IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2012-406-228
[2012] NZHC 3623

UNDER	the Judicatory Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	JEMAAL PETER ROY LARGE Applicant
AND	THE DISTRICT COURT AT BLENHEIM First Respondent
AND	THE ATTORNEY-GENERAL Second Respondent

Hearing: 3 November 2012

Counsel: D Clark for Applicant
B Martin for First Respondent (abides)
J Webber and K Salmond for Second Respondent

Judgment: 21 December 2012

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 5.00pm on the 21st December 2012.

JUDGMENT OF WILLIAMS J

Solicitors:
Wisheart MacNab & Partners, Blenheim for Applicant
Crown Law Office, Wellington for First Respondent
Crown Solicitor, Nelson for Second Respondent

Introduction

[1] The applicant is Jemaal Large. He is charged on indictment with one count of wilfully ill-treating 23 seals by clubbing them to death with a steel pipe about 1 metre long and 1½ inches wide, in breach of s 28(1)(b) of the Animal Welfare Act 1999. (I will refer to it simply as AWA in this judgment). Most were adult cows and bulls, but eight were very young pups. In a police interview – the crucial evidence against him – Mr Large confessed to delivering one or two blows to the head of each seal in order to kill it. He works as a builder at a salmon farm in the Marlborough Sounds and takes the attitude that they are pests that need to be culled because they compete with the fishing industry of which he is, to some extent, a part.

[2] Mr Large now seeks judicial review of a decision of the District Court at Blenheim refusing to grant him a discharge under s 347 of the Crimes Act 1961.

[3] The essential question before the learned Judge was whether in clubbing 23 seals to death, Mr Large was hunting or killing them. That is because although s 28 of AWA makes it an offence to wilfully ill-treat any animal, s 175 places beyond the reach of s 28, anything that amounts to "hunting or killing" an animal in the wild. If Mr Large's admitted actions could properly be described as hunting or killing seals, then Mr Large could not have committed any offence against s 28. If they could not be so described, then s 28 applied.

[4] The learned Judge accepted that the ordinary meaning of the words "hunt or kill" were sufficient to cover this incident but he pointed to five factors that overcame that initial approach. The first was that the Act's primary purpose is the prevention of ill-treatment to animals. The Judge felt that beating largely defenceless seals to death for no good reason was likely to be just the sort of ill-treatment the Act was designed to prevent. Second, s 175 was located under "miscellaneous provisions" – a relatively unimportant position in the legislation. Third, the language of s 175 was not apt to provide an exemption for any suffering imposed on animals in the wild. It was more narrowly cast. Fourth, s 175 had its own exceptions contained in ss 176–178 and Part 6 of the Act. Fifth, marine

mammals are given an elevated status in the Act as a result of ss 138 and 140. He concluded, that the exception in s 175 did not apply to these facts.

[5] I should add for completeness that a charge under s 28 was not the only, or even the obvious option available to the Crown in this case. On the facts as alleged the applicant may well be guilty of the offence of 'taking' a marine mammal without a permit under s 9 of the Marine Mammals Protection Act 1978 (MMPA). But he is not charged with any offence under that Act. According to the Crown, this choice was made deliberately because the penalty available under the MMPA was thought to be too low for this offending.[1] That is why the ambit of s 175 of the AWA is so important in this case.

Reviewability and arguments

[6] It is well established that this Court will entertain an application for judicial review of a refusal to grant a s 347 discharge if such refusal is a result of a fundamental error of law such that, in the interests of justice and efficiency in its administration, it is appropriate to dispose of the issue prior to trial.[2]

[7] For the applicant, Mr Clark argued that the learned Judge misinterpreted AWA. He argued that Parliament's intention was to exclude from the effect of the Act *any* hunting and *any* killing of any animal in the wild. He supported a very literal interpretation of the words employed in s 175. The Crown argued that the killing of animals in the wild is only excluded from the effect of AWA if it is done in pursuit of a "legitimate" hunting purpose. Mr Webber called in aid various contextual clues in the Act in pursuit of his argument.

[8] To answer the issues raised, it is necessary to address the Act in some detail together with its history. I will summarise the leading provisions and overall

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1 Section 9 MMPA makes an offence to 'take' (defined so as to include kill) a marine mammal without a permit under s 6. The maximum penalty is six months' imprisonment or a fine of $250,000, and "a further fine not exceeding $10,000 for every marine mammal in respect of which the offence was committed…" Section 28(3) AWA provides a maximum penalty of five years' imprisonment and/or a fine not exceeding $100,000 for wilful ill-treatment of an animal (see below at [11]).

2 *Horlor v District Court* HC Christchurch CIV-2009-409-2499, 12 March 2010.

structure of the Act and its legislative history. I will then consider in more detail the legislature intention in enacting s 175, the crucial definition of "hunter or kill" in s 2 and the various contextual clues proferred by the parties as elucidating in some way, the meaning of the relevant sections. I will finally reach such conclusions as I am able and apply them to the facts.

The legislation

[9] The AWA is described in paragraph (a) of its long title as an Act:

> (a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,–
>
> (i) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:
>
> (ii) to specify conduct that is or is not permissible in relation to any animal or class of animals:
>
> (iii) to provide a process for approving the use of animals in research, testing, and teaching:
>
> (iv) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:
>
> (v) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct:

[10] The Act is divided into nine parts with each of the first seven parts containing an express statement of purpose for that part. Part 1 relates to the care of animals. It focuses on owners of companion and production animals and those in charge of such animals. Part 2 relates to conduct towards animals. Its purpose is set out in s 27 as follows:

> **27 Purpose**
>
> The purpose of this Part is to state conduct that is or is not permissible in relation to a species of animal or animals used for certain purposes—
>
> (a) By prohibiting certain types of conduct; and
>
> (b) By controlling the use and sale of traps and devices used to kill, manage, entrap, capture, entangle, restrain, or immobilise an animal.

[11] It is within this part that s 28 relating to the wilful ill-treatment of animals (the section under which Mr Large is charged) is to be found. Section 28 provides as follows:

> **28 Wilful ill-treatment of animals**
>
> (1) A person commits an offence if that person wilfully ill-treats an animal with the result that—
>
> (a) the animal is permanently disabled; or
>
> (b) the animal dies; or
>
> (c) the pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering; or
>
> (d) the animal is seriously injured or impaired.
>
> …
>
> (3) A person who commits an offence against this section is liable on conviction on indictment,—
>
> (a) in the case of an individual, to imprisonment for a term not exceeding 5 years or to a fine not exceeding $100,000 or to both:
>
> (b) in the case of a body corporate, to a fine not exceeding $500,000.

[12] "Ill-treat" is defined as follows:[3]

> **ill-treat**, in relation to an animal, means causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary:

[13] Part 3 makes provision for the control of animal exports, while Part 4 establishes committees to advise the Minister and Director-General on animal welfare issues and ethical issues and to develop codes of welfare and ethical conduct. These are important because Part 5 relates to codes of welfare for animals that are owned or in the charge of any person, and Part 6 relates to ethical use of animals in research, testing and teaching. These codes have the force of law. Parts 7, 8 and 9 relate to administration of the Act's provisions, offences and miscellaneous provisions respectively.

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[3] Animal Welfare Act 1999, s 2.

[14] Part 9 contains s 175, the exclusion provision in this case. Section 175 provides:

> **Hunting or killing**
>
> Subject to sections 176 to 178 and Part 6, nothing in this Act makes it unlawful to hunt or kill—
>
> (a) Any animal in a wild state; or
>
> (b) Any wild animal or pest in accordance with the provisions of—
>
> (i) The Wildlife Act 1953; or
>
> (ii) The Wild Animal Control Act 1977; or
>
> (iii) The Conservation Act 1987; or
>
> (iv) The Biosecurity Act 1993; or
>
> (v) Any other Act; or
>
> (c) Any wild animal or pest; or
>
> (d) Any fish caught from a constructed pond.

[15] Section 2 is really the key provision here. It provides a wide but inclusive definition of the crucial phrase "hunt or kill":

> **Hunt or kill**, in relation to animals, includes–
>
> (a) hunting, fishing, or searching of any animal and killing, taking, catching, trapping, capturing, tranquilising, or immobilising any animal by any means:
>
> (b) pursuing or disturbing any animal and;–
>
> and **hunting or killing** has a corresponding meaning.

[16] I will come back to that definition below as it is ultimately the focus of this judgment.

[17] The term "wild animal" has the specific meaning given to it by s 2(1) of the Wild Animal Control Act 1977.[4] Seals are not wild animals for the purpose of s 175. It follows that the focus in this case is on s 175(a) – "any animal in a wild state".

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[4] Section 2(1) of that Act provides as follows:
(1) In this Act, unless the context otherwise requires, –
wild animal –

[18] It is also worth noting that "pest" is defined in the statute.[5] Unsurprisingly, seals are not pests for the purpose of the Act.

[19] Section 175 is made subject to ss 176-178 and Part 6 of the Act. Sections 176 and 177 provide special rules in relation to two matters: hunting in safari parks (where an animal is still wild but there is a person in charge of it) and captured animals in a wild state.[6] Section 178 relates to the use of traps. Part 6 as I have said relates to scientific research testing and teaching using animals. They thus provide limited exceptions to the general exclusion of hunting or killing animals in a wild state. I will come back to these provisions below.

The meaning of "hunt or kill"

(a) means –
  (i) any deer (including wapiti or moose);
  (ii) any chamois, tahr, wallaby, or possum (*Trichosurus vulpecula*):
  (iii) any goat that is not –
    (A) held behind effective fences or otherwise constrained; and
    (B) identified in accordance with an animal identification device approved under the National Animal Identification and Tracing Act 2012 or in accordance with an identification system approved under section 50 of the Biosecurity Act 1993 and approved by the Director-General for the purposes of this Act:
  (iv) any pig that is living in a wild state and is not being herded or handled as a domestic animal or kept within an effective fence or enclosure for farming purposes:
  (v) any member of any species or class of land mammals that the Governor-General may from time to time, by Order in Council, declare to be wild animals for the purposes of this Act; and
(b) includes the whole or any part of the carcass of any such animal:
(c) except for deer lawfully kept in captivity for the purposes of farming, does not include any animal kept in captivity pursuant to a permit or licence that is effective for the purposes of section 12 of this Act during the currency of the permit or licence and the observance of all conditions under which the permit or licence has been issued:

5 **pest** means —
(a) Any animal in a wild state that, subject to subsection (2), the Minister of Conservation declares, by notice in the *Gazette*, to be a pest for the purposes of this Act:
(b) Any member of the family Mustelidae (except where held under a licence under regulations made under the Wildlife Act 1953):
(c) Any feral cat:
(d) Any feral dog:
(e) Any feral rodent:
(f) Any feral rabbit:
(g) Any feral hare:
(h) Any grass carp:
(i) Any Koi or European carp:
(j) Any silver carp:
(k) Any mosquito fish:
(l) Any animal in a wild state that is a pest or unwanted organism within the meaning of the Biosecurity Act 1993:

6 For example, s 12(c) makes it unlawful to kill such an animal in a manner causing it to suffer unreasonable or unnecessary pain or distress.

[20] I turn now to the crux of the case, what "hunt or kill" means. In the sections that follow, I propose to consider first the evidence of legislative purpose in enacting s 175, then the statutory definition, then contextual clues both within the statute and in the Wildlife Act 1953 where the same phrase is used.

Legislative purpose

[21] The exclusion of "hunting or killing" of animals "in a wild state" appears to have been inserted for a particular purpose. That purpose is revealed by the report-back of the Primary Production Select Committee on what was then the Animal Welfare Bill (No. 2).[7] The Committee said:

> We examined this issue very thoroughly and explored options in setting standards on hunting, fishing and pest control within the context of primacy being given to social, economic and other factors. We also sought the advice of DOC, the Ministry of Fisheries and the New Zealand Fish and Game Council (in its capacity as an advisor to the Minister of Conservation). While we agreed that society's approach to the killing of animals in the wild is different to its approach to the killing of companion and production animals, we identified a number of substantive matters which need to be addressed before any decision is made to include hunting and fishing–
>
> - The proposal to include hunting and fishing of wild animals has raised issues which have not been subject to wide public consultation.
>
> - If controls on killing animals in the wild were predicated on all current hunting and fishing methods being able to continue, the costs of developing a code of conduct may not be justified because there may be no welfare benefits to the animals or such benefits may be small.
>
> - If a genuine attempt was made to reduce pain and suffering during hunting and fishing, it is likely that some types of hunting or fishing would need to be prohibited. This could have significant economic, environmental and social consequences such as–
>
> - Disputes of interest could arise if fishers had difficulty catching their entire quota.

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[7] There were in fact originally two bills in existence at the same time relating to this subject matter. The first in time was a private Member's bill sponsored by Hon. Pete Hodgson, a veterinarian. This was eventually overtaken by a Government measure. The Government bill was given the appellation Animal Welfare Bill (No. 2) and was ultimately passed into law as AWA.

- The ability of Government departments such as DOC or the Ministry of Fisheries to administer their legislation could be significantly affected.

- Pest control could become difficult or even impossible for pest control agencies as pest control techniques are not necessarily substitutable.

- There are implications for customary fishing, particularly in relation to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

- The difficulty of changing the long standing culture of hunting and fishing.

- It would be extremely difficult to enforce the standards set in codes.

We decided that hunting, fishing and pest control should continue to be excluded. We preferred that NAWAC encourage the development of voluntary codes of practice (where these are not already available) which address steps that can be taken to ensure the welfare of the target animals (our recommendation on clause 49 refers).

[22] This sentiment is very much reflected in the Parliamentary Debates. The responsible Minister, Hon. John Luxton, explained the exclusion in similar terms in his report back speech at the Bill's second reading:

> One of the more significant and contentious issues dealt with by the committee was the exclusion of hunting, fishing, and pest control. From an animal welfare perspective, society's approach to the killing of animals in the wild is inconsistent with its approach to the killing of companion and production animals. The Hodgson Bill provided that no animal in the wild state should be hunted or fished unless the activity was in accordance with the minimum standards in the code of conduct. This was based on earlier Government policy proposals, which this Government subsequently revisited and rejected.
>
> The particular concern that I had about these proposals was that neither provided clear guidance on how standards in codes of conduct would be set, and this confusion was reflected in the submissions to the select committee. Some thought that codes could prohibit or restrain hunting or fishing, if the pain or distress to animals was too great. There was an expectation, for example, that duck shooting could be banned, and that squid fishing could be closed down where there were significant catches of Hooker's sea lions. Other submitters assumed that there was no intention to stop any particular hunting or fishing practice. I think Mr Hodgson is right when assuming that it perhaps would be best to leave this issue alone. Given the lack of clarity in the policy, I consider that there needs to be considerably more public debate on this issue before consideration is given to legislation in this area.

[23] Parliament did however accept that it was inappropriate for AWA to be completely silent in terms of setting standards for hunting, fishing and pest control. A soft-law option was taken. Section 57(f)(ii) made it a function of the new National Animal Advisory Committee to "… promote and to assist others to promote, the development of guidelines in relation to … the hunting or killing of animals in a wild state". Guidelines promoted under the Act are non-binding.

[24] Meanwhile, the comments made by the Select Committee and the Minister are important pointers in my view, to the intended breadth of the s 175 exclusion. I turn now to the definition of "hunt or kill" in s 2.

Statutory definition

[25] "Hunting or killing" is treated in the statute as a composite term. The words are not separately defined in s 2 of the Act. Rather they are defined (albeit inclusively) as a single phrase, as if Parliament's intention was to treat the two words as conveying a single idea or a closely connected pair of ideas, despite the use of the disjunctive "or" set between them.

[26] The definition is in two parts. Paragraph (a) contains two illustrative lists of words that, in each case, start by confirming common usage (including, rather unnecessarily, repeating both hunting and killing) and then expand on that meaning. The paragraph provides that the phrase includes:

> (a) hunting, fishing, or searching for any animal and killing, taking, catching, trapping, capturing, tranquilising, or immobilising any animal by any means:

[27] The first of the two lists roughly equates with the idea of pursuit of the animal and the second with acquisition to effect whatever purpose is involved, killing being only one of them. The lists are conjunctive inter se – suggesting hunting or killing includes both pursuit *and* purpose rather than pursuit *or* purpose as favoured by the applicant. So, expressly included within that duality in paragraph (a) is the conjunctive choice "hunting", "*and*", "killing".

[28] But the scope of paragraph (a) is, in my view, slightly more complicated than that. The use of "or" in the statutory phrase itself, is presumably necessary because (rather often in my experience) one can pursue the quarry – whether fish, fowl or beast – without actually achieving one's purpose. If Parliament had used "and" so that the head phrase was hunting *and* killing, this would have made it cumulative. It would have excluded from s 175's protection, those hunters and fishers who, despite their best efforts, injure an animal in the pursuit, without succeeding in killing or capturing it, thereby leaving the animal to die a slow and perhaps agonising death. This is the very sort of potential ill-treatment that s 175 was designed to exclude from AWA's sanctions. The use of 'or' met that problem.

[29] It is clear though that hunting or killing is intended to include both successful and unsuccessful hunting.

[30] I said the definition was in two parts. Paragraph (b) of the definition is less textured. It simply includes "pursuing or disturbing any animal". Pursue is already captured in the first part of paragraph (a). "Disturbing" is different – broad enough to take the meaning of hunt or kill beyond the pursuit and effecting of purpose on acquisition – the sense conveyed by all the other words in the definition.

[31] As I noted, the definition is inclusive. Common usage and dictionary definitions have a role to play here. It is sufficient to refer to the Oxford English Dictionary's definition of the verb form as follows:

> To go in pursuit of wild animals or game; to engage in the chase.

[32] Pursuit is therefore a core idea, both in statute and in ordinary usage. There is an element that is implicit in the term "hunt" and in the way that word is defined: the act of hunting requires some skill or poses some challenge to the hunter. There is, inherently in my view, a degree of difficulty involved. Whether it relates to strength and stamina required in the chase, or skill in the kill or capture, the challenge may not be enormous – but it is always there. Even the potentially very broad concept of "disturbing" can be read down in the context of or relating to the hunt. Game birds for example are often disturbed by the hunter in order to get them

airborne for shooting. I doubt that the term is intended to cover inadvertent and innocent stumbling upon an animal even though it is broad enough to do so.

[33] I turn now to the various contextual clues.

Contextual clues in ss 176-178 and Part 6

[34] The Crown submitted that the terms of ss 176-178 and Part 6 of AWA indicated that despite s 175, the Act was intended to apply generally to animals in the wild and s 175 should therefore be construed narrowly.

[35] According to s 176, a hunter that hunts an animal in a wild state in a privately owned safari park, is to be treated as a "person in charge of that animal" for the purposes of the Act and has statutory obligations accordingly. But that is the position only if the animal is captured rather than killed. Section 177 relates to animals in a wild state more generally (as opposed to those on private land only) in circumstances where these are held captive. The person who has charge of the captive animal has obligations under the Act as to the treatment of the animal. And if the captive animal is to be killed, then that person has an obligation under s 12(c) not to cause the animal unreasonable or unnecessary pain or distress in that process.

[36] Section 178 relates to traps. It specifically declares ss 34 and 36 to be applicable to the use of traps and devices in hunting or killing. Section 34 makes it an offence to use a prohibited trap or device. Section 36 requires trappers seeking to capture alive mammals, birds, reptiles or amphibians, to check their traps every 12 hours and to attend to the care of any animal found.

[37] Part 6 relates to the case of animals in research, testing and teaching. Section 82 requires that such work be undertaken pursuant to a code of ethical conduct approved under Part 6. Section 5 defines research, testing and teaching (another composite phrase holistically defined) as involving "manipulation" of an animal in that context.

[38] Section 3 defines manipulation comprehensively as interfering with the animal's "normal" physiological, behavioural or anatomical integrity for research, testing or teaching.[8]

[39] Section 3(2)(d) specifically excludes from the definition of manipulation (and therefore from the definition of research, testing and teaching and the effect of Part 6 generally) the following:

> … the hunting or killing of any animal in a wild state by a method that is not an experimental method.

[40] The clear effect of this definition tree is to imply that hunting or killing any animal in a wild state by means of an experimental method *is* covered by Part 6 and is *not* excluded from the Act by s 175.

[41] I do not myself see any generally applicable clues in these exceptions. They are each explicable on their own terms and for their own purposes. They reflect a view that Parliament felt it was on firmer ground in enacting these specific counter-exceptions to the larger exception. Few would argue against them. Sections 176-

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[8] The whole of the definition is as follows:

(1) In this Act, unless the context otherwise requires, the term **manipulation**, in relation to an animal, means, subject to subsections (2) and (3), interfering with the normal physiological, behavioural, or anatomical integrity of the animal by deliberately—

(a) subjecting it to a procedure which is unusual or abnormal when compared with that to which animals of that type would be subjected under normal management or practice and which involves—

(i) exposing the animal to any parasite, micro-organism, drug, chemical, biological product, radiation, electrical stimulation, or environmental condition; or

(ii) enforced activity, restraint, nutrition, or surgical intervention; or

(b) depriving the animal of usual care;—

and **manipulating** has a corresponding meaning.

(2) The term defined by subsection (1) does not include—

(a) any therapy or prophylaxis necessary or desirable for the welfare of an animal; or

(b) the killing of an animal by the owner or person in charge as the end point of research, testing, or teaching if the animal is killed in such a manner that the animal does not suffer unreasonable or unnecessary pain or distress; or

(c) the killing of an animal in order to undertake research, testing, or teaching on the dead animal or on prenatal or developmental tissue of the animal if the animal is killed in such a manner that the animal does not suffer unreasonable or unnecessary pain or distress; or

(d) the hunting or killing of any animal in a wild state by a method that is not an experimental method; or

(e) any procedure that the Minister declares, under subsection (3), not to be a manipulation for the purposes of this Act.

178 generally impose an obligation to be humane when the animal is actually under the hunter's or property owner's control. The manipulation exception in Part 6 reflects the fact that special obligations are now willingly accepted by the scientific research community in terms of ethical experimentation on animals including (it seems) experiments in relation to how they can be killed. The exceptions provide little guidance in how to determine the area that *is* covered by s 175.

Contextual clues in relation to marine mammals

[42] The Crown identified two specific provisions relating to marine mammals – one in AWA, the other in the Marine Mammals Protection Act (MMPA). The Crown argued these confirmed that AWA applied generally to marine mammals.

[43] The first provision was s 140 of AWA which provides for a special referral procedure in relation to injured or sick marine mammals. An inspector, auxiliary officer or veterinarian under AWA must, if he or she finds such an animal, report the matter to a marine mammal officer appointed under the MMPA.

[44] The second provision is contained in s 20 MMPA. It provides that nothing in the MMPA derogates from the provisions of AWA.

[45] I agree that these provisions confirm that AWA applies to marine mammals. But that is plain anyway from the definition of animal in AWA. I find no assistance at all from these provisions in terms of the ambit of s 175. They certainly do not provide any indication that marine mammals in a wild state were intended to be excluded generally from the s 175 carve-out.

Meaning of hunt or kill in Wildlife Act 1953

[46] In *Solid Energy v Minister of Energy*[9] Mallon J was required to construe the same phrase – hunt or kill – as used in the Wildlife Act 1953. The case related to mitigation measures proposed by Solid Energy in relation to rare native species likely to be affected by a mining consent sought by Solid Energy. These species

9 *Solid Energy v Minister of Energy* [2009] NZRMA 145.

were absolutely protected under the Wildlife Act, making it an offence under s 63 to "hunt or kill" them. Solid Energy proposed to collect and relocate these species. The definition of hunt or kill in that statute is very similar, though not identical, to the definition in AWA. Section 2 of the Wildlife Act provides as follows:

> Hunt or kill, in relation to any wildlife, includes the hunting, killing, taking, trapping, or capturing of any wildlife by any means; and also includes pursuing, disturbing or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not; and also includes every attempt to hunt or kill wildlife in every act of assistance of by any other person to hunt or kill wildlife ...

[47] As can be seen the definition included both "disturbing" and "molesting" any wildlife. Was Solid Energy intending to "hunt or kill" these species by relocating them? The Judge took a broad view of the phrase.

> [86] … The section is intended to capture deliberate actions in relation to wildlife (whether well intended or not) that interfere with the natural and ordinary activities of the wildlife and that may harm the wildlife or carry with them that risk. The words in the "hunt or kill" definition should be interpreted in light of this intent. If such actions are taken it does not matter whether the person intended to protect the wildlife nor whether harm actually ensued. Nor does it matter whether they occurred as an incidental part of other activities (discussed further below at para [124] and following). The action will be within s 63 unless the person has lawful authority for the action.
>
> [87] In my view, on the natural and ordinary meaning of the words in the definition of "hunt or kill", read in their context and in light of their purpose, Solid Energy is "disturbing" the wildlife by "capturing" (by hand) or "taking" (mechanically) it from its habitat and moving it to a new habitat. While it is doing so with the intention of protecting the wildlife it is a deliberate action in relation to the wildlife that forcibly removes the wildlife from where it would otherwise be. It is an action that carries with it risk of injury and death. Requiring its actions to be under "lawful authority" provides a mechanism for the risks to be managed and mitigated.

[48] That construction made perfect sense given the Judge's view of the purpose of s 63 and indeed the protective purpose of the Act generally. AWA's context is different. Its overall purpose is the prevention of ill-treatment to animals. But unlike the use of the phrase in the Wildlife Act, in AWA, hunt or kill is an exception carved out from the Act's punitive provisions. The specific purpose was to exclude hunting, fishing and pest control from the Act's broader purpose. It was felt there was no wide consensus in the community in favour of subjecting those activities to control, and Parliament concluded their incorporation would create a series of new and

difficult downstream issues. "Hunting or killing" in AWA must be read in that context just as in the context of the Wildlife Act 1953, Mallon J used that Act's purpose to take a broader approach in the *Solid Energy* case. Such an approach is of course consistent with s 5(1) of the Interpretation Act 1999 directing that the meaning of an enactment is to be ascertained from "its text and in the light of its purpose".

Conclusions

[49] In s 175, Parliament's intention was to provide an exception wide enough to protect hunters and fishers (including those from either category engaging in pest control) from the punitive provisions of AWA. And the words of s 175 and the definition in s 2, when construed in light of that broad purpose, can be read so as to perform that function. The words are, as Mallon J found in a very different context, capable of extremely wide construction, but that breadth is not what Parliament intended in this case. They are not intended to be read so as to cover *any* treatment of an animal in a wild state by any person no matter what his or her purpose. Section 175 swims against the current of the Act and if it was intended to have that significant an effect on the Act, Parliament would have expressed that intention more clearly in my view. For example by directly excluding all animals in a wild state so as to make it clear that the Act was only intended to apply to ill-treatment of animals under human control or charge.

[50] There is no reason to think that deliberate torture of an animal in the wild by an individual for the purpose of inflicting suffering for its own sake was intended by Parliament to be captured by the terms "hunt or kill". Nor is there any reason to think that an individual whose sole purpose is to harass or molest an animal in the wild, was intended to be able to claim the protection of s 175, even though the word "disturbs" is contained in the definition. Pursuit of an animal for the purpose of injury or annoyance is not hunting or fishing because it is not for the purpose of killing or capturing etc the quarry.

[51] Similarly, dumping toxic materials knowing that they are in a place that will be accessed by animals in a wild state might well be caught by one or other of the

cluster of offences in ss 28, 28A and 29 because in that example is no pursuit to bring the action within s 175.

[52] In the end, hunt or kill in AWA boils down to two basic ideas. The first is that inherent in the closely related concepts of hunting, fishing and searching for an animal in a wild state, is some kind of pursuit requiring the application of a reasonable degree of skill. The skill may relate to a weapon or trap, bait and hook, or in simply outsmarting the quarry. The skill level need not be particularly great. The spectrum is from a child fishing for sprats to a pig hunter with dogs. But some kind of challenge is required for the person engaged in the activity.

[53] The second requirement is pursuit must be for a hunting or fishing purpose – i.e. to kill, capture or immobilise etc the quarry. The exceptions in ss 176-178 and Part 6 are necessary because they would all otherwise meet the definition. That is because they all possess those two basic characteristics.

[54] That said, the legislation does not use words intended to narrow the naturally broad meaning of hunt or kill any further. I cannot see any basis in the legislation upon which to justify introducing, as the Crown suggested in submissions, a case by case moral or social utility balancing test in order to sift out what is good and permissible hunting from what is bad and non-permissible hunting. I cannot see how hunting and fishing can be read down so as to apply only where the animal, once killed by the hunter or fisher, is used in some way for food or materials. There are just too many examples where animals are hunted merely to stop them from competing with humans for land or sea resources. And, as with goats or rabbits, this often leads to animal deaths in very large numbers. Similarly, it is not uncommon that fish are caught, sometimes again in large numbers, but not eaten because the species is unpalatable, for example.

[55] The moral or social utility line is too difficult to draw in fact and, more importantly, is not drawn in the statute itself. If a more subtle case by case approach were intended, a more sophisticated provision would have been enacted. In fact Parliament specifically rejected enacting such a provision when it rejected the option of requiring codes of conduct for hunting and fishing. Instead, as I have said,

Parliament opted in s 57(f)(ii), for voluntary and non-punitive guidelines in that context.

Application to the facts

[56] In this case, the prosecution evidence thus far is that the seals were killed by one or two blows to the head. According to disclosure briefs from DOC witnesses, the bulls are likely to have come to the applicant in an aggressive defence of territory, while the cows, having recently given birth, are likely to have stayed with their pups.

[57] In his police interview, Mr Large provided little detail:

> Q: And what did you do exactly?
>
> A: Just whacked them on the head with the pipe just like you know whatever.
>
> Q: How did the seals react when, when you started doing this?
>
> A: Um well most of them just died just, just a pretty yeah straight pretty instant really.
>
> …
>
> A: Didn't seem like it no it was just sort of a whack and that was it um yeah just like killing a possum in a trap you know.
>
> Q: How, how, how many blows would you say you have hit a seal with a single seal?
>
> A: Oh usually one or yeah maybe two if, if it moved a bit more but that's about it.
>
> Q: Was there any specific seals you targeted?
>
> A: No I mean um yeah not really the big ones cause they are pretty big, got a couple but you know not sort of didn't want to get too close to them.

[58] It is not at all clear to me on the disclosure briefs and police interview whether Mr Large's actions in clubbing these seals could be described as a 'pursuit' requiring skills ordinarily associated with hunting. It is not clear whether going about amongst the adult seals involved real danger to Mr Large, the avoidance of which required a basic level of skill, or whether on the other hand, the seals were

essentially immobile and docile presenting no danger at all to him. The former could well qualify as hunting. The latter would not in my view. The essential point is that it is too early to decide these issues now. The Crown's evidence will need to be called and its content carefully considered before a Judge will be in a position to assess its sufficiency under s 347.

[59] The application is dismissed accordingly.

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Williams J