IN THE SUPREME COURT OF NEW ZEALAND SC 10/2018

BETWEEN **NORTHLAND ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED**
Appellant

AND **CHIEF EXECUTIVE OF THE MINISTRY FOR PRIMARY INDUSTRIES**
First Respondent

COMPTROLLER OF CUSTOMS
Second Respondent

CHIEF EXECUTIVE OF THE MINISTRY FOR CULTURE AND HERITAGE
Third Respondent

Hearing:	20 June 2018
Coram:	William Young J Glazebrook J O'Regan J Ellen France J Arnold J
Appearances:	D M Salmon, D A C Bullock and H A T Bush for the Appellant J K Gorman and H T N Fong for the First Respondent Second Respondent – Abiding B R Arapere and H T N Fong for the Third Respondent

CIVIL APPEAL

MR SALMON:

May it please the Court. Salmon with Bullock and Ms Bush for the appellant.

WILLIAM YOUNG J:

Mr Salmon.

MS GORMAN:

E Te Kōti Mana Nui. Ms Gorman ahau. Kei kōnei māua ko Mr Fong mō te kaiwhakahē tuatahi, me te kaiwhakahē tuarua. May it please the Court. Counsel's name is Ms Gorman and I appear with Mr Fong for the first and second respondent.

WILLIAM YOUNG J:

Thank you Ms Gorman.

MS ARAPERE:

E Te Kōti Mana Nui. Ko Ms Arapere ahau. Kei kōnei ahau mo te kaiwhakahē tuatoru. Your Honours, may it please the Court. Ms Arapere for the Ministry for Culture and Heritage.

WILLIAM YOUNG J:

Thank you Ms Arapere. Mr Salmon.

MR SALMON:

Thank you Sir. There was one small piece of housekeeping, I believe, regarding some confidentiality orders. I'm not sure if that needs the Court to address it in detail but I think the upshot is that the Crown's suggestion is that the media be shown one page of a schedule from a memorandum that was the basis for orders in the Court of Appeal, which contains a list of names that the media might be restrained from publishing. I have no objection to that if that's the proposed approach.

WILLIAM YOUNG J:

We're not conscious of this actually.

MR SALMON:

It's raised –

WILLIAM YOUNG J:

Is it the list of exporters?

MR SALMON:

List of some MBIE personnel and experts. Individual's names.

WILLIAM YOUNG J:

Oh I see.

MR SALMON:

It's arisen Sir because the registrar was contacted by TVNZ with an application to be here, and my learned friend noted that there were orders in the Court.

WILLIAM YOUNG J:

There are extant orders?

MR SALMON:

Yes.

WILLIAM YOUNG J:

In that case we don't need to do anything.

MR SALMON:

No Sir. I think the only question is what the media are shown today and they'll be listening now so I think the expected basis is that they've already been shown that list of names.

WILLIAM YOUNG J:

And they're aware there are existing confidential orders?

MR SALMON:

I believe so Sir.

WILLIAM YOUNG J:

Okay, thank you.

MR SALMON:

And apologies for raising it that way, it's just arisen. Your Honours today I intend to be fairly brief and move fairly quickly through the first part of the appeal, which I'll be arguing. My junior Mr Bullock will be arguing the Protected Objects Act 1975 issue so I'll just address the proposed structure now of the first question on appeal.

My proposed way forward, subject to what will assist the Court more, is to deal very, very briefly in a high level way with the statutory scheme, deal briefly with the Court of Appeal's approach to interpreting that scheme, and in particular to two assumptions that underlay its approach to interpretation, again briefly. Review, again briefly, the factual background. Most of the factual issues that were before the Courts and the Courts below have fallen away because the unreasonableness component of the review has not been served. So really just identifying the broad mischief that has given rise to this case. I'll spend a little more time, but still not a great deal of time, on legislative history, and then engage in detail with the interpretational question around the definition of "finished or manufactured indigenous timber products." If it pleases the Court that's the structure I propose.

WILLIAM YOUNG J:

Can I just ask you one question. If some of the declarations that you seek are made it would have some import on kauri exporters. They must be aware of the litigation, but was consideration given to joining one or more of them?

MR SALMON:

No Sir, no consideration given to joining them, partly because there's no particular single standout exporter, partly also because, and this is something I'll come to, the Court of Appeal appears to have worked on the assumption that MPI is the gateway controller for these sorts of exports. In fact the type of exports at issue today are ones that require no inspection, no oversight of any sort by MPI, indeed no power to inspect. The significance of that is we really don't know who the representative parties would be. So the affidavits show that my clients have endeavoured to identify locations at which there's stockpiling and work being done, and there's, I'm not sure if Your Honours have seen it, but detailed photographic evidence of what they can find.

WILLIAM YOUNG J:

Yes, I've seen some of it. I've sort of looked at it.

MR SALMON:

The point there, Sir, is that doesn't mean that they're in a position to say well a good representative respondent would be X or Y. But certainly Sir this has been well publicised all the way through and there's been no attempt to join by any of the exporters. So I understand the point Sir, but I think they've had their chance and indeed still have their chance here to seek to intervene.

I anticipate that the Court has had a reasonable chance, at least, to look at the statute and the judgments below, so I'll deal just briefly by way of opening remarks with the Forest Act 1949 scheme in Part 3A and really by way of opener, the structure sets out the relevant part of it is at tab 2 of the first volume of the appellant's authorities, and the scheme of the Act involves under Part 3A, which has an express purpose provision referring to what we submit are one of the purposes of the Act, but only one, which is the promotion of sustainable forest management of indigenous forest lands. Effectively sets up three controls over indigenous timber and its use in exports.

WILLIAM YOUNG J:

Sorry, what should we be looking at? Part 2?

MR SALMON:

Part 3A, tab 2, Forests Act 1949, and from section 67A onwards. So page 27 of the statute.

WILLIAM YOUNG J:

Thank you.

MR SALMON:

So the purpose provision, and my friends will point to this, 67B, deals only with the purpose of sustainable forest management for reasons that I'll come to, and I don't think this is disputed, that the section doesn't just embrace existing forests, it embraces other subsidiary purposes, but that is the stated statutory purpose. There are then a suite of three different types of controls to limit the use or exploitation or export of indigenous timber. The first is export controls, which is where we'll spend most of today's time, 67C. The second is a general prohibition on milling indigenous timber except in certain circumstances. So that's control of the milling stage. If you want to cut up indigenous timber this is the gateway for that, and that in turn links to felling controls, which are provided from 67D(b) onwards. So that sets up a statutory scheme whereby the preservation and protection of indigenous timber generally is achieved by some controls over what land use can occur and what felling can take place. Controls over who and how can mill indigenous timber, and then specifically export controls, and as the Court will have noted from the Court of Appeal's decision, export controls and the purposes behind them are a live issue today.

In terms of the export controls then specifically under section 67C, the Court will see that in subsection (1) there are various categories of types of indigenous timber that are not part of the prohibition on export. And the significant part for present purposes is just to note that all of those except (b) and (c) require the involvement of the Ministry before there can be an export.

So all bar personal effects, which is (c), and finished or manufactured products, which is (b), and which is the category in issue here, all of the others have MPI as the gatekeeper, so to speak, for export, and that's a significant plank in the interpretation approach on our case because one of the realities is that MPI's ability, which the Court of Appeal focused upon to consider each possible export in its own unique factual context is a bit of a miss with respect to the Court of Appeal because it can be assumed that a reasonable proportion, possibly the bulk, of finished or manufactured products will be going out without any MPI inspection. So finished or manufactured products and personal effects are without oversight from MPI unless it happens to occur.

I'll just note that one of the issues covered in more detail in the Courts below but needing only brief mention here is that the reason that MPI is aware of some of these finished or manufactured exports is that there's been an ad hoc practice developed whereby parties will voluntarily notify MPI of intended exports. They have to do it for stumps and other products that are in the other part of section 67C but they've chosen to do it at times for finished or manufactured products. One of the reasons postulated in the Courts below during argument for why that might have been, it's just a prophylactic step by exporters. Getting MPI's tick-off gives them comfort because otherwise they're at risk of prosecution because it's an offence to export wrongly. Whatever the reason is, it means we have some insight from MPI's records and the affidavits on what is going out as finished or manufactured indigenous products and otherwise insight from what can be seen on the ground and shown on the ground in the evidence and then what is seen advertised abroad.

Dealing then with the definition of finished or manufactured timber products, which is at page 7 of the Act in tab 2. The provision sets out in three paragraph the components of the definition, the first being the requirement that the wood product be manufactured in its final shape or form, ready for installation, et cetera, "Without the need for further machining." I'll come back to the detail of the language in there because that requires unpicking. And

then provides that this definition, the definition in (a), includes, (b), "A complete item or a component of an item (whether assembled on in kitset form), then with some examples used. And one of the issues there is whether this enables a piece of kauri that will overseas be assembled with the rest of a kit to be exported or whether it requires nevertheless a complete kit or kitset or complete assembled kitset, of which part is kauri, to be completed before it leaves New Zealand.

But probably the biggest point and the one of most significance is the status of paragraph (c), which the Courts below have regarded a informing the interpretation of (a) and (b) and which the appellant submits is in fact a stand-alone provision that trumps those and provides that certain low-value-added bulk-type timber exports are prohibited, even if they might otherwise come within (a) and (b), and that's the clearest and most acute interpretation point before the Court today.

So in terms then of the Court of Appeal's decision – and unless it will help the Court, I think I can be pretty brief about this. The first point is that the Court of Appeal undertook an interpretation that was based first on a review of the intention underlying the passage of Part 3A, and in doing so – this is paragraph 37 of the Court of Appeal's judgment – found that there was no statutory intention to dampen export demand, and I'll come back to that, because the extrinsic materials and the scheme of the Act suggest otherwise. And then found, as well as some more detailed analysis of the wording of paragraph (a) of the definition, that paragraph (c) of that definition was, as Justice Toogood found in the High Court, illustrative – and that's at paragraph 44 of the Court of Appeal's judgment.

Regarding one of the categories of types of products that was exported, in particular the what I might call "totem poles", large, large poles that are effectively kauri logs with some degree of carving attempted on them, the Court of Appeal held that the way in which they should be assessed was – because it was a question of degree on the Court of Appeal's view – one that it was appropriate for MPI or Customs to scrutinise and question as the

products were exported, and that's where I note again of course these products do not need to be as of right inspected.

So two key points of the argument for the appellant today is, one, the Court of Appeal erred in finding that a statutory purpose underlying and apparent from Part 3A was to dampen export demand –

GLAZEBROOK J:
Do you need to dampen the, do you need to go so far as dampen export demand? Don't you just need to say it was to make sure it was finished high-value products that were exported? Because that's clear from the language, isn't it, of the definition, and also from – I'm just looking at paragraph 73 of the first respondent's submissions that they're relying on, which actually does of course also talk about low volume? But it's the high-value aspect, isn't it, that…

MR SALMON:
Yes, I think it is.

GLAZEBROOK J:
So aren't we getting a bit tied up with dampen export demand rather than just saying it's low-volume, high-value, which is what has actually been said by the Minister?

MR SALMON:
Yes. Yes, we may not need to go there. I guess I'm cautious about retreating on it for these reasons. The prism through which we submit the Act should be viewed is one where – and this is very clear from the Hansard excerpts quoted in our submissions, I'm not sure if the Court's reviewed them – but Parliament saw, and it was an unusual Act because it had bilateral support for the Bill, so across the House it was viewed as an Act that protected forests by protecting forests but –

WILLIAM YOUNG J:

Sorry, protected forests by protecting…

MR SALMON:

But protecting the forests first. Also protecting forests by controlling milling, recognising that if the milling industry got away from itself that might promote, subvert or covert logging. But also expressly – and my learned friends have criticised us for putting forward departmental reports as extrinsic material, and I understand why, I can come to that – but in Hansard itself it is clear that the damping of export demand was seen as a lever, to use one of the Member's words, for assisting the achievement of the local goals of environmental protection and of value add and low volume.

So, Your Honour, I do accept your observation that it's not necessary for our case to establish that that was the purpose but it assists in my respectful submission because, as I'll come to in reviewing the extrinsic materials, briefly, I can assure the Court I'll be brief on that, Parliament was engaged quite specifically in a concern about the then version, the early '90s version, of the problem we have now. The Court will know from the affidavits the volume and nature of what's been exported as swamp kauri has caused public concern in the same way that Hansard shows that public concern about raw logs and wood chips being exported from native timbers in the early '90s drove the Forest Amendment Act. And the reason that's significant is that Hansard shows again and again Members saying the public concern and the national interest concern is with low-value exports of, in that case, logs and chip being exported. And that's the driver for a definition of finished and manufactured that we submit is intended to be narrow and tight. And the reason I mention that now is if one imagines some Member in the House standing up and saying, "Of course if you slice the log into three longitudinal pieces with a band saw then it is free to go out," there would have been immediate rejection of the proposition. The reason logs and chip were identified is they happened to be the high volume form in which low-value wood left the country.

Now, in the “gold rush in Northland” which is what the evidence shows the media has been calling it, it’s not logs unless they’re dressed up as carvings – and I’ll briefly come to a few photographs of just how extreme those examples are, they really are surface decoration on what are mighty kauri logs – or they are rough-sawn planks, possibly sometimes sanded, packed into pallets. So the statutory history is significant, because it’s a useful question to ask when considering the purposes underlying the Act whether Parliament would ever have considered that there would be a mid-point between logs and chip which would somehow sweep through the definition of finished and manufactured indigenous timber products. And it won’t surprise the Court that our essential submission is any interpretation which lets that through explodes the very purpose of the prohibition. And so that’s why I’ve begun by pointing to a suite of interlinked controls to protect and prevent the high volume export of kauri and other indigenous timber products, a general prohibition on exports and then a very narrow and limited exception. And the statutory history shows that that narrow and limited exception for a while was going to have MPI and did have MPI oversight. So the appropriate housing for viewing the definition of “finished or manufactured timber products” in our submission is to see it as a deliberately narrow proviso to an otherwise strong export ban driven by concerns to prevent a volume exodus, concerns to ensure value is added to communities in New Zealand, and a concern to dampen export demand. So that’s a long-winded way of answering Your Honour Justice Glazebrook’s question. I don’t need to show that the purpose was to dampen export demand, but it is of assistance in reinforcing why narrow interpretation is, in our submission, appropriate.

GLAZEBROOK J:

I think I was putting to you that the high-value in itself does that, doesn’t it, because if it has to be high-value it’s not really dampening the export demand, it might be even increasing the export demand in terms of a dollar return to the community.

MR SALMON:

It would be increasing export demand but I can appreciate my learned friend may raise, there will always be some difficult examples of relatively low-value finished or manufactured products. If someone chose mindlessly to create clothes pegs out of swamp kauri, we could have a debate about whether they're finished, but I think my point about dampening export demand is there's a profound difference between export demand for a product made in New Zealand and what the evidence shows is happening here, which is a number of cottage industries in the States or Europe selling slabs of kauri that they convert, or buying slabs of kauri cheaper from New Zealand, that they then work on and convert. So a twofold question there. One is whether things can leave the country which might conceivably be finished may not, in the Court of Appeal's words, need further work. A rough-sawn slab might be a table top for someone in the world. We say that's not the statutory test.

But secondly a more important question, whether (c), which makes clear that things such as furniture blanks, which a rough-sawn slab must be, it must be a blank for a table top. Or dressed timber which is, again, exactly what's being exported. Whether that's independently banned as affecting that statutory purpose, and a good analogy would be the approach taken to protection generally of objects such as this which are scarce and finite, and that would be, for example, endangered wildlife. Game parks are set up in Africa that, of course, prevent hunting, but it is only by limiting the demand for trophies, scalps, animal parts and so on, that those bans are fully effective, because the integrated whole of control and demand for scarce species is a combination of supply-side and demand-side restriction. Can I trouble the Court briefly to –

WILLIAM YOUNG J:

Can I just ask. The permission, or the exemption from export ban of finished or manufactured indigenous timber products, what else does is apply to apart from swamp kauri?

MR SALMON:

It applies to normal kauri. So it's common ground that this provision applies to swamp and felled kauri and windblown kauri, and all other indigenous timber. So if one wishes to take a piece of rimu or kauri, or anything that has fallen, or some of the Auckland and Northland kauri that is now dying from kauri dieback and do something with it, it has to fit within the milling restrictions, and then to be exported has to fit within one of these restrictions, and if it's to be exported without going through MPI, it has to be a personal effect, which is not we're about today, or it has to be the finished product.

WILLIAM YOUNG J:

Okay, I understand that, thank you.

MR SALMON:

Is the Court generally working off a hard bundle or electronic copies?

WILLIAM YOUNG J:

Hard bundle.

GLAZEBROOK J:

Our electronic is not really terribly user friendly, it has to be said, as yet.

MR SALMON:

Neither is mine, Your Honour, but having being pushed through it for three months last year in the High Court last year I've now made the leap so if I mess it up can I apologise to the Court in advance. My eyesight and my computer use may yet be a problem but I hope I can get it right. If I can trouble the Court to go to tab 11 and I'll be very brief about this. This is not a case where the facts are more than background to understand the mischief and scale of the issue. Now again I'll do this without –

GLAZEBROOK J:

Sorry, is this tab 11?

MR SALMON:

Tab 11, volume 2, of the case on appeal, my apologies. So I'm going to go briefly to two affidavits and a couple of photographs so the Court gets a sense of what concerns have prompted the appellant to bring this case. now I note up front that there are, there's a large volume of affidavits here, and in some of them MPI witnesses have sought to explain why certain photographic evidence might have been permissible or might have been a stump which has been approved and so on. I accept those comments are generally available. If Your Honours are interested in reading the affidavits, a fairly clear picture emerges nevertheless of a number of exports going out without going through MPI, and the volume of that we simply don't know but we can assume it's the majority, and a number of products going out that do not appear to be finished or manufactured unless form prevails over substance.

So in the affidavit at tab 11, which is the initiating affidavit from Ms Fiona Furrell, one of the members of the appellant, the scale of the mining and industry is generally described in her paragraphs 8 through 10, and links are provided there to pages in the case and if I can get it right, in volume 5 you will find just a couple of pictures of what she's described at 8 through 10. Page 1422 of volume 5 shows the scale of mining that typifies the exploration for swamp kauri.

WILLIAM YOUNG J:

So this requires a resource consent under the district plans I take it?

MR SALMON:

Some do. Large scale ones in swampland I think do under the provisions applying in Northland, to the Northland Regional Council. I think otherwise no Sir. But it is –

WILLIAM YOUNG J:

So it's just people digging up their own lands to see what they can find under it?

MR SALMON:

Yes, and some evidence that some of the people doing it are fairly rugged types digging up any land they can get their hands on. You might recall the scandal about whether or not the fuel line rupture was this sort of thing. There's some evidence of some fairly rugged characters involved in this industry that I won't trouble you with, but that at page 1422 is one aerial I think drone shot of an example of a recently dug up area. Then at paragraph 10 of Ms Furrell's affidavit she refers to page 1429 of volume 5. And again this is not my attempt to be scientific and give you a full run through the affidavits, but rather some examples of scale and size in the context where there is just no cottage industry in New Zealand of turning these into high-value products. That shows an aerial shot of what Ms Furrell refers to in paragraph 10 as an example of a stockpile. You can see that –

O'REGAN J:

Sorry, what page are you on now?

MR SALMON:

Page 1429 Sir. My apologies as they haven't printed well. In the electronic version that's a colour photograph aerial and the lumps to the lower right of the photo we're viewing.

WILLIAM YOUNG J:

No it's printed well, it's just the numbers that are hard to see, where it's against the dark background.

MR SALMON:

My apologies. You will see there those piles of logs being, again an indication of scale. And again from the same paragraph in her affidavit if the Court can be troubled to turn to page 1294, 1294 is *Herald* article she refers to. These again are just examples referring to some Oravida exports from a site now owned by its new name Ruakaka Kauri Ltd, which was quoted in that article as having an estimated 2800 tonnes of swamp kauri stockpiled in its yard, and that article at 1294 has two examples in the top right of the ornamental poles,

or totem poles. If the Court can see it in the copy that you have you'll see that there's a crude kiwi etched onto the right-hand of those poles lower down. Those are examples of, well for want of a better word, could be called ornamental or totem poles, and just finally on a similar point from her affidavit, same paragraph 1216 being another article, a *Radio New Zealand* article this time showing an aerial shot of that Oravida/Ruakaka stockpile and that aerial shot shows the volume of timber which all the evidence suggests has an export venue as its ultimate location.

So those are some aerial shots of the sort of "menace", one could say. Ms Furrell's affidavit then goes on at paragraph 12 to give an indication of why the industry is thriving, and she refers to page 1297 of volume 5 and, if I could trouble the Court to look at that, this is an example of a page from a website of one of the American vendor who make tables and so on, and at page 1297 you'll see a photo of a 40 foot long ancient kauri slab – if the Court has that there? It's quite hard to see, at least on my screen version, but to the left and below that is the asking price from this company's website – she summarises this in her affidavit, and I think there's a clearer copy elsewhere – but if the Court can see, that has the listed priced for that one slab as being $US100,000, and that's for sale in the United States in that form, New Zealand swamp kauri, can't be from anywhere else. So with one slab, and that's a big one admittedly, but with one slab at that sort of price one can see why export demand looms large in concerns about volumes leaving the country.

WILLIAM YOUNG J:
So what does your client say that slab is likely to be used for, a 40 foot long table or, which it could be?

MR SALMON:
It could be. It could be a benchtop, it could be – there's stories of some offices being panelled in the stuff – it could be used for any number of things. I think the enormous ones – this is a submission rather than evidence – are

more likely to be used for mighty bench or table. In other words, unlikely to be cut up because of their pure size.

WILLIAM YOUNG J:
Right.

MR SALMON:
There's indications on one of the other websites, a Dutch one, of veneers being made and shots of smaller furniture. So I think the question depends in part on the size of the these supposed table tops, but anything that's a slab is being exported as a table tops or, quote, "rusticated table top". Call you what you will, it's sawn lumber when it leaves New Zealand.

At paragraph 18 of her brief, and again I don't intend to spend too much time on this, but she refers to the sort of evidence of what is happening abroad, and her reference there is to page 1307 of the bundle, which are excerpts from Alibaba.com. I'm not sure if this Court's stumbled across that, it's an international version of Trade Me or eBay.

O'REGAN J:
Sorry what's the page number again?

MR SALMON:
1307. And you'll see at the heading of that page, "New Zealand ancient kauri logs, buy New Zealand ancient kauri logs, product on Alibaba," and then advertisements with photographs of logs, and I won't take the Court through it in detail but if you scroll two more page to 1309 you'll see in Dutch, "Nieuw zeeland oude kauri plaat voor tafelblad," which appears to be, "Logs for table," but you can see the state of the labs there, they really are logs sliced through with a band saw, and so on. So those pages continue –

WILLIAM YOUNG J:
Just going back to 1307, if that's logs exported it would have to be stump wouldn't it?

MR SALMON:

If it was stump I think that would, just on an eyeball, fail to make the definition of “stump”, which is…

WILLIAM YOUNG J:

Because it’s too long?

MR SALMON:

Too long. We had some debate with Justice Toogood about whether we could discern what was a stump and what was not from photographs and I accept I’ll be straining the Court’s patience if I try to do that, and we don’t need to today. But unless that was a stump exported with approval the way to get that out – and it may not have yet left New Zealand in that photograph of course – the way to get that out under the old regime would have been to paint carvings onto it or slice it up into five.

WILLIAM YOUNG J:

So just, where’s the definition of “stump”?

MR SALMON:

The definition of stump…

WILLIAM YOUNG J:

There’s a sort of slightly mathematical definition…

MR SALMON:

It’s the definition with, it’s allowed enough trunk above the root ball, the equivalent of the diameter at the root ball, of stump above the root ball, if that makes sense Sir. And that definition was introduced, I’m not sure if the Court picked this up –

WILLIAM YOUNG J:

It’s after the *Ancient Trees* case.

MR SALMON:

Correct. So *Ancient Trees of NZ Ltd v Attorney-General* HC Wellington CP483/93, 29 April 1994 would have been the time for Parliament to leave this Act allowing a free export of swamp kauri because that case determined that entire swamp kauri trees were all "stumps". Parliament said, no, no, no, expressly referred to that case in debate, it's in Hansard.

WILLIAM YOUNG J:

The exporter who relies on the stump exception has to get a certificate.

MR SALMON:

Has to get a certificate, correct. Just while we're on these pages I think I've mentioned 1309. If the Court can be troubled to keep turning to 1311. An example of the sort of stacking or palletising of planks can be seen, and over at 1312 actual just logs. Now my learned friend will say well this is advertising, this may not be happening, we don't know it is, but this is showing on 1312 someone promoting the notion that they can bring it at a minimum order quantity of 180 tonnes 40 foot container per month of kauri and referring to just logs. So that demand point looming large and similarly 1313, a shot inside a container of logs patently either ready to go or arriving in another country. Again just chopped up into convenient slab sizes and the Court will be able to see the ones near the top do not look like tables in any sense and nor do some of the others. Again on 1314, slabs and advertisers for dining or boardroom, but not by any means finished and in any sense redolent of the sort of export that one would imagine Parliament had in mind in passing paragraph (c) of the definition.

So that wee dredge of examples carries on for some pages, and I won't tire the Court with it, but I will note just regarding that Netherlands exporter, at paragraph 20(a) of Ms Furrell's affidavit she refers to the Netherlands company Tree Trunk Tables specifically, which links to page 1298 of the bundle, talking about its making of tables. The making is always happening abroad and the only thing you see in these photos if you turn through the following pages happening in New Zealand is the digging up, but some

glowing feedback about the size and age of the logs over on 1300 with photographs that give the Court a sense of just how large some of these remnant logs are, and then over on 1301, still on pages relating to swamp kauri, pictures of veneer and veneer application, chairs and cupboard doors and so on being made. Now again my learned friend may say that those, and indeed the lumber over on page 1302, could well have been based on exports from something that was a stump, and that's of course true. But the acute point here is that the demand in the market shows that there is demand for things that can be made by further trimming and pruning up and slicing up of large slabs, all of which, in my respectful submission, means some suspicion is justified when the only objects that are exported are ones that look much more like raw lumber looks in the yard at Mitre 10 than any furniture ever looks in a furniture shop.

Just then finally and briefly from this affidavit on the poles, the totem poles, at paragraph 33 of her affidavit she refers to some examples of those and these attracted quite a deal of media attention. The first one is at page 1090 of volume 4, and this is a pole that was ultimately after some backwards and forwards, from 1090 onwards, approved for export. So this is one where the company bothered to go to MPI, didn't have to but did. Volume 4, 1090, and on page 1094, for example, there is an internal note from, MPI employs from 2013, the lower half of page 1094, noting that, "NZ Forests is one of two Chinese companies," this is the third paragraph of that lower half email, "that now dominates the New Zealand swamp kauri industry. They have amassed large stockpiles of swamp kauri logs with the intention to export. But the bottleneck for them is to convert the logs to finished products so they can be permitted for export. They have a strong demand for swamp kauri in China due to the large piece size and age, which the Chinese associate with luck and immortality. They intend to export the attached pieces of finished carving, the exporter says it will be going to a Chinese showroom to showcase Māori culture. I find this piece rather unconventional because of its raw appearance," and then a comment about the exporter saying it took two months, with the final sentence saying, "My concern is that the nature of the piece could suggest it's not in its final shape and form as required.

The position of other logs in the yard suggest there are more to come," and indeed there were.

Now I think the suggestion from MPI is that it's tidied things up and is being more staunch about pole exports, but of course we don't know how many are going out where someone will claim they still believe that same interpretation applies. And if one goes to page 1102, the second email down has a reference to an intention to, "Export the attached piece as a finished carving," Chinese showroom with similar wording as the last email. And going over the page you'll see the sort of thing that's going out with supposedly two months' work – this is at page 1103. And so just two points there. One, a concern on the ground by MPI about whether things meet the definition, but you can see by the look of that carving it doesn't, with respect, fit the normal appearance of indigenous carving and appears designed to do the minimum damage to what is otherwise a valuable log.

Nearly done on these, but if I can trouble the Court for one or two more – 1437 of volume 5 provides a striking example of the attempts or the extent and attempts to export as supposed carvings what are just in fact logs. You'll see there on a flatbed truck an enormous kauri log with, if you look closely, some light staining or etching which on a good day could be said to be an attempt to do –

GLAZEBROOK J:
On which page again are we, sorry?

MR SALMON:
1437, Your Honour. I probably don't need to say much more that the picture doesn't say in and of itself.

The evidence regarding poles continues in the next tab, the Furrell affidavit, at tab 12 of volume 2 of the bundle, and has further examples at 1467 to 1471 of the bundle of quite striking poles. Again, the picture says enough. So on

1467 again rather unusual forms of carving, a copy of tiki, a fern and, well, I just don't know what that one on the right is, and other shots over the page.

So the Court can see that there were some pretty ambitious attempts to describe as either completed carvings or completed tables things that on any analysis really weren't in the spirit of the prohibition and had one thing in common, which is that they were attempts to keep the lumber and large pieces for the obvious reason that they can then be worked upon. I mentioned the second affidavit of Ms Furrell at tab 12, I won't go into that in the same detail beyond noting that Ms Furrell in that affidavit from about paragraph 16 onwards following discovery and IA responses reviews internal MPI confusion, this is tab 12 from 16 onwards, about the definitions and internal MPI concern about abuse of the definition and circumventing of the ban. She goes on in that affidavit to refer to a confidential affidavit which contains some whistle-blower information, I don't need to go to that here, but the short point is that this is not a case where the internal documents within MPI show that it was comfortable about the nature of exports.

So stepping back from all of that, there is limited evidence for the simple reason that the exporters were not required to seek MPI's permission and especially once it was clear that MPI was firming its game up on things like the totem poles. An exporter would be unwise too perhaps, but enough evidence to show the scale of an industry with a value of product that's enormous, exporting it as untouched and unworked as possible, to feed external buyers, some of which were foreign-owned corporations that had no interest in the sort of value adding and help to the Northland economy, which Parliament must have had in mind in thinking about the protection of wood like this. So that's the mischief that gave rise to this case.

As you will have seen from the pleadings initially the appellant as well as the declarations sought, judicially reviewed MPI's approach in, possibly ambitious judicial review, but its approach, which involved accepting at face value claims that internal documents showed it did not believe. That's not pursued here but that explains why the affidavits are so extensive. That was a, what we

used to call Wednesbury judicial review. We don't need to be distracted by that here.

ARNOLD J:
Can I just ask. In the export of one of these logs, there's MPI, what role does Customs play?

MR SALMON:
Customs initially at least took the view that it really wasn't as I recall a proper defendant hearing in the sense that it couldn't be expected to look in every container and it didn't have a statutory requirement to look. It is possible that Customs could look. It was joined originally on the basis that if not MPI it could only be Customs as the only possible place it would be seen. There are some inspections of containers, as the Court will know, as they leave New Zealand, less stringently than those that arrive, but it's clear on the evidence it's not happening on every container by any means and a statement that a container contains furniture may just be the end of the matter. So Customs can look in containers. I don't think, as I understand it, my friend will correct me, I don't think Customs sees itself as having a primary role in policing this issue, but presumably if it saw a flagrant breach it might point it out. The reality is, as I learned from my kiwifruit trial last year, we just can't look in every container. At least not on the current prices. So could there be a log in a container, there could. Are there slabs in containers, we know there definitely are from the evidence. Has the totem pole export approach dried up, we don't know. We know that they're not asking MPI for consent anymore because MPI has tightened up on the totem poles. But that doesn't mean that there aren't exporters out there right now taking comfort from the Court of Appeal and High Court's decision on this, and continuing to export, and frankly having a reasonable excuse to do so on the face of those decisions.

So we know what the demand is based on the evidence, and it's for massive logs and for massive slabs. We know that it's still out there. We know that

you'd be unwise to do the more ambitious ones through MPI but no one needs to.

WILLIAM YOUNG J:
Wouldn't MPI have records of the swamp kauri that's milled?

MR SALMON:
Does MPI have records of that?

WILLIAM YOUNG J:
Yes. Isn't consent required to mill the swamp kauri?

MR SALMON:
So the swamp kauri milling, not quite Sir. It needs to come from land that's harvested under a sustainable forest management plan, and the mills themselves need certification, but I don't think they have a record of, I'll defer to my friend on that, I'll be corrected by Mr Bullock, but I don't think the mills keep a record of volumes or anything of that nature. It's not an audited process where there's volumetric data available Sir. I think I can say that much. I stand to be corrected on whether there's something more, but you'll see section 67B contains prohibitions that don't provide for that level of auditing or account keeping.

O'REGAN J:
What about the declarations made on export. What is the declaration say the products are. Does it say –

MR SALMON:
We don't know for most of them but I think the ones that we do know about will tend to be of the nature of finished table tops. They started saying things on those documents we have seen to MPI like rusticated table top, because of course one can always argue there will be someone out there who wants a rough looking table top. Somewhere. And if that's the definition met then –

O'REGAN J:

But if it's been sold to someone whose business is to make it into veneer and then make furniture out of it it's obviously not a table top, that would be a false declaration, wouldn't it?

MR SALMON:

Yes it would. So there may be false declaration issues left, right and centre. Detection is the problem Sir and my clients faced, understandably, competent criticism from my learned friend that we could not link any of those particular web examples with particular examples of specific exports in New Zealand. no given tree is definitely not, is definitely that tree or definitely not that other tree. So we have this enduring problem, especially for a non-profit from Northland who is frightened to approach some of the operators. Limits in the evidence. The likelihood that there aren't false statements being made is pretty low, given what's been said. The extent to which they're made with false intent of course depends on the Court's finding as to the definition of "finished or manufactured product."

ELLEN FRANCE J:

The offence provision 67T does refer to falsifying any milling records as required but are the requirements not particularly extensive?

MR SALMON:

I don't think so Your Honour but it's not a point I've looked at recently, the milling records. Can I come back to the Court on that once my junior has had a proper review, I can see him beavering away. If it's suitable I will go briefly to the extrinsic materials. I'm not sure the extent to which the Court has read the submissions on this point, but I usually shy away from doing so in any detail at all.

WILLIAM YOUNG J:

Well we probably would require a lot of persuading to look at the departmental material I think.

MR SALMON:

I anticipated you might say that Sir. Can I deal with the departmental material briefly by way of saying, my learned friends have characterised this as a new find and is, I'm not saying they've said this, but it's the time as the only basis on which was said there's this dampen demand purpose. With respect that's not right. For damping of demand and the purposes we're pointing to right throughout Hansard and the other, more clearly within the scope references, so I won't burden you Sir by going to the departmental material. It's summarised in the submissions. I'm in the Court's hands whether you want me to take you to the pages themselves of the extrinsic material summarising the subs so I'll just briefly go through the submissions.

WILLIAM YOUNG J:

Yes.

MR SALMON:

Sorry Sir, which was your preference?

WILLIAM YOUNG J:

Just go through the submissions.

MR SALMON:

Through the submissions. So at page 4 from paragraph 15 there are two parts to this review of the history of the Act. One is the extrinsic materials and the other is to note that the Act had a couple of amendments along that way that are material. One is the one Your Honour Justice Young mentioned which is the 1995 amendment to fix the *Ancient Trees* decision, make clear that swamp logs are caught by the prohibition. The 1993 amendment, which was the original passage of Part 3A, had one feature which I'll just note before I get into the detail which is worth noting, which is that only personal effects were exempted from oversight by MPI, or its predecessor, the significance being that as originally passed, finished or manufactured products were to be overseen by MPI, so a further control of them, and that was removed in 2004.

So in terms of extrinsic materials, I won't take you through paragraph 17 and 18 beyond noting that in the Minister's speech introducing the Bill, this is the quote over at the top of page 5, reference to various purposes underlying the reforms were mentioned, and then in the final two paragraphs confirming the analysis I've advanced of the scheme of 3A, the second half of the penultimate paragraph provides that the legislation before the House uses controls on sawmilling, export controls, and sustainable management plans to promote sustainable management. "The new section 67C is one of the two lynchpins of the Bill. It imposes export controls. The only indigenous timber that may be exported under the Bill will be sawn beech or rimu from an area subject to a sustainable management plan, manufactured indigenous timber products et t cetera." Then the balance of that page, the report back from the select committee which expanded the definition that had existed finished and manufactured indigenous timber products to the current wording.

I can pause there and just come back to the Court on your question, which Mr Bullock has answered now, about sawmill records now or I can come back to that?

WILLIAM YOUNG J:
Whatever you like.

MR SALMON:
I'll note section 67Q sets out record-keeping requirements for sawmills and those requirements are to be prescribed in regulations, so there are some requirements, Your Honour.

I was on paragraph 20. The Select Committee's report is not substantive but the departmental reports were, there are mentioned there. I will not push back against Justice Young's indication about the departmental reports but do note to the extent the Court wishes to look at them, and they are sometimes looked at, this was an unusual Bill in that it had across the House support and common ground in Hansard speeches as to its purposes and so on, and those purposes adopt the view summarised in interdepartmental reports of the

conservation perspective rather than the pro-forestry view from the Ministry of Forestry. So those departmental analyses go over to the bottom of page 6.

At paragraph 25 the Court of Appeal's summary about dampening export demand is set out and quoted there just as a comparison to what appears in the materials so far, including in particular the departmental report, and then over on page 7 the subsequent readings summarised. And the presentation of the Committee's report to the House by Alec Neill is set out of 27. "One of the major issues that the Committee faced was that of export controls, fair to say that a large number of submissions considered that any form of export control should be removed from the Bill, the Committee's major concern related to the export of logs and wood chips, gave serious consideration to all the operations that were available on the issue but in the end it agreed that export controls for logs and wood chips were to remain," so there's that volume concern arising.

Then down at 29 Dr Cullen's comments about the use of the export control as being, "A practical one about how we direct the industry towards higher-value use of that timber," and the Minister of Forests then noting that the industry had been largely chip-driven, "The Government is trying to make certain that it changes the industry to an added value industry." The Minister of Conservation at 30 noting that the Government, "Chose to continue the export ban on wood chips and logs because it wanted to move the mentality of the saw milling industry to manufacturing high-value, added-value products in New Zealand and to move away from the very volatile international trade in wood chips so that we can get the very best result for a very much diminished resource here in New Zealand."

And then the quote from Paul Swain at 31, picking up over the page, top of page 8 in terms of managing the forests, "They have to do it sustainably without the huge lure of boatloads of wood chips heading out of the country. That kind of thing shocks people. Therefore the clear signals to people are that, firstly, New Zealand no longer approves of clear-felling of native bush, secondly, it is not prepared to export in log or chip form any native timber.

If there is to be an industry gathered around that work it has to be a value-added industry of high-quality products using high-quality timbers. Similarly at 32, John Blincoe's comments, "It is essential that we do not encourage a large market in unprocessed New Zealand indigenous timbers for export because that would put even greater pressure on our remaining forests. The whole point of this policy was to encourage high-value-added processing and one certainly does not do that if one is exporting wood chips and logs." So there is a very clear overt reference to the need not to encourage a large market for timber abroad akin to the African wildlife bans.

And at 33 Dr Cullen summarises the export ban, having noted at the beginning of that quote at 33 that there is some logic in not having an export ban because of the protections to indigenous forests otherwise in the Act. He summarises it as, in the final two lines, "A pragmatic lever to try to ensure that the industry moves down the right track."

WILLIAM YOUNG J:
Where does anyone say dampen demand?

MR SALMON:
Well I would see, Sir, that being the effect expressly, or express purpose of the Blincoe quote at 32. It is essential that we do not encourage a large market for export because that would put even greater pressure on our remaining forests.

WILLIAM YOUNG J:
Is that the best passage?

MR SALMON:
Unless Your Honour is prepared to look at the –

WILLIAM YOUNG J:
Yes, I know it's in the departmental material.

MR SALMON:

It's overt in the departmental reports. They are worth at least reading before being dismissed. I've noted the Court has looked at them in the past and I wasn't going to push the point, but they're worth reading in a sense that they show two competing views of what the legislation should do, and when one reads them alongside Hansard it is clear the House picked up one of those two versions, which was to dampen export, and again I do submit it's difficult to see what the purpose on an export ban is, other than to provide the synergy of dampening export demand because that flows on to help protect erosion of forests and the resource by breaches of the milling and sustainable forest regimes. In other words, if Parliament was happy that those were enough on their own, there would be no need for an export ban. Dr Cullen's comment that the export ban is a practical lever to help advance that is another way of saying dampening export demand helps advance that.

GLAZEBROOK J:

It may also be from presenting the committee's report to indicate they've chosen one, they've rejected the view that you didn't need an export ban and presumably for the reasons that have been put. I suppose that's the highest you can put it.

MR SALMON:

The highest I can put it without the departmental reports, yes Your Honour.

GLAZEBROOK J:

Yes, but you say well in fact that's all he can have been referring to is effectively picking up the departmental reports and having chosen the continuation of the ban.

MR SALMON:

Yes, I think that' right, and to put another gloss on that, given that there was protection of the forests through the other parts, Part 3A, it's very difficult to see an export ban having any purpose, overt purpose or direct purpose, other than to dampen export demand.

GLAZEBROOK J:

Or to shift them to the high-value which might mean the same thing.

MR SALMON:

And I think that's right Your Honour. It is achieving –

GLAZEBROOK J:

And they certainly do say high-value, high-value, all the way through this material.

MR SALMON:

Yes, and so the two policy goals that one could see the export ban achieving, one is high-value valuating in New Zealand, and we know those economic drivers exist regularly. The other is the environmental cause. The means of achieving that was to dampen export demand and thus of course a purpose was to dampen export demand.

I think I had got to page 7 of the submissions and there at 27 is Alec Neill presenting the committee's report. Sorry, I've done that.

O'REGAN J:

Yes, you're on page 8 now.

MR SALMON:

I'm on page 8, you're quite right Sir. I've leapt back trying to get into the departmental reports again.

O'REGAN J:

Repeating it isn't going to make it better.

MR SALMON:

No. I promise I won't do that on purpose. Over at the top of page 8 is a reference to the boatloads of woodchips leaving and that kind of thing shocking people. Then I'm on 34 was where I was up to, which is the

Ancient Trees provision and the purpose of that amendment in 1995 as noted in response to Justice Young earlier, being to correct what would otherwise have been the position in Justice McGechan's decision in that case, that swamp kauri was outside, effectively outside the export prohibition. Parliament chose to confirm that it remained in.

GLAZEBROOK J:
What was Damien O'Connor's position?

MR SALMON:
Support for the amendment to keep swamp kauri in.

GLAZEBROOK J:
Because in fact probably the better quote is the Minister on the third reading at paragraph 73 of the first respondent's submissions, which seems to deal with low volume, high-value exporting finished products of high-value.

MR SALMON:
Yes. Certainly that captures adequately the purpose of high-value. I've taken that as common ground Your Honour that –

GLAZEBROOK J:
But also low volume.

MR SALMON:
Yes.

GLAZEBROOK J:
So I would have thought that's possibly the highest point of your – because it's not in the Minister on the third reading.

MR SALMON:
Yes, it is from the Minister, although as noted, Your Honour, they –

GLAZEBROOK J:
It was cross-parties.

MR SALMON:
Yes, it was cross-party. Yes, I accept that Your Honour. The quote at paragraph 34, of course, is not that original Bill, it's the 95 amendment, but again –

GLAZEBROOK J:
No, this was the, well I'd understood this was the extension.

MR SALMON:
Yes.

GLAZEBROOK J:
And I understood this was the third reading of that Forest Amendments Act.

MR SALMON:
Yes, right, yes. And again adding to the high-value, low volume, the reasons for that probably go without saying, but they were said including there from the opposition at 34 in the second paragraph, "To stop the wholesale export of jobs and opportunities associated with processing an indigenous product which we should keep and cherish and hold for future generations. Swamp kauri is the product with the highest profile." And so on. The challenge is to create jobs from that. So just relevant to note that when the protections of swamp kauri could have been weakened they were, in fact, upheld and that jobs and swamp kauri in particular, which is a Northland issue, and that's one of the poorest regions with the greatest need for jobs, was expressly noted in the House.

Then as noted the putative amendment in 1999 which didn't proceed at paragraph 35 and 36, and then the 2004 amendment which took finished and manufactured products outside the oversight of MPI and enabled them to be exported, provided they were finished and manufactured, without approval.

But still with, at the passage from the third reading, reference in that quote to the value of indigenous timber as “a heritage material that should not be exported in low-value-added form.”

So I think the short point is that there’s not perhaps a great deal of dispute about what the statutory purposes are except on that component of the package of statutory policy goals and purposes which is whether dampening export demand was part of the package. In my submission it’s clear that it was because there is an export ban and that speaks for itself and its logical purpose is to prevent the lure of foreign farms leading to a demand for volume sales of indigenous timber. But in any event it’s clear on the materials, if the Court is helped by the departmental reports, they are there, but equally if not in my submission the points are clearly made anyway, and that dampening export demand was a lever for achieving the other policy goals of environmental protection, value-adding, job creation and so on.

So we accept that the biggest single purpose underlying the reform was to protect standing forests, but that’s not the only purpose. Everyone before the Court, and the Courts below, accepted that the regime applies equally to felled kauri as to swamp kauri in terms of finished or manufactured timber products and largely the statutory purpose seems to me to be a point that’s not of great dispute.

So against that background the key question then is how to read the definition of “finished or manufactured timber products” in a way that meets that statutory purpose and a way that’s consistent with its words, and that doesn’t, and in my submission this is probably the starting point, that doesn’t set up a gateway through which the very mischief the ban was set up to avoid ends up happening in another form. That’s why I began the review of the parliamentary materials by noting that Parliament repeatedly involved reference to concerns about logs or woodchips fleeing the country in bulk, and all we have now, the poles still are logs, they just are logs leaving the country with decoration, but all we have in terms of the slabs is a mid-point between poles and woodchips. In fact cheaper to produce in woodchips which require

a greater deal of machinery and mechanising then simply band sawing timber. But we have, in effect, the very bulk export that was designed to be removed, and the question is how can section 2 be read in a way that enables that, and the answer from the Courts below was to read down paragraph (c) of the definition.

So I'm now dealing with the nub of this component of the appeal, the interpretation of "finished or manufactured indigenous timber products". The biggest point is the one I'll deal with first. (c) can either be read as it was in the Courts below as an interpretive aid in effect to the scheme in paragraphs (a) and (b), that's one way of reading it, and subject to the other interpretation arguments about paragraph (a) that would enable this very form of exporting, if that's right. Or it can be read as being an overriding or trumping paragraph, as we've called it, which makes clear the very type of timber that definitely cannot be exported. In other words, even if something might be said as finished, if the finished form is a blank or a panel or rough-sawn timber, it doesn't go, it does not leave the country. And that's not a surprising interpretation to read that as paramount because the very purpose of the provision was to prevent low-value-added material leaving in volume, and thus reading (c) as having primacy is entirely consistent with that statutory purpose. It's also consistent with the language and the use of the word "but" at the end of (b). So our first point is that one can see the scheme of (a), (b) and (c) as being (a) and (b) defining the general concept of what can go out, but that anything that falls within (c) being prohibited even if that otherwise meets the definition.

Now the reasons for that are developed in more detail in our submissions at, in the final part of our submissions at 73 and onwards. One point being made there, which is the consequence of the alternative interpretation has been shown to be as bad as one might have expected, it enables extensive abuse, to read down those words. Secondly, the choice of the words used in (c) warrant some time. Dressed timber, which we've noted in our submissions by reference to industry definitions, takes it beyond just rough-sawn timber, it includes either sanded or planed timber, in other words making it smooth is

something Parliament expressly directed was not enough to make something complete and was not within the definition. So dressed and rough-sawn timber quite literally captures, if it's a stand-alone provision, exactly what is going out as supposed table tops. But similarly, when one looks at the remaining wording, furniture blanks and joinery blanks again capture exactly what we're looking at here, a blank for a piece of furniture is the rectangular or square or cubic piece of wood from which something is then shaped or cut, it's the one that leaves it to the detail worker to tune up, and it's expressly excluded.

WILLIAM YOUNG J:
What about mouldings and panelling?

MR SALMON:
So there – I wondered that too, Sir. I think the accurate way of reading those, especially bearing in mind that joinery blanks are excluded and building blanks are excluded. They're distinguishing the items in (b) from those in (c) in a way that helps us understand (c) if – I've started that answer badly but if I can put it this way: Item (b) includes, beyond furniture, things like joinery, and one can imagine why when one sees a few of New Zealand's houses built from this stuff, the joinery, the architraves, doorframes, weren't just pieces of four by two from Bunnings. They are old kauri, joinery and so on, they are crafted and high-value, and redoing an Auckland house can show that in a flash. The interplay of (b) and (c) shows that that kind of joinery might be in but that (c) makes clear blanks for that, joinery blanks, are not. And so once one envisages a differentiation between high quality carved or routed or shaped joinery for architraves or whatever it might be, as opposed to the blanks from which they are drawn, it leads towards a view mouldings would be simply perhaps extrusions that one would find in the timber shop.

So I read (c), Sir, as attempting to describe in words a definition that said if something is the sort of thing you see in a hardware store in the timber section it's out, if that answers your question, Sir.

WILLIAM YOUNG J:

Thank you.

ELLEN FRANCE J:

What sorts of things would come within the similar items?

MR SALMON:

That's in (b) or (c), Your Honour?

ELLEN FRANCE J:

In (c).

MR SALMON:

In (c). Again I think it would capture those things that one might, until someone – if I can put it this way. Someone can always say, no, that's not a piece of lumber, that's a railway sleeper. One can always say that. That's not a slab, that's a table top, or similar items as intended to capture without, of course, exhaustively defining it. Those things that are close to raw lumber, as opposed to those things that are visibly and obviously a carefully worked product.

GLAZEBROOK J:

But you'd say, I suppose, it's designed to cover table top that aren't really table tops, or that might be table tops but they're effectively a slab of wood.

MR SALMON:

Yes. And look there are barbecue tables around New Zealand made of rusticated pieces of wood, they are used. Our simple argument is anyone using those abroad is nevertheless using something that is prohibited under (c). So the mere fact that one intends to use something in a rusticated way, and rusticated should be used cautiously here, those are high-value things worked to perfection and the rustic look is contrived in reality, but even if one were saying that there's a market for rough sawn pieces if kauri to be used on tresses as tables, and before I get to why we say they're outside (a) and (b),

the effect of section (c), entirely consistent with Parliament's goal that that sort of quick produced stuff is not to be exported. The proper interpretation of (c) is that it's simply out, so it limits the category of finished products that could otherwise go out.

O'REGAN J:
So what would you say has to be done to a table top to make it exportable?

WILLIAM YOUNG J:
Put legs on it.

MR SALMON:
Sorry?

WILLIAM YOUNG J:
You'd have to put legs on it.

MR SALMON:
That's part of what we say, yes, so that brings me to dealing with paragraphs (a) and (b) I guess Sir.

O'REGAN J:
But I mean say you have to put legs on it, or have the kitset to do it, just mean you need four sticks attached to it, doesn't it. I mean that's not going to help much.

MR SALMON:
Well of course if they were a sham, attaching of sticks, and they were cheap and inconsistent with this –

O'REGAN J:
Well your whole case is that the table tops are a sham, isn't it?

MR SALMON:

Yes it is Sir, which is not to say that none of them are ever used as table tops. The sham is in two parts. Some are used as table tops and some by look are used for all sorts of things, and really we don't know. But none are finished here in a way that are advertised abroad. Not one of those examples. So that, in and of itself, one would think, should be bringing things to a halt. So a good test for whether they were finished on the basis I know an elephant when I see it, before I get to the linguistic answer to your question Sir, a good test would be we know that tables are finished. We know that some of them are finished before they leave New Zealand when we have evidence of extensive websites in New Zealand advertising tables that are still here looking like they're finished. It's just not happening on any analysis. That's not, of course, an answer to Your Honour's question but it's a good indicator they're not finished. In terms of what is finished in terms of the Act, parking the point I made about (c) which is anything, even if there were a market for rusticated, finished, dressed or rough sawn table tops, they are not within the definition. Putting aside that argument my answer to your question on the linguistic analysis of (a) and (b) –

GLAZEBROOK J:

Sorry, can I just, you would say even if you put four legs on something that was rustic as against worked very cleverly to make it look as though it's rustic when it's nothing of the sort, would not suffice because (c) would still take it out.

MR SALMON:

Yes.

GLAZEBROOK J:

Right. Sorry, and now you're moving on to the question of whether it's an (a) or (b) in any event?

MR SALMON:

Yes, and to round out my answer to that, if one attaches metal legs to a rough sawn slab, it's not a device to circumventing (c). That would explode the bar, explode the ban in terms of –

GLAZEBROOK J:

So (c) is just stand alone. Anything that's truly just a slab as against, and obviously there are some things that take an awful lot of work to make them look rusticated when they're nothing of the sort, there's a distinction between those two is the submission.

MR SALMON:

Yes it is.

GLAZEBROOK J:

And putting legs on it, doing anything with it, doesn't take it out of (c)?

MR SALMON:

Doesn't stop it being dressed or rough sawn timber, correct Your Honour.

WILLIAM YOUNG J:

Well it depends on whether they're serious legs I guess.

MR SALMON:

In part, yes.

WILLIAM YOUNG J:

Do you say that there is no one manufacturing – advertising for sale in New Zealand furniture made from swamp kauri?

MR SALMON:

No, I am not saying there is no manufacture. There is not the international marketing of these top-end things. In New Zealand there is not a market for a $100,000 table full stop. So, I don't think there's any in the evidence. I'm not suggesting there's not someone who's making a table somewhere on

TradeMe Sir, but it's in a completely different category from this market. The overwhelming picture from the evidence is this is all going abroad. So, yes, I would submit that adding tables to something that is other dressed or rough sawn, adding legs, sorry, to something that's otherwise dressed or rough sawn, doesn't take it outside (c).

ARNOLD J:

So even if they are perfectly, the legs complement the slab, they can bear the weight of the slab so that you could use it as a table, the fact that the whole thing is undressed timber means it's out?

MR SALMON:

That's my submission, Sir. And that's, you might say, a higher mark than I need to aim for but, respectfully, I think it makes sense in the scheme of the Act. This is not a position where, generally speaking, the spirit was let everything be exported with some tinkering. This needs to be seen in its housing as part of an otherwise complete ban to prevent anything high volume and low-value leaving, and that's the key to interpreting (c). (c) is describing not things that aren't complete per se, nowhere does it say "unless complete" or "unless ready to be sat at" or anything like that. It's describing in a broad way with a capture of all similar items things that have been lightly worked.

ARNOLD J:

That may be right. But all the items in (c) are really components of something else, a moulding or a panel, or they're things that require further work, furniture blanks, joinery blanks, building blanks, but the hypothetical we are talking out is a table that is complete and perfectly adequate, it's just made of undressed timber.

MR SALMON:

Yes, certainly I agree, Sir, your description applies to the words from "mouldings" and "panelling" on, those are either components of something or the blank for something to be worked from.

Respectfully I wouldn't agree that that describes dressed or rough-sawn timber. That is, in my respectful submission, capturing the spirit that Hansard showed to underlie the Act of stopping the unworked stuff leaving. So the essential submission in terms of the proposition that's being put to me, which is just putting legs on it and making it useable as a table, convert rough-saw out of (c), there's nothing contrary to the spirit of the general export ban or this limited proviso to see low-value, high-volume massive hunks of this scarce resource not being permitted. In other words, Parliament wanted to see more work done on it yet and –

ARNOLD J:
Well, it's low-value in the sense that –

GLAZEBROOK J:
Low added value.

ARNOLD J:
– not a lot of work has been done on it, it isn't, not a lot of craft has been exercised.

MR SALMON:
Yes, low-value-added in New Zealand.

ARNOLD J:
Yes.

MR SALMON:
And it's true Parliament didn't anticipate quite the gold rush, I don't think anyone could say that Parliament when passing this part of the Forests Act envisaged that this would be quite so valuable and lead to quite the heat in Northland that it has. But that doesn't control the interpretation of course, and neither does MPI's expectation that it might see some of that already, those extrinsic things. The goal was any labour needs to be put in on the ground in

New Zealand not elsewhere, and the thing needs to be complete. And for completeness anything that is rough-sawn and dressed timber just doesn't go.

And it may seem that there's a lot of this of course, Sir, but there's not, it's very finite, and Mr Bullock's got the hard task of persuading you that it's a fossil soon, which is another issue. But that reflects the fact that there's no more and, indeed, with kauri die-back now occurring there may be real limits on what's living as well. So Parliament's concerned to treat this as something of a taonga and to treat it as something that presumptively stays in New Zealand is not purely economic either.

Dealing with (a) and (b) then. In terms of whether something has been manufactured into its final shape and form, the Courts below have referred to the possibility of a table top sitting on trestles, and of course any exporter could say, "Well, that's the goal," in the same way they said a totem pole in a Chinese hall, which no one's been able to find since it went there, is the purpose. These things can always be said. But the question is whether the definition and the strict controls allow it.

And if I can start with (b), it'll be apparent from our submissions what our argument is here, and it is that this is not directed at enabling parts of something to be sent abroad to be assembled with parts made abroad. This is rather identifying, (b), identifying or allowing for a product to leave that's part kauri and part something else. So whether one sees it as akin to a set of shelves in which the stand is steel and all of the shelves are polished kauri, in other words a completed set of shelves, or whether one envisages perhaps an Ikea product where part of it's kauri and part of it's not, but it's in kitset form. This is not eroding the notion that the value adding process would be complete before the product leaves the border, but simply making clear that some of the things that leave will be of component parts, assembled or not, not all of which will be kauri. And the hardest example I've dealt with in my submissions is perhaps, in terms of the examples expressed there, is toilet seats, which my learned friends might say, "Well, that suggests that something that's part of a complete item, being a toilet, can be exported."

But of course in real-world terms toilet seats are a separate items sold as a complete set of seat and lid, independently of toilets, all the time, one in a plumbing shop and the other in the nice kind aisles of a hardware store of a home décor store. So toilet seats I think can be read properly as identifying the sort of product that is in normal daily life sold as one rather than –

GLAZEBROOK J:

It would also be the only wooden component. I know that in the past people did make toilets that were wooden, but that wouldn't be the case ever now.

MR SALMON:

No, I hope that's right, Your Honour. I'm sure that's right.

GLAZEBROOK J:

Well, in normal parlance one would not expect a wholly wooden toilet, so it would be the only wooden element of the toilet.

MR SALMON:

Yes. And I wondered indeed whether the drafters envisaged that the seat itself would not be all wood, in other words, putting aside the hinge, the seat might be rotomolded plastic and the lid might be ornamental kauri, if there's someone out there who wants that. In other words, I don't think it's right to treat the reference to toilet seats as somehow exploding the notion that the item needs to be complete when it leaves, because otherwise (b) would really be the controlling provision again and again. If (b) is read as enabling something that is a component of an unassembled incomplete kitset, the rest of which is made in China, it can go, that's one thing (b) can't mean because it would just explode the purpose of the provisions.

ARNOLD J:

As you point out, I mean, you can buy toilet seats separately. The other example is rails, you know, for stairways and things, you can buy them separately.

MR SALMON:

Yes.

ARNOLD J:

They are in themselves a product.

MR SALMON:

Yes.

ARNOLD J:

But I don't know if there are many furniture shops selling table tops, just table tops.

MR SALMON:

Yes, I'm sure one could find one somewhere. If my learned friend – there might be one in the evidence, indeed, and some of those foreign websites will show the slab for sale with little regard for how it's mounted because that's secondary or something for customer input. So I imagine there will be advertisements for a slab that is for a table top, or with at least the suggestion it be used as a table top, which is one of the things one sees in there, this could be. But that brings one back to whether it's complete.

And so my submission essentially is that rather than parting the definition to see whether any particular word on its terms excludes the particular item or whether, as the Court of Appeal's almost put it, whether the thing could be used as a table, in other words, does it need more, I think the word "need" is expressly used, that's really not the test. The better way is to look at (a), (b) and (c) as part of a coherent scheme designed to described in informative ways enough to enable the general market to interpret it, the type of thing that can leave New Zealand and the type of thing that must not. And the dividing line is never going to be perfect because Parliament can't envisage every product. Just as when banning pulp and logs they didn't envisage this loophole.

ARNOLD J:

Well, linguistically there seems to me, at the moment anyway, a recently obvious structure to the definition. It starts out in (a) saying this is what the phrase means and then it says, "By the way, it also includes these things and it doesn't include these things."

MR SALMON:

Yes.

ARNOLD J:

And, I mean, I don't quite understand at the moment why (c) doesn't mean what it says and take out from the fundamental definition (a) the products it mentions or the items it mentions.

MR SALMON:

Yes. And, Sir, apart from the fact that I've been told by Judges that's what it means, I don't understand quite why it would be diluted in that way either. In my respectful submission it's not only linguistically a stand-alone controlling provision, but it's consistent with the purpose to read it that way and would subvert the purpose not to. And so I agree with that, Sir. I regard that respectfully as the more straightforward part of the appeal on which, with respect, the Court of Appeal was wrong.

WILLIAM YOUNG J:

Well, mouldings and panelling could be within (a), except they're likely to be trimmed to size. So, I mean, that's probably an indication that (c) – well, in a way it would be best to read (a), (b) and (c) together and that would be taken as an indication that something such as a generic item, subject to some perhaps minor additional alteration, isn't a finished product.

MR SALMON:

Yes. Yes, Sir, although I'm not sure all moulding would necessarily need to be trimmed to size. Some will be ready corner pieces and so on and just are bog standard.

WILLIAM YOUNG J:
Yes.

MR SALMON:
So I accept what you're saying, apart from that proviso, Sir.

Again, it's difficult to deal with every hypothetical one can put up in a comprehensive, but again I come back to the notion that what emerges for any sincere exporter looking at interpreting this is a general picture based on the sequence Your Honour Justice Arnold has just summarised, a general picture that if it looks like it should be in the wood section of a hardware store it's definitely out. Now that may sound unduly casual, but effectively that captures the spirit of what's said in (c). All of that stuff that's sold by lumber guys, and these stacks of slabs are exactly that, they're outside, they're shoved in shipped containers, it's abroad that they become valuable, and the fact that some of them might be table tops isn't enough. But any normal operator in this industry does actually know the problem they face, which is why they've gone to such lengths to describe things in such a careful way. And I mention that because not just the Court of Appeal but my learned friends in their submissions effectively invite the Court – and I don't want to straw man the submission – but invite the Court to leave it to MPI to interpret this on its facts in any given case, as if MPI will be, but it won't. This is needing to be interpreted on a daily basis by local and foreign companies operating in New Zealand, making decisions on exports, of a finite resource, and the simple statutory language is what it is. It must be finished. There's no hardship in requiring otherwise, the purpose is to require that. And it must be complete, not it might arguably be or one can see that you could use it as a table, it must be the final thing and it must not be rough sawn. So I don't think the Court –

WILLIAM YOUNG J:
Well, I think we'll just pause here, we'll take the adjournment and get back to you in 15 minutes.

MR SALMON:
Certainly, Sir.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.48 AM

WILLIAM YOUNG J:
Mr Salmon, I take it you are reasonably close to the end?

MR SALMON:
I think I'm at the end, Sir. I was just going to conclude on (a) and sit down unless you had questions.

WILLIAM YOUNG J:
Good, thank you.

MR SALMON:
So can I perhaps just refer the Court for reference to paragraphs 57 and 58 of our submissions regarding the meaning of (a), which is essentially a submission that each of those component parts of (a), "manufactured into final shape", "final form", "ready to be installed without further machining", "without further modification", that they really do just mean exactly what they say, which is the point made in 58, that any sanding has been done, that the staining has been done, that the planing's been done. So a table with four by four or two by two legs attached to it which leaves it up to a customer to choose shape is simply not finished. Whether or not there's a demand for such things because customers like to finish them, they're not finished, and quite simply in terms of giving effect to the statutory purpose and scheme, if there is still a decision to be made about some table that might be said to be complete, such as what staining should it have, should it be beeswax or varnish, should it be painted, should the legs be shaped slightly differently, all of those decisions – and there's nothing terrible about this – but all of those

decisions are ones that need to be made before the table leaves New Zealand. And that I think is all I need to say about (a), (b) and c).

Unless the Court has any questions those are my submissions.

WILLIAM YOUNG J:
Thank you.

MR SALMON:
Mr Bullock will now deal with the straightforward issue of protected objects.

MR BULLOCK:
If Your Honours please, my submissions will address the application of the Protected Objects Act to swamp kauri.

The appellant submits the swamp kauri falls within the definition of a protected New Zealand object in that legislation and that therefore its export is governed by the export controls in that legislation.

The legislation is found at tab 6 of the appellant's first bundle of authorities. I think it might be helpful for the Court to turn that up. If Your Honours turn to page 4 of the statute, section 1A describes the purpose of the legislation, that being to provide relevantly for the better protection of certain object by, "Regulating the export of protected New Zealand objects."

The Act places two key nodes of control. The first is a definition of what a protected New Zealand object is, in section 2, and the second are export controls themselves from sections 5 through 7F. If Your Honours look at page 7 of the Act there we have the definition of "protected New Zealand object" to mean an object, "Forming part of the movable cultural heritage of New Zealand," so that's the first element. The second element that's of importance to New Zealand or to a part of New Zealand for the specific reasons listed in paragraph (b), that it, "Falls within one or more of the categories of protected objects set out in Schedule 4." And there are in

Schedule 4, which is a few pages further on in the bundle, nine specific categories of objects, all described, defined and controlled in a variety of ways, and the ways in which those categories are described will come to be of some importance in this submission.

Turning back, once an object is a protected New Zealand object section 5 provides that a person, "May not export or attempt to export a protected New Zealand object," unless one of two things has occurred: either the application for export permission has been submitted and granted by the Chief Executive of the Ministry of Culture and Heritage or, in 5(1)(b), the Chief Executive has previously by a notice in the *Gazette* exempted a particular category or categories of objects from the Act on the basis that there's sufficient examples of that category or categories in public ownership in New Zealand already. So those are the two export routes. If you fall within 5(1)(b) you're fine, if you fall with 5(1)(a) you need an application.

Section 6 describes the application process itself, section 7 provides that the Chief Executive must either grant the application or refuse it. Then section 7A through 7F provide a process by which the applications are treated, section 7A being that the Chief Executive must not or may not grant application for permission," if a certain set of characteristics are attached to the object in question. So we'll see in 7A(1)(a) the protected New Zealand object criterion comes back, there's a criterion of substantial physical authenticity. Then (b) requires that the object is attached to some heightened significance tests, so you'll recall that in section 2, the definition of protected New Zealand object, there is a requirement for importance. Under section 7A(1)(b) there is what I think might be terms a heightened significance test that will prohibit an export and, finally, there is a specific requirement that there may be no export if the object is of such significance that its export would, "Substantially diminish New Zealand's cultural heritage."

So the submission for the appellant is that the Act builds in a cascading series of importance thresholds. There may be some that are embedded in the descriptions of the categories in Schedule 4, there is the importance threshold

set out in section 2(a) of the definition, and when it comes to the export decision itself there are the specific requirements of 7A which will preclude an export. As part of the section 7A export approvals process, section 7B, C and D provide for expert examiners to consult with the Chief Executive for the purpose of making the decision as to whether to grant permission to export.

This statutory scheme differs somewhat from the predecessor legislation to the Protected Objects Act, that was the Antiquities Act 1975. It's actually the same legislation, the name was changed when it was amended in 2006. But the scheme of the export provision and the definition of what objects are protected are somewhat different. Now Your Honours we have the Antiquities Act in our bundle but I see that a number of the sections escaped the printer so what I will do, with the Court's leave, is to hand up a full copy of the Antiquities Act so that that can be on record.

So in the Antiquities Act the key entry provision, so the equivalent of what is now the definition of protected New Zealand object, was really the definition of "antiquity" in section 2, which is on the second page of the hand-up. And what can be seen there is a definition which includes a number of categories, which is somewhat familiar although quite different to what's now in the Schedule of the Protected Objects Act. The notable ones for present purposes include paragraph (e), which refers to type specimens of animals, minerals and plants, paragraph (f), which refers to meteorites, paragraph (g), which refers to, "Any bones, feathers or other parts of eggs of the moa or other species of animals, birds, reptiles, amphibians native to New Zealand which are generally believed to be extinct."

Now one of the key differences of this legislation is that the definition of "antiquity" does not in itself require an assessment of importance, whereas under the Protected Objects Act the object must both fall within the Schedule and it must meet a particular threshold of importance. In the Antiquities Act Parliament has assumed or built in the importance into the specific list of objects that it has included. And if the Court turns over the page we'll see that in section 5 of the Antiquities Act there is a restriction on export without

permission, which is familiar from what remains in the Protected Objects Act, and also within section 5 is a proviso that halfway through that allows for the gazetting of an exemption for certain classes or class of antiquities where there is sufficient public ownership and it wouldn't be contrary to the public interest to exempt those classes.

Section 6 provides what is really the equivalent of section 7A, but it's structured somewhat differently and it requires a range of things to be considered by the Secretary in considering applications for permission to export, and it's at this point under the Antiquities Act where importance comes in. So if you met the definition of "antiquity" it's at the point of export that importance comes to be considered specifically.

WILLIAM YOUNG J:
I'm not sure how helpful this is, but the Antiquities Act wouldn't have caught swamp kauri.

MR BULLOCK:
No, Sir, that's correct.

WILLIAM YOUNG J:
Because a type specimen has a particular definition.

MR BULLOCK:
Correct. So it would have caught a type specimen of swamp kauri but obviously that is a very, very small category.

WILLIAM YOUNG J:
Yes, just one.

MR BULLOCK:
Correct.

GLAZEBROOK J:

I actually don't understand type specimen but maybe we can deal with that later, exactly what it means?

WILLIAM YOUNG J:

Isn't it the original specimen on which a type was, which form the basis of the description of the class to which it belongs?

MR BULLOCK:

I believe that's correct, Sir. Your Honour, we can leave the Antiquities Act there and Your Honour might be assisted by a tab 6 of our bundle of authorities, page 8 of the legislation, there's a definition of type specimen. It means, "The specimen on which is based an original published description of the plant, animal or mineral of which the specimen serves as an example." My understanding is, as His Honour Justice Young has said, that is essentially the specimen on which the description is founded, so very narrow.

GLAZEBROOK J:

I suppose if we're looking at the categories that are there – oh, well, maybe when we get to it I'll get to that point.

MR BULLOCK:

Your Honour, I was proposing to turn to Schedule 4 now, so I think we can turn to –

GLAZEBROOK J:

All right then.

MR BULLOCK:

Where I was proposing to turn first was to clause 5 of the Schedule 4 headed, "Natural science objects," as that's the clause that is really at the heart of the appeal. And just to situate that clause, it begins with a series of specific definitions, including fossil, and we'll come to the definition of fossil, but it's the appellant's submission that that definition includes swamp kauri.

WILLIAM YOUNG J:

I believe swamp kauri that is older than about 800 years.

MR BULLOCK:

Correct. And the evidence is that that is the bulk if not all of it.

Subclause (2) provides that the category consists of, "A range of things, including organisms, products of animal and plant behaviour, fossils, fluids, rocks and minerals of New Zealand origin or related to New Zealand," so New Zealand objects, and subclause (3) provides that, "Objects in this category include," and it gives three examples. It gives type specimens, which we've discussed –

WILLIAM YOUNG J:

Okay, we can put a line through (a) can't we?

MR BULLOCK:

Yes, although we may want to come back to it for context, but we're not within (a). (b), "A specimen considered to be scientifically important for defining a taxon –

WILLIAM YOUNG J:

We can put a line through that too can't we?

MR BULLOCK:

We'll come to that, Sir, too but –

GLAZEBROOK J:

I suppose my question in relation to that was, as I understand the Courts below, they say (3) limits (2), but there are some specific things that are mentioned in (2) like kauri gum. Now does that comes within a type, is there a type specimen of kauri gum for instance?

MR BULLOCK:

I'm not aware of that, Your Honour, but my understanding is that type –

GLAZEBROOK J:

Well, if it limits (2), then surely everything that's mentioned in (2) would have to come within (3) in some way or at least some part of it, otherwise you mention kauri gum in (2) and it's taken out by (3) without even any form of kauri gum coming in, which doesn't make sense to me, which is why I asked the question about what a type specimen was. Because we've got nests – well, is there an object –

WILLIAM YOUNG J:

But there's also (c). I mean, kauri gum could be within (c).

MR BULLOCK:

Twice, Your Honour, just –

GLAZEBROOK J:

Possibly but –

MR BULLOCK:

That is one of the submissions of the appellant for why we say that section, clause (3) does not limit clause (2) or category 5 and why we say the Court of Appeal was, with respect, to find that it did – the reference to, I was planning to come to this later, but I think we're well placed to deal with it now –

WILLIAM YOUNG J:

Just pausing. Wouldn't on a broad reading all gold extracted from New Zealand would be within (2) wouldn't it?

MR BULLOCK:

On a broad reading, yes Sir, if it is a mineral of New Zealand origin, related to New Zealand, yes, but the effect of that shouldn't be overstated because for it to be a protected New Zealand object it still must meet the specific importance

requirements in the definition. So what the appellant says is that there is no harm in section 5 being given a reading that is encompassing, or why, because there is still the control of importance in section 2 definition of "protected objects" itself.

WILLIAM YOUNG J:
But isn't all of (3) identifying particular items that are of particular significance essentially in terms of classification or descriptions of a taxonomy of the item to which it represents.

MR BULLOCK:
Yes Sir, and the appellant's submission is that the way to read 5(3) is as Parliament specifying items, specific items, which are both –

WILLIAM YOUNG J:
But you're not in 5(3).

MR BULLOCK:
No Sir, but we say 5(3) does not control –

WILLIAM YOUNG J:
Okay, but we can actually put a line through 5(3)(a), (b) and (c) and you've got to say that it's within the general language of 5(2).

MR BULLOCK:
Correct Sir, and I also need to say that 5(2) is not limited by 5(3).

WILLIAM YOUNG J:
On the other hand 5(3) may give you an indication of what's an item of significance in New Zealand for the purposes of the public, of the other leg of the argument.

MR BULLOCK:
Precisely Sir, and that is one of our submissions. The reason, one of the ways to read 5(3) is Parliament saying these items are certainly within

category 5, but also to give an indication of the sort of items of particular importance that would trigger –

WILLIAM YOUNG J:
And 5(4) gives you another stair, doesn't it.

MR BULLOCK:
Yes, 5(4) is interesting Sir, because as drafted in the Bill, I won't take Your Honours to it, that was originally included as a sub clause (d) to 3, and plainly its effect is quite limited because it only connects back to 3A, talking about type specimens, so there's a limited carveout there but again that too may be a signal of something which will come to be considered in the export context anyway, namely whether there's sufficient –

WILLIAM YOUNG J:
So you're within 5(2) on the basis that you're kauri is a statutory fossil, although not really a fossil.

MR BULLOCK:
Yes Sir.

WILLIAM YOUNG J:
And you have to say that (3) isn't an exclusion from (2) and you've got to persuade us that you are within the general words of the definition of "protected object".

MR BULLOCK:
Yes Sir. So in terms of why we say (3) does not control, one point is as Her Honour Justice Glazebrook referred to earlier, it's not obvious that all that is within 5(2) is within 5(3).

WILLIAM YOUNG J:
Could be within.

MR BULLOCK:

Could be within.

GLAZEBROOK J:

Well what I don't know is for a start you'd have to, I mean what it's talking about is being able to describe the category. Well the difficulty with nests is I'm not sure what the category would be. I mean maybe there's a category, an original category of certain nest and a certain bird but it's very difficult to work out whether it's limited when you don't know what the taxonomy actually means. So is there a taxonomy of nests and if so what is it.

MR BULLOCK:

Well Your Honour I think you might be assisted with the definition of "taxon", which is somewhat up the page, which means, "A taxonomic grouping of extant or extinct organisms." So it's a reference to organisms, rather than the taxonomy of animal products.

WILLIAM YOUNG J:

And (c) refers to the taxon or object?

MR BULLOCK:

Yes. And that's because (2) includes things like the products of animal and plant behaviour like nests and gum, which may not themselves be part of a tax on it.

WILLIAM YOUNG J:

Fossilised dung.

MR BULLOCK:

Yes, fossilised dung, Sir. The key point is the (3)(c) begins, "A specimen of an extant or extinct plant, rock or mineral, animal or other organism or fossil," it does not refer to the products of animal and plant behaviour. But that phrase is specifically referred to in subclause (2).

WILLIAM YOUNG J:

No, well, it might do because it defines the variation range in environment context of the taxon. So nests and dung may give you an indication of the range of the range of the particular animal concerned mightn't it?

MR BULLOCK:

Yes, Sir, but a nest or dung would not be, if we read (3)(c), a specimen of a plant, a specimen of a rock or a specimen of an animal, it would be a specimen of a product of an animal, which is specifically referred to separately in clause (2). Clause (2) refers to organisms and it separately refers to, "Products of animal and plant behaviour."

WILLIAM YOUNG J:

What about a supporting element?

MR BULLOCK:

Pardon, Sir?

WILLIAM YOUNG J:

What's a supporting element? "Shell or skeletal or supporting element." You say it's part of the animal?

GLAZEBROOK J:

It must be of the organism I think, in context.

MR BULLOCK:

Yes, my reading of that is that those are all things that at least would have been part of that organism that is now dead, the skeleton or its shell, the supporting element. I'm not sure on the precise scientific meaning of that. But it certainly wouldn't seem to include kauri gum or a nest.

So first reason, the appellant says that (3) does not control (2), is that (2) appears to be wider than (3) on its face. The second reason why the appellant says that (3) does not control (2) is that (3) is expressed using the

words, “Objects in this category include,” and the meaning of the word “include” takes on some significance in both parties’ submissions, particularly that of the third respondent. The categories themselves somewhat unhelpfully use a variety of different qualifiers and words of inclusion or exclusion throughout, but NEPS’s submission is that if all of the separate categories are looked at as a whole, where Parliament has intended to make a category subject to particular qualities being present it has said so. So to take for example category 2, which is back over the page, there is a wide inclusive list of objects in 2(1), and then in subclause (2) the language, “An object is included in this category “if it is” not represented by at least two comparable examples,” and a number of other characteristics there including age, and this is art, so the nature of the artist. But what Parliament has does there is that where it has intended to require or limit an otherwise wide category it’s used the language included in this category if it is having the following characteristics. In other words, if it is a “not included” in clause 5(3), Parliament simply used the word “include”. The Court of Appeal, with respect, read 5(3) as if it had included the words “if it is” so as to make those provisions sort of mandatory or controlling. But in a number of the clauses, 3, 8 and 9, Parliament has used a wide inclusive category to describe a number of objects, and then a later clause, “Providing that objects are included in this category if.” So we say Parliament’s been very deliberate about how it’s described the controls in otherwise wide groups.

Interestingly, Parliament has also in some of the categories included, for the avoidance of doubt it seems, the words in parentheses after “include” – so I’m looking at clause 3(2), “Objects in this category include (but are not limited to).” Now on one view that may be unhelpful to the appellant because it is Parliament envisaging that “include” might be seen as exhaustive. But what we say is that Parliament has included that for the avoidance of doubt in the initial or set-up clauses that define in quite broad terms books, maps, photographs and the like to show that the category is quite wide, and has then used the narrow language, “An object is included in this category if it has specific characteristics.” So we say that that's just not found in clause 5(3) and that the word “include” should have its ordinary meaning.

And there are examples in these schedules and I suspect that the parliamentary drafter had a rather challenging task of both being comprehensive but not over-comprehensive. In clause 1 for example we see certain archaeological and ethnographic items of non-New Zealand origin but that relate to New Zealand, and we have there subclauses (a) and (b) which say it consists of items the, "Have been in New Zealand for not less than 50 years and are in or have been in public collections and, "Are not represented by at least two comparable examples." And (c) goes on to say, "And include any object of Polynesian creation or modification brought to New Zealand before 1800 or created by the former Polynesian inhabitants of the Kermadecs." And what we say is that "include" there is certainly being used in its ordinary and inclusive meaning, it hasn't been used to limit matters that might otherwise be within category 1. Rather, it has clarified and confirmed that a certain subcategory of archaeological and historical objects are included. We say that clause 5(3) performs a similar function in that it clarifies and confirms that certain specific and, indeed, important objects that define taxons and are of specific scientific value are included but that it does not have the effect of limiting the otherwise broad description in 5(2) of what the category consists of.

And in some ways the width of category 5 makes sense, because what is relevant to science is a moving feast and will evolve in an ambulatory fashion as time progresses. The control on 5 is really the importance criterion in the definition of "protected New Zealand object", that is the ultimate limiting factor as well as the export provisions.

ELLEN FRANCE J:

Well, how would that work on your approach? How would one piece of swamp kauri be seen as being different from any other on that approach?

MR BULLOCK:

Well, Your Honour, I'll come to that. I have a further document to hand up in that respect, I believe by consent. But one of the reasons is that swamp kauri

turn out to be a very important resource in the climactic sciences as a record of climactic events through tree-ring data. So a particular piece of swamp kauri may be significant as part of the environmental record, environmental history of New Zealand.

ELLEN FRANCE J:

I understand that. But I'm asking about how you'd then distinguish one from another?

MR BULLOCK:

Well, Your Honour, what I think would happen is that for any particular piece of swamp kauri we would say that it falls within 5, because it's a fossil, which I'll come to, and it's within clause 2, and then it is necessary to assess under the definition of "protected New Zealand object" whether it meets the importance threshold to be within the definition of "protected New Zealand object" in addition to category 5 of the schedule, those two linked requirements.

GLAZEBROOK J:

Well, let's say we've got a beautifully carved kauri bowl that's being exported which can be exported under the Forestry regime, how would you actually assess that?

MR BULLOCK:

Well, Your Honour, Parliament's provided for that in the export provisions themselves. So if we turn back to section 7A…

GLAZEBROOK J:

Well, I suppose the other question is does this cut across the regime under the Forests Act which it's said that swamp kauri comes within?

MR BULLOCK:

No, Your Honour, and the reason for that is section 7A which describes the circumstances in which a chief executive must not allow an object to be

exported. 7A(1) paragraph (a)(ii) has a criterion of the object being, “Substantially physically authentic,” so the carved bowl is unlikely to be caught by the export restriction or prohibited by the export restriction, because the carved bowl is unlikely to be substantially physically authentic.

WILLIAM YOUNG J:
But you would need, on the hypothesis being put to you, the export of kauri bowl would require a licence, wouldn't it, because, permission, because it is within the definition of, it’s a fossil?

MR BULLOCK:
We would say it would require an application.

WILLIAM YOUNG J:
Yes.

MR BULLOCK:
But the application may be yes –

WILLIAM YOUNG J:
Yes. So to the extent to which the Forestry’s legislation contemplates the export of swamp kauri in final and finished goods or as stumps it’s subject to a requirement to get permission under this Act?

MR BULLOCK:
Sorry, Sir, yes, the answer is yes.

WILLIAM YOUNG J:
I think that’s the proposition that was being put to you.

MR BULLOCK:
Yes.

WILLIAM YOUNG J:
Not that it’s impossible to get permission.

MR BULLOCK:

Sorry, the answer is yes.

WILLIAM YOUNG J:

But the whole idea of getting permission cuts across what seems to be the scheme of the Forests legislation.

GLAZEBROOK J:

And the scheme of the Forest legislation is you don't have to have permission from anybody to export that beautifully totally finished kauri bowl or piece of furniture.

MR BULLOCK:

Well, I would say to that Your Honour that the scheme of the Forests Act is that you don't need permission from the Chief Executive of the Ministry for Primary Industries. It's not inconceivable and, indeed, I don't understand it to be uncommon that two statutory regimes may both regulate the same activity. Someone looking to build a coal mine in a national park may resource consent, they may also require permission from the Department of Conservation to use that land or to move animals or plants that are on it. It's not inconceivable that you could have overlapping regimes that are engaged with different public actors.

GLAZEBROOK J:

It might be relevant to whether it comes within the definition of "fossil".

MR BULLOCK:

Yes, Your Honour, and it may be helpful if I turn to that now. If we turn back to clause 5 of the schedule, we see there that Parliament has given a deliberately expansive definition of "fossil" which is that, "Irrespective of how it is preserved it is an object constituting the remains or traces of a non-human organism that lived in New Zealand prior to human habitation," including some other specific things but it's trace evidence of its behaviour. So what we say is that that requires that the organism lived in New Zealand prior to human

habitation, that the object must be its remains or traces of it, but that Parliament has decided that we need not be concerned by how the preservation has occurred. And the reason why Parliament has included a specific definition of "fossil" would appear to be that it has taken a more expansive meaning of the word than might ordinarily be given. My understanding is that fossilisation is usually a relatively particularly defined point in a process of preservation but Parliament has said it doesn't matter how it's preserved if it is one of these other things, and what the appellant says is swamp kauri is preserved. We accept that it is referred to in the scientific literature as a subfossil because the fossilisation process is not complete, but Parliament has said that irrespective of how the preservation has taken place, if it is an object that is the, that constitutes the remains or traces of a non-human organism existing prior to human habitation, then it is a fossil for the purposes of the schedule.

WILLIAM YOUNG J:

Perhaps you can get back to why your within the first part of the definition because on the face of it it does look as though kauri that anti-date about 1200 are fossils for statutory purposes. You are within 5(2). You're not within 5(3) but that may or may not matter, but you have to satisfy the Court that you are within the first part of the definition.

MR BULLOCK:

Yes Sir, so perhaps it would be helpful to turn to that now. So this is the first part of the definition that the object is of importance to New Zealand or a part of New Zealand for aesthetic, archaeological, architectural and so on, historical, cultural, scientific reasons. Your Honours, what I'd like to do is to hand up a report that I understand is not objected to by my learned friend. It's a report by the, for the Ministry for Primary Industries by NIWA on the scientific value of swamp kauri. It's the companion report to the report that is in the bundle of authorities already about cultural and heritage value.

GLAZEBROOK J:

I suppose the – if the submission is well it's really useful to know about the environmental aspects and what's happened with climate et cetera, that can only be for something that is in situ, can't it, and you can't actually – so in order to even get to the stage of exporting, you have to come within the Forestry Act and in the final stages it has to be have been manufactured to a final stage, and whatever that means, but it certainly won't be in site, where you can actually have the sort of scientific indications of environment, which was the point again, another point behind the question I asked you earlier about the beautifully finished kauri bowl.

MR BULLOCK:

So two responses to that Your Honour. The first is, and this report talks about it in some detail, certainly the presence of a log in situ is of the most scientific value, undoubtedly. The log itself can yield value but the, what this report shows is generally, yes, once it is cut it is of limited to no scientific value and in fact that is a specific concern noted by the authors of the report, that this material is being extracted and cut up without a chance for members of the relevant scientific communities to examine it. However, Your Honour, that is of course only one aspect of importance.

GLAZEBROOK J:

Well I understand that but in terms of an export ban it doesn't actually help with that. You would have to say, have something that told people they couldn't take it out in the first place for those reasons, and the only thing we're looking at is an export ban here and the only things that can be exported, however they might be defined, are manufactured goods.

MR BULLOCK:

Also stumps Your Honour. Stumps maybe exported. They need to have approval –

GLAZEBROOK J:

Well that's true but again it might not be, they're certainly not in situ. They might have some scientific value, but we're not dealing with stumps because that's not even before us.

MR BULLOCK:

No Your Honour but the, in terms of whether the protected object – well, the Protected Objects Act argument we say applies to –

GLAZEBROOK J:

That would apply to stumps as well.

MR BULLOCK:

Your Honour is right, the definition in the Forest Act is not before you, that issue, but that would apply to stumps as well, and I accept Your Honour's proposition that once you get to the export stage you will almost invariably be dealing with a log that is no longer in situ and that will reduce the scientific value. Nevertheless, this report, in my submission, shows that there is value in the logs themselves and presumably, although I don't know, in a stump.

GLAZEBROOK J:

What I think when you look at the Antiquities Act and this Act is what it seems to be protecting are particular objects, it's not protecting a genus in some way. So however you look at it it's not swamp kauri or, unless there was only one or two left that were of significance. So you're actually looking at objects, not a whole genus of something, I would have thought. That's the whole point about this, it's looking at objects, and the type of application process that's envisaged seems to mean that you're looking at just particular objects, and it's called that as well actually is the other matter.

MR BULLOCK:

Two responses to that, Your Honour. The first is the definition of "object" in the Act, which is tab 6 and it's on page 6 of the legislation, "Objects defined to include a collection or assemblage of objects." So it's not just, with respect,

about specific objects, although that may be the normal course, it's not necessitated by the…

GLAZEBROOK J:

Well, of course, the fact it's a collection might mean it's of cultural significance in itself.

MR BULLOCK:

That's true.

GLAZEBROOK J:

Which is why they'd have that definition.

MR BULLOCK:

That's true, but the submission is "object" does not imply singularity or limitation.

GLAZEBROOK J:

No, no.

MR BULLOCK:

The second submission on that concern is the ability of the Chief Executive to gazette a notice exempting a category or categories of objects if there's sufficient examples held in public ownership in New Zealand. That power would seem to envisage a situation where you have a large number of items being presented for permission in a situation where their presence in public collections mean that the heritage value can be taken as read to be low, so that by notice the Chief Executive can say, "They're protected objects but I don't need to look at them because we've already got enough." We say that provision's important because it does provide a way of regulating bulk categories or classes of objects through a *Gazette* notice. And in the Antiquities Act, which contained a similar provision, the parliamentary debates on the Antiquities Act appeared to deal with that concern, and this is in tab 10 of the respondent's bundle of authorities, we have the second reading of the

Antiquities Bill, the Minister for Internal Affairs who moved that Bill states, and this is on the first page of the debates on the right-hand column, halfway down, he notes that, “It’s important however to frame a definition of an antiquity which is reasonably concise yet comprehensive and capable of being clearly understood.” He considers that that's what the Antiquities Act definitions were designed to do. And then he goes on to say, “It may for instance be found that in certain classes of objects, except for the odd item with some particular associations or which is not widely held in public ownership –

GLAZEBROOK J:
Sorry, whereabouts are you, what page?

MR BULLOCK:
So, Your Honour, this is on the right-hand column on the page of the debates, 2539, tab 10 of the respondent’s bundle of authorities, 2539, the first page there, and it’s on the right-hand column about two-thirds of the way down. The Minister goes on to say, “It may, for instance, be found that in certain classes of objects there is no need for the export of the great bulk to be controlled by the permit system. The select committee has therefore amended clause 5 to provide for the Secretary for Internal Affairs to issue general exemptions if he considers it appropriate.” So the concern Your Honour raised appears to have been addressed in precisely this way, at least in the Antiquities Bill, and that power to gazette an exemption has carried over, albeit with slightly different language mirroring the change in language in the new form of legislation. But that power to gazette remains and we say that that addresses concerns about bulk issues.

ELLEN FRANCE J:
Things like the requirement to have a register and the types of conditions that might be imposed by the Chief Executive don’t seem to fit with the idea of the Act applying to a genus.

MR BULLOCK:

Your Honour, the register I understand is engaged where objects have been presented and declined. I think that's the point, declined first, but I think that's the point where they are registered. Oh, maybe not. No, it's not the case but –

ELLEN FRANCE J:

No I think it's potentially both, but it just doesn't, it seems odd that you have a register of objects or categories of objects when you're talking about a whole class or genus.

MR BULLOCK:

Yes, although the category of an object could include a class. The submission for the appellant is not necessarily that if we're right this will result in the exports being stopped across the board. The concern for the appellant is this is looked at through the heritage lens in the way we say is envisaged by the legislation and it maybe that the Chief Executive gazettes a notice that lets the class go out or it may be that the Chief Executive finds some particular items are of specific cultural or scientific or heritage value.

ELLEN FRANCE J:

Doesn't the gazetting have the potential to cut across what you say is the regime under the Forest Act?

MR BULLOCK:

I don't think so Your Honour. I think the two regimes are sufficiently separate that they wouldn't create any issues. As it stands if a product is a finished and manufactured product under the Forest Act it can be exported without permit. A gazetting under the culture and heritage legislation would simply mean that they could also be – so that kauri could be exported without a permit under that regime. I think they are quite separate in that they don't cut across each other.

GLAZEBROOK J:

But if the genus is of cultural significance then why would you be able to add an exemption.

MR BULLOCK:

They must always be the case with respect Your Honour because for an item to be a protected object it must have met a threshold –

GLAZEBROOK J:

No, I understand that, but in terms of the, if the genus as a whole is, and it seems difficult to have an exemption in respect of that genus as a whole, I mean what is sufficient in public ownership. There's presumably the public, or there are possibly some state forests, or at least national parks that have kauri, probably under threat now so they may not have it for very long, given the dieback issue. There's presumably public land that might have swamp kauri in it. There's presumably in museums but if the genus itself is culturally significant then it's a bit difficult to see how you've got the exemption.

MR BULLOCK:

Well I think Your Honour the short point is we can't answer that here today. That would be a decision that would have to be made by the Secretary using that power –

GLAZEBROOK J:

Well it would be, although that's part of the submission that says well you, that makes it all right, and doesn't cut across the Forest regime. So we do have to fit these two pieces of legislation together.

MR BULLOCK:

I think they can sit side by side. I don't think they necessarily need to interlock. If we are right about the Protected Objects Act, we would say that all exports of swamp kauri are within the definition in that legislation and it needs to be treated under that legislation. Your Honours, the last points I wanted to touch on, but I won't go through them in detail, at least some of

them are in my submissions, there's a report, and it's at tab 43 of our bundle, second volume of authorities, and that is a very detailed report produced by MPI, which post-dates the High Court hearing of this case.

WILLIAM YOUNG J:

Sorry, what tab is it?

MR BULLOCK:

Tab 43 of our authorities, volume 2. Now I won't go through this in detail, but it is a detailed report prepared for MPI, not Cultural and Heritage but for MPI, looking at the various cultural and heritage significance of swamp kauri. The key takeaways from it, it might be helpful just to go to one or two examples, the aesthetic value is mentioned specifically. If Your Honours turn to page 44, 45, of that document – the page numbers are small at the bottom right-hand corner – it's noted that swamp kauri have, "Historical cultural heritage value to communities in northern New Zealand," and we'll recall that the definition of "protected New Zealand object" connects importance to New Zealand or a part of New Zealand. Continuing through to page 53, again the conclusion there under 5.5.6, "A strong aspect of the demonstrated social value of swamp kauri lies in its uniqueness occurring only in the north of New Zealand." And, finally, turning to page 62 and 63, this is under 5.8.6 of the report, "In summary, kauri – both standing trees and swamp kauri – are considered by Māori to be a culturally significant resource, a taonga. While considered as significant on its own, the value of swamp kauri are also tied to the cultural idea of kaitiakitanga and land management." So on the cultural and heritage side we say that there is evidence of importance sufficient to meet the definition, the test and the definition, for a protected New Zealand object. We also –

GLAZEBROOK J:

I suspect that a lot of those would relate to other indigenous timber as well.

MR BULLOCK:

Certainly, Your Honour, I suspect that would be right. And of course under the Forests Act there are significant constraints on the export of other indigenous timbers, and that may be the case here, although of course other indigenous timber would not be a fossil because it would not meet the definition because it would be too modern and it's not preserved. And the final –

GLAZEBROOK J:

Yes, but again, saying kauri is of significance, just because swamp kauri happens to be a fossil doesn't actually put that in a separate category does it, apart from I presume your in situ argument on the environmental side?

MR BULLOCK:

Well, it is revered for its age, is one of the things that comes out of this report. So swamp kauri is particularly old and has a particularly close connection to the land for that reason, so it is distinct, with respect.

GLAZEBROOK J:

Okay.

MR BULLOCK:

The last point I'll touch on briefly is this report that I've handed up. So this appears to have been a companion report that was prepared around the same time for MPI on scientific value, and the key takeaways from that is the executive summary on page 4, which refers to swamp kauri being a unique, globally unique resourced science and that a similar resource is not likely to be found elsewhere, and the authors there talk about its importance to New Zealand's environmental record, environmental history, as a record of climactic events and changes, and in terms of that report it might just be useful to turn through to page 24. There are listed there a number of specific areas of scientific value that are identified by the authors. But as Your Honour Justice Glazebrook has noted, primarily the scientific value comes from seeing the log in situ, being able to ascertain its wider environmental context.

But that said, you know, the ability to radio carbon date particular logs, for example, which is the second bullet point there, may not depend so much on the item or log being in situ. So I would encourage the Court to look at this report, and there's also on page 27 a list of perceived benefits of subfossil kauri to current and future scientific efforts. Where all that comes back to is, we say, that the definition of "protected New Zealand object" is met because we say that swamp kauri is a fossil within category 5 and that it is, or has been demonstrated to be of importance of New Zealand for at least cultural, historical, scientific, social, traditional reasons as demonstrated in the two reports that are before the Court from, or prepared for the Ministry for Primary Industries. So unless Your Honours have any further questions those are my submissions.

WILLIAM YOUNG J:
No, thank you Mr Bullock. Ms Gorman.

MS GORMAN:
Thank you Your Honours. I wanted to start by making a few points of clarification about the operation of the Act so I'd be grateful if you could have volume 1, tab 2 open in front of you. Now it's my submission that the operation of the Act illustrates both the balancing that Parliament sought to make between a variety of interests here, between environmental concerns, the concerns about the living indigenous forest, and also between landowner rights, and I'll come to how that balance is struck. It also, in my submission, illustrates the level of information and knowledge and involvement that MPI has in the indigenous timber industry, which will also be relevant when I come to discuss my learned friend's suggestion that there is a bulk export of swamp kauri going on that is not brought to the attention of MPI.

So the first clarification that I wish to make is in relation to the control on felling, which is at 67DB. So contrary to what one might expect there is no general prohibition on felling of indigenous timber.

WILLIAM YOUNG J:
On selling or felling?

MS GORMAN:
Felling, sorry, on felling of indigenous timber. So it's possible to fell any indigenous timber in New Zealand and cut it up for firewood. What advances the purpose of sustainable forest management are the other two controls, which have been described as the lynchpins, so the control on milling and the control on export, because as you can see from section 67DB, the only control on felling is where land is specified in what I'll term a plan or a permit. So a sustainable forest management plan or a sustainable forest management permit, and there's no requirement to have a plan or a permit if you have indigenous forest land. Where the incentive to have one of those kicks in is the control on milling, which is what I'll come to now.

So the control on milling is in 67D, and that provides a general prohibition on milling any indigenous timber, so this is putting it through a sawmill, unless the sawmill is registered, so there's the first way that MPI knows about what's happening at the sawmill, is that sawmills have to be registered, and in accordance with regulations made, and I'll come to the detail of that, and that at least one of the following paragraphs applies to the harvesting of the timber. So you can't mill unless the indigenous timber has been harvested in one of these ways. So (a) relates to the situation where there is a plan or a permit, and we know already from 67DB the felling control, that where there is a plan or a permit, you would have to fell in accordance with that plan or permit, and I can come to as well how those plans and permits are devised, but that's what (a) deals with. (b), "The Secretary has stated in writing that he or she is satisfied that," and here is another way that MPI is involved in this process because MPI has to approve the source here for milling, and what is relevant here for today's purposes is (b)(iv), "The timber is salvaged timber that has been or will be harvested from an area of land that is not indigenous forest land". So swamp kauri can be milled if it comes from an area that's not indigenous forest land. Or, in (b)(v), "The timber has been or will be harvested from windthrown trees or trees that have died from natural causes,"

so swamp kauri could also come within that phrasing, “on land that is not subject to a plan or a permit but where the Secretary is satisfied that the forest’s natural values will be maintained.”

So we can see here that while – as I’ll come to later – the express purpose of this part is to sustainably manage growing indigenous forest, there is a concern here expressed by Parliament to ensure that even when salvaged timber, dead timber, is milled that that doesn’t negatively impact on a growing forest. So either it has to come from an area of land that’s not “indigenous forest land”, and that’s a defined term in the Act, or it has to come from an area where there’s not a plan or a permit but that the forest’s natural values will be maintained.

WILLIAM YOUNG J:
But just so I understand, does the Secretary not have to certify log-by-log that the timber to be milled is salvage?

MS GORMAN:
Yes, Sir, I’ll take you to those documents right now. So if you could turn to volume 5, there’s three documents in here that were exhibited to the affidavits for MPI that illustrate how this milling control operates. So the first one is at page 1225 of volume 5. Now this document relates in particular to swamp kauri, it’s a quarterly report about swamp kauri activity, and there’s a description there about milling controls showing that, “Indigenous timber, including swamp kauri, can only be milled by registered sawmills,” that there has to be, “An approved milling statement before it can be milled.” And the next document that I’ll take you to is the milling statement and that’s where it records the number of logs and those kinds of details. But before we move off this document, the quarterly report provides the details of the statements that have been approved in this quarter and we can see that this report relates to the period 1 April 2015 to 30 June 2015. And it does note that if someone extracts swamp kauri with no intention to mill then no milling statement will be applied for. So recognises that there may be some situations where a milling statement won’t be required. And then over the page we can see the three

milling statements that were issued in that period, the volume that was approved and then –

GLAZEBROOK J:
The totem poles wouldn't come within this then would they, because there's no milling?

MS GORMAN:
No, they would not need to be milled, that's correct, yes. And I will come and address my learned friend's submissions on those poles as well. So there is a difference here between what's been approved in terms of volume and what's been milled.

Then the next document that's relevant in this bundle is at page 1334, volume 5, and that's the application form for the approval. And that shows that the applicant needs to record the number of pieces and the total volume, and there's a check list that included photographs of the trees or logs, the timber volume record, and photographs showing the property location and the area from which the timber has been salvaged.

WILLIAM YOUNG J:
Is the stump, does that include an above, an area, a length of the stump, sorry, of the tree, aboveground that what is the equivalent of the circumference of the tree?

MS GORMAN:
The diameter of the tree?

WILLIAM YOUNG J:
The diameter.

MS GORMAN:
Yes, and over the page Your Honour, on the second page of that document, there is a reference to the definition of "stump" which is the basal part of the

tree being the roots and the part of the trunk that extends from the ground line, so that's just a slight difference from what my learned friend was referring to because he talked about the root ball, so it's from the ground line. We did have evidence about what a ground line is before the High Court, but because stump is not an issue here it hasn't been included in the case on appeal.

O'REGAN J:

What's the rationale for separating the stump when it's something that's been buried for thousands of years?

MS GORMAN:

Well, Your Honour, my submission overall on the Act is that it's directed towards living trees and ordinarily when living trees are felled stump is more the what's left standing in the ground, and perhaps the reference, the permission in the export control to export stump without it needing to be finished, is to ensure that that waste timber is actually used, if there's a profitable way to export it. It doesn't, I don't expect that Parliament had in mind the swamp kauri logs, but of course when the amendment was made to the Act following the *Ancient Trees* decision where Parliament had fully in mind that there was this difference to swamp kauri, that a whole tree had been buried, Parliament didn't choose to take a different path with swamp kauri and say, well actually, all swamp kauri has to be exported in the form of a finished product. So I probably can't take it too much further than that but to say that Parliament clearly indicated that the same approach should be taken to swamp kauri stump as is taken to all indigenous timber.

WILLIAM YOUNG J:

Just by way of example, just looking 1232 and 1233 is the photo of 1233 of a stump?

MS GORMAN:

Sorry, I'll just get there Your Honour. Yes.

WILLIAM YOUNG J:

I suppose the perspective makes it a bit difficult but it does look to be a bit longer in diameter.

MS GORMAN:

I think you're right Sir, the perspective of these photos can make it very difficult to make an accurate prediction. This was a matter that was debated in the evidence at some detail because of I guess the fact that it will generally be lying on the longest part of the tree for stability, but the diameter needs to be taken I guess at the widest part so that can, because the witnesses for my learned friend had taken photos of themselves next to stumps to try and give a perspective on how high the diameter was and the point was made by the forestry officers in response that that angle of the tree was not the widest part of the diameter. As you can see here the widest part of the diameter is I guess the body –

WILLIAM YOUNG J:

Latitudinally.

MS GORMAN:

Sorry, yes, that's a good way to describe it. So yes it can be difficult to tell from the photos. I was going to refer you, Your Honours, to an illustration of how stump is calculated, because although we don't have all of the evidence before the Court, there's an export manual that provides guidance to forestry officers and exporters, and that's in volume 3 of the case on appeal on page 662. So the manual starts at 623 but the diagram is at 662. Myself, I find that a handy reference for understanding how the calculation is made. I notice it's 1 o'clock.

WILLIAM YOUNG J:

Yes, we might take the adjournment now. How are we placed for time?

MS GORMAN:

We're probably a little bit behind where I thought we might be but I hope to be able to answer all of the questions that there might be on this part within around an hour and then be able to hand over to my learned friend Ms Arapere.

WILLIAM YOUNG J:

Ms Arapere?

MS ARAPERE:

Sir, I can be fast and simply answer questions if that assists.

WILLIAM YOUNG J:

How long sorry?

MS ARAPERE:

Half an hour?

WILLIAM YOUNG J:

That sounds all right.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MS GORMAN:

Thank you, Your Honours. We were at page 1335 of volume 5, and when we broke for lunch I was addressing Your Honours on the definition of "stump" and the example, the photograph that illustrates how the definition is applied.

I just want to, before I leave that topic, give one reference to the evidence around the export of the log that Your Honour Justice Young referred to, the photograph, which is discussed in Mr Bartholomew's affidavit at tab 15 of volume 2, paragraph 47. So I understand that not all of the exhibits to that paragraph have been included on the case on appeal because –

GLAZEBROOK J:
Sorry, which tab?

MS GORMAN:
Tab 15, volume 2. So that's the affidavit of Mr Bartholomew who was at the time of the High Court proceeding the manager of the sustainable forest management team. And at paragraph 47 of this affidavit he addressed the process for inspection of those stumps which were being exported to China by Oceanic Navigation and are described as the "Oceanic logs" in some of the documents. So not all of the exhibits have been included in the case on appeal but the one that has does include some measurements which show that the length of the logs for that export, from recollection, was about – there was one that was 4.2 metres and there was one that was around three metres and the widths were listed as being around three metres as well, that's the document at volume 5, page 1227, so we can easily turn to that if that's useful.

GLAZEBROOK J:
I don't see that it's anything to do with us.

O'REGAN J:
Well, if it is – I mean, we, you know, it's not before us.

MS GORMAN:
Okay. The point that Mr Bartholomew also makes at the beginning of his affidavit is that because of the large width of stumps that the length of permitted stump can go as far as five metres. So that might just provide a guide as to the volume, the possible volume of those lawful exports.

Just a final point I'll make on stump before returning to milling is that just because stumps don't have to be milled before export doesn't mean that they're not. The restrictions on milling go to the source of the timber and there's a similar restriction on stump export. So there's no disadvantage in complying with the milling requirements if you're exporting a stump because

the source of the stump timber is going to be inspected and approved at export anyway.

So then returning to milling, the last document that I wanted to turn to in volume 5 is at page 1515, and I don't need to address it in any detail but it just summarises the requirements around milling. It's a fact sheet that may just be a useful summary. And I apologise, but it appears that the second page of that fact sheet hasn't been copied into the case on appeal. It is available on the MPI website but I'd be happy to ensure that the Court has a copy if that would assist.

So that's all I wanted to address on milling before I move to the export provisions, unless there are any questions for me on that topic?

So then turning to the export provision, which is back in volume 1 of the bundle of authorities at section 67C. It's important, in my submission, to consider how this control operates in the context of those milling controls. Because while finished and manufactured, finished or manufactured, indigenous timber products are not inspected as to source, so they can be exported regardless of the source, in large part those products, and certainly table tops, will have been milled. So when an exporter comes to export a product such as a table top it will have first had to comply with the milling requirements, and that means that MPI will have records of volume and will have checked the source of that timber. And the reason that that's significant in my submission is that my learned friend's suggestion that there is a large amount of export happening without MPI's knowledge firstly isn't supported by the evidence that's contained in the case on appeal and, further, in my submission, is doubtful given the extent to which MPI has knowledge about the volumes of timbering being processed in this sector. There's an incentive on exporters to use the MPI voluntary process because the potential for having your exports stopped for a random check at the border –

GLAZEBROOK J:

Well, there might be, but if the judgment below stands then the check's not going to do much is it, in respect of table tops and vaguely carved poles, except to the extent that MPI has tightened up on that?

MS GORMAN:

Sorry, Your Honour, could I clarify –

GLAZEBROOK J:

Well, I mean, you have milling records but you've no idea what actually goes out of the country do you, apart from the stumps, apart from the ones that have to be notified by export control?

MS GORMAN:

Well, that's a submission, Your Honour, that I'm challenging. My –

GLAZEBROOK J:

Well, yes, but you can't can you? Because if things can go out as export – I mean, either you assume everything that's milled goes out by export, in which case you do have knowledge of it in terms of volume, but you don't have knowledge of the individual things that have gone out because nothing has to be notified if it comes within "manufactured".

MS GORMAN:

Yes, Your Honour, that's the legal position that nothing has to be notified. But I understood my learned friend to be making a factual submission which was that, in fact, large volumes are going out without MPI's knowledge.

GLAZEBROOK J:

Well, you wouldn't know whether it was so or not would you?

MS GORMAN:

No, but I'm suggesting, Your Honour, that the evidence doesn't support that suggestion and in fact the –

GLAZEBROOK J:

But if you don't know how much is going out how do you know whether the evidence supports it or not? I mean, it cuts both ways, but…

WILLIAM YOUNG J:

Well, do MPI have a handle on how much, what percentage of kauri exports are notified?

MS GORMAN:

Well, they do monitor, together with Customs, exports from particular exporters. So some of the evidence in volume 2 in the MPI official's evidence talks about the alerts that can be placed through the Customs system, including by exporter, so MPI can do that if it has knowledge of large stockpiles of swamp Kauri that my learned friend has referred to, it can put an alert in the Customs system to see when exports are happening from that exporter and it can align that with information about –

WILLIAM YOUNG J:

So do we know whether that sort of exercise has produced figures as to what proportion of kauri exports are notified?

MS GORMAN:

From the top of my head I can't remember whether that information has been produced. I know that in the quarterly report that I drew Your Honours' attention to earlier there is reference to MPI knowing that the large proportion of kauri milled doesn't get exported, so more swamp kauri stays in New Zealand than is exported, and I presume that that would derive from a comparison.

WILLIAM YOUNG J:

But we don't know whether that's stockpiled for future export or used for manufacturing in New Zealand?

MS GORMAN:

Yes. I guess the submission that I want to make is that this case has been brought before each of the Courts in relation to a large time period of exports. So what has been challenged is exports during a five-year period which –

GLAZEBROOK J:

Well, all we're doing is looking at what the legislation means, so none of this is very relevant.

WILLIAM YOUNG J:

Except it makes it contextual.

MS GORMAN:

It is contextual, and in my –

WILLIAM YOUNG J:

So we're being shown something in saying, well, that's the sort of thing that's being exported as a finished manufactured product. Now I don't think, we're not being asked to make a ruling in individual cases.

MS GORMAN:

No, Your Honour, that's my understanding.

GLAZEBROOK J:

Or even in relation to extent or reasonableness because that's not before us.

MS GORMAN:

Yes, I accept that, Your Honour. The reason that, in my view, from hearing my learned friend's submissions, it becomes relevant to the statutory question is that my learned friend is advancing an interpretation of the definition that is based on a suspicion that unlawful exports are occurring. And when I get to examine the definition it will be my submission that the types of restrictions that my learned friend would like to see placed on the application of the definition reflect that suspicion rather than reflect Parliament's intent and

rather than advance the purpose of the Act, and that my submission is twofold. Firstly, that there is no reliable evidence of this unlawful export going on…

O'REGAN J:
Well, we don't know it's unlawful until we know what the law is. I mean, it's a circular argument isn't it?

MS GORMAN:
There is no reliable evidence of exports being made with an intent to alter the product post-export.

ARNOLD J:
What we do know though is the approach the MPI takes and, as I understand it, there is a challenge to the fundamental approach, for example in relation to some of the rough slabs that are called table tops?

MS GORMAN:
Yes, Your Honour, and again I differ from my learned friend in terms of what the current MPI approach is, because in my submission what the evidence shows is that there has been a change of approach in relation to table tops since 2010. So Mr Hollis's affidavit addresses the situation as it was when he arrived in the forestry team at MPI and it was in the early days of the export of table tops and it came to MPI's attention that table tops in a rusticated form had been exported, some of which had come before MPI for inspection on a voluntary basis, and that there had been a miscommunication between MPI and their forestry officers who are employed by AsureQuality as to what role AsureQuality was playing on those exports, whether it was just checking source or whether they were being approved by MPI. And following that and an investigation into a particular table top a number of different measures were implemented like the guidance documents, the export manual and other improvements that are outlined in the evidence, and that the current MPI approach, which I can give you references for, is that rough sawn timber is not

approved as a table top, MPI demands a high degree of finish that wouldn't leave doubt about whether the use, the intended purpose, is as a table –

WILLIAM YOUNG J:
So what about dressed timber?

MS GORMAN:
Dressed timber? There is a reference that may be useful, because we are all speaking about technical –

GLAZEBROOK J:
Well, you see, either that approach is right or it's wrong. We're really being asked only to look at the definition. So whether the definition has been applied wrongly or rightly or whatever it is by MPI, all we're looking at is the definition and what the definition means and whether the Court of Appeal was right in its –

O'REGAN J:
I mean, does (c) trump (a) and (b) or not?

MS GORMAN:
No, not in my submission.

O'REGAN J:
Well, that's we have to decide, isn't it?

MS GORMAN:
Yes. Well, I can address that now…

O'REGAN J:
So you are taking an interpretation that you're saying is the correct one and that would clearly allow a much broader range of exports than the interpretation put to us by your opponents?

MS GORMAN:

Well, in my submission paragraph (a) is the central part of the definition, and what paragraph (a) indicates is that Parliament intends the focus to be from the perspective of the purchaser. So what is the intended use and what further machining or modification is needed for a product to be in its final shape and form?

GLAZEBROOK J:

So why do you say that? Because in fact the decision of the Courts below is you don't look at what the purchaser's going to do. So are you now saying that they were wrong on that? Maybe we just need the definition.

WILLIAM YOUNG J:

Well, they placed emphasis I think on "necessary", they said, "Well, it doesn't really matter if it is going to get further processing, if such processing is unnecessary for it to be used as a table top then that's fine."

MS GORMAN:

I wouldn't agree, Your Honour, that the Courts went as far as to say that it doesn't matter whether it's going to be processed further.

GLAZEBROOK J:

Well, certainly the High Court did, explicitly I thought.

MS GORMAN:

There's quite an important footnote qualification to that statement, Your Honour. So in the High Court Justice Toogood said that without more evidence that it had been subjected to a modification, "Which is unnecessary to render it fit for purpose," couldn't be relevant to proving that the export was unlawful, so that's at paragraph 4(c) of the High Court judgment. But that's the paragraph that's summarising paragraph 41 to 46. And at paragraph 46 of the judgment there's a footnote 16 where His Honour found that, "Evidence of major modifications to kauri table tops previously exported may give rise to an inference that a table top submitted for approval by that exporter is not

genuinely intended for use as a table top," and that was a qualification that the Court of Appeal adopted, also was that – so that is why I didn't agree, Your Honour.

WILLIAM YOUNG J:

But, I mean, there is an issue here as to the role of paragraph (c).

MS GORMAN:

Yes. Shall I –

WILLIAM YOUNG J:

You say it's subsidiary to (a) and (b)?

MS GORMAN:

Well, in my submission it's illustrative. So what, in my submission, although I wouldn't come to paragraph (c) first ordinarily, given that it's assumed prominence in this appeal. In my submission the first question that has to be asked about paragraph (c) is what do the items in paragraph (c) have in common? Because similar items to what are in paragraph (c) are intended to be excluded from the definition. And in my submission each of the items in paragraph (c) is timber that's destined for another use, so it's timber that's going to be shaped, modified in form…

WILLIAM YOUNG J:

What, mouldings and panelling?

MS GORMAN:

Yes, Your Honour, and my interpretation of that is, like my learned friend referred to, the kinds of panelling that you might find in a timber yard that's a standard size that would then be cut for the purpose.

ARNOLD J:

But the moulding is already shaped and then it's only an issue of length.

MS GORMAN:

Moulding is already shaped, yes. Well, that's right, Sir, and I believe my learned friend acknowledged that in some cases a moulding might meet the definition of paragraph (a), if it was a –

WILLIAM YOUNG J:

So what do you do if it's within both (a) and (c)?

MS GORMAN:

That is why in my submission, Your Honour, (c) cannot be safely categorised as trumping, so –

WILLIAM YOUNG J:

Why not?

MS GORMAN:

Because –

GLAZEBROOK J:

It says, "Does not include."

MS GORMAN:

Because in my submission the focus has to be on whether this is a product in its final form intended for this final use, and if it does meet (a) then (c) doesn't take it out of (a), in my submission –

GLAZEBROOK J:

But why does it say, "Does not include"?

ARNOLD J:

But what's the point of – so (c) is just a for the avoidance of doubt provision?

MS GORMAN:

The way that I have approached it, Sir, is that there is a technical argument that those items are products in their final form, even though they are destined

for a further use, and that (c) clarifies the position by saying, “These types of items, that’s not what we mean by ‘product’.” Just because you can go to Bunnings and you can buy some panelling doesn’t mean that it’s what we mean in (a).”

WILLIAM YOUNG J:

You see, I’d have thought mouldings and panelling might be rather more of a finished or manufactured indigenous product than some of the slabs of timber we’ve seen.

MS GORMAN:

Yes, Your Honour, and that is why I wanted to take you through some of the evidence about those photographs, because I…

WILLIAM YOUNG J:

So, what, do you say some of the photographs, they might be stump timber?

MS GORMAN:

I say that they might be stump timber, that they may or may not have left New Zealand, that – so they may not have been exported, they may fit within the definition –

GLAZEBROOK J:

But it’s still irrelevant isn’t it? Because we still have to decide whether in fact those sort of products – because that’s what’s in front of us – those sort of products would be able to be exported. Because on the Court of Appeal decision they would be able to be exported.

MS GORMAN:

I’m unsure, Your Honour, why –

GLAZEBROOK J:

Even if they're not exported at the moment, on the Court of Appeal decision they would be able to be, because they would be manufactured products in their final form.

MS GORMAN:

I'm not sure which products you're talking about at this point, Your Honour.

GLAZEBROOK J:

Well, the table tops that we've seen. It doesn't matter whether they are or aren't. So if they weren't made out of stump kauri and they were exported, the question is could they be lawfully exported, and on the Court of Appeal decision the answer would be yes.

MS GORMAN:

Yes, I do accept that the Court of Appeal decision is stronger than the approach that MPI takes. So the Court of Appeal has said that provided that the evidence is or the situation is that this product is in its final form and it's not intended to be modified and that it can be used, that meets subparagraph (a).

GLAZEBROOK J:

Well, I'm not – yes.

ELLEN FRANCE J:

Sorry, could you just finish.

MS GORMAN:

Yes. And the distinction between that and MPI's approach is that MPI has taken the approach that while that might be a possible reading of paragraph (a) it does potentially open the Act to abuse, and that is why it insists on a higher level of finishing, and some of the emails that are in the case on appeal refer to MPI being concerned that they might be challenged by an exporter because –

WILLIAM YOUNG J:

Have you got a, can you take us to a succinct statement of MPI's current position?

MS GORMAN:

Yes.

GLAZEBROOK J:

Because presumably that would be how you would want us to interpret the provision? Because MPI can't take a stronger view than the Court of Appeal has taken, because it would be challengeable by the exporter. Well, it's not an answer to say, "MPI requires something stronger," because it would be not legally able to do so.

MS GORMAN:

No, it's not able to enforce that, and then there could be a problem for MPI if someone chose to export and then they would have to decide whether or not to prosecute.

WILLIAM YOUNG J:

What's the shortest summary of the position you contend for?

MS GORMAN:

Sorry, I'm just coming to that, Sir. At paragraph – so if we turn to Mr Rolls' affidavit which is at tab 16 of volume 2, at paragraph 48, the second half of that paragraph, and also at paragraph 14.

GLAZEBROOK J:

And what information would he be after, he says at 48?

MS GORMAN:

So the kinds of information that are requested are correspondence with the purchaser, examples of the product being used in the way that is –

GLAZEBROOK J:

So the MPI approach is that you do look at the actual end use from the other side?

MS GORMAN:

Yes. And although the Court of Appeal –

GLAZEBROOK J:

Which I don't really think is what the Court of Appeal or High Court say.

MS GORMAN:

Well, the Court of Appeal and the High Court both said that a case-by-case evidence-based approach was the appropriate way to determine –

WILLIAM YOUNG J:

But aren't they primarily interested in whether it's being capable of being used in that form for a table top, in the case of the table tops?

ARNOLD J:

Just going back to that paragraph 48, because I just wanted to understand, this slightly puzzled me about the MPI evidence. It said in the second half of that paragraph, "If I can see loose bits of fibre on a table top or saw marks, or if the table top is being treated roughly and not in a manner one would expect with a high-value product, I would be sceptical of the representations made to me and would make further enquiries and not approve it for export unless I was satisfied with the information received." Now what I took from that is that in some circumstances, if given the right explanation, the export of that table top with loose bits of fibre and rough saw marks and so on would be approved, is that right? It's the way I read it.

MS GORMAN:

I guess that is possible. I mean, it's difficult in the abstract without looking at a particular export to answer that question, Your Honour. But that's…

ARNOLD J:

Well, you see, I thought the argument that was being made was that something which meets that description isn't capable of meeting the definition, that's the case that's being put on the other side as I see it.

MS GORMAN:

Well, and that is what Mr Rolls says at paragraph 14 as well, that it's not consistent with a finished product. But to that extent the approach is consistent with how Justices Young and Glazebrook have described the Court of Appeal decision, which is that if the evidence establishes that that is the intended use…

ARNOLD J:

So an enquiry will be made of the exporter to produce an order form or something from the overseas purchaser which indicates that, yes, indeed, it's going to be used as a table top?

MS GORMAN:

Yes, I don't have that specific information before the Court in the evidence, but that process in relation to the temple poles is outlined in two of the affidavit. So in those instances where the forestry officers inspecting the exports weren't satisfied or had suspicions, they did look at the purchaser's correspondence over a number of years with the exporter, they looked at the locations that these products were going to to check that there were temples there –

ARNOLD J:

It seems a very odd statutory test that would depend on the intention of an overseas purchaser. I mean, when you look at the parliamentary material we were taken to it seems counterintuitive that you would meet the purposes that were described by taking something that fits this description, rough saw marks and all the rest of it, and say, well, we'll approve that or not, depending on what we get from a purchaser overseas.

MS GORMAN:

Well, in my submission there is a consistency with the debates in that the definition is intended to be ambulatory. So rather than prescribing the products that might be exported it can evolve to meet market demand, and certainly the evidence around swamp kauri is that it's at its highest value when you can see the natural state of the wood because people are not buying these table tops, you know, for a standard table that we might have in our kitchen at home, they're an art piece that showcase the natural features of the wood, because it is extremely old, it's extremely large, and that's why people want to have the natural edge rather than a straight edge on the piece. And so in my submission it's intentionally flexible, this definition –

GLAZEBROOK J:

Well, in terms of the parliamentary purpose I think you would have to accept, because you've got it in your submissions, that they wanted high-value products going, and what they meant by that was that they wanted added value in New Zealand, that's been a consistent theme throughout. So it's an added-value issue, not a value issue. And just in terms of what the Court of Appeal said, I certainly don't read the Court of Appeal as saying anything other than it's looked at at the time of export. They might have referred to paragraph 46 but I doubt they were thinking of that footnote 16 because they said it must be applied at the time of export, "It cannot matter after that point what use the intended recipient of the product makes of it," it's at paragraph 42. And then 40, "A table top will be ready for its intended use if it does not need any further machining or other modification to be used as a table top."

MS GORMAN:

I'm just trying to find the reference that I remember to the caution that MPI needs to exercise. So that's at paragraph 49 where the Court held, "No doubt it will be appropriate for MPI and Customs to be sceptical of claims that lightly etched poles have been manufactured into final shape and form and to seek assurances where the nature of any other item is such as to call into question whether that is so." So to my reading that was a reference to –

GLAZEBROOK J:

Well, it was relating to the temple poles, which are just logs.

WILLIAM YOUNG J:

Were any temple poles exported?

MS GORMAN:

So the temple poles are addressed in two affidavits. First of all if I could take you to Mr Rolls' affidavit at tab 16 from page 231 onwards, and Mr Rolls outlines that the first temple pole that came to MPI for approval was in 2010…

WILLIAM YOUNG J:

Can we just sort of – you don't need to go through it all. All I'm really interested in is if any did get through the system.

MS GORMAN:

Yes, well, I did want to refer to my learned friend's comment that it had never been able to be found that it was actually installed in China, he referred to one case of that, and at paragraph 72 Mr Rolls notes that that pole wasn't actually exported, so that may be why it hasn't been able to be located in China. But there have been other poles that have been exported. So the Te Paerangi poles which are outlined at paragraph 73, the process for that. And I was going to refer to that process in response to the question from His Honour Justice Arnold in terms of the process that was adopted there, which was to look at the correspondence with the exporter and also to consult with another official in the Māori primary sector partnerships team at MPI for expertise around Māori carving and to understand whether this carving, although it wasn't what Mr Rolls was familiar with, whether it should be considered a genuine carving. And the advice there was that it was a more contemporary form of carving. So that is an export that was exported. Mr Hollis also at tab 17, in his affidavit –

ARNOLD J:

Somebody said that there'd only been five exports in the way of these poles…

MS GORMAN:

It might have been back in Mr Rolls' affidavit.

ARNOLD J:

It doesn't matter, don't take time. But I thought I read somewhere the…

MS GORMAN:

Yes. I think that that's a, yes, a fair summary was that it's been a very small part of exports in swamp kauri, and I think my learned friend may have confused the history of those temple pole exports with what I've just described about the improvements in the process over table tops, because it's not the case that there's been a tightening of controls around the temple poles, rather the first two were not approved and then subsequent ones where there was satisfaction that they were in their final form were approved. It's the table tops where there's been a tightening of approach. I'm just conscious of allowing enough time for…

GLAZEBROOK J:

Well, how does your interpretation differ – because this is important because this is the nub of it. How does your interpretation differ from that of the Court of Appeal? Because you say we don't need to worry because processes have been tightened. But if the tightened processes don't fit with the decision of the Court of Appeal then they won't stop export or challenge of the MPI processes.

MS GORMAN:

Well…

GLAZEBROOK J:

And people who are just deciding whether they do or not and don't put them through the processes will be perfectly free to put them through and if there's an inspection and challenge then they're perfectly free to continue to export. So what do you say it means?

MS GORMAN:

What do I say the Court of Appeal decision means?

GLAZEBROOK J:

Well, not what Court of Appeal – well, do you, your interpretation is the Court of Appeal's interpretation is it?

MS GORMAN:

Yes.

GLAZEBROOK J:

And if so, how does MPI, how has MPI tightened its processes under that definition?

MS GORMAN:

Yes, well, I agree –

GLAZEBROOK J:

Lawfully, I mean.

MS GORMAN:

Yes. Well, MPI adopts the Court of Appeal's interpretation, so MPI supports that interpretation. What MPI has done is to try and, I guess, reduce the scope for – because that interpretation is so based on what the ultimate use of a product is and because it's very difficult –

GLAZEBROOK J:

Well, no, it's not based on that under the Court of Appeal, it's based on at export is it finished and could it be used as a table top without the necessity for further modification.

MS GORMAN:

Right, so I guess as the interpretation is based on the point of export and what the use of the product is understood to be at the time of export, what MPI's tightened approach does is to try and encourage exporters to satisfy MPI at

the time of export that the claims of use are bona fide, and it does that through looking at purchaser intentions and through encouraging as final state of finishing as is appropriate. Because, like Mr Rolls said at paragraph 14 of his affidavit, “Having loose strands on a table isn’t consistent with use as a table top.” So it takes into account the degree of finishing together with the use, the proposed use.

GLAZEBROOK J:
Where do you get that from, the statutory language?

MS GORMAN:
Well, the product has to be ready to be installed or used without the need for any further machining or modification. So if the use is as a table top then…

GLAZEBROOK J:
I’m just wondering where you get that it has to be the purchaser has to intend to use it as a table top.

MS GORMAN:
The intended purpose? That’s in the definition of finished or manufactured indigenous timber product in section 2.

GLAZEBROOK J:
Well, is ready to be installed or used so you say – but there’s nothing that says it has to be used that way. I mean, you could send the whole table off and they could cut it up and make bowls out of it, couldn't they? And could always intend to do that. But it doesn’t mean that the whole table hasn’t been a finished product, does it?

MS GORMAN:
Well, if they have always intended to do that then strictly speaking it doesn’t meet the definition, because it has to be for its intended purpose. And that is why, in my submission, the caution is appropriate, that if that does happen later on –

GLAZEBROOK J:

So you say intended purpose means the purchaser's intended purpose?

MS GORMAN:

Yes.

ARNOLD J:

That's sort of slightly problematic in one sense because if you look at (a), the indigenous wood product manufactured into final shape or form and is ready to be installed or used for its intended purpose, now, that seems very much to be focused on the manufacturer and the product itself, and so if you look at a product, a table or a set of drawers or something, it speaks about its intended purpose. It does seem to me – with respect – inherently odd to have a product that is in a sense neutral, a great big plank of wood, but it turns into a product that meets this definition because the person who's taking up delivery of it in the United States is going to use it as a table top. I mean, that just strikes me as a very odd way for a Parliament to draft a provision. It's much more logical, given the language of paragraph (a), to focus on the product, what it looks as though it's intended to do.

MS GORMAN:

In my submission, that is what MPI is doing, but it's doing it against the backdrop of understanding why – you know, what a swamp kauri table top is versus a pine table top. It is a different product than another table might be, and it would be strange if the parliamentary definition was read to mean that where the indigenous timber's value is in seeing it for its natural form and being able to distinguish it as that special kind of wood, that because normal tables have four corners and straight edges, that they would also have to – all tables exported would have to meet that sort of standard form.

ARNOLD J:

Well, I don't know if that's the result of the sort of meaning I would give to it, at least at the moment, but, you know, you do have to go back, as

Justice Glazebrook said, to those parliamentary debates and what they saw this as achieving, and it was about adding value in New Zealand, and simply sawing a log into three planks does not add any value in New Zealand that I can see much.

MS GORMAN:

No, but again I would caution reliance on my learned friend's summary of what does actually happen to these pieces of wood before they leave New Zealand, because the evidence from MPI who do speak with these exporters see their operations as quite different, and there's a really useful in Mark Hollis' affidavit at tab 17 paragraph 24.6.3, he talks about one particular exporter who has access to a large high-tech planer which can very cheaply and quickly give you a high gloss and a highly manufactured table top, but although he could do that, what his customer wants is hand sanding, which obviously takes a lot more time, and that's what he does. So the suggestion that these table tops are going out without a lot of work, I mean, the carvings did take a lot of time as well, and there's a description of that process in the affidavit. We haven't gone through all of the evidence.

GLAZEBROOK J:

Well, on the basis of what we've seen I would have thought it could have been done in an afternoon by a master carver, but a master carver would never have put his tool to that use, and I say "his" because it is a male occupation.

WILLIAM YOUNG J:

There was some evidence, wasn't there, about receipts and invoices? I suppose we're going to have to move on. How far away are you from finishing?

MS GORMAN:

Well, I haven't addressed many of the points I was going to, but perhaps it would be useful just for me to summarise what I understand the issue to be here, because the questions that have been put to the Courts by the appellant ask what level of manufacture or finish is sufficient to meet the definition.

In terms of what kind of declaration the Court can make there, the appellant has made suggestions around objective standards like that if a table top hasn't been oiled or if holes haven't been drilled, then it cannot be considered a finished product. The paragraph that I just referred Your Honours to discusses MPI's process of considering whether these kind of objective benchmarks could be applied to determine whether or not a product is finished, and talk about the fact that while all of those different measures can be used to build a picture of whether a product is finished, taken from the point of view of what its use will be, that none of them could safely be applied to every product, to every situation. And so that is why MPI supports the conclusions drawn by the Court of Appeal and the High Court for the need for this to be an evidence-based assessment in relation to an individual product, even though that might not be done by MPI. Even though that might be for the exporter to do or for a Court to do if an exporter is challenged.

GLAZEBROOK J:

Well, it's very unhelpful for an exporter when you don't have a system to have a "it depends" definition. That is so open-ended, isn't it?

MS GORMAN:

Yes, it is a difficult definition to apply.

WILLIAM YOUNG J:

The crunchy legal issue, really, is whether a piece of timber which has been dressed and which fits within (c) of the definition can nonetheless be within (a).

MS GORMAN:

Yes, yes, that's one way of looking – or that's what my learned friend's argument has boiled down to this morning. And I guess on that, that's why I referred to paragraph 24.6.3 of Mr Hollis' affidavit which gives some –

WILLIAM YOUNG J:

Well, he would say if it's dressed and it could be used as a table top it's probably okay.

MS GORMAN:

He would say that dressing does result in a very fine finish on a table top, so it's not going to be in that form with the loose –

WILLIAM YOUNG J:

I'm not sort of asking for the rationale, but he would – if it's dressed timber and it could be used as a table top, his approach is that would probably be okay.

MS GORMAN:

And he has knowledge of table tops being used in that way, and I can take you to photographs of them being used in that way. But it is a genuine – there is a basis for believing that that's a genuine use of the table, yes.

ARNOLD J:

But if the exporter said, "Here is a very nicely planed piece of wood," MPI would say, "You can't export it." But if they say, "Here is a very nice table top," MPI would say, "Yes, you can export it." That's what it comes down to, isn't it? Isn't that what you're …

MS GORMAN:

Yes, because MPI is relying on the declarations about use, but in the context of a lot of knowledge about the industry, of seeing things being used in that way, of seeing purchasers' correspondence about could you please look out for a table top that has a crack down the middle, because I have a purchaser who specifically wants one with a crack down the middle. I've got the reference for that if that's useful. That's at Mr Hollis' affidavit at paragraph 89.

I do want to hand over to my learned friend Ms Arapere so that she can address any questions Your Honours have about the Protected Objects Act, but apart from understanding that you have my written submissions, my

overall submission is that that interpretation advanced is based on a suspicion that these are not bona fide products and that this export of timber is occurring without any check and in breach of the law. And although I take the point that Your Honours have made that this case is not about the evidence and it's not about the particular exports, it's about the statutory interpretation, my submission is that it's not borne out on the evidence that these exports are not bona fide, that the evidence does show that there is a market for true use of table tops that showcase the natural value of the swamp kauri and that as a result the lower Court's interpretation, which is that these products need to be considered individually, they need to be considered in the context of the evidence around them, is the correct approach to the interpretation.

WILLIAM YOUNG J:
Thank you. Right, Ms Arapere.

MS ARAPERE:
Thank you, Your Honour. So returning now to the Protected Objects Act, my learned friend has taken you through statutory scheme so I won't do that again unless you have particular questions for me.

I did just wish to clarify a few matters that were addressed in questioning with my learned friend. The first one was to do with the Antiquities Act and my learned friend's submission was that there was no importance element in the definition of "antiquity". If I could just take you to tab 1 of the bundle, and section 2 has "antiquity". Some of the objects under the definition of "antiquity" do contain an importance test. The definition of a chattel includes, "Is of national, historical, scientific or artistic importance," for instance. Likewise, the definition for, "book, diary, letter". So the importance to New Zealand element is there in some of the categories, categories (a), (c) and (d). There is importance test in relation to (e) –

WILLIAM YOUNG J:
Except it's implicit in type specimen I think.

MS ARAPERE:

Precisely, Sir, that was to be my submission, is that given the limited nature of what a type specimen is it's implicit that it's important. So that was the first point just to clarify with Your Honours. The second –

GLAZEBROOK J:

Although I think isn't there one that's just got feathers and something or other, (g)…

MS ARAPERE:

Feathers, bones…

GLAZEBROOK J:

Although I suppose if they're generally believed to be extinct then they must have a rarity value.

MS ARAPERE:

Yes. So, "Native to New Zealand and generally believed to be extinct," which automatically narrows the class.

The next point I just wanted to clarify, Your Honours, was a question from Her Honour Justice Glazebrook regarding does everything in clause 5(2) come within clause 5(3). So my submission is that all items within (2) can come within (3). So that the example that you raised, Your Honour, was nests, and so nests could help to define a taxon of plant or animal which the creator of the nest is part of, in my submission. So that would bring nests within clause 5(3)(b)...

GLAZEBROOK J:

What about the kauri gum?

MS ARAPERE:

Kauri gum could, in my submission Your Honour, come within clause 5(3)(c), it could contain vital information regarding variation, range, environmental context of kauri, swamp kauri, or kauri gum –

WILLIAM YOUNG J:

So where the forests once were?

MS ARAPERE:

That's right, Your Honour. And lastly the third point I wish to clarify was in relation to my friend's submission about the different language used in the nine categories in Schedule 4, words such as "includes but not limited to", "consists of". I don't need to take you there but I can take you there. The evidence of Dr Butts who was the manager of heritage operations when this proceeding was in the High Court, he was the manager at the Ministry for Culture and Heritage, his affidavit is at tab 16. His evidence is that the categories were drafted in consultation with subject matter experts and working groups who were specialists in the particular fields that the nine categories were addressing. So for category five it's most likely that scientists would have drafted –

WILLIAM YOUNG J:

Sorry, what tab is that?

WILLIAM YOUNG J:

Apologies, Your Honour, it is volume 2, tab 14, and that's at paragraph 10 of his affidavit.

GLAZEBROOK J:

So that's why you're saying it's badly drafted are you, because…

MS ARAPERE:

Indeed, Ma'am. So there were artists involved in the working groups for the art objects, scientists under category 5. I suppose my overall submission is

that the categories are coherent in the context of Schedule 4 as a whole and when looking at the purpose of the Act, and the purpose of the Act being to protect certain objects of particular national value. So it's that representative nature of the object which is important.

So those were the three points I had in relation to my friend's submissions this morning.

I'm conscious we don't have a great deal of time so I could summarise my submissions or I could take your questions.

WILLIAM YOUNG J:
I think you've got another quarter of an hour at least.

MS ARAPERE:
Thank you, Sir.

WILLIAM YOUNG J:
I'd like to Mr Salmon we'll say half an hour for a reply. You won't need that much?

MR SALMON:
I don't think I'll need half an hour at this point, Sir.

WILLIAM YOUNG J:
In that case you're not under much time constraint at all.

MS ARAPERE:
Thank you. So at a high level the Ministry for Culture and Heritage submits that the Court of Appeal was correct to find that the categories in Schedule 4 are intended to have a limiting effect and that in particular in the natural science category, clause 5(3) has an exhaustive meaning. So it's –

WILLIAM YOUNG J:

We should read that as a natural scientist rather than as miserable old Judges.

MS ARAPERE:

That's right, Your Honour.

WILLIAM YOUNG J:

But as they would think about it rather than necessarily us trying to make logic out of every word and see a pattern there.

MS ARAPERE:

That's my submission, Your Honour. While the front part of the Act, the mechanics of the Act, would have been drafted by PCO and normal drafters, we do have evidence before this Court that the categories were drafted in consultation with subject matter experts. And so there's a difference to how you might treat the front part of the Act to the –

WILLIAM YOUNG J:

Well, that's sort of implicit in the text anyway. I mean, "type specimen" is not an expression that trips off our tongues.

MS ARAPERE:

No, nor mine, Your Honour.

GLAZEBROOK J:

So you're really saying that (c) is fairly expansive and explains the type specimens are something that's particularly or very narrow but (c) has the ability to be much wider and it was intended to look at natural objects that did those things and that weren't included or not fully included in public collections?

MS ARAPERE:

Yes. So the limiting factor is whether there are sufficient samples in public collections to define the variation range and environmental context of that genus or species, yes, Your Honour.

GLAZEBROOK J:

So the submission is “includes” means “only includes effectively”?

MS ARAPERE:

Yes, effectively.

WILLIAM YOUNG J:

It’s confined to.

MS ARAPERE:

Confined to, yes.

MS ARAPERE:

It’s confined to objects that fall under (a), (b) and (c).

So the other part of test of course is the importance to New Zealand aspect that I’ve already mentioned. My submission there, Your Honours, is that it’s not possible that every piece of swamp kauri is of importance to New Zealand or a part of New Zealand, but I say that swamp kauri is not a fossil within the meaning of the Act because there’s no evidence that all swamp kauri lived prior to human habitation in New Zealand.

WILLIAM YOUNG J:

But does that matter? I’d have to have another look at it. Is it simply – I mean, it would be a horrible approach to the definition because it would be very hard to tell what swamp kauri is a fossil and what isn’t. I mean, most probably it would be a fossil.

GLAZEBROOK J:
You'd have rings, wouldn't you?

WILLIAM YOUNG J:
Yes, but that just tells you how old the tree was when it died. You'd have to carbon date it or do something else to work out whether it's, say, within the past 800 years or within the past 50,000 or 60,000 years.

GLAZEBROOK J:
But some of those, I think some of that ageing I think even with the rings would mean it was certainly before human habitation.

MS ARAPERE:
There is evidence in the form of reports commissioned by MPI that is before the Court that there is a long chronology for swamp kauri specimens that have been found in New Zealand, but there is no evidence that says it is all from before human habitation in New Zealand before this Court. So the submission, Your Honours, is that there's uncertainty and it's in my submission not safe for this Court to make the declarations that are sought by my learned friends, by NEPS.

My learned friend this morning has referred to two reports commissioned by MPI, one in relation to cultural values associated with swamp kauri, and that's at tab 43 of the bundle, and also there's been a report to do with scientific values associated with swamp kauri.

The third respondent does not disagree that swamp kauri as a genus has cultural and scientific value. The focus of the Protected Objects Act and the purpose which needs to be recalled is that this Act was intended to protect certain objects and in the House when the Bill was going through the types of examples given were objects like the Motunui panels and Your Honours may be familiar with those panels. They were carved panels dug up in Taranaki in the 1970s of exquisite detail, extremely rare, and representative of a particular carving style. Those panels were taken out of New Zealand and on-sold a

couple of times. The Attorney-General went to the House of Lords in order to try and recover those panels to New Zealand. So those were the types of –

WILLIAM YOUNG J:
They have been recovered, haven't they?

GLAZEBROOK J:
Yes, they're in the museum in New Plymouth.

MS ARAPERE:
Yes. They were handed back – they were returned to New Zealand following some long negotiations and returned in about 2015, as I understand it. They were the types of objects that were intended to be covered by this legislation and which when the Bill was going through the House they were very much the focus of Parliament. Like the Forest Act, there was a bipartisan approach here. All parties supported the Protected Objects Act going through the House and being able to be used to recover – well, protect those types of objects. Not being able to recover them.

WILLIAM YOUNG J:
Well, I suppose the risk to the scientific and cultural value in the swamp kauri is not so much the export of manufactured product but rather its extraction from the ground and processing.

MS ARAPERE:
That's right, Your Honour. Once those logs are taken from the ground, a sample that is needed for scientific value, for – I understand it's called dendrochronological study – is only a very small sample, not the whole log. And so the submission is that to give the declarations that NEPS want under the Protected Objects Act will not protect these objects for, you know, from being used and taken elsewhere and their scientific value.

Dr Butts' evidence is helpful, Your Honours, in the sense of the process that the Ministry of Culture and Heritage do go through when they're faced with an

application for export, or when they're aware of a particular object. The two examples that Dr Butts gives in his affidavit are related to Sir Edmund Hillary's Rolex wristwatch, which was presented to him after his ascent of Mount Everest in 1953. It fell under the category 9 social history objects and came within the Act because it was not represented by at least two comparable examples held in New Zealand public collections and it was more than 50 years old, and it was important for historical, cultural – a number of reasons. So that's again the type of object that this Act is intended to protect.

In terms of natural science objects, the example that Dr Butts gives is in relation to moa bones. So every time an application is brought to MCH to export moa bones, generally for scientific research purposes, a temporary export application, the Ministry will look at the object, consider it on a case-by-case basis, and then find out whether it – establish whether it meets the definition of a protected New Zealand object, and then filter through the additional criteria for rarity and science significance. So the submission is that each object is treated on its own merits. It's not intended to – the Act is not intended to capture an entire class or an entire genus of objects.

You have my written submissions, Your Honours. I'm not sure – that's a very potted summary of what's in my written submissions.

GLAZEBROOK J:

Did you have anything to say? Because when I asked the same question of your friend he pointed to the definition of objects. Did you have anything on that? When I said it's not intended to look at a whole genus, he said that "objects" is plural and it does talk about collections, et cetera. Did you have anything specific on that?

MS ARAPERE:

Not in addition to what I've said in my written submissions, Ma'am. It's the intent of Parliament is clear that it's certain objects.

O'REGAN J:

Do you accept that something can be a fossil as defined, even though it's not scientifically a fossil?

MS ARAPERE:

I'm not sure I understand your question, Your Honour.

O'REGAN J:

Well, the argument here is that while it's not a fossil in scientific terms –

MS ARAPERE:

A fossil for the purposes of this Act?

O'REGAN J:

Swamp kauri can be a fossil for the purposes of the Act because the definition is defining it in a much broader sense than the science would define it.

MS ARAPERE:

Yes, I would accept that. But that still wouldn't get NEPS to where they need to be for that declaration in my submission, Sir, because you'd be missing the importance to New Zealand element. I mean, in my submission I think the – I submit the object also needs to fall into clause 5.3 as well as 5.2 and be representative in some way.

WILLIAM YOUNG J:

Okay, thank you. Mr Salmon, the floor is yours.

MR SALMON:

Thank you, Sir. I'll make good on my promise not to take half an hour. I really had just one topic I had intended to reply on unless I can help the Court with anything, and that is the theme in my learned friend Ms Gorman's submissions that this proceeding was brought based on a suspicion that there was a significant export market. I think we've both tried to avoid burdening you with the evidence and I want to continue that in reply by not going into

great troves, but I don't think that's a safe note for the case to end on. There's extensive evidence of an export market. There is no evidence whatsoever of a New Zealand cottage industry soaking up supply.

WILLIAM YOUNG J:
Well, there's a little bit of – I mean, I confess to having a look at Google. You can buy manufactured kauri furniture in New Zealand.

MR SALMON:
Yes, you can.

GLAZEBROOK J:
And you only have to go to the markets and there's any amount of it.

MR SALMON:
Yes. I'm more dealing with what's happening to the piles of swamp kauri that are in the evidence in this case, and the affidavits need to be read.

GLAZEBROOK J:
That's not a sufficient industry, is what –

MR SALMON:
Not remotely, and the value and every arrow points towards an export market. So, as I said this morning, I'm not suggesting you cannot buy kauri furniture here and there's not someone making some somewhere. The scale and size is very much export-focused and I don't want to urge you to have to read the affidavits but a skim though will demonstrate it's quite a powerful picture, and it's a picture supplemented by internal MPI concerns obtained on discovery and OIA request. So I don't think it's controversial to say there's a massive export focus to this process and it's in the evidence that they're foreign, they're Chinese companies in particular, some of them, coming in specifically to get product to export. That's the first point on that issue.

The second is regarding poles. There are only limited numbers of documents about poles being exported because there is no need for people exporting poles to go through MPI, and so it's not safe to assume there are not many poles leaving, there could be hundreds, we simply don't know, because there is no obligation to seek consent and no power to inspect.

WILLIAM YOUNG J:
I mean, it's likely that they would be reasonably accurately described on the Customs entries, isn't it?

MR SALMON:
Well, reasonably accurately described as what though, Sir?

WILLIAM YOUNG J:
Well, I suppose carved poles.

GLAZEBROOK J:
Carved temple poles.

MR SALMON:
Carving or something. I don't think anyone's suggested there's data, that there are data that enable us to determine that. But certainly there is not evidence positively showing that these are the only examples or anything like it. So I think, again, I don't want to force the Court to read through evidence and I certainly don't want to take you through it close to four, but there is evidence of poles being exported and enabling you to infer it is a device for circumventing the ban. How they would be described –

WILLIAM YOUNG J:
The information, you would probably get reasonably close to the informant by looking at exports by those companies that are known to be kauri exporters or known to have stockpiles of kauri, and how they have described the products or what they're exporting.

MR SALMON:

If they're being up front and using one corporate structure with Customs, and I'll come to that point too, because there's evidence to suggest that even if there were data it might not be good. But you're quite right, Sir, we don't have that evidence. So my caveat for the moment it's not a case where I accept it's fair or accurate to suggest this is just suspicion, there –

WILLIAM YOUNG J:

But is it right, in a way do we need to go there? Because is the real issue whether (c) stands alone and qualifies what goes before or whether it's subject to (a) and (b)?

MR SALMON:

Yes, with a subsidiary question about the details of (a). But you're right, Sir, you don't need to go there, I'm more for completeness in reply addressing the suggestion that this is a case based –

WILLIAM YOUNG J:

But you say it's not a storm in a teacup but we don't really have to wrestle with that.

MR SALMON:

You don't have to go there. To the extent that you want to deal with the question of foreign activities and so on, Sir, and don't want to go through the detailed affidavits, I just thought I'd note a couple of page references that just give an example or a sense of things. And some of these are points where MPI witnesses have accepted that these specific products in the photos have been exported. In volume 5 at page 1350 there's a suite of Ancientwood's, there are about 80 pages of just dumpings from the Internet of Ancientwood's own website, and at 1388 in a snowy port in North America is one of the large planks being unloaded that Mr Hollis in his affidavit accepts has been exported. But if turning through 1387, a specific express reference on the web page to "rough-cut" slabs, 1385, inviting suggestions as to finishing when the slab is already in the US, and 1390, a photograph of actual work being

done, and 1415 and 1416, pages boasting of new arrivals which are just plainly stacks of lumber on any view, and a little YouTube video to click on.

WILLIAM YOUNG J:
May be stumps.

MR SALMON:
Some might be. And that can always be said, Sir, and that's the reality. But those are speculative possible explanations that MPI has served up again and again for each photograph. At some point it becomes clear there's a viable and huge export market.

The only other point to note for completeness, lest it appear that it's only the appellant that has concerns about this being – I'll just put it bluntly – being a rort. There is an affidavit at tab 13 which details a whistle blower's specific and detailed allegations about one of the exporters. I think some of the names here are covered by the list that's suppressed but this is a shorter Furrell affidavit. And it summarises some of what is set out in the bundle at volume 3, 0327, which contains the full whistleblower's letter. But the affidavit at tab 13 of volume 2 refers to – and this is a document obtained from MPI – quite a detailed whistleblower complain of illegality and misleading statements being made about volumes, misleading milling statements, and then – this is paragraph 5 of that affidavit summarising handwritten notes and other documents annexed to the whistleblower's letters – they've provided internal documents from this exporter that on any view raise the eyebrows about whether we really can see a scheme working only based on trust that the milling process works.

ELLEN FRANCE J:
This is pre the change to MPI's approach isn't it?

MR SALMON:
It is, Your Honour. So I'm not suggesting that MPI hasn't improved aspects of its approach, it's given evidence that it's tightened up on certain things,

obviously the appellant considers it's applying the wrong interpretation, but what this highlights is milling volumes alone, for example. If there's reason to believe that milling numbers in any audits are being misrepresented and if there's the willingness to make from this misrepresentations that are made here, then the submission that you've heard that we can be comfortable things are being dealt with and there is no data to show that there aren't more being exported in other ways isn't really reliable. So it's just of way of reinforcing the submission that before Your Honours put any weight on the notion this is just suspicion is really is worth reading the evidence. This is, from the appellant's perspective, a serious a major problem causing genuine economic environmental loss to New Zealand.

Unless you have any specific questions, those are my reply submissions.

WILLIAM YOUNG J:
Thank you, Mr Salmon. We'll take time to consider our judgment and deliver it in writing in due course.

HEARING CONCLUDES