**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2015-485-1033**
**[2017] NZHC 1182**

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| UNDER | the Declaratory Judgments Act 1908 |
| BETWEEN | PAUAMAC5 INCORPORATED<br>Plaintiff |
| AND | DIRECTOR-GENERAL OF CONSERVATION<br>First Defendant |
| AND | SHARK DIVE NEW ZEALAND LIMITED<br>Second Defendant |
| AND | SHARK EXPERIENCE LIMITED<br>Third Defendant |

Hearing: 19 October 2016

Appearances: B A Scott and O T H Neas for Plaintiff
J M Prebble and J Dick for First Defendant
S J Grey for Second and Third Defendants

Judgment: 2 June 2017

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**JUDGMENT OF CLARK J**

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*I direct that the delivery time of this judgment is*
*10:00 am on 2 June 2017*

## Introduction

[1] Near Stewart Island people dive to fish for pāua. In recent years they have been joined by those who dive to see white pointer sharks (commonly called great white sharks). Commercial operators take customers to view, from inside cages, great white sharks enticed to the area by "attractants". This is called cage diving.

[2] PauaMAC5 says that when the shark cage diving operations were authorised by the Director-General of Conservation under the Wildlife Act 1953 he should have considered the safety of other water users. The Director-General does not agree. The Director-General considers that the Department of Conservation (which I refer to as the Department or DOC) is under no statutory obligation to consider public safety when making decisions under the Wildlife Act. Rather, the concern under the Wildlife Act is with the welfare of wildlife, in this context, the great white sharks.

[3] Submissions and evidence in the case addressed various matters including modification of shark behaviour, whether shark cage diving puts other water users at risk, and whether the shark cage diving operations could constitute an offence under the Wildlife Act. I consider, however, the key issue is whether s 53(1) of the Wildlife Act, the provision under which the shark cage diving operations were authorised, contemplates the grant of authorities such as those granted to the second and third defendants. In other words: are the authorities lawful?

## The Parties

[4] The plaintiff, PauaMAC5, represents quota holders who harvest pāua commercially in the waters surrounding Stewart Island including around the Titi Islands to the northwest of Stewart Island. PauaMAC5 first filed proceedings in December 2015. At that time it sought a declaration from the High Court that public safety, and in particular the safety of other water users, is a permissible if not a mandatory consideration:

(a) when the Director-General authorises shark cage diving under s 53 of the Wildlife Act; and

(b) when imposing conditions on authorisations issued under s 53; and

(c) when considering the content of a Code of Practice for shark cage diving activities where compliance with the Code is a condition of an authorisation under s 53.

[5] The Department of Conservation and the Director-General of Conservation were the named defendants.

[6] The matter was set down for hearing in July 2016 and came before Collins J. At the outset Collins J advised the parties that he considered there was a real issue as to whether or not s 53(1) of the Wildlife Act permits the Director-General to authorise shark cage diving because shark cage diving does not involve the catching or killing of a protected species and that was the focus of s 53(1). Collins J adjourned the proceeding to enable the plaintiff to amend its statement of claim to address this issue. He directed service of the amended proceeding on the businesses that operate shark cage diving so they would have an opportunity to be heard.

[7] Shark Dive New Zealand Ltd and Shark Experience Ltd (the operators) conduct great white shark cage diving operations in the waters surrounding the Titi Islands. They were served and joined to the proceeding as the second and third defendants. The operators filed a joint statement of defence. Two affidavits were filed on their behalf and they were jointly represented by counsel at the hearing.

**Growth of shark cage diving and regulatory response**

[8] Shark cage diving has been operating in the north eastern waters of Stewart Island since 2008. The fledgling tourism ventures developed in an environment lacking appropriate controls.[1] In 2012 Maritime New Zealand hosted a multi-agency meeting which included officials from DOC and parties who had expressed an interest in establishing commercial shark cage diving operations.

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1 Minister of Conservation "Permits to be required for shark cage tourism" (press release, 28 February 2014) (referred to at [14] below).

[9] In 2013, in light of the growing interest in commercial shark cage diving, DOC released interim guidelines as a means of engaging with dive operators and other interested parties to identify and mitigate potential risks to great white sharks from cage diving. The Department acknowledged in the guidelines its "limited statutory authority to require permit applications for all commercial interactions with protected marine wildlife under the Wildlife Act 1953". The interim guidelines were not intended to provide mandatory regulation of shark cage diving.[2] Rather, they were a form of guidance for operators who, at that time, were not subject to authorisation under the Wildlife Act.

[10] PauaMAC5, representing the commercial pāua industry, made a submission on the interim guidelines. Its interest in the guidelines stemmed from the fact that areas favoured by shark cage dive operators overlap with important commercial pāua fisheries around Stewart Island. Commercial pāua divers, free-diving without the use of underwater breathing apparatus, work in these areas. PauaMAC5's main concern was that the attractants used to lure sharks close to viewing vessels modified shark behaviour by building a strong association between the attractants, and vessels with divers in the water. The association created an elevated risk of shark attack for pāua divers.

[11] PauaMAC5 strongly recommended the immediate development by DOC of a regulatory framework to support a permitting regime for commercial shark cage dive operations. It took the view that commercial operators were "pursuing" and "disturbing" great white sharks and in the absence of authority such operations breached the Wildlife Act specifically the prohibition on "hunt[ing] or kill[ing]" in s 63A of the Act. PauaMAC5 suggested the Director-General could grant authorities under s 53(1) of the Act to "catch alive or kill" any protected wildlife.

[12] This approach clearly commended itself to DOC. In December 2013 it prepared a summary of the submissions it had received. The summary highlighted the element of PauaMAC5's submissions that identified a potential legal route to permitting commercial shark cage diving:

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2 Affidavit of Alan Munn filed on behalf of the first defendant.

> PauaMac5 Incorporated submitted a substantive and detailed submission, including a valid legal argument for permitting commercial shark cage diving. Upon review of this submission, and further advice from the Department's legal team, DOC agrees that there is provision in the Wildlife Act (1953) to permit this activity. The Department is currently working towards implementing a permitting regime for commercial shark cage diving.

[13] The interim guidelines were revised and in December 2013 were released as a Code of Practice. The Code of Practice:

(a) identified activities associated with cage diving that pose a risk to great white sharks and how those risks must be mitigated.

(b) was to be complied with by all operators who were granted a great white shark cage diving permit and was to form "the key conditions for those permits".

(c) noted it was –

> beyond DOC's current mandate to regulate activities that pose a hazard to tourists, or persons in their place of work. These activities are covered under other legislation (e.g. Maritime Transport Act 1994; Health and Safety in Employment (HSE) Act 1992).

[14] On 28 February 2014 the Minister of Conservation announced that tourism businesses viewing great white sharks would be required to have a permit in the same way as for whale, dolphin and seal watching.

[15] The Ministerial statement referred also to the increasing tension over the issue of great white sharks within the small Stewart Island community between those supporting the tourism operators and those concerned about the risk to divers and others from shark attacks. The solution was seen in tightening the rules around shark tourism operators and taking a firm approach to anybody who deliberately killed the sharks.

[16] Although PauaMAC5 declared its strong support for the Minister's announcement that permits would be required under the Wildlife Act for shark cage diving operations it was of the view that Stewart Island permit applications should be

declined. If permits were granted it considered they should be granted with a condition prohibiting the use of all forms of shark attractants. These suggestions were made in yet another comprehensive submission by PauaMAC5 in October 2014. PauaMAC5's submissions were endorsed by the Kina Industry Council. The overarching concern of the submission was the safety of divers. Although PauaMAC5 appreciated DOC's statutory objectives related to the protection of great white sharks PauaMAC5 considered the objectives were closely linked "in that pāua and kina divers face additional risks as a direct consequence of shark behavioural changes induced by shark cage dive operations".

[17] In December 2014 the Director-General granted to each of the operators a "Wildlife Act Authority for interaction with great white sharks". The following statement appears on both authorities:

> **BACKGROUND**
>
> A. The Director-General of Conservation is empowered to issue authorisations under the Wildlife Act 1953.
>
> B. The Authority Holder wishes to exercise the authorisation on the Land subject to the terms and conditions of this Authority.
>
> **OPERATIVE PARTS**
>
> In exercise of the Grantor's powers under the Conservation legislation the Grantor **AUTHORISES** the Authority Holder under Section(s) 53 of the Wildlife Act 1953, subject to the terms and conditions contained in this Authority and its Schedules.

[18] The authorised activities are described in Schedule 1 to each document:

(a) The second defendant was authorised "[t]o attract great white sharks to a vessel, platform or cage for the purposes of viewing or non-commercial filming".

(b) The third defendant was authorised "[t]o attract great white sharks to a vessel, platform or cage for the purposes of viewing or filming them".

[19] The location for both authorities was the same: in the "surrounding waters of Edwards Island" as per the map in sch 5. The authorities were subject to the terms

and conditions contained in each authority and its schedules. The standard terms and conditions of each authority warned that termination of the authority might follow any breach of any condition of the authority including the Code of Practice or in the event the authorised activity caused unforeseen or unacceptable adverse effects. Both authorities were for a term ending on 1 August 2016 (unless terminated earlier). The authorities did not include any conditions relating to the safety of other water users in proximity to cage diving operations.

[20] Understanding that the Department was undertaking a review of the authorities issued to the operators PauaMAC5 wrote to the Director-General in July 2015. PauaMAC5 considered the authorities should be terminated. It claimed the operators had breached conditions in the authorities, including the Code of Practice, on several occasions. PauaMAC5 emphasised that the Department had wrongly interpreted the scope of its legislative mandate by refusing to include within the Code of Practice, or within the conditions of the authorities, provisions aimed at protecting commercial pāua divers and other users of the marine environment. PauaMAC5 invited the Department to revisit the conditions and Code of Practice with a view to setting conditions which went beyond control of the activity and protection of the wildlife to public safety more generally most particularly, other recreational or commercial divers in the areas to which the sharks were lured to cage diving operations.

[21] The Department replied on 1 September 2015 advising that it had undertaken a review of the authorities. As a result of the review formal warnings had been issued to both operators. The Department was confident that the operators fully understood their obligations under the authorities and were aware they would continue to be closely monitored. Amended authorities had been issued to the operators as a result of the Code of Practice being updated.

[22] As to the public safety concerns which were at the forefront of PauaMAC5's concerns DOC acknowledged that public safety was a desirable objective but it did not consider it had a statutory obligation to consider public safety when making decisions under the Wildlife Act.

[23] Responding to PauaMAC5's intimation of a legal challenge to DOC's interpretation of the Wildlife Act, DOC naturally wished to avoid litigation — by any party — but DOC observed that if it were to terminate the shark cage diving authorities or impose impracticable conditions it would place itself in the invidious position of facing a legal challenge from the operators.

[24] PauaMAC5's statement of claim and DOC's statement of defence reflect their antagonistic positions regarding the legitimacy of public safety considerations in the context of authorising human interaction with wildlife under the Wildlife Act.

[25] In short, PauaMAC5 takes the view that public safety, and in particular the safety of other water users, is a permissible if not a mandatory relevant consideration under the Wildlife Act when DOC is issuing authorities under the Act, or imposing conditions on authorities, or developing a Code of Practice where compliance with the Code is a condition of an authorisation under the Act.

[26] The Department on the other hand maintains that public safety matters and issues arising between users competing for space are not relevant considerations under the Act. The Act provides a regime for the protection and control of wildlife (protection being the main objective when dealing with absolutely protected wildlife). Conflicting use of space disputes, and safety issues are the province of other legislative regimes.

[27] Where do the operators stand? To summarise their pleaded position:

(a) The operators applied for authority for cage diving having been instructed by the Director-General that they were required to do so.

(b) The operators say sharks have always been present in the waters around Stewart Island in the months December to June and the risk of shark attack is an occupational risk for pāua divers in many locations around New Zealand irrespective of the activity of shark cage diving.

(c) There is no evidence of any association between shark cage diving

and any elevated risk of shark attack for pāua divers when cage diving follows best international practice.

(d) The concerns raised by the plaintiffs are beyond the scope of the Wildlife Act but, the operators, say, if pāua divers have identified the presence of sharks and the risk of shark attacks (with or without cage diving) as a health and safety issue they are obliged under health and safety legislation to modify their pāua diving practices.

[28] Ultimately, the operators deny that public safety is a permissible or mandatory consideration for the Director-General if a permit is required under s 53 of the Wildlife Act for shark cage diving activities and they deny that the plaintiff is entitled to the relief it seeks. The operators' position is that no authority is required for shark cage diving for the purpose of viewing and filming sharks.

[29] Although there is an array of issues, as I stated at the outset, the primary issue is whether s 53(1) of the Wildlife Act confers power on the Director-General to authorise shark cage diving. I turn then to the relevant provisions of the Wildlife Act.

**Wildlife Act 1953**

[30] The Wildlife Act 1953 relates to the protection and management of wildlife.

[31] Wild animals of any of the species in sch 6 of the Act are subject to the Wild Animal Control Act 1977.[3] Wildlife, on the other hand, (with some exceptions) is declared by s 3 of the Wildlife Act to be absolutely protected throughout New Zealand and New Zealand fisheries waters.

[32] "Wildlife" means any animal living in a wild state and includes the egg or offspring of any such animal.[4] The great white shark that is, the white pointer shark, is an absolutely protected marine species.[5]

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3 Wildlife Act 1953, s 7A.
4 Section 2.
5 Section 3 and sch 7A.

[33] It is an offence under the Wildlife Act to hunt or kill, without lawful authority, any absolutely protected (or partially protected) marine wildlife:

> **63A Taking of absolutely or partially protected marine wildlife**
>
> Every person commits an offence against this Act and is liable on conviction to the penalty set out in section 67(fa) who without lawful authority (the proof of which shall be on the person charged)—
>
> (a) *hunts or kills* any absolutely or partially protected marine wildlife; or
>
> (b) buys or processes for sale or sells or otherwise disposes of or has in his or her possession any absolutely or partially protected marine wildlife or any part thereof; or
>
> (c) robs, disturbs, or destroys, or has in his or her possession the nest of any absolutely or partially protected marine wildlife.
> [Emphasis added]

[34] Hunt or kill is defined in s 2:

> **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 and every act of assistance of any other person to hunt or kill wildlife

[35] Section 53 confers power on the Director-General to authorise a range of otherwise impermissible activities relating to wildlife:

> **53 Director-General may authorise taking or killing of wildlife for certain purposes**
>
> (1) The Director-General may from time to time in writing authorise any specified person to *catch alive or kill* for any purpose approved by the Director-General any absolutely protected or partially protected wildlife or any game or any other species of wildlife the hunting or killing of which is not for the time being permitted.
> [Emphasis added]
>
> (2) The Director-General may from time to time in writing authorise any specified person—
>
> (a) to catch alive or otherwise obtain alive any absolutely protected or partially protected wildlife or any game or any other species of wildlife the taking of which is not for the time being permitted; or

(b) to take or otherwise obtain the eggs of any such wildlife or game, for the purpose of distributing or exchanging the same in any other country or in some other part of New Zealand, or for any scientific or other purpose …

…

(5) Any authority granted under any of the foregoing provisions of this section may contain such conditions as the Director-General may impose. Without limiting the general power of the Director-General to impose any conditions, the Director-General may in any such authority impose all or any of the following conditions:

(a) prescribing the means by which any such wildlife or game or eggs may be caught or killed or taken:

(b) prescribing the areas in which any such wildlife or game or eggs may be caught or killed or taken:

…

(d) prescribing the duration of the authority:

(e) providing for the revocation of the authority and for the issue of any other authority in its place:

(f) providing for the furnishing of returns of the numbers of any such wildlife or game or eggs caught, killed or taken:

…

(6) Notwithstanding anything in any other provision of this Act, any authority issued under this section may contain conditions authorising the holder to use, for the purpose of catching alive or killing any wildlife or game, any live decoys or any net or noose or trap or any firearm or any other method the use of which is otherwise expressly prohibited by this Act or by any regulations made under this Act.

…

**Does s 53 empower the Director-General to authorise shark cage diving?**

[36] The Director-General contends that a modern, purposive interpretation is required to reconcile the "apparent inconsistency between ss 53(1) and 63A". Mr Prebble, in detailed submissions that were supplementary to full submissions prepared for the July 2016 hearing, outlined the legislative history starting with the Animals Protection and Game Act 1921 which was the predecessor to the Wildlife Act. The overarching thrust of the submissions was towards an interpretation of

"kill" in s 53(1) that incorporated the activities included in the meaning of "hunt or kill" in the s 2 definition.

[37] Mr Prebble submitted that this approach aligned with the protective purpose of the Wildlife Act and allowed "less invasive interactions with wildlife to be regulated so as to ensure its overall protection".

[38] In support of the primary contention that the full definition of "hunt or kill" in s 2 is imported into the word "kill" in s 53(1) specific interpretative arguments were advanced:

(a) In order to "kill" a wild animal some form of pursuit, disturbance or molestation is required as envisaged by the definition of "hunt or kill" in s 2.

(b) "By allowing for the authorisation of the more extreme activity (kill), the Act must also authorise the lesser (hunt)."

(c) Section 63A creates an offence of hunting or killing absolutely or partially protected marine wildlife without lawful authority. It follows that there must be a mechanism for obtaining lawful authority. The only provision in the Act under which authorisation to hunt or kill protected marine wildlife can be given is s 53. Other authorising provisions, ss 54 and 59, expressly relate to land-based activities and cannot therefore authorise the hunting or killing of marine wildlife. Section 53(1) must therefore allow the grant of lawful authority to "hunt or kill" absolutely protected marine wildlife even though it uses the phrase "catch alive or kill".

[39] I take a different view from the Director-General. I am unable to discern from the purpose or the text of the Wildlife Act any basis for construing the word "kill" in s 53 as though it imports the extended definition of "hunt or kill" in s 2.

[40] The Director-General's argument proceeds on the basis that as "hunt or kill" includes "pursuing, disturbing or molesting", that is, activities short of killing, then for consistency the word "kill" in s 53(1) must also encompass the same activities.

[41] To my mind the argument overlooks the interconnectedness between "pursuing, disturbing, or molesting" and "hunt or kill" within the s 2 definition. The connection with hunting or killing exists at each level of the definition. Thus "hunt or kill" includes "taking, trapping, or capturing … *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 and every act of assistance of any other person to hunt or kill" (emphasis added).

[42] The activities listed in the s 2 definition are the incidence of "hunt[ing] or kill[ing]". They are not individually proscribed. They are not to be viewed in isolation from the core activity which is hunting or killing. The point is illustrated by two provisions each making separate offences of "hunt or kill" and "disturb":

(a) It is an offence to "hunt or kill" protected wildlife (s 63(1)(a)) or protected marine wildlife (s 63A(a)).

(b) It is also an offence to "disturb … the nest" of protected wildlife (s 63(1)(c)) or marine wildlife (s 63A(c)).

[43] Of and by itself the mere act of disturbing may found the offence of disturbing a nest (putting aside defences and issues of intent). By contrast the mere act of disturbing protected wildlife will not, of and by itself, constitute an offence of "hunting or killing". That is the consequence of the s 2 definition of "hunt or kill". The disturbance of wildlife which s 2 contemplates must be pursuant to the act of "hunting or killing" or the intention to "hunt or kill".

[44] Counsel for the Director-General submitted that the activities listed in s 2 signalled that a wide range of interactions are potentially prohibited under the Act; that there is no need to intend to hunt or kill in the ordinary meaning of those words;

and that the s 2 definition of "hunt and kill" is designed to capture deliberate interference with wildlife that may or may not cause harm to the wildlife. Reliance is placed on the observation of Mallon J in *Solid Energy New Zealand Ltd v Minister of Energy* at [86].[6]

[45] The issue in *Solid Energy* was whether, when Solid Energy took steps to protect wildlife pursuant to conditions attached to consents and licences granted under the Resource Management Act 1991 and the Coal Mines Act 1979, Solid Energy was required also to obtain authorisation or consent under the Wildlife Act 1953.[7]

[46] In the passage cited by Crown Counsel, Mallon J considered whether the accidental or non-negligent killing of wildlife would be caught by the s 63 offence provision. The principal point emerging from Her Honour's analysis was that Solid Energy's intention to safeguard wildlife was irrelevant. By moving the wildlife (*Powelliphanta Augustus* — giant snails) from their old habitat to a new habitat Solid Energy was interfering with the natural and ordinary activities of protected wildlife and engaged in an activity that carried with it the risk of injury and death. It did not matter that Solid Energy was well-intentioned. Unless it had lawful authority its actions would fall within s 63.

[47] The paragraph which counsel cites needs to be read in the context of the judgment as a whole and in particular Her Honour's earlier consideration of the definition of "hunt or kill". Responding to a hypothetical situation of a person walking through bush and thereby startling wildlife so that it moved or flew away Mallon J said that the wildlife was not "disturbed" within the definition of "hunting or killing". That is because the person is taking no action directed at the wildlife. The birds moved of their own volition. Mallon J considered it would be stretching the ordinary meaning of "disturb" in the definition of "hunt or kill", for this kind of disturbance to be captured.[8]

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6 *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC).
7 At [1].
8 At [83].

[48] I do not read Mallon J as suggesting other than that the listed activities in s 2 are incidence of hunting or killing. There is a statutory connection between "disturb", for example, and the proscribed activity namely "hunting or killing". Consistent with Mallon J's approach I observe that the unwitting disturbance of protected birds will acquire a different legal significance if the disturbance is (say) due to flushing them out in the course of hunting or intending to kill them.

[49] The relevant end point for the purpose of this proceeding is that the phrase "catch alive or kill" in s 53(1) takes its ordinary meaning. There is no ambiguity or incoherence in the Wildlife Act that warrants a different approach. In particular I see no basis for importing into the meaning of "catch alive or kill" the definition of "hunt or kill" along with the activities that are listed as having a connection to "hunt or kill".

[50] Compelling statutory indications that "hunt or kill" and "catch alive or kill" have different meanings are provided by ss 54 and 59. The expressions "catch alive or kill" and "hunt or kill" are used within the same provision but expressed disjunctively. For example in s 54:

> (1) The Director-General … may authorise [a person], to hunt or kill, or cause to be hunted or killed, *or* to catch alive for any specified purpose any such animals …
> [Emphasis added]

[51] And in s 59:

> (1) … the Minister … may authorise in writing the Director-General, or any other officer or servant of the Department …
>
> …
>
> (b) to catch alive *or* to hunt or kill any such wildlife.
> [Emphasis added]

[52] Although the expressions are not used disjunctively they appear in contradistinction to each other in s 53(1) itself.

> The Director-General may from time to time in writing authorise any specified person to *catch alive or kill* for any purpose approved by the Director-General any absolutely protected or partially

> protected wildlife or any game or any other species of wildlife the *hunting or killing* of which is not for the time being permitted.
> [Emphasis added]

[53] I am unable to accept that it is necessary to adopt the Director-General's position in order to reconcile conflicting provisions. I see no gap or inconsistency in the provisions that requires one or another to be read in the manner proposed. Section 63A creates an offence of hunting or killing without lawful authority but the source or nature of the "lawful authority" is not specified. The lawful authority may be prospective. It may happen to be supplied under a statutory regime beyond the Wildlife Act. Section 63A is silent on the point. By contrast, s 63B, for example, refers expressly to an "authority … issued, granted or given under the Fisheries Act 1996 …".

[54] Ultimately the Director-General commends reading "kill" in "catch alive or kill" as importing the meaning of "hunt or kill" on the basis that this interpretation "allows less invasive interactions with wildlife to be regulated so as to ensure its overall protection". While the Director-General's objective may be reasonable it is not a sound interpretative basis for a departure from the plain meaning of "catch alive or kill" and the argument misconstrues the definition of "hunt or kill".

[55] The Department's conviction that s 53(1) confers power on the Director-General to authorise shark cage diving proceeds from an erroneous interpretation of the definition of "hunt or kill" in s 2. This interpretative flaw has led to the granting of authorities that are not empowered by the Wildlife Act. Complex arguments, some strained, have been advanced to resolve so-called ambiguities and incoherence in the Wildlife Act. The simple fact, however, is that shark cage diving (without more) does not entail catching alive or killing, or intending to "catch alive or kill" protected wildlife of any description. Consequently, those operations cannot be authorised under s 53(1).

[56] I acknowledge that DOC faces a number of practical issues. Key points raised over time by PauaMAC5 were touched upon in Mr Munn's affidavit. The Department accepts that there is an overlap in the use of space between pāua fishers and the shark cage dive community but that it is not within its jurisdiction or

statutory mandate to control. Nor does the Department have jurisdiction in respect of the health and safety of pāua dive crew. The Department does not accept that shark cage dive operations have modified shark behaviour by building a strong association between bait/food and vessels and divers in the area and considers that it is something which the Code of Practice is intended to prevent.

[57] Mr Munn's evidence is that DOC is not well placed to resolve all of the issues raised by PauaMAC5 and that such resolution may require new legislation or at least further exploration of legislation that currently provides for the safety of employees, for example, the Health and Safety at Work Act 2015.

[58] The Department has attempted to address practical issues by imposing conditions on authorities issued under s 53(1) of the Wildlife Act. But for the reasons I have outlined that course is not legally available. As currently drafted the Wildlife Act is ill-suited to regulating shark cage diving. I contrast s 53 under which the authorities have been granted with, for example, the Marine Mammals Protection Regulations 1992. The purpose of those regulations is to provide for the protection, conservation and management of marine mammals and, in particular, —[9]

> (a) to regulate human contact or behaviour with marine mammals either by commercial operators or other persons, in order to prevent adverse effects on and interference with marine mammals:
>
> (b) to prescribe appropriate behaviour by commercial operators and other persons seeking to come into contact with marine mammals.

[59] There is no similar provision in the Wildlife Act and I am not aware of any regulations made under the Wildlife Act which purport to regulate human contact with marine wildlife in such a way.

[60] The end result is that the Department's regulation of shark cage diving operations, which have increased in attractiveness over the years, has been attempted in the context of a statute that provides no suitable framework for such regulation much less any scope to address the risk to other water users that such operations are said to create. The solution must lie in a legislative framework that confronts the varied and sometimes competing interests at stake. The solution does not lie in

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[9] Marine Mammals Protection Regulations 1992, reg 4.

giving to the words "catch alive or kill" a meaning that they do not bear — on any principle of statutory construction.

**The declarations sought**

[61] The declarations sought by the plaintiff changed over the course of the proceeding. At the hearing the proposed declarations were framed in the following way:

> 1 The definition of "hunt or kill" in section 2 of the Wildlife Act 1953 extends to actions that involve the pursuing, disturbing or molesting of any wildlife whether such actions are accompanied by an intention to kill or not.
>
> 2 When considering issuing authorities under s 53(1) of the Wildlife Act 1953, the Director-General shall interpret the phrase "catch alive or kill" in that subsection according to its natural and ordinary meaning and cannot interpret the phrase by importing the definition of "hunt or kill" from section 2.
>
> In the alternative to [declaration] 2:
>
> 3 Public safety is a permissible and or mandatory consideration under the Wildlife Act 1953:
>
> a when issuing authorities under s 53(1) of the Wildlife Act; and
>
> b when imposing conditions under s 53(5) of the Wildlife Act.

[62] The operators proposed declarations to the effect that the Director-General has no authority to authorise any activity under s 53 unless there is an intent to catch or kill wildlife and that no such authority is required for shark cage diving where the intent is only to view and photograph but not hunt or kill.

[63] The Director-General's position is that the Court should issue a declaration that confirms that an authority to hunt and kill protected wildlife may be granted under s 53.

[64] It follows from my analysis that the phrase "catch alive or kill" in s 53(1) is not to be interpreted by importing the definition of "hunt or kill" from s 2. Further, I have also concluded that s 53(1) does not confer power on the Director-General to do

other than to authorise a specified person to "catch alive or kill" protected wildlife. I am prepared to make a declaration to that limited extent.

**Summary**

[65] To mitigate potential risks to great white sharks from increasingly popular commercial shark cage diving operations, the Director-General of Conservation has endeavoured to regulate such activities. Authorisations, with conditions attached, have been granted under s 53(1) of the Wildlife Act.

[66] Section 53(1) confers a power on the Director-General to authorise a specified person to "catch alive or kill" protected wildlife falling within the terms of s 53(1). The words "catch alive or kill" take their ordinary meaning. They do not extend to shark cage diving unless that activity is undertaken with an intent to catch alive or kill sharks.

[67] It follows that s 53(1) does not confer a power on the Director-General to authorise commercial shark cage diving that involves, as in this litigation, attracting great white sharks to a vessel, platform, or cage for the purpose of viewing or filming them. This conclusion means the question of "public safety" and whether it is a permissible or mandatory consideration when granting authorities under s 53(1) falls away.

[68] Activities will only constitute an offence under s 63A(a) of the Wildlife Act if they involve the hunting or killing, or an intention to hunt or kill, protected marine wildlife in terms of the definition of "hunt or kill" in s 2 of the Wildlife Act (as analysed in this judgment).

**Result**

[69] The following declaration is made:

> Section 53(1) of the Wildlife Act 1953 does not confer power on the Director-General of Conservation to authorise commercial shark cage diving operators, or any person, to attract sharks to a vessel, platform or cage for the purposes of viewing or filming the sharks.

[70] The declarations sought by the plaintiff are not made. In particular there will be no declaration that the Director-General must consider the safety of other water users. That is in consequence of my approach to s 53(1) rather than that such a declaration was successfully resisted by the first defendant.

[71] The declaration I do make aligns with the relief the plaintiff originally sought at B of its statement of claim but not the declarations sought at the hearing. My declaration aligns also with the general position advanced by counsel on behalf of the second and third defendants although the declaration is not in the form sought in counsel's submissions.

[72] In those circumstances I am inclined to the view that costs should lie where they fall. But submissions may be filed. If that is the approach parties decide to take counsel should file focussed memoranda (no more than six pages) by 7 July 2017.

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Karen Clark J

Solicitors:
Chapman Tripp, Wellington for Plaintiff
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