**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA250/2022**
**[2023] NZCA 641**

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| BETWEEN | MUAŪPOKO TRIBAL AUTHORITY INCORPORATED<br>Appellant |
| AND | MINISTER FOR THE ENVIRONMENT<br>First Respondent |
| | TE RŪNANGA O RAUKAWA INCORPORATED<br>Second Respondent |

| | |
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| Hearing: | 20–21 September 2023 |
| Court: | Brown, Mallon and Wylie JJ |
| Counsel: | T H Bennion and E A Whiley for Appellant<br>T C Stephens and E M Jamieson for First Respondent<br>R B Enright, J M Pou and R G Haazen for Second Respondent<br>C M Hockly for Horowhenua 11 Part Reservation Trust as First Intervener<br>S Johnston for Manawatū-Whanganui Regional Council as Second Intervener<br>Horticulture New Zealand as Third Intervener abiding the decision of the Court |
| Judgment: | 13 December 2023 at 3 pm |

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## JUDGMENT OF THE COURT

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**A The appeal and the cross-appeal are allowed.**

**B Clause 3.33 and Appendix 5 of the National Policy Statement for Freshwater Management 2020 are quashed.**

**C The Minister for the Environment is directed to reconsider whether there should be an exemption from the National Policy Statement for Freshwater**

**Management 2020 for the vegetable growing areas in Horowhenua and Pukekohe and, if there is to be an exemption, what form such exemption should take.**

**D The first respondent must pay costs to the appellants, the second respondent/cross-appellant, the first intervener and the second intervener, each for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel for the appellant and the second respondent/cross-appellant.**

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**REASONS OF THE COURT**

(Given by Wylie J)

**Table of contents**


| | |
|---|---|
| **Introduction** | [1] |
| **Background** | [9] |
| *The affected water bodies* | [9] |
| *The appellants/cross-appellants* | [13] |
| *The Horowhenua vegetable growing area* | [16] |
| *The interveners* | [18] |
| *Legislation relating to the Lake and Stream – the Waitangi Tribunals 2017 report* | [21] |
| **Discharges to water** | [23] |
| **National policy statements** | [26] |
| **The NPS-FM** | [31] |
| *The fundamental concept/principles* | [32] |
| *The objective/policies* | [33] |
| *Implementation* | [34] |
| *The exemptions* | [38] |
| **How the vegetable exemption works in practice** | [41] |
| **The Statements of Claim** | [43] |
| *Muaūpoko's statement of claim* | [43] |
| *Ruakawa's statement of claim* | [44] |
| **The High Court Judgment** | [45] |
| **List of issues on appeal** | [60] |
| **Submissions** | [62] |
| *Muaūpoko's submissions* | [62] |
| *Ruakawa's submissions* | [67] |
| *The Trust's Submissions* | [72] |
| *The Regional Council's Submissions* | [75] |

*The Minister's submissions* [76]
**Analysis** [79]
**Consultation** [79]
*Relevant statutory provisions* [79]
*The steps taken by the Minister* [84]
*The further consultation undertaken in relation to the vegetable exemption* [104]
*Did the further consultation undertaken by the Minister comply with the RMA?* [137]
*Conclusion* [144]
**Other issues** [145]
**Result** [146]

**Introduction**

[1] These appeals concern a challenge, by way of judicial review, to cl 3.33 (referred to in this judgment as the "vegetable exemption") of the National Policy Statement for Freshwater Management 2020 (the NPS-FM).[1]

[2] Freshwater environments have been in decline for many years. This became an issue in the 2017 general election and improving freshwater quality was a key priority for the incoming Government when it took office. In June 2018, Cabinet agreed to establish a work programme to meet its commitment to freshwater improvement. The programme was launched in October 2018. It involved several proposed reforms, including amendments to the Resource Management Act 1991 (the RMA) to provide for a new freshwater planning regime, a new national policy statement for freshwater management and new national environmental standards for freshwater.

[3] After receiving and considering various reports as well as representations from interested groups, in September 2019, the Ministry for the Environment (the MfE) published a package of proposals and the Minister for the Environment, the Honourable David Parker (the Minister), together with the Ministers of Agriculture and of Local Government put them out for public consultation. One of the documents in the package was a draft of the proposed new NPS-FM. The draft proposed new

1 Ministry for the Environment *National Policy Statement for Freshwater Management 2020* (February 2023) [NPS-FM]. We note that the NPS-FM was reprinted in February 2023: see below n 38.

“attributes” intended to assist in the management of freshwater pollution.[2] Relevantly the draft proposed new attributes for dissolved inorganic nitrogen and dissolved reactive phosphorus. It was proposed that these and other attributes would be set for all freshwater bodies in New Zealand.

[4] Vegetable growers in the Horowhenua and Pukekohe areas raised concern that run off from their land use activities would make it difficult to meet the proposed new attributes, particularly for dissolved inorganic nitrogen, in freshwater bodies in or adjacent to their vegetable growing areas. Growers were concerned that the proposed “bottom line” attribute for dissolved inorganic nitrogen would require significant reductions in the application of fertilisers to their crops, making vegetable production unviable. They were also concerned that the proposed new attribute would, in effect, put in place restrictions on the intensification of rural land use in areas adjacent to freshwater bodies.

[5] The vegetable exemption was developed as a result of these concerns. It proposed putting in place a special regime for freshwater bodies in two major vegetable growing areas — one in Horowhenua and the other in Pukekohe. The exemption would permit the regional councils in those areas to set freshwater quality targets in their regional plans that were below the national bottom lines stipulated in the NPS-FM for nitrate-related attributes in freshwater.

[6] After undertaking further consultation (which we discuss below) the Minister recommended approval of the proposed NPS-FM, including the vegetable exemption, on 3 August 2020. It was approved by the Governor-General in Council pursuant to s 52(2) of the RMA on the same day and it came into force as from 3 September 2020.

[7] The appellant, Muaūpoko Tribal Authority Inc (Muaūpoko), and the cross-appellant, Te Rūnanga o Raukawa Inc (Raukawa) commenced separate proceedings in the High Court, both by way of judicial review, challenging the legality of the vegetable exemption. Both alleged that the vegetable exemption was unlawful and both sought orders setting it aside. The proceedings were not formally

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2 An attribute is defined in the NPS-FM as a measurable characteristic (numeric, narrative, or both) that can be used to assess the extent to which a particular value is provided for: cl 1.4(1).

consolidated but both were heard together by Edwards J in late October 2021. The Judge issued her judgment in relation to both on 29 April 2022.[3] She dismissed the applications for review.

[8] Muaūpoko has appealed Edwards J's judgment. Raukawa has cross-appealed. Its cross-appeal has been treated as an appeal and we heard both the appeal and the cross-appeal together.[4]

## Background

*The affected water bodies*

[9] Lake Horowhenua, also known as Roto Horowhenua, Waipunahau, Punahau and Te Takere Tangata o Punahau,[5] is located to the west of Levin, between State Highway 1 and the sea. It is the largest dune lake in the country with a surface area of approximately 3.9 square kilometres. It is relatively shallow — about two metres deep. It receives water from several small streams and drains as well as from groundwater. The direct catchment area for the Lake comprises some 43.6 square kilometres.

[10] Pollutants have been entering Lake Horowhenua for many years. Between the early 1950s and 1987, sewage from Levin was discharged into the Lake. There has also been significant agricultural run-off into the Lake, including from the surrounding vegetable growing area. Toxic cyanobacteria are regularly present in the Lake. This is related to the large amounts of nutrients and sediment entering the Lake and already present in it. Cyanobacteria blooms can cause health issues. They can even cause fatalities in dogs and small children. The Lake is now one of the most polluted and degraded lakes in the country. It is classified as hypertrophic — in other words, it is highly fertile and supersaturated in phosphorus and nitrogen.

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3 *Muaūpoko Tribal Authority Inc v Minister for Environment* [2022] NZHC 883, [2022] NZRMA 481 [High Court judgment].

4 In a minute issued by this Court on 29 June 2022, Miller J noted that Raukawa's interests were identical to those of Muaūpoko in the context of this appeal and he directed that Raukawa should be treated as an appellant for timetabling purposes.

5 Waitangi Tribunal *Horowhenua, The Muaūpoko Priority Report, Pre-publication Version* (Wai 2200, 2017) [Waitangi Tribunal Muaūpoko report] at 61.

[11] The Hōkio Stream runs from Lake Horowhenua out to the coastal marine area. It is the sole outlet from the Lake. In 2017 the Waitangi Tribunal noted in a report that then recent data suggested that the Stream becomes anoxic (depleted of dissolved oxygen) at night and that this acts to lessen the Lake's already deeply compromised ability to recover from its hypertrophic state.[6]

[12] Before us, Muaūpoko and Raukawa asserted that the state of the Lake and the Stream is at a "tipping point". They believe that even if the quantities of pollutant entering the Lake and Stream are reduced, there is still a very real risk that they might not recover.

*The appellants/cross-appellants*

[13] Muaūpoko is the mandated authority for the Muaūpoko iwi and hapū. It was incorporated in 1997. Its relationship to the Horowhenua area has been considered by the Waitangi Tribunal.[7] The Tribunal found that Muaūpoko iwi and hapū have been present in the area since at least the 12th century and that Muaūpoko's members have lived alongside the rivers and lakes in the region, including Lake Horowhenua. Muaūpoko considers that its rohe includes the Lake and the Stream and that it holds mana whenua and kaitiaki over them. The Lake is regarded by Muaūpoko as an ancestral taonga. Counsel for Muaūpoko, Mr Bennion, quoted from a kaumātua, Marokopa Wiremu-Matakatea (whose comments are recorded in the relevant Waitangi Tribunal report),[8] "… if the [Lake] was to die [Muaūpoko] would cease to exist … it's who we are, it's our life blood".

[14] Raukawa represents the confederation of Ngāti Raukawa ki te Tonga iwi and 25 hapū. They incorporated Raukawa in 1988. Raukawa claims to be entitled to assert tino rangatiratanga, kaitiakitanga and mana whenua over Lake Horowhenua and the Hōkio Stream. While its claim is yet to be considered by the Waitangi Tribunal, we were advised that it proceeds on the basis that the Lake, Stream and related catchments are related by whakapapa to Raukawa and that the Lake and the Stream are tūpuna.

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6 At 703.
7 Waitangi Tribunal Muaūpoko report, above n 5.
8 At 64 (footnote omitted).

Raukawa asserts that those who hold mana whenua in the catchment are of Ngāti Raukawa descent and that they include a number of the hapū it represents.

[15] Although they have competing claims to the water bodies in the Horowhenua area, both Muaūpoko and Raukawa, and those they represent, shared a common objective in this appeal. They and their members have a deep sense of grievance that Lake Horowhenua and the Hōkio Stream, and other waterways in the Horowhenua area, have been significantly compromised over a prolonged period. They consider that the Lake is central to their mana, their mauri and their identity. They are opposed to the Lake and the Stream being treated differently to other freshwater bodies in New Zealand through the operation of the vegetable exemption in the NPS-FM. They see the vegetable exemption as a licence permitting the ongoing pollution of the affected water bodies.

*The Horowhenua vegetable growing area*

[16] There are a number of vegetable growing areas in the Manawatū-Whanganui region. One major area is adjacent to Lake Horowhenua and the Hōkio Stream. Over 60 per cent of the brassica and green vegetable crops (including leafy greens, Chinese greens, potatoes and onions) grown in the Manawatū-Whanganui region are grown in this area. This represents some 20 per cent of New Zealand's supply of green vegetables and the area is important for the year-round supply of green vegetables throughout the country.

[17] Commercial vegetable growing in the area results in pollution entering freshwater — in particular Lake Horowhenua and the Hōkio Stream. It is estimated by the growers that vegetable growing in the area causes somewhere between 23 and 27 per cent of the nitrogen load discharging to the surrounding receiving environment. Growers say that they are aware of the adverse environmental effects that result from their land use. They say that they have been endeavouring to make improvements to their practices to reduce the impact of their activities on freshwater.

*The interveners*

[18] The first intervener is the Horowhenua 11 Part Reservation Trust (the Trust). It is the legal owner of Māori freehold land, including the bed of Lake Horowhenua, a strip of land around the original margin of the Lake and the bed of the Hōkio Stream. It represents the current owners of the bed of the Lake and Stream as well as their tūpuna. There are approximately 2000 beneficiaries of the Trust (although it may be that some of them are deceased). It supported Muaūpoko and Raukawa's appeal.

[19] The second intervener is the Manawatū-Whanganui Regional Council (the Regional Council). It has statutory responsibilities under the RMA in respect of both the Lake and the Stream. It appeared before us to advise on its relevant obligations and on how it considers the vegetable exemption operates.

[20] The third intervener is Horticulture New Zealand. It appeared before the High Court but advised us that it did not intend to take an active role on the hearing of the appeals. Rather it took a watching brief and agreed to abide the decision of the Court.

*Legislation relating to the Lake and Stream — The Waitangi Tribunal's 2017 Report*

[21] The history surrounding Lake Horowhenua and the Hōkio Stream is lengthy and complex. It has previously been considered by the High Court.[9] Further, Edwards J captured aspects of the relevant history in her judgment. There was no challenge to this part of the Judge's decision and we gratefully adopt her summary. She noted as follows:[10]

> [24] In 1898, following litigation under the Horowhenua Block Act 1896 title to the bed of Lake Horowhenua was vested in [the trustees of the Trust] 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." …
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> [25] In 1905, Lake Horowhenua was declared to be a "public recreation reserve" under the Horowhenua Lake Act 1905. A Domain Board was established to control the activities of the Lake, with at least one-third of the members to be Māori. This legislation was a source of contention and the

[9] *Paki v Māori Land Court* [2015] NZHC 2535 at [9]–[39].

[10] High Court judgment, above n 3 (footnotes omitted).

> 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.
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> [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. Nothing in that provision was said to affect the fishing rights previously granted. The Act also established a new Domain Board.
>
> …
>
> [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, [the] Regional Council and the Department of Conservation. The purpose of the Accord is for the parties to come together to halt degradation and put in place remedial measures that will return Lake Horowhenua to a taonga.
>
> [29] … 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 [Te Tiriti o Waitangi/]the Treaty of Waitangi and its principles in relation to the Muaūpoko people. Recommendations were made for the establishment of a contemporary Muaūpoko governance structure to act as kaitiaki for the Lake, stream, and associated waterways. Additionally, the Tribunal report recorded that Ngāti Raukawa ki te Tonga may also have interests in the area. …

[22] It is also appropriate to record that the Waitangi Tribunal, in its 2017 report, concluded, amongst other findings, as follows:

(a) The Horowhenua Lake Act 1905 took control of Lake Horowhenua from its Muaūpoko owners and vested that control in a board, thus turning Muaūpoko's private property into a public recreation reserve and subordinating Muaūpoko's use of their private property (a taonga) to that of the public.[11]

(b) This transfer was done without consent or compensation and was a serious breach of Te Tiriti o Waitangi/the Treaty of Waitangi (the

[11] Waitangi Tribunal Muaūpoko report, above n 5, at 453.

Treaty), which left Muaūpoko essentially powerless to exercise tino rangatiratanga over their taonga.[12]

(c) There were omissions from the 1905 Act. In particular, the Crown failed to include prohibitions against pollution from entering the Lake, in breach of the principles of partnership and the duty of active protection in the Treaty.[13]

(d) There were omissions from the Reserves and Other Lands Disposal Act 1956 as well. It provided no compensation for past acts or omissions of the Crown and it did not include provisions controlling pollution or the entry of water-borne pollutants into the Lake, notwithstanding that pollution was known to be a problem before the Act was passed.[14]

(e) Causes of pollution include agricultural runoff, the build-up of nutrient-rich sediment and other factors relating to farming and nearby urban development. The key cause of the pollution was the discharge of effluent (human waste) into the Lake between 1952 and 1987. The Crown was complicit in the discharge of this effluent from at least 1957.[15]

(f) Muaūpoko has objected over the years to the cultural offence of contaminating waters used for food with human waste. The Crown was aware of these protests. They were expressed through petitions, Domain Board meetings, litigation and in various Tribunal claims.[16]

**Discharges to water**

[23] This appeal concerns the discharge of pollutants into Lake Horowhenua and the Hōkio Stream. Under s 15 of the RMA, no person may discharge any contaminant

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12 At 453.
13 At 454.
14 At 512.
15 At 585.
16 At 585–586.

into water or onto land in circumstances which may result in that contaminant entering water, unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan or a resource consent.[17]

[24] The evidence before us suggested that there is only one consent to discharge into Lake Horowhenua but that there are numerous consents to discharge onto land in the catchment area. The evidence also suggested that there are a number of other discharges in the area which may not have been properly consented in accordance with the RMA.[18]

[25] Regional councils are entrusted with the function of controlling the use of land for the purpose of maintaining the quality of water in water bodies, as well as enhancing the quality of water and ecosystems within those water bodies.[19] Regional councils are primarily responsible for the control of discharges into water.[20] Such control is achieved through regional policy statements and regional plans.[21] Regional plans invariably contain rules which seek to control such discharges and, in formulating these rules, regional plans must "give effect to" any relevant national policy statements.[22] The words "give effect to" used in the RMA mean to "implement".[23] This is a strong directive, creating a firm obligation on those subject to it.[24]

**National policy statements**

[26] The NPS-FM is a national policy statement under the RMA. It is important to record its place in the planning hierarchy established under the RMA so that the significance of the document can be appreciated.

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17 Resource Management Act 1991, s 15(1)(a)–(b).
18 Reference was made to a decision of the Environment Court: *Wellington Fish and Game Council v Manawatū-Wanganui Regional Council* [2017] NZEnvC 37.
19 Resource Management Act, s 30(1)(c).
20 Section 30(1)(f).
21 Section 66(1)(a).
22 Section 67(3).
23 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [77].
24 At [77], referring to *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 at [51].

[27] There is a three-tiered management system under the RMA — national, regional and district — moving from the general to the specific.[25]

[28] Part 2 of the RMA sets out the Act's purpose — the promotion of the sustainable management of natural and physical resources — and its key principles.[26] The purpose and the key principles fall to be implemented through the various planning documents required under the legislation:

(a) First, there are documents which are the responsibility of central government — national environmental standards, national policy statements, the New Zealand Coastal Policy Statement and national planning standards.[27] The purpose of national policy statements (such as the NPS-FM) is to set out objectives and identify policies for matters of national significance that are relevant to achieving the purpose of the RMA.[28]

(b) Secondly, there are documents which are the responsibility of regional councils — regional policy statements and regional plans.[29] Regional policy statements are also intended to achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the region.[30]

(c) Thirdly, there are documents which are the responsibility of territorial authorities — specifically district plans.[31] District plans are intended to assist territorial authorities to carry out their functions in order to achieve the purpose of the RMA.[32]

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25 *King Salmon*, above n 23, at [14].
26 Resource Management Act, ss 5(1) and 6–8.
27 *King Salmon,* above n 23, at [11(a)].
28 Resource Management Act, s 45(1).
29 *King Salmon,* above n 23, at [11(b)].
30 Resource Management Act, s 59.
31 *King Salmon,* above n 23, at [11(c)].
32 Resource Management Act, s 72.

The effect is that, as one goes down the hierarchy of documents, greater specificity is provided both as to content and locality — the general becomes increasingly specific.[33] 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 of the RMA more generally.[34]

[29] As the Judge recorded, the content of national policy statements is set out in s 45A of the RMA.[35] A national policy statement must state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA.[36] National policy statements can also state the matters set out in s 45A(2), namely matters that local authorities must consider in preparing policy statements and plans, methods or requirements in policy statements or plans, matters that local authorities must achieve or provide for in policy statements and plans, constraints or limits on the content of policy statements or plans, objectives and policies that must be included in policy statements or plans, directions to local authorities on the collection and publication of information and on monitoring and reporting, and any other matter relating to the purpose or implementation of the national policy statement. National policy statements may apply generally to specified districts or regions or to any specified part or parts of New Zealand.[37]

[30] There are detailed provisions relating to the preparation of national policy statements (and other national directions). We discuss these provisions below.

**The NPS-FM**

[31] The NPS-FM replaced the National Policy Statement for Freshwater Management 2014. As noted, the NPS-FM came into force on 3 September 2020. It has since been amended by the Minister under s 53 of the RMA,[38] but these amendments have no relevance for present purposes.

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33 *King Salmon*, above n 23, at [14].
34 At [30].
35 High Court judgment, above n 3, at [35].
36 Resource Management Act, s 45A(1).
37 Section 45A(3).
38 The NPS-FM was reprinted in February 2023 to incorporate amendments made by the Minister pursuant to s 53 of the RMA.

*The fundamental concept and principles*

[32] The fundamental concept underlying the NPS-FM is Te Mana o te Wai.[39] This concept seeks to encapsulate the fundamental importance of water. It acknowledges that protecting the health of freshwater protects the health and wellbeing of the wider community and the mauri of the wai. Te Mana o te Wai encompasses six principles relating to the role of tangata whenua and other New Zealanders in the management of freshwater. These principles inform the NPS-FM and its implementation.[40] They are as follows:

(a) Mana whakahaere.

(b) Kaitiakitanga.

(c) Manaakitanga.

(d) Governance.

(e) Stewardship.

(f) Care and respect.

There is a hierarchy of obligations in Te Mana o te Wai. It prioritises first, the health and wellbeing of water bodies and freshwater ecosystems, secondly, the health needs of people and thirdly, the ability of people and communities to provide for their social, economic and cultural wellbeing now and in the future.[41]

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[39] NPS-FM, above n 1, at cl 1.3.

[40] Clause 1.3(3)–(4).

[41] Clause 1.3(5).

*The objective and policies*

[33] The objective of the NPS-FM is to ensure that natural and physical resources are managed in a way that prioritises the hierarchy of obligations set out above.[42] There are 15 policies. Relevantly, they include the following:[43]

> **Policy 1:** Freshwater is managed in a way that gives effect to Te Mana o te Wai.
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> **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 (including 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 9:** The habitats of indigenous freshwater species are protected.
>
> …
>
> **Policy 12:** The national target … for water quality improvement is achieved.
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> **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 15:** Communities are enabled to provide for their social, economic, and cultural well-being in a way that is consistent with [the NPS-FM].

*Implementation*

[34] Part 3 of the NPS-FM focuses on implementation. It sets out a non-exhaustive list of things that local authorities must do to give effect to the objective and policies set out in the NPS-FM. However, nothing in part 3 prevents a local authority adopting more stringent measures than are required by the NPS-FM nor limits a local authority's

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[42] Clause 2.1(1).
[43] Clause 2.2.

functions and duties under the RMA in relation to freshwater.[44] Relevantly, every regional council must:

(a) Engage with communities and tangata whenua to determine how Te Mana o te Wai applies to water bodies and freshwater ecosystems in its region.[45]

(b) Give effect to Te Mana o te Wai and, in doing so, actively involve tangata whenua in freshwater management and engage with communities and tangata whenua to identify long term visions, environmental outcomes and other elements of the national objectives framework.[46]

(c) Develop long-term visions for freshwater in its region,[47] through engagement with communities and tangata whenua, and actively involve tangata whenua in freshwater management.[48]

(d) Adopt an integrated approach. This requires local authorities, amongst other things, to recognise the inter-connectedness of the whole environment and to recognise interactions between freshwater, land and the like.[49]

(e) Manage land use and development in catchments in an integrated and sustainable way to avoid, remedy or mitigate adverse effects, including cumulative effects, on the health and wellbeing of water bodies, freshwater ecosystems and receiving environments.[50]

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44 Clause 3.1(1)–(2).
45 Clause 3.2(1).
46 Clause 3.2(2)(a)–(b).
47 Clause 3.3.
48 Clause 3.4.
49 Clause 3.5(1).
50 Clause 3.5(1)(c).

(f) Make or change its regional policy statement to the extent needed to provide for the integrated management of the effects of the use and development of land and freshwater on receiving environments.[51]

[35] The national objectives framework is set out in subpart 2 of part 3. It requires that every regional council engage with communities and tangata whenua at each step of the process.[52] Regional councils are required to undertake the following steps:[53]

(a) Identify freshwater management units in their regions.

(b) Identify values for each such unit.

(c) Set environmental outcomes for each value and include them as objectives in regional plans.

(d) Identify attributes for each value and set baseline states for those attributes.

(e) Set target attribute states, environmental flows and levels, and other criteria to support the achievement of environmental outcomes.

(f) Set limits as rules and prepare action plans as appropriate to achieve environmental outcomes.

[36] Clause 3.11 is relevant to this appeal. It provides that, in order to achieve environmental outcomes, every regional council must set a target attribute state for each attribute identified for a value and identify the site or sites to which the target attribute state applies. 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. Pursuant to cl 3.11(4), 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, subject however to three exceptions which are set out in cls 3.31, 3.32

51 Clause 3.5(2).
52 Clause 3.7.
53 Clause 3.7(2).

and 3.33 (the latter being the vegetable exemption). Every target attribute state must specify a timeframe for achieving that target attribute state or, if the target attribute state has already been achieved, state that it will be maintained as from a specified date. Timeframes for achieving target attribute states may be of any length or period but, if timeframes are long-term, they must include interim target attribute states (set for intervals of not more than 10 years) which can be used to assess progress towards achieving the target attribute state in the long-term. 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.

[37] There are then provisions specifying what regional councils must do to achieve target attribute states and environmental outcomes, to make special provision for attributes affected by nutrients, for the setting for limits on resource use, the preparation of action plans, the setting of environmental flows and levels, the identification of take limits, for monitoring, for assessing trends and, relevantly, for responding to degradation.[54] In this regard, cl 3.20 provides that if a regional council detects that a freshwater management unit or part of such unit is degraded or degrading, it must, as soon as practicable, take action to halt or reverse the degradation (for example, by making or changing a regional plan, or preparing an action plan). Every action taken in response to a deteriorating trend must be proportionate to the likelihood and magnitude of the trend, the risk of adverse effects on the environment and the risk of not achieving target attribute states.

*The exemptions*

[38] Turning to the exemptions, cl 3.31 deals with large hydro-electric generation schemes and cl 3.32 deals with naturally occurring processes. Neither of these clauses was in issue in the High Court or on this appeal.

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54 Clauses 3.12–3.20.

[39] Clause 3.33 — the vegetable exemption — is in issue. Relevantly, it provides as follows:

> **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 [a freshwater management unit] or part of [a freshwater management unit] 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) [a freshwater management unit] or part of [a freshwater management unit] 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 [freshwater management unit] or part of the [freshwater management unit] 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.
>
> …
>
> (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.

[40] Appendix 5, part 1, describes the two specified vegetable growing areas, (including the Lake Horowhenua and the Hōkio Stream catchments). Part 2 specifies the attributes referred to in cl 3.33(3)(b). They are as follows: phytoplankton, periphyton, total nitrogen (trophic state), ammonia (toxicity), nitrate (toxicity), dissolved oxygen, cynobacteria and macroinvertebrates. Appendices to the NPS-FM detail the attribute bands, the descriptions, and the national bottom lines for each attribute. For example:

(a) Phytoplankton (trophic state) in lakes has a national bottom line of 12 milligrams chlorophyll-*a* per cubic metre (mg chl-*a*/$m^3$) as an annual median and 60 mg chl-a/$m^3$ as an annual maximum. The risk of exceeding these figures is said to be as follows:[55]

> Lake ecological communities have undergone or are at high risk of a regime shift to a persistent, degraded state (without native macrophyte/seagrass cover), due to impacts of elevated nutrients leading to excessive algal and/or plant growth …

(b) Total nitrogen (trophic state) in lakes has a national bottom line of 750 milligrams per cubic metre (mg/$m^3$) as an annual median in seasonally stratified and brackish water and 800 mg/$m^3$ in polymictic water. Total nitrogen (trophic state) in excess of these bottom lines is said to result in the same effects as are noted immediately above where phytoplankton (trophic state) exceeds the national bottom line.[56]

(c) Nitrate (toxicity) in rivers has a national bottom line of 2.4 milligrams nitrate-nitrogen per litre (mg $NO_3$-N/L) as an annual median and 3.5 mg $NO_3$-N/L as an annual 95$^{th}$ percentile. If the nitrate (toxicity) level exceeds these national bottom lines, but falls below 6.9 mg $NO_3$-N/L, growth effects on up to 20 per cent of species are noted but it is recorded that there should be no acute effects.

55 Appendix 2A, table 1.
56 Appendix 2A, table 3.

Above 6.9 mg $NO_3$ – N/L, impacts on the growth of multiple species are expected and at levels above 20 mg/L, there is a risk of death to sensitive species.[57]

(d) Cyanobacteria (planktonic) in lakes and lake fed rivers has a national bottom line of 1.8 cubic millimetres per litre ($mm^3/L$) biovolume equivalent of potentially toxic cyanobacteria or 10 $mm^3/L$ total biovolume of all cyanobacteria. If cyanobacteria (planktonic) levels exceed these figures it is anticipated that high health risks will exist from any contact with the freshwater.[58]

**How the vegetable exemption works in practice**

[41] In the High Court, Edwards J outlined the operation of the vegetable exemption as relevant to Muaūpoko's and Raukawa's claims. She observed as follows:

(a) The regional council decides whether the vegetable exemption applies.[59]

(b) The vegetable exemption is permissive. If it applies, it permits, but does not require, the regional council to set a target attribute below the national bottom line.[60]

(c) The vegetable exemption mandates improvement. The target attribute state must be set to achieve improvement without compromising the domestic supply of fresh vegetables or the maintenance of food security.[61]

(d) The timeframes for compliance are to be set by the regional council.[62]

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57 Appendix 2A, table 6.
58 Appendix 2A, table 10.
59 High Court judgment, above n 3, at [125(a)].
60 At [125(b)].
61 At [125(c)].
62 At [125(d)].

(e) Other parts of the NPS-FM remain in force. The regional council must still give effect to Te Mana o te Wai and actively involve tangata whenua in decisions involving the freshwater bodies to which the vegetable exemption applies.[63]

(f) The vegetable exemption is time-bound. It will expire in 2030 or when it is replaced by national environmental standards or other regulations under the RMA.[64]

[42] We agree with this analysis.

**The statements of claim**

*Muaūpoko's statement of claim*

[43] Muaūpoko's statement of claim is dated 7 December 2020. Four causes of action were raised:

(a) First, illegality. It was asserted that because the vegetable exemption was significant new policy not included in the draft NPS-FM and therefore not reported on under s 52(1)(a) of the RMA, the Minister acted unlawfully in changing the draft NPS-FM. In the alternative, it was asserted that the Minister was required to consider whether to revisit some or all of the steps in the truncated process adopted by him under s 46A(4) of the RMA and that he failed to do so. As a further alternative, it was asserted that consultation over the vegetable exemption did not meet the minimum standards required for consultation with iwi under the RMA.

(b) Secondly, a failure by the Minister to consider various matters said to be relevant.

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63 At [125(e)].
64 At [125(f)].

(c) Thirdly, the Minister breached Treaty principles, including the duty to actively protect taonga.

(d) Finally, discrimination by the Minister against Muaūpoko as a minority in breach of s 19 of the New Zealand Bill of Rights Act 1990.

Muaūpoko sought a declaration that the Minister acted unlawfully, a declaration that the Minister breached the Treaty, an order setting aside the Minister's decision to approve the vegetable exemption and an order requiring the Minister to reconsider the matter in full consultation with Muaūpoko and in light of any other directions the Court might make.

*Raukawa's statement of claim*

[44] In a separate proceeding, Raukawa made similar claims in a statement of claim dated 4 December 2020. Four causes of action were relied on:

(a) Invalidity.

(b) As an alternative to the first cause of action, unlawful delegation (or an irrelevant consideration).

(c) As a further alternative to the first cause of action, that the Minister applied the wrong legal test, breached pt 2 and s 5 of the RMA, failed to consider relevant matters, considered irrelevant matters, and/or reached a manifestly unreasonable decision.

(d) As a further alternative to the first cause of action, that the Minister's decision breached Treaty principles.

Raukawa sought a declaration that the Minister's decision to include the vegetable exemption in the NPS-FM was unlawful, an order setting aside the Minister's determination to approve the NPS-FM as it relates to the vegetable exemption and appendix 5, or alternatively, to set aside the vegetable exemption and appendix 5 with the Minister being directed to reconsider the exercise of his statutory powers of

decision-making in relation to these provisions. Directions were also sought that the Minister follow the process set out in the RMA and relevant Treaty principles, including consultation and engagement with Raukawa.

**The High Court judgment**

[45] The Judge carefully summarised the factual, historical and planning background. She commented that, in order to understand the challenges to the vegetable exemption, it was first necessary to understand how the exemption operated.[65] Her approach to this interpretative task was informed by the part the NPS-FM plays within a "carefully structured legislative scheme" and against the backdrop of its "thoroughgoing process of development". She treated the language of the policy as "carefully chosen".[66]

[46] The Judge started with the plain meaning of the vegetable exemption and noted that it applies only to two specified vegetable growing areas: Pukekohe and Horowhenua. When implementing the NPS-FM in these two 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.[67] It is then for the regional council to determine whether the exemption applies.[68] The exemption will apply where a freshwater management unit is adversely affected by vegetable growing, the baseline state of a specified attribute is below the national bottom line for the attribute, and achieving that bottom line would compromise the domestic supply of vegetables and the maintenance of food security for New Zealanders.[69] Where the exemption applies, the regional council may set a target attribute state below the national bottom line for that attribute, although there is no requirement that it do so. If the regional council does set a target attribute state 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. [70]

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[65] High Court judgment, above n 3, at [114].
[66] At [115].
[67] At [116]; and NPS-FM, above n 1, at cl 3.33(2).
[68] High Court judgment, above n 3, at [118].
[69] At [117].
[70] At [119].

[47] The Judge recorded that the effect of cl 3.33(6) was the subject of debate at the hearing before her.[71] This sub-clause sets out when the exemption expires. The Judge considered that the effect of sub-cl (6) is that the exemption will expire after 10 years if no national environmental standards are in force. Thereafter, the regional council will not be able to set a target attribute state below the national bottom line.[72] Under sub-cl (6)(b), if national environmental standards are in force, the exemption will expire.[73]

[48] The Judge then turned to consider whether the vegetable exemption is contrary to s 5 of RMA. The argument being advanced by Muaūpoko and Raukawa was to the effect that s 5(2)(a)-(c) contains environmental bottom lines. The Judge discussed the Supreme Court's judgment in *King Salmon*, noting that the issue before the Supreme Court was whether a board of inquiry was required to give effect to the New Zealand Coastal Policy Statement, or whether it was entitled to take an "overall judgment" approach which had reference to both the New Zealand Coastal Policy Statement and pt 2 of the RMA.[74] The Supreme Court concluded that the Board had erred in taking an overall judgment approach and that the Board was required to implement the New Zealand Coastal Policy Statement and have exclusive regard to the environmental bottom lines noted in that document.

[49] In the Judge's view, the issues in *King Salmon* were different to those before her. She noted that there was no challenge to the validity of the New Zealand Costal Policy Statement in *King Salmon*, and in any event, she did not consider that *King Salmon* was authority for the proposition that s 5(2) of the RMA contains environmental bottom lines. Rather, she considered that s 5(2) allows for the statement of environmental bottom lines in planning documents. The Judge did not consider that s 5 of the RMA contains environmental bottom lines and concluded that this ground of review could therefore not succeed.[75] Nor did the Judge consider that the vegetable exemption otherwise contravened s 5.[76]

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71 At [121].
72 At [122].
73 At [124].
74 At [130]–[131], referring to *King Salmon*, above n 23.
75 High Court judgment, above n 3, at [12] and [145].
76 At [146]–[152].

[50] The Judge did not consider that the vegetable exemption was contrary to ss 6 and 7 of the RMA. She noted the concepts behind Te Mana o te Wai, and the roles given to tangata whenua in managing freshwater.[77] She considered that the requirements set out in ss 6 and 7 are recognised and provided for in the NPS-FM and she did not consider that the vegetable exemption departs from the obligations imposed on regional councils set out in the document.[78] She noted that regional councils must set attributes in a way that gives effect to Te Mana o te Wai and the objectives of the NPS-FM and that, at a regional level, the principles in ss 6 and 7 take on "a more tailored and site-specific expression", and that is where "kaitiakitanga will find voice".[79]

[51] The Judge then turned to consider whether or not the vegetable exemption was invalid for any other reason. She recorded that there appeared to be a conflict between the principles of Te Mana o te Wai, the hierarchy of obligations embraced in that concept, and the vegetable exemption, but commented that the conflict might be "more apparent than real".[80] She reiterated that the target attribution state set by each regional council had to be set in a way that gave effect to Te Mana o te Wai, but also in a way that did not compromise the domestic supply of fresh vegetables and the maintenance of food security. The Judge acknowledged that this is likely to be a difficult task, but that striking the balance did not appear to be "completely unachievable".[81] The Judge went on to observe, by reference to *King Salmon*,[82] that even if the NPS-FM was internally inconsistent, that did not make it ultra vires the RMA.[83]

[52] The Judge did not consider that the Minister had failed to take in account mandatory relevant considerations. She considered that the documentary record relating to the development of the vegetable exemption showed that the Minister was aware of Muaūpoko's and Raukawa's concerns reflecting the matters in ss 6 and 7 of the RMA when deciding to include the vegetable exemption in the NPS-FM.[84] The

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[77] At [160].
[78] At [161] and [166].
[79] At [166]–[167].
[80] At [174]–[175].
[81] At [176].
[82] *King Salmon*, above n 23.
[83] High Court judgment, above n 3, at [177].
[84] At [184]–[185].

Judge also considered that it was relevant that there was consultation with Muaūpoko and Raukawa after the in-principle decision was made and that the Minister was personally aware of the issues and grievances of iwi and hapū in the affected areas.[85] Further, the Judge did not consider that the vegetable exemption invited regional councils to propose targets that will maintain a level of harm because, while the targets can be set below the national bottom line, they must still 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) (which mandates an improved state without comprising vegetable supply).[86] The Judge considered that it was too early to conclude that there would be a conflict with other obligations under the RMA, and she did not consider it clear how a target attribute state which provided for improvement could permit a nuisance.[87]

[53] The Judge noted that Muaūpoko and Raukawa have competing interests and that those interests have been before the courts and will likely be considered in a forthcoming Waitangi Tribunal report into Raukawa's claim.[88] The Judge considered that these competing claims were not directly relevant to any particular resource management outcome and that the Minister was therefore not required to make determinations as to the relevant merits of the respective claims when deciding whether or not to include the vegetable exemption in the NPS-FM.[89]

[54] Next, the Judge turned to consider whether there had been adequate consultation. She started by noting the process for preparing national policy statements as prescribed by s 46A of the RMA.[90] She noted that the Minister had to give notice of the proposed national direction and why it was considered to be consistent with the purpose of the RMA. Those notified had to be given adequate time and the opportunity to submit on the subject matter and the Minister retained a discretion to consult at any time on the draft national direction.[91] The Judge also recorded that the Minister did not dispute that the development of the vegetable

85 At [187].
86 At [191].
87 At [192].
88 At [199].
89 At [200].
90 At [209].
91 At [210].

exemption triggered a duty to reconsult, consistent with the Supreme Court's discussion in *New Zealand Pork Industry Board v Director General of the Ministry for Primary Industries*.[92]

[55] The Judge recounted the development of the vegetable exemption. She said that there was no obligation on the Minister to undertake consultation on a proposed change to the NPS-FM, but that the Minister retained a discretion to consult at any time, which had to be exercised consistently with pt 2 of the RMA.[93] The Judge discussed the consultation undertaken after the in-principle decision was made. She considered it would have been preferrable if the consultation had occurred beforehand, noting that the fact that the in-principle decision was made without consultation gave the impression that the vegetable exemption was "a done deal".[94] She also noted that the time period for consultation was compressed, that the vegetable exemption was not included in the draft NPS-FM and thus was not subject to scrutiny by expert bodies, nor the subject of public submissions.[95] Further, the Judge noted that had the applicants been involved earlier in the process, alternatives to the vegetable exemption might have been considered.[96]

[56] However, the Judge did not consider that the Minister had breached his consultation obligations, given the circumstances at the time the vegetable exemption was developed (during the Covid-19 pandemic).[97] The Judge was also satisfied that the consultation following the in-principle decision was approached with an open mind.[98] While the timetable was tight, she considered that the appellants had time to express their views and that the Minister had clearly considered them.[99] The Judge also noted that consultation is ongoing.[100] She found that there was no breach of the duty to consult.[101]

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92 At [210]–[211] and [213], referring to *New Zealand Pork Industry Board v Director General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477.
93 High Court judgment, above n 3, at [230].
94 At [231]–[232].
95 At [232].
96 At [234].
97 At [235].
98 At [236].
99 At [237].
100 At [239].
101 At [241].

[57] The Judge went on to find that the vegetable exemption did not breach the principles of the Treaty. She repeated that the vegetable exemption requires regional councils to set targets which allow for improvement in water quality over time, even if the targets are set below the national bottom lines.[102] She considered that other parts of the NPS-FM gave effect to the principles of the Treaty, including the matters set out in ss 6 and 7 of the RMA, and that those parts of the NPS-FM continue to apply.[103] She considered that the Minister took into account s 8 when reaching his decision.[104]

[58] Finally, the Judge found that the decision to include the vegetable exemption in the NPS-FM could not be impugned for unreasonableness because the decision was clearly supported by the available evidence.[105] She also considered that there was logic underlying the Minister's decision to try and reconcile improving water quality without comprising vegetable supply and that the vegetable exemption's permissive nature and time limitation recognised the difficulties in that task.[106]

[59] As a result, the Judge dismissed the applications for review.[107]

**List of issues on appeal**

[60] Counsel for the parties agreed the following issues — namely whether the Judge erred in finding:

(a) that the vegetable exemption did not contravene pt 2 of the RMA;

(b) that the vegetable exemption was not inconsistent with the NPS-FM;

(c) that it was not necessary for the Minister to consider the relative strengths of the relationship of the hapū of Raukawa and Muaūpoko iwi to Lake Horowhenua when deciding to include the vegetable exemption in the NPS-FM;

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102 At [255].
103 At [257].
104 At [259].
105 At [262]–[263].
106 At [264].
107 At [266].

(d) that the Minister did not breach or fail to consider Treaty principles;

(e) that the Minister adequately consulted on the vegetable exemption; and

(f) that further public consultation was not required in relation to the vegetable exemption.

[61] Our analysis will focus primarily on issues (e) and (f) above. We will touch on some of the other issues, albeit briefly, given our views in regard to the consultation issues.

**Submissions**

*Muaūpoko's submissions*

[62] Mr Bennion argued that the Judge erred in finding that it was lawful for the Minister to direct the Regional Council to consider setting contaminate discharge levels for Lake Horowhenua in accordance with the vegetable exemption. He argued that there was illegality, both in the way the exemption was added to the NPS-FM and in its content.

[63] Mr Bennion submitted that the NPS-FM had to be publicly notified, independently assessed and reported on to the Minister. He noted that the draft NPS-FM, without the vegetable exemption, was notified on 5 September 2019 and that public consultation ran for a period of some eight weeks, closing on 31 October 2019. An independent advisory panel (the Panel), headed by a retired Environment Court Judge, then prepared a report on the submissions made. The report did not specifically address concerns about commercial vegetable production. Mr Bennion submitted that the Minister was however in discussions with horticultural growers.

[64] A regulatory impact analysis was made available on 6 May 2020, advising Cabinet that, assuming then current horticultural methods continued, the nitrate toxicity bottom lines would essentially require wholesale conversion from vegetable production as a land use. On 18 May 2020, Cabinet approved an "in-principle"

decision to allow regional councils to maintain freshwater quality at a level worse than the new national bottom lines for nitrogen in freshwater in Horowhenua and Pukekohe. Thereafter, targeted consultation with Muaūpoko and Raukawa took place in June and July 2020. On 15 July 2020, the Minister received a briefing paper, setting out three policy options. Mr Bennion asserted that those options were not discussed with iwi, but that the Minister nevertheless decided to adopt an option known as "Option 3". Thereafter an updated s 32 report was provided to the Minister, which recommended approval of the vegetable exemption, and, on 3 August 2020, the Minister recommended approval of the NPS-FM.

[65] Mr Bennion submitted that the Judge erred when she concluded first that the Minister had complied with s 52(1)(a) and secondly that the vegetable exemption did not require further public notification. He acknowledged that the Minister had a wide-ranging ability to make changes to the draft NPS-FM, but argued that the Minister's powers were limited by the context of s 52 and the overall scheme of the RMA. He argued that the section did not deal with changes that are so significant that they require the Minister to revisit his statement about why the policy is consistent with the RMA and that new matters of national significance or importance cannot be belatedly introduced.

[66] Further, Mr Bennion argued that the vegetable exemption does not follow from other objectives and policies contained in the NPS-FM. He also argued that consultation with iwi did not meet the standards for consultation with Māori under the RMA, or generally. The fact the consultation requirement was breached, was, in Mr Bennion's submission, given further impetus by the vulnerability of the taonga in question, the customary and legal rights involved and the policies and implementation provisions of the NPS-FM itself. He submitted that the in-principle decision removed important issues from consultation and that not all relevant information was available to the Minister or to iwi.

*Raukawa's submissions*

[67] Mr Enright for Raukawa argued that prima facie, the vegetable exemption enables the setting of lower target attribute states for Lake Horowhenua and the

Hōkio Stream than the national bottom lines for all other parts of New Zealand (apart from Pukekohe). He submitted that for Raukawa, even an improvement below national bottom lines does not constitute active protection of their freshwater taonga and that this cultural perspective is reflected in the requirement to place the health and wellbeing of freshwater as the first priority, under cl 2.1 of the NPS-FM.

[68] Mr Enright took us through the NPS-FM in detail and then discussed the decision-making process followed by the Minister. He noted that the vegetable exemption was introduced late in the process, after public and iwi consultation on the notified version and following the release of the Panel's report. He submitted that rather than engage in a second round of public and iwi authority consultation, or seeking further review by the Panel, the Minister followed an ad hoc process of targeted consultation, which was limited and time constrained.

[69] Further, Mr Enright submitted that the Minister and the officials were considering the vegetable exemption from at least 18–19 March 2020, but that Raukawa was not specifically advised of the proposed exemption until 28 May 2020. He noted that the in-principle decision to support the vegetable exemption was made by Cabinet before any engagement or consultation with Raukawa. He argued that Raukawa was not provided with a copy of the proposed wording for the exemption and that it was not advised of the options being considered by the Minister, or their related costs and benefits, prior to the final decision being made. He noted that the final MfE advice was provided to Cabinet on 15 July 2020, after consultation had been completed, and that the Ministers decision was confirmed on 28 July 2020, after the receipt of advice in the s 32 report. He submitted that Raukawa was not given the opportunity to review or comment on matters asserted in the s 32 report, that the sequence followed created unreasonable time pressures and that material information was not provided to inform Raukawa of the relevant issues. He said that such information as Raukawa was given was disclosed too late to influence the process.

[70] Mr Enright also argued that the NPS-FM and the principles of Te Mana o te Wai reflect s 5 and pt 2 of the RMA, by implementing a protective regime for the health and wellbeing of freshwater bodies and their ecology. In contrast, he argued that the vegetable exemption puts the health of New Zealanders above the health and

wellbeing of freshwater bodies, at least in the near term. He argued that the vegetable exemption reverses the priority framework identified in the NPS-FM. By way of overlapping argument, Mr Enright argued that the decision to include the vegetable exemption was inconsistent with directive priorities established by the NPS-FM.

[71] Mr Enright went on to discuss Treaty principles, arguing that the Minister was required to have regard to them. He argued that there was a duty of active protection on the Crown given the history of past breaches by the Crown of its obligations in regard to Lake Horowhenua.

*The Trust's submissions*

[72] Mr Hockly, on behalf of the Trust, noted the Trust's interests in Lake Horowhenua. He discussed the Waitangi Tribunal's findings, in particular, that the Crown has an obligation under the Treaty to actively protect Lake Horowhenua. He pointed to the Waitangi Tribunal's conclusion that the Crown cannot delegate the duty of active protection and that active protection requires not only honourable conduct, but also fair processes from the Crown, including full consultation with, and where appropriate, decision making by those whose interests are protected.[108] Mr Hockly argued, by reference to the decision of the Privy Council in *New Zealand Māori Council v Attorney-General*.[109]

[73] Mr Hockly discussed the NPS-FM in detail. He argued that there was tension between Te Mana o te Wai and the vegetable exemption and submitted that the High Court erred when it concluded that a balance could be struck between the two.

[74] Mr Hockly further argued that the consultation undertaken by the Minister was inadequate in the circumstances of this case and that the nature of the engagement entered into did not amount to either cooperation or open dialogue. He was particularly critical of the in-principle decision made by Cabinet prior to consultation and without any structure and argued that this did not amount to fair process.

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[108] See Waitangi Tribunal Muaūpoko report, above n 5, at 555; and Waitangi Tribunal *Tino Rangatiratanga me Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Pre-publication Version, Part 1* (Wai 1040, 2022) at 60, citing Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims, Volume 1* (Wai 785, 2008) at 4.

[109] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

*The Regional Council's submissions*

[75] Ms Johnston, for the Regional Council, took us through the Regional Council's statutory responsibilities under the RMA. She noted that cl 3.33(2) of the vegetable exemption introduces mandatory matters that the Regional Council must consider when implementing all stages of the national objectives framework insofar as it relates to the Horowhenua vegetable growing area. She noted that the fundamental concept of Te Mana o te Wai is not displaced by clause 3.33(2); rather the requirement to take into account the importance of the contribution of the vegetable growing area to the domestic supply of fresh vegetables and to maintaining food security for New Zealanders introduced by the subclause reflects the tensions at play. She observed that no specific guidance is given to the Regional Council on how to make the determination required under cl 3.33(3) of the vegetable exemption. She advised that the Regional Council is currently taking steps to implement the NPS-FM through a freshwater planning process within its region. She noted that the issues which the Regional Council must address are complex.

*The Minister's submissions*

[76] Mr Stephens for the Crown acknowledged that the Minister's proposal to include the vegetable exemption in the NPS-FM arose after the Minister was presented with the concerns raised by horticultural growers in Horowhenua and Pukekohe. He noted that those concerns meant that the Government's freshwater reforms risked materially reducing the quantity of fresh vegetables grown in New Zealand for domestic supply and therefore increasing their cost. He argued that the apparent need for a special provision for vegetable growing gave rise to a significant conundrum for the Minister, because Lake Horowhenua and Hōkio Stream lie in the heart of Horowhenua's vegetable growing area and because both Muaūpoko and Raukawa claim mana whenua and kaitiaki rights and interests over the Lake and the Hōkio Stream and regard them as taonga.

[77] Notwithstanding the time constraints during the development of the exemption, Mr Stephens submitted that Muaūpoko's and Raukawa's opposition to the proposed vegetable exemption and their concerns about the state of their taonga were put squarely to the Minister and to relevant officials on several occasions, including at

face-to-face meetings attended by the Minister personally in Levin. He submitted that the Minister paid close attention to Muaūpoko and Raukawa's concerns and took their views into account, modifying the proposed vegetable exemption to make it a timebound measure. He submitted that the Minister's paper to Cabinet seeking authorisation to submit the revised draft NPS-FM (which included a timebound vegetable exemption) to the Executive Council properly summarised the concerns of Muaūpoko and Raukawa, including that water bodies in their rohe of significant cultural importance to them would be afforded less protection than other water bodies, that their food basket was being harmed to provide a food basket for the rest of New Zealand and that the exemption transgresses their role as kaitiaki because the waterways would remain degraded. He submitted that the Minister ultimately concluded that a temporary exemption for Horowhenua was necessary to avoid a significant risk to the supply and affordability of fresh vegetables for New Zealanders and that even with significant land use change and available on-farm mitigations, it was simply not feasible for Horowhenua to meet the new nitrogen bottom lines in a foreseeable timeframe. He noted that the Minister did not consider it acceptable to weaken the bottom lines across New Zealand to correspond with existing nitrate levels in freshwater in the Pukekohe and Horowhenua areas, because national water policy would then be a function of the lowest common denominator. He submitted that the Minister planned on further ongoing consultation with iwi and hapū to explore other non-regulatory means of achieving desired outcomes for the affected areas and that potential regulatory intervention in the future was a feature of the timebound vegetable exemption.

[78] It was acknowledged that the vegetable exemption was not part of the draft NPS-FM, but it was submitted that the Judge did not err when she found that the Minister was not required to completely restart the process as a result of the proposed changes. It was submitted that the RMA expressly recognises that following consultation, the Minister can make any changes to a proposed national policy statement as the Minister thinks fit and that it is not correct to characterise the vegetable exemption as introducing new matters of national significance or importance, in the sense contemplated by either ss 6 or 45(1) of the RMA. It was nevertheless acknowledged that the Minister was obliged to undertake a degree of further consultation in relation to the vegetable exemption and that the Minister did

so, recognising that the proposed vegetable exemption represented a meaningful change from the draft NPS-FM that had originally been published for consultation. It was submitted that the Minister was however permitted to make an in-principle decision, that the targeted consultation undertaken was genuine and approached with an open mind and that there is no evidence suggesting that the consultation was narrowed in the ways Muaūpoko now suggests, or that matters were "taken off the table". It was argued that Muaūpoko and Raukawa were sufficiently informed and that the timeframe for consultation was adequate.

**Analysis**

**Consultation**

*Relevant statutory provisions*

[79] The recommendation of the issue of a national policy statement under s 52 of the RMA is for the Minister.[110] The onus lies on the Minister to ensure that the statutory process is followed.

[80] In 2017 the RMA was amended and a new process for the preparation of national directions (including national policy statements) was put in place.[111] Notwithstanding that the new process is said to comprise a single process for preparing a new national direction, it gives the Minister a choice — either to follow the requirements set out in ss 47–51 of the RMA (which involves a hearing by a board of inquiry) or to establish and follow a bespoke process that includes the steps set out in s 46A(4).[112]

[81] In an affidavit sworn in the proceedings, the Minister explained that his initial preference was for the board of inquiry process. However advice given to him by officials projected that any board of inquiry process would take at least 12 months, that there would be limited time for early engagement with Te Kāhui Wai Māori and the Freshwater Leaders Group to develop policy, and that it would be unlikely that a new NPS-FM could be achieved before the end of 2020. The Minister saw this as

110 Resource Management Act, s 24(a).
111 Resource Legislation Amendment Act 2017, ss 36–37.
112 Resource Management Act, s 46A(3).

inconsistent with the Government's commitment to deliver meaningful progress on freshwater quality within its term. The Minister was persuaded that an alternative procedure could be designed that would incorporate key elements of the board of inquiry process (including an independent advisory group to make recommendations) while arriving at an outcome faster than a board of inquiry could achieve.

[82] Any bespoke process adopted by the Minister had to include the steps described in s 46A(4). This subsection requires:

(a) the giving of notice to the public and iwi authorities of the proposed national direction and why the Minister considered that it was consistent with the purpose of the Act;

(b) that those notified be given adequate time and opportunity to make submissions on the proposed national direction;

(c) that a report and recommendations be made to the Minister on the submissions and on the proposed national direction; and

(d) that the matters listed in s 51(1) of the RMA be considered, namely that consideration be given to the matters in pt 2, the proposed national direction, any submissions received on the proposed national direction, any additional material provided by the Minister under s 47A(1)(b), any evidence received and any other relevant matter.

[83] Once this process had been completed, s 52 of the RMA provides that the Minister was required to consider the report and any recommendations made to him pursuant to s 46A(4)(c). He could then make any changes, or no changes, to the proposed national direction as he thought fit, or he could withdraw all or part of the proposed national direction and give public notice of the withdrawal, including the reasons for the withdrawal. Finally, if he was going to proceed, he had to undertake an evaluation of the proposed national direction in accordance with s 32 of the RMA and have particular regard to that evaluation when deciding whether to recommend the national direction.

*The steps taken by the Minister*

[84] The steps taken by the Minister are discussed in detail by the Minister in his affidavit and by the Judge in her judgment.[113] We summarise as follows.

[85] 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*.[114] As already noted, the package included a draft NPS-FM. The draft contained exemptions for large hydro-electricity generation schemes and for naturally occurring processes. It also included a transitional exemption which would allow regional councils to set target attribute states that were worse than national bottom lines in respect of certain freshwater ecosystems but there was no vegetable exemption in the draft.

[86] A few days later, on 9 September 2019, the Minister announced the appointment of the Panel, chaired by a former principal Environment Court Judge, David Sheppard. The Panel was tasked with considering submissions received on the draft NPS-FM (and on the draft national environmental standards for freshwater released at the same time) and providing a report and recommendations for the Minister to consider.

[87] Consultation and the time for filing submissions on the *Action for healthy waterways* policy package ran for eight weeks, closing on 31 October 2019. During this period, MfE ran a series of public meetings across the country. This consultation process involved a local government roadshow, with 17 general public meetings, eight meetings for the primary sector and the rural community and 16 hui for iwi and Māori. Over 17,400 submissions were received. Relevantly, and as noted above, horticultural growers in Horowhenua and Pukekohe raised concerns about the impact of the proposed new limits for nitrate-related attributes in the draft NPS-FM.

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113 High Court judgment, above n 3, at [80]–[113].

114 Ministry for the Environment *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (September 2019).

[88] In a briefing paper dated 16 December 2019, MfE officials advised the Minister about some of the matters that had been raised during the consultation period:

(a) One of the matters recorded was the concern expressed by vegetable growers about the effect of the *Action for healthy waterways* policy package on domestic vegetable production, especially in the Pukekohe and Horowhenua areas. As already noted, growers were concerned that the proposed bottom line for dissolved inorganic nitrogen would require a significant reduction in the application of fertilisers, making existing production unviable. They were also concerned that the proposed new national environmental standards for freshwater would put in place restrictions on the further intensification of rural land use. Overall, there was a concern that the *Action for heathy waterways* package would decrease the quantities of vegetables grown in New Zealand.

(b) MfE noted that New Zealand is dependent on the domestic supply of fresh vegetables, because of its geographical isolation and the perishability of such produce. MfE warned that the proposed freshwater reforms could potentially result in a decline in the availability and affordability of fresh vegetables. Officials did not see a straightforward solution that both stopped further decline in freshwater quality from commercial vegetable production and ensured that domestic vegetables remained available and affordable. It was noted that a final decision would likely require some trade-offs. Officials stated that they were therefore considering targeted support in the areas most effected by the proposals. They advised that further work was needed to refine the ideas and to determine their viability and their pros and cons.

[89] On 27 February 2020, the Panel released its report on the draft NPS-FM.[115] Over 80 recommendations were made. Relevantly, the report recorded concern

[115] Raukawa presented to the Panel through an appointee, Jessica Kereama.

expressed by some submitters about the inadequate time for consultation, considering the importance of the issues raised and their complexity. The report also recorded that the hierarchy of principles drafted as part of Te Mana o te Wai was vulnerable to challenge and expressed reservations about the way in which the proposed NPS-FM expressed priorities and obligations concerning Te Mana o te Wai. The Panel considered the submissions regarding the hydro-electricity exemption and recommended that the exemption be limited only to the most significant hydro-electricity schemes in order to retain the exceptional nature of the provision. The Panel acknowledged that vegetable growing is a major emitter of nitrogen, but no area specific vegetable exemption was discussed or proposed. There was a discussion in the report about the effectiveness of dissolved inorganic nitrogen limits. The Panel advised that the limits operated as "blunt tool[s]". It recommended changing the dissolved inorganic nitrogen attribute tables from target-setting attributes to action plan attributes to allow for the consideration of catchment and water body specific variability.

[90] On 8 March 2020, the Minister and the Minister of Agriculture received a further briefing from MfE and from the Ministry for Primary Industries (MPI) called *Essential Freshwater 83: Policy decisions following consultation*.[116] This briefing paper recorded the different views expressed, including those set out by the Panel, on whether adopting the proposed dissolved inorganic nitrogen attribute limits would lead to improved ecosystem health and the cost impacts in so doing. MfE and MPI did not share a common view.

(a) MfE recommended adopting dissolved inorganic nitrogen as a limit setting attribute with a national bottom line but with an exemption to allow for situations where the national bottom lines for all other ecosystem health attributes in the draft NPS-FM could still be achieved even if dissolved inorganic nitrogen was below the national bottom line.

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116 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater 83: Policy decisions following consultation* (March 2020).

(b) MPI did not support the inclusion of dissolved inorganic nitrogen as a target setting attribute and instead supported managing nitrogen levels through more stringent national bottom lines for nitrate and ammonia toxicity. It recommended further ecological and economic impact analyses, particularly in key regions, before dissolved inorganic nitrogen attributes and national bottom lines were progressed.

Officials from MfE and MPI were tasked by the two Ministers with seeing if they could come to joint view on the issue, as well as on other key unresolved issues.

[91] On 18–19 March 2020, officials presented various options for amending the draft NPS-FM to the Minister and to the Minister of Agriculture. The Ministers met with senior officials from MfE and MPI to discuss matters and to try and find a way forward. On either 18 or 19 March 2020, the Ministers decided that they would recommend to Cabinet that the inclusion of a dissolved inorganic nitrogen attribute in the NPS-FM be delayed for 12 months so that further work could be undertaken on the underlying science. At the same time, they proposed strengthening the national bottom lines for the nitrate (toxicity) and ammonia (toxicity) attributes. These decisions/proposals did not however alleviate the tension between the Government's freshwater objectives and ensuring that domestic vegetable production could meet demand. The Ministers' proposal to strengthen the nitrate (toxicity) national bottom line meant that a solution would still have to be found to deal with the impact of the proposed NPS-FM on the availability and affordability of fresh vegetables. Officials recommended developing an exemption to the national bottom lines driving nitrogen reductions for small areas of key catchments where the majority of vegetable growing for the domestic markets took place. The Ministers accepted this advice. They directed officials to draft a proposed exemption for specific vegetable growing areas.

[92] The Minister was aware of the need to engage with Māori in the areas likely to be affected. In particular, the Minister knew that Lake Horowhenua engaged important Māori interests and that the Lake was seriously degraded. He knew that treated sewage from Levin had been discharged into the Lake and he was aware that the Lake continued to be adversely affected by pollution from vegetable growing and dairy farming. We discuss below the steps taken to consult with affected hapū and iwi.

[93] MfE released a regulatory impact analysis on 6 May 2020. The analysis noted that a vegetable exemption was not the MfE's preferred option. The upside of the exemption was nevertheless seen as ensuring that vegetable production was not compromised; the potential downsides were that affected waterways would not be protected from nutrient contamination and that the opportunity would be lost to encourage the spread of vegetable growing into other areas. It was however noted that regional councils would still be able to set other requirements to achieve ecosystem health. It was also noted that, if a strengthened nitrate toxicity bottom line was adopted, an exemption for areas such as Pukekohe and Horowhenua would need to be considered, because a strengthened nitrate toxicity bottom line would essentially require wholesale conversion from vegetable production as a land use in the affected areas. It was considered that this would have negative implications for consumers, regional economies, health outcomes and domestic food security. It was also noted that the mobility of vegetable production to other catchment areas was limited by factors such as soil quality, climate and access to suitable markets. The impact on Māori of any vegetable exemption was recognised and further consultation with local iwi was recommended before a final decision was made.

[94] Cabinet was scheduled to meet to make decisions on the proposed NPS-FM, the new national environmental standards for freshwater and the proposed new regulations.

[95] The Minister and the Minister of Agriculture prepared a Cabinet paper putting forward their recommendations and explained their reasons for them. They recorded:

(a) That the Government had consulted on a possible new attribute table for dissolved inorganic nitrogen but that, on balance, it should not be progressed at that time. Instead, that the appropriateness of a dissolved inorganic nitrogen attribute with a national bottom line should be reassessed in 12 months' time, with the benefit in the interim of a thorough analysis of the environmental and economic implications. It nonetheless remained critical for the Government to take steps to improve the management of nitrogen, because nitrogen policies in the then current NPS-FM (and regional councils' implementation of them)

were insufficient to provide for ecosystem health. In line with the recommendations of the Panel, the Ministers proposed strengthening the existing nitrogen (toxicity) attribute from 6.9 mg/L to 2.4 mg/L to protect 95 per cent of species from toxic effects.

(b) That notwithstanding the importance of managing nitrogen for ecosystem health, national food security and the stability of supply for human health depends on the domestic production of adequate and affordable supplies of fresh vegetables. The vegetable growing areas in the Pukekohe and Lake Horowhenua catchments are major supply areas for domestic fresh vegetable production. It would not be practicable to reduce nitrogen to meet national bottom lines in these catchments without significantly compromising vegetable production. The Ministers recommended enabling regional councils to maintain nitrogen-related attributes at levels worse than the proposed new national bottom lines. The Ministers explained that further engagement with local iwi was needed before final decisions could be made, so as to meet Treaty requirements and existing settlements.

[96] The Cabinet Economic Development Committee accepted the Ministers' recommendations on 13 May 2020 and authorised them to make final policy decisions and drafting changes as needed to the proposed NPS-FM, including a vegetable exemption, provided that the changes were consistent with the broad objectives of the proposals set out in the Cabinet paper. This was confirmed by Cabinet on 18 May 2020 (the in-principle decision).

[97] The Minister in his affidavit says that he then had a series of meetings with key stakeholders and iwi in May to update them and to seek their feedback on the *Action for healthy waterways* decisions, including the proposed vegetable exemption. We discuss these steps below.

[98] The Minister in his affidavit also discussed a detailed background briefing given to him by MfE officials. He was not comfortable with defending the vegetable exemption as then proposed. He was conscious of the representations that iwi were

making regarding the significance of freshwater taonga in Horowhenua and the history of degradation and neglect in the area. He expressed his concern to officials that the proposed vegetable exemption could be viewed as giving polluters "a free ride to the detriment of iwi and the environment". Accordingly, the Minister asked officials to develop alternatives to the vegetable exemption as then proposed.

[99] As a result, on 15 July 2020, MfE and MPI officials submitted a further briefing paper to the Minister and to the Minister of Agriculture.[117] The briefing paper highlighted the dilemma that the Government faced. It also recorded the concerns expressed by local iwi and the position of Te Kāhui Wai Māori. It identified three policy options as follows:

(a) Option 1: an exemption to national bottom lines affected by nitrogen by inserting an enabling provision into the NPS-FM to give regional councils the option of setting attribute states below national bottom lines.

(b) Option 2: a statement in the NPS-FM requiring councils to "have particular regard" to the importance of vegetable growing to the national supply when setting attribute states and limits, while still setting attribute states at the national bottom lines or higher.

(c) Option 3: inserting a 10-year time limit into the exemption as outlined in option 1. In the interim, the Government would work in partnership with local iwi/hapū and other stakeholders to develop regulations containing targets and limits that were appropriate for the area. Once the regulations were in place, the exemption would no longer apply.

The briefing paper recorded the view that a timebound 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 improvement as well

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[117] Ministry for the Environment and Ministry for Primary Industries *Essential freshwater: NPS-FM provision for vegetable growing in select areas* (July 2020).

as engage meaningfully to find solutions. It recorded that an exemption from the bottom lines should be accompanied by the Crown taking a proactive role in working with iwi and hapū in a partnership approach, along with the relevant councils and stakeholders, to find enduring solutions to the issues in Horowhenua.

[100] The Minister made the decision to adopt option 3 and modify the proposed vegetable exemption in light of the feedback from Muaūpoko and Raukawa. Rather than being open-ended, the exemption would have a time limit of 10 years from the date the NPS-FM came into force. Thereafter, regional councils would be required to set targets and plans to meet the national bottom lines over time, unless they had already been replaced by a national environmental standard or other regulations under the RMA designed to avoid remedy or mitigate the adverse effects of vegetable growing on freshwater.

[101] On 22 July 2020, the Minister received a s 32 report which had been prepared by Harrison Grierson Consultants Ltd and was entitled *Action for heathy waterways: Section 32 evaluation*.[118] This report was required under the RMA.[119] It included an addendum prepared by MfE relating to the proposed vegetable exemption. It also recorded the disappointment of iwi and hapū with the way in which consultation had occurred in relation to the vegetable exemption.

[102] On 28 July 2020, the draft NPS-FM (including the vegetable exemption) was brought before the Cabinet Legislation Committee for authorisation to submit the final version to the Executive Council. The Minister and the Minister of Agriculture submitted a Cabinet paper which, amongst other things, explained the conundrum which confronted the Government. It explained potential approaches which they considered were open to the Government and recommended that the Government should provide a mechanism to allow regional councils to set lower targets solely in Pukekohe and Horowhenua for nitrogen attributes. It noted the engagement that had occurred with iwi and hapū and recorded the strong concerns that tangata whenua had expressed. The Cabinet Legislation Committee considered the paper and authorised

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[118] Harrison Grierson Consultants Ltd *Action for healthy waterways: Section 32 Evaluation* (July 2020).

[119] Resource Management Act, s 52(1)(c).

the submission of the final version of the NPS-FM, with a timebound exemption for the vegetable growing areas in Pukekohe and Horowhenua, to the Executive Council.

[103] On 3 August 2020, Cabinet confirmed the 28 July 2020 decision of the Cabinet Legislation Committee. On the same day, the Governor-General in Council approved the NPS-FM. Notice was given in the *Gazette* and the NPS-FM came into force on 3 September 2020.

*The further consultation undertaken in relation to the vegetable exemption*

[104] Muaūpoko and Raukawa did not challenge the initial notification and consultation process undertaken by the Minister and, notwithstanding the power to make changes to the draft NPS-FM conferred by s 52(1)(b) of the RMA, the Minister did not dispute that the proposal to incorporate the vegetable exemption into the NPS-FM triggered a duty to reconsult. He said however, that this duty was discharged by the targeted consultation that followed Cabinet's in-principle decision.

[105] The Minister must have been aware of the broad concerns of the vegetable growers. Horticulture New Zealand first expressed their concerns to the Minister in August 2018. It told the Minister that, in its view, nitrogen allocation regimes in regional plans needed to consider more than nitrogen loads per hectare. Moreover, following the launch of the Government's programme for freshwater improvement, Horticulture New Zealand again advocated, in October 2018, to the Minister and to the Minister for Primary Industries, in relation to the issue. It was then seeking a national regulatory approach specific to vegetable growing.

[106] It seems that the Minister first became aware of the specific concerns raised by vegetable growers in Horowhenua and Pukekohe when he received the briefing paper dated 16 December 2019 which had been prepared by MfE officials.[120] In late February 2020, the Minister received the Panel's report. It did not comment on the vegetable exemption (because it had not then been proposed), but it did comment on the hydro-electricity exemption and on the appropriateness of the proposed dissolved

[120] Ministry for the Environment *Essential Freshwater 81: Update on options to address key consultation themes* (December 2019).

inorganic nitrogen limits. The Minister received a further report from MfE and MPI on 9 March 2020,[121] and, on 18–19 March 2020, officials presented various options to the Minister for dealing with the matters raised as a result of the initial consultation. The proposals for the vegetable exemption evolved from this report and the decision to develop a vegetable exemption was made on 19 March 2020.

[107] The Minister was clearly aware of the need to engage with Māori in the affected areas. It seems that the issue was discussed between the Minister and officials on 18–19 March 2020. As noted above at [92], the Minister knew that Lake Horowhenua engaged important Māori values and that the Lake was seriously degraded.

[108] Officials prepared a draft iwi engagement plan and sought advice from the Office for Māori Crown Relations — Te Arawhiti. This advice was received on 24 April 2020 and incorporated into MfE's approach for consultation. Emails were then sent to Muaūpoko and Raukawa on 29 April 2020 seeking to organise meetings so that discussions could be held regarding proposed changes to the draft NPS-FM.[122] The emails however did not refer to the specific concerns raised by the vegetable growers nor to any proposed vegetable exemption. Muaūpoko and Raukawa could not then have appreciated the import of the matters which MfE officials wished to discuss with them because they received no advice in this regard from MfE officials and because the summary of the submissions made following on from the initial public notice had not then been released. It was only released in early May 2020.[123]

[109] The Minister says that he held a series of meetings with key stakeholders in May 2020. He does not however provide any great detail of these meetings other than to say that he met with the Iwi Leaders Group, the New Zealand Māori Council and the Federation of Māori Authorities. There is nothing in the papers filed to suggest that he met with Muaūpoko, Raukawa or the Trust at this stage.

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121 Ministry for the Environment and Ministry for Primary Industries *Essential Freshwater 83*, above n 116.

122 Tim Tukapua, a member of Muaūpoko, says that there was a discussion in April 2020, but that the only option then presented was mitigation of the effects of a vegetable exemption.

123 Lindsay Poutama, the Chief Executive Officer of Raukawa, says that there was a "[s]ummary of submissions to the [Independent Advisory] Panel" on 20 November 2019. There is however nothing to suggest that this summary was published until May 2020.

[110] MfE prepared talking points for the Minister for these meetings. There is however nothing to suggest that these talking points were given to those representing Māori interests, including Muaūpoko, Raukawa or the Trust. Also, as noted above, MfE released a regulatory impact analysis on 6 May 2020 discussing the proposed vegetable exemption. This document recognised the impact on Māori of any vegetable exemption and recommended further consultation; there is however nothing to suggest that the analysis, or even a summary of it, was then made available to Muaūpoko, Raukawa or the Trust.

[111] Officials from MfE and MPI had zoom calls with some iwi and hapū on 15 May 2020. The purpose of these calls was to establish relationships, have an initial discussion about the proposed vegetable exemption and see how iwi would like to continue their engagement. It is not clear who these zoom calls were with.

(a) Tim Tukapua, on behalf of Muaūpoko, says that Muaūpoko board members participated in a zoom telephone conference with MfE officials about the proposed vegetable exemption, but only on 22 May 2020 and 24 June 2020.

(b) Bryan Smith, MfE's chief advisor for freshwater strategy, has confirmed that he did not have a zoom call with Raukawa on 15 May 2020. Rather he says that he had emailed a representative of Raukawa on 29 April 2020 seeking to set up a meeting to discuss the vegetable exemption, but that he had difficulties arranging a time, because of conflicting schedules and because of the Covid-19 pandemic. He also notes that officials and iwi representatives had many competing priorities. Mr Smith was only able to speak to Raukawa's representative, Lindsay Poutama, on 28 May 2020.

(c) It is not clear to what extent the Trust was involved. It seems that it may have been consulted at the same time as Muaūpoko.

[112] Notwithstanding the very limited involvement with affected hapū and iwi, the Minister, together with the Minister of Agriculture, recommended to the Cabinet

Economic Development Committee in mid-May 2020 that it make an in-principle decision authorising them to make final policy decisions and to draft changes to the NPS-FM, including to put in place a vegetable exemption. Cabinet confirmed the in-principle decision on 18 May 2020. Muaūpoko, Raukawa and the Trust knew nothing about this at the time.

[113] We agree with Edwards J that it would have been preferable if consultation had occurred beforehand.[124] The in-principle decision gave the impression that the inclusion of a vegetable exemption in the NPS-FM was "a done deal".[125]

[114] On 3 June 2020, counsel for the Tamarangi hapū (who are also based near Lake Horowhenua but are not associated with either Muaūpoko or Raukawa) sent a letter to the Minister outlining the hapū's opposition to the proposed vegetable exemption.

[115] On 4 June 2020:

(a) Te Kāhui Wai Māori sent a letter to the Minister expressing the view that the Government should reconsider its approach to the proposed vegetable exemption.

(b) Mr Poutama of Raukawa received a copy of an MfE document — *Essential freshwater regulation: information for horticultural growers*. However, he received the document from an iwi member and not from MfE. The document referred to the in-principle decision.

[116] On 10 June 2020, Mr Poutama had a meeting with MfE officials, including Mr Smith. Raukawa was then advised, albeit in general terms only, about the proposed vegetable exemption.

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124 High Court judgment, above n 3, at [231].
125 At [232].

[117] On 15 June 2020, a copy of a proposed policy summary in relation to the vegetable exemption was sent by MfE officials on a "FYI" basis to Nicholas Peet, the Group Manager Strategy and Regulation, for the Regional Council. Mr Peet responded to MfE by email, noting the potential implications of the proposal for the Regional Council's planning documents and also for a plan change known as "PC2", which had been notified in 2019 to address issues relating to the management of nutrients from existing intensive farming land uses within targeted catchments, including Horowhenua. Mr Peet requested information from MPI regarding the evidential basis for the proposed vegetable exemption.

[118] On 16 June 2020, MfE sent an email to Muaūpoko and Raukawa representatives attaching brief background information on the proposed vegetable exemption. MfE apologised for the delay in providing this information. One of the documents sent was a five page summary document, titled *Further information on the Proposed Policy Thinking for Horowhenua*. The document referred to modelling undertaken to assess the quantity of nitrogen in Lake Horowhenua and to the impacts of reducing nitrogen concentrations in the Lake. The underlying data was not disclosed. Mr Poutama was told in the accompanying email that the modelling recorded "initial results" only and that it was in the process of "being finalised".

[119] Horticulture New Zealand became aware that the Government was consulting with iwi and hapū. On 19 June 2020, it offered to meet with iwi and hapū during this period, but was told that the priority for iwi and hapū was the conversations that they were having with the Government.

[120] Also on 19 June 2020, Mr Peet met with MPI officials via zoom to discuss the proposed vegetable exemption. They discussed whether putting an exemption in place for one industry had the potential to undermine the progress being made with PC2 in reducing nutrient discharges from commercial vegetable growing in targeted catchments, the Regional Council's concerns about the lack of evidence for any exemption and whether MfE should look for a national and not a regional solution for reducing the impacts of fresh vegetable production.

[121] On 24 June 2020, Mr Smith of MfE and a MPI representative attended a Muaūpoko board meeting in Levin in relation to the vegetable exemption. Various concerns were discussed. The data used to support the policies and models was criticised as being of poor quality and old, and MfE was told that it needed better monitoring, undertaken by someone independent of the Regional Council. A number of board members expressed the view that they needed "to be at the table equally". They said that they also needed to be part of creating any solution. Officials were reminded that the Lake is privately owned.

[122] On 1 July 2020, Mr Peet raised further concerns with MfE and MPI officials about the proposed vegetable exemption.

[123] On 2 July 2020, Mr Smith sent an email to all iwi and hapū representatives, including Muaūpoko and Raukawa representatives, seeking further feedback following on from the earlier discussions.

[124] On 3 July 2020, Muaūpoko sent a letter to Mr Smith expressing concern about the proposed exemption and seeking a meeting with the Minister. On the same day Raukawa sent a follow up letter to Mr Smith. Mr Poutama also had a telephone discussion with Mr Smith. In its letter, Raukawa expressed its concerns about the proposed vegetable exemption. Raukawa sought the opportunity to meet with the Minister to discuss the proposals. It requested all correspondence between the Minister's office and officials from MfE and MPI in relation to the vegetable exemption. The request extended to records of engagement between the Minister's office, MPI, the Regional Council and industry lobby groups.[126]

[125] Muaūpoko, Raukawa, the Trust and other interested parties met with the Minister in Levin on 7 July 2020. A background briefing paper was prepared for the Minister. It does not seem to have been made available to other participants. At the meeting Raukawa representatives queried how the Government's plan impacted on the

[126] Mr Poutama in one of his two affidavits states that further information was provided to Raukawa by MfE on 6 July 2020. He annexes a copy of the further information provided. It is the same document as is referred to in [118] above. Mr Smith does not suggest that any further information was provided to Raukawa on 6 July 2020. We suspect that Mr Poutama is in error.

mauri of the water. The Minister responded that he viewed the economy as a wholly owned subsidiary of the environment and that the new NPS-FM would introduce a number of changes which would reflect that view by putting the health of the water and the environment first. Raukawa suggested that the proposed vegetable exemption did not do that. The rationale for the exemption was discussed by the Minister. Raukawa expressed concern about a lack of consultation and the compressed timeframe. The comment was made that if the NPS-FM was to be successful, all parties needed to be informed and all needed to have the right information. The possibility of a review period being built into the vegetable exemption was discussed. The Minister indicated that this was a possibility, in principle. In the course of the meeting, Raukawa again requested copies of the modelling data, as well as the other data referred to in the further information document which had been made available to their representatives.

[126] On 8 July 2020, Raukawa sent a letter to the Minister thanking him for attending the meeting but recording that Raukawa's position remained unchanged. The letter expressly advised that Raukawa did not support the vegetable exemption and that it continued to maintain that, as a Treaty partner, the consultation with it "was lacking". It recorded Raukawa's preparedness to explore alternative pathways to deal with the Lake Horowhenua catchment, including ways in which the proposed vegetable exemption could be modified or implemented.

[127] Between 10 July and 13 July 2020, Raukawa's environmental consultants, Gregory Carlyon and Dr Fleur Maseyk, spoke with officials from MfE and MPI regarding Raukawa's concerns about the proposed vegetable exemption. Ultimately, on 13 July 2020, Mr Carlyon sent a letter to Mr Smith objecting to the proposed vegetable exemption.

[128] On 14 July 2020, MfE and MPI officials had further zoom meetings with Muaūpoko and the Trust to discuss the proposed exemption. On the following day, 15 July 2020, MfE and MPI officials had a zoom meeting with Mr Carlyon and Dr Maseyk, also in relation to the exemption.

[129] As noted above at [99], on 15 July 2020 MfE and MPI officials presented a briefing paper to the Minister and to the Minister of Agriculture, setting out the three options identified by the Ministry. There is nothing to suggest that this briefing paper, was given to Muaūpoko. It seems something may have been given by an official from MPI to Raukawa although the affidavits are not clear on this issue. Raukawa was not however given the wording of the proposed vegetable exemption; nor was it given the other material which would need to be incorporated into the NPS-FM if the exemption was to be adopted, for example, maps of the areas intended to be covered by the exemption. Nevertheless the briefing paper recorded that MfE had tested option 1 with iwi and hapū and that they did not support an exemption as there proposed.

[130] On 16 July 2020, counsel for Raukawa sent a letter to the Minister objecting to the vegetable exemption proposals. It was noted that the letter had been prepared under relative urgency "absent full disclosure by the Crown of a relevant paper-trail". It was recorded that Raukawa had only recently been informally notified about the proposed vegetable exemption and that Raukawa had not seen a written copy of the proposed exemption. It was also noted that the exemption had not been publicly notified in September 2019 and that it had not been considered by the Panel. Concern was expressed that the process followed did not comply with the Crown's consultation obligations as a partner to the Treaty. Inter alia, it was asserted that, from Raukawa's perspective, the exemption had "come from left field", without due diligence as to the history of the area, without adequate science to support it and without adequate consultation with those affected. The possibility of proceedings was raised.

[131] The report under s 32 of the RMA, which was required pursuant to s 52(1)(c) of the RMA before the NPS-FM could be recommended for approval, was received by the Minister on 22 July 2020. The s 32 report was not made available to Raukawa or, it seems, to Muaūpoko.

[132] As already noted, on 3 August 2020, Cabinet confirmed its 28 July 2020 decision and approved the NPS-FM. The NPS-FM was then notified as approved in the *Gazette*. It was published online and announced by the Government on 5 August 2020.

[133] Raukawa subsequently corresponded with the Minister and on 14 August 2020, Raukawa's lawyers sent an Official Information Act request to the Minister.

[134] On 2 September 2020, MPI informed Mr Peet of the Regional Council that they had completed the modelling report used to justify the vegetable exemption and asked Mr Peet to participate in a peer review of the report. He declined to do so.

[135] The final modelling report for Lake Horowhenua including the underlying data was provided to Raukawa on 24 November 2020 by email from MfE.

[136] On 18 December 2020, Raukawa received a copy of the recommendation signed by the Minister requesting that the Governor-General in Council approve the NPS-FM.

*Did the further consultation undertaken by the Minister comply with the RMA?*

[137] Like the Judge, we accept that the Minister consulted with Muaūpoko and Raukawa, and that, to an extent, he took into account their views.[127] We also accept that, on the evidence, the Minister acted in good faith throughout. Nevertheless, we do not consider that, in the circumstances of this case, the further consultation that was undertaken in regard to the vegetable exemption was appropriate or sufficient.

[138] Open processes and opportunities for public input have been incorporated into the RMA in a number of contexts; they were obviously seen as important values by those who framed the Act.[128] When national policy statements are being prepared, there are express requirements for notification, submission and consultation:

(a) If the Minister opts for the board of inquiry process under s 46A(3)(a), as soon as practicable after its appointment, the board of inquiry must ensure that public notice of the proposed national direction and inquiry is given, publish a summary giving the prescribed information and recording that submissions may be made in writing by any person, and

[127] High Court judgment, above n 3, at [237].
[128] *King Salmon*, above n 23, at [15].

fix a closing date for submissions.[129] Any person making a submission is entitled to ask to be heard.[130] The board of inquiry is required to give at least 10 working days' notice of the dates, times and place of the hearing of the inquiry.[131]

(b) If the Minister establishes a bespoke process under s 46A(3)(b), he has to notify the public and iwi authorities of the subject matter of the national policy statement, give notice of the reasons why he considers it is consistent with the Act, and give those notified adequate time and opportunity to make a submission.

(c) The Minister also has a discretion to consult at any time under s 46A(5).

[139] If consultation is to be adequate, the opportunity for input must be meaningful. More than mere notification is required.[132] Those being notified/consulted must have a reasonable opportunity to state their views.[133] They must be properly informed about what is proposed so that they can make appropriate decisions and respond fully. The decision maker must ensure there is adequate time for the submission/consultation process. In some cases, a single conservation may suffice; in other contexts, consultation may demand months or years of consultation.[134] The decision-maker must keep an open mind and be ready to change or start afresh.[135] The obligation to consult and/or to notify, receive and consider submissions can trigger an obligation to start afresh and reconsult where a substantial change to the original proposal is contemplated.[136]

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129 Resource Management Act, ss 46A(4)(a)–(b) and 48.

130 Section 49(2).

131 Section 50(2).

132 *Constitutional Law and Administrative Law — A to Z of New Zealand Law — Procedural Impropriety* (online ed, Thomson Reuters) at [17.25.4.9(2)].

133 *Port Louis Corp v Attorney-General (Mauritius)* [1965] AC 1111 (PC), [1965] WLR 67 at 1124; and *Board of Trustees Phillipstown School v Minister of Education* [2013] NZHC 2641 at [60].

134 *Constitutional Law — A to Z of New Zealand Law — Procedural Impropriety*, above n 132, at [17.25.4(2)], citing *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) at 675.

135 *Wellington International Airport Ltd,* above n 134, at 675.

136 *New Zealand Pork Industry Board*, above n 92, at [173].

[140] The leading case in this country on the obligation to consult is the decision of this Court in *Wellington International Airport Ltd v Air New Zealand Ltd*.[137] Although it was decided in a very different context, the Court noted that consultation does not require that there be agreement but that it clearly requires that there be more than mere prior notification. The Court cited from a Privy Council decision, *Port Louis Corp v Attorney-General of Mauritius*, as follows: [138]

> … If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. … The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.

The Court went on to observe that, for consultation to be meaningful, there must be available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.[139]

[141] What constitutes adequate consultation will depend on the context.[140] In this regard we note the following:

(a) Lake Horowhenua's and the Hōkio Stream's long and complicated history, including the earlier statutes, noted at [21] above.

(b) Both Muaūpoko and Raukawa claim mana whenua and kaitiaki over the Lake and the Stream. These matters were important given ss 6–7 of the RMA.

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137 *Wellington International Airport Ltd*, above n 134.
138 At 674, citing *Port Louis Corp*, above n 133, at 1124.
139 *Wellington International Airport Ltd*, above n 134, at 676.
140 *New Zealand Pork Industry Board*, above n 92, at [168].

(c) The fishery rights in the Lake are vested in Muaūpoko and the beds of the Lake and the Stream are vested in the Trust. Existing property rights conferred by statute were affected.

(d) Lake Horowhenua is a taonga but it has long suffered from pollution. It is now badly polluted. The Crown has been complicit in that pollution. Muaūpoko has protested but to no apparent avail. The observations of the Privy Council in *New Zealand Māori Council v Attorney-General* were apposite. The Court was there considering the Crown's obligations under the Treaty to protect the Māori language as a taonga. After setting out the English version of Treaty in full, the Privy Council said as follows:[141]

> While the second article refers to "other properties", the [Māori] text uses the word "taonga" and in the reconstruction of that text the word "taonga" is translated as treasures …
>
> … In Their Lordships' opinion the "principles" [of the Treaty] are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. …
>
> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving [Māori] property, including the [Māori] language as part of taonga … . It is therefore accepted … that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. … [I]f as is the case with the [Māori] language at the present time, 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.

[141] *New Zealand Māori Council*, above n 109, at 517.

The matters addressed by the Privy Council were relevant context in the circumstances of this case. They should have been taken into account pursuant to s 8 of the RMA.

(e) The proposed NPS-FM had as its underlying concept Te Mana o te Wai, which prioritises the health and wellbeing of water bodies and freshwater ecosystems over the health needs of people and the ability of keeping communities to provide for their social, economic and cultural wellbeing. It may be arguable that the vegetable exemption is in conflict with this underlying concept, with the related principles and with the priority accorded to the concept's operation by the NPS-FM.

(f) The proposed NPS-FM recognised the role Māori were to play in the management of freshwater and spelt out how Māori were to be involved in decisions relating to freshwater.

(g) The underlying water quality mitigation and remediation issues are complex. The data underlying the modelling undertaken was not available at the time. It could not be provided to either Muaūpoko or Raukawa, despite requests for the same. Nor could it be provided to the Regional Council.

Given these contextual issues, we agree with Muaūpoko and Raukawa that there was a need for extra diligence when undertaking the required consultation. Although the Minister was clearly anxious to advance water quality reforms during the Government's first term, it was a situation which, in our view, required considerable caution notwithstanding the possibility of delay.

[142] Further, we are not satisfied that Muaūpoko, Raukawa and the Trust were given sufficient information, in sufficient time, to properly consider the same and to formulate their respective responses to the proposed vegetable exemption. Much of the detailed information only became available to Muaūpoko and Raukawa as a result

of the present proceedings being issued. At the time that the Minister was consulting with them, initially in May 2020, and then in more detail in June and July 2020, they had little information. They certainly did not have all of the materials which were available to the Minister and to the Government through MfE and MPI. When they did get some of the information, they had very little time to consider it, to respond fully and to identify and investigate alternative options.

[143] There is a further concern. The vegetable exemption effectively introduced a new matter of national significance in certain situations — the importance of the contribution from the two growing areas to the domestic supply of fresh vegetables and the maintenance of food security for New Zealanders. It is not apparent whether thought was given to how regional councils were to inform themselves in relation to these matters. Further, and as we have noted, the requirement that the relevant regional councils take these matters into account when setting attributes below the national bottom lines set out in the NPS-FM potentially cut across the fundamental concept on which the proposed NPS-FM was based and the principles, objectives and policies put in place to advance that fundamental concept. In these circumstances, we consider that consideration should have been given by the Minister to the powers vested in him by s 52(1)(b)(ii) of the RMA — namely withdrawing all or part of the proposed NPS-FM and giving public notice of the withdrawal, including the reasons for the withdrawal. The Minister could then have gone back and undertaken afresh the various steps envisaged by s 46A(4). He would then have had the advantage of wider rather than targeted consultation and of a report and recommendations on the proposed vegetable exemption. There is nothing in the affidavits filed to suggest that any consideration at all was given to this possibility. Any withdrawal would have delayed matters, but given the long history attaching to Lake Horowhenua and the Hōkio Stream, further delay may have been unavoidable.

*Conclusion*

[144] For the reasons we have set, we consider that the further consultation undertaken by the Minister was inadequate and that it failed to comply with the RMA and with the Minister's obligations at law to properly consult with those affected by the proposed vegetable exemption. We disagree with the Judge's finding that there

was no breach of the duty to consult. As a result, we have concluded that the vegetable exemption should be quashed and that the Minister should be directed to reconsider whether a vegetable exemption is required and if so, in what form such exemption should be.

**Other issues**

[145] We comment briefly on some of the other issues raised by the parties:

(a) Mr Enright submitted that s 5 and pt 2 of the RMA contain environmental bottom lines, which were breached by the vegetable exemption. We agree with Edwards J that they do not, for the reasons the Judge gave at [137]–[138] of her judgment.

(b) It was argued before us that the vegetable exemption is inconsistent with other parts of the NPS-FM. We have accepted above that that is arguable. We take this issue no further, because it is unnecessary for us to resolve it given the views we have reached in relation to consultation and because it may be raised and considered in the context of any further consultation. We accept that conflicts between policies are likely to be rare, if those policies are properly construed. Any apparent conflict between policies may dissolve if close attention is paid to the way in which they are expressed.[142]

(c) In relation to whether or not the Minister should have considered the relative strengths of Muaūpoko's and Raukawa's claims to Lake Horowhenua, we agree with Edwards J, for the reasons she gave at [200] of her judgment, that the Minister was not required to do so.

(d) It is not necessary for us to address the other Treaty considerations that were raised on appeal, given that these considerations are likely to be raised in any further consultation undertaken.

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[142] *King Salmon*, above n 23, at [129]; and *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 [2023] 1 NZLR 205 at [63].

**Result**

[146] The appeal is allowed.

[147] Clause 3.33 and Appendix 5 of the National Policy Statement for Freshwater Management 2020 are quashed.

[148] The Minister for the Environment is directed to reconsider whether there should be an exemption from the National Policy Statement for Freshwater Management 2020 for the vegetable growing areas in Horowhenua and Pukekohe and, if there is to be an exemption, what form such exemption should take.

[149] The first respondent must pay costs to the appellants, the second respondent/cross-appellant, the first intervenor and the second intervenor, each for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel for the appellant and the second respondent/cross-appellant.

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