IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-2128
[2017] NZHC 308

UNDER	the Judicature Amendment Act 1972 and the Declaratory Judgments Act 1908
IN THE MATTER	of an application for Judicial Review of decisions under the Forests Act 1949, Customs and Excise Act 1996 and the Protected Objects Act 1975
BETWEEN	NORTHLAND ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Plaintiff
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF PRIMARY INDUSTRIES First Defendant
AND	COMPTROLLER OF CUSTOMS Second Defendant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY FOR CULTURE AND HERITAGE Third Defendant

Hearing: 25, 26, 27 July 2016

Appearances: D Salmon and D Bullock for Plaintiff
J Gorman and B Charmley for First and Second Defendants
B Arapere for Third Defendant

Judgment: 1 March 2017

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 1 March 2017 at 3.00 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The Waipoua Forest in Northland is home to New Zealand's mightiest kauri tree, Tane Mahuta, and many other great *agathis australis* specimens. The forest is a national taonga which is protected as a remnant of the magnificent kauri forests which covered the Far North and spread as far south as the Kawhia Harbour. Those forests were decimated in the 18th and 19th centuries, but the relics of fallen trees have lain buried in swamp land for centuries; some for many thousands of years. The unique swamp conditions have preserved the timber intact. Located almost exclusively under areas of farmland and wetland in Northland, ancient swamp kauri stumps and logs are highly prized. Over the past five years, a sizeable industry in the excavation, milling and export of ancient swamp kauri and its products has developed.

[2] The plaintiff, Northland Environmental Protection Society Inc (NEPS), is concerned that many exports of ancient swamp kauri products have occurred illegally. By way of judicial review and under the Declaratory Judgments Act 1908, it seeks declarations against the defendants, on various grounds relating to their perceived roles in regulating the export of ancient swamp kauri.

[3] The relief sought includes:

(a) A declaration of the meaning of "finished or manufactured indigenous timber product"[1] which will result in export approval for table-tops made of ancient swamp kauri being restricted to table-tops which are to be exported with any intended legs, stand or other mounting, or with necessary preparatory machining for such legs or mounting.

(b) A declaration that ancient swamp kauri logs with "light surface carvings or decoration" are not finished or manufactured indigenous timber products.

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1 As defined and used in the Forests Act 1949, s 2 and part 3A.

(c) Declarations that the Ministry for Primary Industries has acted unreasonably in approving the export of ancient swamp kauri products.

(d) Declarations, the effect of which would be to define ancient swamp kauri as "a protected New Zealand object", no example or product of which may be exported without the approval of the Chief Executive of the Ministry for Culture and Heritage.

Summary of decisions

[4] For the reasons set out below, I decline to make any of the declarations sought. In particular, I have decided that:

(a) The primary aim of part 3A of the Forests Act 1949 is directed to the narrow goal of protecting the longevity and sustainability of land which is wholly or substantially covered by living indigenous flora: [38] – [39].

(b) The definition of "finished or manufactured indigenous timber product" is intended to operate as part of a number of measures designed to discourage, if not prohibit, the felling of indigenous forests and the milling of green indigenous timber for export except as part of a New Zealand-based industry involving the production of furniture or other finished products: [40].

(c) Whether a proposed export is a "finished or manufactured indigenous timber product" as defined in s 2 of the Forests Act must be determined by the appearance and intended use of the product when it is presented to MPI during the approvals process, or at the time of export. Post-export evidence that the product has been subjected, in a foreign destination, to some modification which is unnecessary to render the product fit for the purpose intended at the time of export

cannot, without more, be relevant to proving that the export was unlawful: [41] – [46].

(d) The lawful export of table-tops made from ancient swamp kauri is not confined to table-tops with their legs or base affixed or included at the time of export: [47] – [49].

(e) A practical approach to the application of the definition of "finished or manufactured indigenous timber product" is required. Whether a table-top or a piece of carved timber made from ancient swamp kauri is sufficiently finished to fall within the category of permitted exports will be a matter of fact and degree for determination on a case by case basis. The statutory purpose of protecting and maintaining New Zealand's living indigenous trees does not call for pedantic scrutiny in MPI's decision-making about the export of ancient swamp kauri. A commonsense approach, founded in any case on evidence which demonstrates that the export product in question is finished to a state in which it is reasonably fit for its intended purpose, will usually be sufficient to determine whether the questioned product meets the statutory test: [53] – [56].

(f) If it is thought desirable to impose stricter limitations on the export of finished products derived from ancient swamp kauri, in order to retain the stock of such taonga in New Zealand, further and more focussed legislation will be required: [57].

(g) The declarations sought under judicial review proceedings are not granted as the instances relied upon by NEPS are moot. In any event, declaratory relief directed at condemning the approval of those exports by MPI or Customs as unreasonable or incorrect could have no practical effect: [58] – [71].

(h) Interpreting the scope of the Protected Objects Act 1975 requires a commonsense and practical approach which avoids unreasonable

consequences. Accepting the submission that the Act protects and limits the export of all ancient swamp kauri (and, by necessary extension, other treasured objects such as whale bones, moa bones and pounamu) would create an oppressive regime restricting the removal from New Zealand, by ordinary travellers, of everyday products which have no particular significance. That cannot have been contemplated: [75] – [81].

(i) It could not have been Parliament's intention to create an impossibly onerous administrative role for MCH under the Protected Objects Act, requiring it to consider all exports of a wide range of natural resources in order to assess the importance of each object against the criteria in the Act: [75] – [82].

(j) NEPS's claim under the Protected Objects Act is based on the misconception that the Act is capable of applying generally to an entire species, such as ancient swamp kauri, rather than to particular objects within the species: [85].

General background

[5] Ancient swamp kauri is often excavated as large trunks with an attached root-ball. These pieces can be up to 15 metres long and two metres in diameter. The rarity, age, size and unique aesthetic characteristics of ancient swamp kauri means that, in recent years, products made from its timber have become items of high demand in the international market, particularly in Europe, China and North America.

[6] Prior to 2010, the volume of ancient swamp kauri being exported from New Zealand each year was relatively small. Export volumes increased dramatically between 2010 and 2015, although they have remained relatively steady since 2013. Exporters fetch high prices for ancient swamp kauri – ranging between $1,500 and $6,000 per cubic metre of the product. The price is generally dependent on the work

required to produce an item and its size. Timber from the stump and root-ball is typically less valuable than table-tops and manufactured furniture.

[7] Table-tops, or table-top slabs, cut from the trunks of logs are the most common ancient swamp kauri export products. Although table-tops are sold with a variety of finishes, overseas purchasers often want them to be in their natural form with minimal sanding or polishing, and with natural edges and cracks. A smaller component of ancient swamp kauri exports is described as "temple poles" or "carvings".

Background to the claims against the first and second defendants

[8] The Forests Act is the primary legislation regulating the export of ancient swamp kauri products. Ancient swamp kauri is an indigenous timber as defined in s 2 of the Act. Section 67C of the Forests Act prohibits the export of indigenous timber products unless the export falls into one of the specified exceptions.[2] One of those exceptions is when the export is a "finished or manufactured indigenous timber product" (FMITP):

> **67C Prohibition on export of certain indigenous forest produce**
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> (1) No person shall export from New Zealand indigenous timber, except the following:
>
> ...
>
> (b) any finished or manufactured indigenous timber product, regardless of the source of the timber used in the product: …

[9] A central issue in this case concerns the definition of FMITP, and whether officials in the Ministry for Primary Industries (MPI) and the Customs Department have been properly interpreting and applying it in various instances where ancient swamp kauri products have been exported from New Zealand.[3] The term is defined in s 2 of the Forests Act:

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2 Section 67T(a) of the Forests Act makes it an offence to export indigenous timber from New Zealand in contravention of s 67C.

3 A claim related to the definition of "stumps" was discontinued during the hearing.

finished or manufactured indigenous timber product—

(a) means any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification; and

(b) includes a complete item or a component of an item (whether assembled or in kitset form) such as joinery, furniture, toys, tools, and household utensils, household fixtures such as rails and toilet seats, ornaments such as picture frames and carvings, and similar items; but

(c) does not include dressed or rough sawn timber, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items

[10] NEPS says that MPI and Customs have wrongfully allowed the export of various ancient swamp kauri products where the exporter has claimed that the product is an FMITP, but where the exports do not actually fall within a proper application of the definition. NEPS's statement of claim contains 22 instances of exports where the defendants were alleged to have wrongfully applied the definition of FMITP. Before those allegations are addressed, it is necessary to set out the roles of Customs and MPI in the export of ancient swamp kauri products.

MPI's role in the export of ancient swamp kauri

[11] Under s 67C(3) of the Forests Act, finished or manufactured indigenous timber products are exempt from the mandatory process by which other indigenous timber products must be inspected and approved by a forestry officer before export:

(3) No indigenous timber (other than personal effects and any finished or manufactured indigenous timber products) may be exported from New Zealand—

(a) unless—

(i) a notice of intention to export has been given to the Secretary in a form approved by the Secretary; and

(ii) the notice of intention includes or is accompanied by a statement of the source of the timber; and

(iii) the timber has been presented to a forestry officer for inspection and he or she has inspected and approved it; and

(b) until the expiry of a period (if any) specified for the purposes of this paragraph in the notice of intention.

[12] Nevertheless, MPI has offered a voluntary inspection and approval process for FMITP exports of ancient swamp kauri since around 2011. The purpose of the voluntary regime is to increase both public and exporter confidence in the legality of the ancient swamp kauri products being exported, as well as to gain better intelligence on the nature of ancient swamp kauri exports with which to carry out its enforcement role. MPI has summarised this voluntary inspection and approval process for FMITP as follows:

(a) An exporter completes an "intention to export" (ITE) form;

(b) Forestry Officers from AsureQuality, a state-owned enterprise contracted by MPI for conducting inspections, inspects the proposed export;

(c) If necessary, the exporters are asked for further information about the proposed export, such as evidence of the buyer's requirements and proposed use;

(d) Proposed exports that are considered to be FMITP are then given "approval".

[13] MPI maintains that a case by case assessment is fundamental to this approval process. It does not wish to apply isolated objective benchmarks to the factual matters which might be relevant to the assessment of whether a proposed export is an FMITP, such as timber moisture content, size and thickness of the product, or its level of sanding. MPI officers also may request evidence, which might be extrinsic to the product itself, that a proposed export is in its final shape and form, and is destined for its proposed use.

[14] In addition to this voluntary approval process, MPI takes other steps to gain intelligence about ancient swamp kauri exports in accordance with its enforcement function. Its officers inspect milling sites and stock piles to identify activities which

indicate that an export is in preparation. It works with Customs to gain intelligence about export numbers, including placing alerts on the Customs computer system to notify suspicious potential exports. It monitors the websites of overseas retailers to ensure that ancient swamp kauri products exported as FMITP are actually being sold as FMITPs.

[15] The evidence establishes that, since late 2011, MPI has progressively improved its procedures for monitoring the export of ancient swamp kauri products. Prior to that time, AsureQuality officers had mistakenly assumed that the approval process related to whether the proposed export matched what was written on the ITE form. MPI emails from around this time demonstrate a growing awareness that exporters may have been intending to push the boundaries of the Act, and were presenting a greater number of marginal cases for approval under the voluntary process.

[16] MPI now has better engagement with AsureQuality, including joint inspections, meetings and peer reviews. It is now well understood that proposed exports are to be assessed as to whether they meet the definition of FMITP. In 2015, MPI also implemented revised operational measures, including further inspections of activities relating to ancient swamp kauri and the employment of an additional Forestry Officer based in the Ministry's Whangarei office. MPI has also encouraged exporters to undergo the voluntary approval process, and its officers have vigorously debated the proper definition of FMITP.

The role of Customs in the export of ancient swamp kauri

[17] NEPS says that, although MPI has the primary regulatory responsibility for the export of ancient swamp kauri, Customs has a crucial secondary responsibility in ensuring that the regulations surrounding ancient swamp kauri exports are upheld.

[18] Sections 49 to 53 of the Customs and Excise Act 1996, and the related rules and regulations, set out the role of Customs in the exportation of goods from New Zealand. In general, the details of every export must be "entered" into the Customs

computer system at least 48 hours prior to the intended export date.[4] Only registered persons are permitted to make an entry onto the system,[5] and each registered person is issued with a unique code and PIN to prevent unauthorised entries from being made. In practice, although some exporters become registered to make entries themselves, many engage in the entry process through the services of an approved Customs broker.

[19] An entry of goods for export must include the applicable tariff item, or tariff code, for that good.[6] Each code comprises ten numbers followed by one letter. The code identifies exactly what the good is, and all exportable goods have one. The Working Tariff Document of New Zealand 2008, which is arranged into different chapters for different types of goods, lists these codes. For example, chapter 44 lists the codes for different wood products, and chapter 94 lists all the codes for various items of furniture.

[20] The majority of export entries into the Customs system will be automatically approved and cleared for export. This is because there are no taxes or regulations surrounding many exportable goods. For example, entries represented as furniture will usually clear automatically, regardless of whether the furniture is made out of exotic timber, indigenous timber or ancient swamp kauri.[7] It seems very likely that the majority of FMITP products exported under the categories of "table-tops" or "carvings" will be represented under the furniture category, and will therefore be automatically cleared.

[21] Other entries, however, will not automatically clear. Instead, the system will alert a Customs Officer, and he or she will have to manually clear the export. Such is the case for entries where the tariff code indicates that the intended export is unprocessed indigenous timber. In those cases, the Customs system will alert the officer and direct them to contact the exporter or broker, so the officer can receive

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4 Customs and Excise Act 1996, s 49(1); Customs and Excise Regulations 1996, reg 28.
5 Customs and Excise Act, pt 11.
6 Customs (Export Entry) Rules 1997.
7 Chapter 16.4 of Customs' Prohibited Exports Policies reflects the requirements of the Forests Act: "Approval is not required for any indigenous wood product that has been manufactured into its final shape and form and is ready to be installed or used for its intended purpose without the need for any further machining or other modification."

the relevant ITE approval documents given by MPI. If the relevant documents exist, the officer can then check that the description of the export on the entry, and the description on the ITE match. If there is a match, the officer will usually clear the export manually. If, on the other hand, the documents do not exist or there is not a match, the officer will not clear the entry, and the item will not be loaded onto the ship or aircraft.

[22] Customs does not ordinarily inspect timber exports as part of the clearance process unless it has received specific intelligence that an export is considered high risk, or if there is an alert or instruction to do so. The evidence indicates that Customs has a history of liaising with MPI in respect of ancient swamp kauri matters, in respect of both individual exporters and individual shipments. There is no express requirement, however, that Customs must inspect, or even x-ray, goods during the export entry and clearance process. It would be impractical for Customs to do so on each and every occasion.

NEPS's claims against MPI and Customs

[23] Against that background, NEPS alleges that MPI has wrongly granted export approval for, and that Customs has wrongly cleared, products that have been mis-described as finished or manufactured indigenous timber products. It is said that MPI and Customs erred in law and acted unreasonably in permitting the exports. NEPS seeks declaratory relief under both the Declaratory Judgments Act 1908 and by way of judicial review.

[24] NEPS's general concern underlying these allegations is that exporters are presenting certain products for export as FMITP, when in fact the products are essentially raw materials which are intended for re-processing overseas. It says that, in this way, the exporters are avoiding the general prohibition on exporting ancient swamp kauri timber.

Swamp kauri table-tops

[25] NEPS has challenged the involvement of MPI and Customs in two different types, or classes, of FMITP exports.[8] The first is the export of "table-tops", "rusticated table-tops", "table slabs" and "slabs". These exports tend to be very large slabs of timber cut from the trunks of ancient swamp kauri logs. They can be over 10 metres long, and are exported in a variety of finishes. Some of them have only basic levels of processing or manufacture and appear to be un-sanded, un-oiled and un-varnished. It appears that they are generally exported without legs, or without holes or routings cut for the attachment of legs. A large number of these items have been exported since 2011.

[26] NEPS has provided evidence these ancient swamp kauri table-top products are being exported overseas. This is also evidence indicating that reprocessing is occurring overseas. Some of this material is taken from offshore websites of retailers that sell ancient swamp kauri products. One American website advertises a large number of ancient swamp kauri "slabs" for sale; many of these are rough and unfinished in appearance. Some of these are advertised in shipments, including shipments from early 2013 and January 2012. The export date of many of the products, however, is unclear and the items may have either been exported without approval, or before MPI improved its processes surrounding the approvals process. Some photos depict completed tables made from ancient swamp kauri table-tops, with captions stating that the tables are "created" or "completed" by the retailer. Although the evidence is by no means conclusive, it is reasonable to infer from it that some further processing of ancient swamp kauri exports has occurred after export from New Zealand. What is less clear is when, and in what circumstances, the reprocessing was undertaken.

[27] NEPS also provided and relies upon video evidence. One video from the American retailer mentioned above shows rough cut slabs of ancient swamp kauri arriving at an unknown destination on a truck. Another video, published online in 2012 by an Italian company that appears to purchase ancient swamp kauri exports,

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[8] Initially, NEPS also brought proceedings challenging MPI's export procedures surrounding "stump logs". These, however, were discontinued during the oral hearing.

depicts ancient swamp kauri slabs being planed, sanded and finished in a large workshop, before showing a final shot of a completed table. The location of this workshop is not apparent from the video.

[28] The evidence obtained from the internet illustrates the difficulty that would confront New Zealand regulatory authorities, whose jurisdiction and responsibilities cease at the border, if they were required to control, or even monitor, what happens to exported products once they reach their intended purchaser overseas.

Ornaments, temple poles and carvings

[29] The second and smaller class of exports that NEPS challenges is ancient swamp kauri "temple poles", "ornaments" and "carvings". These are typically entire logs, which feature surface carving, etching, or painting, exported on the basis that they are finished products which will be used in Chinese temples or tourist sites. NEPS has particularised three of these approvals in its statement of claim. There is no evidence which establishes that these three approved exports have been remanufactured overseas. NEPS's challenge to the approval of these items stems from what is said to be the implausibility of the exporters' explanations as to the intended use of the exports.

[30] The first is an approval to export "Kauri Display Ornaments" to China in around September 2012. NEPS says the items were simply logs that were stripped of bark and coated with varnish or oil. Some might consider it surprising, at least at first blush, that an oiled or lacquered log would be used as an ornament, and that it would be approved for export as an FMITP on that basis. I note, however, the observations of an MPI officer that this log "had been meticulously oil polished", "that it was clear that a lot of time had been put into it", and that the exporter had enhanced the natural features of the log. Put in context, those observations add some degree of credibility to the idea that a venerable piece of timber might actually be intended for use as an ornament.

[31] The second challenged approval is of an item, described as a Māori carving, for export in 2013 to Fuzhou, China. This large cylindrical item would be

approximately four metres high when standing upright. It appears to have been etched with Māori motifs and is painted, although NEPS describes the "carving" as simply a log which had been stripped of bark and lightly etched and painted. MPI officials, however, engaged in internal correspondence with Māori advisors about this export. They were advised that, while unusual, it could not be ruled out as a contemporary carving. MPI officials then obtained more information about the carving and carver from which they concluded that the carving is legitimate.

[32] The final challenged approval is of two swamp kauri trunks as "carved ornamental temple poles" for export to China in 2015. These items are large logs, stripped of their bark, with three New Zealand motifs representing a silver fern, a tiki and a bird such as a pukeko or a kiwi, along with the words "New Zealand Kauri", carved into the surface of the wood. The carvings are not sophisticated in design and do not appear to have been produced by a master Māori carver. The exporter said these items were to be displayed at a particular temple in Yingtan, China. There, they would promote New Zealand culture to the people of China, and would be revered due to their age. MPI conducted inquiries into the exporter's claims, which indicated that the temple site was a bona fide tourist location, and which revealed email trails going back to 2014 in which the buyer selected the carvings to go on the ornaments.

[33] Although the attraction of the somewhat naïve, almost childish, embellishments may lie in the eye of the beholder, they do not appear to be any less representative of New Zealand than many of the inexpensive souvenirs found in shops in Rotorua and lower Queen Street, Auckland. Moreover, the potential attraction of a large piece of timber which may be many centuries – if not millennia – old should not be underestimated.

Declaratory Judgments Act proceedings

[34] Section 3 of the Declaratory Judgments Act 1908 enables interested persons to apply to the High Court for declarations as to the construction of a statute. The Court of Appeal has indicated that the provision confers a very broad right of

standing,[9] and decisions from this Court have accepted that credible, purpose-based organisations can have the requisite interest for standing.[10] The defendants have not suggested that NEPS does not have standing to apply for declarations under s 3.

The declarations sought

[35] NEPS seeks declarations that:

(a) Ancient swamp kauri table-tops, whether described as "rusticated table-tops", "table slabs", "table-tops", "slabs" or otherwise, are not FMITP within the definition in s 2 of the Forests Act 1949, unless:

(i) their actual intended end use at the time of export is as a table;

(ii) they do not require any further machining or other modification, including any further coating of paint, oil or lacquer, sanding or other finishing, to be in its final shape and form and ready to be installed our used;

(iii) they

1. include any intended legs, stand or other mounting (whether assembled or in kitform), or, alternatively,

2. they include all necessary routing, machining or other preparation for the installation of intended legs stand, or other mounting; and

(iv) they are completed beyond the state of being dressed or rough sawn timber.

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9 *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (CA).

10 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2015] NZHC 2393; *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, [2013] 2 NZLR 230; *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265 (HC).

(b) Ancient swamp kauri logs with light surface carvings or decoration are not FMITP within the definition of s 2 of the Forests Act 1949.

[36] Accordingly, the main issue for consideration in the case against MPI and Customs relates to the construction of the definition of FMITP in s 2 of the Forests Act. The parties offer competing interpretations of the provision, each of which is equivocal in terms of its application to particular facts.

[37] I repeat the definition of FMITP in s 2:

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

The meaning of "finished or manufactured indigenous timber product"

[38] As in all statutory interpretation exercises, the meaning of FMITP in the Forests Act is to be ascertained from the text of the definition, and in light of its purpose.[11] The purpose provision of part 3A of the Forests Act, which is the part that contains the export restrictions for ancient swamp kauri, does not assist NEPS. It provides:

> **67B Purpose**
>
> The purpose of this Part is to promote the sustainable forest management of indigenous forest land.

[11] Interpretation Act 1999, s 5(1).

[39] The relevant definitions of the words in s 67B,[12] as well as prior judicial consideration of the provision,[13] make it plain that the primary aim of part 3A is directed to the narrow goal of protecting the longevity and sustainability of land which is wholly or substantially covered by living indigenous flora. Specifically, "sustainable forest management" is defined in s 2 as maintaining the ability of forest growing on "indigenous forest land" – that is, "wholly or predominately under the cover of indigenous flora" – "to continue to provide a full range of products and amenities in perpetuity whilst retaining the forest's natural values."

[40] It is reasonable to infer that the definition of FMITP is intended to operate as part of a number of measures designed to discourage, if not prohibit, the felling of indigenous forests and the milling of green indigenous timber for export except as part of a New Zealand-based industry involving the production of furniture or other finished products.

[41] I am not persuaded, however, that the wording of s 67B lends any support to the proposition that there is a more general conservation purpose to this part of the Act, which supports NEPS's interpretation of FMITP and inhibits the recovery and export of the relics of an ancient forest which have lain buried under in swamps or under farmland for centuries. I agree with MPI's submission that other legislation, such as the Resource Management Act 1991, is better aimed at addressing such an issue. And I respectfully agree with the observation of McGechan J in *Ancient Trees* that:

> … there should not be undue emphasis upon added value processing of kauri remnants before export is permitted. This is forests legislation, not employment protection legislation.[14]

[42] The legislative history supports these conclusions. The definition of FMITP was inserted into the legislation by the Forests Amendment Act 1993. The amending legislation introduced the general prohibition on the export of indigenous timber products, with specific exceptions such as the export of FMITP, and was promoted as ending the clearance of New Zealand's remaining indigenous forests, and promoting

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12 See the definitions of "sustainable forest management" and "indigenous forest land" in s 2.
13 *Ancient Trees of NZ Ltd v Attorney-General* HC Wellington CP483/93, 29 April 1994.
14 At 23.

their sustainable management instead.[15] The legislative purpose focuses on the protection and maintenance of New Zealand's living indigenous trees.

What constitutes "further machining or other modification"?

[43] NEPS suggests that, if the shape and form of a product may be altered by being sanded, filed, planed, routed, drilled, sawn, oiled or varnished, it cannot be said to be in its final shape or form. It follows from that argument that if a table-top requires further holes or slots to be drilled or created for legs, or if it is capable of further sanding, oiling, or painting before use, it cannot be an FMITP. If these propositions are correct, MPI has wrongly approved a large number of ancient swamp kauri shipments.

[44] I accept the submission by MPI, however, that Parliament could not have intended that exports would be prohibited if an overseas purchaser retained the ability to modify a product such as by re-staining or repainting the product to meet their own decorative preferences. Moreover, I do not consider that the drilling of holes or slots in a table-top for the attachment of legs or a base, or the drilling of holes in a timber door for the attachment of hinges, could properly be regarded as "further machining or other modification" which takes the product outside the permitted category of export.

[45] MPI refers to the use of the expression "without the *need* for any further machining or other modification" (emphasis added) in the definition. I agree that it is instructive and that the definition excludes only a product which requires further manufacturing or modification to enable it to be properly regarded as the intended "finished" timber product, such as a table-top, door or mantelpiece.

[46] The offence of unlawfully exporting an indigenous timber product that is not FMITP will be completed when the item leaves New Zealand. Whether a proposed export is an FMITP must be determined by the appearance and intended use of the product when it is presented to MPI during the approvals process, or at the time of export. Post-export evidence that a product has been subjected, in a foreign

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15 (20 June 1992) 526 NZPD 9643.

destination, to some modification which is unnecessary to render the product fit for the purpose intended at the time of export cannot, without more, be relevant to proving that the export was unlawful.[16] It follows that Parliament cannot reasonably be regarded as having intended that what happens to an exported product once it is offshore should be within the purview of New Zealand regulators. Such an intention would not serve the statutory purpose.

Do the words "whether assembled or in kitset form" in para (b) expand or constrain the meaning of the word "component"?

[47] Paragraph (b) of the definition says that an FMITP "includes a complete item or a component of an item (whether assembled or in kitset form)", before listing particular items as examples. NEPS submits that the parentheses qualify the term "component of an item", so that any "component of an item" that is made out of indigenous timber must either be assembled (that is, that a table with a top made of ancient swamp kauri must have its base attached), or in a kitset form (that is, that a top made from ancient swamp kauri must have the base and the means for attaching the base included with the export). It is by no means clear how such a fine distinction serves the statutory purpose described above.

[48] It should be noted that the extended definition in paragraph (b) is not exclusive; it must be read as illustrating, explaining or expanding the primary definition in paragraph (a). The inclusion of components within the definition is instructive in reference to table-tops. By definition, a complete table must have a top and a base; a table-top is necessarily a component of a table. The base may take any form and, once the table is complete, the top may or may not be affixed to it. The examples given in the definition illustrate that the expression "whether assembled or in kitset form" in parentheses qualifies both the term "a complete item" and "a component of an item". It cannot have been intended that wooden toilet seats could not be exported without their cisterns, or that wooden picture frames could not be exported without pictures inserted. Apart from making little sense, such an intention would not support the purpose of sustainable forest management.

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[16] Nevertheless, evidence of major modifications to swamp kauri table-tops previously exported by the exporter (such as sawing the exported product into planks for flooring) may give rise to an inference that a table-top submitted for approval by that exporter is not genuinely intended for use as a table-top.

[49] I do not accept that the lawful export of table-tops made from ancient swamp kauri is confined to table-tops with their legs or base affixed or included at the time of export.

Is paragraph (c) a "carve out" provision?

[50] Paragraph (c) contains a list of items which are expressly excluded from the definition of FMITP:

> … dressed or rough sawn timber, mouldings, panelling, furniture blanks, joinery blanks, building blanks, or similar items

[51] NEPS characterises this paragraph as a proviso, or a trumping provision. It submits that a product which is otherwise in its final shape and form, and can be used for its intended purpose without further machining or modification, but which is also "dressed or rough sawn timber" etc cannot be an FMITP. It provides the example of a timber blank for a guitar body. It says that taken literally, the guitar blank is in its final shape and form and can be used for its intended purpose without further machining or modification. NEPS says it is excluded from being FMITP, however, because of paragraph (c).

[52] I do not accept that submission. First, it is not correct to say that a guitar blank is in its final shape and form. The final shape and form of what begins as a guitar blank will be one component of a guitar, and the blank would not meet the definition in paragraph (a): it is not in its final shape or form and it will need further machining or modification.[17] More to the point, however, I consider this paragraph also to be illustrative or explanatory of items not intended by Parliament to be included in the definition, and given for the avoidance of doubt. The items listed would not, in the usual circumstances, fall within paragraph (a). None of them are in their "final shape and form", and paragraph (c) simply clarifies that.

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[17] Nor is it brought within the scope of the definition by paragraph (b).

Application of the definition to table-tops and carvings

[53] NEPS refers to the evidence of one MPI officer who said that "finished product is a hash to enforce". Given the unlimited range of products that arguably fall within the defined category, it is understandable that officials will experience some difficulty identifying whether marginal products are covered by the definition. But enforcement of the legislation may be assisted by this judgment, at least so far as it confirms that the purpose of the export prohibition is that identified above at [38] – [42]; namely, to discourage, if not prohibit, the felling of indigenous forests and the milling of green indigenous timber for export except as part of a New Zealand-based industry involving the production of furniture or other finished products.

[54] The declaration related to table-tops which NEPS proposes[18] is not in reality a declaration of the meaning of the statutory wording. It is a recast or revised definition intended to meet NEPS's view that only the export of complete tables (whether made up or in kitset form) should be permitted. That view is not sustainable on the plain wording of the section. Each case must be determined on its merits as a matter of fact and degree.

[55] Similarly, the declaration that kauri logs "with light surface carving or decoration" do not fall within the category defined by the statutory wording begs the question of the degree of carving necessary in any particular case to meet the test expressed in the Act.

[56] I am not persuaded that any attempt at making a declaration about the meaning of a description which covers an unlimited variety of potential timber products will assist in the enforcement of the legislation. A practical approach to the application of the definition is required. Whether a table-top or a piece of carved timber made from ancient swamp kauri is sufficiently finished to fall within the category of permitted exports will be a matter of fact and degree for determination on a case by case basis. The statutory purpose of protecting and maintaining New Zealand's living indigenous trees does not call for pedantic scrutiny in MPI's decision-making about the export of ancient swamp kauri. A commonsense

[18] Set out at [35] above.

approach, founded in any case on evidence which demonstrates that the export product in question is finished to a state in which it is reasonably fit for its intended purpose, will usually be sufficient to determine whether the questioned product meets the statutory test.

[57] I decline to make the declarations sought. If it is thought desirable to impose stricter limitations on the export of finished products derived from ancient swamp kauri, in order to retain the stock of such taonga in New Zealand, further and more focussed legislation will be required.

Judicial review proceedings

[58] NEPS's statement of claim directs the judicial review towards both MPI and Customs, but its submissions at the hearing indicated that its judicial review proceedings are primarily directed at actions taken by MPI and its agent, AsureQuality. The causes of action and the declarations sought were revised in the course of the hearing. Very broadly, I understand NEPS's allegations in respect of the judicial review proceedings to be that:

(a) Table-tops and carvings which do not meet the definition of FMITP have been approved or allowed for export. That is because MPI and Customs have made errors of law in their approach to the definition of FMITP in relation to the export of certain ancient swamp kauri products.

(b) MPI and Customs knew or ought to have known that ancient swamp kauri exports presented as FMITP were intended to be further processed or manufactured overseas, and that decisions in relation to these exports were unreasonable.

The case against MPI

[59] The relief sought by NEPS is in the form of declarations that certain actions of MPI were unreasonable:

(a) MPI acted unreasonably in taking at face value exporter claims that dressed or unfinished "table-tops" or "table slabs" (or similar) were "finished or manufactured indigenous timber products" as defined by s 2 of the Forests Act;

(b) MPI acted unreasonably in taking at face value exporter claims that large swamp kauri logs or sections of logs with light surface carving or decoration were "finished or manufactured indigenous timber products" as defined by s 2 of the Forests Act; and

(c) MPI acted unreasonably in entertaining applications for approval to export swamp kauri "stump logs" pursuant to s 67C of the Forests Act.

[60] Section 4 of the Judicature Amendment Act 1972 makes judicial review available in relation to the exercise, or proposed or purported exercise, by any person of a statutory power. Counsel for NEPS accepts that there is no specific statutory power authorising MPI to approve FMITP exports. Instead, it submits that MPI has clearly taken on this role and that it is, in substance, exercising a public power with real effects. Mr Salmon drew attention to the opening paragraph of Elias CJ and Arnold J's judgment in *Ririnui v Landcorp Farming Ltd:*[19]

> [1] This is a judicial review case. Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source.

[61] Immediately following that statement, however, Elias CJ and Arnold J make the point which is more central to the determination of justiciability in this case:[20]

> The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event,

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19 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056. Glazebrook J issued a separate judgment in which she stated that she agreed with the reasons of Elias CJ and Arnold J on this point.

20 At [1].

> discretionary. It is the scope of these limits that is at issue in the present case.

[62] MPI submits that the challenged decisions are beyond these limits of judicial review. It emphasises that there is no requirement for an exporter of FMITP made from ancient swamp kauri to engage in the approval process, and that a lack of approval from MPI does not provide any barrier to an ancient swamp kauri exporter exporting what he or she considers to be FMITP. It is the prohibition in s 67C that provides the legal barrier if the FNITP exception cannot be invoked. MPI says that in the event it receives intelligence that a product has been or is intended to be exported as an FMITP, but is in fact not FMITP, it will investigate the allegation and then consider enforcement action against that exporter if the allegations are borne out.

[63] MPI submits, therefore, that the voluntary inspection and approval process in which it engages amounts to no more than MPI providing its opinion on whether or not a proposed export comes within the definition of FMITP and is not susceptible to review by the Court. It submits that MPI's actions in cases where approval is given are akin to decisions not to prosecute and notes that the courts conventionally exercise "considerable restraint" in reviewing such decisions.[21]

Discussion and conclusions

[64] I am not sure that it is apt to draw an analogy between MPI's approvals of logs for export under the voluntary approvals process and prosecutorial decisions. An approval for export is given before an item leaves the country, at a stage before any event which might give rise to a prosecution. The approvals process is more comparable to the giving of an opinion about the potential legality of an export. Although there has been traditional hesitation about finding that such opinions are reviewable decisions,[22] I acknowledge that the courts may now be more inclined to review such decisions where an opinion could have legal consequences for those relying on it.[23]

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21 *Polynesian Spa v Osborne* [2005] NZAR 408 (HC) at [69].
22 *R v Sloan* [1990] 1 NZLR 474 (HC).
23 *Cancer Society of New Zealand Inc v Ministry of Health* [2013] NZAR 146 (HC) at [23].

[65] But there is a more compelling reason why the relief available on judicial review is not appropriate in this case: the instances NEPS relies upon are moot. The impugned exports occurred well in the past and the evidence before the Court – while sufficient to illustrate the basis for NEPS's concerns – falls well short of that which would be required to support declarations that MPI or AssureQuality acted unreasonably in the way they processed the approval applications or that the particular exports occurred in breach of the Act.

[66] In any event, declaratory relief directed at condemning the approval of those exports by MPI or Customs as unreasonable or incorrect could have no practical effect. That is particularly so when it is apparent from the evidence that MPI has identified, and has more recently taken steps to address, a systemic issue which may have given rise to exports which ought not to have been approved. As discussed above,[24] MPI now acknowledges that officials may have adopted previously an approach based on an undue readiness to accept as credible, without further inquiry, exporter statements about the intended end uses of the exported products. I am satisfied on the evidence of the Ministry's officials that they no longer consider it sufficient to accept at face value the representations of exporters about the degree of processing undertaken and the intended use of the products overseas.

[67] In any case where pre-export approval is sought, or where the Ministry's attention is drawn to a proposed export, officials will be required to make their own assessment of whether the product in question meets the statutory test for exemption from the prohibition on export.

The case against Customs

[68] The NEPS case for judicial review of decisions made by Customs is even less clearly defined and the relief sought does not identify the second defendant as having acted unreasonably.

[69] The role of Customs in processing the clearance of products for export is purely functional, following from MPI's decision to approve an export, and does not

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[24] At [13] – [16].

involve the exercise of any statutory power of decision susceptible to review. If I am wrong about that, I would decline to grant relief in any event, for the reasons I have given regarding MPI.

Claim against the third defendant

[70] The fourth cause of action in NEPS's statement of claim is directed at the Chief Executive of the Ministry of Culture and Heritage (MCH). NEPS says that ancient swamp kauri is a "protected New Zealand object" under the Protected Objects Act 1975, and that the Chief Executive has erred in law by not treating it as such. It further says that the Chief Executive has erred by failing to implement the restrictions and requirements relating to the export of protected New Zealand objects in relation to ancient swamp kauri.

[71] In response, the Ministry submits that ancient swamp kauri is not a protected New Zealand object in its own right. It maintains that it has not erred in law by not applying the regulations in respect of protected New Zealand objects to swamp kauri, and that it has had no applications or complaints about specific exports of the product. This means that, in any case, there has been no occasion for the Ministry to apply the tests in the Act to specific ancient swamp kauri products.

The Protected Objects Act 1975

[72] The first listed purpose of the Protected Objects Act (the POA) states that the Act provides for the "better protection of certain objects by … regulating the export of protected New Zealand objects."[25] Section 2 of the Act defines "protected New Zealand object" in these terms:

> **Protected New Zealand object** means an object forming part of the movable cultural heritage of New Zealand that—
>
> (a) is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional reasons; and

[25] The Protected Objects Act 1975, s 1A.

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

[73] I return to the first limb of this definition below. As to the second limb, sch 4, which is entitled "Categories of protected New Zealand objects", outlines additional criteria necessary to meet the definition of protected New Zealand object. NEPS says that ancient swamp kauri fits into the category of "natural science objects":

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

(3) Objects in this category include—

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

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

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

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

Ancient swamp kauri is a protected New Zealand object, NEPS argues, because it fits within the schedule's definition of "fossil" in paragraph 5:

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

[74] Section 5 of the Act prohibits the export or attempted export of protected New Zealand objects, unless certain conditions are met. One of these conditions is that the exporter has applied for, and received, permission to export the object from the Chief Executive of MCH. Section 7A restricts the instances in which the Chief Executive can grant permission for the export of a protected New Zealand object:

> (1) The chief executive may not grant an application for permission to export if the chief executive determines that the object—
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> (a) is—
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> (i) a protected New Zealand object; and
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> (ii) substantially physically authentic and—
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> (A) made or naturally occurring in New Zealand; or
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> (B) made with New Zealand materials; or
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> (C) used by New Zealanders; or
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> (D) related to New Zealand; and
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> (b) is—
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> (i) associated with, or representative of, activities, events, ideas, movements, objects, persons, or places of importance to New Zealand; or
>
> (ii) important to New Zealand for its technical accomplishment or design, artistic excellence, or symbolic, commemorative, or research value; or
>
> (iii) part of a wider historical, scientific, or cultural collection or assemblage of importance to New Zealand; and
>
> (c) is of such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand's cultural heritage.

Discussion

[75] The principal argument for NEPS in its claim against MCH is that all ancient swamp kauri falls within the definition of "a protected New Zealand object". If correct, that would mean that no example or product of ancient swamp kauri may be exported from New Zealand without the permission of the Chief Executive of MCH.

[76] The declarations sought are that:

(a) Swamp kauri is a "fossil" within the meaning of Schedule 4 Category 5 of the Protected Objects Act 1975; and

(b) Swamp kauri is a "protected New Zealand object" within the meaning of s 2 of the Act.

[77] These claims may be disposed of briefly, largely for the reasons advanced on behalf of the Ministry.

[78] I do not accept that, on a plain reading of the POA, ancient swamp kauri as an entire species or class of objects can be regarded as an object for the purposes of the Act. The word "object", which the POA defines as including "a collection or assemblage of objects",[26] does not in its ordinary meaning refer to an entire species. The scheme of the Act is directed towards the protection of individual objects or collections of objects which form part of New Zealand's important cultural heritage. It may be doubted whether ancient swamp kauri comes within the definition of a "fossil". Although the point was not in issue before him, McGechan J said in *Ancient Trees*, discussing swamp kauri remnants:

> The buried wood has undergone some chemical changes. Undoubtedly, however, it remains "wood". It is not a "fossil".[27]

[79] Even if ancient swamp kauri fits within the definition of "fossil", it cannot reasonably be said that every piece of antique swamp kauri is of importance to New Zealand or a part of New Zealand for any of the reasons specified in paragraph (a), the first limb, of the definition in s 2.

[80] In her submissions on behalf of the Ministry, Ms Arapere referred to a Parliamentary discussion, during the passage of the Protected Objects Amendment Bill 2006, by the Associate Minister for Arts, Culture and Heritage, Hon Mahara Okeroa, about the purpose of protecting "certain objects".[28] The Associate Minister

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26 Section 2.
27 Above n 13, at 3.
28 Section 1A.

said that the purpose of the Act was to protect "precious objects", "items of major heritage value", objects that "sustain our sense of national identity", and "objects whose unique value makes them an indispensable part of New Zealand's cultural heritage".[29] During the debate, Christopher Finlayson MP (as he then was) referred to the export in the 1970s of the door of a treasure house of a Te Atiawa Chief with "five panels carved with exquisite skill, depicting human figures with serpentine bodies and white pointed heads" as an example of an object which could be protected from export under the Act.[30] As Ms Arepere submitted, the scheme of the Act is to protect certain objects of particular national value, not to create sweeping export restrictions on entire categories of object such as bulk natural materials.

[81] Interpreting the scope of the Act requires a commonsense and practical approach which avoids unreasonable consequences.[31] Accepting the submission that the POA protects and limits the export of all ancient swamp kauri (and, by necessary extension, other treasured objects such as whale bones, moa bones and pounamu) would create an oppressive regime restricting the removal from New Zealand, by ordinary travellers, of everyday products which have no particular significance. That cannot have been contemplated.

[82] I am satisfied also that it could not have been Parliament's intention to create an impossibly onerous administrative role for MCH under the Act, requiring it to consider all exports of a wide range of natural resources in order to assess the importance of each object against the criteria in the Act. Other legislative schemes exist for that purpose; as this case demonstrates, the export of swamp kauri is governed by the Forests Act.

[83] The Ministry's submissions included an example of the way in which the Ministry adopts a practical, case by case approach to applications for the export of moa bones, which are listed in Schedule 4 of the Act. The evidence of Dr David Butts for the Ministry explained that two cases considered by the Ministry under the

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29 (2 Aug 2006) 633 NZPD 4646.

30 (10 May 2006) 631 NZPD 2971.

31 See, for example, the approach mandated by the Supreme Court in a case concerned with tax legislation: *Contract Pacific Limited v Commissioner of Inland Revenue* [2010] NZSC 136; [2011] 1 NZLR 302 at [30] per William Young J.

Act involved a conclusion that the moa bone samples concerned did not meet the definition of a protected New Zealand object, because they did not meet the additional criteria of rarity and natural science significance.

[84] A similar approach would be appropriate in the event of an intention to export an example of ancient swamp kauri which met the "importance" criteria in the Act because of its particular characteristics.

[85] In summary, NEPS's claim under the POA is based on the misconception that the Act is capable of applying generally to an entire species, such as ancient swamp kauri, rather than to particular objects within the species. The declarations sought by NEPS are not appropriate.

Result

[86] For the reasons given, I decline to grant any of the relief sought by the plaintiff.

Costs

[87] That is not to say, however, that the issuing of the proceeding by NEPS was not justifiable. Plainly, there had been historical concern about the increase in exports of ancient swamp kauri products giving rise to genuine questions about whether the regulatory regime was being managed appropriately. It is not my intention to pre-empt any application by the defendants for costs, but I do not consider it could reasonably be suggested that the plaintiff was not motivated to bring this proceeding by what might be regarded as legitimate public interest. And it seems clear that the change in MPIs approach to the approval scheme has been informed by the proceeding and the evidence adduced in it.

[88] I reserve costs for the exchange of memoranda if orders are sought. Any application for costs shall be filed and served on or before 31 March 2017. Any memorandum in reply should be filed and served on or before 28 April 2017. Costs shall then be determined on the papers unless the Court directs otherwise.

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Toogood J