ... amount[ed] in effect to a general power of appointment” over the assets of the trust.⁸⁶ Given the statutory context of the PRA as social legislation, and the extent of the powers, the Court considered the powers were property for the purposes of the PRA.

(4) Summary

In summary, two key findings in *Clayton* expanded the possible notion of property under the PRA. The first was the finding that the PRA is social legislation. The second was the recognition of the need for worldly realism in the relationship property context. Both findings can be read as PRA-specific and do not necessarily apply to trust law generally.⁸⁷

The third key finding — that powers analogous to general powers of appointment may be property — is not PRA-specific. It was merely a useful thread of the common law on which to ground a finding that the powers in Mr Clayton’s case amounted to property. As the next sub-part shows, however, lower courts have tended to focus on this general power of appointment doctrine to the detriment of the social legislation and worldly realism findings. Focusing on this aspect of *Clayton* has led to confusion.

D *Post-Clayton developments and the existing approach*

The prevailing approach in the post-*Clayton* cases has been to analyse the terms of the trust deed to ascertain whether the donee of the power is subject to constraints that are of any practical significance to the exercise of their powers. If the donee’s power is constrained, the power is deemed not to be analogous to a general power of appointment. Undertaking that analysis, courts have found several factors which might constrain a power.

The first consideration, exemplified in *Cooper* and in *Goldie v Campbell*, is the constraints the donee of the power (as a trustee or as a person authorised by the trust deed) might have on their power to appoint trustees. In such cases, self-appointment of the trust property generally requires the donee to first appoint themselves as a trustee or appoint a corporate trustee that they

85 At [64].

86 At [68].

87 This point bears emphasis, given concerns before the Supreme Court’s decision that the Court of Appeal’s finding in *Clayton* would extend beyond just the PRA. See Josie Beverwijk “Power, To a Point: Is the Power to Add and Remove Discretionary Beneficiaries of a Trust Fiduciary?” (LLB(Hons) Dissertation, University of Otago, 2015) at 5–7.

control. Here, courts have tended to reiterate the finding in *New Zealand Maori Council v Foulkes* that a power to appoint trustees generally carries fiduciary obligations.⁸⁸ Once that is established, any action whereby the donee could prejudice other beneficiaries — such as appointing themselves as a trustee — would constitute a breach of their fiduciary obligations or the proper purpose rule. Thus, the existing approach is that once such constraints are found, the court concludes that the donee's powers are not property because they cannot use such powers to appoint the entirety of the property to themselves.⁸⁹

Also relevant is the extent to which the donee's power is limited by the existence (or non-existence) of a prohibition on self-dealing in the trust deed. A clause prohibiting self-dealing will clearly constrain the ability of a donee to appoint property to themselves, either through direct appointment, or through indirect mechanisms like appointing a corporate trustee or removing other beneficiaries. In *Brkic v White*, for example, the Court of Appeal held that the power to appoint a trustee was a fiduciary power. Thus the appointment of a corporate trustee the donee of the power controlled would breach the fiduciary obligation not to self-deal contained elsewhere in the trust.⁹⁰ A similar line of reasoning was adopted in *Goldie* and *White v MacInnes*.⁹¹ So, as with the first consideration, the existing approach seems to be that once a significant constraint is found, the power cannot be property because it cannot be analogous to a general power of appointment. For more recent cases, in the absence of contrary terms in the trust deed, the default duties in the Trusts Act 2019 will impose the fiduciary obligations to avoid conflicts and not to self-benefit.⁹² Thus, it seems that only where a trust explicitly permits self-dealing will a court consider that the power might be property.

(1) Issues in the post-*Clayton* cases

Lower courts interpreting *Clayton* have tended to neglect the finding that the PRA is social legislation. Instead, they leap to the more complex analysis — determining whether the donee's combination of powers and entitlements is analogous to a general power of appointment. But whether the powers are analogous to a general power of appointment is not the ultimate question. The issue is whether the powers constitute property. If the combination of

88 See, for example, *Brkic*, above n 7, at [29] citing *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337.

89 See, for example, *Goldie*, above n 7, at [73]; and *Cooper*, above n 10.

90 *Brkic*, above n 7, at [35].

91 *Goldie*, above n 7; and *White v MacInnes* [2024] NZHC 3375.

92 See Trusts Act 2019, ss 28–38.

powers is analogous to a general power of appointment, that might short-cut the analysis — the powers will be property and no further reasoning will be required.⁹³ But, as a close reading of *Clayton* shows, if the powers are not analogous to a general power of appointment, the analysis must be continued to ascertain whether the powers should constitute property through some other mechanism.⁹⁴ Any analysis must take into account the variety of forms property may take under the bundle of rights theory.⁹⁵

The lower courts' focus on the general power of appointment question has affected how the law on trustees' fiduciary obligations has developed. As noted above, lower courts have tended to dispense with the property analysis once satisfied there are obligations that constrain the trustee's power to appoint all the trust property to themselves. That practice, in turn, has inspired more academic research arguing that key trust powers are inherently fiduciary.⁹⁶ The result is effectively to confine *Clayton* to its facts. In a similar vein, pre-*Clayton* wisdom continues to be persuasive, despite the fact that it tends to be grounded in the conventional understanding of property — a notion *Clayton* expressly rejected.⁹⁷ In *MacInnes*, for example, eight years after *Clayton*, the High Court noted that a leading legal academic “has cautioned against attempts by the courts to widen the concept of property”, even though the relevant chapter was published seven years before *Clayton*.⁹⁸ While caution when widening the conception of property is undoubtedly necessary, reliance on a conventional conception of property in a post-*Clayton* context risks confusion and mistakes.⁹⁹ The conventional view of property leads judges to focus on the general power of appointment question and to use the mere existence of fiduciary obligations, or the possibility of breaching the proper purpose rule, to negate it. Such an analysis does not

93 A point helpfully clarified by the Supreme Court in *Cooper*, above n 10, at [93]–[94].

94 See also the comments made by Miller J to this effect in the Court of Appeal in *Cooper: Cooper v Pinney* [2023] NZCA 62, [2023] 2 NZLR 455 at [72].

95 See the discussion in *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [89] per Lord Carnwath, Lady Black, Lord Briggs and Lord Kitchin.

96 See, for example, Beverwijk, above n 87.

97 See, for example, Jessica Palmer and Nicola Peart “*Clayton v Clayton*: a step too far?” (2015) 8 NZFLJ 114; Palmer, above n 51; and Jessica Palmer and Nicola Peart “Trust principles overlooked” [2011] NZLJ 423.

98 *MacInnes*, above n 91, at [37] citing Nicola Peart “Equity in Family Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 1177.

99 As occurred, for example, in *Bourne v Baker* [2016] NZFC 2668, [2016] NZFLR 944. There, the Family Court incorrectly held that a *Clayton* interest could support a notice of claim under s 42 of the PRA. A *Clayton* interest is not a beneficial interest in the underlying trust property, but rather in the power itself. See *BW (2004) Ltd v Mlouk* [2021] NZHC 1894, [2021] NZFLR 451 at [48]; and *Pisidia Holdings Ltd v Darby* [2019] NZHC 1216, [2019] NZFLR 96.

adequately consider the social legislation and worldly realism findings in *Clayton*. So, what kind of approach *is* consistent with *Clayton*?

E *What Clayton left open: a partial value approach*

In one of the *Clayton* footnotes, the Supreme Court explicitly referenced what it intended to leave unanswered:¹⁰⁰

We leave for another case what would be the position if the [trust] powers were less extensive: both the issue as to whether the powers were property and, if so, how they would be valued.

The Court's framing in this sentence provides the stimulus for this article. The Court could have simply written that it may have decided differently in another case where the powers were less extensive. But instead it elaborated and suggested that such a case would invite two *distinct* questions — whether the powers would be property *and* how they would be valued. By explicitly referencing valuation, the Court left open a tenable argument that less extensive powers could be valued partially. In *Clayton*, the extreme extent of Mr Clayton's powers meant the value of his powers equalled the value of the trust's assets. With less extensive powers, one available conclusion is that any constraints on the power merely limit the value of the power.¹⁰¹

V The Case for a Partial Value Approach

This part elaborates on the thesis that less extensive powers could be valued partially. It addresses the scenario where the power is constrained such that the donee is prevented from appointing *all* the trust property to themselves, but where the donee retains sufficient power to appoint *some* property to themselves. Using the coherence framework, it argues a more coherent doctrine than the existing approach would find that the power is property, but that its value is limited by the extent of the donee's obligations. It calls this approach the “partial value approach”.

100 *Clayton*, above n 5, at [80], n 81.

101 This approach was also proposed by Glazebrook J in the oral hearing in *Cooper*, although Ms Cooper's counsel chose not to pursue it: *Cooper v Pinney* [2023] NZSC Trans 19 at 13. See also Atkin, above n 17, at 98 saying of the Clayton decision: “the Supreme Court indicated that, given the extreme nature of the circumstances, the value of the interest equalled that of the trust property. It follows that, in less extreme situations, the interest may be a partial one.”

At the outset, it must be made clear that a partial value approach assumes the principles developed in *Clayton* to be correct in law. If *Clayton* were overturned in favour of a reversion to the conventional notion of property, then a partial value approach would be unlikely to remain tenable. Thus, this analysis takes *Clayton* as its starting point. Such an assumption is, however, likely to be reasonable given the Supreme Court's recent affirmation of *Clayton* in *Cooper*, which applied the principles developed in *Clayton*.¹⁰²

A *The all-or-nothing dilemma*

The primary issue with the existing approach is that it creates an unjust all-or-nothing dichotomy. *Clayton*-type powers, which are so broad and unconstrained that the donee of the power can legitimately appoint all the property to themselves, are treated as property. The extent of the powers means they are valued equivalent to the value of the trust's assets. By contrast, constrained powers — those subject to constraints preventing the donee from appointing *all* of the property to themselves — are not treated as property. Even if the donee, adhering to the terms of the trust, retains sufficient control to appoint part — possibly almost all — of the trust property to themselves without breaching any fiduciary obligation or the proper purpose rule, the existing approach would not recognise that power as a property interest.

The theoretical underpinning of *Clayton* is a conception of property interests as a bundle of rights.¹⁰³ A property interest is composed of a combination of rights and interests in an object, with some given combination equating to property. With the existing approach (as discussed above), lower courts — focusing on the general power of appointment question — have decided that the threshold level of rights and interests required for the power to be property is where the donee retains the power to appoint *all* of the trust property to themselves without breaching any fiduciary obligation or the proper purpose rule.

That threshold yields a nonsensical result. A person who is in a qualifying relationship with someone holding a *Clayton*-type power will be fully compensated. Their interest will be valued at half the trust's assets, given the power will be valued equivalent to the trust's assets.¹⁰⁴ By contrast, a person who is in a qualifying relationship with someone who retains sufficient power to appoint themselves only a part, but not *all*, of the trust property, will receive no compensation at all. The donee, through their powers, might be

102 *Cooper*, above n 10, at [90].

103 Wall, above n 8, at 743.

104 Although if separate property were also held in the same trust, the value of the power would be reduced.

able to retain substantial personal enjoyment of the trust's assets. Given the range of acceptable trust structures, it is even conceivable that one spouse could continue living in the trust-held family home to the exclusion of the other after separation, without owing any compensation.

Such a proposition raises the question of the threshold's consistency with the PRA. The notion in *Clayton* that the conception of property is wider under the PRA is grounded in the purposes of the PRA. The two primary purposes are "to recognise the equal contribution" of both partners to the relationship and "to provide for a just division of the relationship property" upon separation.¹⁰⁵ If *Clayton*-type powers are relationship property, and the social legislation and worldly realism findings apply to make them so, it would be remarkably unjust if a power to appoint only part of a trust's property to oneself was not property at all. Such a doctrine would not uphold the purposes of the PRA.

B *Consistency with the reality of trustees' obligations*

The all-or-nothing approach to proprietary interests in trusts also fails to reflect the true nature of donees' obligations to beneficiaries. As noted in *Cooper*, powers may be limited either by fiduciary obligations imposed by the trust deed, the Trusts Act 2019 (if not modified or excluded by the trust deed), or by the proper purpose doctrine.¹⁰⁶ But, as the Supreme Court majority's reasons in *Legler* show, the obligations on donees may themselves be limited where part of the purpose of the trust is to enable the donee to appoint some of the trust property to themselves.¹⁰⁷

In *Legler*, the beneficiaries of a trust settled by their deceased father challenged an action taken by another beneficiary — their father's second wife — in relation to the trust.¹⁰⁸ The wife had, consistent with the terms of the trust deed, appointed a corporate trustee of which she was the sole director and shareholder.¹⁰⁹ The corporate trustee then excluded the children as beneficiaries of the trust and distributed trust property to the wife.¹¹⁰ The beneficiaries issued proceedings claiming that the wife's appointment of the corporate trustee was for an improper purpose: "to enable [the wife] to use

105 PRA, s 1M(b)–1M(c).

106 *Cooper*, above n 10, at [75] and [105].

107 *Legler*, above n 10, at [135].

108 At [2].

109 At [4].

110 At [2].

the trust property to benefit herself at their expense”.¹¹¹ Both the High Court and a majority of the Court of Appeal ruled against the children.¹¹²

A majority of the Supreme Court dismissed the appeal.¹¹³ One part of its reasons is particularly relevant to this article. The majority found that the beneficiary children could not reasonably have argued that the wife “should receive *no* ongoing benefits from [the trust]”.¹¹⁴ Part of the purpose of the trust was to support her, and “[s]he was clearly a beneficiary of the trust ... and needed funds for her accommodation and living expenses”.¹¹⁵ In that context, the children’s claim could not “plausibly be that *any* amount of concern for her own interests would be improper”.¹¹⁶ Instead, the majority considered “their argument must relate to the *extent* of the distributions” she made to herself.¹¹⁷

Clearly then, where part of the trust’s purpose is the ongoing maintenance and support of the donee of the power under the trust, the donee retains a power to distribute at least some of the trust’s assets to themselves. The majority’s conception of the trust in *Legler* shows that there is an *extent* to which self-appointment of trust assets will not breach the proper purpose rule. Depending on the particular terms of the trust, such self-appointment could conceivably also not breach the relevant fiduciary obligations. So, in *Legler*, one could describe the wife’s power to appoint herself *part* of the trust property as a “right”, which, when coupled with her beneficial “interest”, would amount to property under the PRA.¹¹⁸

Legler did not concern the PRA, but there is no reason why the Court’s findings in relation to donees’ obligations should not also apply to trusts in PRA claims. If the donee can retain an unconstrained power to appoint a substantial portion of trust property to themselves, it would be contrary to the purposes of the PRA not to recognise such a power as property. The hypothetical discussed later in this article exemplifies the kind of case in which recognising a constrained power as property might be compelling.

111 At [2].

112 *Legler v Formannoij* [2021] NZHC 1271, (2021) 5 NZTR ¶31-006; and *Legler v Formannoij* [2022] NZCA 607, (2022) 5 NZTR ¶32-013.

113 *Legler*, above n 10, at [141]. Winkelmann CJ dissented, finding that the wife exercised the power of appointment for an improper purpose — “to deliver complete control of [the trust] and its assets, to herself”: at [143] and following.

114 At [135] (emphasis added).

115 At [135].

116 At [135].

117 At [135] (emphasis added).

118 PRA, s 2 definition of “property”.

C *Relative coherence of the approaches*

As discussed in part III, a Dworkinian coherence analysis assesses coherence using two factors: fit and justification. This sub-part uses that analysis to argue that the partial value approach proposed in this article is more coherent than the existing approach.

(1) Fit

The existing approach plainly “fits” the legal tradition and statutory context to an adequate degree. The existing approach limits the recognition of property interests in trust powers to those powers that are analogous to general powers of appointment. Following *TMSF*, there is an established legal tradition that treats general powers of appointment as property for certain purposes.¹¹⁹ While it is arguably inconsistent with the social legislation and worldly realism findings in *Clayton*, it is consistent with the broader pre-*Clayton* approach to proprietary interests in trusts.

By contrast, it is not clear that a partial value approach adequately fits the legal tradition. Inherent difficulties arise when trying to value the power. Putting aside the concern that a court would have to ascribe a quantitative value to a rather uncertain degree of limitation on a power,¹²⁰ an even more fundamental issue arises.¹²¹ The PRA is legislation that governs a relationship between two partners. A trust, on the other hand, implicates third parties.¹²² If a court partially valued a trust power for relationship property purposes, the donee of the power could essentially be forced to exercise the power in a manner that reflects the court-imposed value. They would have to compensate their partner at half the value of the trust power. To be able to do so, the donee may need to distribute trust property to themselves, which would be inconsistent with the prohibition on distributing trust capital under s 44C. Distributing property to themselves would also have the effect of modifying other beneficiaries’ interests under the trust, even though those beneficiaries are not part of the PRA relationship. Through a partial value approach, the PRA could indirectly affect the interests of other beneficiaries

119 *Clayton*, above n 5, at [61].

120 For more on the difficulties with valuation see Shelley Griffiths “Valuing ‘bundles of rights’ for the Property (Relationships) Act 1976; when neither art nor science is enough” (2011) NZFLJ 98. But see Tobias Barkley “Valuing Discretionary Interests and Accompanying Rights” (2013) 7 NZFLJ 229 for an argument that discretionary interests in trusts can be valued like any other item of property, even though it may be practically difficult and require greater judgement from judges.

121 See *B v M* [2005] NZFLR 730 (HC) at [98].

122 *Kennon*, above n 66, at [174].

in the trust. On this basis one could argue that a partial value approach does not adequately fit the legal tradition.

It is important, however, when considering the implications of a partial value approach, to understand the limited context in which it would apply. A partial value approach is grounded in the social legislation and worldly realism factors that only arise in relation to family trusts under the PRA. Family and relationship property law implicates social considerations to a greater extent than trust law generally. In family law, issues about “fixing” or “crystallising” third parties’ interests — especially children’s interests — are always present. When a trust is not used, the PRA itself bluntly fixes children’s interests when apportioning the family home equally between their parents.¹²³ In separation settlements, parents are free to divide relationship property differently, which also has the effect of fixing or crystallising children’s interests in the property. The Law Commission has noted that even where a valid trust *is* in use, in practice many couples divide trust property as if it were relationship property, notwithstanding the trust structure.¹²⁴ The triumph of *Clayton* is a greater recognition of the blurry interface between the complex social considerations in family law and the certain, definable interests that trust law upholds.

New Zealand would not be an outlier in adopting a partial value approach for the limited purpose of identifying relationship property under the PRA. In the United Kingdom, for example, the legislation directs courts in relationship property cases to have regard to the financial resources a spouse is “likely” to have in the future. In *Charman v Charman*, that consideration required the Court to ascertain whether “if the husband were to request it to advance the whole (*or part*) of the capital of the trust to him, the trustee would be likely to do so”.¹²⁵ Given the Court’s specific recognition of the possibility of a partial interest, one might consider that valuing partial interests in trust property is a viable approach.

A strong case can be made, therefore, that a partial value approach to trust powers as relationship property fits the legal tradition to an adequate degree. In accepting that conclusion, it is necessary to recognise the limited context in which it would apply — only those cases where the social legislation and worldly realism factors under the PRA are implicated. While the risk of fixing third parties’ interests might be inconsistent with trust law generally, such a risk is permitted on the grounds *Clayton* established — to uphold the purposes of the PRA.

123 PRA, ss 8(1)(a) and 11(1)(a).

124 *NZLC R143*, above n 18, at [11.18].

125 *Charman*, above n 73, at [12] (emphasis added).

(2) Justification

Given both approaches fit the legal tradition to an adequate degree, the next step is to ascertain which approach has the better justification.

The existing approach provides greater certainty. Very few powers will be analogous to general powers of appointment, so the existing approach will tend to yield results in relationship property cases that would be consistent with conventional notions of property. The existing approach is also likely to result in less litigation, given that only in extreme circumstances — where a donee is subject to no constraints of any practical significance — will their partner have a potential claim to half the value of the power. In that respect, the existing approach might help facilitate the “clean break” principle — the notion implied in the PRA that on the breakdown of a marriage, there should be an inexpensive, simple and speedy resolution of property issues so partners are free to go their separate ways.¹²⁶ As discussed above, the existing approach also limits the application of nebulous notions like worldly realism in the relationship property context.

However, the partial value approach upholds the purposes of the PRA in a way that the existing approach cannot. The following hypothetical helps illustrate how.

(a) *Mr Smith and Ms Smith*

Mr Smith settles a trust containing his mortgaged home. The home is worth \$1 million and the mortgage stands at \$700,000. Mr Smith is about to become a partner at his accounting firm, so he wants to protect it from potential creditors. He has two young children from a prior relationship, so the trust deed states the purpose of the trust is to provide for the financial and housing security of himself and his children (together, the beneficiaries). Being an accountant, Mr Smith is well versed in the administration of trusts, so he makes himself a trustee, along with another accountant friend. The trust deed provides that if Mr Smith has not sold the house by the time his first child turns 50, the house must be sold and the proceeds distributed equally to each child. However, to enable Mr Smith to manage his affairs with the greatest flexibility, the deed also provides him a “power to sell” — he may decide to sell the house at any time and distribute the proceeds in any manner to any beneficiary to the exclusion of others, provided he upholds the purpose of the trust. He may also add and remove beneficiaries, provided he does not remove the children. To enable further flexibility, the trust deed permits self-dealing — it excludes the default obligations not to conflict or profit imposed by the Trusts Act 2019.

126 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [286], n 364.

Mr Smith then begins a relationship with Ms Smith. In the following five years, Mr and Ms Smith marry and have three children. Mr Smith makes Ms Smith and the new children beneficiaries of the existing trust. Ms Smith knows the home is held in a trust but does not know entirely what that means. Nor does she think it makes any difference, since Mr Smith treats the home like it is his own. Of course, she has not been asked to take legal advice or sign a contracting-out arrangement under s 21 of the PRA.

Mr and Ms Smith's family life runs smoothly, with Ms Smith caring for the children (including the children from Mr Smith's previous relationship) in the home and working part-time to help fund the family's affairs. Around 10 years later, the house has no mortgage.¹²⁷ The value of the house has also risen to \$2 million, in part due to Ms Smith's maintenance of the home, including landscaping a new garden and painting the interior of the house.

Unfortunately, after 15 years of marriage, Mr and Ms Smith fall out. They agree to separate. Ms Smith returns to her parents' home while she processes the separation, and Mr Smith continues to take care of the children in the family home.

In separation negotiations, Ms Smith asks Mr Smith to compensate her for the family home. She asks for \$500,000 — half of the increase in value of the home during the time they were together.¹²⁸ As a condition of their separation agreement, they will share day-to-day care of the children in alternating weeks, and she would like to buy her own house in which to provide care. She believes Mr Smith will oblige because she supported their shared finances with her part-time work, contributed to improvements, and raised the children in the home. Mr Smith refuses, believing the children do not need another home. He says they can stay at Ms Smith's parents' house when she has day-to-day care.

(b) *Analysis*

Ms Smith cannot access the trust-specific PRA remedies.¹²⁹ Section 44 does not apply because the disposition was not made with the intent to deprive her of her rights under the PRA — it was made to protect the house from creditors. Section 44C does not apply either, because the disposition was made prior to the qualifying relationship (their marriage).¹³⁰ At equity, Ms Smith is merely a discretionary beneficiary.

127 Interest has been excluded from this hypothetical for simplicity.

128 To reflect s 9A(2) of the PRA. If Ms Smith were more ambitious, she may even ask for \$1 million, since that is the amount she would be entitled to if the trust did not exist.

129 At least not to compensate her for the amount she claims: see n 130 below.

130 One could argue that when paying down the mortgage, Mr and Ms Smith made dispositions of relationship property (salary money) to the trust and therefore s 44C might apply. But compensation for such dispositions — excluding interest — would

The existing approach would not recognise Mr Smith’s power to sell the house at any time and distribute the proceeds to any beneficiary as he sees fit as property under the PRA. It is constrained. He cannot appoint *all* of the trust property to himself — that would be improper. His actions are limited by the purpose of the trust. That is especially the case given the nature of the children’s interests. The fact the house must be sold when the eldest child reaches 50 also provides an argument that part of the purpose of the trust is to provide for them to the exclusion of Mr Smith. However, Mr Smith still retains a discretionary power to sell the house before then.

Mr Smith’s actions are nevertheless justified by the purpose of the trust. Similar to *Legler*, he maintains a power to appoint himself trust property to the exclusion of other beneficiaries. By implication, the trust deed permits him to continue living in the house with the children. In the extreme case, he could even sell the house and move elsewhere with the children, or remove Ms Smith as a beneficiary after appointing her a nominal amount. Such actions would be permissible so long as they remain consistent with the purpose of the trust, and do not improperly deprive Ms Smith of her interest.

If the trust did not exist, Ms Smith would be automatically entitled to a half share of the home (\$1 million) under ss 8(1)(a) and 11(1)(a) of the PRA. But with the trust, Ms Smith could receive far less, even though she contributed significantly to the maintenance of the family home. This outcome is especially unjust given a key rationale behind equal sharing of the family home under the PRA is to recognise the “equal contribution of both spouses to the marriage partnership”, reflecting the fact that the contributions of stay-at-home caregivers are often non-financial.¹³¹ So, after 15 years of marriage, Ms Smith is left deprived of the enjoyment of the relationship’s primary asset, while Mr Smith is able to continually appoint it to himself.

(c) *Objections*

One issue with the hypothetical is that Mr Smith obtains his powers in relation to the trust prior to the relationship. At least initially, his power is not relationship property, but separate property. At what point might it become relationship property? The context of the PRA would suggest that it is when Ms Smith’s contributions become so mixed with the property that it becomes relationship property. That is the underlying principle behind s 9A(2), which

amount to \$350,000 (half of the \$700,000 mortgage), and would still not reflect the increase in value of trust-held property due to Ms Smith’s contributions.

131 PRA, s 1M(b). One might also question the justice of her position given she would not have been required to sign a contracting-out arrangement under s 21, which would have meant she obtained legal advice regarding the implications of such a decision.

notes that any increase in value of separate property attributable to the other spouse is relationship property, with the shares of that relationship property to be determined in accordance with the contribution of each partner to the increase in value. That principle also supports the presumption of equal sharing of the family home in s 11(1)(a), which is a way of recognising the value that caregivers contribute to the relationship. So, one could argue the power to sell the home — or part of that power — becomes relationship property when the home (but for it being in a trust) would have become the family home, and when increases in its value are attributable to Ms Smith.

The problem then is how to value the power.¹³² It is key here to understand the *changing* value of the power. Over the course of the relationship, the value of the power increases with the value of the trust assets — in part, of course, due to Ms Smith's financial contributions and maintenance of the home. The value of the power *to Mr Smith* also changes over time. During their marriage, Mr Smith is constrained by the proper purpose rule and the obligation to ensure the trust supports the children. But when Ms Smith leaves the home and they separate, the application of the proper purpose rule changes significantly. Mr Smith is no longer constrained to the same *extent*, because supporting his own interests over Ms Smith's is justified through providing for the interests of the children. So, when Ms Smith leaves, the value of the power becomes much greater to Mr Smith at the expense of Ms Smith.

Partially valuing powers may be inexact, but the analysis above shows that Mr Smith's power to appoint himself part of the trust property can be considered relationship property. Such an approach is consistent with the PRA's statutory context, especially the provisions relating to the family home and the increase in value of separate property. The partial value approach's grounding in those provisions also mitigates concerns about the uncertainty of the valuation. Analysis of the increase in value of separate property is exactly the kind of analysis often undertaken by the courts applying s 9A(2).

(d) *Result*

In a case like Ms Smith's, there is a greater justification for applying a partial value approach. The existing approach does not uphold the purposes of the PRA. Partially valuing Mr Smith's power would be difficult, but necessary, to recognise the equal contribution of each spouse and achieve a just division of the relationship's assets. A partial value approach is therefore more coherent than the existing approach.

132 Griffiths, above n 120; and Barkley, above n 120.

D *Does Cooper v Pinney threaten the viability of a partial value approach?*

The Supreme Court released *Cooper v Pinney* in December 2024. It considered the same question as *Clayton*, namely: “what rights or powers in respect of assets in a family trust can properly be treated as ‘property’” under the PRA?¹³³ The appeal directly considered “the breadth and application of the principles established ... in *Clayton*”.¹³⁴ Ultimately, the Court unanimously found Mr Pinney’s power to appoint and remove trustees was not property.¹³⁵ With such a conclusion, some have suggested the *Clayton* doctrine might now be limited to its facts.¹³⁶ However, this article argues a partial value approach remains viable post-*Cooper*.¹³⁷

(1) Factual overview

During their de facto relationship, “Ms Cooper worked alongside Mr Pinney on a farm held in a family trust”.¹³⁸ The settlors of the trust were Mr Pinney, his mother, and two others, and the trust property consisted of a distribution from Mr Pinney’s father’s trust.¹³⁹ Mr Pinney was a discretionary beneficiary of the trust, and held the power to appoint and remove trustees.¹⁴⁰ The final beneficiaries were Mr Pinney’s children and grandchildren, who were also discretionary beneficiaries. The trust deed required a minimum of two trustees at all times to act unanimously.¹⁴¹

133 *Cooper*, above n 10, at [1].

134 At [3].

135 At [126].

136 For commentary on *Cooper* see Anna Piebenga “When are trust powers ‘property’ under the Property (Relationships) Act 1976? A critical analysis of *Cooper v Pinney* [2024] NZSC 181” (2025) 11 NZFLJ 225; Jack Alexander “Equity and Trusts” [2025] NZ L Rev 251 at 265–271; Nathaniel Walker and James Tocher “*Cooper* and *Legler* — deciphering the New Zealand Supreme Court’s message to trustees” (2025) 31 *Trusts & Trustees* (forthcoming); Daniel McLaughlin “Trustee powers and the PRA: why *Cooper v Pinney* is such an important decision” *LawNews* (online ed, Auckland, 11 February 2025); and Kerry Bowler “Another take on *Cooper v Pinney* and a broader definition of property” *LawNews* (online ed, Auckland, 20 February 2025).

137 See further Nathan Pinder “*Cooper v Pinney*: A Retreat from *Clayton*?” (2025) 31 *Auckland U L Rev* (forthcoming) where I analyse in greater depth the tensions *Cooper* leaves between trusts and the PRA.

138 *Cooper*, above n 10, at [6].

139 At [21].

140 At [21] and [25].

141 At [25].

(2) Findings

The Court began by considering *Clayton* and issuing helpful clarifications on its applicability.¹⁴² The appellant asked the Court to apply *Clayton*, while the respondent and interested parties urged the Court to confine *Clayton*.¹⁴³ Ultimately, the Court applied “the principles developed” in *Clayton*.¹⁴⁴ It is notable, then, that the Court felt it necessary to clarify that it had not been asked to revisit the conventional principle that a “discretionary beneficiary under a discretionary trust does not have a beneficial interest” in that trust.¹⁴⁵ As the analysis in part IV of this article shows, the extended notion of property under the bundle of rights theory supports an argument revisiting that principle, so long as the combination of rights and interests the beneficiary holds is sufficient to constitute a proprietary interest. But this point was not argued in *Cooper*.

Next, the Court helpfully restated a point central to this article’s criticism of the lower courts’ approach to *Clayton*-type cases. That is the notion that the ultimate question is not whether the power is analogous to a general power of appointment, but whether the power constitutes property.¹⁴⁶ A finding that a power amounts “in effect to a general power of appointment may offer a short-cut”, but the ultimate question is whether the power is property for the purposes of the PRA.¹⁴⁷

Unfortunately, there is no further reckoning with the property theory underlying *Clayton*. The remainder of the decision contrasts the specific differences between the trust deed and the facts in *Clayton* and those in *Cooper*. Ultimately, that analysis leads the Court to conclude that Mr Pinney’s powers are fiduciary and constrained, in contrast to Mr Clayton’s, which were not.

(3) A missed opportunity

Cooper would have been perfect for a partial value approach. The beneficiaries of the trust were Mr Pinney and his children and grandchildren. In that context, Mr Pinney is likely to continue to receive most of the benefit

142 See the Court’s summary at [31]–[45] and the application of *Clayton* to *Cooper* at [90]–[94].

143 At [92].

144 At [90].

145 At [91].

146 At [93]–[94]. See also the comments made by Miller J to this effect in the Court of Appeal: *Cooper*, above n 94, at [72].

147 At [94].

of the trust property.¹⁴⁸ Further, Ms Cooper worked extensively on the farm during their relationship without remuneration, and received very little from Mr Pinney after the separation.¹⁴⁹ These factors indicate that upon separation the equal contribution of both partners to the relationship was not recognised in the distribution of property.

Those points provide a strong justification for a more flexible approach to the interpretation of property. In Ms Cooper's case, valuation of the partial interest is even less difficult than in others — an approximation of the increase in value due to her work is precisely the kind of analysis often undertaken by courts under s 9A(2) of the PRA.

The Court's reasons did not engage substantively with a partial value approach because it was not the focus of argument.¹⁵⁰ Instead, despite the Court's clarification that the ultimate issue is not whether the power amounts in effect to a general power of appointment, it repeated precisely the same analysis performed by the lower courts post-*Clayton*. It considered only whether the powers were constrained by fiduciary obligations or the proper purpose rule. Finding that they were, it held that the powers were not property under the PRA. As the analysis in this article has shown, such a limited conception of property cannot uphold the purposes of the PRA in all circumstances, and does not reflect the theoretical underpinnings of property interests in the bundle of rights doctrine.

(4) A partial value approach remains open

While some have argued that *Cooper* might have confined *Clayton* to its facts, there were significant factual differences between *Clayton* and *Cooper*. The trust in *Cooper* required at least two trustees at any given time and unanimity of trustee decision-making, which constrained the ability of an individual trustee to appoint trust property to themselves.¹⁵¹ It also lacked provisions enabling the trustees not to consider the interests of, or to remove, beneficiaries.¹⁵² Given those factors, it is likely there remains a factual space between *Cooper* and *Clayton* where the more coherent partial value approach

148 A factor considered notable in *Charman*, above n 73, albeit in a different statutory context.

149 Peter Watts, Steven Zindel and Isaac Hikaka “*Cooper v Pinney*: Submissions for the Appellant” (Courts of New Zealand, 20 September 2023) at [7].

150 Instead, Ms Cooper's counsel asked the Court to apply *Clayton*, arguing that “where the partner holds the power of appointment and removal of all trustees ... the requirement for one trustee other than the partner ... is not itself a sufficient ground for distinguishing the reasoning in *Clayton*”: at [5].

151 *Cooper*, above n 10, at [102(a)]–[102(b)].

152 At [102(c)]–[102(d)].

may take root.¹⁵³ The more ambitious might even consider using the bundle of rights conception of property to try to limit the applicability of *Cooper*. In future cases, if *Cooper* is any indication, it might be more effective to argue for a partial value approach rather than claim that certain powers amount to a general power of appointment.¹⁵⁴

VI Conclusion

The relationship between trust powers and relationship property remains a complex and evolving area of law. The primary reason for the complexity is that the remedies the PRA provides to enable access to trust property are limited and rarely apply. The Law Commission has proposed wide-ranging legislative reform, but unless those reforms are enacted, the most coherent conception of property under the PRA must be applied.¹⁵⁵

Recent cases have overlooked that the decision in *Clayton* marked a departure from the formal, conventional conception of property in favour of the bundle of rights conception.¹⁵⁶ Focusing on the conventional view of property, judges have prioritised the general power of appointment question and used the mere existence of constraints on the power to find that the power is not property.

Such an approach is inconsistent with the social legislation and worldly realism findings in *Clayton*. It imposes an unjust all-or-nothing dichotomy whereby a *Clayton*-type power results in compensation to the prejudiced partner equal to half of the full value of the trust property, but a power constrained by fiduciary obligations or the proper purpose rule results in no compensation at all. The existing approach also fails to reflect the reality that donees' obligations are often partial, as confirmed in *Legler*.¹⁵⁷ In cases where part of the purpose of the trust is to provide for the maintenance of the donee, the donee will retain sufficient control to appoint at least *some* of the trust property to themselves. But under the existing approach, such a power would not be property under the PRA.

This article has argued that a more coherent doctrine would employ a partial value approach to valuing trust powers. While fiduciary duties or

153 A partial value approach was not argued in *Cooper*, though the possibility was mooted by Glazebrook J in oral argument: see n 101 above.

154 Such an argument might be more effective in a case like *Nind v Booth* [2025] NZHC 465, which the High Court has characterised as having “little chance of success”: at [46]. It appears Ms Nind has advocated a total valuation approach, rather than a partial valuation approach: at [5(a)].

155 *NZLC R143*, above n 18.

156 See, for example, *Goldie*, above n 7; and *MacInnes*, above n 91.

157 *Legler*, above n 10, at [135].

the proper purpose rule might limit the *value* of the power, coherence with the purposes of the PRA and *Clayton* supports a finding that a constrained power is property. *Clayton* explicitly left such an approach open for future consideration, but since *Clayton*, a partial value approach has received little attention.¹⁵⁸

Using a Dworkinian coherence analysis, this article has shown that both the partial value approach and the existing approach fit the legal tradition to an adequate degree. The partial value approach, however, upholds the purposes of the PRA better than the existing approach. That is to say, the partial value approach would better enable courts to facilitate a just division of relationship property and recognise the equal contribution of both partners to the relationship. Thus, a partial value approach is more justified and therefore more coherent with *Clayton* and the PRA.

While *Cooper* might be understood to confine the *Clayton* doctrine, *Cooper* also affirmed the principles developed in *Clayton*. There is, therefore, a factual space between *Clayton* and *Cooper* where a partial value approach may yet take root, consistent with both cases. Moreover, under the bundle of rights theory, any number of combinations of rights and interests under a trust might be property, so each case must turn on its specific facts.

The recognition of constrained trust powers as property under a partial value approach would be an evolution in judicial reasoning that both respects *Clayton* and *Cooper* and applies the worldly realism necessary to navigate the competing social considerations inherent in family law. Using this approach, courts could better uphold the purposes of the PRA to provide for a just division of relationship property and recognise the equal contribution of both partners to the relationship.

158 *Clayton*, above n 5, at [80], n 81.

The Problem with the Atkinson Discrimination Test and How to Fix It

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The question of finding the right comparator under s 19 of the New Zealand Bill of Rights Act 1990 has led to much confusion in discrimination litigation in this jurisdiction. The confusion arises because matters of comparability in relation to differential treatment cannot be divorced from matters of justification. To resolve it, we should dispense with comparability as a requirement under the first step of the Atkinson test and focus only on whether there has been materially disadvantageous treatment on the basis of a prohibited ground. In harder, indirect discrimination cases, this involves deciding what unprotected traits are sufficiently caused by or correlated with protected traits, such that differential treatment on the basis of an unprotected trait amounts to differential treatment on the basis of a protected trait. Only after this should we consider matters of justification by reference to incomparability. Doing so results in clearer analysis and prevents cutting off potentially meritorious claims too early in the analysis.

I Introduction

Imagine an employer who wishes to hire some office workers. After interviewing various applicants, it turns out that the employer has rejected the women and hired only men. The women, upon discovering this, allege that they have been unlawfully discriminated against: they say that the

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employer's hiring policy and preferences meant that compared to the men who were hired, they were disadvantaged on the basis of their sex. In response, the employer says the women were disadvantaged not on the basis of their sex, but because they had child pick-up duties that meant they could not be in the office from 9 am to 5 pm. The proper comparator group, the employer says, is men who have child pick-up duties. As it happens, the only male interviewee who had child pick-up duties was not hired. If the claimants are compared to him, then there was no differential treatment. Nonetheless, it remains that the employer has hired no women and only men. How do we decide the right comparator?

In 2015, the authors of *The New Zealand Bill of Rights Act: A Commentary* lamented that New Zealand courts had not developed a methodology to answer this question.¹ This was considered unfortunate because, as just illustrated, the success or failure of a claim could turn on the comparator that is adopted.² Today, a decade on, still no methodology has emerged.

This is not for a lack of discrimination case law. We have not found a methodology for determining the right comparator because it is impossible to do so without resorting to matters of justification — something that *Ministry of Health v Atkinson*³ tells us not to do. In this way, the *Atkinson* test is itself internally inconsistent and needs to be reformulated so that courts are not required to look for the “correct” comparator at the initial stage. This focuses the inquiry on the real question in hard cases, which is when differential treatment is really *on the basis of* a prohibited ground.

This question is most likely to be an issue in indirect discrimination cases, and comes down to a question about what traits should be encompassed within a prohibited ground of discrimination — in other words, what matters are *proxies* for the protected ground.⁴ Does having child pick-up duties sufficiently correlate with sex such that differential treatment on the basis of the former amounts to differential treatment on the basis of the latter? This question cannot be resolved by looking for appropriate comparators; rather, the right comparator becomes apparent *after* the proxy question is answered.

The purpose of this article is to make the case for the above claims. Part II sets out some background and explains the *Atkinson* inconsistency and why the solution is to dispense with the comparability requirement in the first limb of the test. Having dispensed with the comparability requirement, part III proposes some principles for how to determine when a trait is a

1 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.10.11].

2 At [17.10.11].

3 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

4 See Deborah Hellman “Defining Disparate Treatment: A Research Agenda for our Times” (2023) 99 *Ind L J* 205.

proxy for another. Part IV then explains why comparability is still relevant to the second limb of the *Atkinson* test in relation to material disadvantage. Finally, part V sets out a summary of the proposed framework, and part VI uses the case study of *B v Waitemata District Health Board* to illustrate how the framework might operate in practice.⁵

II The Comparator Problem

A Basics and background

The anti-discrimination right in New Zealand is contained in s 19(1) of the New Zealand Bill of Rights Act 1990 (NZBoRA). It provides that “Everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993” (HRA).

Under s 21(1) of the HRA, the prohibited grounds, broadly, are:

- sex, which includes pregnancy and childbirth;
- marital status of any kind, including being a surviving spouse or partner;
- religious belief;
- ethical belief, meaning the lack of a religious belief;
- colour;
- race;
- ethnic or national origins, nationality and citizenship;
- having a disability, whether physical, intellectual or psychological;
- age;
- political opinion or lack thereof;
- being unemployed or a recipient of a benefit;
- family status, meaning being related to or in a relationship with any particular person or having responsibility for caring for dependants or not; and
- sexual orientation.

As with all rights in NZBoRA, the s 19(1) right applies to any act of the legislature, executive or judiciary, and any act of any other person or entity done in the performance of any public function, power or duty pursuant to law.⁶

5 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 [*B v WDHB* (CA)] and *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 [*B v WDHB* (SC)].

6 New Zealand Bill of Rights Act 1990, s 3.

Not all limits on NZBoRA rights are unlawful. Rights may lawfully be limited under s 5 if the limit is pursuant to law and can be demonstrably justified in a free and democratic society. If it cannot be, there will be a breach of NZBoRA. So, there are usually two steps under a NZBoRA analysis:

1. prima facie limit of the right under the section setting out the right; and
2. demonstrable justification under s 5.

As to the first step, “discrimination” in s 19(1) is not defined. However, since 2012, the accepted test for whether s 19(1) has been prima facie limited is that set out in *Ministry of Health v Atkinson*.⁷ There, the Court of Appeal said that discrimination under s 19 is “differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination” where “that treatment has a discriminatory impact”.⁸ There will be discriminatory impact if the differential treatment “imposes a material disadvantage on the person or group differentiated against”.⁹

So, prima facie discrimination under s 19(1) has two limbs:

- (a) differential treatment or effects on a prohibited ground between persons or groups in comparable situations; and
- (b) imposition of a material disadvantage.

On closer examination, limb (a) itself contains two different requirements as to the nature of any differential treatment or effect: (i) it must be on the basis of a prohibited ground; *and* (ii) it must be as between persons or groups in comparable situations. Therefore, fully expanded, the *Atkinson* test for prima facie discrimination under s 19(1) is:

- (a) differential treatment/effect that is *both*:
 - (i) on the basis of a prohibited ground; *and*
 - (ii) between persons or groups in comparable situations; and
- (b) imposition of a material disadvantage.

Because limb (a)(ii) requires that differential treatment or effects be between those in “comparable situations”, courts presently assess whether a claimant’s comparator is in fact “comparable”. This raises the question as to who the appropriate comparator group is.¹⁰ This exercise is notoriously fraught with

⁷ *Atkinson*, above n 3.

⁸ At [55].

⁹ At [109].

¹⁰ At [56].

difficulty, and much ink has been spilt over it.¹¹ A review of that discussion is outside the scope of this article, but as we saw in the child pick-up hypothetical in part I, a key problem is that the characteristics of the comparator can be highly contested because it could be the difference between succeeding and failing to prove differential treatment on a prohibited ground.

Atkinson illustrates this. The case concerned the Ministry of Health's policy of funding support services for disabled persons except when the support person was a parent, spouse or resident family member of the disabled person.¹² The plaintiffs, who were all supporting their disabled children without funding, alleged discrimination on the ground of family status. The Ministry's policy position was that it was meeting gaps in natural support already provided by family members. So, it argued that the appropriate comparator was those employed to meet gaps not filled by natural supports.¹³ As the Court identified, however, this comparator would lead to an "inevitable answer" favourable to the Ministry:¹⁴ suddenly, the difference between the plaintiffs and the comparator was not that they were relatives of the people they were caring for (a prohibited ground), but that they were not filling gaps left by natural supports (not a prohibited ground).

For this reason, the Court in *Atkinson* was at pains to emphasise that comparability analysis should be kept separate from justification analysis. Rejecting the Ministry's comparator, the Court warned that comparators should not build in artificial qualifications that incorporate the policy behind the allegedly discriminatory rule or policy.¹⁵ Doing so risks "justification creep", where matters of justification that ought to be considered under s 5 NZBoRA (here, meeting gaps in natural support) are "shifted to the s 19 analysis" of prima facie discrimination.¹⁶ On the other hand, separating

11 See, for example, Aileen McColgan "Cracking the comparator problem: discrimination, 'equal' treatment and the role of comparisons" (2006) 6 EHRLR 650; Daphne Gilbert and Diana Majury "Critical comparisons: The Supreme Court of Canada dooms section 15" (2006) 24 Windsor YB Access Just 111; Colin Campbell and Dale Smith "Direct discrimination without a comparator? Moving to a test of unfavourable treatment" (2015) 43 Fed L Rev 91; Issa Kohler-Hausmann "Eddie Murphy and the dangers of counterfactual causal thinking about detecting racial discrimination" (2019) 113 Northwest U L Rev 1163; and Jose M Álvarez and Salvatore Ruggieri "Mutatis Mutandis: Revisiting the Comparator in Discrimination Testing" arXiv:2405.13693 [cs. LG]. See also the Canadian Supreme Court's discussion in *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396 at [40]–[67] in relation to the role of mirror comparators.

12 *Atkinson*, above n 3, at [64].

13 At [61].

14 At [67].

15 At [66].

16 At [132] citing Hart Schwartz "Making Sense of Section 15 of the Charter" (2011) 29 NJCL 201 at 217.

prima facie discrimination and justification would ensure a “structured and reasoned approach and so avoid decision-making based on instinct rather than analysis”.¹⁷

Similar comments were made by Tipping J three years earlier in a concurring opinion in *Air New Zealand Ltd v McAlister*.¹⁸ His Honour observed that a comparator “is not appropriate if it artificially rules out discrimination at an early stage of the inquiry”, and that there should be a “purposive and untechnical approach to whether there is ... prima facie discrimination, while allowing the alleged discriminator to justify that prima facie discrimination”.¹⁹

These principles have been recited often in discrimination cases since, and they remain the law today.²⁰

B *The problem with the Atkinson test*

Despite the above, the phenomenon of justification creep continues to occur. The most recent example is *J v Attorney-General*,²¹ which was criticised by Winkelmann CJ for “collaps[ing] together the first question under *Atkinson* (finding a comparator against whom differential treatment can be measured) with the third (whether the difference of treatment is justified)”²² — precisely what the *Atkinson* Court held should not be done.

The reason this happens is because matters of comparability and matters of justification²³ are inextricably linked. Various commentators have long observed that there is a “similarity between considerations of comparability and justification [that] make[s] it difficult to achieve a clear separation of the enquiries”.²⁴ Therefore, “[d]eterminations of comparability can operate as justification by another name”.²⁵ Or, “differences in otherwise similar

17 At [128].

18 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153.

19 At [51].

20 See, for example, *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [148]; *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [121]; and *J v Attorney-General* [2023] NZCA 660 [*J v Attorney-General* (CA)] at [105].

21 *J v Attorney-General* (CA), above n 20.

22 *J v Attorney-General* [2025] NZSC 103 [*J v Attorney-General* (SC)] at [228].

23 By “justification” here I mean moral justification rather than justification in the technical sense under s 5 of the New Zealand Bill of Rights Act 1990 [NZBoRA].

24 Asher Gabriel Emanuel “To whom will ye liken Me, and make Me equal? Reformulating the Role of the Comparator in the Identification of Discrimination” (2014) 45 VUWLR 1 at 11.

25 At 11.

situations' are among the circumstances that can justify different treatment in a given case",²⁶ and so "[d]etermining whether the situations of two persons, who are treated differently . . . , are comparable is difficult without taking the reasons for the different treatment into account".²⁷

These observations, however, tend to understate the problem insofar as the *Atkinson* test is concerned. As the test currently stands, it is not just "difficult" to separate matters of comparability and justification; it is logically impossible.

The first limb of the *Atkinson* test — limb (a) — focuses on differential treatment. Thus, we are concerned with equal treatment, or equality.²⁸ When we are concerned with equal treatment, we are naturally also concerned with who is similar enough to be treated in the same way as whom. Only likes should be treated alike. That is why we think differential treatment should only be between comparable persons or groups. But what does it mean to be alike, or comparable, in this context? Of course, no two people are exactly alike in all respects, but everyone is like someone else in at least some respect. So, to be meaningful for the purposes of equal treatment, to be alike (or "comparable") is to be alike only in the ways that we consider to be relevant.²⁹ Relevant to what? Well, relevant to being deserving of being treated alike. Thus Peter Westen wrote in 1982 that "equality is entirely '[c]ircular"; people are comparable if they "should be treated alike", and people should be treated alike if they are comparable.³⁰

The upshot of this is that when courts are required to think about comparability under limb (a) of the *Atkinson* test, they are effectively required to ask whether A and B are similar enough to be treated in the same way. But whether A and B are similar enough to be treated in the same way depends on whether they *should* be treated in the same way in light of their differences.

26 Oddný Mjöll Arnardóttir "Cross-fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights — the Case of the Discrimination Grounds under Article 14 ECHR" (2015) 33 Nordic Jnl of HR 220 at 229.

27 Hanna Pettersson "Discrimination against Part-Time and Fixed-Term Workers: A Critical Legal Positivist Analysis" (2015) 31 Int J Comp LLIR 47 at 61.

28 Equal treatment being the opposite of differential treatment. Note there are various views on the ultimate aim of discrimination law, for example: to protect human dignity (see *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [52]); to protect personal autonomy (see John Gardner "On the Ground of Her Sex(uality)" (1998) 18 OJLS 167); to protect deliberative freedoms (see Sophia Moreau "What is Discrimination?" (2010) 38 Phil & Pub Aff 143); to treat people "as equals" (see Deborah Hellman "Two Concepts of Discrimination" (2016) 102 Va L Rev 895).

29 Peter Westen "The Empty Idea of Equality" (1982) 95 Harv L Rev 537 at 544–545.

30 At 547.

Take *S v Attorney-General*.³¹ This case was about three men who suffer from intellectual disability and various psychological disorders. Due to their disabilities, they were found unfit to stand trial and so were detained and treated in medium-secure forensic hospital units under the relevant legislation. The applicants alleged that their detention had been discriminatory because they were disadvantaged compared to “ordinary offenders” (the comparator) on the basis of their disabilities, including because they were detained for longer than the maximum period of imprisonment available for the offences for which they were charged.³²

The High Court held that “ordinary offenders” were incomparable to the applicants because the former are morally responsible for their actions and are detained as a means of punishment, while the latter are not and are detained to avoid harm to society and facilitate treatment.³³ The Court of Appeal agreed for the same reasons.³⁴

But these reasons are also matters of justification. The difference in moral culpability between the groups explains why they are said to be incomparable *and* why we think it is a good idea to treat them differently in the context of criminal offending. The groups are incomparable *because* they are different in a sufficiently relevant way, which is that they should be treated differently. Thus, a conclusion of incomparability necessarily begs the question because it requires us to have already decided that the groups should be treated differently.

This circularity is unavoidable given the *Atkinson* test is formulated around differential or equal treatment. There is no principled way to draw a line between matters of comparability for the purposes of differential treatment, which *Atkinson* says belong under limb (a), and matters of justification, which *Atkinson* says belong under s 5. The *Atkinson* test is therefore internally inconsistent and needs to be reworked.

C *How to fix it*

(1) The proposal: dispensing with comparability as an independent limb

Assuming we do not wish to jettison the *Atkinson* test entirely, we have two options: dispense with comparability as an independent requirement under limb (a) of the s 19(1) test, or permit matters of justification to be considered

31 *S v Attorney-General* [2017] NZHC 2629.

32 At [669].

33 At [680]–[681] quoting *Winko v Forensic Psychiatric Institute* [1999] 2 SCR 625 at [79] and [93].

34 *M (CA677/2017) v Attorney-General* [2020] NZCA 311 at [129].

in the prima facie analysis of discrimination. If we remove comparability as a distinct requirement under limb (a), then the test for discrimination would simply be:

- (a) Is there differential treatment/effect on the basis of a prohibited ground (using the claimant’s comparator)?
- (b) If so, did it result in a material disadvantage?
- (c) If so, is this justified under s 5 of NZBoRA?

This means that courts should not be asking whether the claimant’s proposed comparator is “appropriate” under limb (a); they should simply take it as presented and ask whether that comparator discloses differential treatment on the basis of a prohibited ground.³⁵

To be clear, I am not suggesting that there should be no comparison made under limb (a) of the s 19(1) test. Comparison is often required to demonstrate differential treatment or effect, and claimants should of course spend time choosing the best comparator that will advance their case. What I am saying is that courts should not, under limb (a) of s 19(1), scrutinise the *correctness* of the claimant’s proposed comparator because, as discussed, no criterion for comparability exists that does not also beg the question. The only relevant question under limb (a) should be whether the claimant’s chosen comparator discloses differential treatment on the basis of a prohibited ground: either it does, or it does not. If it does, and if there is a material disadvantage because of it (limb (b)), then all matters of justification should be considered through s 5 of NZBoRA.

Here we should distinguish between “justification” in the moral sense and “justification” in the legal sense under s 5 of NZBoRA. The sort of justification that is necessarily implicated in assessing comparability is moral justification. This is different from s 5 justification, which has a technical meaning. Generally,³⁶ it requires a structured proportionality analysis where a limit on a right is justified under s 5 only if it:³⁷

- (a) serves a sufficiently important purpose to justify curtailing the right;
- (b) is rationally connected to the purpose;

35 As also proposed in Emanuel, above n 24, at 21.

36 A less structured inquiry may be needed in relation to a discretionary decision: see *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [96]–[98] quoting *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [89].

37 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J, recently endorsed by the Supreme Court in *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [195]–[197] per Winkelmann CJ, O’Regan, Williams and Kós JJ.

- (c) is no more than reasonably necessary to achieve the purpose; and generally
- (d) is proportionate to the importance of the objective.

Moral justifications for differential treatment, in the form of appeals to difference, will be relevant to s 5 justification analysis by feeding into both step (a) and the general proportionality analysis under (d). If the purpose of some practice is itself to recognise some difference between groups, then the more significant we think that difference is to how the groups should be treated, the more likely the purpose will be sufficiently important to justify differential treatment. It will also be more likely that the practice is proportionate to the importance of the objective. For example, if the purpose of treating mentally disabled and non-disabled offenders differently is to recognise their different moral culpability (as could have been argued in *S v Attorney-General*), we are more likely to consider that a sufficiently important purpose to justify differential treatment where we think the difference in moral culpability is a significant difference.

If the purpose of the impugned practice is something else, then the significance of the difference between groups will be relevant to the weight we attach to the right not to be treated differently. For example, say that in our earlier child pick-up hypothetical we had decided the employer's practice amounted to differential treatment on the basis of sex and resulted in material disadvantage. At the s 5 analysis, the employer says that the purpose of its hiring policy of avoiding applicants with child pick-up duties is to prevent disruptions to office work. Here, our assessment of the importance of that purpose relative to the right will be affected by the extent to which we think men and women should be treated differently because they happen to have unequal child pick-up duties.

(2) The case for dispensing with comparability as an independent limb

There are three reasons why dispensing with a “comparability” test under limb (a) should be preferred: precedent, statutory interpretation, and general principle.

First, in terms of precedent, dispensing with comparability under limb (a) better accords with the Court of Appeal's judgment in *Atkinson* when read as a whole. The question of where matters of justification should go was subject to full argument from both the Ministry and the Human Rights Commission.³⁸ Having heard that argument, the Court considered it and deliberately decided that such matters should remain under s 5 rather

38 See *Atkinson*, above n 3, at [114]–[117] and [127]–[132].

than creep into s 19.³⁹ On the other hand, no reasons were given as to why comparability needed to be an independent requirement under s 19 — it seems to have been assumed because it was common ground between the parties.⁴⁰ Since then, the comparability requirement has merely been recited in judgments as part of the *Atkinson* test without specific scrutiny. There is therefore less precedential value in the comparability requirement than those repeated citations might suggest. In these circumstances, the best reading of *Atkinson* should give effect to its reasoned decision on justification, rather than nullify that ruling for the sake of an assumed requirement that was not fully considered.

Secondly, retaining an independent “comparability” requirement under limb (a) is not consistent with the long-established principle of interpreting NZBoRA rights generously.⁴¹ Section 19(1) does not itself refer to any concept of comparability. It merely prohibits discrimination on the grounds listed in the HRA. An interpretation of “discrimination” that requires only material disadvantage imposed on the basis of a prohibited ground is broader and more generous than one that also requires the disadvantage to be relative to a “comparable” person or group. The former should thus be preferred.

Now, one might say that there still must be *some* threshold. You might think that we need some kind of comparability test to provide “some inbuilt safeguards against ridiculous claims”, as the Court of Appeal put it in *Atkinson*. The example it gave there was an able-bodied person complaining about the presence of a lift only for disabled persons.⁴² The immediate response to this is that we do not need a comparability test to exclude this sort of ridiculousness because Parliament has already excluded it for us: being able-bodied is simply not a prohibited ground under s 21(1) of the HRA.

The broader point is that Parliament has made deliberate decisions as to which characteristics are to be protected. Some grounds are only asymmetrically protected, meaning that not all groups within a ground can claim discrimination under that ground.⁴³ Disability is one example: an able-bodied person cannot claim disability discrimination. In this respect, New Zealand is consistent with many other cognate jurisdictions, which

39 At [117].

40 At [55].

41 See, for example, *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41] per Winkelmann CJ (citing *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328 per Lord Wilberforce); *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] per Elias CJ and Keith J; and *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268 per Cooke P.

42 *Atkinson*, above n 3, at [124].

43 See discussion in Tarunabh Khaitan *A Theory of Discrimination Law* (Oxford University Press, Oxford, 2015) at 61.

also do not allow able-bodied persons to claim disability discrimination.⁴⁴ Another example is age, where those under 16 years cannot claim age discrimination.⁴⁵

This can be contrasted with grounds that are symmetrically protected, such as sex, religion, colour, race, ethnic or national origins, and political opinion.⁴⁶ All groups within those grounds may claim discrimination, irrespective of whether they are majority or minority groups.⁴⁷

So, the fact is that we do have a threshold: the threshold is differential treatment creating material disadvantage *on the basis of the prohibited grounds enacted by Parliament in the Human Rights Act*. Courts should not further narrow the scope of the anti-discrimination right by deciding nonetheless that *some* instances of material disadvantage imposed on the basis of the prohibited grounds do not prima facie limit the s 19(1) right because, in the opinion of that court, that would be “ridiculous”. Doing so adds an unnecessary gloss over a fundamental right that has already been carefully defined.

Finally, retaining an independent comparability requirement is dangerous as a matter of general principle because it can shield problematic practices from further scrutiny.⁴⁸

For example, a claim may appear intuitively “ridiculous” only because we are labouring under precisely the same prejudices that the claim seeks to question. Much discrimination against certain groups has historically been perpetrated on the basis of commonly held assumptions (eg “women belong at home, men at work”) that are no longer accepted. There is no reason to believe that society has now rid itself of all prejudicial assumptions. Today’s “ridiculous” claim may be tomorrow’s cautionary tale. Closely interrogating and demanding explanations for assumptions underlying differential treatment on the basis of prohibited grounds is the point of anti-discrimination law.⁴⁹ That purpose would be defeated if a claim could be dismissed based on the very assumptions it is seeking to challenge because a comparator was thought to be incomparable.

44 See Equality Act 2010 (UK), s 13(3); Canadian Human Rights Act RSC 1985 c H-6, s 25 definition of “disability”; Disability Discrimination Act 1992 (Cth), s 4(1) definition of “disability”; Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (South Africa), s 9; and Americans with Disabilities Act 42 USC § 12102 definition of “disability”.

45 Human Rights Act 1993 [HRA], s 21(1)(i).

46 Section 21(1)(a), (c), (d), (e), (f), (g), and (j).

47 This is subject to s 19(2) of NZBoRA, which provides an express exception for affirmative action.

48 Emanuel, above n 24, at 7.

49 Gilbert and Majury, above n 11, at 125.

Another example is a scheme that is intended to create substantive equality by recognising different needs but which does not actually achieve that goal and instead perpetuates disadvantage. If those different needs are considered at the very first step to make the two groups “incomparable”, then we will never move to the next step of considering whether there is material disadvantage, and the scheme’s failure will never be uncovered. The scheme will thus continue to operate and impose material disadvantage on a group based on a prohibited ground, even though it was not intended to do so.

S v Attorney-General, discussed under part II B above, illustrates this risk. If we leave aside matters of comparability, the only initial question is whether the claimants were treated differently from “ordinary offenders” on the basis of a prohibited ground. Arguably, they were.⁵⁰ It was because of their disability that they were found unfit to stand trial, which in turn triggered the differential treatment of longer detention.⁵¹ If we agree they were treated differently on the basis of a prohibited ground, we should then ask whether, in the scheme of things, that treatment imposed a material disadvantage compared to ordinary offenders.

The answer could well be no, in which case there will be no prima facie discrimination. This was where the Court of Appeal landed in *J v Attorney-General*, which also concerned a man with intellectual disabilities detained under a compulsory care order after offending.⁵² However, if a court were to find there *was* material disadvantage (as Winkelmann CJ would have found in *J v Attorney-General* on appeal⁵³), then it is properly for the state to justify why it is running a scheme that materially disadvantages offenders who are unfit to stand trial due to disability, compared to those who are not. But we will never get to this stage if the difference between the groups makes them “incomparable” and shuts down the claim at the very first limb, as was the case in *S v Attorney-General*.

Finally, a law or policy may impose a material disadvantage on prohibited grounds for a desirable public purpose, but the purpose could be achieved by imposing a lesser disadvantage — in other words, the freedom from discrimination is being impaired more than is reasonably necessary to achieve the desirable purpose. In such a case, the discriminating law or

50 I discuss the connection that should be necessary between a neutral trait and a protected trait below in part III.

51 The Chief Justice came to this conclusion in *J v Attorney-General* (SC), above n 22, at [233].

52 *J v Attorney-General* (CA), above n 20, at [159]. Essentially, the Court found that the different scheme for offenders unfit to stand trial was intended to create “alternative, more appropriate, pathways for initial disposition” of offences: at [157]. As noted, this judgment was appealed: *J v Attorney-General* (SC), above n 22.

53 *J v Attorney-General* (SC), above n 22, at [237].

policy would not be justified under s 5 of NZBoRA.⁵⁴ But, again, this failure will not be uncovered if the court decides at the outset that the groups are incomparable. The same can be said for the rational connection and the proportionality inquiries under the s 5 analysis.

Now, it is true that this approach broadens the s 19(1) right and leaves more work to be done under the s 5 NZBoRA analysis. But the High Court in *Hoban* saw “no difficulty” in such a prospect, noting that confining matters of justification to s 5 “assists in the analysis being simpler and more structured, as it avoids the answers to hard cases being determined by a less certain definitional approach”.⁵⁵ As noted, the danger posed by such a “definitional approach” is that it invites justification to be assumed. This, as Winkelmann CJ put it in *J v Attorney-General*, “short-circuit[s] the discrimination analysis” and “allows the critical question to be avoided — namely *why*” there is differential treatment between the two groups.⁵⁶ The test for discrimination should not allow this to occur.

(3) “Trivialising” the right?

It might be said that dispensing with a threshold comparability test could “trivialise” the anti-discrimination right by robbing it of its content.⁵⁷ Adopting a neutral definition of discrimination, the objection goes, results in “a conception that is devoid of any normative content” because it amounts only to “an observation that a distinction has been drawn rather than an allegation of impropriety”.⁵⁸ We might therefore think that disadvantageous treatment can only be between comparable groups or individuals for such treatment to amount to discrimination under s 19. Indeed, one commentator has argued that the *Atkinson* test itself “created” a right that “lacks the moral content that is necessary to justify its inclusion in a constitutional bill of rights”.⁵⁹ But this is not the case.

It is true that in the early years of the NZBoRA, it was considered possible that all “discrimination” under s 19 should mean is a distinction on

54 See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [103]–[104] per Tipping J.

55 *Hoban v Attorney-General* [2022] NZHC 3235 at [24]. Compare Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) at 386 noting “[a] more limited conception of the right that is subject to few limits seems preferable ... to a broader conception of the right that is subject to numerous limits”.

56 *J v Attorney-General* (SC), above n 22, at [229] (emphasis in original).

57 *Atkinson*, above n 3, at [97] and [124].

58 Grant Huscroft “Discrimination, Dignity, and the Limits of Equality” (2000) 9 Otago LR 697 at 710.

59 Julia Adams “Breaking the Constitution: Discrimination Law, Judicial Overreach and Executive Backlash After *Ministry of Health v Atkinson*” [2016] NZ L Rev 255 at 266–267.

the basis of a prohibited ground.⁶⁰ The above objections have force against such a definition, since not all distinctions on the basis of a prohibited ground are a bad thing — for example, separate bathrooms for men and women.⁶¹ It is sensible that “discrimination” under s 19 should have moral content in that it should refer to distinctions that are in some way “wrongful”⁶² in a moral sense. The debate in those years, however, seemed to be premised on a false dichotomy: either the definition is completely neutral (ie limited to distinctions on the basis of prohibited grounds), in which case the right is empty; or the definition should be “purposive” (ie build in the question whether groups are comparable for some purpose to be treated equally), in which case we risk building in matters of justification.⁶³

But it does not follow from rejecting a neutral definition that we must rely on a comparability component to give us moral content for discrimination. Since *Atkinson*, it has been clarified that a key part of the definition of discrimination is the imposition of a material disadvantage. Whether there is such disadvantage is to be viewed in context.⁶⁴ In light of the statutory allowance for affirmative action,⁶⁵ this commits us to a substantive over formal view of equality.⁶⁶ That answers the concern expressed by the authors of *The New Zealand Bill of Rights* that “virtually every distinction made on the basis of a prohibited ground of discrimination can be characterised as causing disadvantage of some sort”.⁶⁷ That is only true if any formal disadvantage suffices. If the alleged disadvantage is to be viewed in context, under the current law, then it should not be possible to sidestep that hurdle simply through formal recharacterisation.

Taken together with the prohibited grounds, the material disadvantage requirement gives us a meaningful definition of discrimination: it commits us to an ideal where people should not in substance be disadvantaged by the characteristics listed in the prohibited grounds. That is a normative commitment. Where a person *is* substantively disadvantaged by a characteristic that we do not believe they should be disadvantaged by, we can say that is a bad thing without the need to appeal to comparability.

This means we need not be worried that the state will suddenly be called upon to justify “all sorts of legitimate government activity”⁶⁸ that it should not have to waste time defending. This kind of “floodgates” thinking usually

60 See Andrew Butler “Same-Sex Marriage and Discrimination” [1998] NZLJ 229 at 230.

61 Rishworth *New Zealand Bill of Rights*, above n 55, at 376.

62 At 376.

63 See discussed at 385–386.

64 *Atkinson*, above n 3, at [109].

65 NZBoRA, s 19(2).

66 See also *J v Attorney-General* (CA), above n 20, as discussed in the previous section.

67 Rishworth *New Zealand Bill of Rights*, above n 55, at n 26.

68 Adams, above n 59, at 286.

does not withstand scrutiny if considered seriously. For example, it has been suggested that unemployment benefits could be challenged under s 19(1),⁶⁹ but just like being able-bodied, being employed is not a prohibited ground of discrimination.⁷⁰ Another suggestion has been sole parent benefits,⁷¹ but it is unlikely that a parent in a relationship will be materially worse off compared to a sole parent receiving a benefit because the parent in a relationship by definition has an extra person to rely on for support. To assume material disadvantage merely because the parent in a relationship is denied a benefit another parent receives is to take an overly formal view of equality that has been rejected by *Atkinson* and by Parliament in enacting the affirmative action allowance under s 19(2).

Nor should we be concerned that public entities might be called upon to defend practices imposing a material disadvantage on the basis of a prohibited ground if they turn out to be justified. Practices that do materially disadvantage a person or group on the basis of a prohibited ground are inherently suspect, since in an ideal world no one should suffer such disadvantage. Those practices therefore *should* be demonstrably justified, even if ultimately it is just to satisfy us all that there was no reasonable alternative. That is not a waste of resources, it is a necessary cost of ensuring — and knowing — that fundamental freedoms are impaired proportionately and as little as reasonably possible in a free and democratic society.

Finally, if we are worried that too many practices will come to light that cannot be justified, then that is not a legitimate normative argument at all, but really just “a fear of too much justice”.⁷²

III The Proxy Problem

If we dispense with comparability as an independent requirement under limb (a) — differential treatment or effect — of the s 19(1) analysis, then the question that remains is simply whether there is differential treatment on the basis of a prohibited ground.⁷³

This simplifies the limb (a) inquiry considerably in direct discrimination cases. By definition, these are cases where the face of a law, policy or practice creates a distinction by direct reference to a prohibited ground, so limb (a) will always be satisfied in a direct discrimination case. *Atkinson* is

69 See, for example, at 266–267.

70 HRA, s 21(1)(k): “employment status” means only being *unemployed* or being a recipient of a social security benefit or accident compensation entitlement.

71 Adams, above n 59, at 266–267.

72 *McCleskey v Kemp* 481 US 279 (1987) at 339 per Brennan J (dissenting).

73 Material disadvantage is discussed separately below in part IV.

an example of direct discrimination on the ground of family status,⁷⁴ because the Ministry's policy expressly excluded parents, spouses and other resident family members from funding.

The question is more difficult in indirect discrimination cases, but the inquiry is still clarified when we stop looking at comparability. The rest of this part explains how that inquiry should be structured.

A Indirect discrimination and proxies

Section 19 of NZBoRA does not expressly refer to indirect discrimination. Nonetheless, the High Court has held that both direct and indirect discrimination are prohibited under s 19.⁷⁵ Indirect discrimination is also expressly prohibited by s 65 of the HRA, which provides that “any conduct, practice, requirement, or condition that is not apparently” discriminatory will still be unlawful if it “has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination where such treatment would be unlawful ...”.

Prima facie indirect discrimination occurs where a law, policy or practice does not distinguish by reference to any prohibited ground on its face, but nonetheless disadvantages a person or group protected by a prohibited ground *in effect*.⁷⁶ For instance, a “text book example of indirect discrimination”⁷⁷ on the basis of sex is a rule that disadvantages those under a certain height — say, 175 cm. The rule applies neutrally to both men and women, so there is no direct discrimination, but because many more women in New Zealand are shorter than 175 cm compared to men, they will be disproportionately impacted, and so the rule indirectly discriminates on the ground of sex.

Indirect discrimination exists because being a member of a protected group, or having a protected trait, is not simply about falling under the strict definitions of that trait. For example, being aged 16 is, by definition, to have been alive for more than 16 but fewer than 17 years after one's date of birth. We can think of this as the core of the trait. But there is also a penumbra around the protected trait comprising unprotected traits that correlate with but do not necessarily apply to all who fall within the core. For example, in respect of being 16, the penumbra might include being in high school, having a certain level of brain development, having more than a certain level of impulsivity, having less than a certain level of wealth, and so on.

74 Which includes “being a relative of a particular person”: HRA, s 21(1)(i)(iv).

75 *NRHA v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236–238.

76 Butler and Butler, above n 1, at [17.12.1].

77 *Fehling v Appleby* [2015] NZHC 75, [2015] NZAR 547 at [85] citing Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) at 278.

Discrimination is indirect if the disadvantageous treatment occurs on the basis of a penumbral trait. The question in hard cases will be deciding whether an unprotected trait falls within the penumbra of a protected trait, such that differential treatment on the basis of the former should amount to differential treatment on the basis of the latter. To put it another way, it is as a question of deciding when an unprotected trait is a *proxy* for a protected trait.⁷⁸

B *A note on the role of comparators*

Focusing limb (a) of s 19(1) on proxies in this way shows that comparability is a distraction.

If it is known on what basis two groups were treated differently, then for the purposes of limb (a) we need only ask whether that neutral basis is a proxy for a prohibited ground. If it is, then the differential treatment is on the basis of a prohibited ground. No comparator is necessary, and comparability is irrelevant.

If it is not known why two groups are treated differently, then a claimant can only point to the group receiving better treatment than them. In these cases, comparing the claimant to that group may yield systematic differences other than in terms of the prohibited ground argued. If so, then the respondent may point to one of those other differences as the real basis for differential treatment. At that point, the question comes back to whether that difference is a proxy for the protected trait upon which discrimination is argued. A comparator serves only to flush out the real basis for the treatment, but comparability (ie whether the comparator is “correct”) is still irrelevant. Indeed, a fanciful comparator will only disadvantage the claimant, since the more dissimilar the comparator is to the claimant, the less likely the actual basis for differential treatment is a proxy for the prohibited ground argued.

The advantage to this approach is that unlike the comparability inquiry, the proxy inquiry *is* guided by independent principles⁷⁹ and can be answered without question-begging appeals to whether two groups deserve to be treated alike. I discuss these general principles in more detail below and, in doing so, criticise some of the case law that has developed in this area.

78 See also *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78, [2004] 3 SCR 657 at [57]: “[i]n indirect discrimination, the terms on which the claimants are denied the benefit operate as a proxy for their group status”; and Hellman “Defining Disparate Treatment”, above n 4, at 234.

79 This is not to overstate the simplicity of the methodology. When one trait should be considered a proxy for another is a matter of ongoing academic discussion: see Hellman “Defining Disparate Treatment”, above n 4, at 234.

C *Group versus individual claims*

When considering whether differential treatment on the basis of some unprotected trait is actually treatment on the basis of a protected trait, we should first distinguish between individual-level and group-level claims.

An individual-level claim is one where it is alleged that some individual (or group of specific individuals) has been disadvantaged by a rule indirectly on the basis of a prohibited ground, given their personal circumstances. This would be a breach of what Khaitan and Steel have called a “particular duty” owed to an individual not to disadvantage them based on a morally irrelevant trait.⁸⁰ A group-level claim is, by contrast, one where it is alleged that a facially neutral rule disproportionately disadvantages a protected group as a whole. This would be a breach of what Khaitan and Steel have called a “general duty” not to cause relative group disadvantage, which is owed not to any one individual but generally to a group or to society.⁸¹

A policy or practice may disadvantage only a few individuals on the basis of a protected trait without necessarily disadvantaging all or most members of the group with that same trait at a general level.

An individual-level claim justifies only a remedy specific to the individuals who make out their claim, such as a declaration that some rule is discriminatory as applied to those individuals. On the other hand, a group-level claim justifies a remedy that applies to the challenged rule generally, such as a broad declaration that a policy is generally discriminatory, as well as remedies specific to the individual (to the extent not already covered by the general remedy).

Because these two types of claims each seeks to establish a different sort of breach, the connection required between the unprotected and protected trait should also be different. At the group level, the connection is usually correlation, while at the individual level the connection should be causation. I explain why this is so below.

D *Correlation at the group level*

If the claim is that a policy or practice indirectly discriminates at the group level, then it should be enough to show a correlation between the protected and unprotected trait such that one group is disproportionately disadvantaged relative to the comparator.

80 Tarunabh Khaitan and Sandy Steel “Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law” in Hugh Collins and Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing, Oxford, 2018) 197 at 199.

81 At 200.

Take the “text book example” of height,⁸² where there is a rule that disadvantages those under 175 cm tall. A claim that this rule generally discriminates on the basis of sex would assert a correlational link between the unprotected trait (being shorter than 175 cm) and the protected trait (being a woman). The correlation is that significantly more women than men are shorter than 175 cm, which means that women will be disproportionately disadvantaged by the rule.

If this correlation is strong enough, then we can say that being shorter than 175 cm is a proxy for being female, and thus a rule that disadvantages on that basis is *prima facie* indirectly discriminatory on the basis of sex.

Note here that the correlation at group level is a basis to presume causation at the individual level. So, if it is found that a 175 cm height rule is indirectly discriminatory on the basis of sex generally, then we can presume that an individual woman who was disadvantaged by the rule was indirectly discriminated against on the basis of her being female; she should not need to prove that the reason *she* is shorter than 175 cm is because she is female, unless the defendant is able to somehow rebut that presumption.

E *Incomplete correspondence*

It follows from adopting a correlational standard for group-level claims that there should not need to be complete correspondence between the unprotected and the protected trait for the former to be a proxy of the latter.⁸³ In other words, not all those with the protected trait need have the unprotected trait, and not all those with the unprotected trait need have the protected trait. This may seem obvious, but I address it because some judicial decisions have suggested otherwise.

One example is *New Zealand Health Professionals Alliance Inc v Attorney-General*, which concerned a statutory provision that permitted employers of health practitioners to prefer candidates who did not object to abortion if accommodating an objection would unreasonably disrupt the provision of health (ie abortion) services.⁸⁴ The applicant argued, among other things, that this was indirectly discriminatory on the ground of religious belief because its members all object to abortion on the ground of their faith.⁸⁵ The Court declined to find *prima facie* discrimination for other reasons,⁸⁶ but it noted that not all those who object completely to abortion are Roman

82 Referred to above in part III A.

83 See discussed in relation to British law in *Khaitan and Steel*, above n 80, at 201.

84 *New Zealand Health Professionals Alliance Inc v AttorneyGeneral* [2021] NZHC 2510.

85 At [156].

86 At [167].

Catholics and not all Roman Catholics object completely to abortion.⁸⁷ In other words, there was not complete correspondence between objecting to abortion (unprotected) and being a Roman Catholic (protected).⁸⁸

This may be true, but for a group-level indirect discrimination case, it is a distraction. It is evident from the height example that complete correspondence between a protected and unprotected trait cannot be required. Not all women (the protected trait) are shorter than 175 cm (the unprotected trait) and not all those under 175 cm are women. Yet everyone agrees that differentiating on this ground may amount to differentiating on the ground of sex. An even clearer example is a rule that disadvantages all people with breasts. Every judge, I hope, would accept that amounts to differential treatment on the basis of sex. But, of course, not all women have breasts — some have had a double mastectomy — and not all those with breasts are women — some are men with gynecomastia.

The reality is that probably all indirect discrimination claims at the group level will fail to show 100 per cent correspondence between the unprotected trait and the protected trait. That is inherent in a trait being in the penumbra of a prohibited ground and should not itself be an obstacle to an indirect discrimination claim. The relevant questions are *how strong* the correlation is and how disproportionately one group is affected compared to another.

F *Causation at the individual level*

Claims at the individual level exist as a category because it might be impossible to show a disproportionate group disadvantage, yet a particular individual or individuals may still have suffered a material disadvantage indirectly due to a protected trait.

For example, take the facts of *Higgs v Minister of Immigration*.⁸⁹ That case concerned certain changes to New Zealand’s approach to processing visas during the COVID-19 pandemic. The effect of the changes was that some same-sex partners of New Zealand citizens or residents could not obtain a visa to join their partners in New Zealand because they could not show that they were “living together with their partner in a genuine and stable partnership”. This was because “living together” was interpreted by Immigration New Zealand (INZ) to mean sharing the same home,⁹⁰ which was not possible in countries that either prohibited partners from living

87 At [167].

88 Other examples include *B v WDH* (SC), above n 5, at [101]; and *Higgs v Minister of Immigration* [2022] NZHC 1333 at [185].

89 *Higgs*, above n 88.

90 At [31].

together before marriage or were hostile to same-sex relationships and others in the LGBTQIA+ community.⁹¹

The Court dismissed the claim because it did not have “cogent evidence on which to draw any safe conclusions about whether the [group] impact is or is not disproportionate”.⁹² But there *was* evidence in this case that one of the applicants *personally* could not live together with his partner while in China due to the country’s non-recognition of same-sex relationships.⁹³ That impact could still have grounded an individual-level claim.

In such cases, the connection between protected and unprotected trait needs to be causal. This causal connection cannot simply be but-for causation. The causal link should be morally significant, or what is sometimes referred to as “operative”.⁹⁴

What does it mean for a cause to be morally significant? Imagine a member of a political party decides to stop by the local party office for a meeting before going to work and, as a result, is reprimanded by her employer for being late. A but-for causal link exists between her political beliefs and her being reprimanded at work in the sense that had she not had those political beliefs, she would not have attended the party meeting, in which case she would not have been late and would not have been reprimanded. But we do not think that this means she was discriminated against on the basis of her political beliefs. Why? Probably because we think that she had a choice whether or not to attend that meeting, and so the morally significant (or operative) cause of her being late and reprimanded was her decision to attend the meeting without notifying her employer, not the mere fact of her political belief.⁹⁵

Contrast the situation in *Higgs v Minister of Immigration*, where the reason the claimant’s partner could not meet INZ’s requirements was a combination of his sexuality and the country in which he lived. This causal link seems intuitively different from the causal link in the above example because it seems unreasonable to expect a person to move away from their country of national origin to satisfy a criterion adopted by INZ during a global pandemic. Why does it seem unreasonable?

The feature that the prohibited grounds all have in common is that they are traits that are either immutable (such as race) or “so central to a person’s

91 At [9].

92 At [186].

93 At [13].

94 I prefer “morally significant” because when we decide that a cause is “operative”, what we are really doing is deciding that one cause over another is more worthy of being assigned responsibility or blame, or that a person should or should not have a right to do X without consequence. Much like equality, meaningful causation is also circular.

95 Adapted from an example in Mitchell N Berman and Guha Krishnamurthi “*Bostock Was Bogus: Textualism, Pluralism and Title VII*” (2021) 97 *Notre Dame L Rev* 67 at 99.

identity that it would be abhorrent for government to penalise a person for refusing to change them”⁹⁶ (such as religious belief). Thus, we might consider that an unprotected trait has been caused by a protected trait in a morally significant way where the unprotected trait is also either impossible or too onerous to change, or the value in recognising the protected trait as fundamental to a person’s identity would be undermined if we were to force that person to choose to alter the unprotected trait.

If this causative element is satisfied, then indirect discrimination should be found at the individual level regardless of whether a disproportionate impact can be shown at the group level.

G *Key manifestations*

It follows from the above that an unprotected trait should be a proxy for a protected trait if it is a key manifestation of the latter. This is just a special instance of the causation requirement. So, for example, cultural practices or language should be a proxy for race or ethnic origins, religious practices should be a proxy for religious belief, homosexual activity should be a proxy for homosexuality, and so on.⁹⁷ This means we should not draw what has been called the “status/conduct” distinction, which has been criticised for being artificial.⁹⁸ After all, protecting a trait counts for little if we do not also protect what it means to have that trait.

Unfortunately, this is not the current law in New Zealand. In *B v Waitemata District Health Board*, the Court of Appeal drew a distinction between “the symptoms of the relevant psychiatric illness” and having the psychiatric illness itself.⁹⁹ This was in the context of a claim against a blanket smoke-free policy adopted by the Waitemata District Health Board (WDHB).¹⁰⁰ The claimant argued that the blanket smoke-free policy discriminated on the ground of disability because the more acute the mental illness, the more likely one was to be held in a secure ward, which in turn forced those patients who smoke to suffer nicotine withdrawal as they could not smoke.¹⁰¹

96 Khaitan *A Theory of Discrimination Law*, above n 43, at 59.

97 See also Khaitan and Steel “Legitimacy of Indirect Discrimination Law”, above n 80, at 207.

98 See Deborah A Widiss “Intimate Liberties and Antidiscrimination Law” (2017) 97 B U L Rev 2083.

99 *B v WDHB (CA)*, above n 5, at [92]–[96].

100 *B v WDHB (CA)*, above n 5.

101 This was said to be an instance of “intra-ground discrimination”, in the sense that the differentiator was not having a disability, but the degree of severity of the disability. WDHB did not dispute that intra-ground discrimination was possible as a matter of principle. See at [81]–[89].

The Court found no prima facie discrimination because it considered that the reason for holding patients in the secure ward was “the symptoms of the relevant psychiatric illness and the resulting risk to the safety of themselves and others”, not the disability itself, and “behaviour is not a prohibited ground of discrimination”.¹⁰² It was not “having a psychiatric illness per se that [led] to ... the inability to smoke”.¹⁰³ On appeal, the Supreme Court agreed for essentially the same reasons.¹⁰⁴

If we analyse this in terms of proxies, the Courts were essentially saying that displaying a symptom of psychiatric illness is not sufficiently linked to the state of having the psychiatric illness to be a proxy of it; that is, differential treatment on the ground of exhibiting symptoms of disability is not differential treatment on the ground of disability.

Seen in this light, this precedent is alarming: it essentially renders the protection of psychiatric disability meaningless. What is psychiatric disability if not a label for a collection of symptoms, many of which manifest as behaviours? Moreover, it is especially the uncomfortable behavioural manifestation of these disabilities that causes society to marginalise those suffering from them, which is what disability discrimination law aims to prevent.¹⁰⁵ On the same logic, we would be free to discriminate on the basis of cultural practice, religious practice, homosexual activity, and other behaviours, *even if* such discrimination were driven by prejudice and nothing else. This is an unsatisfactory state of affairs, and *B v Waitemata District Health Board* should be revisited.

IV The Relationship between Proxies, Comparators, and Material Disadvantage

So far we have been dealing with the first limb — limb (a) — of the prima facie test for discrimination, and my claim has been that courts should not be looking for the “appropriate” comparator specifically under that limb; rather, the focus should just be on whether differential treatment was on the basis of a prohibited ground.

Courts may, however, need to check whether the comparator being used is appropriate under the second limb — limb (b) — when assessing material disadvantage. At this stage, this inquiry is *not* circular because it is directed

102 At [92]. See also at [94]–[96].

103 At [94].

104 *B v WDHB* (SC), above n 5, at [98]–[101].

105 Indeed, this may be why s 4(1) of the Disability Discrimination Act 1992 (Cth), “to avoid doubt”, defines “disability” to include “behaviour that is a symptom or manifestation of the disability”.

at a purpose other than “whether A and B should be treated alike”. That purpose is to find out whether the treatment based on the prohibited ground has caused material disadvantage.

Of course, in some cases, no comparison may be needed. For example, a law that required all Catholics to give up 25 per cent of their wealth to the state would clearly impose a material detriment on the basis of a prohibited ground; comparison with any other group is unnecessary to determine this.¹⁰⁶

Where comparison with another group is needed to determine material disadvantage, however, the appropriate comparator is the one that excludes all the traits found to be the basis for the differential treatment under limb (a). Only such a comparator will disclose whether there has been material disadvantage *as a result of* differential treatment on a prohibited ground.

In direct discrimination cases, the exercise should again be straightforward. By definition, these will be cases where the differential treatment is expressly by reference to the prohibited ground itself — like family relation in *Atkinson*. To make sure that there is material disadvantage *as a result of* this treatment, the comparator should generally¹⁰⁷ be as similar to the claimant as possible in all the relevant ways¹⁰⁸ except for the prohibited ground. This is known as a “mirror comparator”,¹⁰⁹ or a *ceteris paribus* “all else being equal” comparator.¹¹⁰ So, for the claimants in *Atkinson*, the group they should be compared with to determine material disadvantage is those who, like them, are able and willing to provide disability support services, but who do not have their protected trait, that is, are not related to the person being cared for.

In indirect discrimination cases, the comparator cannot be a mirror comparator because that will ignore the proxy. Rather, the comparator should

106 Similarly, s 22(1)(d) of the HRA makes it unlawful for an employer to simply “retire [an] employee ... by reason of any of the prohibited grounds of discrimination”. A comparison group is not referred to because no comparison is needed to establish this detriment. For a discussion of direct discrimination without a comparator see Colin Campbell and Dale Smith “Direct discrimination without a comparator? Moving to a test of unfavourable treatment” (2015) 43 Fed L Rev 91.

107 I say “generally” because there may be situations where the prohibited ground causes some other status, which in turn is the reason for a disadvantage. In such a case, the comparator needs to exclude that other status, otherwise excluding the prohibited ground will be pointless.

108 I say “in all the relevant ways” because, of course, people will differ in many ways that have no bearing on the disputed treatment at issue — for example, in the *Atkinson* case, whether the claimants like or dislike ice cream.

109 See discussed in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [46] and [49].

110 Álvarez and Ruggieri, above n 11, at 2.

be as similar to the claimant as relevantly possible except for the prohibited ground *and everything found to be a proxy for it*.

For example, if being shorter than 175 cm is the basis of differential treatment, and the court finds under limb (a) that this amounts to differential treatment on the basis of sex (ie being shorter than 175 cm is a proxy for being female), then the comparator for the purposes of determining material disadvantage should be those in the claimant's position but who are neither female *nor* shorter than 175 cm. If violent behaviour is the basis of differential treatment and is found to be a proxy for a disability, then the comparator should be someone in the claimant's position who does not have the disability *and* who does not exhibit the violent behaviour. This has also been called a *mutatis mutandis* comparator, or a comparator "with the appropriate adjustments being made".¹¹¹ The appropriate adjustments are the exclusion of traits that the court has already found are proxies of the protected trait.

Viewing the comparator in this way also explains why mirror comparators seem to be appropriate sometimes, but not other times.¹¹² It comes down to whether the disadvantageous treatment is as a result of a prohibited ground or a proxy.

This also means that if ever a court rejects a claimant's limb (a) argument but nevertheless finds *prima facie* indirect discrimination through a different proxy, then the comparator to be used to determine material disadvantage under limb (b) should exclude the proxy that the court found, not the one that the claimant argued.

Finally, the comparison used for the purposes of determining material disadvantage is different from that used to determine whether there has been disproportionate impact in a group-level indirect discrimination case. Take Table 1, which shows hypothetical population numbers in relation to a rule that treats differently those shorter than 175 cm.

Table 1

	Male	Female	Total
At least 175 cm	70	5	75
Under 175 cm	30	95	125
Total	100	100	200

If we want to show that height is correlated with sex such that women are disproportionately impacted by the rule, we might compare the percentage of women impacted (which is 95/100 or 95 per cent, as seen in Table 1

¹¹¹ At 2.

¹¹² See discussed in *Withler*, above n 11.

above) to the percentage of men impacted (which is 30/100 or 30 per cent). The comparison would show that the ratio of impacted women compared to impacted men is 95:30, or 3.17:1, meaning women are more than three times as likely as men to be impacted by the rule.

This exercise can be used to determine whether there is a sufficient correlation between unprotected and protected trait for the former to be a proxy.

Once that is determined, however, then the comparison for material disadvantage is a different comparison: it needs to be between the women who are impacted and the men who are not (ie those who have neither the protected *nor* the unprotected trait), as seen in Table 2 below.

Table 2

	Male	Female	Total
At least 175 cm	Comparator group		
Under 175 cm		Claimant group	
Total			

These are the groups that should be compared to identify the nature of any disadvantage and its materiality. At this point, the numbers are no longer relevant because we are no longer comparing proportions; we are comparing the benefit or disadvantage received by these groups.

V The Framework

Bringing all of the above together, we get the following general framework for analysing discrimination claims:

- (1) Is there differential treatment or effect on a prohibited ground?
 - (a) For direct discrimination cases: the answer is necessarily yes because, by definition, a protected trait will expressly be the facial basis for different treatment.
 - (b) For indirect discrimination cases: the issue is whether the facial basis for differential treatment *amounts to* treatment on the basis of a prohibited ground. This will usually involve asking if the unprotected trait that is the facial basis for the differential treatment is a proxy for a protected trait. Apply the following principles:
 - (i) For a group-level claim, a proxy may be established by showing either a direct and morally significant causal link in respect of all members of the group, or a correlation between protected and

unprotected trait among the group. There need not be 100 per cent correspondence at the group level.

- (ii) For an individual-level claim, the protected trait should be causally connected to the proxy trait in a morally significant way (and not merely in a but-for sense). The causal connection is morally significant if the person cannot reasonably alter that connection or if forcing them to do so would undermine recognition of the protected trait. This includes behaviours and characteristics that are key manifestations of the protected trait.
- (2) If there was differential treatment or effect on a prohibited ground, did this cause the applicant a material disadvantage?
 - (a) For direct discrimination cases: the claimant should be materially disadvantaged compared to a mirror comparator.
 - (b) For indirect discrimination cases: the claimant should be materially disadvantaged compared to a mutatis mutandis comparator; that is, one that does not have either the protected trait or the proxy trait.
 - (3) If there is differential treatment on a prohibited ground that resulted in a material disadvantage, is the treatment really affirmative action under s 19(2)?
 - (a) If it is, then it is not unlawful.
 - (4) If the differential treatment is not affirmative action under s 19(2), then is it justified under s 5 NZBoRA?
 - (a) Apply the appropriate s 5 NZBoRA test, which usually means considering whether there is a sufficiently important objective, a rational connection, minimal impact, and proportionality.
 - (b) All arguments as to why two groups are incomparable fall to be made and assessed under this section. The greater or more relevant the difference between groups, then the more likely that the objective will be sufficiently important and that materially disadvantaging one group will be proportional to the objective.

VI Application

We can now apply this framework to a case to illustrate how it works in practice.

Let us take *B v Waitemata District Health Board*. Recall that this case concerned a blanket smoke-free policy adopted by the WDHB and its effect on patients committed to secure wards. The claim was that those suffering more acute forms of mental illness were more likely to be admitted to secure wards where they could not smoke, and so were disproportionately impacted by the policy. As noted, the Court of Appeal and Supreme Court both rejected the claims on the grounds that the reason for holding the patients

in the secure ward was the symptoms of the psychiatric illness and not the disability itself.¹¹³ I have discussed the problems with this approach above under part III G.

This is a useful example to test the robustness of the framework set out above because the stigma around smoking can easily lead a court to reason by instinct, as seems to have happened in this case. On top of the distinction it drew between behaviour and disability, the Court of Appeal also considered that the claimant's comparator was not appropriate because it included the characteristic of smoking, and so amounted to "claiming a right to smoke", which the claimant did not have.¹¹⁴ At first glance, this is a puzzling statement, because obviously, smoking is not a right protected by NZBoRA. The only thing the Court could have meant in this context is that a secure ward patient's desire to be allowed to smoke uniformly with other patients is not sufficiently important to override a smoke-free policy adopted by a DHB for important public health purposes. In this sense, a secure ward patient does not have a "right to smoke". But this is just begging the question — whether the DHB policy is important enough to justify disadvantaging those with acute mental illnesses in this way is the very question the court needs to resolve.

If we apply the framework in part V, the analysis becomes clearer. It might proceed as follows.

First, this is an indirect discrimination claim. The facial criterion for differential treatment is being in a secure ward, which in turn is based on risk levels caused by the symptoms of the relevant psychiatric illness. These are not themselves prohibited grounds. The real question is whether the symptoms of psychiatric illness and the resulting risks are proxies for disability, which *is* a prohibited ground.¹¹⁵ What should be required for a proxy finding will depend on whether the claim is made at the group or individual level; that is, whether the claimant seeks for the policy to be invalidated as unlawful generally, or only for its application to the individual claimant to be invalidated.¹¹⁶ Comparability here is irrelevant.

If it is a group-level claim, then that is a claim that the smoke-free policy generally has a discriminatory effect. To show this, there would need to be a correlation¹¹⁷ between those with acute psychiatric illness and those who are held in secure wards and cannot smoke, such that there is a disproportionate impact on those with acute psychiatric illness. This might be proven if there were figures showing that out of smokers with acute psychiatric illness,

113 *B v WDHB* (CA), above n 5, at [92]–[96]; and *B v WDHB* (SC), above n 5, at [98]–[101].

114 *B v WDHB* (CA), above n 5, at [97]–[98].

115 See above in part III A–B.

116 See above in part III C.

117 See above in part III D.

the proportion who are held in the secure ward is significantly greater than the proportion of smokers without psychiatric illness who are held in the secure ward. This would show that those with acute psychiatric illness are significantly more likely to be forced to suffer withdrawal compared to those without, which could amount to differential treatment on the basis of disability.

If it is an individual-level claim, then it would suffice for prima facie discrimination to show that the particular claimant's disability was the morally significant cause¹¹⁸ of the risk assessment that led them to be held in the secure ward where they cannot smoke, or that their symptoms were a key manifestation¹¹⁹ of the disability. For example, this would be the case if their disability meant that they could not help being impulsive or violent.

If the claimants can show that their risk assessment is a proxy for disability, then the next question is material disadvantage. To assess this, since the claim is for indirect discrimination, the claimant individual or group should be compared to a *mutatis mutandis* comparator, that is, those that share the same relevant characteristics except for their protected trait and the proxy.¹²⁰ This means the comparator should be those who also smoke, but who neither have an acute psychiatric illness (the protected trait) *nor* pose the same level of risk that leads them to be held in a secure ward (the proxy trait). We include smoking in the comparator not to assert a "right to smoke", but because it is a relevant characteristic of the claimant group that is neither a prohibited ground nor a proxy trait.

If, compared to those people, the claimants must suffer nicotine withdrawal whereas the comparator group does not because they are free to leave the premises to smoke, then we might think that is a material disadvantage. It is not relevant whether we believe smoking is a good or bad thing; the fact remains that the claimants do suffer nicotine withdrawal and that is an unpleasant experience.

Given the smoke-free policy is not an affirmative action programme, there would be prima facie discrimination if the elements above are satisfied.

Of course, none of this shows that the smoke-free policy, whether generally or applied to a specific person, is *unlawfully* discriminatory. There are very good reasons why a public health body would want to adopt a smoke-free policy on its premises, such as ensuring a healthy environment for all of its patients and staff, and promoting health in general. We might think that the importance of these objectives justifies materially disadvantaging some patients on the basis of their disability, satisfying the first step of the test

118 See above in part III F.

119 See above in part III G.

120 See above in part IV.

under s 5 NZBoRA. We must then look at rational connection, reasonably minimal impairment, and proportionality.

For example, one might reasonably ask why WDHB could not reduce the impact of its smoke-free policy on those patients held in secure wards by making available nicotine patches or similar products to alleviate the withdrawal symptoms. Indeed, in the actual case, WDHB did prescribe smokers with nicotine replacement products.¹²¹ It is possible that alternative, more effective ways of alleviating the effects of nicotine withdrawal were impractical or would have created too much risk. If that is the case, then one could reasonably say that, on balance, WDHB's policy is justified due to the importance of its objectives and because the limit on the right is proportionate and not greater than reasonably necessary to achieve those objectives.

If we reach this conclusion, then the outcome is the same: WDHB does not need to alter its policy either generally or in respect of any particular person. The difference under this framework is that we are not distracted by circular inquiries into what group is comparable or question-begging rhetoric on the right to smoke; instead, we can clearly satisfy ourselves on the basis of structured analysis that if we are disadvantaging a person or group on the basis of a prohibited ground, then we are doing so for good reason and via means that are proportionate and not more disadvantaging than reasonably necessary. Had WDHB not bothered to alleviate the effects of nicotine withdrawal in patients committed to secure wards, then the limit may well not have been justified. But the existing case law does not even get us to the point of asking that question, and that is a crucial failing in our discrimination jurisprudence.

121 *B v WDHB (CA)*, above n 5, at [1].

Human Rights

PAUL RISHWORTH*

I Introduction

This review considers developments to March 2025 in the field of human rights, emphasising Supreme Court cases. It covers:

- (1) climate change litigation invoking the rights to “life” and “culture”;
- (2) a recommendation by the Royal Commission into Abuse in Care to amend the New Zealand Bill of Rights Act 1990 (Bill of Rights) by adding a new right to “security of the person”;
- (3) two Supreme Court cases on ss 4, 5 and 6 of the Bill of Rights and what counts as “inconsistency”;
- (4) applying the Bill of Rights to administrative law decisions;
- (5) a recent Supreme Court of Canada case allowing the possibility of damages for *legislative* infringement of the Canadian Charter of Rights and Freedoms; and
- (6) concluding thoughts on a theme emerging from these developments.

II Climate Change and Human Rights

Around the world there is growing concern that governments are not dealing with the reality of climate change. Cases are being brought before national and international courts to force action. New Zealand is part of that trend. There are two broad litigation strategies. One focuses on judicial review, typically fought over whether executive government is properly implementing mitigation measures prescribed by Parliament through legislation (such as setting appropriate carbon emissions targets). Cases in this category are on the increase. A second strategy is to frame the perceived lack of government action, including legislative action, as human rights breaches. These are

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not judicial review cases challenging specific decisions, but ordinary civil proceedings. Cases with this framing have not yet been successful, at least not in New Zealand. It is this second category, and its relationship to the first, that I deal with below.

The first case to mention, however, is *Smith v Fonterra Co-operative Group Ltd*.¹ There the Supreme Court allowed a novel claim in tort to proceed to trial against seven New Zealand companies. Disagreeing with the Court of Appeal, it held that a claim of “public nuisance” based on the companies’ greenhouse gas emissions was not incapable of success and should not have been struck out. Insofar as this is a tort case, I do not discuss it here. I note only in passing that tort law itself is fundamentally about human rights (to be free from the “wrongs” that tort law protects). The high value ascribed to life, liberty, bodily security, reputation and enjoyment of property were expressed in the common law of torts, well before those interests were abstracted and set out in 20th-century bills of rights.² The rights-protecting feature of tort law is sometimes refashioned for a new age. The tort of unreasonable invasion of privacy is an example, responding to new invasive technologies.³ The idea, then, that tort law might reckon with the threat of climate change is not to be lightly dismissed, even if it raises issues about attribution of responsibility, the feasibility of remedies, and whether any such development sits within the stream of common law reasoning so as to be a matter for judges rather than legislators.

It is the second, more recent, case of *Smith v Attorney-General* that is of interest here.⁴ The same Mr Smith, an elder of Ngāpuhi and Ngāti Kahu, has sued the Crown for breach of several rights in the Bill of Rights. Specifically, that the Government’s inaction in controlling climate change threatened his and his whānau’s rights to life under s 8; denied their right to enjoy their minority culture under s 20; and breached a common law right said to arise from a combination of ss 8 and 20 along with s 15 (religion), s 27 (natural justice), various rights in international law, the Treaty of Waitangi, and a general notion of “public trust”. Importantly, the action was not one for judicial review, seeking to set aside a decision made under an enactment. Rather, the claims were free-standing: that the current state of affairs — namely insufficient executive and legislative response to climate change — represented a breach of his and his whānau’s rights for which relief ought to be available. The actual relief sought is not specified in the

1 *Smith v Fonterra Co-operative Group Ltd* [2024] 1 NZLR 134.

2 The United States Bill of Rights, contained in the Amendments to the United States Constitution adopted in 1791, was well ahead of its time. The global adoption of human rights came with the Universal Declaration of Human Rights in 1948: *Universal Declaration of Human Rights* GA Res 217A (1948).

3 See *Hosking v Runting* [2005] 1 NZLR 1 (CA).

4 *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1.

judgment save that it included a claim for “reporting orders” by which the Crown would have been obliged “to update the court of the steps it is taking to bring itself into a position of compliance with [the Bill of Rights]”.⁵ I consider the s 8 and s 20 claims in turn.

A Section 8 claim

On its face, the right not to be deprived of life in s 8 is relevant if a person is dead — or at least in peril of imminent death — at the hands of a state official, or of a third party whose actions or omissions the state has a specific duty to prevent. The *Smith* case essentially took the latter angle, with the “third party” being the threat of climate change.⁶ This was first and foremost a factual question: were the lives of Mr Smith and those he represented in such peril that the state should be required to avert that threat?

The Crown brought a strike-out application, and succeeded in the High Court. Mr Smith appealed. The Court of Appeal’s reasoning is appropriately generous in recognising that a claim may be made good by particularisation and evidence to be led at the ultimate trial. Nonetheless, and in agreement with the High Court, the Court of Appeal struck out all claims. Given the essentially factual nature of these claims, that outcome rested ultimately on a legal point: that the regulatory framework put in place by government to deal with climate change was a matter of legislative policy that courts were not empowered to second-guess.⁷ Rather, said the Court, it is the quality of decisions made *under* that regime that will determine the adequacy of New Zealand’s response. And as to those decisions, judicial review is available if it is contended they do not give proper effect to the legislation. In short, the Court pointed to what I have called the first litigation strategy — applying principles of judicial review to contested actions or omissions of designated authorities. That, said the Court, is where remedies may be found for climate inaction.

In getting to that point the Court considered several other arguments made by the Crown, though not resting its strike-out on these. The first argument was that a s 8 claim depended upon a person being dead, or the real likelihood of death, but did not embrace claims of a diminution in the “quality” of a life.⁸ As to that, the Court said it could not exclude the possibility that s 8 *would*

5 At [101].

6 Climate change being accepted to be a “man-made” phenomenon in that it arises by dint of human activities, there is no problem in fitting it within the general construct of “right to life” cases in Anglo-New Zealand law. The issue is the reality and proximity of a threat and whether there is a legal duty to prevent it.

7 *Smith*, above n 4, at [94]–[96].

8 At [47].

be engaged “[i]n the context of a potentially unliveable [sic] planet because of climate change” where the population could not be accommodated with “a minimum level of dignity”.⁹ Next, the Court was unwilling to accept the Crown’s argument that threats to life had to relate to a single identifiable individual or class, and not to the whole population. As to this, the Court said that whether Mr Smith was at risk of losing his life would be a matter of evidence at trial. That evidence might equally establish a risk to many or even all others, but that would not mean the plaintiff had no claim; only that others had claims as well.¹⁰ Finally, and perhaps most generously, the Court would not exclude the possibility that the risk of death might be “sufficiently timely and proximate”¹¹ so as to require positive action by the Crown right now. There was no basis for saying s 8 could not compel positive steps.¹² Whether that would be so was a matter for evidence at a trial.

That apocalyptic vision of our global future is always going to be present, in principle, in climate change cases, so one can understand the Court holding it not incapable of proof. Having regard to the Court’s later points, though, it seems the Court was really saying that, while there might come a time at which the plaintiff’s arguments could succeed, that time is not now. But that approach would have required conclusions on the facts, which it seems the Court was not wishing to make. The Court had its eye, instead, on a strike-out ground that did not require factual conclusions. This was that the Government was already required to act under the comprehensive regulatory framework put in place by Parliament. That regime should work its lawful course, with judicial review available if it were contended that it was not being lawfully administered. In short, the regulatory regime could not be said to be defective. It had the capacity to protect the right to life affirmed in s 8.

That is orthodoxy, even if some might say too much orthodoxy. It is for the executive to develop legislative policy, the legislative branch to enact it, and the executive to faithfully apply it. The plaintiff had, of course, recognised this: his s 8 claim was that, taken as a whole, Government had failed to “put in place an *effective* policy or regulatory framework to mitigate Crown emissions” that is “*sufficient*” to manage “national [ie non-Crown] emissions”.¹³ He pointed to some specific criticisms (for example, that the 2050 net zero target was not a reasonable target having regard to the “best available science”).¹⁴ But the Court did not consider these claims amounted

9 At [57].

10 At [61].

11 At [74].

12 At [88].

13 At [29] and [39(d)] (emphasis added).

14 At [95].

to “omissions engaging s 8”, pointing to the fact that the legislation allowed for targets to be reviewed.¹⁵ The Court concluded:¹⁶

Ultimately, decisions about the treatment of agriculture emissions in the [Climate Change Response Act 2002 (CCRA)] are for Parliament. Given the purpose of the CCRA it must be assumed that Parliament intends to contribute to the global effort to limit the global average temperature increase to 1.5[°]C and that its framework, including its treatment of agriculture emissions, has been developed to do so.

B Section 20 claim

Mr Smith also framed a claim around the right to culture in s 20 of the Bill of Rights, which reflects art 27 of the International Covenant on Civil and Political Rights (ICCPR). Section 20 reads:

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Here Mr Smith’s claim was expressed to be on behalf of “members and future generations of Ngāpuhi and Ngāti Kahu”.¹⁷ Mr Smith needed to establish that their rights to enjoy their minority culture were being “denied” by culpable omissions of the state. The s 20 claim repeated those made under s 8 (rights to culture being necessarily abrogated by death) but included some specific claims about failings in the regulatory framework as to Māori cultural rights. Essentially the plaintiff’s argument was that, as with s 8, there had been no, or no sufficient, executive or legislative action taken.

The idea of s 20 requiring positive actions (as opposed to merely refraining from acts of “denial”) had been rejected by the Court of Appeal in *Mendelssohn v Attorney-General*,¹⁸ absent exceptional facts. Here the plaintiff claimed the facts were exceptional. He pointed to *Billy v Australia*,¹⁹ where a successful claim was made to the Human Rights Committee under art 27 of the ICCPR (which, recall, our s 20 affirms). Ongoing climate impacts to the island occupied by Mr Billy’s clan had not been handled in a

15 At [95]–[96].

16 At [96].

17 At [39(b)].

18 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14] and [24].

19 Human Rights Committee *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 3624/2019 UN Doc CCPR/C/135/D/3624/2019* (18 September 2023) (*Billy and others v Australia*).

timely way by the Australian Government. But the Court of Appeal agreed with the Crown that the plaintiff could not point to a comparable scenario in New Zealand: Mr Smith's own ancestral land was not in peril in the way that the island in the *Billy* case was (needing protection from encroaching sea). And, to the extent that the plaintiff relied on the possibility of future degradation, this was answered by the same reasoning as the s 8 claim. There was a regulatory regime in place with judicial review available as to its operation.

If there is something odd about the *general* threat of global climate change being litigated with regard to specific people and specific plots of land, the message of this case (and others) is that plaintiffs invoking s 20 will need to be able to point to specific proximate impacts upon them and their land. Here, it seems, the reality was that it was the generalised threat of climate change to all in New Zealand — including the plaintiff — that was the driving force of the claim. And that was taken as answered by the existence of the regime put in place to manage the problem.

I agree with commentator Graham Taylor, writing in *The Capital Letter*,²⁰ that claims made to ensure the regime is faithfully implemented are likely to be more fruitful than the seeking of a global finding that not enough is being done to reckon with climate change. That approach has the advantage that courts are operating in familiar territory and able to make orders that invalidate unlawful decisions or mandate actions required by legislation. It is true that this depends on the legislated regime having the capacity, if lawfully implemented and managed, to keep climate change to a level that protects rights. An argument of that type did not seem to have been front and centre in this particular litigation.²¹ Perhaps its time will come; I return to this at the end of my review.

C *Canadian approach*

For an example of a rights-based judicial review appeal, a recent Ontario Court of Appeal decision in *Mathur v Ontario* is instructive.²² The plaintiff (a group of young Canadians) brought what was described as a challenge to the “constitutionality” of Ontario’s “greenhouse gas emission reduction target and plan”, based on rights to life and security of the person in s 7 of the Charter of Rights and Freedoms and the right to equality in s 15 (youth

20 Graham Taylor “Thoughts for future climate litigants from the CA judgment in *Smith v A-G*” *The Capital Letter* (27 January 2025).

21 At least as described in the Court of Appeal judgment of *Smith*, above n 4, at [27]–[35].

22 *Mathur v Ontario* [2024] ONCA 762, (2024) 173 OR (3d) 81.

being said to be especially at risk).²³ Though dismissed by the trial judge as an impermissible claim seeking “positive” actions by government, which were not indicated as necessary on the facts, the Court of Appeal saw it differently.²⁴ They pointed to the fact that the Ontario legislative assembly had enacted a requirement that the Government set an emissions reduction target, which the Ontario Government had done in its Environmental Plan and which the plaintiffs were contending was not “Charter compliant”.²⁵ This was, in the Court of Appeal’s view, a classic judicial review case: it was not a claim for any positive action other than compliance with the statute (which indeed allowed for revision of targets from time to time). The Court of Appeal was not prepared itself to rule on whether the current targets were in fact Charter-compliant, seeing that as a matter for the trial court to which the matter was therefore remitted. It recorded, however, that there was unchallenged expert evidence filed that the Target “falls short of the international scientific consensus of the reductions recommended to mitigate the most catastrophic effects of climate change”.²⁶ In that way the substance of the challenge was reached through a challenge to the lawfulness of administrative action; specifically, that the “[T]arget violates their ss. 7 and 15 Charter rights” of life, liberty, security of the person, and equality.²⁷ This, said the Court of Appeal, was a question the trial court could answer by way of a declaration “without the necessity of telling Ontario precisely what to do to make its [T]arget Charter compliant”.²⁸

The Canadian case exemplifies the (relative) simplicity of bringing a judicial review claim as opposed to a free-standing claim for illegality premised on the lack of a whole-of-government (executive and legislative) response. A judicial review claim finesses the question of whether the Bill of Rights requires positive actions, and especially whether the facts are such that it requires those actions *now*. The very premise of climate change legislation is acceptance of the harm that lies ahead if steps are not taken. A judicial review case is more narrowly contained; it is about whether that legislation is being lawfully implemented, in line with its purpose. Rights in the Bill of Rights will be highly salient in that judicial review — indeed the equivalent Charter rights were the entire basis of the claim in the *Mathur* case. Legislation that requires climate change responses to be made is, in fact, *affirmatory* of the rights to life and culture, and for that reason ought

23 At [1].

24 At [4]–[5].

25 At [5] and [37] (emphasis omitted). The legislation requiring targets to be set by Government was itself a step back from earlier legislation that had set targets by statute: see at [16]–[17].

26 At [2].

27 At [69] (emphasis omitted).

28 At [69] (emphasis omitted).

to be read and applied consistently with those rights. But the mandate in s 6 of the Bill of Rights — to construe legislation consistently with rights when it is possible to do so — applies to similar effect. So there is considerable scope for Bill of Rights arguments in judicial review cases.

III Should a Right to “Security of the Person” Be Added to the Bill of Rights?

As noted above, s 7 of the Canadian Charter of Rights and Freedoms protects rights to “life, liberty and security of the person” and there has been frequent recourse to it in climate change cases.²⁹ The eagle-eyed will know already that ss 8–11 of our Bill of Rights bears the sub-heading “*Life and security of the person*”, yet the word “security” does not actually feature in any of these sections. It seems instead to be a shorthand description of the rights in ss 9–11. These are about bodily integrity — rights against torture, cruel or disproportionate treatment or punishment, and against non-consensual medical and scientific experimentation and treatment. What seems to be missing, however, is any right against bodily harms not serious enough to fall within s 9 and which do not arise in medical treatment or experimentation.³⁰ These could be sexual abuse, psychological abuse or common assault, for example. The effect of this omission should not be exaggerated: assaults are both crimes and torts, so retribution and remedies are already available at law. But one effect of this gap in ss 8–11 is that a *Baigent* action (seeking compensation for breach of a right in the Bill of Rights) might not be available for “mere” assault.³¹ And, while exemplary damages in tort might cover the same ground, in a Bill of Rights context those claims may be removed by statutory immunities under the Crown Proceedings Act 1950.

In its 2024 Report, the Royal Commission of Inquiry into Abuse in State Care and in the Care of Faith-based Institutions recommended that consideration be given to amending the Bill of Rights by adding security of

29 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 7.

30 See the discussion in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) at 252.

31 A *Baigent* action is a claim for compensation for breach of the Bill of Rights, a cause of action held to exist in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA). Claims for common assault have had to be packaged, where possible, as a breach of the right in s 23(5) to be treated with dignity, but this right is limited to those in detention. See commentary in Mathew Downs (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [BC13.04(4A)].

the person.³² The Government has, in its initial response, agreed to consider this. My concern below is whether this is a good idea and, if so, how it might best be done. To explore this, it helps to know how the so-called “gap” in ss 8–11 came about. The Royal Commission did not address this.

A *Why s 8 of the Bill of Rights is as it is*

The drafting of the New Zealand Bill of Rights began in late 1984, leading to the White Paper published in April 1985.³³ The proposal was for a higher-law bill of rights empowering judicial invalidation of inconsistent statutes, as the United States Bill of Rights and the then-recent Canadian Charter of Rights and Freedoms each did. The Canadian Charter then seemed an especially relevant precedent: it had been introduced into Canada just two years earlier, taking its place within a new Constitution that, until that point, was broadly similar to New Zealand’s. Both constitutions were sourced in British statutes and the principle of parliamentary supremacy.

The drafters of our Bill of Rights were concerned, however, to limit the potential for judicial interpretations of rights that would allow substantive review of legislation. One of the principal drafters, the Rt Hon Sir Kenneth Keith KC, has since explained their guiding principle to be that the Bill of Rights should “be largely limited to process writ large and process writ small”.³⁴ By “process writ large” was meant the framework that ensures Parliaments are representative, elections free and fair, and the fundamental freedoms of expression, religion, association and assembly respected. That is, observing ss 12 to 18 of the Bill of Rights. For its part, “process writ small” denoted the procedural protections of natural justice in both criminal and civil contexts. But, beyond these fundamentals, the actual substance of legislation ought to remain a matter for Parliament and not the courts.

For those with knowledge of United States constitutional law (and this certainly describes Sir Kenneth and the drafting group he led), it was s 7 of the Canadian Charter that had the potential to be far-reaching if incorporated into New Zealand’s draft. Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

32 Royal Commission of Inquiry into Abuse in Care *Whanaketia: The Future — Hei ara māou kei pōkai kōtuku* (Part 9, June 2024) at 301, Recommendation 119(a).

33 Geoffrey Palmer “A Bill of Rights for New Zealand” [1984–1985] I AJHR A6.

34 KJ Keith “The New Zealand Bill of Rights Act 1990 — An Account of Its Preparation” (2013) 11 NZJPIL 1 at 9.

This section was seen as analogous to the Fifth and Fourteenth Amendments to the Constitution of the United States. Those Amendments guarantee, against federal and state governments respectively, that persons will not be deprived of “life, liberty, or property, without due process of law”.³⁵ While they might have suggested a concern for “process writ small”, a line of Supreme Court cases in the 20th century had established that liberty could be denied not only when a law was *applied* unfairly but also when the substance of the law *itself* was unfair. This approach came to be termed “substantive due process”. On that basis the concept of “liberty” was taken to include aspects of economic liberty such as freedom of contract. Numerous state and federal enactments making workplace reforms were, controversially, invalidated as invasions of liberty. In the 1940s the Supreme Court retreated to a narrower view — that only fundamental *personal* rights were included in the “substantive” liberty guaranteed by the Constitution.³⁶ By the 1960s this substantive liberty had been held to include reproductive freedom.³⁷ Famously, in 1973, the United States Supreme Court held in *Roe v Wade* that “liberty” in the Fourteenth Amendment also embraced a right to privacy that was broad enough to protect, from legislative intrusion, a woman’s decision to terminate her pregnancy.³⁸

The Canadian provincial premiers, in negotiating the drafting of the Charter text, did not wish Canada’s Charter of Rights to take that uncertain path. They sought to make their s 7 a “made in Canada” provision.³⁹ The words in s 7, “life, liberty and security of the person”, were drawn from a provision of the existing (statutory) Canadian Bill of Rights of 1960, which was itself based on art 3 of the Universal Declaration of Human Rights (1948). As well as rejecting the United States’ guarantee of property rights, the drafters replaced the general qualifying phrase “due process” (and its American “baggage” of substantive review) with the distinctly Canadian phrase “principles of fundamental justice”. That phrase had also been used in the Canadian Bill of Rights of 1960, where its context clearly denoted the procedural protections of natural justice available at common law. It was hoped that by using this phrase, redolent with “process writ small”, s 7

35 United States Constitution, amends V and XIV, § 1.

36 The seminal cases on personal and fundamental rights were and remain *Pierce v Society of Sisters* 268 US 510 (1925) (Oregon law requiring that children attend state schools unconstitutional) and *Meyer v Nebraska* 362 US 390 (1923) (a fundamental liberty interest in directing a child’s education precluded a state’s making it unlawful to teach foreign languages to students).

37 *Griswold v Connecticut* 381 US 471 (1965).

38 *Roe v Wade* 410 US 113 (1973).

39 This is how it is described in the dissenting judgment of Miller J in *Drover v Canada (Attorney-General)* [2025] ONCA 468. The Judge gives a succinct account of the legislative history, on which I have drawn in the text above.

would not be suggestive of “substantive due process”, enabling the substance of laws to be evaluated for consistency with notions of liberty untethered to matters arising in the administration of justice such as fair trial rights.

As it happened, the drafters of the New Zealand Bill of Rights of 1984 had the valuable input of Professor Peter Hogg, an expatriate New Zealander who was then (and until his death in 2020) Canada’s leading expert on its Constitution and Charter of Rights. Speaking of what became s 8 of our Bill of Rights, Sir Kenneth reports that the drafters:⁴⁰

... happily agreed with Peter Hogg’s advice not to include in our proposals the right not to be deprived of liberty, except in accordance with principles of fundamental justice, with its possibilities of substantive review, [as] included in s 7 of the Canadian Charter.

As the New Zealand drafters explained in the White Paper, there was (in 1984) “uncertainty [in Canada] whether the phrase ‘fundamental justice’ [in s 7] there refers merely to procedures or extends to substance — in other words whether it is simply a synonym for natural justice”.⁴¹ Was it, then, a guarantee of fundamentally just laws or of fundamentally just procedures? If the former, a supreme law Bill of Rights would empower judges in much the same way as the North American instruments.

All this explains why art 14 in New Zealand’s White Paper proposal (which, lightly amended, became s 8 of the Bill of Rights) takes the form it does. Influenced by Peter Hogg and his Canadian experience, our drafters chose to incorporate neither “liberty” *nor* “security”. The right to life alone was retained, but expressed as a right not to be “deprived of life”. At the same time, s 8 retains the overall structure of Canada’s s 7 including its “principles of fundamental justice” phrase. The forging of our s 8 is, then, an intriguing example of the cross-pollination of ideas and apprehensions, across time and across jurisdictions — the more so given that the American “due process” phrase itself came from an English statute of 1354.⁴²

Where does this leave us in New Zealand? First, our s 8 has a phraseology with little local salience, other than a sense of caution about what judges might do.⁴³ Were we starting from scratch in designing a Bill of Rights in 2025 it is doubtful we would be basing it on the Charter’s s 7, instead likely clinging more closely to the ICCPR. At the same time, in 2025 we now have

40 Keith, above n 34, at 9.

41 Palmer, above n 33, at 88.

42 Liberty of Subject 1354 (Eng) 28 Edw III c 3, being a reiteration of the liberties clause in Magna Carta 1215.

43 See, for a fuller account of s 7 and its drafting history, Claudia Geiringer and Paul Rishworth “Magna Carta’s Legacy? Ideas of Liberty and Due Process in the New Zealand Bill of Rights Act” [2017] NZ L Rev 597.

the record of what has actually occurred under the Charter's s 7. This may be a cautionary tale for those seeking to retain the focus of the Bill of Rights on process writ large and small. A substantive reading of s 7 of the Charter is now established in Canada, resulting in cases in which enactments have been invalidated for inconsistency with one or more of "life, liberty and security of the person". I will mention some.

In 1988 in *R v Morgentaler*,⁴⁴ Canada's abortion law was invalidated on the basis that the relevant Criminal Code provisions infringed women's rights to security of the person. As then in New Zealand, lawful abortions turned on gaining certification they met the statutory criteria. This involved a so-called "Therapeutic Abortion Committee", but the regime could operate to delay access and add expense to lawful abortions. In some regions of Canada there were few and sometimes no consultants who were willing to be involved in certifying abortions, meaning that pregnant women had to travel to major urban centres elsewhere. Lawful abortions would therefore be later in pregnancy and consequently less safe, thereby (in the view of the majority) threatening a pregnant woman's security of the person. This was held to require invalidation of the regime, including the provisions that criminalised abortions when performed without certification. No replacement regime for abortion has since been enacted, so the *Morgentaler* case effected "decriminalisation" in Canada rather like the reform enacted by the New Zealand Parliament did here in 2020.⁴⁵ (Two of the seven judges in *Morgentaler* dissented, on the basis that no "right to an abortion" could be discerned in the Charter text, and that administrative difficulties in relation to the legislated defence could not rise to the level of invalidating the offence.)

In 2013 in *Canada (Attorney General) v Bedford*,⁴⁶ the regulatory regime around prostitution was invalidated on the basis that it made sex-work (not itself illegal) unnecessarily dangerous to sex-workers, so impairing their security of the person. This was because the law criminalised the keeping of a "common bawdy house", living on the "avails of prostitution" and communicating in public "for the purposes of prostitution",⁴⁷ essentially denying sex-workers the ability to operate from safe premises, to employ security and to advertise their services. The remedy in the Supreme Court was a delayed declaration of inconsistency, allowing the Government 12 months to devise an alternative regulatory regime.

Other successful invocations of security of the person include: *Carter v Canada (Attorney General)* where the prohibition of assisted suicide was

44 *R v Morgentaler* [1988] 1 SCR 30.

45 See Abortion Legislation Act 2020.

46 *Canada (Attorney General) v Bedford* [2013] SCC 72, [2013] 3 SCR 1101.

47 These are all phrases from Canada's Criminal Code in force at the time.

invalidated based on all three of the terms in s 7;⁴⁸ *R v Smith*, invalidating the criminalisation of marijuana use in cases where it was medically indicated;⁴⁹ and *Chaoulli v Quebec (Attorney General)* where Quebec's ban on private medical insurance was invalidated.⁵⁰

Of course, the New Zealand Bill of Rights does not similarly empower invalidation of enactments; only declarations of their inconsistency. But, with that adjustment, cases of the type that have occurred in Canada would be possible in New Zealand.⁵¹ Views may differ over whether this is a bad thing, but one would need to adopt such a regime with eyes open.⁵² It would also raise the question whether the right to liberty should be added as well, especially given significant overlap between the two concepts.⁵³

B *Should the Bill of Rights reflect, instead, the ICCPR?*

While the Bill of Rights was considerably influenced by the Charter,⁵⁴ the fact is that much of its text reflects the ICCPR by which New Zealand is bound. It is art 9 of the ICCPR that deals with security of the person, and

48 *Carter v Canda (Attorney General)* [2015] SCC 5, [2015] 1 SCR 331.

49 *R v Smith* [2015] SCC 34, [2015] 2 SCR 602.

50 *Chaoulli v Quebec (Attorney General)* [2005] SCC 35, [2005] 1 SCR 791.

51 *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 is an instance of this, relying on "life" in s 8 of the New Zealand Bill of Rights, a claim reflecting the one made in *Carter*, above n 48.

52 See, for a further example, *Cycle Toronto v Attorney General (Ontario)* [2025] ONSC 4397 where the Ontario Superior Court invalidated legislative provisions that authorised removal of bicycle lanes on the basis that doing so breached s 7 of the Charter.

53 The United States Amendments do not include security of the person but one's interest in bodily integrity is accepted to be included within the guarantee of liberty. See, for example, *Ingraham v Wright* 430 US 651 (1977).

54 The principal Charter influence is that our s 5 is based on s 1. Section 1 of the Charter was an innovation in 1982: the idea that all the rights were amenable to "reasonable limits prescribed by law" so long as they "can be demonstrably justified in a free and democratic society". The International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR] and the European Convention on Human Rights [ECHR] had led the way in recognising that rights had limits, and that this ought to be acknowledged in the instruments by which they were established. But those instruments built the idea of reasonable limits only into the freedoms of expression, religion, association and assembly, and (in the case of the ECHR) the right (really a liberty) to private life. The Canadian Charter opted for economy of expression by having one universal concept of limits, potentially applicable even to very specific criminal procedure rights and not simply to the fundamental freedoms.

this suggests a very different framing from the North American precedents. Article 9(1) provides:⁵⁵

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The balance of art 9 then sets out criminal procedure rights that we have incorporated in ss 23–25 of our Bill of Rights, all within the sub-part headed “Search, arrest and detention”. In other words, “process writ small”. So, too, the Human Rights Committee in its General Comment on Article 9 does not appear to envisage it having a substantive element that extends the concept of security of the person beyond the field of judicial and administrative process.⁵⁶ An amendment to the Bill of Rights that placed a “security” right within s 22, corresponding to art 9 of the ICCPR, might ensure that this sub-part is read in the intended “process” sense.

A peculiarity would then arise, however: some aspects of “security of the person” would be covered by ss 9–11 (“Life and security of the person”) while the word “security” itself would be in s 22 (“Search, arrest, and detention”). But it is really only the headings that would confuse. In other respects, that approach (adding “security of the person” into s 22) would more accurately reflect the text and structure of the ICCPR than the Bill of Rights is designed to affirm.⁵⁷ Perhaps, then, *all* the headings in pt 2 of the Bill of Rights might simply be deleted, with s 22 and its marginal note being amended to include security of the person.

The related, but unarticulated, issue is whether and where a right to “liberty” should be added to the Bill of Rights. There is a case for this insofar as the word is used in art 9, where it seems to serve simply as a positive affirmation of the right against arbitrary detention, akin to freedom of movement or physical liberty. But the truth is that, as United States jurisprudence attests, “liberty” can mean much more than that, embracing all the fundamental freedoms (speech, religion etc)⁵⁸ as well as extending to a right to other aspects of human dignity such as making one’s own choices

55 ICCPR, above n 54, art 9(1).

56 See Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014).

57 See the Long Title to the Bill of Rights.

58 Indeed, this explains how the Bill of Rights is said to apply to the States, even though it was written to control the Federal Government. The Fourteenth Amendment guarantees that *States* will respect “liberty” and “due process”; this has been held by the United States Supreme Court to “incorporate” other provisions of the Bill of Rights so that they too may be invoked against a State.

about how to live and who to marry. Article 8 of the European Convention on Human Rights embraces this type of right in its affirmation of a right to “respect for... private and family life, ... home and ... correspondence”.⁵⁹ One might say that any such amendment would be inconsistent with the aspirations and design of the Bill of Rights enacted in 1990, and if it is to be considered at all should await a more comprehensive reform. The proposal to add “security of the person”, at least as that appears to be conceived by the Royal Commission, is more modest.

IV The Interpretive Mandate in Section 6 and What Counts as Inconsistency in Terms of Section 4

A *A case of rights-consistency*

My last review in 2021 discussed two controversial interpretation cases in the Supreme Court where, in each, the apparent broad scope of an enactment was read down by making an implicit exception to preserve rights-consistency.⁶⁰ The period since then has not seen cases of that type. The following case from 2024 is much more routine and, for that reason, just as important.

Seleni v Chief Executive of the Department of Corrections concerned an offender’s eligibility for an extended supervision order (ESO) under the Parole Act 2002.⁶¹ ESOs may be made when the court is satisfied an “offender has, or has had, a pervasive pattern of serious sexual or violent offending”.⁶² The question was whether, in making that assessment, the Judge below was right to have had regard to the offender’s “*unproven* conduct” — that is, to conduct that had not resulted in a conviction but was nonetheless relevant to making an ESO because it suggested a pattern of offending.⁶³

The Supreme Court began by observing that it may well be “more rights-consistent” “to interpret ‘offending’ as meaning [simply] ‘convictions’”.⁶⁴

59 Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

60 See Paul Rishworth “Human Rights” [2021] NZ L Rev 613; and see *Director of Public Prosecutions (Vic) v Smith* [2024] HCA 32, (2024) 98 ALJR 1163 at [131]–[143] for a very helpful taxonomy of what is meant by “reading down”. While this is a dissenting judgment, that does not seem to bear on the points made.

61 *Seleni v Chief Executive of the Department of Corrections* [2024] NZSC 152, [2024] 1 NZLR 690.

62 Parole Act 2002, s 107I(2).

63 *Seleni*, above n 61, at [2]–[3] (emphasis added).

64 At [32]. The Court does not appear to make the point that the word “offending” is, as a matter of ordinary construction, quite apt to denote the commission of offences that are not made the subject of proceedings and hence do not lead to convictions.

But, it went on, doing so would be inconsistent with the statutory scheme and purpose underpinning ESOs. First, use of the phrase “serious sexual or violent offending” did not of itself denote there need be convictions before a candidate’s conduct was relevant.⁶⁵ Parliament could have specified that only convictions be considered, but it did not. Other indicators were the breadth of material that the Act enabled to be covered in the assessors’ reports that inform the court’s decisions when making ESOs. This went beyond a simple list of previous convictions. It would be odd, in that context, if such further material could not be considered by the court. And finally, before any ESO could be made, a hearing was required at which evidence could be challenged and tested. This, too, was consistent with the view that the information on which ESOs may be based goes beyond offences resulting in convictions.⁶⁶

The question then became whether any reasons militated against that construction, and in favour of the proposition that “offending” ought to mean just “convictions”. Here the Court proceeded to apply s 26(2) — the right against a second penalty — describing it as the “necessary Bill of Rights lens” for deciding the case.⁶⁷ In argument there had been reference also to ss 22 and 25(c) (rights against arbitrary detention and the presumption of innocence), each of which is in play where ESOs are based on conduct as well as convictions. The Court did not explain exactly why s 26(2) was taken as a proxy for all relevant Bill of Rights considerations, but presumably it was that if s 26(2) were not triggered by considering unproven conduct then nor would doing so fall foul of ss 22 or 25(c).⁶⁸ Indeed, one category of unproven conduct is where a person has been tried and acquitted: in such instances s 26(2) is clearly in play because one who has been acquitted ought not to be tried again, nor punished. But the Court went on to hold that s 26(2) would not *necessarily* be triggered by considering unproven conduct in such cases. Still, it said, “great care” would be required “before stepping behind a jury acquittal” in an ESO context.⁶⁹ Something new and compelling would be required to make the underlying conduct a permissible consideration.

A person still offends against the law in such cases. But this point is implicit in its approach.

65 At [48].

66 At [40] and [56]–[59].

67 At [31].

68 The Court took a similar approach in *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768, saying (when considering the rights-consistency of the ESO and PPO (public protection order) regimes) that s 22 did not add anything to the analysis under s 26(2), given the argument for arbitrariness hinged on the claim that the regimes breached s 26(2).

69 *Seleni*, above n 61, at [56].

The Court’s overall conclusion was that the application of “necessary safeguards” by judges when making ESOs will ensure there is no rights-inconsistent outcome where unproven conduct is being considered.⁷⁰ Those safeguards, in addition to the respect required for jury acquittals, were: the need for “cogent evidence” that the unproven conduct had occurred; an assessment of the evidence that bears “in mind the seriousness of what is at stake for the offender if an [ESO] is imposed”; and the need for a “reasoned explanation” as to why the court is satisfied the offending took place.⁷¹ Applied in such a way, said the Court, the Act is consistent with the Bill of Rights in allowing regard to be had to unproven conduct.⁷²

Seleni is therefore an example of a case holding there to be no mandate in s 6 to accord meanings to legislation that *maximise* the scope for a right to operate to a person’s advantage, when the meaning accorded by applying the legislative text in light of purpose and context itself meets the standard set by the Bill of Rights and leads to no inconsistency.⁷³ The ESO legislation necessarily assumed a rights-consistent approach would be taken to assessing unproven conduct. (One might add that a *non*-rights-consistent approach — such as “there’s no need for the evidence of relevant conduct to be cogent” — was neither supported nor compelled by the text, and no one argued for it.) The Bill of Rights here supplied the implicit side-constraints governing how statutory power is exercised. Though not mentioned in the Parole Act, they could be taken as read.

B *What counts as inconsistency?* Attorney-General v Chisnall

The long-awaited judgment in *Attorney-General v Chisnall* was delivered in December 2024, more than two years after its first hearing in October 2022.⁷⁴ The Court has made declarations of inconsistency (with s 26(2)) as to the “detention-authorising aspects” of the ESO regime in the Parole Act and “the entirety of the [public protection order (PPO)] regime” in the Public Safety (Public Protection Orders) Act 2014 (PPO Act).⁷⁵

Briefly, an ESO may be made against an “eligible offender” on application by the Chief Executive of the Department of Corrections to the “sentencing

70 At [33].

71 At [33] and [60].

72 At [60].

73 In applying this approach to the facts of the case, the Court excluded from its consideration the conduct for which there had been a jury acquittal. But another instance of unproven conduct was held to meet the “cogency threshold”: see at [70]. The appeal was therefore dismissed, the ESO being properly made.

74 *Chisnall*, above n 68. A second hearing had taken place in April 2023.

75 At [265].

court”.⁷⁶ The criterion is that there is a “high risk” the offender will commit a relevant offence in the future and that the offender exhibits relevant traits and characteristics (“intense drive” to commit sexual or violent offences, “limited self-regulatory capacity”, absence of “remorse” or understanding, and so on).⁷⁷ The duration of an ESO is for the period assessed to be needed, up to 10 years.⁷⁸ An ESO involves a set of standard conditions (including reporting, susceptibility to directions over accommodation, employment and travel, no-association orders, and a rehabilitative needs-assessment if required).⁷⁹ There may also be special conditions that amount to detention (24-hour home detention for the first 12 months, and a lesser period thereafter) as well as intensive monitoring (which the Court considered may also effect detention in fact).⁸⁰ There is no explicit right to rehabilitative services but there is the needs-assessment mentioned above, and there may be specific conditions to participate in rehabilitative programmes.

For its part, the PPO regime came about because of a concern that the ESO regime was not sufficient to manage a small class of very high-risk offenders. A PPO authorises detention and places the offender under the control of the Chief Executive. If made, it continues until cancelled pursuant to the review provisions and hence can last for life. The PPO Act says a PPO is not for punishment but to protect the public.⁸¹ A residence may be within a prison precinct, but that residence is declared not to be a prison in terms of the Corrections Act 2004. While the offender has all the rights of a free person save to the extent set out in the Act, that qualification includes the possibility of considerable limits on the ability to have visitors and to communicate. An order must be reviewed every five years. Mr Chisnall had been subject to various orders since serving a prison sentence ending in 2016: a PPO which was quashed, renewed and quashed again, and then an ESO which was in force at the time of this case and which he did not contest (though he did contest the two *regimes*, which the Court accepted he could do).

A second point to make before exploring the case itself is this. Each Act — the Parole Act and the PPO Act — applies retrospectively in the sense that, as from the time they came into force, they have allowed courts considering ESOs and PPOs to consider a person’s conduct that occurred *prior* to their coming into force. In that way ESOs and PPOs can impose a “penalty” for conduct that was not available at the time it occurred. But it is important to recognise that even when the regimes operate

76 Parole Act, Section 107F.

77 Sections 107I and 107IAA.

78 Section 107I(4).

79 Section 107JA.

80 Section 107K.

81 Section 107I.

prospectively, to post-enactment conduct, they still operate as a second punishment for an offence and so implicate s 26(2) of the Bill of Rights.

In the High Court, Whata J had held the ESO regime to be inconsistent with s 26(2) as to its retrospective application, but a justified reasonable limit (on the s 26(2) right) as to its prospective operation.⁸² As to PPOs, Whata J held they were not penal in nature (a view taken also by the Attorney-General in his s 7 advice), so that s 26(2) was not implicated. The Court of Appeal considered the entire ESO regime to be inconsistent and that it had not been justified on the evidence.⁸³ And as to PPOs, it held they too were second penalties meaning that the entire PPO Act was similarly inconsistent.

The Supreme Court's overall conclusion was that, agreeing with the Court of Appeal, both regimes imposed penalties. However, as to ESOs, it introduced a distinction that had not been made in the courts below. The Supreme Court identified a "detention-authorising" component of the regime and a "non-detention" part (essentially the standard conditions).⁸⁴ The latter were consistent with s 26(2), being a justified limit on the right in terms of s 5 of the Bill of Rights. That left the ESO regime substantially unaffected. But as to the PPO regime (which to recap, was effective detention) and as to the detention-authorising component of ESOs, each was held inconsistent with s 26(2).⁸⁵

The fulcrum of the Supreme Court's decision was, therefore, that detaining persons for public safety purposes, based on their previous offending, is a serious intrusion on liberty. This conclusion followed from the premise that retrospective penalisation involving detention engages fundamental "rule of law and fairness imperatives".⁸⁶ This, the Court pointed out, had been exemplified in the New Zealand cases of *R v Poumako*⁸⁷ and *R v Pora*⁸⁸ where an increased penalty for "home invasion" homicides had been introduced with retrospective effect.⁸⁹ The Court of Appeal in those cases had emphasised that there could be no reasonable limit to such a fundamental

82 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110.

83 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.

84 *Chisnall*, above n 68, at [255].

85 The Court further differentiated between prospective and retrospective application of the detention-authorising regimes. Retrospective application, it said, was not capable of justification; prospective application was held not to have been justified by any evidence made available at trial, but the Court did not rule out the possibility of there being justification.

86 *Chisnall*, above n 68, at [146].

87 *R v Poumako* [2000] 2 NZLR 695 (CA).

88 *R v Pora* [2001] 2 NZLR 37 (CA).

89 *Chisnall*, above n 68, at [147]–[148].

rule.⁹⁰ And, while the Court recognised that the Court of Appeal was there focusing on retrospective *criminal* liability rather than with detention as such, it considered that cases involving detention based on retrospective laws must be regarded as more serious than cases involving restrictions short of detention (even imposed retrospectively).⁹¹ These conclusions then drove the result of the case.⁹²

Against that background, *Chisnall* can now usefully be compared to the *Seleni* case just discussed, which was also about ESOs. Recall that in *Seleni*, the various side-constraints on decision-making affirmed by the Bill of Rights — do not punish twice (s 26(2)), do not detain arbitrarily (s 22), respect the presumption of innocence (s 25(c)) — assisted the Court in its overall conclusion that the ESO regime could be applied in a rights-consistent way even while allowing consideration of unproven conduct. In *Chisnall* the Crown’s argument in the Court of Appeal and Supreme Court had been essentially the same: that the PPO and ESO regimes did not *compel* inconsistent outcomes and could be applied consistently. For example, the detention-authorising components of ESOs might be regarded as available only in very serious cases where future dangerousness could be demonstrated to a high level of certainty. On this argument, the achievement of rights-consistency lay in judicial *application* of the regimes.

One might say this is not so different from what the Court said it was doing in *Seleni*. The one thing that marks *Chisnall* out is the finding that retrospective application of the PPO regime (which necessarily involves detention) is not capable of justification at all. It could therefore be said that, where the facts supporting the making of a PPO pre-dated the Act’s commencement, a court would be compelled to impose a rights-inconsistent outcome. To exercise a “discretion” against making the order would essentially be non-application of the statute, something that s 4 of the Bill of Rights prevents (and which invites a declaration of a statute’s inconsistency).

But what of ESOs and their detention-authorising aspects, going beyond the standard conditions? Might the *Seleni* approach have been apt there? Here the Crown’s submission was that a court had a discretionary power to make orders, and any rights-breaching orders would be unlawful such that the regime as a whole could never lead to an inconsistent outcome. Any ESO made would be a reasonable limit, with unreasonable applications able to be remedied through ordinary appeals. But the Court did not accept the premise of this argument: it said there was no true discretionary power involved; rather the ESO regime required courts to evaluate the proffered evidence against the statutory criteria. An ESO would be compelled if the criteria

90 At [148].

91 At [148].

92 At [146]–[149].

were met. That differed from a broad discretion from which inconsistent applications could be interpretively excised for Bill of Rights reasons.⁹³

I am not sure that making a distinction between “evaluating” and “exercising a discretion” really met the Crown’s argument. It can still be said that judicial evaluation of criteria requires a court to apply a Bill of Rights “lens” — to use the term from *Seleni* — where the case involved the evaluating of conduct that could justify an ESO. In that way, at least as to prospective applications of detention-authorising ESOs, the justification that the Court found lacking in the Crown’s evidence might instead be found in the detail of individual cases (where judges demand cogent demonstration of serious risk making detention justifiable).

That said, *Chisnall* makes it clear that the *Seleni* approach (applying an Act consistently with Bill of Rights imperatives) may take a court only so far. As to retrospective PPOs, the real complaint was that the Act authorised them and so was facially inconsistent. As to prospective PPOs and retrospective “detention-imposing” ESOs, comparable legislation in Germany suggested less restrictive approaches were available but the Crown had not advanced evidence in support of their justification.⁹⁴ Overall, then, the Crown appeal succeeded as to non-detention-imposing ESOs.

The two regimes remain in force despite the declarations of inconsistency, but the procedures in s 7A of the Bill of Rights will now need to take place. Meanwhile, the Law Commission has reviewed this area of the law, and its report is now available.⁹⁵

The *Chisnall* decision was not unanimous. Glazebrook J dissented, indicating she would not have made a declaration of inconsistency. She pointed to the very high threshold for making PPOs — “a very high risk of imminent serious sexual or violent offending” which suggested a “clash of rights” between a person subjected to an order and those whom such orders are designed to protect, “albeit as yet unidentified”.⁹⁶ She also said that “the appeals were not argued on the basis of a clash of rights and it is therefore inappropriate to say more”.⁹⁷

The high threshold is, I agree, in favour of the regime’s rights-consistency. But I find the “not argued on the basis of a clash of rights” point hard to

93 See discussion from [89] to 105], and especially [95].

94 See [231]–[232]. The Court had traversed “Alternative German models” of regimes for serious recidivist offenders from [216] to [220], and commented in [234] that these demonstrated how the regime should “impose the least intrusive restrictions consistent with the public protection objectives”, “minimise the extent to which the conditions are experienced ... as punishment” and the “focus ... should be rehabilitation”.

95 See Law Commission *Here ora: Preventive measures in a reformed law* (NZLC R149, March 2025).

96 *Chisnall*, above n 68, at [272].

97 At [272].

understand. The idea of a clash of rights is, it seems to me, simply another way of describing rights-limiting legislation, which is often — perhaps mostly — designed to promote the interests of groups other than those whose rights are being limited. So, for example, the limits on expression found in the “racial disharmony” provisions in the Human Rights Act 1993 are intended to protect the interests of other persons from being disparaged on account of their race and ethnicity.⁹⁸ So here: the purpose of the ESO and PPO legislation is to protect unknown future victims from violent attacks by others. *That* was the objective to be weighed in the balance against the rights of persons whose susceptibility to orders was in issue. It seems to me the appeals were argued on that basis. It was not a case of balancing rights against rights, but rights against interests.

Glazebrook J’s second reason was that the PPO regime was capable of being therapeutic and rehabilitative but that there had been limited evidence of its operation in practice. That is indeed salient to whether the regime was inescapably rights-breaching on its face. It is possible that Glazebrook J considered there should have been opportunity allowed to adduce that evidence, or that even without evidence the existence of a therapeutic rationale was discernible from the legislation. For the majority though, it was for the Crown to adduce such evidence, and its absence counted against justification.

And, finally, her Honour noted that the Law Commission had recently issued a paper outlining its preferred approach to reform. Glazebrook J thought it would be better to wait until the final report of the Commission (now available, see above), and the Government’s response to that report, before considering whether it is appropriate to make a declaration. I have some sympathy for that view. But could the case really have been adjourned to await those developments, as opposed to being dismissed because those developments were awaited? The former seems to suggest the Court has a watching brief on the law reform process that can be maintained by the timing of a decision, and this seems a new type of consideration in adjudication.

V The Bill of Rights and Administrative Law

Since my last review there have been three important Supreme Court decisions dealing with administrative law in the rights context.

In *Moncrief-Spittle v Regional Facilities Auckland Ltd* the Court affirmed that “the correct approach is to treat the right [under the Bill of Rights] as constrain[ing] the outcome the decision-maker may reach, rather

⁹⁸ See the discussion in *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [31]–[37].

than simply a mandatory relevant consideration”.⁹⁹ The significance of this is that outcomes may be challenged for rights-inconsistency, with inconsistency being a matter of law for a court to decide. In practice, however, rights-consistency can often involve specialised or technical inquiries that are within the competence of the assigned decision-maker, or upon which a decision-maker takes expert advice in the process of making its own decision.

This generates an important question in administrative law that is often labelled “deference” or “margin of appreciation”. The question is this: to what extent should a court on review substitute its own judgment for that of the decision-maker to whom the legislature has assigned such decisions? If rights-consistency is a matter of law, it suggests the court must remake the decision. That said, regard must necessarily be had to the justification offered by the decision-maker. This is not, literally, “deference” to the decision-maker. Rather, as the House of Lords put it in *Huang v Secretary of State for the Home Department*, it is:¹⁰⁰

... performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.

That passage was approvingly cited by the majority in *Chisnall v Attorney-General*,¹⁰¹ albeit in the slightly different context of courts assessing Parliament’s legislation for reasonableness and not, as is more common, assessing executive or administrative decisions. This is a helpful reaffirmation of the position that rights-consistency is a question of law, and what that means in practice.

The recent case of *Chief of Defence Force v Four Members of the Armed Forces*¹⁰² returns to this point. At issue were orders mandating vaccination of members of the Armed Forces during the Covid-19 pandemic. Disagreeing with the Court of Appeal, the Supreme Court held that these orders did not amount to a breach of s 11 of the Bill of Rights (right against non-consensual medical treatment). Its reasons were essentially that the decision to impose the orders was within a range of reasonable options and that the Court of Appeal had erred in not allowing a “margin of appreciation” to the Defence

99 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [82].

100 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [16].

101 *Chisnall*, above n 68, at [249].

102 *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21.

Forces.¹⁰³ By that was meant the necessary respect for the Chief of Defence Force’s own assessment of the need for, and impact of, the orders. The following paragraphs explain the point at a high level, our Supreme Court broadly following the position in Canada on the same point:¹⁰⁴

[101] The Court’s approach in *Moncrief-Spittle* reflected that of the Supreme Court of Canada in *Doré* That Court also considered a reasonableness standard was appropriate because a decision-maker making decisions under their home statute “has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing [Canadian Charter of Rights and Freedoms] values” in any particular case. . . . For these reasons, a decision would survive a reasonableness review if it fell “within a range of possible, acceptable outcomes”. It was appropriate to give decision-makers a margin of appreciation, or deference, in balancing Charter values against broader objectives.

[102] Mr Butler, for the Human Rights Commission, invited us to eschew the terms “deference” and “margin of appreciation”, using instead “latitude” (or “leeway”) and “weight” (or “regard”) respectively for room afforded to decision-makers to choose among options and the amount of regard shown for their evaluations. Courts sometimes speak of leeway and weight, but we do not find it appropriate to insist that they do so. This Court has used the term “deference” in the past and sometimes speaks, as we do in this judgment, of a margin of appreciation. These terms do not signify that the Court is abandoning its duty to make its own assessment. They signify rather that the Court may accept a decision which it is reviewing for reasonableness, so long as the decision-maker has satisfied it that the decision lies within a range of reasonable alternatives.

The third case is *A (SC 70/2022) v Minister of Internal Affairs*.¹⁰⁵ The appellant’s passport had been cancelled by the Minister due to concerns she was intending to travel to facilitate a terrorist act. The Supreme Court overturned that cancellation on the basis (explained in “closed reasons” not publicly available) that the Minister did not have reasonable grounds for his belief.¹⁰⁶ That made it unnecessary to consider other reasons advanced for illegality, but the Court gave brief views on these as well. One of these was that the Minister’s decision had “failed to address whether the cancellation decision was a reasonable limit on the rights of the appellant under the

103 At [129]–[132].

104 At [101]–[102] (citations omitted).

105 *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372.

106 At [116].

... Bill of Rights” — a criticism that invoked the “mandatory relevant consideration” ground.¹⁰⁷ The Crown responded that, while the Bill of Rights was not mentioned as such, the Minister in his affidavit had stated that he was “acutely aware” that his decision would restrict the appellant’s freedom of movement.¹⁰⁸ In the lower courts this omission to consider explicitly the Bill of Rights was not seen as fatal, given that the cancellation was (as they saw it) consistent with the appellant’s rights.

The Supreme Court disagreed. Though repeating its conclusion in *Moncrief-Spittle* that substantive compliance with the Bill of Rights is a legal issue for a court to resolve, the Court said this “does not mean the decision-maker ... does not need to engage with the Bill of Rights”.¹⁰⁹ “[T]hey must turn their mind to and engage with the question of whether it was reasonable to limit the affected rights by their decision”.¹¹⁰ The Court considered that not to have happened.

This needs to be unpacked. The Crown had argued, consistently with *Moncrief-Spittle*, that the critical question was the rights-consistency of the decision, not the mode by which it was reached. It pointed to the well-known dictum of Lord Hoffmann to the effect that (speaking of the United Kingdom) if a decision did not infringe the European Convention on Human Rights, then it would not matter if the decision-maker had never heard of the Convention, and if the decision did infringe then “no display of human rights learning” could save it from being unlawful.¹¹¹ The Court noted this, accepting that an intention to facilitate a terrorist act would make it obvious that cancelling a passport was reasonable. But, it went on, “that does not mean the decision-maker (in this case, a Cabinet Minister) does not need to engage with the Bill of Rights”.¹¹² It seems, then, that the Bill of Rights is both a substantive limit and an implied mandatory relevant consideration. Lord Hoffmann’s dictum, though quoted, was not applied.

In principle, this may be a good approach for public administration. One might still wonder what counts as “consideration”. In both *Seleni* and *Chisnall*, as we saw, the Supreme Court was prepared to look at the Bill of Rights issues through the “lens” of s 26(2) of the Bill of Rights, even though other rights were involved. Here the Minister had articulated in his decision the pivotal importance of the applicant’s freedom of movement. It does not seem unreasonable to suggest that this “lens” necessarily embraced also A’s rights of expression, religion, and association. That is, the restriction on freedom

107 See at [130]–[141].

108 At [139].

109 At [138].

110 At [138].

111 *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [13].

112 *A (SC 70/2022)*, above n 105, at [138].

of movement (in cancelling a passport, designed to facilitate movement) could only be reasonable if imposing it was not an unreasonable limit on the exercise of rights that led to its being imposed, namely expression, religion, and association.

Where this seems to leave us is that the Bill of Rights (and each salient right) must, when relevant, be identified as such and then applied to a decision, with the correctness of that application being amenable to review by a court for correctness. On that review the court will give appropriate weight to the views of the decision-maker and the views of those with special knowledge to whom the decision-maker had recourse. In *A (SC 70/2022)* the decision had already been held invalid for non-Bill of Rights reasons.¹¹³ The real test would be a case where there is no argument for unlawfulness save the Bill of Rights, the actual decision is agreed to be rights-consistent, and the only complaint is that the Bill of Rights was not identified as relevant. The practical answer may simply be that judicial review will not be brought in such cases, being seen as unproductive if the same decision could then be made in correct form.

VI Damages for Rights Violations by Parliament?

In *Canada (Attorney General) v Power*, the Supreme Court of Canada affirmed, by majority, that Charter damages may be awarded against the Crown, in certain defined circumstances, for infringements of Charter rights perpetrated by federal or provincial *legislation*.¹¹⁴ A majority (of five judges) held those circumstances to be where the legislation was “clearly unconstitutional”, was enacted in “bad faith” or was “an abuse of power”.¹¹⁵ A further two judges agreed that damages are in principle available in the first of those categories, though regarded the “bad faith” and “abuse of power” categories as too vague and unable to be applied without infringing parliamentary privilege (a constitutional value against which an individual’s constitutional rights had to be balanced). The remaining two judges considered that parliamentary privilege simply precluded any remedy for legislative breaches at all.

The facts were that Mr Power had been convicted of an offence in 1996 and served a term of imprisonment. He subsequently qualified as a medical technician and worked in a hospital for several years. In 2011 an anonymous tip-off about his convictions led to him losing his job. Unable to get another,

113 At [141].

114 *Canada (Attorney General) v Power* [2024] SCC 26.

115 At [4].

he sought in 2013 to apply for a “suspension” of his criminal record¹¹⁶ — something that at the time of his conviction was available under federal law, if five years had passed since release. But it turned out that legislation in 2012 had removed the possibility of having a criminal record suspended for the offence Mr Power had committed. The absence of transitional provisions in that legislation was subsequently declared unconstitutional by a court on the grounds that it both increased the penalty and amounted to a second punishment for offenders like Mr Power, whose offences pre-dated the legislation. This prompted Mr Power to bring a case for damages for the Charter breach wrought by that 2012 legislation.

An older Canadian Supreme Court decision, *Mackin v New Brunswick (Minister of Finance)*,¹¹⁷ had, albeit in passing, affirmed the possibility of damages for legislative breaches of the Charter, posing the three criteria (clearly unconstitutional, bad faith and abuse of power). Those features were held to be absent in that case, and the Court did not articulate or explore the point that became central to the argument in *Power* — whether parliamentary privilege precluded a remedy for legislative action. The majority’s answer, as set out above, was no. The remedy is therefore available in principle. A case of clear unconstitutionality is where “the unconstitutionality was readily or obviously demonstrable at the time of enactment and could not be subject to any serious debate”.¹¹⁸

The *Power* case prompts the question whether damages might be awarded against the Crown in New Zealand for legislative breaches of the Bill of Rights.¹¹⁹ There has been at least one claim of that general type: *Mangawhai Ratepayers’ and Residents’ Association Inc v Kaipara District Council*.¹²⁰ The plaintiff challenged the defendant’s special rates demands in judicial review proceedings. Prior to the High Court hearing, Parliament enacted validating legislation at the defendant’s request, it being accepted that the rates were indeed unlawfully levied. The hearing proceeded, with unavailing arguments by the plaintiff as to the scope of the validation, and the plaintiff’s claim was dismissed. Those arguments were repeated in the Court of Appeal, and in the alternative the appellant sought a declaration of inconsistency (that the validating legislation infringed s 27(2) of the Bill of Rights, the right to bring judicial review) and damages of \$1,000 for each individual member of the plaintiff association (against the defendant District

116 This resembled the New Zealand scheme under the Criminal Records (Clean Slate) Act 2004.

117 *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13, [2002] 1 SCR 405.

118 *Power*, above n 114, at [243].

119 See *Simpson v Attorney-General* [1994] 3 NZLR 667.

120 *Mangawhai Ratepayers’ and Residents’ Association Inc v Kaipara District Council* [2014] NZHC 1147, [2014] 3 NZLR 85.

Council as the promoter of the validating legislation — the Crown was not a party to the case, only an intervener).

In the result, the Court of Appeal found no inconsistency with s 27(2) so there was no declaration, and the damages issue did not arise.¹²¹ But in a brief discussion of the damages point, each of the two judgments given in the Court of Appeal observed that the Council could not have been liable as the local Bill’s promoter, for it was Parliament that enacted the Bill into law. Miller J went a little further, noting that any claim against a Bill’s promoter would be contrary to the principle of comity operating between the judiciary and Parliament, which manifests itself in a rule of “non-interference” by the former in the latter’s affairs.¹²² That, of course, is an aspect of parliamentary privilege too, and the Canadian Supreme Court’s decision in *Power* shows the question might be decided differently if it were directly challenged.

Of course, the *Mangawhai* case was not, in terms, an action against the Crown for a legislative breach, only against the promoter of the Bill. That said, the reasons against any such remedy seem apt to foreclose a damages remedy against the Crown. Certainly an argument for damages for rights-infringing litigation in New Zealand would be more difficult here than in Canada. For a start, one cannot call legislation in New Zealand “unconstitutional” — at least not in the same way that can be said of legislation in Canada. Section 4 of our Bill of Rights explicitly contemplates inconsistent legislation and provides that it is effective. Quite apart from s 4, the same proposition flows from the Bill of Rights being ordinary law rather than entrenched as supreme law.

Still, those arguing for damages might call in aid the majority judgments in *Attorney-General v Taylor* where rights-inconsistent legislation is described throughout the majority judgments as a “breach” requiring a “remedy” — in that case the remedy of a “declaration of inconsistency”.¹²³ It might be seen as a comparatively small step to say that financial compensation ought to be available for rights-infringing legislation as a remedy in addition to declarations. After all, just as was said in *Taylor* of declarations, nothing in s 4 actually precludes damages.

There is also the point that our s 7 “vetting” process operates a little differently from its Canadian equivalent (from which it was originally derived). In New Zealand, the test applied when an Attorney-General is

121 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437.

122 At [134] and [149]–[151].

123 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at, for example [13], citing the reference to “breach” by the trial judge, and [2], [38]–[39] and [45] per Ellen France J and [100]–[102] and [104] per Elias CJ. See my discussion of this case in “Human Rights” [2021] NZ Law Rev 613.

making s 7 reports is whether a court would, more likely than not, find a Bill to be inconsistent with a right in the Bill of Rights if it were enacted as law. In Canada, in contrast, an enactment would be considered inconsistent only if there were no “credible argument” for its consistency. This difference explains why there have been no instances of such notices in Canada.¹²⁴ In light of this, there is a possible argument that when, in New Zealand, legislation is enacted despite a s 7 report, it is “knowingly inconsistent”.

Possible they may be, but these arguments are weak. There is a profound difference between inconsistency and unconstitutionality. And an Attorney-General’s s 7 advice to the House of Representatives is no more than a statement of his or her opinion; Members of Parliament are entitled to their own opinions and can disagree in good faith. That is true for the Parliament as a whole. For these and other reasons, the Canadian precedent will unlikely be seen as apt to New Zealand. Allowing damages for rights-inconsistent legislation moves too far from the nature and purpose of a statutory Bill of Rights. There is a gulf between declaring an enactment inconsistent (though valid) and awarding damages for the impact of a (valid) law. It would seem odd for valid legislation to result in continuing financial liability to those affected by it. The position in Canada is different: a judicial finding of inconsistency with Charter rights brings legislative inconsistency to an end.

VII The Bill of Rights and the Consistency of Regulatory Regimes

A theme that emerges from the foregoing is how our Bill of Rights impacts on legislative regimes, in addition to its interpretive impact on isolated or incidental provisions in legislation. From that perspective, the decision in *Chisnall* is much more consequential than, say, that in *Drew v Attorney-General* which simply invalidated a provision in secondary legislation that had hitherto limited access to lawyers in prison discipline cases.¹²⁵ Likewise, the Bill of Rights claim in *Smith v Attorney-General* — that the legislative regime governing climate change constituted a breach of ss 8 and 20 — is different from, say, a claimed deficiency in police action (such as was attempted in *Wallace v Attorney-General* where a police officer’s lethal response to the agitated Mr Wallace was claimed to breach the latter’s right to life).¹²⁶

124 I have written about this in “Rights-vetting under the New Zealand Bill of Rights Act 1990” in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Thomson Reuters, Sydney, 2020).

125 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

126 *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398.

Of course, the difference between what counts as a regime, on one hand, and an isolated provision or action, on the other, is one of context and degree. Some regimes, such as the so-called “three strikes” regime at issue in *Fitzgerald v R*, essentially turned on one contested concept — in that case, the mandating of increasingly severe sentences on those committing second and third offences. A similar point might be made about Canada’s *Morgentaler* case where the challenge to the abortion regime centred on the shortage, in certain areas, of consultants who could approve abortions. The resulting delay in gaining approval for abortions rendered unconstitutional not just the non-availability of timely approval for those affected but also the underlying legislative prohibition of non-approved therapeutic abortions across the whole of Canada.

The *Smith* and *Chisnall* cases exemplify an important distinction between two types of challenges to a regime. The focus in *Chisnall* was on whether the legislation positively authorised rights breaches so as to be *facially* inconsistent with the Bill of Rights (not being saved by interpretive “severance” of the inconsistency as in the *Fitzgerald* case, nor by the proposition that a statute must be applied in a rights-consistent way, as in *Seleni*). That can be distinguished from claims (as seemed to be involved in *Smith*) that rights-breaches are currently being caused by legislation that is ineffective, or missing when it ought to exist. Nothing prevents breaches of that type from being declared, as a judicial remedy. But that would not be a declaration of *legislative* inconsistency; it would be a declaration to mark a breach of rights that has occurred, or is occurring, on the proven facts. There are deep waters in these developments that I hope to explore in a future paper. An expected decision from the Court of Appeal, at the time of writing — being an appeal from the High Court’s judgment in *Hoban v Attorney-General*¹²⁷ — will be of interest in this regard.¹²⁸

127 *Hoban v Attorney-General* [2023] NZHC 222. The plaintiff seeks a declaration that s 61 of the Human Rights Act 1993 is inconsistent with s 19 of the Bill of Rights because it does *not* render unlawful speech that brings into contempt a group defined by sexual orientation; only groups defined by colour, race, or ethnic or national origin. The appeal was heard in 2024.

128 The Court of Appeal decision was released as this article was in press: *Hoban v Attorney-General* [2025] NZCA 644 (8 December 2025).

Intellectual Property

JANE GLOVER*

I Introduction

This review covers significant developments in intellectual property law in New Zealand since January 2020.

II Trade Marks

A Colour marks — “predominant colour”

The Court of Appeal decision in *Energy Beverages LLC v Frucor Suntory New Zealand Ltd* concerned a trade mark registered by Frucor.¹ The trade mark was represented by “a swatch of green colour”² together with an explanation as follows:³

The mark consists of the colour green (Pantone 376c), as shown in the representation attached to the application, applied as the predominant colour to the goods, their packaging or labels. Section 18(2) of the Trade Marks Act 2002 applies [ie the trade mark has acquired a distinctive character through use or other circumstances].

Energy Beverages applied to revoke the mark on the basis that, inter alia, the registration was invalid as it comprised a sign that did not qualify as a trade mark. Energy Beverages argued that the imprecise term “predominant colour” resulted in a registration that was for a multitude of different applications, “unlimited in number and scope”.⁴ Accordingly, Energy

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1 *Energy Beverages LLC v Frucor Suntory New Zealand Ltd* [2022] NZCA 536, [2023] 2 NZLR 329.

2 At [1].

3 At [1].

4 At [56].

Beverages maintained, the sign lacked the clarity and precision to be capable of being represented graphically and was an invalid registration under s 18 of the Trade Marks Act 2002.⁵

The first hurdle Energy Beverages faced — and ultimately failed to surmount — was the fact that application for a declaration of invalidity was made more than seven years after the date of registration.⁶ Section 75 of the Act provides that after the expiration of seven years, a registration is deemed valid unless it was obtained by fraud, or should not have been registered on the grounds in s 17(1) or (2), or the post-application grounds in s 66, such as non-use, apply. The Court of Appeal accepted that, as a matter of statutory interpretation, s 18 was not one of the specific exceptions, and therefore the trade mark was deemed to be valid.⁷ The application for a declaration of invalidity under s 18 was time-barred.⁸

Strictly speaking, therefore, there was no reason for the Court to go on to consider whether the use of the phrase “predominant colour” caused the registration to be unclear. It did so nonetheless, on an obiter basis, to provide clarity for the future concerning the registrability of colours as trade marks.⁹

The Court of Appeal observed that the word “predominant” can convey both quantitative and qualitative notions.¹⁰ Here, it could potentially include both an extensive background coverage in the relevant green colour, or a style of decoration by “green coloured geometric shapes, such as circles, triangles and stars against a contrasting background such as silver”.¹¹

Actual or potential competitors are entitled to know the scope of the mark applied for and registered.¹² The description of a colour trade mark by means of the phrase “the predominant colour” will generally be an insufficient mode of identification of a trade mark. The description of “a predominant *background* colour” might be acceptable, however.¹³ Traders wishing to monopolise colours should take pains to be clear as to the boundaries of the registrations. An obvious way to do this is to include in the application a representation of the spatial application of the claimed colour, whether that is done visually or verbally.¹⁴

5 At [56].

6 At [10]–[11].

7 At [35].

8 At [54].

9 At [55].

10 At [76].

11 At [79]–[80].

12 At [86].

13 At [89] (emphasis in original).

14 At [105].

B Section 25(1)(b) test for confusion/deception

In *Pharmazen Ltd v Anagenix IP Ltd*, Pharmazen advanced, without success, the novel submission that actual market use and conditions are factors relevant to the assessment of confusion and deception under s 25(1)(b) of the Trade Marks Act 2002.¹⁵ This submission was contrary to the long-established position that what has actually occurred in the market is relevant to the assessment of whether use of the mark would be likely to deceive or cause confusion under s 17(1)(a), but is not relevant to the assessment of whether use of the mark is likely to deceive or confuse for the purposes of s 25(1)(b).

Pharmazen sought to register the word mark ActiPhen for nutraceutical products. Anagenix opposed the trade mark application. Anagenix owned the trade mark ACTAZIN in relation to similar products but did not sell ACTAZIN products in the New Zealand domestic market, due to the risk of infringing a relevant New Zealand patent. Anagenix had made a business decision in 2012 to sell ACTAZIN products only outside New Zealand so long as the patent remained in force.¹⁶

Accordingly, Anagenix's ground of opposition based on s 17(1)(a) had no real prospect of success, as that ground is based on actual use and reputation of the mark in New Zealand. The Court of Appeal decision focused solely on s 25(1)(b), which is concerned with the position of the Register of Trade Marks. Section 25(1)(b) provides that the Commissioner of Trade Marks must not register a trade mark if it is similar to a trade mark that belongs to a different owner and is registered in respect of the same or similar goods or services, and use of the mark applied for is likely to deceive or confuse.

Pharmazen argued that the Commissioner and High Court had both been wrong to conclude that the assessment under s 25(1)(b) only involved consideration of notional fair use of the respective trade marks. It argued that the fact that Anagenix did not have a product on the New Zealand market at the relevant date should have been a relevant factor.¹⁷

The Court of Appeal observed that, although both s 17(1)(a) and s 25(1)(b) use the phrase "likely to deceive or cause confusion", they serve different purposes and work in different ways. Section 17(1)(a) is concerned with protecting the public from deception and confusion as a result of the use and reputation of an earlier mark, whereas s 25(1)(b) is concerned with the fair allocation and protection of property rights; once a trader has registered

15 *Pharmazen Ltd v Anagenix IP Ltd* [2020] NZCA 306.

16 At [11].

17 At [23].

a trade mark, it has the exclusive right to it regardless of whether or not it has used the mark.¹⁸ No use need be shown.¹⁹

The fact that the protection afforded by s 25(1)(b) is of the owner's property interest in the trade mark registration, not protection of the public, is underscored by the fact that the owner can agree to forgo those rights. Section 26(a) provides that if the owner consents, the Commissioner is obliged to accept the application for registration of a later trade mark, notwithstanding s 25(1)(b). There is no equivalent power of consent in the context of s 17(1)(a),²⁰ which is consistent with the fact that the purpose of s 17(1)(a) is to protect the public.

Similarly, it is well-established that the test for infringement under s 89 is concerned with the notional use of a registered trade mark compared with the actual use of the allegedly infringing mark. In the infringement context, it is irrelevant whether the proprietor who is alleging infringement has made actual use of its own registered mark.²¹ For the trade mark system to operate coherently, the rights that flow from registration of a trade mark ought to function in the same way in both the opposition and infringement contexts.

C *Deception/confusion — descriptive marks*

In *Brands Ltd v Bed Bath 'N' Table Pty Ltd (Bed Bath 'N' Table)*,²² a critical issue was the likelihood of confusion or deception arising from the following two word marks:

BED BATH & BEYOND

BED BATH 'N' TABLE

In comparing the two marks, Ellis J applied the following established principles:²³

- (a) the Court should consider the marks in their entirety; the overall or net impression of the marks should be considered;

18 At [33] citing *BALI Trade Mark* [1969] RPC 472 (HL) at 496.

19 Subject to s 66, which provides that three years' continuous non-use of a mark can be a separate ground for revocation in certain circumstances. Here, however, there was relevant "use" that would defeat a non-use application because the definition of "use" deems the use of a trade mark in relation to export goods to be use of a trade mark in New Zealand: Trade Marks Act 2002, s 7(1) (as discussed at [39]).

20 *Pharmazen Ltd v Anagenix IP Ltd*, above n 15, at [34].

21 At [38].

22 *Brands Ltd v Bed Bath 'N' Table Pty Ltd* [2023] NZHC 1766.

23 At [129] citing *Pharmazen Ltd v Anagenix IP Ltd*, above n 15, at [47].

- (b) while differences between two marks may be significant, it is the similarities which are most significant, whether visual, audible, distinctive, or conceptual;
- (c) the impression or idea conveyed by the marks is important in assessing how they will be recalled; the idea of a mark is more likely to be recalled than its precise details;
- (d) comparison is not of the opponent's mark with the mark of the applicant when taken side by side, but taking into account imperfect recollection in all the circumstances in which the products might be sold; and
- (e) the marks are to be compared as they would be encountered in the usual circumstances of trade.

On this basis, her Honour held that there was considerable visual and aural similarity between the marks,²⁴ and that they were likely to be encountered in similar circumstances.²⁵ On the face of it, therefore, the inescapable conclusion was that the marks were similar.²⁶ Further, there was some evidence of actual confusion in the market.²⁷ Ellis J herself, for example, was aware of the existence of both a Bed Bath & Beyond store and a Bed Bath 'N' Table store in central Wellington and tended to be confused about the names of each.²⁸

Despite these factors, Ellis J held that in the circumstances of this particular case, especially the descriptiveness of the two marks, the confusion was not sufficient to invalidate the mark BED BATH 'N' TABLE, that is, the use of the mark BED BATH 'N' TABLE was not likely to deceive or confuse for the purposes of s 25(1)(b). The mark BED BATH & BEYOND, which was registered under the previous Trade Marks Act 1953, included a disclaimer that registration of the mark "*shall give no right to the exclusive use of the words 'BED' and 'BATH'*".²⁹ Regardless of whether there was a formal disclaimer in place, Ellis J accepted that the words "bed" and "bath" were towards the descriptive end of the spectrum when used to refer to products for the bedroom or bathroom.³⁰

Ellis J observed that where a trade mark includes descriptive or non-distinctive words, some confusion must be expected and tolerated as the price for using such words.³¹ So, for example, Ellis J's own confusion was

24 At [130(m)].

25 At [130(n)].

26 At [133].

27 At [159]. Her Honour did not accept, however, that the confusion was as widespread as claimed: at [160].

28 At [171].

29 At [21] (emphasis in original).

30 At [147] and [149].

31 At [153] and [174].

a product of the fact that the first two words of the store were the same and were common words that are highly suggestive of the very similar goods and services provided by each trader.³² Despite her Honour's confusion about the names of the stores, it did not occur to her Honour that there was any connection in trade between the two stores.³³

D *Honest concurrent use*

In *Bed Bath 'N' Table* a further issue considered in detail, albeit on an obiter basis, was honest concurrent use. Brands Ltd alleged that Bed Bath 'N' Table's trade mark registration was invalid under s 25(1)(b) and s 17(1)(a). Ellis J found that Bed Bath 'N' Table would have a defence of honest concurrent use to the invalidity claim under s 25(1)(b), but not to the claim under s 17(1)(a).³⁴ Her Honour observed that registration of a trade mark may be allowed on the grounds of honest concurrent use even when the possibility of confusion is considerable.³⁵ (However, as discussed below, the subsequent conclusion that honest concurrent use does not affect the s 17(1)(a) prohibition on the Commissioner registering a mark that would be likely to deceive or cause confusion significantly undermines the situations in which honest concurrent use can be applied to useful effect.)

The factors that traditionally guided the assessment of honest concurrent use, including under the former 1953 Act, are:³⁶

- (a) the extent of the current use (time, quantity and area);
- (b) the degree of confusion likely to ensue if the mark is registered, which is indicative of the measure of public inconvenience;
- (c) the honesty of the concurrent use;
- (d) whether any instances of confusion have in fact been proved; and
- (e) the relative confusion likely to be caused if the mark is registered.

Ellis J confirmed that these five factors remain the guiding principles under the current 2002 Act. Her Honour rejected an argument that factors (b) and (e) above are no longer relevant. Despite the fact that s 26(b) of the 2002 Act uses the word "must" ("The Commissioner *must* register trade mark A if ... a case of honest concurrent use exists ... that, in the opinion of the court or

32 At [172].

33 At [172].

34 At [356(c)].

35 At [182].

36 At [183].

the Commissioner, makes it proper for the trade mark to be registered”³⁷ whereas s 17(5) of the 1953 Act used the word “may”, the subjective factors are still relevant. All five factors set out above continue to provide a useful structure for the analysis.³⁸

In this case, there had been use of the mark BED BATH ‘N’ TABLE in Australia from at least 1976 and in New Zealand since at least March 2007. The relevant trade mark application was filed in 2014. The relevant Bed Bath & Beyond trade mark was registered in 1994. Ellis J agreed that the relevant period of use was logically focused primarily on the time before June 2014, although subsequent use may be relevant to the exercise of the discretion.³⁹ Her Honour was also prepared to take some account of the use of the mark occurring outside New Zealand, especially as that related to the question of honesty.⁴⁰ The standard for honesty is “commercial honesty” — which is the same as common honesty.⁴¹ Honest development of a trade mark goes a long way to establishing the requisite honesty.⁴² Knowledge of the existence of the prior registration of the other trader’s mark does not inevitably lead to a conclusion of dishonesty, depending on factors such as the reasons for choosing a similar name.⁴³ Knowledge that the other trader objects to use of the name weighs against a finding of honesty, whereas if the other trader makes no protest that can weigh in favour of a finding of honest concurrent use.⁴⁴

Ellis J accepted that Bed Bath ‘N’ Table had used its mark in Australia for a period of 30 years before bringing it to New Zealand. When it decided to enter the New Zealand market, it was commercially obvious to use the same name, which already had a degree of recognition here.⁴⁵ It had no intention of deceiving people by doing so, and any risk of confusion was a risk borne equally by Bed Bath ‘N’ Table.⁴⁶ Even though it knew of both the Bed Bath & Beyond’s trade mark registration and trading existence in New Zealand, this did not demonstrate dishonesty.⁴⁷ Brands Limited raised no objection to Bed Bath ‘N’ Table’s entry into the market at the time, nor

37 Trade Marks Act 2002, s 26(b) (emphasis added).

38 *Bed Bath ‘N’ Table*, above n 22, at [186].

39 At [189] citing *VB Distributors Ltd v Matsushita Electric Industrial Co Ltd* (1999) 53 IPR 466 (HC) at [81]–[82].

40 At [190]–[195].

41 At [198] citing *Parkington & Co Ltd’s Application* (1946) 63 RPC 171 at 182.

42 At [198].

43 At [199].

44 At [199].

45 At [201].

46 At [202].

47 At [206].

for some years afterwards.⁴⁸ Also, there were some differences between the names and trade marks, and the parties were targeting different ends of the market at that time; the Bed Bath & Beyond brand was at the lower end. The risk of confusion was therefore less than it might otherwise have been, and if it did arise, might be expected to benefit the trader operating at the lower end of the market.⁴⁹ Additionally, Bed Bath ‘N’ Table would have been aware of the disclaimer, which could have caused it to reasonably believe that it would not infringe the pre-existing mark as a result of the use of the words “Bed” and “Bath”.⁵⁰

Therefore, although there was some consumer confusion between the two marks,⁵¹ the circumstances favoured a finding of honest concurrent use.⁵² The marks had co-existed in the New Zealand market for 15 years. The public inconvenience of rebranding would also be substantial; it would likely cause the public to mistakenly think that the stores and/or their ownership had changed.⁵³ Further, the cost of rebranding would be significant, as would the ongoing cost and inconvenience of having to use a different brand in New Zealand.⁵⁴ The application for a declaration of invalidity under s 25(1)(b) would have been overcome by the honest concurrent use defence.

However, Ellis J further confirmed that honest concurrent use is not available as a shield to an opposition or invalidity application based on s 17 of the Act.⁵⁵ As the focus of s 17, like the Fair Trading Act, is on consumer protection, it would be anomalous to permit the registration of a trade mark that is in fact a confusing and deceptive trade mark under s 17, only then to have its use constitute an infringement of the Fair Trading Act 1986.⁵⁶ Given the considerable overlap between s 17(1)(a) and s 25(1)(b), there is presumably little scope for the operation of the doctrine of honest concurrent use in New Zealand. Even if an applicant/owner could overcome a s 25(1) ground of opposition or invalidity by relying on the doctrine of honest concurrent use, if s 17(1)(a) was also relied upon, the honest concurrent use exception would not be available. Typically, if the s 25(1) ground is successful, so is the ground of opposition under s 17(1)(a), and vice versa, as there is much in common between them.

48 At [208] and [211].

49 At [209].

50 At [210].

51 At [216].

52 At [221].

53 At [220].

54 At [219].

55 At [277].

56 At [275].

E “Own name” defence

Another issue helpfully clarified in *Brands Ltd v Bed Bath ‘N’ Table Pty Ltd* is that the “own name” defence is not available to companies.⁵⁷ In that case, the trade mark infringement claim was not established, but out of an abundance of caution, Ellis J went on to consider the availability of the “own name” defence to trade mark infringement under s 95(a) under the 2002 Act.

Section 95(a) provides that a person does not infringe a registered trade mark if, in accordance with honest practices in industrial or commercial matters, the person uses their name or the name of their place of business. This provision must be reconciled with s 91, which provides that it is not a defence that trade mark infringement arose from the use of the name under which a company has been registered.

Similar issues had arisen under the equivalent provisions of the 1953 Act, with the Court of Appeal being divided on the issue. The majority of the Court of Appeal in *Anheuser Busch Inc v Budweiser Budvar National Corp*⁵⁸ held that the earlier equivalent to s 91, which provided that it “shall not of itself be a defence that the infringement arose from the use of the name under which a company has been registered” did not deprive companies of the own name defence.⁵⁹ The words “of itself” were central to the analysis and finding of the majority decision of the Court of Appeal. As those words were not carried through to s 91 of the 2002 Act, Ellis J reached the opposite conclusion under the 2002 Act. Her Honour concluded that, as a matter of statutory interpretation, the own name defence is no longer available to companies.⁶⁰

F *Bad faith*

In *Planet Fitness Ltd v PFIP International LLC*, after detailed consideration, La Hood J applied a more expansive approach to the bad faith ground of opposition than had been taken at first instance and in earlier cases more generally.⁶¹

A New Zealand company, Planet Fitness Limited (Planet Fitness NZ), applied to register PLANET FITNESS as a trade mark. The respondent,

57 At [302].

58 *Anheuser Busch Inc v Budweiser Budvar National Corp* [2002] NZCA 264, [2003] 1 NZLR 472.

59 At [143]–[150] (emphasis added). The Court was unanimous as to the result, but differed as to the reasons. Gault P, in the minority, took the view that the own name defence was not available to companies under the 1953 Act, at [120].

60 At [302].

61 *Planet Fitness Ltd v PFIP International LLC* [2024] NZHC 2745, (2024) 179 IPR 393.

PFIP International LLC (PFIP), had used the same mark for many years internationally, although not in New Zealand.

One of the directors of Planet Fitness NZ, Mr Patchell-Evans, was the owner of multiple gym chains in Canada and New Zealand. He was an experienced, well-informed and sophisticated commercial trader.⁶² He also clearly knew about PFIP and the PLANET FITNESS brand. Mr Patchell-Evans met with PFIP in 2007, either with the intention of becoming a franchisee, or for the purpose of making an offer to purchase part of their business. The meeting ended with a proposal by Mr Patchell-Evans that the parties not compete with one another in their respective countries. That proposal was not agreed.⁶³

In the period 2016 to 2019, there was significant media attention given to PFIP's expansion in the United States and in various other countries internationally. In November 2019, following settlement of a dispute with Australian entities that used the mark PLANET FITNESS, PFIP opened 35 gyms in Australia. Although the opening of the gyms took place four months after Planet Fitness NZ's New Zealand trade mark application was filed on 24 July 2019, the dispute had been the subject of litigation in Australia for several years and was a matter of public record.

PFIP submitted that it was no coincidence that Mr Patchell-Evans applied to register the mark in July 2019 following the publicity of its proposed expansion and the associated dispute in Australia. PFIP submitted that Planet Fitness NZ's trade mark application was filed in bad faith because its purpose was to hinder the entry of a competitor into the New Zealand market rather than to use the mark itself.

At first instance, Assistant Commissioner Aldred refused registration of Planet Fitness NZ's trade mark application on the basis that use of the trade mark would be likely to deceive or cause confusion for the purposes of s 17(1)(a) in light of data showing New Zealand visitors to PFIP's website, and therefore some level of reputation in New Zealand.⁶⁴ If Planet Fitness NZ used the mark PLANET FITNESS, New Zealanders who were aware of PFIP's mark PLANET FITNESS would be confused or deceived in the sense of being likely to wonder whether there was some relation between the gym services marketed under the opposed mark and PFIP's gym franchise.⁶⁵ Assistant Commissioner Aldred found, however, that the trade mark application was not made in bad faith pursuant to s 17(2) of the Act, noting that PFIP did not expand into Australia until after the relevant date.⁶⁶

62 At [77].

63 At [77].

64 *Planet Fitness Ltd v PFIP International LLC* [2024] NZIPOTM 10 at [86]–[88].

65 At [87].

66 At [100]–[101].

On appeal to the High Court, La Hood J agreed with the Assistant Commissioner's finding in relation to s 17(1)(a). Significantly, however, La Hood J further held that the application was made in bad faith. This finding appears to have been influenced by a detailed academic article on bad faith that was published by Associate Professor Batty from the University of Auckland after the case was heard.⁶⁷ La Hood J gave the parties an opportunity to address that article, which contended for a more expansive application of the ground of bad faith, by way of further submissions.

La Hood J observed that bad faith can be established even if it was not the sole motive for filing the trade mark application.⁶⁸ His Honour expressed the relevant test as follows:⁶⁹

... whether there is clear and cogent evidence that the appellant filed its application with the intention of impeding, or taking advantage of, the interests of the respondent using its mark, or to use the registration regime for purposes other than protecting a genuine intention to use the mark. In other words, whether the appellant's intention was to abuse the trade mark system. In the context of this case, that essentially comes down to whether there is a clear and cogent inference that the appellant's intention was to impede the respondent's use of its mark in New Zealand rather than a genuine intention to use the mark.

La Hood J held that the circumstances of this case established a prima facie case of bad faith,⁷⁰ and gave rise to a clear and cogent inference that the purpose of the trade mark application was to prevent the possible expansion of a competitor into New Zealand rather than an intention to use the mark.⁷¹ His Honour accepted PFIP's submission that Planet Fitness NZ had provided no alternative explanation, let alone a convincing one, as to why it had applied to register the mark.⁷²

G *Compatibility statements — trade mark infringement*

The parties in *Zuru New Zealand Limited v Lego Juris A/S* were both involved in the manufacture of plastic toy building bricks, figurines and base plates.⁷³

67 Rob Batty "Bad Faith: A Section Whose Time has Come?" [2024] NZ L Rev 261, cited by La Hood J at [63], [67], [69] and [74].

68 *Planet Fitness Ltd v PFIP International LLC*, above n 61, at [73].

69 At [75].

70 At [81].

71 At [83].

72 At [91].

73 *Zuru New Zealand Ltd v Lego Juris A/S* [2023] NZHC 1808 [*Zuru* (HC)].

Lego had been the dominant player in the field for many years. Zuru were relative newcomers, entering the field in 2018.

One of the selling points of Zuru's products was that they were compatible for use with Lego's products. Initially, Zuru's product packaging included a notice saying "LEGO BRICKS COMPATIBLE". Lego immediately took exception, and Zuru replaced it with a statement that its products were "COMPATIBLE WITH MAJOR BRANDS". Two years later, Zuru attempted to revert to the initial form of compatibility statement. It sought declarations that this would not infringe Lego's trade marks on the following bases:

- (a) Consumers would not take the use of the word LEGO in the compatibility statements as being a use of the trade mark.
- (b) If such use did constitute use as a trade mark, it was a form of comparative advertising and therefore did not infringe the LEGO trade mark by virtue of s 94.
- (c) Such use indicated a characteristic of Zuru's MAX Build More products and/or was reasonably necessary to indicate the intended purpose of those products. It did not infringe the LEGO trade mark by virtue of s 95.⁷⁴

As set out below, all three arguments failed in the High Court. Zuru's use of the mark LEGO in the context of compatibility statements was not shielded from allegations of trade mark infringement.

After the period covered by this review, on 10 December 2025 the Court of Appeal issued a decision reversing the High Court decision.⁷⁵ Although the Court of Appeal decision is not analysed in detail here, certain key points of difference with the High Court decision are noted.

(1) Use as a trade mark

Zuru relied on s 89(2), which excludes from infringement any use of a trade mark that would not be likely to be taken as use as a trade mark. The purpose of that section is to exclude non-descriptive, or merely descriptive, uses of a trade mark from the scope of infringement.⁷⁶ Unlike words such as "Vintage", which can have both trade mark significance and function as an ordinary descriptive term, the word LEGO has no ordinary meaning beyond

⁷⁴ At [32].

⁷⁵ *Zuru New Zealand Limited v LEGO Juris A/S* [2025] NZCA 650 [*Zuru* (CA)].

⁷⁶ *Zuru* (HC), above n 73, at [64]–[65].

its connection with Lego's toy products. It has never had any other use in everyday language.⁷⁷

In the High Court, Lang J observed that the inquiry under s 89(2) is intensely context-specific.⁷⁸ In this situation, the overall context, including the size and prominence of the word LEGO in the compatibility statement, led his Honour to conclude that many consumers would likely perceive the word LEGO as being use of that word as a trade mark.⁷⁹

The Court of Appeal was split on this issue. Cooke J, in the minority, agreed with the High Court, finding that Zuru had used the word LEGO as a trade mark.⁸⁰ The majority, Ellis and Palmer JJ, disagreed, holding that the use of the word LEGO as part of the phrase "LEGO® BRICK COMPATIBLE" was purely descriptive and therefore did not amount to use as a trade mark.⁸¹

(2) Section 94 — no infringement for comparative advertising

Section 94 provides that a registered trade mark is not infringed by the use of that mark for the purposes of comparative advertising, but goes on to say that:

... any such use otherwise than in accordance with honest practices in industrial or commercial matters must be treated as infringing the registered trade mark if the use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

The assessment of whether use of a trade mark is "in accordance with honest practices in commercial [or industrial] matters" must be determined objectively.⁸² Lang J held that the use of the LEGO trade mark on the original compatibility statement was not in accordance with honest practices in commercial matters.⁸³ Viewed objectively, the use of the LEGO trade mark on the original compatibility statement was an aggressive attempt to obtain leverage for Zuru's products. Its decision to reintroduce the original compatibility statement in March 2021 was even more aggressive because by that stage it knew beyond any doubt how Lego would react.⁸⁴

77 At [83].

78 At [93].

79 At [107].

80 *Zuru (CA)*, above n 75, at [228].

81 At [161] and [256].

82 *Zuru (HC)*, above n 73, at [115].

83 At [133].

84 At [133].

Zuru sought to use the LEGO trade mark “to gain leverage from the reputation LEGO had built up over many years”.⁸⁵ It sought to do so by positioning the LEGO trade mark in a prominent location, size and colour on the front panel of its containers and packaging to draw the attention of prospective customers to its products. By using the LEGO trade mark, Zuru “sought not only to inform consumers that its products were compatible with LEGO products but also to reassure them that they were of similar quality”.⁸⁶

Given the finding that the use of LEGO’s trade mark was not in accordance with honest practices in commercial matters, in order to be protected by s 94, the use must have occurred in the context of comparative advertising *and* could not take unfair advantage of, or be detrimental to, the distinctive character or reputation of the LEGO trade mark.

Lang J proceeded on the basis that, even though the packaging of products for display in retail stores was not paid advertising in the same way as, say, a television commercial, product packaging may nonetheless contain promotional material that amounts to “advertising” for the purposes of s 94. However, these statements were not “comparative” advertising. If a trader wishes to obtain the benefit of the protection of s 94, the advertisement in question must contain an express comparison between the advertiser’s product and that of a competitor.⁸⁷ The compatibility statements did not compare Zuru’s products with those manufactured by Lego. They stated only that Zuru’s products were compatible with Lego’s products. The ordinary meaning of the word “compatible” in this context was that Zuru’s products could be used interchangeably with Lego’s products.⁸⁸ Section 94 did not apply.

The Court of Appeal (unanimously) took a different view, applying a broader assessment of what amounts to a “comparison”. The Court held that a comparison can involve saying that the two things are equivalent to each other, or compatible with each other.⁸⁹ It is not necessary to imply that one is better than the other.

(3) Section 95 — no infringement for honest practices

Section 95 provides that a person does not infringe a registered trade mark if, in accordance with honest practices in industrial or commercial matters, the person uses:

85 At [131].

86 At [131].

87 At [154].

88 At [155].

89 *Zuru (CA)*, above n 75, at [167].

- (a) the person’s name or the name of the person’s place of business; or
- (b) the name of the person’s predecessor in business or the name of the person’s predecessor’s place of business; or
- (c) a sign to indicate—
 - (i) the kind, quality, quantity, intended purpose, value, geographical origin, or other characteristic of goods or services; or
 - (ii) the time of production of goods or of the rendering of services; or
- (d) the trade mark where reasonably necessary to indicate the intended purpose of the goods (in particular as accessories or spare parts) or services.

The finding that Zuru’s use of the mark was not in accordance with honest practices meant that s 95 did not apply. If, however, the use had been in accordance with honest practices, it would have qualified for protection under s 95(c)(i).⁹⁰ Lang J considered that the use of the word LEGO in the compatibility statements alerted consumers to one of the principal characteristics of Zuru’s products, namely their compatibility with products made by Lego.⁹¹

The Court of Appeal did not express a concluded view on this issue.⁹²

III Copyright

A Exhaustion of “distribution right” (issuing copies of works to the public)

Copyright owners enjoy various exclusive rights — most obviously, the exclusive right to copy the work. Another exclusive right, which is less well known, is the exclusive right to issue copies of their works to the public (known as the “distribution right”). In *Burden v ESR Group (NZ) Ltd*, the Supreme Court considered the nature and extent of this right, ultimately interpreting it in a manner favourable to copyright owners.⁹³

The case concerned furniture products, which were placed on sale in Vietnam and subsequently imported into New Zealand. The key issue was whether the importer was liable for primary infringement of copyright under s 29(1) of the Copyright Act 1994.⁹⁴ Section 29(1) provides that copyright

⁹⁰ *Zuru* (HC), above n 73, at [168].

⁹¹ At [168].

⁹² *Zuru* (CA), above n 75, at [183] and [265(a)].

⁹³ *Burden v ESR Group (NZ) Ltd* [2025] NZSC 18.

⁹⁴ To be liable for primary infringement there is no need for a defendant to have knowledge that the goods were infringing copies. By contrast, secondary infringement by importation does have a “knowledge” element — the importer must have knowledge or reason to believe that it is an infringing copy: Copyright Act 1994, s 35.

will be infringed if a person does one of the restricted acts set out in s 16, which include issuing copies of a work to the public. In this decision, the Supreme Court grappled with the proper meaning of “issuing copies of a work to the public”, and the significance of the fact that the works had been put on sale in Vietnam before being imported into New Zealand.

Section 9(1) defines “issuing copies of a work to the public” as “putting into circulation copies not previously put into circulation”. The works had been placed on sale in Vietnam, but the implications of that were unclear — that is, it was not clear whether that prior sale affected whether the works were still “copies not previously put into circulation” for the purposes of s 9(1). The answer depended partially on whether sales in another country “counted” — that is, on whether the copyright owner’s rights of first distribution had been exhausted by the prior sale of the goods in Vietnam (even though the goods sold in Vietnam were infringing, not genuine, and the copyright owner had not consented to their sale).

Unhelpfully, s 9(1) was copied from the equivalent United Kingdom legislation, but with slightly different wording. The United Kingdom Act defined issuing copies of a work to the public as putting into circulation copies “not previously put into circulation *in the United Kingdom or elsewhere*”, making it clear that exhaustion of the right of first distribution was not confined to the United Kingdom.⁹⁵ Section 9(1), however, did not include the words “in New Zealand or elsewhere”. It was simply silent as to territory. The Supreme Court observed that it was unfortunate that the New Zealand drafters did not make it clear whether the intention was to adopt the United Kingdom model in its entirety (which could easily have been achieved by adding “in New Zealand or elsewhere”), or to adopt it with modification (which could easily have been indicated by adding “in New Zealand”).⁹⁶ The result was unnecessary and avoidable uncertainty.⁹⁷

Ultimately, however, the Supreme Court held that the copyright owner’s first distribution right was not extinguished by the prior sale of the infringing copies in another jurisdiction before they were imported into New Zealand. It observed that this position was consistent with the statutory wording, the statutory history and context, and policy considerations.⁹⁸ Intellectual property rights are territorial in nature, and each exclusive right can be owned or licensed to different entities in different jurisdictions.⁹⁹ The territorial nature of copyright supports the view that exhaustion is national, in the absence of any indication to the contrary. As the Court observed: “It would

95 *Burden v ESR Group (NZ) Ltd*, above n 93, at [71] (emphasis added).

96 At [62].

97 At [62].

98 At [61].

99 At [68].

be odd if the copyright owner could be deprived of their rights by actions outside the jurisdiction without clear wording to indicate that this was the intended effect of the legislation.¹⁰⁰ A copyright owner's first distribution right in New Zealand is not exhausted by the issue of copies to the public outside New Zealand.¹⁰¹

The Supreme Court decision also included obiter observations on a further argument raised by the copyright owner that the words "put into circulation" in s 9(1) should be read as referring only to circulation with the consent of the copyright owner, in addition to being limited to prior circulation within New Zealand. This would mean that s 9(1) would be interpreted to mean "previously circulated in New Zealand with the consent of the copyright holder". It was not strictly necessary for the Court to address this argument, but it observed there was "a good argument that consent of the copyright owner would also have been required for exhaustion of the first distribution right".¹⁰²

B *Copyright — relationship property*

Copyright is undoubtedly a form of property.¹⁰³ In *Alalääkkölä v Palmer*, the question before the Supreme Court was whether copyright is also relationship property, or whether it should be treated differently in that context.¹⁰⁴ The Supreme Court unanimously upheld the decisions of the Court of Appeal and High Court (contrary to the Family Court Judge at first instance) that copyright is property for the purposes of the Property (Relationships) Act 1976 (PRA) and therefore can be relationship property.

Ms Alalääkkölä was an artist, and her paintings were the family's principal source of income. She separated from her husband, and the relationship property was divided. The parties agreed that the artworks themselves, in the sense of the physical paintings, were relationship property. The dispute was about the status of the underlying copyright in those works. At one stage, Mr Palmer said that he intended to set up a business selling copies of the artworks. Later, he said that Ms Alalääkkölä should retain the copyright in the works and he should be credited with their share of the value. Ms Alalääkkölä wished to retain copyright in the works she created during the relationship but without compensating Mr Palmer for them.¹⁰⁵ She argued

100 At [69].

101 At [104].

102 At [109].

103 Copyright Act 1994, s 14(1).

104 *Alalääkkölä v Palmer* [2025] NZSC 9.

105 At [18].

that while copyright is a species of property under the Copyright Act, it need not be property for the purposes of the PRA.¹⁰⁶

As noted above, the Family Court Judge held that the underlying copyright was Ms Alalääkkölä's separate property. In the High Court, Isaac J disagreed, saying that copyright in the artworks was relationship property that should be divided equally. He drew attention to the Family Court's jurisdiction to vest artworks or copyright in one party, with an adjustment to the distribution of proceeds of sale of the family home to achieve an overall equality of division.¹⁰⁷ The Court of Appeal agreed that the copyright in the artworks created during the relationship should be classified as relationship property.¹⁰⁸

On appeal, the Supreme Court agreed with the decisions of the High Court and Court of Appeal.¹⁰⁹ The Copyright Act expressly provides that copyright is property, and further that it exists apart from the author's moral rights.¹¹⁰ It fits the PRA definition of "property" as "personal property". There is no reason to exclude intangible personal property from the definition.¹¹¹

The Supreme Court also noted, however, that the artist enjoys the right to decide when a given work is complete, whether it is fit for public viewing, and when it should leave the private domain.¹¹² So, for example, incomplete or damaged unpublished works that Ms Alalääkkölä did not now wish to publish were to remain in the private domain and their value, if any, was as canvases to be reused for future works.¹¹³ Likewise, private works, such as nudes, that were never intended to be sold or disclosed to the public during the lifetime of the artist or by her executor should be valued on that basis.

C Damages — calculation of notional licence fee

In *Geostel Vision Ltd v Oraka Technologies Ltd*, the issue before the Court of Appeal was the reasonable licence fee payable in respect of each infringing use of a "cup" forming part of an asparagus grading machine.¹¹⁴

In 2016 the High Court awarded Oraka Technologies \$4.1 million in damages, constituting the loss of profits suffered as a result of the copyright infringement. On an appeal to the Court of Appeal in 2016 it was held that

106 At [27].

107 As recorded in the Supreme Court decision at [8].

108 As recorded in the Supreme Court decision at [10].

109 At [29].

110 At [30].

111 At [30].

112 At [51].

113 At [53].

114 *Geostel Vision Ltd v Oraka Technologies Ltd* [2020] NZCA 256.

damages were to be measured not on a loss of profits basis, but on the basis of a notional licence fee — that is, the amount that the parties would have agreed should be paid in return for permission to use the designs if they had negotiated a licence at the time of the first breach. The matter was referred back to the High Court so that damages could be determined on the basis of a notional licence fee.

Hinton J's application of the user principle yielded a notional licence fee of \$6.00 for each infringing cup assembly sold, giving a total damages award of \$510,000. That finding was also appealed, and for the reasons set out below, the appeal was allowed. The High Court's damages award of \$510,000 was quashed and substituted with damages in the sum of \$47,000.

The Court of Appeal began by noting that the cases on damages for IP infringement can be usefully grouped into two typical situations:¹¹⁵

- (i) first, where the intellectual property (IP) relates to an invention which is exploited by the patent owner to make products which are sold at a profit, the effect of an infringement will be to divert sales from the owner of the patent to the infringer and the measure of damages will then normally be the profit which would have been realised by the owner of the patent had the sales been made by him [loss of profits].
- (ii) secondly, where the IP is exploited by its owner through the granting of licences for royalty payments, the measure of damages an infringer must pay will be the sums that he would have paid by way of royalty if he had obtained such a licence [notional licence fee].

In the latter case, quantifying a hypothetical royalty can be difficult but, ultimately, will be a matter of evidence. Where there is evidence of the royalties paid by other users of the same invention, that is, there is a “going rate”, that rate can — all other things being equal — generally be taken as being the price or royalty that presumably would have to be paid by the infringer.

In other situations, where it is not possible to prove a normal, or established, royalty, it is for the plaintiff to adduce evidence that will guide the court. The ultimate process is one of judicial estimation of the available indications. The following principles apply:¹¹⁶

115 At [21(d)] citing *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1976] 93 RPC 197 at 211–215.

116 At [22] citing Gillian Davies, Nicholas Caddick and Gwilym Harbottle (eds) *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, London, 2016) vol 1 at [21–292] (footnotes omitted) as quoted in *New Zealand National Party v Eight Mile Style LLC* [2018] NZCA 596, [2019] 2 NZLR 352 at [29].

- (i) The hypothesis is that the actual licensor and the actual infringer are willing to negotiate with each other as they are, with their strengths and weaknesses, in the market as it existed at the date of the infringement. Accordingly the task of the court is to assess the value of the use to the defendant, not to a hypothetical person.
- (ii) However, any impecuniosity on the part of the notional licensee is to be disregarded, as are the personal characteristics of the parties (e.g. an easy-going or aggressive nature), as opposed to the objective factors with which they were faced. ...
- (iii) The fact that one or both parties would not in fact have reached an agreement is irrelevant.
- (iv) The terms of any notional licence must reflect the actual infringement. Accordingly, where only part of a copyright work has been infringed, the notional licence is a licence to carry out the infringing act and not a licence to use the whole of the copyright work. The period of the licence is the period of actual infringement. Where the infringer enjoyed exclusivity in practice, the notional licence should accord with the reality. Likewise, the licence should permit the infringer to contract with others on the terms on which it actually contracted.
- (v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain.
- (vi) The court can take into account other relevant factors, and in particular, delay on the part of the claimant in asserting its rights.
- (vii) It is relevant under this head that the defendant could have arrived at the same result by lawful means if the parties can be expected to have taken that fact into account in their hypothetical negotiation. That alternative need not have had all the advantages or other attributes of the infringement.
- (viii) In the absence of comparable licences or other compelling evidence the royalty may be based on the “available profits” method: the defendant’s actual profits are calculated; it is assumed that the parties would have accurately predicted these profits when negotiating; the profits are then (in effect) divided between the claimant and the defendant.
- (ix) In some cases it may be appropriate to award as damages the cost of producing or commissioning the material in a form which did not infringe copyright.
- (x) In a case within this group, the court may have to call into play “inference, conjecture and the like”, and apply “a sound imagination and the practice of the broad axe”.

The burden was on the plaintiffs to prove their loss and to adduce evidence which would guide the Court in its assessment of a notional licence fee.¹¹⁷ In this case, they failed to do so. Instead, they re-ran (in thinly disguised form) the original lost profits claim.¹¹⁸

The Court of Appeal concluded that there were material errors and omissions in the High Court's assessment which warranted a considerable reduction in damages.¹¹⁹ These were as follows:

- (a) The High Court Judge held that the notional licence would have been exclusive and that a premium should be applied accordingly. However, the notional licence would not have been exclusive.¹²⁰
- (b) Territorial scope was a factor that was wrongly ignored by the High Court.¹²¹ The fact that the copyright in the cup assembly design was not protected overseas was a relevant factor that should have been taken into account. The designs were the subject of domestic copyright only; they had no protection in the countries to which the cups were exported.
- (c) At the time the notional licence was entered into, there was a separate judgment debt owing that would have created substantial leverage for the licensee and should have been taken into account.¹²²
- (d) The licence fee should not have exceeded Geostel's actual operating profits. The evidence was that Geostel's overall profits (for the sales of the grading machines and the cup assemblies over the entire infringement period) were considerably less than the \$510,000 damages sum awarded.¹²³
- (e) There was no obvious basis for the use of a 40 per cent royalty figure and, in the absence of any other evidence, the "25 per cent rule" should have been used as a starting point.¹²⁴

D *Industrial designs with functional constraints*

In *Technopak Ltd v Monzeal Ltd*, the plaintiff alleged copyright infringement in relation to 10 separate parts of its automated bag-filler machines.¹²⁵ The products at issue were industrial machines that filled bags with powdered

117 At [141].

118 At [142].

119 At [83].

120 At [153].

121 At [107].

122 At [134].

123 At [149].

124 At [50]–[51], [67(b)], [104(c)] and [150]–[152].

125 *Technopak Ltd v Monzeal Ltd* [2024] NZHC 1420.

substances such as milk powder. The machine would pick up a standard-size bag, present the bag to a filling spout, fill the bag with powder, seal the bag, and convey the bag away for packing. As discussed below, Tahana J dismissed the plaintiff's claim for copyright infringement.

Tahana J noted that in assessing whether there is objective similarity between works, the similarity must be assessed by what is visually significant to a person to whom the work would normally be addressed.¹²⁶ In this situation, because these were engineering drawings that were to be used to manufacture parts, it was the impact on the engineering eye that was important.¹²⁷ Even though some of the designs looked strikingly similar to a layperson, they must be assessed from the perspective of an engineer and with consideration to functional constraints.¹²⁸

Designs embodying features dictated by functional, manufacturing constraints will necessarily be similar, and similarities may arise due to the constraints rather than as a result of copying.¹²⁹ In such situations, small differences between competing products may be sufficient to rebut an inference of copying.¹³⁰ All the automated bag-filler machines performed the same functions of presenting the same standard-sized bag to a filling spout for filling with the same quantity of powder, and conveyed the bags to be packed away.¹³¹ Given that, it was unsurprising that there were similarities between the designs.¹³²

Other elements of the alleged infringing designs were standard, or off-the-shelf.¹³³ Most of the components involved only a very low level of originality and/or were commonplace. In addition, in relation to at least some components of the machine, there was evidence of a documented, independent design path.¹³⁴

Overall, the various differences between the respective works were sufficient to indicate that Monzeal's design was not objectively similar to Technopak's design.¹³⁵ The Judge also accepted that there was merit in the defendants' submission that Technopak had selected a small number of

126 At [97] citing *Zhang v Sealegs International Ltd* [2019] NZCA 389, [2020] 2 NZLR 308 at [164].

127 At [97].

128 At [100].

129 At [98] and [150].

130 At [98].

131 At [250].

132 At [250].

133 At [192].

134 At [173] and [177]–[180] regarding the filling spout and clamp arms; and at [195] regarding bag stack guides.

135 At [238].

drawings from thousands in an attempt to establish copying.¹³⁶ The overall conclusion was that the defendants had followed an independent design path and that any similarities between the designs arose because of functional constraints.¹³⁷ The allegation of copyright infringement was rejected.

IV Patents

A Interim injunction principles

Inguran LLC v CRV Ltd involved an application for an interim injunction.¹³⁸ Both the plaintiffs and the defendants produced straws of bull semen, largely sorted into the respective sexes, for sale to farmers for sex-selected herd management.¹³⁹ Typically, this is done to prevent the birth of male calves that are otherwise slaughtered at a young age. At issue was whether the defendants were infringing the plaintiffs' New Zealand-registered patents for the provision of sex-sorted animal sperm, using technology which sorts the sperm in fluid suspension (flow cytometry) according to its X- or Y-chromosome characteristic.¹⁴⁰ The plaintiffs sought an interim injunction to prevent the defendants from continuing to use the relevant technology pending a full trial.

The interim injunction was granted. For the reasons outlined below, Jagose J held that there was a serious question to be tried, the balance of convenience favoured the plaintiffs, and the overall justice of the case supported the grant of an interim injunction. As can be seen from the summary below, his Honour appeared to be influenced strongly by the fact that the subject matter involved the plaintiffs' statutory monopoly patent rights, resulting in a relatively generous approach being afforded to the plaintiffs.

(1) Serious question to be tried

Counsel for the defendants prepared detailed claim charts, which were designed to demonstrate that not every claimed feature of any claim was present in the alleged infringing technology, and therefore no infringement arose. Jagose J did not engage with these claim charts in detail, however. His Honour observed that it is an established principle of claim construction that

136 At [250].

137 At [250].

138 *Inguran LLC v CRV Ltd* [2023] NZHC 3692.

139 At [2].

140 At [2].

the claims must be construed purposively from the specification as a whole, as they would be understood by “a person skilled in the relevant art”.¹⁴¹ In order to construe the claims properly, the purpose of the various features would need to be understood from the overall specifications.¹⁴² On this basis, his Honour considered that it was not possible to make any real assessment of likely infringement at the interim injunction stage; the complete patent specifications ran to hundreds of pages. Accordingly, it was accepted by the Court that there was a serious question to be tried regarding the alleged infringements.¹⁴³

(2) Balance of convenience

As is often the case, the most extensive consideration was given to the issue of the balance of convenience. Jagose J began by observing that in assessing where the balance of convenience lies between the parties, patent cases carry a particular weight in favour of the grant of an injunction.¹⁴⁴ His Honour observed that that is because patents confer a statutory monopoly — “the opportunity to create its own market which may to a greater or lesser degree survive the expiry of the patent”.¹⁴⁵ This in turn affects the assessment of the adequacy of damages. Any infringement means that the monopoly advantage is lost and may not be adequately assessed in damages. Thus, other factors going to weight the balance against grant of interim relief may have correspondingly greater work to do.¹⁴⁶

Conversely, Jagose J considered that damages would be an adequate remedy for the defendants if they sustained loss by reason of the injunction, that is, if they needed to have recourse to the undertaking as to damages.¹⁴⁷ Damages would compensate them for any lost or deferred investment, including establishing a foothold in the market. Such damages are not complicated by the right to be immunised from competition.¹⁴⁸

141 At [22] citing *Peterson Portable Sawing Systems Ltd (in liq) v Lucas* [2006] NZSC 20, [2006] 3 NZLR 721 at [25]–[28].

142 At [23]–[28].

143 At [34].

144 At [35].

145 At [35] citing *Congoleum Corporation Ltd v Poly-Flor Products (NZ) Ltd* [1979] 2 NZLR 560 (CA) at 572.

146 At [35].

147 At [38].

148 At [38].

The defendants argued that the effect of an injunction may be to remove them from the New Zealand market altogether.¹⁴⁹ Jagose J acknowledged that the terms of an injunction should not interfere lightly with rights of market participation and the benefits of that to third parties.¹⁵⁰ Nonetheless, that is the intended statutory consequence of the grant of a patent. Accordingly, complaint of monopoly conduct does not carry significant weight.¹⁵¹

His Honour considered that the defendants' stronger argument was the substantial delay in issuing proceedings. The defendants' sexed semen processing facility was publicised in February 2022.¹⁵² The proceeding was filed in May 2023 and served on the defendants in June 2023. The application for an interim injunction was filed in July 2023.¹⁵³ The plaintiffs claimed that the 16-month delay was for practical, commercial reasons; they had hoped to resolve the matter through commercial talks.¹⁵⁴

Ultimately, this delay was not held to be fatal to the application for an interim injunction. The defendants had had the benefit of establishing their operation with the impugned technology in full knowledge of the consequential risk, and the patents had only a short remaining life.¹⁵⁵

(3) Overall justice

Jagose J considered that the grant of an interlocutory injunction up until the patents' expiry would give rise to the least irremediable prejudice to the parties. That would maintain the plaintiffs' opportunity to exploit their monopoly for the short remaining period of the patents' life, while leaving the technology available for use immediately after their expiry.¹⁵⁶

His Honour dismissed, however, a suggestion that interlocutory relief should extend beyond the period of the patents, commensurate with the period of alleged infringement. Interlocutory injunctive relief is ancillary to the substantive claim and not remedial. The plaintiffs could not, on an application for interim relief, effectively seek to extend the life of the patents.¹⁵⁷

149 At [39].

150 At [39].

151 At [39].

152 At [42].

153 At [41].

154 At [43].

155 At [49].

156 At [53].

157 At [54].

B *AI as inventor*

The issue of whether an artificial intelligence can be named as an inventor of a patent was considered in *Thaler v Commissioner of Patents*.¹⁵⁸ Dr Thaler created an AI system called DABUS or Device for the Autonomous Bootstrapping of Unified Sentience. Allegedly, DABUS autonomously created a new type of food container for liquids which had fractal walls that allowed it to interlock with other containers.

Dr Thaler applied for patents in various jurisdictions, naming DABUS as the inventor. Notably, Dr Thaler sought only for DABUS to be named as the inventor; Dr Thaler was named as the owner and provided a notice of entitlement to the invention on the basis that he derived title to the invention from the inventor under the principle of “accession, first possession and/or possessory title”.¹⁵⁹

At IPONZ, Assistant Commissioner Luiten refused to accept the application on the basis that the term “inventor” as used in the Patents Act 2013 refers only to a natural person.¹⁶⁰ On appeal to the High Court, Dr Thaler argued that it would be factually incorrect, and therefore encourage litigation and ultimately risk potential revocation of the patent, to say that anyone but the AI was the true inventor. He said that if an AI is not the inventor of what it invents, then those inventions are simply not patentable at all, and that this would achieve the opposite of encouraging and supporting innovation. It would arbitrarily exclude an important class of inventions from patentability.¹⁶¹

Palmer J concluded, however, that there was nothing in the legislative history of the Act to indicate Parliament intended to open up the possibility of an AI being an inventor.¹⁶² Accordingly, his Honour did not consider that it was appropriate for the courts to effectively expand the definition of inventor. Such a step was more appropriately reserved for Parliament.¹⁶³ His Honour refused to be drawn into any broader philosophical debate, saying that this case was simply a matter of statutory interpretation.¹⁶⁴

Dr Thaler has met with the same outcome in many other jurisdictions. For example, he was unsuccessful before the Full Court of the Federal Court of Australia,¹⁶⁵ and the High Court of Australia refused to grant special leave

158 *Thaler v Commissioner of Patents* [2023] NZHC 554, [2023] 2 NZLR 603, (2023) 170 IPR 460.

159 At [3].

160 *Thaler* [2022] NZIPOPAT 2 at [2]–[6].

161 *Thaler v Commissioner of Patents*, above n 158 at [22(c)].

162 At [32].

163 At [2].

164 At [24].

165 *Commissioner of Patents v Thaler* [2022] FCAFC 62.

to appeal.¹⁶⁶ The UK Supreme Court unanimously rejected his appeal on the basis that “an inventor must be a natural person”.¹⁶⁷

V Breach of Confidence

A *Interim injunction principles*

Vision Personal Training Franchises Pty Ltd v Williams involved a successful application for an interim injunction to prevent a person associated with a personal training franchise from having any involvement with a competing chain of personal training studios.¹⁶⁸

Mr Williams operated three New Zealand Vision PT personal training franchises. The second and third defendants operated personal training studios called “The Right Fit”. The directors of each were friends and former employees of Mr Williams.¹⁶⁹ The plaintiffs alleged that Mr Williams and the other defendants were using their confidential information and copyright materials. They claimed, amongst other things, that: large sections of The Right Fit’s operations manual were the same as the Vision PT operations manual; The Right Fit used a series of advertisements copied from Vision PT material; the opening of a The Right Fit studio was advertised in a Vision PT client newsletter; the defendants appeared to be operating the Vision PT studios and The Right Fit studios as a combined business.¹⁷⁰

Mr Williams submitted that even if there was evidence of the second and third defendants using the plaintiffs’ confidential information, there was no cogent evidence of Mr Williams having done so.¹⁷¹ Mr Williams submitted that he was simply providing consultancy/training services to The Right Fit under the auspices of his separate company, Strive to be Healthy Limited (Strive). This was inconsistent with Mr Williams’ prior statements that he had not provided any formal support to The Right Fit.¹⁷²

Walker J held that there was a serious question to be tried regarding the involvement of the first defendant (Mr Williams) with the competitive personal training franchise.¹⁷³ Her Honour noted that The Right Fit manual

166 *Thaler v Commissioner of Patents* [2022] HCATrans 199, 11 November 2022.

167 *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2023] UKSC 49 at [56].

168 *Vision Personal Training Franchises Pty Ltd v Williams* [2023] NZHC 2848. The author of this review appeared as counsel for the plaintiffs in this case.

169 At [4].

170 At [44].

171 At [45].

172 At [51].

173 At [47].

referred to Strive/Mr Williams in ways that appeared to go beyond the provision of training services, but this was not explained. For example, the manual said: “Whenever we open up a new studio 100 shares are added to our overarching company Strive.”¹⁷⁴

In addition, quantifying the loss of the plaintiffs’ goodwill because of the defendants’ actions was a difficult exercise,¹⁷⁵ favouring the grant of an injunction. The balance of convenience also favoured the plaintiffs by a clear margin.¹⁷⁶ Accordingly, Mr Williams was restrained from having any involvement with The Right Fit business.¹⁷⁷

VI Plant Variety Rights

A *Conduct outside New Zealand*

Gao v Zespri Group Ltd was only New Zealand’s second infringement case under the Plant Variety Rights Act 1987 (the PVR Act).¹⁷⁸ At first instance, Katz J held that Mr Gao and his company, Smiling Face Limited, had surreptitiously supplied two varieties of Zespri’s gold kiwifruit to a number of orchards in China.¹⁷⁹ Katz J described Mr Gao as a person who lacked a moral compass and did not place a high value on honesty.¹⁸⁰

Many of the relevant activities took place in China, not New Zealand. The exclusive rights afforded by the PVR Act include the exclusive right to produce for sale, to offer to sell, and to sell the relevant reproductive material. The exclusive rights did not, however, include the express right to control the export of protected plant varieties.¹⁸¹ Her Honour accepted, however, that conduct within New Zealand that facilitates the export of protected varieties can potentially diminish a rights holder’s enjoyment of its exclusive rights in New Zealand. At first instance, damages of nearly \$15 million were awarded, calculated on the “user principle” basis.

174 At [48].

175 At [60].

176 At [62].

177 At [71].

178 *Gao v Zespri Group Ltd* [2021] NZCA 442 [*Gao* (CA)]. As noted in *Zespri Group Ltd v Gao* [2020] NZHC 109 [*Zespri v Gao*] at [23], the only previous infringement case under the PVR Act is *Cropmark Seeds Ltd v Winchester International (NZ) Ltd* HC Timaru CIV-2003-476-8, 28 September 2004; *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* [2005] NZCA 301.

179 *Zespri v Gao*, above n 178, at [192]–[195].

180 At [43].

181 This position has now changed: Plant Variety Rights Act 2022, s 15(3).

On appeal, damages were reduced to just over \$12 million, but were calculated on the same user principle basis. The appeal was largely unsuccessful, succeeding only on narrow points of liability and quantum.¹⁸² The Court of Appeal noted that it is not for infringing parties, faced with the enormity of the price, to now repent of the bargain. The deal is done by reason of their actions, and the law simply backfills the price, no matter how large or small.¹⁸³

An application for leave to further appeal to the Supreme Court was unsuccessful.¹⁸⁴

VII Procedure

A *Subsequent patent claim after copyright determination*

Anura Ltd (formerly Orion Marine Ltd) v Sealegs International Ltd concerned amphibious boats and boats with amphibious systems.¹⁸⁵

In 2016, Sealegs brought a proceeding against Orion and Smuggler alleging infringement of copyright in the amphibious systems that Orion was making and supplying and that Smuggler was attaching to its boats. In December 2016, Sealegs obtained an interim injunction preventing Orion and Smuggler from making or selling the amphibious systems. Sealegs gave the usual undertaking as to damages.

Sealegs initially said it would also claim breach of patent. Sealegs was directed that, if it was going to amend its pleading to add a claim for breach of patent, it do so by 30 June 2017. Sealegs chose not to do so. It confined its proceeding to a claim for breach of copyright.

Sealegs succeeded in its copyright claim at first instance,¹⁸⁶ but that judgment was set aside on appeal.¹⁸⁷ Orion, Smuggler and the other appellants brought a proceeding to enforce Sealegs' undertaking as to damages. Sealegs filed a statement of defence and counterclaim alleging that the appellants had breached Sealegs' patent. Sealegs said that, owing to those patent breaches, no amount was owing on its undertaking.

The appellants applied to strike out the counterclaim and those parts of the statement of defence that alleged breach of patent. The appellants argued

182 *Gao* (CA), above n 178.

183 At [139].

184 *Gao v Zespri Group Ltd* [2022] NZSC 13.

185 *Anura Ltd (formerly Orion Marine Ltd) v Sealegs International Ltd* [2024] NZCA 538, (2024) 181 IPR 286.

186 *Sealegs International Ltd v Zhang* [2018] NZHC 1724.

187 *Zhang v Sealegs International Ltd*, above n 126.

that the patent claim could and should have been pursued with the copyright claim, and that it was therefore a *Henderson v Henderson*¹⁸⁸ abuse of process for Sealegs to now make the patent claim. The appellants' *Henderson v Henderson* allegation failed in the High Court,¹⁸⁹ but succeeded on appeal.¹⁹⁰

Sealegs submitted it was not practicable to add a patent claim to the earlier proceeding because there was no prospect of that claim being heard together with the copyright claim in September 2017. It claimed that a patent claim would have required additional pleadings, and discovery and inspection of documents. There would have been extensive additional expert evidence.¹⁹¹

The Court of Appeal did not accept that the addition of a patent claim would have prevented a trial from starting in 2017.¹⁹² Sealegs never raised the question with the appellants or the Court at the time, as it should have done, and thereby failed to “put its cards on the table”.¹⁹³ As the Court observed: “Further, the need for openness is even greater where, as here, the plaintiff has obtained an interim injunction.”¹⁹⁴ For Sealegs to bring a patent claim subsequently was to “harass the appellants and to make inefficient use of scarce judicial resources”.¹⁹⁵ Moreover, “Sealegs not only knew of the alleged patent infringement before it started the earlier proceeding but said, when starting that proceeding, that it would also be bringing a patent proceeding”.¹⁹⁶ As Sealegs was suing the appellants in respect of the same acts as in the earlier proceeding, the concerns underlying the abuse of process principle were engaged.¹⁹⁷ This factor pointed to a finding that Sealegs should have brought the patent claim in the earlier proceeding and that to do so subsequently was an abuse of process.¹⁹⁸

In March 2017, Sealegs had applied to the Commissioner of Patents to amend its patent. Sealegs further submitted that, as a result of its amendment application, it could not have brought a patent claim in 2017; s 85 of the Patents Act provides that the Commissioner must not allow a patent to be amended while an infringement proceeding on that patent is pending. It said that although there is a procedure under s 89 in which the court can amend

188 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch).

189 *Orion Marine Ltd v Sealegs International Ltd* [2021] NZHC 3207.

190 *Anura Ltd (formerly Orion Marine Ltd) v Sealegs International Ltd*, above n 185.

191 At [86].

192 At [106].

193 At [107]–[112].

194 At [111].

195 At [112].

196 At [81].

197 At [82].

198 At [82].

the patent in the context of a patent proceeding, that procedure normally takes many months. Sealegs submitted that would not have concluded by September 2017 and so once Sealegs decided to amend the patent it could not have brought a patent claim with the copyright proceeding.

The Court of Appeal accepted that a court would ordinarily deal with a s 89 application before the substantive hearing and, “had Sealegs applied under s 89 after June 2017, its application would not have been determined before the September 2017 trial”.¹⁹⁹ Nonetheless, it was Sealegs’ choice to apply to amend the patent. The Court of Appeal concluded:²⁰⁰

The timing of these steps was in Sealegs’ hands. If Sealegs had made the amendment application earlier (or if it had brought a patent claim in March 2017 and promptly made a s 89 application) there is unlikely to have been a timing problem.

The Court concluded:²⁰¹

Sealegs should have brought its current claim for patent infringement in (or with) the earlier proceeding, and ... it was an abuse of process for it to bring the patent claim subsequently. Sealegs is suing the appellants in respect of the same acts as in the earlier proceeding. The appellants faced the stress and cost of responding to claims in two proceedings when one would have done. This is oppressive and wasteful of judicial resources. The oppression and waste are aggravated by Sealegs’ failure to be open with the appellants and the Court.

B *Without notice applications — obligations of full and frank disclosure*

In *Green Way Ltd v Mutual Construction Ltd*, Campbell J rescinded a without notice search order granted in the context of a breach of confidence claim because the order was granted without full information being provided to the Court.²⁰²

Green Way Ltd was a civil engineering and construction company, specialising in asbestos removal and demolition. Mutual Construction was establishing a new branch of its business also specialising in asbestos removal and demolition. That business involved former employees from Green Way. Green Way alleged “that the former employees [had] obtained and misused

199 At [123].

200 At [124].

201 At [130].

202 *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704.

Green Way's confidential information, and that [Mutual Construction had] participated in, and benefited from, that misuse".²⁰³

At the time the proceeding was filed, Green Way applied, without notice, for orders including a search order and an interim injunction, and "[t]he application was supported by two affidavits and accompanied by a memorandum of counsel and various undertakings".²⁰⁴ The orders were made and the search order executed. The search order required Mutual Construction to permit an independent solicitor and the plaintiff's IT technicians to obtain computers, laptops, smart phones, and associated electronic equipment. It also required the company to provide the necessary passwords and passcodes.²⁰⁵

Subsequently, Mutual Construction applied to rescind the orders. Campbell J observed that a without notice application can be made only in exceptional circumstances, such as where proceeding on notice would cause undue delay or irreparable injury. The applicant must make full and frank disclosure of all material facts, whether those facts assist the applicant's case or not.²⁰⁶ Further: "The applicant must also make 'reasonable enquiries' to ensure that all relevant material is disclosed."²⁰⁷ In particular, where a search order is sought, which interferes seriously with a defendant's rights, "the obligation to make proper enquiries (and the obligation of full and frank disclosure generally) is enhanced".²⁰⁸

Here, a voluminous quantity of material was supplied in support of the application. It was therefore essential that the accompanying memorandum of counsel identify relevant material and possible grounds of opposition or defence.²⁰⁹ The accompanying memorandum omitted important information, including that the former employees had taken legal advice and a firm of solicitors was acting for them, and that they had confirmed in correspondence that they would not use or misuse any of Green Way's confidential information.²¹⁰ Nor did the affidavit evidence include full details of the pre-action correspondence. The failure to disclose was stark. "It is

203 At [10].

204 At [18].

205 At [20].

206 At [34] citing *McPherson v Bergers Securities Ltd* HC Auckland CIV-2003-404-2752, 12 June 2003 at [2] and [3].

207 At [36].

208 At [37].

209 At [54].

210 At [64].

likely”, said Campbell J, “that, had the full facts been disclosed, the orders would not have been made”.²¹¹ Accordingly, the orders were rescinded, and all the documents and data were ordered to be returned.²¹²

Green Way sought leave to appeal the decision rescinding the orders, but leave was declined.²¹³

211 At [80(b)].

212 At [84].

213 *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 3029.

