IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-000508
[2022] NZHC 883

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	the Resource Management Act 1991
BETWEEN	MUAŪPOKO TRIBAL AUTHORITY INCORPORATED Applicant
AND	MINISTER FOR ENVIRONMENT Respondent

see over for further proceeding

Hearing: 26–29 October 2021

Appearances: T H Bennion and E A Whiley for Applicant, Muaūpoko Tribal Authority Incorporated
R B Enright and R G Haazen for Applicant, Te Rūnanga o Raukawa Incorporated
T C Stephens, E M Jamieson and E K Bain for Respondent
M J Slyfield and N S C Buxeda for Horticulture New Zealand (First Intervener)
S Johnston and A J R Sinclair for Manawatū-Whanganui Regional Council (Second Intervener)
C M Hockly for Horowhenua 11 Part Reservation Trust (Third Intervener)

Judgment: 29 April 2022

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 29 April 2022 at 4.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

CIV-2020-485-000489

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	the Resource Management Act 1991
BETWEEN	TE RŪNANGA O RAUKAWA INCORPORATED Applicant
	MINISTER FOR ENVIRONMENT Respondent

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[1] Lake Horowhenua is a shallow dune lake on the Manawatū coast. Once a water body of abundance, the Lake is now one of the most polluted and degraded lakes in the country. Contributing to that polluted state is run-off from the horticulture and farming activities carried out on the surrounding land. The Lake, the Hōkio stream and their related catchments are located in the heart of a major growing area for the domestic supply of vegetables.

[2] The applicants ("Muaūpoko" and "Raukawa") each represent iwi and hapū who assert tino rangatiratanga (autonomy or authority as people), kaitiakitanga (guardianship) and mana (authority over land and water) over Lake Horowhenua and the Hōkio stream. For these respective iwi and hapū, the Lake, stream, and related catchments are taonga (treasures) and tūpuna (ancestors). Although they have competing claims to the water bodies, the applicants and those they represent share a common objective of restoring the mauri (life principle) and mana (prestige or reputation) of the water ways within their rohe.[1]

[3] That objective is also reflected in the Essential Freshwater Work Programme which the Government launched in 2018. That Programme has an aim of stopping further degradation and loss of New Zealand's freshwater resources, reversing past damage, and addressing water allocation issues.[2] Part of the Programme involved the promulgation of new national direction instruments under the Resource Management Act 1991 (RMA), including a new National Policy Statement for freshwater management. A National Policy Statement enables central government to provide direction to local authorities regarding their planning documents.

[4] The National Policy Statement for Freshwater Management 2020 (NPS-FM 2020) came into force on 3 September 2020.[3] It sets out policies, objectives and national bottom lines for water quality that regional councils must implement in regional policy statements and plans.

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1 These Māori terms and their translations are adopted from Waitangi Tribunal *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 1 and 239–240.

2 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater: Healthy Water, Fairly Allocated* (October 2018) at 7.

3 Minister for the Environment *National Policy Statement for Freshwater Management 2020* (issued by notice in the *New Zealand Gazette* on 5 August 2020 and taking effect on 3 September 2020).

[5] This proceeding concerns the Minister for the Environment's decision to include clause 3.33 in the NPS-FM 2020. That clause is known as the vegetable exemption. The exemption was inserted after submitters on the draft NPS-FM 2020 raised concerns about the application of some of the national bottom lines compromising the domestic supply of vegetables.

[6] The effect of the vegetable exemption in this case is that it permits the regional council to set certain water quality targets for Lake Horowhenua and the Hōkio stream below national bottom lines. If targets are to be set below national bottom lines they must nevertheless still be set so as to achieve an improved state without compromising the domestic supply of vegetables and food security. The vegetable exemption has a limited life and will expire either 10 years after the commencement date, or when replaced by National Environmental Standards or other regulations made under the RMA, whichever is the earlier. Work on a replacement for the vegetable exemption is ongoing.

[7] The applicants feel a deep sense of grievance that the Lake and other waterways are being treated differently to other water bodies in New Zealand. They see the exemption as a licence to continue polluting their taonga and tūpuna. Both applicants seek judicial review of the decision to include the vegetable exemption in the NPS-FM 2020. They challenge the legality of the exemption and its compliance with Part 2 of the RMA and the principles of te Tiriti o Waitangi (Treaty of Waitangi). They say the consultation on the exemption was inadequate, and that the Minister for the Environment failed to take into account mandatory relevant considerations in making the decision to include it. It is also claimed that including the exemption was unreasonable.

[8] The Minister for the Environment says that none of the grounds of review are made out.

Summary of findings

[9] The key response to the applicants' claims arises out of the way the vegetable exemption operates. I interpret the exemption as permissive in nature. That is, it enables, but does not require or direct, a regional council to set a target attribute state below the national bottom line for that particular attribute.

[10] Even if a target attribute state is set below the national bottom line, it must still be set to achieve an improved state, albeit without compromising the domestic supply of fresh vegetables or the maintenance of food security. Importantly, the exemption is only from the obligation to set targets at or above the national bottom line. It does not exempt regional councils from complying with other parts of the NPS-FM 2020 in setting those targets, such as the obligation to give effect to Te Mana o te Wai, the policies of the NPS-FM 2020, and to actively involve tangata whenua in decisions affecting freshwater bodies.

[11] The regional council will also be responsible for setting the timeframes for compliance with the target attribute state. Those timeframes will apply whether the target attribute state is below, at, or above the national bottom line. Unlike the other exemptions, the vegetable exemption is time-bound. It will expire in 2030 or when replaced by regulations or national environment standards. Work on a replacement is ongoing and the applicants are involved in that process.

[12] I decline to review the decision on the basis that it does not comply with s 5 of the RMA. I find that s 5 does not itself contain environmental bottom lines that are directly enforceable, but instead allows for the stipulation of environmental bottom lines in planning documents. The NPS-FM 2020 gives effect to Part 2 of the RMA through the fundamental concept of Te Mana o te Wai and the policies and objectives set out in the NPS-FM 2020. The requirements set out in ss 6 and 7 are also recognised and provided for in the NPS-FM 2020 including the obligation to actively involve tangata whenua in the implementation of the NPS-FM 2020 and the obligation to set environmental outcomes and objectives which achieve the compulsory value of mahinga kai.

[13] I do not accept the other grounds asserted by the applicants, namely that the scope of the exemption and its alleged internal inconsistency rendered the vegetable exemption invalid.

[14] As to consultation, I find that it would have been preferable for the applicants to have been consulted before Cabinet made an in-principle decision to adopt the vegetable exemption subject to further consultation with iwi and hapū. However, the targeted consultation that followed was genuine and approached with an open mind. There was no breach of the duty to consult.

[15] I find that the Minister did take into account the mandatory considerations in ss 6 and 7 of the RMA. It was not necessary for him to have regard to the relative strengths of the relationship between each applicant and the Lake and stream as that was not material to the decision. Furthermore, the Minister did take into account alternatives and these were considered in a Cabinet paper issued prior to the final decision on the vegetable exemption being made.

[16] The past breaches of the Crown's duties under the Treaty of Waitangi to protect Lake Horowhenua engages the duty of active protection in relation to vulnerable taonga. However, I find that the vegetable exemption does not breach the principles of the Treaty. The exemption requires councils to set targets which would allow for improvement in the water quality over time, even if they were set below the national bottom line. The other parts of the NPS-FM 2020 which give effect to the principles of the Treaty (including those factors set out in ss 6 and 7) continue to apply. These provisions reflect the fact that the Minister took into account s 8 when reaching his decision.

[17] Finally, the claim of unreasonableness is rejected on the grounds that the decision was supported by evidence, and there was underlying logic in the Minister's decision.

Lake Horowhenua and Hōkio stream

[18] Lake Horowhenua (also known as Roto Horowhenua, Waipunahau, Punahau and Te Takere Tangata o Punahau)[4] is the largest dune lake in New Zealand with a surface area of approximately 3.9 square kilometres. The Hōkio stream runs from the Lake out to the coastal marine area. The Lake and stream make up 98 per cent of the Horowhenua catchment waterways.

[19] The applicants in this case each represent iwi and hapū who make competing claims to the Lake, stream and associated waterways. The relationships between the respective iwi and hapū and the water bodies at the centre of this proceeding are centuries old. Some of that history is set out in the judgments of the Māori Land Court, this Court, and the reports of the Waitangi Tribunal. Other parts of that history are set out in affidavits filed for the purposes of this proceeding. It is a near- impossible task

4 Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 61.

to distil the complexities of this history and the essence of the relationship to the water bodies into a few paragraphs. What follows is to be understood and read in that light.

[20] Te Rūnanga o Raukawa Incorporated represents the confederation of Ngāti Raukawa ki te Tonga iwi and hapū. Raukawa's claim to the area has yet to be determined by the Waitangi Tribunal. Their claim proceeds on the basis that the Lake, stream and catchments are related by whakapapa to Ngāti Raukawa ki te Tonga and these water bodies are themselves regarded as tūpuna (ancestors). There is a strong claim to interests in the Hōkio stream.

[21] The Muaūpoko Tribal Authority Incorporated is the mandated authority for the Muaūpoko iwi and hapū. Its relationship to the area was considered by the Waitangi Tribunal which determined its claim for breach of the Treaty of Waitangi. The Tribunal found that Muaūpoko had been present in the district since at least the 12th century and had lived alongside rivers and lakes in the region, including Lake Horowhenua.[5] Lake Horowhenua is regarded as an ancestral taonga for the Muaūpoko people handed down from their ancestors: he taonga tuku iho, he taonga mo te katoa.

[22] Both Raukawa and Muaūpoko relied on the water bodies in their rohe for food, textiles and materials, and means by which to travel and trade and to perform spiritual rituals.

[23] The legal history of Lake Horowhenua is canvassed in some detail by Clifford J in *Paki v Maori Land Court*.[6] His judgment draws on numerous decisions of the Native Land Court, Māori Land Court and Māori Appellate Court dealing with the Lake. For present purposes it is sufficient to record only a few of the key events.

[24] In 1898, following litigation under the Horowhenua Block Act 1896 title to the bed of Lake Horowhenua was vested in trustees as a reserve for the purpose of a fishery easement for the benefit of "all the members of the Muaūpoko Tribe who may now or hereafter own any part of Horowhenua No XI".[7] The Horowhenua 11 Part

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5 Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 34.
6 *Paki v Maori Land Court* [2015] NZHC 2535 at [9]–[39].
7 *Horowhenua 11* (1898) 37 Otaki MB 10.

Reservation Trust (Trust) was granted intervener status in this hearing and Mr Hockley made submissions on behalf of the trustees.

[25] In 1905, Lake Horowhenua was declared to be a "public recreation reserve" under the Horowhenua Lake Act 1905.[8] A Domain Board was established to control the activities of the Lake, with at least one-third of the members to be Māori.[9] This legislation was a source of contention and the following years saw growing conflict between Muaūpoko, the Domain Board and various territorial authorities. In 1934 a Committee of Inquiry was established to investigate these issues. In its report the Committee recommended that the ownership of the Lake bed and the surrounding area be confirmed as belonging to the trustees of the Trust.

[26] However, it was not until the enactment of the Reserves and Other Lands Disposal Act 1956 that Māori ownership of specified areas of the Lake and stream was formally recognised. Under s 18 of that Act, it was declared that land including the Lake bed and bed of the Hōkio stream were owned by Muaūpoko as beneficiaries of the Trust. Public access to the land and the Lake was preserved with the surface of the Lake declared to be a public domain.[10] Nothing in that provision was said to affect the fishing rights previously granted.[11] The Act also established a new Domain Board.[12]

[27] From the early 1950s to 1987, sewage effluent from the Levin district was discharged into Lake Horowhenua. Consequently, the Lake and its prized fisheries became seriously polluted. Since the 1990s, intensive dairying, agriculture and horticulture activity further contributed to the pollution of the Lake. The resultant level of degradation led to Lake Horowhenua being classified as hypertrophic (highly fertile and supersaturated in phosphorus and nitrogen).

[28] In August 2013, the He Hokioi Rerenga Tahi (Lake Horowhenua Accord) was signed. The Accord's five foundation partners are: the Trust, the Lake Domain Board, Horowhenua District Council, Horizons Regional Council and the Department of Conservation. The purpose of the Accord is for the parties to come

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8 Section 2.
9 Section 2.
10 Section 18(4).
11 Section 18(6).
12 Section 18(7)–(8).

together to halt degradation and put in place remedial measures that will return Lake Horowhenua to a taonga.

[29] As already noted, the Waitangi Tribunal issued its report on a claim by Muaūpoko into the area in 2017. It recorded public concessions made by the Crown that the Crown had breached the Treaty of Waitangi and its principles in relation to the Muaūpoko people.[13] Recommendations were made for the establishment of a contemporary Muaūpoko governance structure to act as kaitiaki for the Lake, stream, and associated waterways.[14] Additionally, the Tribunal report recorded that Ngāti Raukawa ki te Tonga may also have interests in the area.[15] A separate claim made by Ngāti Raukawa ki te Tonga has yet to be determined.

[30] Today, Lake Horowhenua is surrounded by one of two major vegetable growing areas in New Zealand. Although small in size, vegetables grown in the Horowhenua region account for approximately 20 per cent of New Zealand's domestic supply of green vegetables. The domestic supply of fresh leafy greens throughout winter is particularly important, as these vegetables are unable to grow in most areas of the South Island during the winter months. Continuity of supply in fresh vegetables is important for national food security and human health. However, intensive commercial vegetable production involves the application of nitrogen and other nutrient fertilisers. The leachate of nitrates and other chemicals from these fertilisers has contributed to the severely degraded state of the Lake and related catchments. The tension between improving water quality whilst ensuring continuity in the supply of fresh vegetables underpins the vegetable exemption.

[31] Work is underway on a project to improve water quality in the Lake. This includes the construction of a wetland complex to interrupt nutrient/sediment pathways leading to it. That work is funded by Government and forms part of the Horowhenua Freshwater Management Unit Water Quality Interventions Project.

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13 Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 426.
14 At 707.
15 At 656 and 658.

Statutory framework

A cascade of planning documents

[32] The NPS-FM 2020 is a national direction instrument promulgated under the RMA. The RMA provides for three other national direction instruments: national environmental standards, national planning standards and regulations.

[33] National direction instruments are part of the three-tiered hierarchy of planning documents provided for in the RMA. They sit at the first tier of that hierarchy, with documents which are the responsibility of regional councils at the second tier and documents the responsibility of district councils at the third tier. The Supreme Court described this hierarchy of documents as follows:[16]

> [30] … the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

[34] This case is concerned with a national policy statement, specifically, the NPS-FM 2020. However, another form of national direction instrument, national environmental standards, also have some relevance as the vegetable exemption will expire if replaced by national environmental standards. National environmental standards enable central government to make regulations that prescribe technical standards or methods for various matters including contaminants, water quality, level of flows and air quality.[17] Although these standards are made nationally, they are able to function like a rule in a regional or district plan by regulating activity.[18]

Contents of a national policy statement

[35] The contents of a national policy statement are set out in s 45A of the RMA. A national policy statement "must state objectives and policies for matters of national significance that are relevant to achieving the purpose of [the RMA]".[19] Section 5 identifies the purpose of the RMA as the promotion of "sustainable management of

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16 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
17 RMA, s 43.
18 RMA, s 43A(1)(a)–(b).
19 Section 45A(1).

natural and physical resources". I shall come back to the definition of sustainable management set out in s 5(2) of the Act later on in this judgment.

[36] Sections 6, 7 and 8 supplement the s 5 purpose by stating particular obligations on those administering the RMA.[20] Relevantly for this case, these sections require the Minister (among other things) to:

(a) recognise and provide for matters of national importance, including the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;[21]

(b) have particular regard to kaitiakitanga,[22] intrinsic values of ecosystems,[23] and the maintenance and enhancement of the quality of the environment;[24] and

(c) take into account the principles of the Treaty of Waitangi.[25]

[37] A national policy statement may also contain the matters set out in s 45A(2). These include: matters that local authorities must consider in preparing policy statements and plans; methods or requirements in plans or policies; matters that local authorities must achieve or provide for; constraints or limits; objectives and policies; directions on information; monitoring and reporting; and any other matter relating to the purpose or implementation of the statement. A national policy statement may apply generally, to a specified district or region, or to any specified part of New Zealand.[26]

Process for the development of a national policy statement

[38] The power to recommend the issue of a national policy statement lies with the Minister for the Environment.[27]

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20 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [26].
21 Section 6(e).
22 Section 7(a).
23 Section 7(d).
24 Section 7(f).
25 Section 8.
26 Section 45A(3).
27 Sections 24(a)–(b) and 52.

[39] Section 46A of the RMA sets out the process for preparing national directions, including a national policy statement. The Minister must either follow the prescribed board of inquiry process or use an alternative process that meets the requirements set out in the RMA.[28] In this case, the Minister elected to use an alternative process.

[40] Section 46A(4) sets out the steps required in the alternative process. That section provides:

> **46A Single process for preparing national directions**
>
> …
>
> (4) The steps required in the process established under subsection (3)(b) must include the following:
>
> (a) the public and iwi authorities must be given notice of—
>
> (i) the proposed national direction; and
>
> (ii) why the Minister considers that the proposed national direction is consistent with the purpose of the Act; and
>
> (b) those notified must be given adequate time and opportunity to make a submission on the subject matter of the proposed national direction; and
>
> (c) a report and recommendations must be made to the Minister on the submissions and the subject matter of the national direction; and
>
> (d) the matters listed in section 51(1) must be considered as if the references in that provision to a board of inquiry were references to the person who prepares the report and recommendations.
>
> …

[41] Section 46A(5) provides that, in preparing a national direction, "the Minister may, at any time, consult on a draft national direction".

[42] To meet the requirements in s 46(4)(c), the Minister appointed an Independent Advisory Panel (IAP). The report of this Panel in this case is discussed later in the judgment.

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[28] Section 46A(3).

[43] After consideration of these reports and recommendations, the Minister may make any or no changes to the proposed national policy statement and may withdraw all or any part of it.[29] The Minister must then undertake an evaluation of the proposed national policy statement in accordance with s 32 of the RMA and have particular regard to that evaluation when deciding whether to recommend the national policy statement.[30]

[44] Section 32 of the RMA provides for a report which examines the extent to which the objectives of the proposal are the most appropriate way to achieve the purpose of the RMA. The report is also required to identify other reasonably practicable options including the efficiency and effectiveness of the proposal in achieving the objectives and the reasons for any decision on the proposal.

[45] After considering the s 32 Report, the Minister may then recommend that the Governor-General approve the national policy statement.[31]

Regional Council planning process

[46] As the NPS-FM 2020 must be followed and implemented by regional councils, the regional council planning process forms part of the relevant statutory framework.

[47] Regional councils have the function of controlling the use of land for the purpose of maintaining the quantity of water in water bodies as well as enhancing the quality of water and the ecosystems within those water bodies.[32] A regional council may prepare a regional plan for the whole or part of its region for any of these functions.[33] Such a plan must give effect to any national policy statement and national planning standard.[34]

[48] If effect is to be given to a national policy statement for freshwater management, then the preparation of that regional plan or policy must follow a freshwater planning process.[35] That process involves:

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29 Section 52(1)(a)–(b).
30 Section 52(1)(c).
31 Section 52(2).
32 RMA, s 30(1)(c).
33 RMA, s 65(1).
34 RMA, s 66(1)(ea).
35 RMA, s 80A.

(a) Consultation during the preparation of the plan including with tangata whenua through iwi authorities;[36]

(b) Provision of a draft of the plan to iwi authorities;[37]

(c) Preparation of a s 32 report to which a regional council must have regard when deciding whether to proceed with a statement or plan;[38]

(d) Public notification of the proposed policy statement or plan;[39]

(e) Provision of the notified plan and relevant documents to the Chief Freshwater Commissioner;[40]

(f) The convening of a freshwater hearings panel by the Commissioner to conduct public hearing of submissions on the freshwater planning instrument;[41]

(g) Consideration of the report of the freshwater hearings panel with a decision by the regional council whether to accept or reject the recommendations made.[42]

[49] The relevant regional council in this case is Horizons Regional Council. Horizons must notify a freshwater planning instrument by no later than 31 December 2024. Planning is underway to prepare that planning instrument.

The NPS-FM 2020

[50] The NPS-FM 2020 came into force on 3 September 2020 and replaced the NPS-FM 2014 as amended in 2017.

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36 RMA, sch 1 cls 3–3C.
37 RMA, sch 1 cl 4A.
38 RMA, sch 1 cl 5(1)(a).
39 RMA, sch 1 cl 5(1)(b).
40 RMA, sch 1 cl 37(1).
41 RMA, sch 1 cls 38–39.
42 RMA, sch 1 cl 52.

Part 1 – preliminary provisions

[51] The fundamental concept underpinning the NPS-FM 2020 is Te Mana o te Wai. As recorded in the NPS-FM 2020, Te Mana o te Wai refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment.[43] It protects the mauri of the wai and is about restoring and preserving the balance between the water, the wider environment, and the community.[44]

[52] Te Mana o te Wai encompasses six principles relating to the roles of tangata whenua and others in the management of freshwater. Those six principles are:[45]

(a) *Mana whakahaere*: the power, authority, and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of, and their relationship with, freshwater

(b) *Kaitiakitanga*: the obligation of tangata whenua to preserve, restore, enhance, and sustainably use freshwater for the benefit of present and future generations

(c) *Manaakitanga*: the process by which tangata whenua show respect, generosity, and care for freshwater and for others

(d) *Governance*: the responsibility of those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future

(e) *Stewardship*: the obligation of all New Zealanders to manage freshwater in a way that ensures it sustains present and future generations

(f) *Care and respect*: the responsibility of all New Zealanders to care for freshwater in providing for the health of the nation.

[53] There is a hierarchy of obligations in Te Mana o te Wai that prioritises:[46]

(a) first, the health and well-being of water bodies and freshwater ecosystems

(b) second, the health needs of people (such as drinking water)

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43 Clause 1.3(1).
44 Clause 1.3(1).
45 Clause 1.3(4).
46 Clause 1.3(5).

(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

Part 2 – objectives and policies

[54] Part 2 sets out the objective and policies of the NPS-FM 2020. The objective is to ensure that natural and physical resources are managed in ways that prioritises the hierarchy of obligations in Te Mana o te Wai.[47]

[55] There are fifteen policies listed in Part 2. Those which are of particular relevance to this case include:[48]

> **Policy 1:** Freshwater is managed in a way that gives effect to Te Mana o te Wai.
>
> **Policy 2:** Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.
>
> […]
>
> **Policy 5:** Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.
>
> […]
>
> **Policy 12:** The national target (as set out in Appendix 3) for water quality improvement is achieved.
>
> **Policy 13:** The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.
>
> **Policy 14:** Information (including monitoring data) about the state of water bodies and freshwater ecosystems, and the challenges to their health and well-being, is regularly reported on and published.
>
> **Policy 15:** Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with this National Policy Statement.

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47 Clause 2.1(1).
48 Clause 2.2.

Part 3 – implementation

[56] The implementation of the NPS-FM 2020 is provided for in Part 3. The Part sets out a non-exhaustive list of things that local authorities must do to give effect to the objectives and policies set out in Part 2. Nothing prevents a local authority from adopting more stringent measures than required by the NPS-FM 2020 or limits a local authority's functions under the RMA in relation to freshwater.[49]

[57] Under cl 3.2, every regional council must engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in the region. A regional council must give effect to Te Mana o te Wai, and in doing so must take the actions set out in cl 3.2(2) which includes actively involving tangata whenua, engaging with communities, applying the hierarchy of obligations in Te Mana o te Wai, and ensuring the application of a diversity of systems of values and know-how, such as mātauranga Māori to the management of freshwater. Te Mana o te Wai informs the interpretation of the NPS-FM 2020 and the provisions required by the NPS- FM 2020 to be included in regional planning documents.[50]

[58] A regional council must develop a long-term vision for freshwater in its region and include those visions as objectives in their regional policy statement.[51] Those long-term visions must be developed through engagement with communities and tangata whenua, and express what communities and tangata whenua want their water bodies and freshwater ecosystems to be like in the future.[52]

[59] Under cl 3.4, every local authority must actively involve tangata whenua in freshwater management, including decision-making processes. The obligations contained in that clause are set out at [163] of this judgment.

[60] Clause 3.5 requires local authorities to adopt an integrated approach (ki uta ki tai) as required by Te Mana o te Wai. This requires local authorities to: recognise the interconnectedness of the whole environment; recognise interactions between freshwater, land, water bodies, ecosystems and receiving environments; manage

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49 Clauses 3.1(1)–(2).
50 Clause 3.2(4).
51 Clause 3.3.
52 Clause 3.3(3).

freshwater and land use and development in an integrated and sustainable way; and encourage the co-ordination and sequencing of regional or urban growth.

[61] Transparent decision-making is required by cl 3.6.

[62] Subpart 2 of Part 3 sets out the National Objectives Framework. As Mr Stephens submitted, this is the engine room of the NPS-FM 2020. It sets out the requirements that regional councils must take to implement the NPS-FM 2020. As summarised in cl 3.7(2), the national objectives framework requires regional councils to undertake the following steps:

> (a) identify FMUs [Freshwater Management Units] in the region (clause 3.8)
>
> (b) identify values for each FMU (clause 3.9)
>
> (c) set environmental outcomes for each value and include them as objectives in regional plans (clause 3.9)
>
> (d) identify attributes for each value and set baseline states for those attributes (clause 3.10)
>
> (e) set target attribute states, environmental flows and levels, and other criteria to support the achievement of environmental outcomes (clauses 3.11, 3.13, 3.16)
>
> (f) set limits as rules and prepare action plans (as appropriate) to achieve environmental outcomes (clauses 3.12, 3.15, 3.17).

[63] Each of the clauses cross-refer to other clauses in Part 2. The identification of a freshwater management unit (FMU) is provided for in cl 3.8.[53] The identification of values for FMUs is set out in cl 3.9. Those values include the compulsory values listed in Appendix 1A to the NPS-FM 2020 which apply to every FMU or part of an FMU. Those compulsory values are: ecosystem health, human contact, mahinga kai (food that is safe to harvest and eat) and threatened species. Once a value has been identified, the regional council must identify an environmental outcome for every value that applies to an FMU.[54] Those environmental outcomes must be stated as objectives in a regional plan.[55]

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53 An FMU is defined in cl 1.4 as "all or any part of a water body or water bodies, and their related catchments, that a regional council determines under clause 3.8 is an appropriate unit for freshwater management and accounting purposes".

54 Clause 3.9(3).

55 Clause 3.9(4).

[64] The next step involves a regional council identifying attributes and their baseline states for assessing the achievement of environmental outcomes.[56] An "attribute" is defined as a measurable characteristic (numeric, narrative or both) that can be used to assess the extent to which a particular value is provided for.[57] A regional council must use all the relevant attributes identified in Appendix 2A and 2B for the compulsory values and must identify, where practicable, attributes for all other applicable values.[58] By way of example, Appendix 2A sets out the attributes requiring limits on resource use. Table 6 refers to Nitrate (toxicity) and provides:

Table 6 – Nitrate (toxicity)

Value (and component)	Ecosystem health (Water quality)	
Freshwater body type	Rivers	
Attribute unit	Mg NO_3 – N/L (milligrams nitrate-nitrogen per litre)	
Attribute band and description	**Numeric attribute state**	
	Annual median	Annual 95th percentile
A High conservation value system. Unlikely to be effects even on sensitive species.	≤1.0	≤1.5
B Some growth effect on up to 5% of species.	>1.00 and ≤2.4	>1.5 and ≤3.5
National bottom line	**2.4**	**3.5**
C Growth effects on up to 20% of species (mainly sensitive species such as fish). No acute effects.	>2.4 and ≤6.9	>3.5 and ≤9.8
D Impacts on growth of multiple species, and starts approaching acute impact level (that is, risk of death) for sensitive species at higher concentrations (>20 mg/L).	>6.9	>9.8
This attribute measures the toxic effects of nitrate, not the trophic state. Where other attributes measure trophic state, for example periphyton, freshwater objectives, limits and/or methods for those attributes may be more stringent.		

[65] Once attributes have been identified, regional councils must then set "target attribute states" to achieve the environmental outcomes included as objectives. That step is governed by cl 3.11 which provides:

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56 Clause 3.10.
57 Clause 1.4(1).
58 Clause 3.10(1).

3.11 Setting target attribute states

(1) In order to achieve the environmental outcomes included as objectives under clause 3.9, every regional council must:

(a) set a target attribute state for every attribute identified for a value; and

(b) identify the site or sites to which the target attribute state applies.

(2) The target attribute state for every value with attributes (except the value human contact) must be set at or above the baseline state of that attribute.

(3) The target attribute state for the value human contact must be set above the baseline state of that attribute, unless the baseline state is already within the A band of Tables 9 or 10 in Appendix 2A, as applicable.

(4) Despite subclauses (2) and (3), if the baseline state of an attribute is below any national bottom line for that attribute, the target attribute state must be set at or above the national bottom line (*see* clauses 3.31, 3.32, and 3.33 for exceptions to this).

(5) Every target attribute state must:

(a) specify a timeframe for achieving the target attribute state or, if the target attribute state has already been achieved, state that it will be maintained as from a specified date; and

(b) for attributes identified in Appendix 2A or 2B, be set in the terms specified in that Appendix; and

(c) for any other attribute, be set in any way appropriate to the attribute.

(6) Timeframes for achieving target attribute states may be of any length or period but, if timeframes are long term:

(a) they must include interim target attribute states (set for intervals of not more than 10 years) to be used to assess progress towards achieving the target attribute state in the long term; and

(b) if interim target attribute states are set, references in this National Policy Statement to achieving a target attribute state can be taken as referring to achieving the next interim target attribute state.

(7) Every regional council must ensure that target attribute states are set in such a way that they will achieve the environmental outcomes for the relevant values, and the relevant long-term vision.

(8) When setting target attribute states, every regional council must:

(a) have regard to the following:

(i) the environmental outcomes and target attribute states of any receiving environments

(ii) the connections between water bodies

(iii) the connection of water bodies to receiving environments; and

(b) use the best information available at the time; and

(c) take into account results or information from freshwater accounting systems (*see* clause 3.29).

[66] The effect of cl 3.11 is that a regional council must set targets at or above the baseline state for that attribute (and above the baseline state of that attribute for the value human contact, with certain exceptions). If a baseline state of an attribute is below any national bottom line for that attribute, then the target attribute state must be set at or above the national bottom line. That subclause is subject to the exemptions set out in the NPS-FM 2020 including the vegetable exemption set out in cl 3.33.

[67] In setting a target attribute state, a regional council must specify a timeframe for achieving that target attribute state. Timeframes may be of any length or period but if timeframes are long-term, then they must include interim target attribute states, of no more than 10 years (to be used to assess progress towards achieving the target in the long-term).

[68] Regional councils achieve target attribute states by identifying limits on resource use and including those limits as rules in their regional plans. Further, regional councils may prepare an action plan and may impose conditions on resource consents to achieve target attribute states.[59]

[69] Clauses 3.13 to 3.20 of the NPS-FM 2020 provide further direction to regional councils in relation to attributes affected by nutrients (cl 3.13), setting limits on resource use (cl 3.14), preparing action plans (cl 3.15), setting environmental flows and levels (cl 3.16), identifying take limits (cl 3.17), monitoring (cl 3.18), assessing trends (cl 3.19) and responding to degradation (cl 3.20).

[70] Subpart 3 of Part 3 of the NPS-FM 2020 comprises cls 3.21 to 3.30. Those clauses address specific requirements such as natural inland wetlands (cls 3.22 and

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59 Clause 3.12.

3.23), rivers (cl 3.24 and 3.25), fish passage (cl 3.26), primary contact sites (cl 3.27) and water allocation (cl 3.28). Clauses 3.29 and 3.30 provide for freshwater accounting systems and assessment and reporting requirements.

Exemptions

[71] Clauses 3.31, 3.32 and 3.33 set out exemptions to the NPS-FM 2020 scheme. Clause 3.31 relates to an exemption for five hydro-electricity generation schemes. The exemption allows the regional council to set a target attribute state below the national bottom line. However, in doing so it must still set a target that improves the attribute state to the extent practicable without having significant adverse effect on the hydro-electricity generation schemes.

[72] Clause 3.32 provides an exemption for naturally occurring processes. If all or part of a water body is affected by natural occurring processes that mean its current state is below national bottom lines, then, again, the council may set a target attribute state that is below the national bottom line for that attribute. However, it must still set the target attribute state to achieve an improved target attribute state to the extent practical given the naturally occurring processes.

[73] The vegetable exemption clause is found in cl 3.33. That clause provides:

> **3.33 Specified vegetable growing areas**
>
> (1) This clause applies only to the 2 **specified vegetable growing areas** identified in Part 1 of Appendix 5.
>
> (2) When implementing any part of this National Policy Statement as it applies to an FMU or part of an FMU that is in, or includes, all or part of a specified vegetable growing area, a regional council must have regard to the importance of the contribution of the specified growing area to:
>
> (a) the domestic supply of fresh vegetables; and
>
> (b) maintaining food security for New Zealanders.
>
> (3) Subclause (4) applies if:
>
> (a) an FMU or part of an FMU is adversely affected by vegetable growing in a specified vegetable growing area; and
>
> (b) the baseline state of an attribute specified in Part 2 of Appendix 5 in the FMU or part of the FMU where all or part of the specified vegetable growing area is

located is below the national bottom line for the attribute; and

(c) achieving the national bottom line for the attribute would compromise the matters in subclause (2).

(4) When this subclause applies, the regional council:

(a) may set a target attribute state that is below the national bottom line for the attribute, despite clause 3.11(4); but

(b) must still, as required by clause 3.11(2) and (3), set the target attribute state to achieve an improved attribute state without compromising the matters in subclause (2) of this clause.

(5) When implementing clauses 3.12 to 3.14 in relation to FMUs that include all or part of a specified vegetable growing area, a regional council must ensure that vegetable growers in the area are not exempt from any requirements (such as in limits, action plans, and conditions on resource consents) aimed at achieving target attribute states.

(6) This clause ceases to apply to a specified vegetable growing area on the earlier of the following dates:

(a) 10 years after the commencement date; or

(b) the date National Environmental Standards (or other regulations under the Act) come into force that:

(i) apply to the specified vegetable growing area; and

(ii) are made for the purpose of avoiding, remedying, or mitigating the adverse effects of vegetable growing on freshwater.

[74] The meaning and effect of this clause is discussed at [114] of this judgment.

Part 4 – timing and transitional provisions

[75] Part 4 of the NPS-FM 2020 sets out timing and transitional provisions. It provides that every local authority must give effect to the NPS-FM 2020 "as soon as reasonably practicable".[60] Policy statements and plans must be kept up to date.[61] Clause 4.3 governs existing policy statements and plans.

60 Clause 4.1(1).
61 Clause 4.2(1).

Development of the NPS-FM 2020

Essential Freshwater Work Programme

[76] The issue of a new national policy statement for freshwater management was part of the Government's Essential Freshwater Work Programme launched in 2018. As stated earlier, the Programme had aims of stopping further degradation and loss of New Zealand's freshwater resources, reversing past damage, and addressing water allocation issues.

[77] The Government's approach to achieving these aims was set out in a policy document entitled *Essential Freshwater: Healthy Water, Fairly Allocated*.[62] At the same time, a companion document was published with the Minister for Māori Crown Relations: Te Arawhiti called *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater*.[63] That document set out a framework for how Government would work together with Māori to achieve the aims of the Programme.

[78] In addition to a new national policy statement for freshwater, the Programme outlined planned amendments to the RMA and new national environmental standards for freshwater.[64]

[79] A multi-agency taskforce of officials based at the Ministry for the Environment was established to deliver the Programme.[65] The policy development process was also supported by four advisory groups. One of those four was Te Kāhui Wai Māori – the Māori Freshwater Forum.[66] That group was established to bring perspectives and insights from various sectors of Māori society on freshwater management issues.[67] The other three groups engaged to assist with the programme were: the Freshwater

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62 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater: Healthy Water, Fairly Allocated* (October 2018).

63 Ministry for the Environment and Māori Crown Relations Unit *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater* (October 2018).

64 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater: Healthy Water, Fairly Allocated* (October 2018) at 13–14.

65 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater: Healthy Water, Fairly Allocated* (October 2018) at 18.

66 Ministry for the Environment and Māori Crown Relations Unit *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater* (October 2018) at 9.

67 At 8.

Leaders Group, the Science and Technical Advisory Group and the Regional Sector Water Subgroup.[68] These groups provided reports on the proposed programme.

Consultation on initial draft national policy statement

[80] On 5 September 2019, the Minister released a package of proposals for public consultation. The Government's overall approach was set out in a document entitled *Action for healthy waterways: A discussion document on national direction for our essential freshwater*.[69] The proposals released as part of this package included draft national environmental standards for freshwater and a draft NPS-FM. The draft NPS-FM contained exemptions for large hydro-electricity generation schemes, naturally occurring processes and a transitional exemption which allowed regional councils to set target attribute states that were worse than national bottom lines in respect of certain freshwater ecosystems. There was no vegetable exemption in this draft.

[81] The Minister had elected to use an alternative consultation process to prepare the NPS-FM 2020 under s 46A of the RMA. In an affidavit sworn in this proceeding, the Minister said he chose this alternative process because it enabled him to engage with a network of advisory groups. Further, a board of inquiry process would take up to 12 months, whereas an alternative process would deliver a national policy statement in a shorter time frame, consistent with the Government's commitment to achieve meaningful progress on freshwater quality within its term.

[82] As part of the alternative consultation process, the Minister announced the appointment of an Independent Advisory Panel (IAP) chaired by the former Principal Environment Court Judge, David Sheppard. The tasks of the IAP were to consider the submissions received on the draft NPS-FM and draft national environmental standards and to prepare a report and make recommendations for the Minister to consider.

[83] Consultation on the *Action for healthy waterways* policy package ran for eight weeks, closing on 31 October 2019. The process included 17 general public meetings, eight meetings for the primary sector and rural community and 16 hui for iwi and Māori around New Zealand. Over 17,400 submissions were received as part of this process.

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68 At 9.

69 Ministry for the Environment *Action for healthy waterways – A discussion document on national direction for out essential freshwater* (September 2019).

Concerns about the impact on vegetable growing areas

[84] During the consultation process horticultural growers raised concerns about the impact of the proposed new limits for nitrate-related attributes in the draft NPS-FM. In particular, there was a concern that proposed bottom lines for dissolved inorganic nitrogen (DIN) would require significant fertiliser reductions to be met in some areas which would, in turn, compromise existing vegetable production.

[85] In a briefing paper dated 16 December 2019, Ministry officials highlighted the tension in the submissions between the Government's freshwater objectives and ensuring that domestic commercial vegetable production could meet demand. Officials advised that they could not see a "simple short-term solution that both halts further decline in freshwater quality from commercial vegetable production and ensures domestic vegetables remain affordable". Officials reported that they were considering options including targeted support in the areas most affected including the Horowhenua region. The Minister was advised that a final decision would likely require "some trade-offs" between freshwater objectives and domestic vegetable production. The Minister says the vegetable exemption was developed as a means of addressing the tension between these two objectives.

[86] On 27 February 2020, the IAP released its report. Over 80 recommendations were made on the proposed new national direction instruments. The report recorded concerns expressed by some submitters about the inadequate time for consultation considering the importance and substance of the issues and their complexity. The report also recorded that the hierarchy of principles drafted as part of Te Mana o te Wai was vulnerable to legal challenge, and reservations were made regarding the way in which the proposed NPS-FM expressed priorities and obligations concerning Te Mana o te Wai.

[87] The IAP considered submissions regarding the hydro-electricity exemption, recommending that the exemption be limited to only the most significant hydro-electricity schemes in order to retain the exceptional nature of the provision.

[88] There was also discussion in the report on the effectiveness of DIN limits, with the IAP concluding that these limits operated as "blunt tools". The IAP recommended changing the DIN attribute tables from target-setting attributes to action plan attributes

to allow for the consideration of catchment and water body-specific variability. The IAP supported the tightening of ammonia and nitrate toxicity criteria.

Development of the vegetable growing exemption

[89] The Minister received a briefing from officials at the Ministry for the Environment and the Ministry of Primary Industries on 8 March 2020. The briefing paper recorded the different views, including those expressed in the IAP report, on whether adopting the proposed DIN attribute limits would lead to improved ecosystem health, and the magnitude of the cost impacts in doing so.

[90] There was a scheduled Cabinet meeting for 16 March 2020 which did not take place due to the developing situation with the COVID-19 pandemic. However, on 18 March 2020, officials presented a table of policy options for the Minister for the Environment and the Minister of Agriculture to consider. The options table noted the concerns about the impact of certain attribute limits on vegetable growing which was magnified given the uncertainty created by COVID-19 and the possibility of a recession. One of the options put forward by officials was a transitional exception to national bottom lines driving nitrogen reductions in specified vegetable growing areas.

[91] The Ministers made recommendations in line with those made in the IAP report with respect to the DIN attribute, and the strengthening of nitrate and ammonia bottom lines. However, those decisions did not resolve the ongoing tension between improvement of freshwater quality and ensuring continued domestic vegetable supply.

[92] It was anticipated that the strengthened national bottom line for nitrate toxicity and ammonia might not be achievable in Pukekohe and Horowhenua unless there was widespread land use change and a consequent reduction in the area available for vegetable growing for the domestic market. The consensus of officials was that an exemption from national bottom lines driving nitrogen reductions was therefore likely to be needed in these areas. The Minister directed officials to develop this proposal. This was the genesis of the vegetable exemption.

[93] The impact of a proposed vegetable exemption on iwi and hapū was also discussed at this meeting. Mr Bryan Smith, the chief advisor for freshwater strategy at the Ministry for the Environment, swore an affidavit in these proceedings in which

he recalls a parallel being drawn between the proposed vegetable exemption and the hydro-electricity exemption in the draft NPS-FM 2020. The latter had been an issue of significant concern for iwi and hapū in catchments affected by that exemption. Mr Smith says that the expectation was that a similar level of engagement with tangata whenua would be required in relation to the proposed vegetable exemption. Work on a plan for iwi engagement commenced.

Regulatory Impact Analysis

[94] The Ministry for the Environment published a two-part Regulatory Impact Analysis (RIA) on 6 May 2020.

[95] The first part of the RIA noted that the vegetable exemption was not the Ministry's preferred option. The upside of such an exemption was seen as ensuring vegetable production was not compromised. The potential downsides were that the waterways would not be protected from nutrient contamination, and there would be a lost opportunity to encourage the spread of less intensive vegetable growing areas across different regions in New Zealand. However, it was noted that the regional council would still be able to set other requirements to achieve ecosystem health.

[96] In the second, more detailed, part of the RIA, it was noted that if a strengthened nitrate toxicity bottom line was adopted, then an exemption for areas such as Pukekohe and Horowhenua should be considered. That is because a strengthened nitrate toxicity bottom line would essentially require wholesale conversion from vegetable production as a land use in these areas. That would have negative implications for consumers, regional economies, health outcomes and domestic food security. It was noted that the mobility of vegetable production to other catchment areas was also limited by factors such as soil quality, climate, and access to suitable labour markets.

[97] The impact on Māori of the vegetable exemption was recognised, and further consultation with local iwi was recommended before a final decision was made.

The in-principle decision

[98] On 18 May 2020, Cabinet met to consider recommendations made by the Minister for the Environment and Minister of Agriculture in a Cabinet paper outlining the draft NPS-FM and new national environment standards for freshwater.

[99] The paper explained the changes that had been made and the tensions which had led to the development of a vegetable exemption. The paper relayed the Ministers' recommendations to strengthen nitrogen toxicity criteria and to delay consideration of an attribute table for DIN by 12 months. Additionally, the Ministers proposed an in-principle decision including an exemption in the NPS-FM 2020 for specified vegetable growing areas, enabling regional councils to maintain nitrogen-related attributes at a level worse than the new national bottom lines. The Ministers acknowledged that further engagement with local iwi and hapū was needed before a final decision was made. The Cabinet paper also detailed the Crown's obligations in relation to the protection of Treaty settlements and taonga, the exercise of tino rangatiratanga and kawanatanga, and the principles of the Treaty.

[100] Cabinet accepted the recommendations set out in the Cabinet paper at the Cabinet meeting.

Further consultation

[101] In June and July 2020, following the in-principle Cabinet decision, the Minister for the Environment, along with officials from the Ministry for the Environment and Ministry of Primary Industries, met with representatives of Raukawa and Muaūpoko. The nature of the meetings, and matters discussed, are considered in further detail in the context of a challenge to the adequacy of the consultation undertaken on the vegetable exemption.

[102] The further consultation on the NPS-FM and vegetable exemption included a summit in Levin on 7 July 2020. That was attended by the applicants, Horizons Regional Council, Horowhenua District Council, Horticulture NZ and vegetable growers operating in the region.

[103] In his affidavit sworn for this proceeding, the Minister says he reflected on his engagement with tangata whenua following this summit and did not feel comfortable defending the exemption as proposed. He asked officials to develop alternatives to the exemption.

Briefing paper dated 15 July 2020

[104] The Ministry for the Environment and Ministry for Primary Industries prepared a briefing paper on 15 July 2020. The paper included modelling which indicated that a 50 to 90 per cent reduction in nitrogen on land would be required to meet the national bottom lines in the Horowhenua region. The same modelling showed that only a 30 per cent reduction could be achieved if 40 per cent of all horticulture and dairy hectares were converted to less nitrogen intensive land uses and all remaining areas applied on-farm mitigation and good management practice.

[105] The briefing paper set out three policy options as follows:

> - Option 1 – exemption to national bottom lines affected by nitrogen. This option will insert an enabling provision into the NPS-FM to give councils the option of setting attribute states below national bottom lines.
>
> - Option 2 – a statement in the NPS-FM which requires councils to *'have particular regard'* to the importance of vegetable growing to the national supply when setting attribute states and limits. Attribute states must still be set at the national bottom line or higher.
>
> - Option 3 – insert a ten-year time-bound exemption in the NPS-FM as outlined in Option 1. Central Government would work in partnership with local iwi/hapū and other stakeholders to develop regulations containing targets and limits that are appropriate for the area. Once the regulations are in place the exemption would no longer apply.

[106] The paper noted that under all options further work would be required, including research into future mitigations and practices. A detailed discussion and an analysis of the pros and cons of each option was included. It was recorded that Option 1 had been tested with iwi/hapū and they were clear that they did not support it. Option 2 was assessed as leaving the door open to bottom lines being met in the future. The risk, however, was that it could lead to more pressure on other land uses to carry a disproportionate burden to reduce leaching. Moreover, there was reference back to the modelling which suggested that large amounts of land use change out of vegetable production would not produce the reductions needed.

[107] Ultimately, the recommendation was for Option 3 with officials stating that the time-bound exemption to national bottom lines would send a strong signal to both iwi and vegetable growers that the Government was serious in its intention to improve

water quality and that vegetable growers needed to use all practicable mitigations to contribute to that improvement and engage meaningfully to find solutions. It was noted that this option had not been tested with relevant iwi and hapū, but officials considered it was the option that most aligned with feedback on the vegetable exemption generally.

[108] The briefing paper also recorded that any exemption from the bottom lines would have to be accompanied by the Crown taking a proactive role in working with iwi, hapū and others to find enduring solutions to the issues in Lake Horowhenua.

Section 32 Report

[109] On 22 July 2020, the Minister for the Environment received a report prepared in accordance with s 32 of the RMA.[70] The report included an addendum addressing the vegetable exemption.

[110] An analysis of all the options resulted in a time-bound vegetable exemption being preferred. The report said:[71]

> In terms of achieving the NPS-FM 2020 Objective, we consider that a timebound exemption is most appropriate because it would send a strong signal to iwi that the government is serious in its intention to improve water quality. It sends an equally strong message to vegetable growers and other land users that they must be prepared to use all practicable mitigations to contribute to that improvement and engage meaningfully to find solutions (the default being catchments must eventually mean the NPS-FM 2020 national bottom lines).

[111] The report noted concerns of iwi and hapū including their disappointment regarding the consultation process on the proposed exemption.

Final decision

[112] The Minister sought authorisation from Cabinet to submit the revised draft NPS-FM 2020, including a time-bound vegetable exemption, on 28 July 2020. The cabinet paper noted the strong concerns that the applicants had with the exemption. Cabinet authorised the submission of the NPS-FM 2020 to the Executive Council. The

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70 Ministry for the Environment *Action for Healthy Waterways: Section 32 Evaluation* (22 July 2022).

71 At 135.

Governor-General in Council subsequently approved the NPS-FM 2020 and it came into force on 3 September 2020.

Work on a replacement

[113] Work is currently ongoing on a replacement for the exemption. A governance group for the Lake Horowhenua wetlands project was established in February 2021. That group includes representatives from Raukawa, Muaūpoko and the Trust.

The meaning and effect of the vegetable exemption

[114] To understand the challenges to the vegetable exemption it is first necessary to understand how the exemption operates.

[115] I approach the interpretation task in light of the important part the NPS-FM 2020 plays within a "carefully structured legislative scheme" and against the backdrop of its "thoroughgoing process of development".[72] I treat the language used in the NPS-FM 2020 as "carefully chosen".[73]

[116] The starting point is the plain meaning of cl 3.33. The vegetable exemption only applies to two specified vegetable growing areas: Pukekohe and Horowhenua.[74] When implementing the NPS-FM 2020 in those areas, the relevant regional council "must" have regard to the importance of the contribution of the specified growing area to the domestic supply of fresh vegetables and maintaining food security for New Zealanders.[75]

[117] Clause 3.33(3) sets out when the exemption will apply. It will apply where:

> (a) an FMU is adversely affected by vegetable growing in a specified vegetable growing area; and

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72 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [142].
73 At [142].
74 Clause 3.33(1) and Appendix 5.
75 Clause 3.33(2).

(b) the baseline state of a specified attribute is located below the national bottom line for the attribute (there are eight such attributes listed in Part 2 of Appendix 5); and

(c) achieving the national bottom line would compromise the domestic supply of vegetables and the maintenance of food security for New Zealanders.

[118] It is common ground between the parties that it will be for the regional councils to determine whether the exemption applies.

[119] The "exemption" is set out in sub-cl (4). If it applies, then the regional council *may* set a target attribute state that is below the national bottom line for that attribute.[76] There is no requirement to set the target attribute state below the bottom line; it can still be set at or above the bottom line.[77] If the regional council sets the target attribute below the bottom line, it *must* still set the target at a level to achieve an improved attribute state without compromising the domestic supply of fresh vegetables and the maintenance of food security in New Zealand.[78]

[120] Sub-clause (5) requires a regional council to ensure that vegetable growers in the area are not exempt from any requirements aimed at achieving target attribute states. This reaffirms that the exemption only operates in relation to the specified attributes and does not operate as a general exemption from the scheme of the NPS-FM 2020 as a whole.

[121] The effect of sub-cl (6) was the subject of some debate at the hearing. That sub-clause sets out when the exemption expires. The sub-clause is set out below again for convenience:

(6) This clause ceases to apply to a specified vegetable growing area on the earlier of the following dates:

(a) 10 years after the commencement date; or

(b) the date National Environmental Standards (or other regulations under the Act) come into force that:

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76 Clause 3.33(4)(a).
77 Clause 3.1(2).
78 Clause 3.33(4)(b).

(i) apply to the specified vegetable growing area; and

(ii) are made for the purpose of avoiding, remedying, or mitigating the adverse effects of vegetable growing on freshwater.

[122] The effect of sub-cl (6)(a) is that the exemption will expire after 10 years (2030) if no national environmental standards are in force. That will mean the vegetable exemption will no longer apply and the regional council will not be empowered to set a target attribute state below the applicable national bottom line; it must be set at or above that bottom line.

[123] The obligation is on a regional council to give effect to the NPS-FM 2020 as soon as reasonably practicable.[79] Given the timeframes for review of regional plans, it could be 2037 or later by the time the regional council sets target attribute states at or above the national bottom lines. Importantly, however, there is nothing in the exemption which dictates the timeframes in which the target attribute state must be achieved. That means the regional council still sets the timeframe, and interim targets if timeframes are long term, for a target attribute state set below the bottom line.

[124] The effect of sub-cl (6)(b) is that if there are national environmental standards in force, then the exemption in cl 3.33 will expire. National environmental standards may prescribe rules and/or standards and a local authority must amend its plan to the extent it contains a rule that duplicates or is in conflict with national environmental standards.[80]

[125] To summarise, there are several points about the way the exemption operates which are relevant to the applicants' claim:

(a) *The regional council will decide whether the vegetable exemption applies*. The vegetable exemption only applies to freshwater bodies adversely affected by vegetable growing in the two specified vegetable growing areas where the baseline state of a specified attribute is below the national bottom line for that attribute. Whether the exemption will apply will depend on whether achieving the national bottom line for that attribute will compromise domestic supply of fresh vegetables and

79 Clause 4.1(1).
80 RMA, s 44A.

the maintenance of food security for New Zealanders. That is a determination to be made by the regional council.

(b) *The exemption is permissive*. If the vegetable exemption applies, then it permits (but does not require) a regional council to set a target attribute state below the national bottom line for that attribute. It will be for the regional council to decide whether to set the target attribute state below, at or above the national bottom line.

(c) *Improvement is mandated*. The target attribute state set by the regional council must be set to achieve improvement without compromising the domestic supply of fresh vegetables or the maintenance of food security.

(d) Timeframes for compliance are to be set by the regional council. Whether the target attribute states are set below, at or above the national bottom line, regional councils will determine the timeframe in which those targets are to be met.

(e) *Other parts of the NPS-FM 2020 remain in force*. The exemption is limited to the obligation to set targets at or above the national bottom lines referenced in cl 3.11(4). It does exempt councils from implementing other parts of the NPS-FM 2020. That means, for example, that regional councils must still give effect to Te Mana o te Wai and actively involve tangata whenua in decisions involving freshwater bodies to which the vegetable exemption applies.

(f) *The vegetable exemption is time-bound*. Unlike the other exemptions in the NPS-FM 2020, the vegetable exemption will expire in 2030 or the date that it is replaced by national environmental standards or other regulations under the Act. Work on a replacement is ongoing.

Is the vegetable exemption contrary to s 5 of the RMA?

[126] Both applicants claim that the vegetable exemption is legally invalid as it contravenes s 5 of the RMA. Section 5 sets out the purpose of the Act as follows:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; an
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[127] Mr Bennion, for Muaūpoko, submits that the promulgation of national bottom lines for attributes is a finding, on a national basis, of levels of contaminants that do not meet any of the environmental bottom lines in s 5(2)(a) to (c). He says that the approach in the NPS-FM 2020 is that at levels above the bottom lines there may be some "trade-off" between the matters in Part 2 of the RMA, but below those bottom lines no such "trade-off" exists.

[128] Further, Mr Bennion submits that the exemption is invalid because it would trespass against most elements that make up the purpose of the Act. That is contrary to the meaning of the word "while" in the definition of sustainable management.

[129] Mr Enright, for Raukawa, submits that the NPS-FM 2020 contravenes the environmental bottom lines set out in s 5 and the other sections found in Part 2 of the RMA.

Does s 5 of the RMA contain environmental bottom lines?

[130] The premise underlying both sets of submissions is that s 5(2)(a) to (c) contains environmental bottom lines. This premise raises questions about the interpretation of s 5, and the application of principles set out in the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.[81]

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[81] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

[131] The issue in *King Salmon* was whether a Board of Inquiry was required to give effect to the New Zealand Coastal Policy Statement (NZCPS), or whether it was entitled to take an "overall judgment" approach which had reference to both the NZCPS and the matters set out in Part 2 of the RMA. The issues in that case were accordingly different to those raised in this proceeding. There was no challenge to the validity of the NZCPS on the basis of s 5, or at all.

[132] The Supreme Court considered the purpose of the Act and the definition of "sustainable management" set out in s 5(2). It said that s 5 is a "carefully formulated statement of principle intended to guide those who make decisions under the RMA".[82] The purpose is given further elaboration by the remaining sections in Part 2, namely, ss 6, 7 and 8. Four points were made about the definition of "sustainable management":[83]

> (a) First, the definition is broadly framed. Given that it states the objective which is sought to be achieved, the definition's language is necessarily general and flexible. Section 5 states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation.
>
> (b) Second … in the sequence "avoiding, remedying, or mitigating" in sub-para (c), "avoiding" has its ordinary meaning of "not allowing" or "preventing the occurrence of". The words "remedying" and "mitigating" indicate that the framers contemplated that developments might have adverse effects on particular sites, which could be permitted if they were mitigated and/or remedied (assuming, of course, they were not avoided).
>
> (c) Third, there has been some controversy concerning the effect of the word "while" in the definition. The definition is sometimes viewed as having two distinct parts linked by the word "while". That may offer some analytical assistance but it carries the risk that the first part of the definition will be seen as addressing one set of interests (essentially developmental interests) and the second part another set (essentially intergenerational and environmental interests). We do not consider that the definition should be read in that way. Rather, it should be read as an integrated whole. This reflects the fact that elements of the intergenerational and environmental interests referred to in sub-paras (a), (b) and (c) appear in the opening part of the definition as well (that is, the part preceding "while"). That part talks of managing the use, development and protection of natural and physical resources so as to meet the stated interests – social, economic and cultural well-being as well as health and safety. The use of the word "protection" links particularly to sub-para (c). In addition, the opening part uses the words "in a way, or at a rate". These words link particularly to the intergenerational interests in sub-paras (a) and (b).

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82 At [25].

83 At [24] (footnotes omitted).

> As we see it, the use of the word "while" before sub-paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. That is, "while" means "at the same time as".
>
> (d) Fourth, the use of the word "protection" in the phrase "use, development and protection of natural and physical resources" and the use of the word "avoiding" in sub-para (c) indicate that s 5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management. This accords with what was said in the explanatory note when the Resource Management Bill was introduced:
>
> > The central concept of sustainable management in this Bill encompasses the themes of use, development and protection.

[133] In considering the meaning of s 5, the Supreme Court identified two different approaches in the early RMA jurisprudence: the "environmental bottom line" approach and the "overall judgment" approach.[84] The source of the environmental bottom line approach can be traced back to Parliamentary speeches made by the responsible Ministers on the effect of s 5.[85] The approach was then promoted in a series of early cases in the Planning Tribunal (as it then was), where s 5(2)(a), (b) and (c) were interpreted as cumulative safeguards which had to be met in order to fulfil the purpose of the Act.[86]

[134] The "overall judgment" approach appears to have originated in *New Zealand Rail Ltd v Marlborough District Council*.[87] In that case, Greig J stated that Part 2 of the RMA should not "be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used".[88] The Judge observed that there was "a deliberate openness about the language, its meanings and its connotations which … is intended to allow the application of policy in a general and broad way".[89]

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84 At [38]–[42].
85 At [107].
86 *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT) at 10; and *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT) at 8.
87 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
88 At 86.
89 At 86.

[135] In *King Salmon* the Supreme Court held that the Board of Inquiry had erred in applying the overall judgment approach. It determined that the Board was required to implement the NZCPS and have exclusive regard to the environmental bottom lines laid out in that policy document; recourse to the principles in Part 2 by the Board was unnecessary given that those principles were articulated and translated into the NZCPS itself.[90]

[136] To the extent it is argued that the Court's rejection of the overall judgment approach supports the interpretation of s 5(2) as comprising environmental bottom lines, then I must disagree. The Supreme Court's rejection of the overall judgment approach was in relation to the Board of Inquiry's obligation to implement the NZCPS. The reasons for that rejection were due to the hierarchy of planning documents provided for in the RMA and the obligation on local authorities, and the Board of Inquiry, to give effect to the NZCPS.

[137] I do not accept that the Supreme Court's construction of s 5 in *King Salmon* means that s 5(2) itself contains environmental bottom lines. Such an interpretation would be at odds with the first of the four points (set out at [132] above) in which the Court emphasised that the section was "broadly framed" and used "general and flexible" language which stated a guiding principle for those performing functions under the Act. Rather than incorporating environmental bottom lines, I consider the Supreme Court to have found that s 5(2) may allow for the statement of environmental bottom lines in planning documents, such as the NZCPS at issue in that case.

[138] That interpretation is consistent with statements made by Glazebrook J about s 5 and *King Salmon* in another recent Supreme Court case, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[91] That case concerned an application for marine consents in order to undertake seabed mining within New Zealand's exclusive economic zone. The consents were granted subject to conditions under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). The High Court quashed the consents, finding the decision to grant them was wrong in law. The Court of Appeal agreed.

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90 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [90].

91 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

[139] On appeal, the Supreme Court considered the appropriate approach to take to s 10 of the EEZ Act, which provides:

> **10 Purpose**
>
> (1) The purpose of this Act is—
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must—
>
> (a) take into account decision-making criteria specified in relation to particular decisions; and
>
> (b) apply the information principles to the development of regulations under section 27, 29A, 29B, or 29E and the consideration of applications for marine consent.

[140] As with s 5 of the RMA, the purpose of the EEZ Act set out in s 10(1) is to promote sustainable management, and the definition of sustainable management in s 10(2) mirrors the definition in s 5(2).

[141] The Supreme Court unanimously dismissed the appeal, but their reasons differed. Glazebrook J (with whom Winkelmann CJ and Williams J agreed) stated that s 10 provided an overarching guiding framework for decision-making under the

EEZ Act and to that extent it had substantive or operative force.[92] Parallels were drawn in that respect to the Supreme Court's view of s 5 of the RMA as set out in *King Salmon*.[93]

[142] Glazebrook J considered that the central concept of the definition of sustainable management in s 5(2) of the RMA was the same as that in s 10(2) of the EEZ Act with the differences merely reflecting the different contexts in which the two Acts operated.[94] The Judge said that *King Salmon* was authority for the proposition that "even sustainable management can … at times require absolute protection from environmental harm, depending on the circumstances or the terms of other planning documents".[95] I interpret that statement to mean that the implementation of s 5 can result in environmental bottom lines – but that is different from a finding that s 5 itself contains environmental bottom lines.

[143] Further, Glazebrook J went on to say that the proposition that sustainable management can require absolute protection from environmental harm was equally applicable to s 10(1)(b) of the EEZ Act. The Judge considered that s 10(1)(b) established an environmental bottom line:

> [245] Section 10(1)(b) is cumulative on s 10(1)(a). It must therefore provide for something more than sustainable management. In my view, s 10(1)(b) is an operative restriction for discharges and dumping and thus an environmental bottom line in the sense that, if the environment cannot be protected from pollution through regulation, then discharges of harmful substances or dumping must be prohibited. I therefore agree with the Court of Appeal that s 10(1)(b) is a separate consideration from sustainable management and should have been separately addressed by the decision-making committee (DMC) of the EPA as a bottom line.
>
> (footnotes omitted)

[144] The finding of an environmental bottom line related solely to s 10(1)(b) of the EEZ Act. There is no equivalent to s 10(1)(b) found in s 5 of the RMA. The reasoning about s 10(1)(b) cannot be simply grafted onto s 5(2). That point is underscored by the fact that the definition of sustainable management in s 10(2) mirrors that in s 5(2). It was not suggested by Glazebrook J that s 10(2)(a), (b) or (c) constituted environmental bottom lines – that was not the issue in that case.

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92 At [240].
93 At [240].
94 At [241].
95 At [242].

[145] Contrary to the submissions made on behalf of Raukawa, I do not consider either *King Salmon* or *Trans-Tasman Resources* stand for the proposition that s 5 of the RMA contains environmental bottom lines. Nor do I consider the language and plain meaning of s 5 can sustain such an interpretation. To the extent that the invalidity ground of review relies on a construction of s 5 as containing environmental bottom lines, then that ground of review cannot succeed.

Does the vegetable exemption otherwise contravene s 5?

[146] The second, related, ground advanced by Mr Bennion for Muaūpoko is that the vegetable exemption is invalid because it allows councils "the option of setting targets which would trespass against most elements that make up the purpose of the Act". He submits that this offends against the meaning of "while" in the definition of sustainable management.

[147] The meaning of "while" was the third of the four points made by the Supreme Court in *King Salmon* about the definition of "sustainable management" (set out above at [132]). The Supreme Court rejected a bifurcated approach to the definition of "sustainable management" instead finding that it should be read as an integrated whole. The Supreme Court said that the use of the word "while" before paras (a), (b) and (c) means that those paragraphs must be observed in the course of the management referred to in the opening part of the definition. In other words, "while" means "at the same time as".

[148] To the extent that this submission reflects the notion of environmental bottom lines contained in s 5(2)(a), (b) and (c) then it is rejected for the reasons already discussed. Similarly, to the extent the submission turns on a construction of s 5(2) that would give primacy to any single interest in either paras (a), (b) or (c) of that subsection, then it also must be rejected as being contrary to the Supreme Court's decision. All the interests in s 5(2) shall be managed at the same time, and neither takes precedence over the others.

[149] The answer to Mr Bennion's submission, and the s 5 challenge in general, lies in the operation and effect of the vegetable exemption and the NPS-FM 2020. Regional councils must give effect to the NPS-FM 2020 including Te Mana o te Wai when setting target states for attributes. That obligation subsists whether the targets

to be set are below, at, or above the national bottom lines. Nothing in the vegetable exemption alters that obligation. None of the applicants challenged the validity of the NPS-FM 2020 on the basis that, absent the vegetable exemption, it did not comply with s 5. Indeed, the claims and submissions were to the opposite effect. The concept of Te Mana o te Wai, and the policies and objectives of the NPS-FM 2020, are said to be decisions which give effect to "sustainable management" in the freshwater context.

[150] The structure of the RMA and the hierarchy of documents mean that so long as the regional council gives effect to Te Mana o te Wai and the other policies and obligations in the NPS-FM 2020 when setting the attribute targets for FMUs within the specified vegetable area, it will be complying with s 5 of the RMA. That is so whether the target attribute states are set below the national bottom lines or not.

[151] That structure and process recognises that giving effect to Te Mana o te Wai may require localised responses. Different water bodies have different characteristics and require different responses. It is not inconsistent with s 5 to allow those differences to be recognised when the NPS-FM 2020 is implemented at a localised level. Indeed, allowing Te Mana o te Wai to take on a different shape in implementation is consistent with managing the various interests in s 5 "at the same time".

[152] In sum, I do not consider s 5(2) establishes environmental bottom lines. Nor do I consider the vegetable exemption to be contrary to s 5 and invalid for that reason.

Is the vegetable exemption contrary to ss 6 and 7 of the RMA?

[153] In addition to breaching s 5, both applicants claim that the vegetable exemption breaches the remaining sections in Part 2 of the RMA, namely, ss 6, 7 and 8.

[154] The claims in relation to s 8 of the RMA are co-extensive with the claims that the decision breached the Treaty of Waitangi and duties relating to consultation. To minimise repetition, I address the claim of invalidity for breach of s 8 when addressing those other grounds of review. The focus of this section is solely on ss 6 and 7 of the RMA.

[155] Those sections provide:

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) *[Repealed]*

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

[156] In *King Salmon*, the Supreme Court found that as between ss 6 and 7, the stronger direction is given by s 6, and that the matters set out in that section fell naturally within the concept of sustainable management in a New Zealand context.[96] The matters in s 7 tended to be more abstract and more evaluative than the matters in s 6.[97]

[157] Muaūpoko submits that the vegetable exemption:

(a) does not recognise and provide for the relationship of Māori and their culture and traditions with the ancestral waters of the Lake and catchment (s 6 (e)); and

(b) does not pay any regard (let alone particular regard) to kaitiakitanga (s 7(a)).

[158] Raukawa also claims that the exemption infringes these provisions by failing to recognise and provide for tangata whenua values and relationships.

[159] As with the challenge based on s 5, the response to this ground of review lies in the operation of the NPS-FM 2020 and the effect of the vegetable exemption.

[160] The starting point is the fundamental concept of Te Mana o te Wai. That concept encompasses six principles relating to the roles of tangata whenua (and others) in managing freshwater. The six principles (set out above at [52]) are mana whakahaere, kaitiakitanga, manaakitanga, governance, stewardship and care and respect. The first three principles relate specifically to the relationship between tangata whenua and freshwater. Those principles specifically recognise and provide for the matters set out in ss 6(e) and 7(a).

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96 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [26].

97 At [26].

[161] The policies in the NPS-FM 2020 also reflect the matters set out in ss 6 and 7. Policy 1 requires freshwater to be managed in a way that gives effect to Te Mana o te Wai.[98] Policy 2 requires tangata whenua to be actively involved in freshwater management, including decision-making processes, and for Māori freshwater values to be identified and provided for.[99] That policy recognises the relationship between Māori and freshwater and the decision-making function that is part of the kaitiaki role.

[162] Regional councils are obliged to give effect to Te Mana o te Wai.[100] In doing so they must actively involve tangata whenua in freshwater management (including decision-making processes) and enable the application of a diversity of systems of values and knowledge, such as mātauranga Māori, to the management of freshwater.[101]

[163] Clause 3.4 of the NPS-FM 2020 imposes specific obligations on local authorities regarding tangata whenua involvement in the implementation of the NPS:

(a) Every local authority must actively involve tangata whenua in freshwater management, including in identifying the local approach to giving effect to Te Mana o te Wai and developing and implementing mātauranga Māori.

(b) A regional council must work collaboratively with, and enable, tangata whenua to identify any Māori freshwater values (in addition to mahinga kai) that apply to freshwater, and to be actively involved in decision-making relating to those values.

(c) A regional council must also work with tangata whenua to investigate the use of mechanisms available under the RMA to involve tangata whenua in freshwater management such as transfers or delegations of power, joint management agreements and mana whakahono a rohe (iwi participation arrangements).

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98 Clause 2.2.
99 Clause 2.2.
100 Clause 3.2(1).
101 Clause 3.2(2)(a) and 3.2(2)(d).

[164] Regional councils must also set environmental outcomes and adopt objectives in their regional plans that achieve the compulsory value of mahinga kai. That value is described in the NPS-FM 2020 as being met when "customary resources are available for use, customary practices are able to be exercised to the extent desired, and tikanga and preferred methods are able to be practised".[102] Other values to be considered by regional councils include wai tapu (places where rituals and ceremonies are performed or where there is special significance to tangata whenua) and tauranga waka (places to launch waka and watercraft and places for waka to land).[103]

[165] I consider these parts of the NPS-FM 2020 are consistent with ss 6 and 7, and in particular ss 6(e) and 7(a). None of the parties contend otherwise.

[166] The vegetable exemption does not derogate from the obligations on regional councils set out in these clauses. Regional councils must set attribute targets in accordance with the NPS-FM 2020. That is, they must still be set in a way that gives effect to Te Mana o te Wai and the policies and objectives set out in the NPS-FM 2020, including those set out above. The regional councils must also comply with the clauses dictating how those target attribute states are to be set.

[167] It is at the regional council level, therefore, that the principles in ss 6 and 7, as reflected in the NPS-FM 2020, will take on a more tailored and site-specific expression. As the Supreme Court said in *King Salmon*, "… the [relevant] authorities fill in the details in their particular localities".[104] The relationship between each of the applicants on the one hand, and Lake Horowhenua and its associated catchments on the other, will have to be taken into account in setting the target attribute states and the timeframes by which those targets are to be achieved. It is at the regional level, therefore, that the principle of kaitiakitanga will find voice.

[168] It follows that I am not satisfied that the vegetable exemption is contrary to ss 6 or 7 of the RMA.

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102 Appendix 1A.
103 Appendix 1B.
104 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [79].

Is the vegetable exemption legally invalid for other reasons?

Scope of the vegetable exemption

[169] Muaūpoko submits that, at best, there is very limited scope for a vegetable exemption. As I understand this argument, it is that the breadth of the exemption undermines the force and effect of the national bottom lines contained in the NPS-FM 2020. Extracts from the IAP report highlighting a need to confine the hydro-electricity exemption were cited in support of this submission.

[170] Raukawa also claims invalidity on the basis of scope. Mr Enright submits that as the exemption was not part of the notified version of the NPS-FM 2020, was not commented on by the IAP, and did not arise out of the s 32 analysis, it was not a "reasonably foreseen, logical consequence" and was therefore ultra vires.

[171] I do not consider the vegetable exemption to be overly broad. It is limited to the national bottom lines for eight attributes which might be found to apply in two specified vegetable growing areas (Pukekohe and Horowhenua). The exemption does not apply to the implementation clauses of the NPS-FM 2020.

[172] Raukawa's objection on the grounds of scope appears to be grounded in process. Causes of action challenging the process adopted by the Minister were discontinued at the hearing. Complaints about a compressed timeframe within which to give feedback on the exemption are addressed as part of the ground of review relating to consultation.

Internal inconsistency

[173] Both applicants submit that the vegetable exemption does not give effect to the objectives and relevant policies of the NPS-FM 2020 and is internally inconsistent with those provisions. That internal inconsistency is said to render the vegetable exemption legally invalid.

[174] At first blush, there does appear to be a conflict between the six principles of Te Mana o te Wai and the hierarchy of obligations embraced in that concept on the one hand and the vegetable exemption on the other. Given the way the exemption developed, it would be natural to interpret the exemption as prioritising the domestic

supply of fresh vegetables and the maintenance of food security for New Zealanders over the health and wellbeing of water bodies and freshwater ecosystems. That prioritisation is contrary to the wishes of those exercising mana whakahaere, kaitiakitanga, and manaakitanga, being the first three principles of Te Mana o te Wai.

[175] However, on closer analysis, the conflict may be more apparent than real – at least at this stage and prior to implementation of the NPS-FM 2020 at regional levels. Under cl 3.33(4)(b) a regional council must still set any target attribute state at a level that will achieve an improved attribute state without compromising the factors set out in sub-cl (2); namely, the domestic supply of fresh vegetables and maintenance of food security. That sub-clause does not prioritise those factors over the health and wellbeing of waterways and freshwater ecosystems, but simply adds a further mandatory requirement to the mix.

[176] The target attribute states must also be set in a way that gives effect to Te Mana o te Wai and in accordance with the NPS-FM 2020 so as to set an improved attribute state, but it must be done in a way that does not comprise the domestic supply of fresh vegetables and the maintenance of food security. Just where to strike the balance between these competing factors will be for the relevant regional council to decide after following the processes laid down in the NPS-FM 2020 and in the RMA. I do not underestimate the difficulty of that task, but at this stage at least, striking that balance does not appear completely unachievable.

[177] In any event, even if the NPS-FM 2020 is internally inconsistent, then that does not make it ultra vires the RMA. In *King Salmon*, the Supreme Court said that while there may be rare occasions where policies "pull in different directions", an apparent conflict could dissolve if close attention was paid to the way in which the conflicting policies were expressed.[105] The Court went on to say that it was only if the conflict remained that a decision-maker would be justified in reaching a determination which has one policy prevailing over another. In those circumstances, the area of conflict should be kept as narrow as possible.[106] There was no suggestion in *King Salmon* that internal inconsistency renders a national direction instrument legally invalid.

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105 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [129].

106 At [130].

[178] In sum, to the extent that there is inconsistency between the vegetable exemption and the objectives and policies of the NPS-FM 2020, that inconsistency does not render the exemption legally invalid.

Did the Minister fail to take into account mandatory relevant considerations?

[179] Both applicants submit that the Minister failed to have regard to the mandatory relevant considerations set out in ss 6, 7 and 8, and to have regard to the relative strength of their claims in relation to Lake Horowhenua.

[180] In addition, Muaūpoko submits that the Minister failed to take into account:

(a) its customary interests in Lake Horowhenua and the impact of the exemption on the reasonable use of the land;

(b) that the exemption would permit a nuisance which would be contrary to the common law and principles of Tikanga; and

(c) other less harmful and culturally offensive options, including those discussed in the s 32 report.

[181] Raukawa claims that the Minister failed to consider the extent to which the exemption was inconsistent with the purpose of the RMA, and internally inconsistent with the objective and policies of the NPS-FM 2020.

[182] These grounds of challenge overlap with each other, and with others already discussed. The challenges in relation to s 8 are addressed under the Treaty of Waitangi ground of review. The remaining submissions are addressed under the following three heads:

(a) Mandatory relevant considerations in ss 6 and 7 of the RMA;

(b) Relative strengths of respective relationships with the Lake and stream;

(c) Alternatives.

Mandatory relevant considerations in ss 6 and 7 RMA

[183] Sections 6 and 7 are set out at [155] of this judgment. Those provisions which are particularly relevant are: s 6(e) (the relationship of Māori and their culture and traditions with ancestral lands, water, sites, waahi tapu and other taonga); s 6(g) (the protection of protected customary rights); and s 7(a) (kaitiakitanga).

[184] A claim that the vegetable exemption is ultra vires for breaching ss 6 and 7 is different to a claim that these sections were not taken into account. Nevertheless, there is an overlap between these two grounds, and the reasoning at [153] to [168] is also relevant to this ground of review.

[185] As set out in that section of the judgment, various clauses of the NPS-FM 2020 give effect to the principles in ss 6 and 7. The inclusion of these clauses in the NPS-FM 2020 demonstrates that the Minister did have regard to ss 6 and 7 in promulgating the NPS-FM 2020. There is no challenge to those clauses of the NPS-FM 2020 on the grounds that they do not reflect the principles in ss 6 and 7. And, as I have explained, the vegetable exemption does not exempt compliance with those clauses; they continue to apply to the freshwater bodies meeting the exemption criteria in the specified vegetable growing areas.

[186] The documentary record regarding the development of the exemption shows that the Minister was aware of the concerns expressed by Muaūpoko and Raukawa reflecting the matters in ss 6(e), 6(g) and 7(a) when making the decision to include the vegetable exemption. That record includes:

(a) A briefing paper prepared for the Minister in anticipation of consultation with the applicants on 7 July 2020. That briefing paper summarised concerns raised by the applicants in their correspondence with the Ministry. Additionally, it provided summaries of the connections between iwi and the freshwater bodies, the history of Lake Horowhenua, and the Waitangi Tribunal's recommendations in respect of Lake Horowhenua.

(b) A 28 July 2020 Cabinet paper proposing the implementation of the NPS-FM 2020 including the vegetable exemption. That paper recorded:

(i) The strong concerns expressed by the applicants that water bodies in their rohe would not be afforded the same level of protection as other water bodies in New Zealand, and that their food basket was being seriously harmed to provide a food basket for the rest of New Zealand. The time-bound exemption was adopted as a response to those concerns with the intention of replacing the exemption "in the next few years".

(ii) In reporting on the compliance with the principles of the Treaty of Waitangi, the Minister recorded the disappointment of local iwi and hapū in the consultation process, and their view that an exemption to the bottom lines transgressed their role as kaitiaki, as the exemption could allow for the waterways to remain in a degraded state while improvements were being made.

(iii) That the Crown and local authorities will need to engage with iwi and hapū when implementing the instruments to ensure the implementation is not inconsistent with Treaty settlements.

[187] The consultation with both applicants after the in-principle decision had been made (discussed later in this judgment) is also relevant here. It is significant that the Minister was personally aware of the issues and grievances of iwi and hapū in the area. That reflects an acknowledgement of the relationship between those iwi and hapū and the Lake, including their kaitiaki status.

[188] The decision to include the vegetable exemption is time-limited so as to allow a process whereby affected iwi and hapū can work together with the Crown on a bespoke replacement for the exemption. That process also reflects the kaitiaki status of both applicants, and an acknowledgement of their relationship to the Lake and related catchments.

[189] These steps and documentary record provide a partial response to Muaūpoko's claim that the Minister failed to take into account its "customary property interest" in the Horowhenua catchment. As this record shows, the Minister was aware of Muaūpoko's interests in the area and took those into account when considering whether to include the vegetable exemption.

[190] Muaūpoko expands on this submission by referring to s 85 of the RMA. Under s 85(2), a person may make a submission on a plan where that person considers a provision of a plan or proposed plan will render their interest in land incapable of reasonable use. The issue was framed this way in submissions:

> 7.5 The issue is not that the NPS-FWM itself renders the lake and fishing rights incapable of reasonable use, but that it may have the effect of placing regional councils in conflict with section 85, because the NPS-FWM invites them to propose targets that it is known will maintain a level of harm to waters, land, ecosystems and fisheries below an acceptable standard.
>
> 7.6 The test of what is 'reasonable use' of this customary land would also incorporate customary concepts.
>
> (footnote omitted)

[191] I do not consider the vegetable exemption "invites" regional councils to propose targets that will maintain a level of harm. The exemption permits regional councils to set targets below the national bottom line for eight identified attributes if that is the outcome reached by the regional council in implementing the NPS-FM 2020. The target attribute states set by the regional council must provide for an improved state. A target that maintains the status quo will therefore be contrary to the direction set out in cl 3.33(4)(b). In advance of the regional council setting those targets it is too early to say whether there will be a conflict with other obligations under the RMA, including (if applicable) the obligations in s 85 and the reasonable use of land.

[192] For the same reasons, it is difficult to envisage how a target attribute state which provides for an improved attribute state could permit a nuisance. The tenets of such a claim (whether framed as a nuisance in common law nuisance or tikanga Māori) were not fleshed out in submissions. In any event, it cannot be said that such a contingent claim is a mandatory relevant consideration which the Minister was obliged to take into account. It was sufficient for the Minister to have acted in accordance

with ss 6 and 7 of the RMA and taken into account Muaūpoko's interests in the area when making the decision.

Relative strengths of relationships to the Lake and stream

[193] Both applicants say that the Minister was required to take into account the relative strengths of the interests of Muaūpoko and Raukawa in the area in making the decision to include the vegetable exemption in the NPS-FM 2020.

[194] Muaūpoko submits as follows:

> 7.13 The Minister did not consider that the impact on Muaūpoko of the proposal in the Horowhenua catchment was at a different level or nature than the impact on Ngāti Raukawa. He treated the two iwi as being impacted in the same manner. Ngāti Raukawa is not an original customary owner in the underlying land since the 12th century, and does not have a fishing property right of ancient lineage. Nor is this water resource central to the existence of that iwi as it is for Muaūpoko.
>
> 7.14 Had the Minister properly considered the customary interests of Muaūpoko being at this older and deeper nature, rather than at a more generalised 'kaitiaki' level in common between the two groups, he would not have given the exemption.

[195] Raukawa says:

> 80 The Minister was required to consider and respond to different and competing values and interests asserted by Ngāti Raukawa and Muaūpoko over the same freshwater resources, including the strength of their asserted relationships with their ancestral waters and taonga. It was not sufficient to simply engage with the affected Iwi, without understanding that wider context.
>
> (footnote omitted)

[196] Both applicants rely on *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* in support of their submissions.[107] That case concerned conditions to a consent obtained to extend Westhaven Marina which dealt with mana whenua engagement. Ngāti Whātua Ōrākei claimed that there was a duty to consider priority status when there was a material issue triggered by competing evidence from iwi and hapū submitters. The Environment Court determined that it did not have jurisdiction to consider whether an iwi holds primary mana whenua over an area the subject of a

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[107] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352.

resource consent application generally. However, it did find that it had jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal where it was relevant to the claimed cultural effects of the application and wording of the resource consent conditions.

[197] The appeal to the High Court concerned whether the Environment Court had erred procedurally in reframing the questions for determination, and substantively, whether it had erred in answering those questions. In addressing those issues Whata J said:

> [67] However, when making resource management decisions, local authorities and the Environment Court are not engaged at pt 2 of the RMA in a process of conferring, declaring or affirming tikanga-based rights, powers or authority per se whether in State law or tikanga Māori. Similarly, pt 2 does not expressly or by necessary implication empower resource management decision-makers to confer, declare or affirm the jural status of iwi (relative or otherwise) and there is nothing in the RMA's purpose or scheme which suggests that resource management decision-makers are to be engaged in such decision-making. The jurisdiction to declare and affirm tikanga based rights in State law rests with the High Court and/or the Māori Land Court.
>
> [68] Nevertheless, the Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties. To elaborate, as the Privy Council asseverated in McGuire, ss 6(e), 7(a) and 8 contain strong directions that must be observed at every stage of the planning process. Where iwi claim that a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision-makers must meaningfully respond to that claim. That duty to meaningfully respond must apply when different iwi make divergent tikanga-based claims as to what is required to meet those obligations. This may involve evidential findings in respect of the applicable tikanga and a choice as to which course of action best discharges the decision-makers statutory duties. To hold otherwise would be to emasculate those directions of their literal and normative potency insofar as concerns iwi.
>
> [69] It is not possible to be definitive about the scope of the jurisdiction to respond to iwi tikanga-based claims, including claims based on asserted mana whenua, in the abstract. But the operation of s 7(a) dealing with kaitiakitanga is illustrative. Kaitiakitanga is exercised by the hapū or iwi that holds mana whenua over a particular area. As the RMA anticipates, and as this case exemplifies, there will be occasions when there are overlapping iwi interests in the same whenua. Nevertheless, s 7(a) directs that regard must be had to their respective kaitiakitanga. Where the views of those iwi diverge as to the responsibilities of kaitiaki, a decision may need to be made as to which of those views is to apply in the context of that particular application and that may involve evidential findings as to what the iwi consider is required in tikanga Māori …
>
> …

> [73] But the statutory obligation to recognise and provide for the relationship of Māori and their culture and traditions with their whenua and tāonga, to have regard to their kaitiakitanga and to take into account the principles of the Treaty of Waitangi, does not permit indifference to the tikanga-based claims of iwi to a particular resource management outcome. On the contrary, the obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. To ignore or to refuse to adjudicate on divergent iwi claims about their relationship with an affected tāonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty.
>
> (footnotes omitted)

[198] In that case the competing claims between iwi were of direct relevance to a particular resource management outcome. The obligation to consider those competing interests in the context of ss 6 and 7 of the RMA were directly engaged.

[199] In this case, the competing interests of Muaūpoko and Raukawa have a long history and have played out in the many Court cases and proceedings between the two iwi and respective hapū. The competing interests in relation to the Lake and related catchments is a matter which will no doubt be considered in the forthcoming Waitangi Tribunal Report into the Raukawa claim.

[200] However, those competing claims did not have direct relevance to a particular resource management outcome in this case. This is not a situation where the relative strengths of the claims by each iwi to Lake Horowhenua, the Hōkio stream and related catchments called for a different assessment vis-à-vis the vegetable exemption. Indeed, on this particular issue, both iwi are aligned in their opposition to the vegetable exemption and its alleged infringement on their respective rights and interests in their freshwater taonga. The Minister was not required, therefore, to make any determination of the relative merits of their respective claims when deciding whether to include the vegetable exemption in the NPS-FM 2020 – the respective merits and strength of each claim were not relevant to his decision.

Alternatives

[201] Muaūpoko submits there were other less harmful and culturally offensive options available than the adoption of the vegetable exemption. Although advanced

as part of the claim to invalidity, I address this claim as part of the alleged failure to consider relevant options.

[202] The option which Muaūpoko favoured was Option 2 of the three options set out in the 15 July 2020 briefing paper (reproduced above at [105]). That option would have required councils to set target attribute states at the national bottom line or higher and "have particular regard" to the importance of vegetable growing to the national supply when setting those targets.

[203] The 15 July 2020 briefing paper set out an analysis of this option and the others raised in that paper. It considered the pros and cons of each of the options. One risk associated with Option 2 was that it could place more pressure on other land uses to carry a disproportionate burden in relation to nitrate leaching. Moreover, the analysis undertaken at that time indicated that even large amounts of land use change out of vegetable production would still not produce the reductions needed.

[204] As this paper reflects, the Minister clearly did have regard to various options when making the decision regarding the vegetable exemption. Judicial review is mainly concerned with the process of decision-making rather than the merits of the decision actually made. The fact that the option preferred by Muaūpoko was not selected by the Minister does not make the decision legally invalid or otherwise impugn the decision-making process.

Was there adequate consultation on the vegetable exemption?

[205] Both applicants say that the Minister's consultation on the vegetable exemption fell short of the required standards.

[206] Muaūpoko submits that by choosing the truncated Board of Inquiry approach the Minister was constrained in the scope of changes he could make to the NPS-FM 2020 following public notification, and the receipt of submissions and the IAP's recommendations. Further, it says that after receipt of the IAP report, officials were not free to develop new proposals which constituted a radical departure from the NPS-FM as notified, and the Minster was not free to create a bespoke process to consider those proposals as he did. Muaūpoko is critical of the failure to consult on "Option 2"

of the 15 July 2020 ministerial briefing paper and the overall adequacy of the consultation process on the vegetable exemption.

[207] Raukawa submits that the Minister did not provide adequate time and opportunity to respond to Cabinet's in-principle decision to include the vegetable exemption. That includes the failure to provide sufficient information on the underlying reasons for the exemption so that Raukawa could make an informed response. Moreover, Raukawa submits that the in-principle decision narrowed the parameters of the discussion to matters which could accommodate the interests of commercial vegetable grower interests at the expense of the health of the waterways.

[208] Both applicants submit that the that the lack of consultation breached ss 8, 46A(4) and 52 of the RMA and the Treaty of Waitangi principles relating to consultation.

Legal framework

[209] Section 46A sets out the process for preparation of national directions. It contains a statutory obligation for consultation. Subsections (4) and (5) are relevant to the claims in this case and provide as follows:

> **46A Single process for preparing national directions**
>
> …
>
> (4) The steps required in the process established under subsection (3)(b) must include the following:
>
> (a) the public and iwi authorities must be given notice of—
>
> (i) the proposed national direction; and
>
> (ii) why the Minister considers that the proposed national direction is consistent with the purpose of the Act; and
>
> (b) those notified must be given adequate time and opportunity to make a submission on the subject matter of the proposed national direction; and
>
> (c) a report and recommendations must be made to the Minister on the submissions and the subject matter of the national direction; and
>
> (d) the matters listed in section 51(1) must be considered as if the references in that provision to a board of

> inquiry were references to the person who prepares the report and recommendations.
>
> (5) In preparing a national direction, the Minister may, at any time, consult on a draft national direction.
>
> …

[210] The effect of these subsections is that the Minister must give notice of the proposed national direction and why the Minister considers it is consistent with the purpose of the Act. Those notified must be given adequate time and opportunity to make a submission on the subject matter of the proposed national direction. The Minister also retains a discretion under s 46A(5) to consult "at any time" on a draft national direction.

[211] In *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries*, the Supreme Court made the following comment about the nature of any consultation:[108]

> [168] The final preliminary point concerns the nature of any consultation. The content of a statutory obligation to consult will be affected by context. So, an obligation to consult before a decision-maker has formulated any proposal is different from an obligation to consult arising after the decision-maker has formulated a proposal. In the present case, because s 22(7) provides that the required consultation may be on a risk analysis or a draft import health standard, the statutory obligation arises after the Ministry has undertaken work rather than from the outset. In this context, the obligation to consult will involve obligations to inform, to listen and to consider. The chief technical officer must tell those to be consulted what is proposed, must give them a fair opportunity to express their views and must consider their views with an open mind before making any recommendation to the Director-General. These principles emerge from the decision of the Full Bench of the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*. That case also makes it clear that "consultation" is not synonymous with "negotiation" and that there is no requirement that the persons consulted agree with the final decision (in this case, the chief technical officer's recommendation).
>
> (footnote omitted)

[212] The Supreme Court also considered that the obligation to consult may entail an obligation to reconsult or undertake further consultation. Whether such an obligation is triggered will depend on whether there has been a substantial change to the proposal originally submitted. Although the legislative context was different to

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[108] *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477.

the present, the Supreme Court's observations on further consultation are equally applicable to this case:

> [173] This does not mean, however, that whenever a review panel recommends further work, there must necessarily be further consultation under s 22(6) after that work is completed. Work of a "tidy-up" nature is unlikely to trigger a further obligation to consult, for example, nor is the updating of existing data where the updated data is consistent with existing data and supports the conclusion already expressed. Ultimately, whether the obligation to consult again is triggered will depend upon the nature, extent and impact of the further work, the focus being on whether the work has led to a substantial change in the scientific basis for the chief technical officer's recommendation. The fact that further consultation is required will not necessarily mean that there must be a further independent review if one is requested, given that the Director-General has some discretion in that respect.
>
> (footnote omitted)

[213] The Minister does not dispute that the development of the vegetable exemption triggered the duty to reconsult. He says that the duty was discharged by the targeted consultation that followed Cabinet's in-principle decision to incorporate the vegetable exemption in the NPS-FM 2020 subject to further engagement with iwi and tangata whenua.

Consultation on the vegetable exemption

[214] It is self-evident that the focus of the applicants' challenge is on the lack of consultation on the vegetable exemption. Neither applicant made submissions on the NPS-FM as originally proposed.

[215] The decision to develop an exemption for vegetable growing areas was recorded on 19 March 2020. Officials prepared a draft iwi engagement plan on the exemption and sought advice from the Office for Maori Crown Relations – Te Arawhiti on that plan which was received towards the end of April 2020. Emails were sent to iwi representatives on 29 April 2020 noting that there was an aspect of the *Action for Healthy Waterways* package that affected their rohe and seeking to set up a time to discuss that aspect.

[216] A Cabinet paper dated 13 May 2020 was prepared in which an in-principle decision to adopt the vegetable exemption subject to further consultation with iwi and hapū was recommended. That recommendation was accepted by Cabinet when it met on 18 May 2020.

[217] On 15 May 2020, officials from the Ministry for Primary Industries and Ministry for the Environment had calls with various iwi and hapū representatives, including a representative for Muaūpoko. Those calls were held over Zoom as the country was in a nationwide COVID-19 lockdown at the time.

[218] The summary notes from those calls record that officials outlined the vegetable exemption proposal, explained the reasons for the exemption, discussed possible ways in which the exemption could work in practice and acknowledged that there was scope for agreed alternatives. There were issues raised in those calls about resourcing for ongoing iwi engagement and broader issues relating to water management. There was agreement to continue engaging with the Crown on the proposed exemption.

[219] On 28 May 2020 officials called a representative for Raukawa to similarly discuss the proposed vegetable exemption.

[220] On 10 June 2020, there was a meeting between Ministry officials and both applicants to discuss the vegetable exemption. On 16 June 2020, a paper entitled *Further Information on the proposed policy thinking for Horowhenua* was provided to the applicants. That paper included information on what was proposed for the nitrogen bottom lines, the in-principle decision reached by Cabinet, the importance of the domestic supply of fresh vegetables, and the anticipated impact of land use change out of vegetable growing in the Horowhenua and Pukekohe regions. The paper also outlined the lack of any technological solutions to substantially reduce nitrogen leaching from commercial vegetable growing areas to the extent needed to meet nitrogen bottom lines. It was said that the proposed exemption may be revisited once the identification of potential solutions or new technologies were available to ensure national bottom lines could be met in the future. A time-bound review of the exemption was floated as a way of ensuring that water quality below bottom lines did not continue indefinitely.

[221] On 24 June 2020, Ministry officials attended a board meeting of the Muaūpoko Tribal Authority.

[222] On 2 July 2020 a Ministry official emailed all of the iwi and hapū representatives who had been engaged to seek additional feedback on the proposed vegetable exemption. On 3 July 2020 the official spoke with a representative for

Raukawa and, on the same day, received a letter from the Muaūpoko Tribal Authority. Both Raukawa and Muaūpoko sought a meeting with the Minister to discuss their strong opposition to the vegetable exemption.

[223] On 7 July 2020, the Minister hosted a summit in Levin on the proposed vegetable exemption. There were pre-summit meetings with both applicants before the summit officially started. The summit was also attended by Horizons Regional Council, Horowhenua District Council, Horticulture NZ and vegetable growers operating in the region.

[224] Notes from the summit record Raukawa's opposition to the exemption and their frustration at a compressed consultation timeframe. Of note, Raukawa raised the possibility of a review period being built into the exemption. The Minister responded that this was a possibility.

[225] There was further correspondence with Raukawa and its consultants regarding their opposition to the exemption following this summit. In a letter dated 8 July 2020 Raukawa reiterated its opposition to the exemption, but stated that it was not its intention to stall the progress of the healthy waterways package to Cabinet. The letter went on to acknowledge the situation in Horowhenua as both complex and fraught. With that in mind, Raukawa expressed a willingness to explore alternative pathways for dealing with the Lake Horowhenua catchment, including ways that the proposed exemption could be modified or implemented.

[226] Officials had further Zoom meetings with the applicants on 14 and 15 July 2020. In these last meetings, officials discussed three options for the Horowhenua region. Those were essentially the same three options set out in the briefing paper for the Ministers of the same date (as set out above at [105]).

Discussion

[227] The starting point for analysis is the decision to amend the NPS-FM 2020 after submissions on the original proposal were made.

[228] To the extent there is a challenge made to the power to make that decision after submissions had closed then such a challenge cannot succeed. Section 52 of the RMA

permits a Minister to make changes to a national direction instrument after first considering a report and recommendation under, in this case, s 46A(4)(c).[109] The in-principle decision to include the vegetable exemption was made after the IAP sent its report to the Minister in February 2020. Accordingly, there was compliance with s 52(1)(a).[110]

[229] The key question, however, is not whether the Minister was empowered to add the vegetable exemption to the NPS-FM 2020, but whether he adequately consulted with the applicants before he did so.

[230] There is no obligation on the Minister to undertake consultation on a proposed change to the NPS-FM at any particular point in time. The Minister retains a discretion under s 46A(5) to undertake that consultation "at any time". However, that discretion must be exercised consistently with Part 2 of the Act, and in particular, ss 6, 7, and 8.

[231] Although there was clearly consultation after the Cabinet's in-principle decision was made, I consider it would have been preferable if the consultation had occurred beforehand. I say that for the following reasons.

[232] First, rightly or wrongly, the fact that an in-principle decision had been made without consultation gave the impression that the inclusion of an exemption in the NPS-FM 2020 was effectively a done deal. Standing in the applicants' shoes, it is not difficult to understand their grievance towards being presented with an in-principle decision so late in the process. The time period for consultation on the proposed NPS-FM 2020 was already compressed due to the alternative process adopted by the Minister. The vegetable exemption was not included in the draft NPS-FM and so was not the subject of scrutiny by the IAP or other expert bodies. Nor was it the subject of public submissions. And, there was no earlier indication that such an exemption was being considered at all.

[233] The applicants are kaitiaki of the water bodies in their rohe. Those water bodies are taonga and tūpuna. There is a history of degradation and neglect of

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109 RMA, s 52(1).

110 Muaūpoko pleads illegality on the basis that the vegetable exemption was a new and significant policy and therefore not reported on under s 52, and therefore the Minister acted unlawfully in including the exemption. This claim was not pursued in written submissions or at the hearing. To the extent it is maintained as a separate ground of review then it is dismissed.

Lake Horowhenua and its related catchments which has led to the Lake becoming one of the most polluted freshwater bodies in New Zealand. There is also a long history of grievances with the Crown regarding these water bodies. To find out that a vegetable exemption had been developed which could have significant impact on a taonga and tūpuna and that Cabinet had agreed to it in-principle, can only have added to the applicants' deep sense of grievance.

[234] Second, the involvement of both applicants much earlier in the process may have allowed other options to the vegetable exemption to be considered. For example, it may have allowed alternatives arising out of mātauranga Māori to have been taken into account. Muaūpoko's clear preference for Option 2 of the briefing paper could also have been aired.

[235] However, I do not consider the failure to consult with the applicants earlier in the process constituted a breach in this case. The process followed has to be assessed in the circumstances that existed at the time. The decision to develop the vegetable exemption was made in March 2020. An iwi engagement plan was immediately prepared and sent out for consultation. The first COVID-19 lockdown happened in March 2020. Officials acted quickly to engage with iwi and hapū once the decision to develop a vegetable exemption was made.

[236] Furthermore, whatever impression may have been left by the in-principle decision, I am satisfied that the subsequent targeted consultation on the proposed exemption was genuine and was approached with an open mind. Meetings were arranged between the applicants and the Minister personally. Information explaining the policy reasons underpinning the vegetable exemption and including some of the modelling was provided to both applicants. It was not necessary for a draft of the exemption to be provided or for all options (including Option 2 as preferred by Muaūpoko) to be identified at that stage. It was sufficient for the subject matter of the proposed exemption to be put forward and discussed.

[237] Although the timetable for further engagement was tight, there was nevertheless time for both applicants to express their strong opposition to the vegetable exemption both in letters and meetings held with the Minister. Most importantly, it is clear that the Minister listened and took those views into account. That is evident in the following paragraphs from the Minister's affidavit sworn in this proceeding:

> 59. I have my own personal commitment to the health of waterways in this country. Prior to entering Parliament, I had been in legal practice for some decades. For much of that time, I was deeply involved with water law. I acted for the applicants for water conservation orders in various river systems in the South Island. Since becoming a MP in 2002, I have devoted a major part of my political life to improving the state of freshwater in New Zealand.
>
> 60. Immediately following the summit [of 7 July 2020] I recall doing a radio interview regarding the vegetable exception. I did not feel comfortable defending the exception as proposed. I was conscious of the representations that iwi had made regarding the significance of freshwater taonga in Horowhenua and the history of degradation and neglect in the area.
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> 61. I subsequently expressed my concern to officials that the exception could be viewed as giving polluters a free ride to the detriment of iwi and the environment. I asked them to develop alternatives to the exception as currently proposed.

[238] The fact that the proposal for a time-bound exemption originated with Raukawa's representatives and found its way into the final form of the exemption is also significant. Consultation does not require the Minister to agree with the submissions made on behalf of the applicants, but the fact that this proposal was picked up and implemented speaks to the open minded nature of the exchange.

[239] Finally, it is relevant to note that consultation is ongoing. That is one of the purposes of the time limit on the exemption contained in cl 3.33(6). The purpose of that clause is to allow the parties further time to explore alternatives to the vegetable exemption. That has occurred since the NPS-FM 2020 came into force and both applicants are involved in that process.

[240] The consultation is also ongoing in another context also. The exemption enables the relevant regional councils to set a target attribute state below the national bottom line for that attribute. But it does not require them to do so. The obligations on a regional council to consult on the plans which will give effect to the NPS-FM 2020 gives another opportunity to the applicants to put forward alternatives and proposals by which their concerns and interests may be met.

[241] I decline to review the decision for an alleged failure to consult with the applicants regarding the vegetable exemption.

Was the decision to include the vegetable exemption contrary to the principles of the Treaty of Waitangi?

[242] Section 8 of the RMA requires decision makers to take into account the principles of the Treaty of Waitangi. Both applicants claim that the decision to include the vegetable exemption was invalid because it was contrary to principles of the Treaty, and that the Minister failed to take these principles into account in deciding to include the vegetable exemption. In addition, Raukawa pleads as a separate ground of challenge that the exemption breaches the principles of the Treaty of Waitangi.

[243] There is no dispute that Treaty of Waitangi implications were considered by the Minister in the course of developing the NPS-FM 2020. These were addressed in the Cabinet paper from both the Minister and the Minister of Agriculture dated 13 May 2020. That paper considered the Crown's responsibilities to "protect taonga, the exercise of tino rangatiratanga and kawanatanga, and the principles of the Treaty". Similarly, the impact of the Waitangi Tribunal's report on stage two of the freshwater and geothermal resources enquiry[111] was also referred to, as was the need to assess consistency with Treaty of Waitangi settlements.

[244] But that is not the focus of the applicants' claims. Their claims target the vegetable exemption in particular, and its compliance with the principles of the Treaty of Waitangi.

[245] Raukawa's separate ground of challenge raises a question about whether the Treaty confers any directly enforceable rights. Whilst acknowledging the enormous constitutional significance of the Treaty, the Crown submits that it does not. Mr Stephens submits that the settled judicial approach is that a breach of the Treaty is not a standalone cause of action.

[246] I consider the constitutional significance of the Treaty means direct enforcement by way of judicial review may be justified. This is consistent with the Court of Appeal's decision in *Takamore v Clarke* in which it was observed that the courts indirectly "enforce" the Treaty in a number of ways including by giving it

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111 Waitangi Tribunal *Stage 2 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2019).

"direct impact" in judicial review as an implied mandatory consideration.[112] The Supreme Court did not disavow this statement on appeal.[113]

[247] However, it is not necessary to reach a concluded view on that point. That is because it is not contended that direct enforcement of the Treaty in this case gives any different, or any greater, rights than those contained in s 8 of the RMA.

[248] That flows from the impact of s 8 in decisions made under the RMA. It is a section that has both substantive and procedural force.[114] For example, where various options are available to a decision-maker, the Privy Council has interpreted s 8, in combination with other provisions in Part 2 of the RMA, as inviting the decision-maker to prefer the option not detrimental to Māori interests.[115] That construction is consistent with a recent Supreme Court case in which it was confirmed that Treaty clauses should not be narrowly construed and must be given a broad and generous construction.[116]

[249] Accordingly, I address the s 8 and Treaty of Waitangi claims as if they were co-extensive in this case with the focus on an alleged breach of Treaty principles.

[250] The principles of the Treaty were canvassed in the seminal case of *New Zealand Maori Council v Attorney-General*[117] and have been developed and fleshed out in subsequent cases and Waitangi Tribunal claims. The Court confirmed in that case that the Treaty signified a partnership between Pākeha and Māori, and creates responsibilities analogous to fiduciary duties. Those duties require each party to act towards each other reasonably and with the utmost good faith. The duty is not merely passive but extends to the active protection of Māori people in the use of their lands and waters to the fullest extent practicable.[118] Depending on context, consultation and cooperation may be required for the Crown to discharge its duty.[119]

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112 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [248].
113 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
114 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [88].
115 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at 594.
116 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [150]–[151] and [296].
117 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).
118 At 664.
119 At 683.

The obligations of both parties under the Treaty accordingly inform the statutory duty to consult, as discussed in the previous section of this judgment.

[251] The key principle relied on by both applicants in this case is the duty of active protection of vulnerable taonga. The Privy Council has described that duty in the following terms:[120]

> … [if] a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.

[252] These observations are apt in this case as the Waitangi Tribunal has found that the polluted and degraded state of Lake Horowhenua and the Hōkio stream can be attributed to past breaches by the Crown of its obligations under the Treaty.[121] The Waitangi Tribunal has recommended a statutory settlement to restore Lake Horowhenua and the Hōkio stream, although it acknowledges that Ngāti Raukawa's claim to the area has yet to be determined.[122]

[253] The claim that the vegetable exemption breaches the Crown's duty of active protection of a vulnerable taonga has given me considerable pause. The applicants' grievances are readily understood when viewed in historical context. Their interests have been subordinated in the past to the public use of the Lake as a recreational reserve, and the use of the Lake as a repository for Levin's sewage. From the applicants' perspective, the vegetable exemption is just more of the same with the interests of vegetable growers taking precedence over their relationship with the Lake and stream. As it was framed in submissions, the degradation of the applicants' food basket is being allowed to occur so as to provide a food basket for the rest of the country.

[254] If the vegetable exemption operated so as to maintain the status quo, or enable further degradation, then I would have found this claim to have been proved. Permitting the further degradation and pollution of the Lake, or failing to take active

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120 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.
121 Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 701.
122 At 707–708.

steps to restore it, would not be consistent with the Crown's active duty to protect a vulnerable taonga.

[255] However, I do not interpret the vegetable exemption to have that effect. Allowing a regional council to set target attribute states for certain attributes below a national bottom line is not to be equated with maintaining the status quo or permitting further degradation of the Lake. Any targets set by the regional council, even if below the national bottom line, must be set so as to provide for an improvement in that attribute state. That is, an improvement in overall water quality.

[256] It is true that, as identified in the addendum to the s 32 report, setting targets below the national bottom line may mean that it takes longer to improve water quality. But this could be so even if the targets were set at or above the national bottom line. That is because it is for the regional council to set the relevant timeframes by which the targets are to be achieved. In any event, a longer timeframe for achieving water quality does not equate to a failure to take any steps at all. The situation affecting Lake Horowhenua and the Hōkio stream is complex, not least because of the historical acts that contributed to its current state. Restoring the Lake and stream is likely to take time whether the targets are set below, at or above the national bottom line.

[257] Finally, and as previously mentioned, the exemption does not relieve the regional council from setting targets that give effect to Te Mana o te Wai, and the policies of the NPS-FM 2020. Those provisions of the NPS-FM 2020 give effect to the principles of the Treaty of Waitangi, by recognising the relationship between the applicants and their taonga, and by ensuring that those in the applicants' position have a say on the management of freshwater taonga. These clauses reflect principles of rangatiratanga and partnership. They set out the means by which freshwater taonga are to be actively protected, and they put in place a process for consultation and information exchange with tangata whenua on decisions affecting freshwater in their rohe.

[258] To that extent, at least, my findings in relation to the applicants' challenges advanced under ss 6 and 7 also apply here. So too do the findings in relation to consultation. I consider the principles of the Treaty inform the scope of the statutory duty to consult. My conclusion that there was no breach of the duty to consult means there was no breach of the Treaty principles insofar as they relate to consultation.

[259] These provisions mean that I am satisfied that the Minister took into account the principles of the Treaty of Waitangi when deciding to include the vegetable exemption. The decision is not, therefore, legally invalid for breach of s 8, and nor can it be impugned for failure to take into account mandatory relevant considerations as set out in s 8.

Was the decision to include the vegetable exemption unreasonable?

[260] Muaūpoko challenges the decision on the grounds of *Wednesbury* unreasonableness.[123] Mr Bennion submits that there is a "material disconnect in the chain of logic from both facts and legal propositions to the conclusion".

[261] In making that submission, Mr Bennion places reliance on the formulation of unreasonableness by Palmer J in *Hu v Immigration and Protection Tribunal*.[124] Drawing on the Supreme Court's decision in *Bryson v Three Foot Six Ltd*,[125] and *Edwards v Bairstow*,[126] Palmer J encapsulated unreasonableness as follows:

> [30] Lord Radcliffe's three scenarios, encapsulated by the Supreme Court as an insupportable or untenable ultimate conclusion, also assist in identifying what constitutes a relatively narrow but usable concept of unreasonableness. A decision may be unreasonable if it is not supported by any evidence, or if the evidence is inconsistent with or contradictory of it, or if the only reasonable conclusion contradicts the determination. The first two of these involve the adequacy of the evidential foundation of the decision. The last involves the chain of logical reasoning in the application of the law to the facts: if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision may be unreasonable and therefore unlawful.

[262] The Court of Appeal has commented that this formulation of *Wednesbury* unreasonableness is "useful";[127] although the formulation has reinvigorated debate on reasonableness review.[128] This is not the right case to enter that debate. That is because whether the traditional *Wednesbury* formulation (a decision which no reasonable decision-maker could have reached) or Palmer J's formulation is used, the decision to include a vegetable exemption cannot be impugned for unreasonableness.

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123 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).
124 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508.
125 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
126 *Edwards v Bairstow* [1956] AC 14 (HL).
127 *CP Group Ltd v Auckland Council* [2021] NZCA 587 at [135].
128 See MB Rodriguez Ferrere "Redefining reasonableness" [2017] NZLJ 67.

[263] That is because the decision was clearly supported by evidence. That evidence consisted of scientific modelling produced by the Ministry which suggested that a requirement to set target attribute states at or above national bottom lines could compromise the domestic supply of vegetables.

[264] There was also logic underlying the decision in that the Minister was trying to reconcile improving freshwater quality without compromising domestic vegetable supply. The permissive nature of the exemption, and its time-bound nature, recognises that these issues are difficult and further work on them is required. That work is ongoing. It is in the context of this work that alternative methods to protecting vegetable production short of setting targets below national bottom lines are being explored. The applicants and their representatives are involved in that process.

[265] This ground of review is dismissed.

Result

[266] The applications for judicial review are dismissed.

[267] The parties are encouraged to confer and reach agreement on the question of costs. If costs cannot be agreed, then submissions in support of costs shall be filed and served 30 working days after delivery of this judgment. Submissions in response shall be filed 14 working days thereafter. Costs shall be determined on the papers.

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Edwards J

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