IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 10/2018
[2018] NZSC 105

BETWEEN	NORTHLAND ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	CHIEF EXECUTIVE OF THE MINISTRY FOR PRIMARY INDUSTRIES First Respondent
AND	COMPTROLLER OF CUSTOMS Second Respondent
AND	CHIEF EXECUTIVE OF THE MINISTRY FOR CULTURE AND HERITAGE Third Respondent

Hearing:	20 June 2018
Court:	William Young, Glazebrook, O'Regan, Ellen France and Arnold JJ
Counsel:	D M Salmon, D A C Bullock and H A T Bush for Appellant J K Gorman and H T N Fong for First and Second Respondents B R Arapere for Third Respondent
Judgment:	9 November 2018

JUDGMENT OF THE COURT

A **The appeal relating to the interpretation of the export restriction in s 67C(1)(b) of the Forests Act 1949 is allowed.**

B **The appeal relating to the Protected Objects Act 1975 is dismissed.**

C **Costs are reserved.**

REASONS

GLAZEBROOK, O'REGAN, ELLEN FRANCE AND ARNOLD JJ
(Given by Glazebrook J)

Introduction

[1] This appeal concerns the export of swamp kauri and products made from swamp kauri.[1] Swamp kauri is kauri that has been buried and preserved in swamps for anywhere between 800 and 60,000 years.[2] It is found largely in Northland in areas that were, but usually are no longer, wetlands. It is extracted almost exclusively from privately owned scrub or farm land and is of high commercial value, given its age and

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1 Leave to appeal was granted on 19 April 2018: *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries* [2018] NZSC 36.

2 For a brief discussion on the background of swamp kauri see *Northland Environmental Protection Society Inc v Chief Executive of the Ministry of Primary Industries* [2017] NZHC 308 (Toogood J) [*Northland* (HC)] at [1].

the size of the timber pieces that can be milled. Exports of swamp kauri increased significantly from 2010 to 2015.

[2] The appellant, Northland Environmental Protection Society Inc (NEPS), has as one of its purposes the protection of indigenous biodiversity ecosystems in Northland. NEPS became concerned that swamp kauri was being exported out of New Zealand illegally. In 2015 it brought proceedings in the High Court which sought, by way of judicial review and under the Declaratory Judgments Act 1908, certain declarations relating to the interpretation and operation of s 67C of the Forests Act 1949, the Customs and Excise Act 1996 and the Protected Objects Act 1975.[3] The declarations now sought in this Court relate only to the interpretation of the relevant provisions of the Forests Act and the Protected Objects Act.

[3] Under s 67C of the Forests Act,[4] swamp kauri can only be exported if it is (among other things):

(a) a finished or manufactured indigenous product as defined in s 2(1) of the Forests Act;[5] or

(b) a stump or root that meets the requirements in s 67C(1)(d) or a salvaged stump or root in terms of s 67C(1)(e).[6]

[4] If swamp kauri is a protected New Zealand object as defined in s 2(1) of the Protected Objects Act,[7] it can only be exported with the permission of the

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3 The declarations sought relating to the operation of the Forests Act 1949 included a declaration that light surface carvings or decoration do not meet the definition of finished or manufactured indigenous product and a declaration that the Ministry for Primary Industries had acted unreasonably in approving exports of swamp kauri: see *Northland* (HC) at [3].

4 The relevant part of the section is set out at [14] below.

5 This definition is set out below at [15].

6 Stump is defined in s 2 of the Forests Act as: "the basal part of a living or dead tree (whether rooted or uprooted), being the roots and that part of the trunk that extends from the groundline to a point (up the trunk) equal to the maximum diameter of the trunk; and, for the purposes of this definition, any remnant of a tree shall be regarded as part of a complete tree". This definition was introduced in 1995 – see below at [21].

7 The definition is set out below at [64].

Chief Executive of the Ministry for Culture and Heritage[8] or if it falls within a category that has been exempted under the Act by the Chief Executive.[9]

[5] There are two issues in the appeal:

(a) The interpretation of the definition of finished or manufactured indigenous product contained in s 2(1) of the Forests Act and the effect of the export restrictions in s 67C of that Act.

(b) Whether some or all swamp kauri is a protected New Zealand object as defined in s 2(1) of the Protected Objects Act.

Forests Act

[6] Before discussing the export restrictions in the Forests Act, we set out the background, the legislative scheme and the legislative history. We then summarise the arguments of the parties and the decisions of the Courts below on this issue.

Background

[7] NEPS' focus in the High Court was on slabs of kauri exported as table tops without any intended legs, stand or other mounting and on the export of swamp kauri logs with light surface carvings or decoration. Multiple affidavits expressed concerns that logs with light surface carving had been exported under the guise of being used as temple poles in China. It contends that these items do not meet the definition of finished or manufactured indigenous product under the Forests Act.

[8] The Chief Executive of the Ministry for Primary Industries (MPI) submits that the evidence before the Court does not sustain a submission that the law is not being complied with. For example, MPI submits that many of the items NEPS points to may have come from stump kauri[10] or may in fact never have been exported.[11] It also points

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8 Protected Objects Act 1975, s 5(1). Chief Executive is defined in s 2(1).

9 For a discussion on the Chief Executive's role see below at [68].

10 For the definition of stump kauri see above at n 6.

11 In evidence before the High Court were a number of photographs of kauri table tops and carved logs that NEPS alleged had been exported illegally. NEPS concedes that some of the objects presented in evidence may not have left New Zealand or may have been from stump kauri.

out that it has changed its processes since 2010, meaning improved inspection[12] and audit procedures that reduce the likelihood of illegal exports.[13] It also notes other controls in the Forests Act, such as those related to milling.[14]

[9] It is not necessary for us to make any comment on MPI's submissions as to the reasonableness of its actions as these are no longer challenged.[15] The only exercise is one of statutory interpretation. For that purpose, the question is the hypothetical one of whether a table top or a carved log could meet the statutory definition of finished or manufactured indigenous product.

[10] We note at this point that we asked at the hearing whether consideration had been given to joining one or more of the kauri exporters. Mr Salmon indicated that it had not, partly because there is no single major exporter but also because MPI has no power of inspection and this meant that it would not have been possible to identify the relevant party in relation to any of the alleged illegal exports. Mr Salmon, however, said that the proceedings have been well publicised throughout and no application for joinder had been made by the exporters in the Courts below. Nor was there any application for joinder in this Court. In any event, in this Court the issue was one of statutory interpretation only and MPI raised all the relevant arguments in that regard.

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12 Since May 2004 finished or manufactured indigenous timber products have not been subject to a mandatory inspection process under the Forests Act: see discussion at [22] below. Rather there is a voluntary inspection process where exporters can present their proposed export to MPI. The proposed export is sent to AsureQuality Limited for assessment. AsureQuality is a company contracted by MPI to provide inspection and verification services as required under Part 3A of the Act. They are appointed as forestry officers under s 11 of the Act. AsureQuality inspectors are contracted by MPI to provide the first port of contact in this voluntary inspection process, as many finished or manufactured indigenous timber products are necessarily subject to phytosanitary inspections by AsureQuality. AsureQuality can also comment on whether the product meets the requirements under the Act. In the event of any doubt whether the product meets the requirements under the Act, MPI conducts its own assessment of the product.

13 To assist in ensuring that the Act is complied with MPI provides swamp kauri specific export forms, has issued guidance documents and actively tried to engage with exporters, AsureQuality and customs inspectors. In the hearing MPI noted that the incentive to take part in voluntary inspections was to reduce the risk of random checks at customs. MPI conceded that, in its early days, the system may not have been as effective as it is now.

14 See the discussion below at [37].

15 This was an issue in the High Court, see *Northland* (HC), above n 2, at [4](g) and [58]–[71] and the Court of Appeal, see *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries* [2017] NZCA 607 (Harrison, Cooper and Clifford JJ) [*Northland* (CA)] at [74]–[82].

Legislative scheme

[11] Part 3A is entitled "Provisions relating to indigenous forests". Section 67B describes the purpose of that Part as being "to promote the sustainable forest management of indigenous forest land". Part 3A places controls on the felling, milling and the export of indigenous timber.

[12] The Forests Act prohibits the felling of indigenous timber on land subject to a registered sustainable forest management plan[16] or a registered sustainable forest management permit,[17] other than in accordance with that plan or permit.[18] Such plans and permits are designed to ensure the sustainability of the forest.[19] The extraction of swamp kauri from the ground is not, however, covered by the Forests Act. It may be subject to other legislation, such as the Resource Management Act 1991.

[13] Various restrictions on milling indigenous timber (including swamp kauri) are contained in s 67D(1)(a)–(e). Among other things, indigenous timber can be milled if the Chief Executive[20] of MPI is satisfied that the timber has been salvaged from an area that is not indigenous forest land.[21] Indigenous forest land is defined in the Act as meaning "land wholly or predominantly under the cover of indigenous flora".[22]

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16 See ss 67E–L.

17 Section 67M.

18 Section 67DB. The Forests Act expressly provides that Part 3A does not permit the felling or harvesting of timber on land held, managed or administered under the Conservation Act 1987 or any Act listed in sch 1 of that Act other than in accordance with the relevant Act: see s 67AB of the Forests Act.

19 Schedule 2 of the Forests Act.

20 The Act refers to the "Secretary" which is defined in s 2 as "the chief executive of the Ministry". Ministry is defined as "Ministry of Agriculture and Forestry or such other Ministry as has, with the authority of the Prime Minister, for the time being assumed responsibility for the relevant function or matter". The relevant ministry is MPI. We use the term Chief Executive rather than Secretary in this judgment.

21 Section 67D(1)(b)(iv).

22 Section 2(1).

[14] Restrictions on the export of indigenous timber[23] are contained in s 67C, which prohibits the export of indigenous timber unless it comes within one of the statutory exceptions set out in s 67C(1) including when it is:

> …
>
> (b) any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product:
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> (c) any personal effects:
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> (d) any stump or root, whether whole or sawn, where the [Chief Executive] has stated in writing that he or she is satisfied that the timber has been taken from an area subject to, and managed in accordance with, a registered sustainable forest management plan:
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> (e) any salvaged stump or salvaged root, whether whole or sawn, where the [Chief Executive] has stated in writing that he or she is satisfied that the timber has been taken from an area that is not indigenous forest land:
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> …

[15] A finished or manufactured indigenous timber product is defined in s 2 as follows:

> **finished or manufactured indigenous timber product—**
>
> (a) means any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification; and
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> (b) includes a complete item or a component of an item (whether assembled or in kitset form) such as joinery, furniture, toys, tools, and household utensils, household fixtures such as rails and toilet seats, ornaments such as picture frames and carvings, and similar items; but
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> (c) does not include dressed or rough sawn timber, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items

Legislative history

[16] The current export restrictions in s 67C of the Forests Act and the definition of "finished or manufactured indigenous timber product" were introduced by the Forests Amendment Act 1993 which inserted Part 3A. The Amendment Act followed

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[23] It is common ground that this includes swamp kauri.

Cabinet's decision in 1990 to place an interim export ban on indigenous timber products, apart from those produced from forests managed under a certified sustainable management plan.[24]

[17] The Hon John Falloon, the Minister of Forestry, at the first reading of the Forests Amendment Bill 1992,[25] said:[26]

> The new section 67C is one of the two linchpins 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, and fern tree-trunks not taken from natural indigenous forest nor harvested under a sustainable management plan.

[18] The Bill was reported back from the Planning and Development Select Committee with the proposed export controls retained, despite a large number of submissions that they should not be.[27]

[19] The Select Committee recommended two material changes from the Bill as introduced: that the current definition of finished or manufactured indigenous timber product be added, as well as an amendment requiring a notice of intention to export such product, followed by inspection and approval by a forestry officer.

[20] The Minister of Conservation, the Hon Denis Marshall, on the second reading of the Bill explained the purpose of the export controls as follows:[28]

> … the Government chose to continue the export ban on wood-chips and logs because it wanted to move the mentality of the sawmilling 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 diminishing resource here in New Zealand.

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24 This part of the history of the export ban was discussed in passing by Wild J in *Alan Johnston Sawmilling Ltd v Governor-General* [2002] NZAR 129 (HC) at 134.

25 Forests Amendment Bill 1992 (172-1).

26 (30 June 1992) 526 NZPD 9644.

27 Forests Amendment Bill 1993 (172-2) (select committee report). See (9 March 1993) 533 NZPD 13791.

28 (11 March 1993) 533 NZPD 13940. The Bill had cross-party support.

[21] The Forests Act was amended again in 1995 with the Forests Amendment Act 1995.[29] The amendment was enacted in response to the decision of the High Court in *Ancient Trees of New Zealand Ltd v Attorney-General*.[30] This case concerned whether the extracted remnant tree trunk and rootball of a swamp kauri was a salvaged stump[31] under the provisions of s 67C(1)(e) of the Forests Act.[32] If it was, then sawn timber sourced from the wood could be exported. McGechan J held that a "salvaged stump" is the "total swamp kauri remnant whether still rooted vertically into the ground, or lying on its side and comprising trunk remnant with or without rootball remnant still attached regardless of size or length".[33] The 1995 amendment was, among other things, intended to constrain the implication of the judgment by inserting the new definition of stump.[34]

[22] In July 1999 the Forests Amendment Bill 1999 was introduced by the then National-led coalition.[35] The Bill contained provisions liberalising certain export controls. The Bill was read twice in the House but did not pass into law before the 1999 election and subsequent change of government. The Bill was not revisited until May 2004, by which time it had been substantially amended by the new Labour-led coalition. The existing export controls were retained in the 2004 amendment but, in order to streamline administration, the Forests Amendment Act 2004 removed the

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29 With the passage of the Forests Amendment Bill (No 2) 1995 (38-3D) into the Forests Amendment Act 1995. This Bill was originally part of the omnibus Law Reform (Miscellaneous Provisions) Bill (No 3) (38-2). The nature of the omnibus Bill meant that there was limited discussion on the provisions contained in the legislation.

30 *Ancient Trees of New Zealand Ltd v Attorney-General* HC Wellington CP483/93, 29 April 1994.

31 There was no statutory definition of stump prior to the one introduced in the 1995 Amendment (see the current definition set out at n 6 above). It appears that the Ministry of Forestry used its own definition of stump for swamp kauri: "about one metre, or a little more" from the base to the roots. See *Ancient Trees,* above n 30, at 5.

32 At 2.

33 At 25. See also at 26.

34 See (9 March 1995) 546 NZPD 6002. Alec Neill, Chairman of the Justice and Law Reform Committee, when delivering the report of the Justice and Law Reform Committee, noted that the definition was the result of the decision in *Ancient Trees,* above n 30. See also Law Reform (Miscellaneous Provisions) Bill (No 3) 1994 (38-1) (explanatory note), where it was noted that the insertion of the definition of stump "is perhaps the most significant change as it abrogates the effect of the relevant part of the judgment of McGechan J in *Ancient Trees*". It was expressly noted that the new definition was to "confine" the scope of the definition: at iii. See also (23 March 1995) 546 NZPD 6418.

35 Forests Amendment Bill 1999 (311-1).

requirement that finished or manufactured indigenous product exports be notified, inspected and approved.[36]

[23] The Hon Paul Swain, then the Minister of Labour, observed when the Forests Amendment Bill 2004 was read for the third time:[37]

> The bill as introduced contained considerable liberalisation of the export controls, in order to allow export of all sustainably produced indigenous timber products. However, consistent with an election promise, the Government decided to retain the existing controls on the export of indigenous timber. These prohibit the export of woodchips and logs, but allow the export of some items, including sustainably produced sawn beech or rimu, finished or manufactured products, and personal effects. The existing controls have been in the Forests Act since 1993, and are a publicly acceptable compromise on an issue that historically has been highly controversial. Indigenous timber is regarded as a heritage material that should not be exported in low-value-added form. The Government considers that indigenous timber production should be a low-volume, high-value business, with an emphasis on domestic use but with an opportunity for exporting finished products of high value. The existing export controls serve this purpose, and the bill streamlines administrative requirements for finished or manufactured products by removing the need for the Ministry of Agriculture and Forestry to approve each export consignment.

[24] What is clear from the legislative history is that one of the purposes of Part 3A when it was first introduced in 1993 was to curtail the export of indigenous timber logs and woodchips and encourage sustainable management of indigenous forests. Another aim was to encourage the industry to ensure that value was added before indigenous timber products were exported, creating job opportunities in New Zealand. A question had arisen during the Select Committee process as to whether export restrictions were necessary to achieve these aims or whether the felling and milling restrictions would suffice.[38] It was decided that the export restrictions should remain. A conscious decision to maintain the export controls was made again in 2004 for similar reasons to those behind the earlier amendments.[39]

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36 Restrictions removed by Forests Amendment Act 2004, s 5. See above at [19] for when these provisions were originally introduced.

37 (13 May 2004) 617 NZPD 12947–12948. He also said that the Government's position on export controls is consistent in important respects with the recommendations of the Primary Production Committee in its 2002 report: *A sustainable future for our indigenous forests* (June 2002). In particular, the committee recommended retention of the ban on exporting indigenous logs and chips: at 79.

38 See above at [18].

39 See above at [22].

Submissions of the parties

[25] In the Courts below, and in this Court, NEPS advances the argument that the definition of finished or manufactured indigenous timber product should be interpreted in light of the purpose of the export controls in s 67C, being to dampen export demand and protect the environment. It submits that the detailed requirements in para (a) of that definition mean what they say and must be strictly applied. Further, a broad interpretation of para (b) of the definition to include a component of a product by itself does not accord with the statutory wording. It would also subvert the requirements in para (a) and the purpose of the export restrictions.

[26] In addition, NEPS submits that, contrary to the approach in the Courts below, para (c) creates a "carve out" from paras (a) and (b). Paragraph (c) operates to exclude what can be loosely termed as generic building materials and similar products from the definition. In its submission, this means that rough sawn or dressed timber can never meet the definition, whether it is intended for use as a table top or not. The same would apply to a product containing rough sawn or dressed timber, meaning that a table with such a table top would be excluded from the definition even if it had legs attached.

[27] In its submissions MPI essentially supports the analysis used by the Courts below, to which we now turn.

Decisions below

[28] The High Court held that the primary aim of Part 3A of the Forests Act is directed to the narrow goal of protecting the longevity and sustainability of land which is wholly or substantially covered by living indigenous flora as outlined in s 67B.[40] The definition of finished or manufactured indigenous timber product operates as part of a number of measures directed to fulfilling that purpose.[41]

[29] The Court of Appeal accepted that it is possible to discern in s 67B a purpose wider than that identified in the High Court, being to ensure value is added to exported

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40 *Northland* (HC), above n 2, at [38]–[39]. See above at [11].
41 At [4](a), [4](b) and [38]–[40].

timber.[42] The Court of Appeal, however, rejected NEPS' submission that the purpose of the export controls in s 67C was to dampen export demand.[43] It did accept that Part 3A of the Forests Act applies to control the export of swamp kauri and that there is no basis upon which the meaning of the definition could alter having regard to the origin of the wood.[44]

[30] As to the definition of finished or manufactured indigenous timber product, the High Court held that whether a product meets the definition is determined by the appearance and intended use of the product at the time of export.[45] It held further that the lawful export of table tops made from swamp kauri is not confined to table tops with their legs or base affixed or included at the time of export.[46] A practical approach to the application of the definition of "finished or manufactured indigenous timber product" is required. Whether a table top or a piece of carved timber made from swamp kauri is sufficiently finished to fall within the category of permitted exports will be a matter of fact and degree for determination on a case by case basis.[47]

[31] The Court of Appeal considered that the High Court correctly held that the definition must be applied at the time of export.[48] The Court of Appeal said that it does not matter what use the intended recipient of the product makes of it once it is exported; the secondary statutory purpose of adding value to the timber will already have been achieved. The Court did not consider that the expression "ready to be installed" should be construed so as to prevent minor alterations that might be carried out subsequent to export as part of the process of installation.[49] The reference in para (a) of the definition to the *need* for further machining or modification must be properly taken into account.[50]

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42 *Northland* (CA), above n 15, at [37].
43 At [37].
44 At [38]. Section 67C(1)(b) reads "any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product".
45 *Northland* (HC), above n 2, at [4](c) and [43]–[46].
46 At [4](d) and [47]–[49].
47 At [4](e) and [53]–[56].
48 *Northland* (CA), above n 15, at [42].
49 At [42].
50 At [43].

[32] In the Court of Appeal's view, a major difficulty with NEPS' argument was that para (b) of the definition extends to components.[51] This means that, as long as a component has been manufactured into its final shape and form and thus comes within para (a), it will be within the definition. A table top (a component of a table) will be ready for its intended use if it does not need any further modification to be used as a table top.

[33] As to para (c) of the definition, the High Court rejected NEPS' submission that this para was a carve out provision. It considered the paragraph to be "illustrative or explanatory of items not intended by Parliament to be included in the definition, and given for avoidance of doubt".[52]

[34] The Court of Appeal agreed with that analysis.[53] The Court did not see para (c) as invariably operating so as to exclude products that would otherwise fall within para (a). It noted that, in many cases, para (c) would have effect to exclude from the definition items not falling within para (a). The Court was therefore not persuaded that Toogood J erred when he spoke of the items listed in para (c) illustrating the kind of products not embraced by para (a).

Proper interpretation

[35] The words of 67C(1)(b), and the associated definition of finished or manufactured indigenous timber product, must be interpreted in light of their purpose and the purpose of Part 3A more generally. Also relevant will be the statutory context and the scheme of Part 3A.

[36] One of the purposes of Part 3A was to ensure that indigenous timber was not exported in raw form (logs or wood chips).[54] The exception for finished or manufactured indigenous timber products was designed to ensure that value is added to indigenous timber before export unless it can be lawfully exported under one of the

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51 At [40].
52 *Northland* (HC), above n 2, at [52].
53 *Northland* (CA), above n 15, at [44].
54 See above at [16]–[24].

other paragraphs of s 67C(1). This purpose is clear both from the legislative history and the statutory wording.

[37] In terms of statutory context and the scheme of Part 3A, there are three layers of protection for indigenous timber, not all of which will apply to all sources of such timber.[55] The three layers are: the felling restrictions,[56] the milling restrictions[57] and the export restrictions.[58] This tripartite structure (and the purpose of adding value in New Zealand) suggests that something must be done to the timber after milling in order for it to meet the export restrictions in s 67C(1)(b).

[38] Another point worth noting is that in 2004 the requirement to present finished or manufactured indigenous timber products for inspection and approval was removed in order to streamline administrative requirements.[59] As NEPS submits, this suggests that Parliament considered that the definition of those products was an easy one for exporters to apply without the need for official oversight. We thus accept the submission that an interpretation that requires a detailed case by case analysis cannot have been intended.

[39] Turning to the wording of the definition of finished or manufactured indigenous timber product, the first point is that this definition has a straight forward and conventional structure. Para (a) contains the general definition. Para (b) extends the definition in certain respects, while para (c) excludes certain categories of items that would otherwise come within paras (a) or (b).

[40] Moving to a more detailed analysis of each paragraph, para (a) requires any indigenous timber product to be in its final shape and form and ready to be installed or used without further machining or modification. The first point is that the use of the term "product" means that any item coming within this section must be a product in its own right.

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55 For example the felling restrictions outlined in s 67DB do not apply to the extraction of swamp kauri. See above at [12].
56 Forests Act 1949, s 67DB.
57 Section 67D.
58 Section 67C.
59 Above at [22]–[23].

[41] The next point is that a product can come within the paragraph if it is to be "used" or "installed". The term "used" implies that the product in question is a standalone product. The term "installed" contemplates that the product in question is destined to be part of a larger product or structure. This is not surprising. For example, buildings will often include wooden products as fixtures and fittings, even where the buildings are largely comprised of products other than wood.

[42] In both cases, the product must be in its final shape and form and ready for immediate use or installation without any further modification. Whether a product is in its final form requires an examination of the product at the time of export. The label given to the product, what the exporter intended the product to be and what the customer intends to do with it may all be relevant as evidence of whether a product is in its final shape and form but are not determinative.

[43] Whether a product is in its final shape and form and any use to which it may be put must be able to be discerned from the product itself. The product must also be assessed in light of the scheme of the Act and the Act's purpose of ensuring that value is added in New Zealand and that any value added is additional to that created by felling or milling.

[44] We also accept NEPS' submission that the words "without the need for further machining or other modification" mean what they say. The product must be ready to be used or installed in the form which it is to be exported.

[45] Turning to para (b) of the definition, the words in parentheses extend the definition in para (a) to products that are exported in kitset form, which would otherwise not come within para (a) as they are not immediately ready for use and installation. In that context, the terms "complete item" or "a component of an item" must relate back to the two categories of product covered in para (a): those that can immediately be used or installed. A complete item is thus a product that is ready to be used immediately and a component of an item is a product that is ready to be installed. In each case they can either already be assembled or be in kitset form. In the latter case they must be immediately ready to be used or installed once assembled and without any further refining or modification. Contrary to the submission of MPI, the

words in parentheses in (b) "(whether assembled or in kitset form)" refer to the item itself and not to a component of an item.

[46] We accept NEPS' submission that a component of an item cannot have been intended to mean any piece of a product. If it had been, then the words in parentheses would make no sense. A single component cannot come in kitset form. Nor can it sensibly be said to have been assembled. Further, this interpretation would in many cases subvert the purpose of ensuring value is added in New Zealand. Accordingly, an indigenous wood product that is the component of an item in terms of para (b) of the definition is one that forms part of a product in its own right and either has been assembled and is ready to install or is in kitset form and ready to be installed once assembled.[60]

[47] The above interpretation of para (b) is reinforced by the examples of products given in that paragraph. All of the examples given are products in their own right, even if they are designed to be installed in another larger product or structure. They may often, like toilet seats, be the only wooden item contained in a larger product.

[48] Moving to para (c), we accept NEPS' submission that it is effectively a carve out provision. The phrase "does not include" means what it says: that, even though the items listed may meet the definition in paras (a) or (b), they will be excluded by para (c). The language of para (c) does not reflect a legislative intention for the listed items to be "illustrative or explanatory" only. By contrast, the examples given in para (b) are prefaced with the words "such as", indicating that they are intended to be illustrative or explanatory of the other concepts in that paragraph.

[49] We accept NEPS' submission that the listed items in para (c) have a common feature. They are all what can be classed as generic building materials that could be purchased in a building supplies store. In many cases being standard products, they would be ready for immediate installation and thus would, absent the carve out in para (c), meet the definition of finished or manufactured indigenous timber product.

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[60] Where a complete product or kitset has been exported, it may be that replacement parts could be exported, if they can be seen as being related to the original export of the kitset or complete item. But we need not be definitive on this issue as it is not suggested that any of the items referred to in the affidavits were replacements.

The carve out means that, if an item to be exported could be described as "dressed or rough sawn timber, mouldings, panelling, furniture blanks, building blanks or similar items", then it will not be able to be exported under s 67C(1)(b).

[50] The carve out in para (c) lists specific items with a catchall clause of "or similar items". When considering whether an item is similar to one of the named items in para (c), it will be necessary to assess the degree of similarity. As this is a carve out provision, and there is a need for exporters to be able to interpret the provision easily,[61] a high degree of similarity to one or more of the items identified would be required for it to fall under the catch all provision in the definition.

Application

[51] We now look at, and make some comments on, the hypothetical examples of products that were in evidence: lightly carved or decorated logs and table tops.

[52] Under para (a) of the definition of finished or manufactured indigenous timber product, whether a product is in its final form and ready for use or installation is judged by considering the product itself. Logs will almost always require modification before being ready for use or installation. Merely labelling a log a totem or temple pole does not change this.[62] The definition must also be interpreted in light of its purpose. Two main (related) purposes of the introduction of Part 3A were to curtail the export of indigenous logs and woodchips and to ensure that value was added in New Zealand.[63] Also relevant is the scheme of the Act which suggests that something more should be done after milling for a product to be exported under s 67C(1)(b).[64]

[53] Against that background a log cannot be a finished or manufactured indigenous timber product unless the work on it is so extensive that it has lost its identity as a log. Surface carving or decoration, however elaborate, is unlikely to cause such a loss of identity. In most cases, any value added in New Zealand by surface carving or decoration is likely to be minimal.

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61 See above at [38].
62 See above at [7].
63 See above at [22]–[24].
64 See above at [37].

[54] A slab of swamp kauri labelled a table top would not fit within para (a) of the definition. The use as a table could not be discerned from the product itself. Further, a table top is not a product in its own right and thus is not ready to be installed in a larger structure.

[55] For similar reasons, we also accept NEPS' submission that a table top, exported as a timber slab without routing, legs, or fixings, does not fall within para (b). Further, an unfinished "table top", in the form of a rough sawn or dressed timber slab or similar, would in any event be excluded from the definition of finished or manufactured indigenous timber product by para (c). Paragraph (c) operates to limit the export of items that, whatever the label attached to them, are in reality unfinished timber and have not had the level of domestically added value that was the purpose of the export restrictions.

[56] We do not, however, accept NEPS' submission that a complete table will be excluded by para (c) in all cases where the table top could be classified as dressed or rough sawn timber. Whether a complete (or kitset) table comes within the exclusion in paragraph (c) will depend on whether the table in question has a high degree of similarity to dressed or rough sawn timber or building materials in general.

[57] This will be a factual question assessed by considering the product itself at the time of export.[65] We do note that, where the adding of legs or other mountings can be seen as a device to avoid the exclusion clause, then it would be excluded by para (c) and may well not even come within para (a).[66] At the other end of the scale, a crafted rustic bespoke table[67] would clearly come within para (a) (or (b) if in kitset form) and would not come within the exclusion in para (c), even if the table had a table top that, considered alone, could be classified as rough sawn timber.

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65 In cases where the likely classification is uncertain exporters would be well advised to seek guidance from MPI through the voluntary approval process: see above at n 12.

66 The absence of a general anti-avoidance provision does not change the principles of interpretation that are to be applied to give effect to the purpose of the provision in accordance with s 5(1) of the Interpretation Act 1999: see *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39]–[41].

67 In evidence before the Court, some customers were said to have requested products with special specifications such as table tops with particular cracks or holes which can be filled with glass or resin.

Conclusion

[58] We have differed in a number of major respects from the Court of Appeal's interpretation of the definition of finished or manufactured indigenous timber product. This means that the appeal on this point must be allowed.

Protected Objects Act

Legislation

[59] The Protected Objects Act was first enacted as the Antiquities Act 1975. The long title said it was "[a]n Act to provide for the better protection of antiquities, to establish and record the ownership of Maori artifacts, and to control the sale of artifacts within New Zealand".[68] The Antiquities Act made it unlawful to export an "antiquity" from New Zealand without a written certificate of permission from the Secretary for Internal Affairs.[69]

[60] The definition of antiquity provided in the Act had eight categories of items. Categories covered by the Antiquities Act included any work of art related to New Zealand which is "more than 60 years old, and is of national, historical or artistic value or importance".[70] Other categories included natural history objects such as "[a]ny type specimen of any animal, plant, or mineral existing or formerly existing in New Zealand",[71] "[a]ny meteorite or part of a meteorite recovered in New Zealand"[72] and any bones, feathers, eggs or other parts of the moa or another species of animals, birds, reptiles or amphibians native to New Zealand believed to be extinct.[73] Once an object met the definition of antiquity, it fell under the Act's export restrictions.

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68 Antiquities Act 1975, long title. Its precursor was the Historic Articles Act 1962.
69 Section 5.
70 Section 2, definition of "Antiquity", para (d).
71 Section 2, definition of "Antiquity", para (e).
72 Section 2, definition of "Antiquity", para (f).
73 Section 2, definition of "Antiquity", para (g).

[61] Following a review, the Antiquities Act was amended in 2006 and its name changed to the Protected Objects Act 1975.[74] The amendment's purpose, described in the explanatory note to the Bill, was to:[75]

> … describe more systematically and precisely the types of protected New Zealand objects subject to export regulation by—
>
> (i) establishing descriptive categories of those objects; and
>
> (ii) specifying the relevant criteria to assess the significance of those objects to New Zealand;
>
> …

[62] When introducing the Protected Objects Amendment Bill in the first reading, the Hon Judith Tizard, the Associate Minister for Arts, Culture and Heritage said:[76]

> The purpose of the bill, therefore, is to address the shortcomings of the Antiquities Act and to strengthen the safeguards protecting valued New Zealand and international cultural heritage objects. The bill will do that by clarifying meanings and introducing more precise categories that describe the heritage objects for which permission to export is required. ...

[63] Section 1A of the Protected Objects Act provides that the purpose of the Act is "to provide for the better protection of certain objects" by, among other things, regulating the export of protected New Zealand objects. [77]

[64] "[P]rotected New Zealand object" is defined in s 2(1) as meaning:[78]

> … an object forming part of the movable cultural heritage of New Zealand that—
>
> (a) is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical,

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74 By the Protected Objects Amendment Act 2006, ss 4 and 5. The Hon Mahara Okeroa, Associate Minister for Arts, Culture and Heritage, said on the Protected Object Amendment Bill's third reading that this change would help bring the Act into the 21st century: (2 Aug 2006) 633 NZPD 4645.

75 Protected Objects Amendment Bill 2004 (243-1) (explanatory note) at 1. The amendment's purpose is reflected in the definition of protected New Zealand object as set out below at [64].

76 (5 April 2005) 624 NZPD 19617.

77 Although the Antiquities Act did not contain an equivalent, distinct purpose provision its long title set out above at [59] was to enable the protection, record keeping and control of Māori artifacts and New Zealand antiquities.

78 Protected Objects Act 1975, s 2. This definition replaced the definition of antiquity in s 2 of the Antiquities Act discussed above at [60].

literary, scientific, social, spiritual, technological, or traditional reasons; and

(b) falls within 1 or more of the categories of protected objects set out in Schedule 4.

"Object" is, in turn, defined as including "a collection or assemblage of objects". Movable cultural heritage is not defined.

[65] Schedule 4 contains nine categories of objects which include archaeological, ethnographic and historical objects of non-New Zealand origin relating to New Zealand,[79] art objects including fine, decorative and popular art,[80] documentary heritage objects,[81] and Ngā taonga tūturu.[82] Other categories include natural science objects,[83] New Zealand archaeological objects,[84] numismatic and philatelic objects,[85] science technology, industry, economy and transport objects[86] and social history objects.[87] Each category was worked on by experts from the relevant field.[88]

[66] In NEPS' submission, the relevant category in sch 4 for swamp kauri is category five, "Natural science objects". This category:[89]

(2) … consists of extant or extinct native organisms, products of animal and plant behaviour (such as nests, coprolites, and kauri gum), fossils, fluids, rocks, and minerals (including, but not limited to, ventifacts, obsidians, pumices, meteorites, and tektites) of New Zealand origin or related to New Zealand.

(3) Objects in this category include—

(a) a category of type specimen as defined by the current edition of the International Code of Botanical Nomenclature, the International Code of Zoological Nomenclature, or the International Code of Nomenclature of Bacteria: Bacteriological Code:

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79 Schedule 4, Category 1.
80 Schedule 4, Category 2.
81 Schedule 4, Category 3.
82 Schedule 4, Category 4. Ngā taonga tūturu is defined in the Act per s 2(1) as "2 or more taonga tūturu". Taonga tūturu is defined in s 2 as an object more than 50 years old that relates to Māori culture, history, or society and was manufactured, modified, brought into New Zealand by, or used by, Māori.
83 Schedule 4, Category 5.
84 Schedule 4, Category 6.
85 Schedule 4, Category 7.
86 Schedule 4, Category 8.
87 Schedule 4, Category 9.
88 This was according to the evidence from the Ministry for Culture and Heritage.
89 Protected Objects Act, sch 4 cl 5.

(b) a specimen considered to be scientifically important for defining a taxon through having been illustrated in the original description, or new material subsequently illustrated (that is, hypotypes) and used to expand or refine this description in the scientific literature:

(c) a specimen of an extant or extinct plant or rock or mineral, animal, or other organism or fossil or part thereof including any developmental stage, shell, or skeletal or supporting element, of which there is not a sufficient selection in New Zealand public collections to define the variation, range, and environmental context of the taxon or object.

(4) Duplicates of a category of type specimen as defined by the current edition of the International Code of Botanical Nomenclature, the International Code of Zoological Nomenclature, or the International Code of Nomenclature of Bacteria: Bacteriological Code may be excluded from this category if there is sufficient original type material held in New Zealand public collections to define the taxon.

[67] NEPS argues that swamp kauri is a "fossil", which is defined in cl 5(1) as:

> **fossil**, irrespective of how it is preserved, means an object constituting the remains or traces of a non-human organism that lived in New Zealand prior to human habitation; including (but not limited to) the whole organism or parts of it, or trace evidence of its behaviour

[68] The Protected Objects Act prohibits the export or attempted export of protected New Zealand objects, unless certain conditions outlined in s 5(1) of the Act are met.[90] This includes the condition that the exporter has applied for, and received, permission from the Ministry for Culture and Heritage's Chief Executive to export the relevant object.[91] The Chief Executive may, by notice in the Gazette, exempt any category or categories from the export restriction, where he or she is satisfied that there are sufficient examples of that category held in public ownership in New Zealand.[92]

[69] Section 7 provides that the Chief Executive must either refuse or grant applications for permission to export. An application can be granted unconditionally or subject to conditions. Section 7A(1) sets out circumstances in which an application must not be granted including where a protected New Zealand object is substantially physically authentic and related to New Zealand and:

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90 Exporting without meeting these requirements is an offence punishable by a fine up to $100,000 or up to five years in prison in the case of an individual: s 5(2).

91 Protected Objects Act, s 5(1). The Ministry for Culture and Heritage is the relevant department under the Act: s 2.

92 Protected Objects Act, s 5(1)(b).

(b) is—

(i) associated with, or representative of, activities, events, ideas, movements, objects, persons, or places of importance to New Zealand; or

(ii) important to New Zealand for its technical accomplishment or design, artistic excellence, or symbolic, commemorative, or research value; or

(iii) part of a wider historical, scientific, or cultural collection or assemblage of importance to New Zealand; and

(c) is of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage.

[70] In considering an application for permission to export, the Chief Executive must consult with two or more expert examiners who must consider the matters above.[93] An examiner must recommend that permission be declined where he or she considers that an object is of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage.[94]

[71] Under s 7F, the Chief Executive must establish and maintain a register of objects or categories of objects of national significance. The register must include any protected New Zealand object in respect of which the Chief Executive has refused permission to export.[95]

Court of Appeal decision

[72] The Court of Appeal held that the purpose of the Protected Objects Act is to protect certain objects of particular national value. Agreeing with the High Court,[96] the Court of Appeal said that the Act was intended to apply restrictively to certain types of objects rather than creating sweeping export restrictions on entire categories.[97] The Court of Appeal agreed that the statutory language implies a protected object must

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93 Sections 7A(3), 7B and 7C.
94 Section 7D.
95 Section 7F(2)(a). It may also include an object that the owner has submitted for inclusion on the register that meets the criteria in s 7D.
96 *Northland* (HC), above n 2, at [80]–[85].
97 *Northland* (CA), above n 15, at [63]–[73].

be "representative of some class … rather than a collection or assemblage that is coextensive with the entire class".[98]

[73] The Court of Appeal considered that the categories of protected New Zealand objects in sch 4 have been drafted in a manner that begins with a broad category and then places restrictions on it, the exact approach taken differing according to the objects in question.[99] The Court noted that category 1, for example, deals amongst other things with historical objects relating to New Zealand but of non-New Zealand origin. The potential breadth of that category is reduced by the requirement that the historical objects must have been in New Zealand for not less than 50 years, not be represented by at least two comparable examples permanently held in New Zealand public collections and, in the case of objects of Polynesian creation or modification, brought to New Zealand before 1800.[100] The Court was of the view[101] that an equivalent approach is also used in category 3 (documentary heritage objects),[102] category 8 (science, technology, industry, economy, and transport objects)[103] and category 9 (social history objects).[104] It considered that this context was of assistance in interpreting category 5, where in its view a similar approach was taken.

[74] The Court noted that cl 5(2) states what the category consists of but cl 5(3) states what the "objects in this category include". It accepted that the language is not precisely the same as that employed in the other categories, which in each case (except for category 1) states that "[a]n object is included in this category if", but the Court did not consider the difference in the wording to be significant. It held that the wording of cl 5(3) must have been intended to reduce the very broad ambit of cl 5(2); otherwise the category would be impractically wide.[105]

[75] NEPS had emphasised the artistic, cultural and historical significance of swamp kauri for the purposes of para (a) of the definition of "protected New Zealand

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98 At [63].
99 At [64]–[67].
100 Protected Objects Act, sch 4, cl 1.
101 *Northland* (CA), above n 15, at [68].
102 Schedule 4, cl 3(3).
103 Schedule 4, cl 8(3).
104 Schedule 4, cl 9(4).
105 *Northland* (CA), above n 15, at [69].

object" in s 2 of the Protected Objects Act. The Court said that both paras (a) and (b) of the definition must be satisfied. The only protected category that could possibly apply to swamp kauri is category 5, relating to natural science objects.[106] The Court did not consider artistic, cultural and historical significance to be relevant to category 5. It noted that this apparent misalignment was another reason why it did not consider swamp kauri to be a protected object under the legislation.[107] The Court also noted that the individual items of swamp kauri in issue had been modified for the purposes of export thereby reducing any value they might have as "natural science objects".

NEPS' submissions

[76] NEPS submits that there is a tripartite structure to the definition of a protected New Zealand object. First it must form part of the movable cultural heritage of New Zealand. This requirement is easily satisfied. Second it must be of importance to New Zealand for the specified reasons in s 2(1)(a) of the Act and third it must come within one of the categories of protected objects in sch 4. The third element (falling under sch 4) is the first step that must be addressed.

[77] In NEPS' submission, swamp kauri comes within the definition of fossil in cl 5(1) of sch 4. It thus comes within cl 5(2). In response to the argument that the definition does not apply to the species as a whole, NEPS submits that the Act's reference to "categories of objects" in s 7F and "categories of protected New Zealand objects" in s 5 shows that Parliament intended for categories of New Zealand objects to be protected.[108] Thus NPES submits that the use of "categories" extends the meaning from a collection or assemblage of objects to an entire category of objects.

[78] Further, NEPS submits that cl 5(3) is illustrative only. In NEPS' submission there is nothing in the context of cl 5 or sch 4 generally to suggest that the term "includes" in cl 5(3) should be interpreted other than in accordance with its ordinary

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106 At [72].
107 At [72]–[73].
108 For a discussion on the effect of ss 5 and 7F see above at [68] and [71].

meaning. Where specified attributes are needed before an object can come within a clause of the schedule, the words "an object is included if" are used.[109]

[79] It is submitted further that interpreting cl 5(3) as limiting cl 5(2) is inconsistent with the legislative history of the Protected Objects Act. Such a reading would decrease the scope of the Act, restricting it to the narrow subcategories in cl 5(3). In NEPS' submission, the Act was intended to increase the original protection under the Antiquities Act, not reduce it. The Protected Objects Act for example encompasses a larger range of natural history objects than the three categories originally covered by the Antiquities Act.[110]

[80] Finally, it is submitted that the practical difficulties alleged to arise on NEPS' interpretation of cl 5 have been exaggerated. This is because the other requirement of the definition of protected New Zealand object in s 2(1) provides a key control. NEPS submits that s 5 of the Act allows the Chief Executive, by way of notice in the Gazette, to exempt swamp kauri (if held to be prohibited from export in bulk) from the export prohibition where he or she is satisfied that there are sufficient examples of swamp kauri in public ownership.[111] NEPS submits that this "safety valve" makes it unnecessary to read down the scope of the legislation.

[81] In NEPS' submission, the Court of Appeal was wrong to consider that s 2(1) requires a natural history object to be of scientific value. An object can be significant for a number of reasons. It submits that swamp kauri is of artistic, scientific, cultural and historical significance to New Zealand and thus meets the test in s 2(1)(a).[112] Mr Bullock, who presented this part of the argument for NEPS, did, however, concede

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109 Categories 3, 8 and 9 use this wording. NEPS also points out that cl 5(2) uses the term "consists of" which is used in categories 1 and 7 to mean an exhaustive definition and that cl 5(3) of category 5 uses the term "includes" without the parentheses "but not limited to" that is seen in other categories such as category 2, but that "includes" clearly has its ordinary meaning.

110 NEPS in its submissions noted that the Antiquities Act only provided for three types of natural history objects: type specimen, meteorite and parts of animals, birds, amphibians and reptiles native to New Zealand: see above at [60].

111 Protected Objects Act, s 5(1)(b).

112 Referring to Andrew M Lorrey and Gretel Boswijk (National Institute of Water and Atmospheric Research) *Understanding the scientific value of subfossil bog (swamp) kauri* (Ministry for Primary Industries, MPI Technical Paper No: 2017/04, January 2017); and Extent Heritage Pty Ltd *Swamp Kauri: Cultural Heritage Values Assessment* (Ministry for Primary Industries, MPI Technical Paper No: 2017/03, January 2017).

that the scientific value largely relates to swamp kauri that has not been extracted and milled.

[82] NEPS submits further that the requirements of the Forests Act and the Protected Objects Act are complementary rather than inconsistent. It is not unusual for different regulatory statutes to apply simultaneously to exports with each statute having a slightly different purpose.

Submissions of the Ministry

[83] The Ministry for Culture and Heritage (the Ministry) says that the purpose of the Act, as expressly stated in s 1A, is to protect certain objects of particular national value. In the Ministry's submission this means that the Act was not designed to create sweeping export restrictions on entire categories of objects, such as bulk natural materials. Further, the purpose of the amendments in 2006 was to define more precisely the categories of objects to be protected, rather than widen them.

[84] The Ministry concedes that some swamp kauri could come within the definition of fossil in cl 5(1) and therefore come within cl 5(2) of sch 4 but submits that not every piece of swamp kauri will, as it is not clear that all swamp kauri predates human habitation.

[85] In the Ministry's submission, the primary issue in the appeal is the proper interpretation of the phrase "objects in this category include" in cl 5(3). It submits that the word "include" should be given an exhaustive meaning.[113] Thus it submits that, properly interpreted, cl 5(3) reduces the scope of cl 5(2).

[86] If cl 5(2) were the only criteria for determining whether an object falls under the category, then, in the Ministry's submission, it would render cl 5(3) redundant. Clause 5(3) defines when the objects in cl 5(2) are of scientific value. The Ministry also points out that, where the word "include" or its variant is intended to have a non-

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[113] *Dilworth v Commissioner of Stamps* [1899] AC 99 (PC) at 106 where the Privy Council noted in dicta that the term "include" can be used in an exhaustive definition. See also *Commissioner of Inland Revenue v Lilburn* [1960] NZLR 1169 (CA) at 1176, where the word "include" was held to have an exhaustive effect.

exhaustive meaning under sch 4, Parliament made this clear by adding the words "but not limited to" in parentheses. It did not do so in cl 5(3).

[87] Further it is submitted that, if the Act were interpreted to allow the protection of an entire class of object, this would create a major administrative burden that could not have been intended. NEPS suggests that the Chief Executive could overcome the practical problem by exempting swamp kauri from the export regime under the Act.[114] The Ministry submits that, if the legislative intent had been to place a general restriction on the export of a bulk natural resource, it would be curious if whole categories could then be exempted by Gazette notice on administrative or resourcing grounds.

[88] Finally, the Ministry submits that a requirement to make an application to prohibit export of a class of objects under the Protected Objects Act would cut across the categories of permitted exports under the Forests Act. The Ministry notes that, if the two Acts were intended to work together, it would be expected that provisions in the Forests Act would reference the Protected Objects Act.

Our analysis

[89] The purpose of the Protected Objects Act is to protect certain objects of particular national value to New Zealand. The focus is therefore on individual items that, as individual items, have significance for one or more of the reasons set out in s 2(1)(a). The Act is not designed, as the Courts below held, to protect natural materials such as swamp kauri in bulk. It is true that protected New Zealand object is defined to include a collection or assemblage of objects[115] but these terms imply that the collection or assemblage is in one place or in the hands of one owner. That does not apply to swamp kauri.

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114 See above at [68].

115 It seems to us that the reference to collection or assembly of objects may be designed to cover the situation where the individual objects may not all individually merit being subject to controls on export but where the national value lies in the collection itself. This focus may be shown for example by s 7A(1)(b)(iii) which prohibits the Chief Executive from granting permission to export if the object is, among other things, "part of a wider historical, scientific, or cultural collection or assemblage of importance to New Zealand".

[90] Further, to require all pieces of a bulk natural material, such as swamp kauri, to be subject to an application process before export would create a major administrative burden, both on the Ministry and the public. This cannot have been the intention of the Act. It is true that an exemption could be granted if there are sufficient examples of swamp kauri in public ownership but, if swamp kauri generally had been intended to be covered by the Act, this then raises the question, given the finite nature of the resource, as to what would be a sufficient amount in public ownership in order for it to satisfy the criteria for an exemption.[116]

[91] We also accept the Ministry's submission that subjecting swamp kauri to the Protected Objects Act would not fit easily with the regime in the Forests Act. It is true, as Mr Bullock submitted, that it is not unusual for actions to be subject to more than one regulatory regime but, where this is the case, the regimes would be expected to be consistent and complementary. That is not the case here.

[92] Under NEPS' argument on the Protected Objects Act, any scientific value of swamp kauri largely relates to kauri that has not yet been extracted.[117] NEPS' argument in relation to the cultural, artistic, social and historical significance in terms of the Protected Objects Act is also largely related to the significance of swamp kauri generally as a finite resource and thus in its essential character as swamp kauri.

[93] There are no controls on the extraction of swamp kauri in the Forests Act, although extraction may be subject to other Acts such as the Resource Management Act.[118] The Forests Act requires, before swamp kauri can be exported, value to be added in New Zealand after milling, unless it comes within one of the other exceptions in s 67C(1). The Forests Act thus requires swamp kauri to have effectively lost its identity as swamp kauri before it can be exported lawfully as a finished or manufactured indigenous product. This would be inconsistent with the purpose of any protection under the Protected Objects Act, assuming NEPS' interpretation of that Act to be correct.

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116 We also accept the Ministry's submission that, as the extent of swamp kauri in public ownership is not known and is not in issue before this Court, there is no way of knowing whether an exemption would reduce the practical ramifications of NEPS' proposed interpretation.

117 See above at [81].

118 See above at [12].

[94] Further, if NEPS' argument on the Protected Objects Act were accepted, there would be a conflict between the two Acts. The Forests Act would allow export with no prior clearance,[119] while the Protected Objects Act would require consent for all exports unless there was an exemption.[120]

[95] The above suffices to dispose of the appeal. As this is the case, we do not need to make findings on the interpretation of cl 5 of sch 4, which is a matter of some complexity. This is better left to a case where it is vital to the outcome. We do, however, note that the issues with the interpretation of cl 5 may warrant legislative attention.

Conclusion

[96] For the reasons set out above,[121] we do not consider that swamp kauri generally is covered by the Protected Objects Act. The appeal in relation to the Protected Objects Act must therefore be dismissed.

[97] We do, however, accept that swamp kauri is a finite resource and that it has scientific and cultural significance.[122] Its significance is heightened by the threat to living trees from kauri die back disease.[123] While the parties agree that swamp kauri comes within Part 3A of the Forests Act, the focus of that Part is largely on living trees. For example, the extraction of swamp kauri is not covered by the Act.[124] Further, some provisions may suit living trees better than swamp kauri. For example, while the inclusion of stumps as allowable exports is understandable in the context of living forests subject to sustainable management plans,[125] it is arguably less so with regard

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119 See above at [14].
120 See above at [68].
121 See above at [89]–[95]. Individual pieces of swamp kauri may, however, be covered if they meet the requirement in s 2(1)(a) outlined above at [64] and come within one of categories in sch 4.
122 See above at [81].
123 For more information generally on Kauri dieback disease see Department of Conservation "Kauri dieback" <www.doc.govt.nz>.
124 See above at [12].
125 For example the sustainable management plans for indigenous forests, see above at [11]–[12].

to swamp kauri.[126] All this suggests that a review of the legislative framework with regard to swamp kauri may be desirable.[127]

Result

[98] The appeal relating to the interpretation of the export restriction in s 67C(1)(b) of the Forests Act is allowed. The interpretation of that provision and its associated definition is as set out in this judgment.

[99] We do not make the declarations sought by NEPS as to the operation of s 67C(1)(b) and the definition of finished or manufactured indigenous timber product. This judgment has set out the correct interpretation of those provisions. We do not consider that there is any added benefit in making a declaration. Further, any declaration would of necessity be truncated and not able to capture our full reasoning.

[100] The appeal relating to the Protected Objects Act is dismissed for the reasons set out above[128] which differ in some respects from those of the Court of Appeal.

[101] Costs are reserved. If not able to be agreed, submissions on costs should be filed in accordance with the following timetable:

(a) The appellant is to file and serve its submissions on or before 4 pm on 28 November 2018.

(b) The respondents are to file and serve their submissions on or before 4 pm on 5 December 2018.

(c) Submissions in reply are to be filed and served by the appellant on or before 4 pm on 12 December 2018.

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126 Evidence before the Court indicated that retrieving swamp kauri affects the surrounding area's hydrology and surface oscillation, damaging native plant and animal life and causing runoff from the peat to enter the water ways.

127 We are not to be taken as indicating any view on what the result of any such review should be.

128 See above at [89]–[95].

WILLIAM YOUNG J

My approach to the case

[102] On the Protected Objects Act 1975 aspect of the case, I agree with the reasons prepared by Glazebrook J. On the other issue – the definition of "finished or manufactured indigenous timber product" – my approach is broadly similar to the one she has adopted. There are, however, sufficient differences between us to warrant recording my reasons separately.

The definition of "finished or manufactured indigenous timber product"

[103] The kauri tree is indigenous to New Zealand and therefore its timber can be exported in only limited circumstances. This is because s 67C of the Forests Act 1949 prohibits the export of indigenous timber except as provided for in that section. The exception which is material for the purposes of this appeal permits the export of:

> (b) any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product:

I will refer to such product as FMITP.

[104] The definition of FMITP in s 2 of the Act is as follows:

> **finished or manufactured indigenous timber product—**
>
> (a) means any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification; and
>
> (b) includes a complete item or a component of an item (whether assembled or in kitset form) such as joinery, furniture, toys, tools, and household utensils, household fixtures such as rails and toilet seats, ornaments such as picture frames and carvings, and similar items; but
>
> (c) does not include dressed or rough sawn timber, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items.

[105] The discussion in the case focused on exported swamp kauri in the form of lightly processed slabs which could be used as table tops and lightly carved trunks which could be used as totem or temple poles. Those exports could also be used for other purposes for which further processing after export would be required. This gives

rise to two interconnected questions: first, how the "intended purpose" of a product should be determined; and secondly, the interrelationship between paras (a), (b) and (c) of the definition.

The role and approach of the Ministry for Primary Industries

[106] As Glazebrook J has explained, when the definition of FMITP first appeared in the Act, the export of FMITPs was subject to inspection and approval by a forestry officer.[129] In 2004 this requirement for inspection and approval was removed.[130] In the result, there is currently no mandatory certification process which applies directly to the export of FMITPs. There is thus no requirement for an exporter to satisfy the Ministry for Primary Industries (the Ministry) that a product to be exported as an FMITP meets the statutory definition.

[107] There are three different ways in which the Ministry may become involved with the export of FMITPs:

(a) Timber exported as an FMITP often, perhaps usually, will be subject to phytosanitary inspection,[131] which is carried out for the Ministry by AsureQuality Ltd. Forestry officers are involved in the inspection and as part of this process there is an opportunity for an assessment to be made whether the product meets the FMITP definition.

(b) There is a voluntary process in place in which exporters can present their product to the Ministry, thus giving the Ministry an opportunity to express a view on the whether the product is an FMITP.

(c) Complaints as to alleged illegal exporting of timber are investigated by the Ministry.

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129 See above at [19] of the reasons given by Glazebrook J.

130 Forests Amendment Act 2004, s 5.

131 Phytosanitary inspections are necessary where an importing country has requirements that timber imports must meet, commonly in respect of the biosecurity of an export.

[108] The Ministry's 2012 "Indigenous Timber and Timber Products Export Procedures Manual" provides guidance for forestry officers and AsureQuality.[132] Appendix two of this document is titled "Guidance Note on Interpretation of Finished or Manufactured Indigenous Timber Products proposed for Export". It sets out the definition of FMITP and, after some preliminary comments, provides:

> 6. If a FO [forestry officer] does not believe the product can be used for its intended purpose without further machining or modification, it is NOT *finished or manufactured*.
>
> 7. Conversely, if a FO is satisfied that the product can be used for its intended purpose without further machining or modification it CAN be accepted as *finished or manufactured*.
>
> 8. Painting, staining or varnishing is excluded from further modification. That is, a product can be accepted as a finished product if it is unpainted, but in all other respects is in its final shape and form.
>
> 9. Paragraph (b) of the definition provides guidance on the kinds of products which may be considered *finished or manufactured.* These are all clearly completed items or components of completed items which require no further finishing or manufacture. There will be many more examples than those listed.
>
> 10. Paragraph (c) attempts to further clarify by stating what is not in the definition. Dressed or rough sawn timber that is not in its final shape and form is not *finished or manufactured*. Similarly, mouldings and panelling do not qualify and neither do the various blanks cited. The reason for all these products being outside the definition is because further work needs to be undertaken on each of them to make a "final shape and form" product.
>
> 11. If no further manufacture, modification or finishing is needed to these products then they are "finished products". Thus planks of dressed or rough sawn timber do not meet the definition but a kit set pergola made of timber components (dressed or rough sawn), cut to length, in final shape and form so that it can be assembled as part of a plan without further modification meets the definition of a finished product.
>
> **Examples of Finished Products which have been accepted by MPI** (in the case of examples 13 to 16, after comprehensive checks):
>
> 12. All items listed under [paragraph (b) of the definition] … .
>
> 13. A wooden tongue and groove floor which has been cut to length according to a floor plan provided and which can be assembled from its component parts without further modification.

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[132] Ministry for Primary Industries *Indigenous Timber and Timber Products Export Procedures Manual for Forestry Officers MPI and AsureQuality* (January 2012).

14. A Kauri tree trunk manufactured into an ornamental "temple pole" for decorative/religious purposes.

15. Kitchen fit outs using finished indigenous timber components specified in a design plan.

16. A complete shop interior fit-out (boutique clothing store).

Note: In each of examples 13 – 16 MPI requested and received detailed plans and specifications concerning the product and how and where it was to be used/displayed. Generally these were treated as one-off exports and not to be regarded as precedents for future exports in bulk.

[109] The Ministry's approach is that timber in a shape and form suitable for use as a table top can be an FMITP if this is its alleged intended purpose even though the "table top": (a) could also be used for purposes involving alteration to its shape and form or further machining or modification; (b) is not attached to legs; and (c) could accurately be described as "dressed or rough sawn timber". It takes a broadly similar approach to lightly carved kauri trunks described as temple or totem poles.

[110] In simple terms, the Ministry interprets para (c) of the definition of FMITP as if it read:

> does not include dressed or rough sawn timber *[unless in its final shape and form and is ready to be used for its intended purpose]*, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items.

In other words, the Ministry applies para (c) as if it contained the additional words inserted from para (a). Further, it is at least implicit that the Ministry takes a subjective approach to "intended purpose", that is one which depends on the state of mind of the purchaser.

The approach of the High Court and Court of Appeal

[111] The High Court and Court of Appeal adopted approaches which were broadly similar to that of the Ministry.[133]

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[133] *Northland Environmental Protection Society Inc v Chief Executive of the Ministry of Primary Industries* [2017] NZHC 308 (Toogood J) [*Northland* (HC)]; and *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries* [2017] NZCA 607 (Harrison, Cooper and Clifford JJ) [*Northland* (CA)].

[112] Toogood J explained in the High Court:[134]

> … I consider [paragraph (c)] to be illustrative or explanatory of items not intended by Parliament to be included in the definition, and given for the avoidance of doubt. The items listed would not, in the usual circumstances, fall within paragraph (a). None of them are in their "final shape and form", and paragraph (c) simply clarifies that.

[113] The Court of Appeal's reasoning was as follows:[135]

> NEPS argued that anything comprised of "dressed or rough-sawn timber" is not a finished or manufactured indigenous timber product. We accept that would be so if the product could not be brought within para (a) of the definition, and para (c) would simply underline that conclusion. But, we do not see para (c) as invariably operating so as to exclude products that would otherwise fall within para (a). In many cases, para (c) would have effect to exclude from the definition items not falling within para (a). We are therefore not persuaded Toogood J erred when he spoke of the items listed in para (c) as illustrating the kind of products not embraced by para (a).

My views

Framing the interpretative issue

[114] The case can be seen as coming down to whether para (c) operates as an exclusion; with the result that items within the language of (c) are not FMITPs even if they are within the language of paras (a) and (b). This is explained in the reasons given by Glazebrook J at [39]. If para (c) is exclusionary, it follows that the approach adopted by the Ministry is incorrect, as the reasons given by Glazebrook J demonstrate. On this construction, para (c) trumps para (a). Conversely, the interpretation advanced by the Ministry and upheld in the Courts below treats para (a) as trumping para (c), a result which, as I explained in [110] above, involves reading into para (c) words which make it subject to para (a). The result of this construction is that items within the language of (a) will constitute FMITPs notwithstanding they are also within the language of para (c). This "insertion of words" point can, however, be turned around; this because treating para (c) as an exclusion is tantamount to reading into para (a) words which make it subject to para (c).

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134 *Northland* (HC), above n 133, at [52].
135 *Northland* (CA), above n 133, at [44].

[115] Another interpretative approach – and the one I prefer – is to read the definition as a composite whole; effectively on the basis that para (c) can be read alongside para (a). As will become apparent, this approach produces a result which is similar to, although not precisely the same as, that proposed in the reasons given by Glazebrook J.

Legislative scheme and purpose

[116] The legislative scheme in relation to the FMITP exception and its history are explained in the reasons given by Glazebrook J.[136]

[117] When the concept of FMITP was first introduced there were requirements for inspection and approval of product to be exported as FMITPs. And, as explained there are still some inspections, either in the context of phytosanitary checks or as part of the voluntary scheme. I see all of this as consistent with an interpretation of the definition which can be applied by a forestry officer in a straightforward way in the course of an inspection.

[118] The language of the FMITP definition shows that its purpose is to preclude (save as otherwise authorised) the export of native timber in other than a finished state. Implementation of this purpose requires that all significant processing of native timber is to take place in New Zealand. The definition should be construed so as to give effect to that purpose and in particular, an interpretation which would facilitate significant overseas processing of native timber should, if possible, be avoided.

An interpretation of the definition as a composite whole

[119] The requirement in para (a) is that the product has been "manufactured into its final shape and form". Given the legislative history and the practical context in which the definition must be applied, it is sensible to construe this language on the basis that the shape and form of the product are such that it is reasonable to conclude that it will not be subject to further machining or other modification. This will be the case, for instance, where the shape and form of the product would make further processing uneconomic. On the other hand, where the shape and form of the product is consistent

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[136] See above at [11]–[24] of the reasons given by Glazebrook J.

with use for end purposes involving higher value to be obtained by machining or other modification, the conclusion that it is in its final shape and form will not be available.

[120] The reference in para (a) to "intended purpose" denotes the need for an assessment of the probable eventual use of the product. But I consider that this must be ascertained from the shape and form of the product before it is exported. For this reason, assertions by the purchaser as to intended purpose are not controlling. This is not to preclude the Ministry making inquiries of the exporter or the purchaser of the product as to why its shape or form denote an intended purpose for which further machining or modification is not required (for instance by way of explanation as to why it cannot practically be used for other purposes). The critical point, however, is that the final conclusion must be based on the appearance of the product and the potential uses to which it could be put.

[121] I read para (b) as indicating that a piece of timber can be regarded as being in its final shape and form even if its eventual use requires that it be attached or otherwise fitted to something else, as is the case with a toilet seat. So a need for minor adjustments, including fitting, to enable the product to be used for its intended purpose does not preclude the application of the FMITP definition. For this reason, and in this respect parting company with the reasons given by Glazebrook J, I consider that timber so processed that it is readily apparent from its shape and form that its only practical and economic use is as a table top would be an FMITP even if not attached to legs.

[122] I see para (c) as supplementing para (a) by making it clear that timber which has only been lightly processed (such as rough sawn timber) and which is capable of a number of uses is not within the FMITP definition. As will be apparent, I do not see this as necessarily trumping para (a); rather it provides assistance in determining whether a particular product has been manufactured into its final shape and form. It also supports the adoption of an objective approach to "intended purpose". Where the existing shape and form of the product is such that further processing is plausible, para (a) will not be satisfied.

[123] On any interpretative approach, the FMITP definition may call for practical evaluative judgements. But the fundamental purpose of the definition, as its text

makes clear, is that the FMITP exception is available only for finished products, that is for timber which is not going to be subject to further substantial processing after export. If it is apparent from the shape and form of the product that it is, in this sense, finished, then the exception is available. If, on the other hand, this is not apparent, the FMITP exception is not engaged.

Solicitors:
Lee Salmon Long, Auckland for Appellant
Crown Law Office, Wellington for the Respondents