IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA355/2017
[2018] NZCA 348

BETWEEN	PAUAMAC5 INCORPORATED Appellant
AND	DIRECTOR-GENERAL OF CONSERVATION First Respondent
AND	SHARK DIVE NEW ZEALAND LIMITED Second Respondent
AND	SHARK EXPERIENCE LIMITED Third Respondent

Hearing:	27 March 2018
Court:	Cooper, Clifford and Williams JJ
Counsel:	B A Scott and O T H Neas for Appellant J M Prebble and D J Watson for First Respondent S J Grey for Second and Third Respondents
Judgment:	4 September 2018 at 4.00 pm

JUDGMENT OF THE COURT

A Shark cage diving is an offence under s 63A Wildlife Act 1953.

B The Director-General of Conservation has no power under s 53 to authorise this activity.

C The appeal is therefore dismissed.

D There is no award of costs.

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] Shark Dive New Zealand Ltd and Shark Experience Ltd are commercial cage diving companies operating off the northern Tītī Islands, a cluster of tiny islands located around 8–12 kilometres east of Stewart Island. They use berley and bait to draw white pointer sharks, or great white sharks, as they are commonly known, to the vicinity of their vessels. Tourists who, it seems are prepared to pay good money for the experience, then view the sharks up close but from behind the safe confines of submerged cages suspended from the vessels.

[2] The Director General of Conservation (the Director-General) issued authorities to Shark Dive and Shark Experience to undertake these activities. They were issued pursuant to the Wildlife Act 1953 (the Act). The authorities are conditional on compliance with a Code of Practice that is focussed on protecting the welfare of the sharks.

[3] The appellants, PauaMAC5 Inc (PauaMAC5) represents commercial pāua quota owners. They also operate in the Tītī Islands as the Islands are home to extensive beds of fast-growing pāua. They fear their divers' lives are being put in greater danger due to this tourism activity occurring so close to where they work. They say their safety was ignored when the Director-General granted the permits. They sought declarations in the High Court to the effect that the Director-General had no power to authorise cage diving or, if there was such a power, that the safety of pāua divers must be a mandatory relevant consideration when deciding whether and, if so, on what conditions, authorities should be granted. In this Court, PauaMAC5 did not pursue the first of these declarations.

[4] The Director-General takes the position that he has authority to authorise cage diving (or to refuse to do so) by virtue of s 53(1) of the Act and that without such

permission, the activity is an offence under s 63A.[1] The Director-General says further the focus of that Act is wildlife, not humans, and it is not required to consider human safety as a mandatory relevant consideration in its authorising decisions.

[5] Shark Dive and Shark Experience meanwhile argue that shark cage diving is not an offence under the Wildlife Act and no authority is required. They also argue that the Director-General is not required to consider public safety.

[6] In the High Court, Clark J reasoned that shark cage diving is not an offence under s 63A of the Act, and found therefore that the Director-General did not have jurisdiction to control it under s 53(1).[2]

[7] The appeal raises three issues:

(a) Is shark cage diving an offence under s 63A of the Act? The answer to this question depends on whether luring the animals to submerged cages using attractants is to "hunt or kill" them within the definition in s 2(1).

(b) If shark cage diving is an offence under s 63A, does the Director-General have the power to authorise the activity under s 53(1) of the Act? The answer to this question depends on whether the activity is to "catch alive or kill" those sharks in terms of that provision.

(c) If the Director-General does have this power, is he or she required to consider the safety of pāua divers when making a decision under s 53(1), or alternatively is such consideration at least permissible?

Background

[8] PauaMAC5 represents local owners of pāua quota who harvest pāua in and around Stewart Island generally and the northern Tītī Islands in particular. Pāua may

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1 The Director-General is Mr Lou Sanson.

2 *PauaMAC5 Inc v Director-General of Conservation* [2017] NZHC 1182 at [66]–[68].

only be harvested by free-diving, that is, without artificial breathing apparatus.[3] Pāua is a high value commodity, making its harvest profitable despite this restriction on harvest method. An indicator of value may be seen in the fact that the 90 tonnes of pāua quota available within the Stewart Island pāua Quota Management Area — that is the quota, not the pāua itself — was trading in April 2016 at around $400,000 per tonne.

[9] Great White Sharks frequent the northern Tītī Islands generally between the late summer and early winter months of March to June. They are described by marine biologists as apex predators. Males can grow to around 6 metres in length and females can exceed 6.4 metres. They are long lived — perhaps 50 or even 70 years — precise data on this question is understandably sparse. The attraction of the Tītī Islands for the sharks is the extensive seal population domiciled there during those months. Of the 178 great white sharks that have been photo-identified in and around Stewart, Ruapuke and the northern Tītī Islands between February 2007 and June 2015, most were located off the Tītī Islands. Abundance seems to vary from year to year although the evidence is that "most" sharks return to the Islands. That is the sharks frequenting the area during those months are not the same each year.

[10] Shark Dive and Shark Experience are in turn attracted to the Tītī Islands by the presence of the great white sharks. They conduct shark cage diving in waters surrounding the Islands. Cage diving involves fee paying divers viewing these sharks in their natural habitat from the safety of a cage that is lowered into the water. Sharks are drawn to the area using tuna berley which is ground so fine that it provides scent but no food. Once the sharks are in the vicinity, they are attracted to the cage itself using tuna meat baits.[4]

[11] Shark cage diving began in the northern Tītī Islands area in 2008. At this time, there were no formal controls in place. The Department of Conservation's (DOC) initial position was that it did not have jurisdiction to impose them because the Act did

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3 Fisheries (Commercial Fishing) Regulations 2001, reg 76.

4 These are large chunks of tuna suspended at the end of a rope. The object is the shark should not be able to catch the bait, but the evidence is that on occasion the shark outwits the bait operator.

not apply to this activity. But in 2013, following consultation with stakeholders including cage diving operators and pāua divers, DOC released interim guidelines in order to assist operators to identify and mitigate risks to the sharks from their activities. At first these were intended to be no more than best practice guidelines.

[12] PauaMAC5 made its own submission on the interim guidelines. It expressed concern that the use of attractants could modify shark behaviour by causing sharks to build an association between the presence of attractants in the water, the cage diving vessels, and pāua divers in the vicinity. This increased the risk of shark attacks for unprotected pāua divers. PauaMAC5 submitted that s 63A of the Act applied to prohibit this activity which (due to the extended definition in the Act to which we will turn below) could be said to amount to "hunt[ing] or kill[ing]" sharks. PauaMAC5 submitted that authorities would therefore be needed under s 53(1) of the Act.

[13] Following consideration of these submissions, DOC decided that it did have authority under the Act after all. The interim guidelines then became a code of practice and DOC took the view that it could require compliance with the code by way of condition on authorities granted under s 53(1). The code was released in December 2013. It identified relevant risks to the sharks and how they could be mitigated. It also noted that 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] In December 2014, the Director-General granted shark cage diving authorities to Shark Dive and Shark Experience to operate in the "surrounding waters of Edwards Island" located in the Tītī Island group. There were no conditions in the authorities to provide greater protection for other users in the vicinity of cage diving operations. Shark Dive was authorised by its authority "[t]o attract Great White sharks to a vessel, platform or cage for the purposes of viewing or non-commercial fishing". Shark Experience was authorised "[t]o attract Great White sharks to a vessel, platform or cage for the purposes of viewing or filming them."

Legislative Framework

[15] "Wildlife" is relevantly defined in the Act as "[a]ny animal that is living in a wild state … ".[5] Under the Act, all wildlife in New Zealand is "absolutely protected" unless such protection is reduced or removed by one or other of ss 4–7, 7A or 7C.[6] It is unnecessary to discuss further the effect of these provisions except to note they provide that certain wildlife species listed in schedules to the Act may be hunted, taken, managed or farmed subject to certain conditions. Section 7BA(1) declares that the marine species listed in schedule 7A are "animals" for the purpose of the Act. White pointer sharks are listed in that schedule. Great white sharks are thus absolutely protected under the Act.

[16] Section 63 of the Act makes it an offence (inter alia) to "hunt or kill" any absolutely protected wildlife unless a person can point to lawful authority to do so.

[17] Section 63A makes it a specific offence to hunt or kill certain marine wildlife (including great white sharks) in the following terms:

> **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.

[18] Section 67(fa) is the relevant penalty provision. It provides for a maximum fine of $250,000 and/or a maximum term of imprisonment of two years for an offence under s 63A.

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5 Wildlife Act 1953, s 2. The extended definition is as follows:
wildlife means any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise; but does not include any animals of any species specified in Schedule 6 (being animals that are wild animals subject to the Wild Animals Control Act 1977).

6 Section 3.

[19] The key phrase for our purposes is "[h]unt or kill". It 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 to 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

[20] The definition is further extended by the definition of "take" in s 2 as follows:

> **take**, and all references thereto, includes taking, catching, or pursuing by any means or device, and also includes the attempt to take

[21] The Director-General is then able to authorise any "specified person" to contravene some of the Act's prohibitions by providing them with lawful authority to do so.[7] Such authorisations will variously enable the person to "catch alive or kill", or "otherwise obtain alive", any partially or absolutely protected species; and/or to "hunt or kill or cause to be hunted or killed" any such species; and/or to "take or otherwise obtain" the eggs of any such species.

[22] Section 53 is the general authorisation provision. The Director-General purported to authorise shark cage diving pursuant to subsection (1) of that section:

> **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.
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> (2) The Director-General may from time to time in writing authorise any specified person—
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> (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
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> (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 party of New Zealand, for any scientific or other purpose approved by the Director-General, or

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7 Wildlife Act, ss 53 and 54.

for the purpose of rearing any such wildlife or game, or for the purpose of hatching any such eggs and of rearing any progeny arising from that hatching,—

and may in any such authority authorise the holder to have any such wildlife or game or eggs or progeny in his or her or its possession for any of the purposes specified in this subsection, and may in any such authority authorise the holder to liberate any such wildlife or game or progeny in such area and during such period as may be specified in the authority.

…

(Emphasis added)

[23] Section 54 provides similar powers but is aimed specifically at situations where wildlife is damaging land, stock, crops, chattels or other wildlife:

54 Director-General may authorise hunting or killing of wildlife causing damage

(1) The Director-General, on being satisfied that injury or damage to any person or to any land or to any stock or crops or to any chattel or to other wildlife has arisen or is likely to arise through the presence on any land of any animals (whether absolutely protected or not), and whether or not the land is a wildlife refuge or a closed game area, may authorise in writing the occupier of the land, or any officer or servant of the Department, or any other person, *to hunt or kill, or cause to be hunted or killed, or to catch alive* for any specified purpose any such animals, or to take or destroy the eggs of any such animals, subject to such conditions and during such period as may be specified in the authority.

…

(Emphasis added.)

[24] In addition, s 59 provides a power of entry onto private land for a s 54 purpose and thereby to "catch alive or hunt or kill" wildlife:

59 Entry on land for purposes of Act

(1) If in the opinion of the Minister any wildlife is causing or is likely to cause injury or damage to any land, or to any person, or to any stock or crops, or to any chattel, or to any other wildlife, or to any trees, shrubs, plants, or grasses, the existence of which may tend to protect the habitat of any absolutely protected wildlife or of any game, or which may tend to mitigate soil erosion or to promote soil conservation or the control of floods, he may authorise in writing the Director-General, or any other officer or servant of the Department, to enter at any time and from time to time on any land under the control of any local authority or public

body or any Maori land or private land, with such assistants as he thinks fit, for all or any of the following purposes:

…

(b) *To catch alive or to hunt or kill* any such wildlife.

…

(Emphasis added.)

[25] It will be seen that the relevant offence is to "hunt or kill" protected marine wildlife but the authorisation provisions (both marine and terrestrial) utilise different words or word combinations to describe the kind of interference in the wildlife which may be the subject of an authority. In fact, in s 53(1) "hunt or kill" is not used as the operative phrase at all, instead the word combination is "catch alive or kill" an animal, "the hunting or killing of which is not permitted". There is a certain untidiness in this drafting.

[26] Finally, by way of background, it is necessary to refer to s 68B which provides defences to offences in respect of marine wildlife. It relevantly provides:

68B Defences to offences in respect of marine wildlife

…

(3) Where any person is charged with an offence against section 63A, it is a defence to the charge if the defendant proves that the act or omission constituting the offence took place in circumstances of stress or emergency and was necessary for the preservation, protection, or maintenance of human life.

(4) Where any person is charged with the killing or injuring or being in possession of any marine wildlife contrary to the provisions of this Act, or any regulations made under it, and the provisions of subsections (1), (2), and (3) do not apply in the circumstances of the case,—

(a) it is a defence to the charge if the defendant proves that the death or injury to such wildlife was accidental or incidental, and that the requirements of section 63B were complied with:

(b) it is a defence to the charge if the defendant proves that the death or injury to, or possession of, such wildlife took place as part of a fishing operation and the requirements of section 63B were complied with.

[27] Section 63B is specifically referenced in s 68B(4)(a). It relates to fishing operations. It accepts that fishers will have unintended by-catch, and requires that such a catch be logged in the vessel's log or reported to a ranger and/or a fisheries officer. The effect of ss 68B and 63B in combination is that if these steps are taken, the fishers will have a defence to any change under s 63A, provided what occurred was accidental, incidental or part of a fishing operation.

[28] By implication, it follows that the offence in s 63A is one of strict liability. That is, it is not necessary to prove intention to hunt or kill a protected marine species, but it will be a defence to such a charge if the defendant can prove that the injury or death to the animal was accidental, incidental or occurred as part of a fishing operation.[8]

High Court decision

[29] The case argued in the High Court was significantly different to the case that was originally pleaded. PauaMAC5's original case centred on whether public safety is a permissible, if not a mandatory relevant consideration under the Act for issuing authorities and drafting conditions and the Code of Practice. When the proceedings first came before Collins J in July 2016, he adjourned the matter and asked the parties to address the broader issue of whether s 53(1) of the Act permits the Director-General to authorise shark cage diving activities.[9]

[30] Amended proceedings were then heard by Clark J. The Judge held that the Director-General is not empowered by the Act to authorise shark cage diving because it does not meet the description of "catch alive or kill" in s 53(1).[10] She noted that s 53(1) refers to "catch alive or kill" where s 63A refers to "hunt or kill".[11] She considered the overall question was therefore whether the s 2 definition of "hunt or kill" is imported into the word "kill" in s 53(1).

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8 Section 68AB refers specifically to mens rea and strict liability offences but subsection (6) of that section provides that ss 63A and 63B "continue to apply as if this section had not been enacted".

9 *PauaMAC5 Inc v Director-General of Conservation*, above n 2, at [6].

10 At [66]–[67].

11 At [68].

[31] Clark J reasoned that in the s 2 definition, the listed activities short of killing are incidents of "hunt[ing] or kill[ing]" and so are coloured by those wider purposes.[12] They are not to be viewed in isolation and are not individually intended to amount to "hunt[ing] or kill[ing]".[13] The Director-General relied on *Solid Energy New Zealand Ltd v Minister of Energy* where Mallon J had held that intention was irrelevant to the activities short of hunting and killing in s 2.[14] Clark J considered this part of the judgment had been taken out of context and noted that earlier in the judgment, Mallon J had considered that if a person were to startle wildlife by walking through bush, this would not be disturbing for the purposes of "hunting or killing" as the person "took no action directed at the wildlife".[15] Clark J concluded that:

> [48] I do not read Mallon J as suggesting other than that the listed activities in s 2 are incidence (sic) of hunting or killing. There is a statutory connection between "disturb", for example, and the proscribed activity namely "hunting or killing".

[32] Clark J further considered that the separate references to "hunt or kill" and "catch alive" in ss 54 and 59 showed they were intended to have different meanings.[16]

[33] Clark J concluded that there were no convincing arguments that displaced the ordinary meaning of "catch alive or kill" and there was no reason to import the definition of "hunt or kill" into s 53(1).[17] She recognised that this led to a number of practical issues,[18] but held that the Act is not the correct framework under which to control this activity.[19] In her view there was no tenable interpretation of the Act that could resolve this particular issue.[20] The following declaration was made:[21]

> 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.

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12 At [42].
13 At [42].
14 *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC) at [86].
15 At [47], citing *Solid Energy New Zealand Ltd v Minister of Energy*, above n 14, at [83].
16 At [50].
17 At [53].
18 At [56].
19 At [60].
20 At [60].
21 At [69].

[34] The Judge made no formal finding on the question of whether shark cage diving is nonetheless an offence under s 63A. It must however be said that the irresistible implication of her conclusion that disturbance can only meet the definition of "hunt or kill" if it is done for the actual purpose of hunting or killing in the ordinary sense, is that shark cage diving is not an offence.

Submissions

[35] PauaMAC5 argues as follows:

(a) Deploying attractants and baits to draw sharks to a diving cage is "hunt[ing] or kill[ing]" within the terms of s 63A. That is because the extended statutory definition includes "pursu[ing], disturb[ing], or molest[ing]" the animals.

(b) The phrase "catch alive or kill" in s 53(1) imports the extended meaning of "hunt or kill". It is sensible to accept that catching alive or killing first requires the perpetrator to "pursue, disturb or molest" the animal. Thus, it makes better sense to read "hunt or kill" disjunctively so that "kill" is capable of bearing the full extended meaning in s 2. The effect of this is that kill does not necessarily mean "kill" in its ordinary sense. In addition, a purposive approach would ensure that the Director-General is empowered to authorise under s 53(1) any activity that would otherwise be an offence under s 63A and shark cage diving is plainly an offence.

(c) Public safety is a mandatory relevant consideration in any authorisation decision under s 53(1) because:

(i) public safety is a matter of inherent importance;

(ii) authorisations under s 53(1) can be granted for "any purpose";

(iii) the scheme of the Act is to control all human interaction with wildlife in New Zealand; and

(iv) public safety is a logical or rational consideration in the circumstances.

[36] The Director-General argues as follows:

(a) Shark cage diving is "pursu[ing], disturb[ing] or molest[ing]" sharks and is therefore "hunt[ing] or kill[ing]".

(b) The words "catch alive or kill" import the entire definition of "hunt or kill". This is the interpretation consistent with the Act's purpose of providing blanket protection to wildlife subject to a general power to control harmful interactions. Further, both ss 63 and 63A refer to an absence of "lawful authority". The only provision capable of supplying such authority in respect of marine wildlife is s 53(1). The power to authorise must therefore be available in this case.

(c) Public safety is not a mandatory relevant consideration under s 53 because the focus of the Act is the welfare of the wildlife. Anthropocentric concerns are expressly limited to the circumstances covered by ss 5(2), 54 and 59. That said, it was accepted that public safety may be a permissible relevant consideration where the facts justify it and its effect is not to undermine the purpose of the Act.

[37] Shark Dive and Shark Experience jointly argue:

(a) Their activity is not hunting or killing in terms of s 63A because:

(i) There is:

(1) no actual catch, hunt or kill;

(2) no activity undertaken or method used by which it is intended to hunt or kill; and

(3) no attempt to hunt or kill.

(ii) A narrower intention-based approach to s 63A is consistent with:

(1) the Act's purpose of wildlife protection;

(2) the freedom of movement and expression protected in the New Zealand Bill of Rights Act 1990; and

(3) avoiding over-criminalisation by ensuring that the proscribed wrong is proportionate to the significant penalties under s 67(fa).

(iii) Even if "pursue, disturb or molest" without any hunting purpose is all that is required, shark cage diving simply attracts sharks to a cage. It does not "disturb, pursue or molest" them.

(b) As there is no offence, no authority is required. But if that is incorrect, then it is necessary to read "catch alive or kill" in s 53(1) as enabling the grant of such authority. This is achieved by giving effect to Parliament's intention that all elements of the definition of "hunt or kill" are imported into that prior phrase.

(c) Public safety is not a mandatory relevant consideration under s 53(1) because:

(i) the purpose of the Act is protection of wildlife;

(ii) DOC has no expertise in public safety;

(iii) public safety is protected by other legislation;

(iv) section 53 can be distinguished from Part 1 of the Act in relation to wildlife reserves. This Part imports Part 3B of the Conservation Act 1987 specifying detailed processes and criteria including extensive mandatory relevant considerations; and

(v) there is no evidence to support the suggestion that the activity increases risks to public safety in any event.

[38] Further argument was independently advanced by PauaMAC5. PauaMAC5 noted that all three parties now agreed that Clark J was in error in concluding no authorisation could have been given for shark cage diving. This meant the case no longer had a contradictor on that point. PauaMAC5 undertook to provide further submissions as contradictor, a course which this Court approved by direction on 22 March 2018. PauaMAC5 therefore argued further as follows:

(a) "[H]unt or kill" and "catch alive or kill" are intended to carry different meanings in the Act — the former is defined while the latter is not; and the phrase "catch alive" is used independently of "or kill" in a number of provisions. It cannot therefore be the case that the two phrases were intended to be co-extensive.

(b) Both phrases occur separately in s 53(1).

(c) "[H]unt or kill" is specially defined as a single phrase rather than disjunctively as separate words each carrying the same extended meaning.

(d) Such narrow reading of "catch alive or kill" is consistent with the Act's purpose of wildlife protection.

Is shark cage diving an offence?

[39] We consider that Clark J erred when she took the view that "pursu[ing], disturb[ing] or molest[ing]" protected wildlife will only be "hunt[ing] or kill[ing]" if they occur in pursuit of the purpose of "hunt[ing] or kill[ing]" (in its narrower ordinary sense).[22] Such conclusion fails to take account of the fact that the definition expressly includes attempts. For example, disturbing a protected species for the purpose of hunting or killing it would be an attempt to hunt or kill, which is already provided for

[22] At [42].

in the definition. Disturb must logically mean something else. We turn now to make our own assessment of what is, and what is not, included in the definition.

[40] "[H]unt or kill" must be construed in its statutory context and in light of the underlying statutory purpose. The phrase is given an "extended, non-exclusive meaning" in s 2.[23] It must therefore be intended to include the ordinary meaning of hunt or kill — to pursue an animal for the purpose of catching or killing it; even though the definition does not quite use those terms. But it is intended also to carry a wider meaning as both Mallon J in *Solid Energy New Zealand Ltd* and Clark J in this case affirm.[24] For example, the definition provides that "hunt[ing] or kill[ing]" expressly includes "tak[ing] or trap[ping]" which, although analogous to hunting, would not generally attract that description. In this way the definition is extended to cover the taking of eggs and the trapping of kiwi for conservation purposes. Nor would "tak[ing] or trap[ping]" amount to killing if that was not the result, intended or otherwise. The meaning is extended in that sense too.

[41] Further, "hunt[ing] or kill[ing]" is plainly intended to apply to protected marine species as a result of the enactment of s 63A. It must therefore, by necessary implication, include fishing for, diving for or otherwise gathering such species, whether or not the wildlife is killed in the process. The meaning is extended in that sense also. Further all attempts at hunting or killing are expressly covered as is assisting someone else to hunt or kill.

[42] Finally, as we have noted, there is no necessity to prove any intention to hunt or kill. Rather, as we have mentioned above at [28], a lack of intention is a defence in certain circumstances. This can only mean that "pursu[ing], disturb[ing] or molest[ing]" any protected marine species will each be sufficient to constitute an offence irrespective of whether the individual intended to hunt or kill the animal in the ordinary sense of pursuing for the purpose of catching or killing. This aspect of the definition is also an extended meaning. Comprehensive coverage of a wide range of

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23 *Solid Energy New Zealand Ltd v Minister of Energy*, above n 14, at [78]

24 *Solid Energy New Zealand Ltd v Minister of Energy*, above n 14 at [78]–[85]; and *PauaMAC5 v Director-General of Conservation*, above n 2, at [44]–[48].

actions that bring a risk of harm to wildlife reflects the absolute protection purpose of the Act.

[43] But there are limits. Just what constitutes pursuit or disturbance will be a question of fact to be determined by reference to the Act's primary purpose which is to facilitate the protection (in this case) of protected marine species against harmful or potentially harmful interaction with humans. That will mean that some forms of pursuit or disturbance will be so unlikely to result in harm to the animal, that it ought not to be construed as amounting to pursuing or disturbing for the purpose of the Act. For example, a protected fish that is required to deviate momentarily from its path to avoid a swimmer is probably not disturbed for the purpose of the definition, but a protected bottom-dwelling species that is accidentally stood on probably is; and the perpetrator would need to have recourse to the defences in s 68B in the unlikely event he or she is prosecuted for it. In this minor respect, we differ from Mallon J who took the view that action intentionally directed at the animal is required.[25] That approach imports an element of intention into the offence which is inconsistent with the existence of an explicit accidental death or injury defence in s 68B.

[44] Similarly, following a protected marine species as it swims naturally would probably not constitute "pursuit" or "disturb[ance]" in terms of the definition, but active pursuit, causing the animal to feel it necessary to evade or outrun the pursuer may well, even if the interference is not to catch or kill the animal but merely to photograph it. Where the line is to be drawn will come down to the risk the act presents for the animal.

[45] In light of the foregoing, we are satisfied that shark cage diving is "pursu[ing] or disturb[ing]" great white sharks and therefore is "hunt[ing] or kill[ing]" within the meaning of s 63A. Shark Dive and Shark Experience use berley and bait as attractants to bring the animals to the cage. This is pursuing them in the same way that the use of bait or a fly to draw a fish to the angler's hook is pursuing the fish. Further, attractants are designed to cause the animal to deviate significantly from its natural swimming pattern. That amounts to a disturbance of the animal.

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25 *Solid Energy New Zealand Ltd v Minister of Energy*, above n 14, at [86].

[46] We are fortified in these conclusions by the evidence with respect to risk to the sharks. According to the evidence of Mr Clinton Duffy, a Technical Advisor in the Marine Ecosystems Team at DOC, cage diving operations may result in sharks:

(a) biting or colliding with cages and support vessels;

(b) ingesting ropes, decoys or other equipment such as bags used to deploy berley;

(c) becoming entangled in lines or entrapped in the cages themselves;

(d) engaging in aggressive interactions with other sharks also drawn to the vicinity.

[47] We accept that Shark Dive and Shark Experience deny that any such risks exist, but the existence of potential for such harm is sufficient to satisfy the extended definition. Its relatively low threshold is consistent with the Act's absolute protection purpose.

[48] We conclude that shark cage diving is an offence under s 63A of the Act.

Can shark cage diving be authorised?

[49] We do not however consider that shark cage diving is amenable to authorisation under s 53(1).

[50] We accept that there is some sense in interpreting the Act so that the Director-General may authorise any action that would otherwise be an offence. There is a tidy symmetry in that. We accept also that the Act is 65 years old and the marine species offence provision was enacted in 1996, 43 years after the general authorisation provision that is argued to apply to it. As shark cage diving demonstrates, the way humans choose to interact with protected marine species has changed since 1953, and perhaps even since 1996. A purposive approach to statutory

interpretation must take account of these factors where relevant.[26] And in old often-amended legislation like the Wildlife Act, complementary provisions such as ss 63A and 53(1) cannot be expected to clip together with the neat precision of a new Act. But the words of s 53(1) must still be capable of bearing the meaning argued for, or it must be reasonably necessary to adopt that meaning in order to give effect to the Act's purpose in a modern context. In our view, neither proposition bears close scrutiny in the case of s 53(1).

[51] The offence of "hunt[ing] or kill[ing]" absolutely or partially protected marine wildlife is one of strict liability, incorporating a number of actions that would not be either "hunt[ing] or kill[ing]" in common usage. But "catch alive or kill", which is the key phrase in s 53(1), must have been intended to mean something different — logically, a subset of "hunt or kill". Our reasons are as follows.

[52] First, authorisation envisages something inherently intentional. That is, the authorisation must by definition have the purpose of "catch[ing] alive or kill[ing]". It cannot be for the purpose of facilitating an accidental or inadvertent action. Lesser interferences such as mere disturbance or unsuccessful pursuit would only be authorised if they occurred in pursuit of the overall purpose of "catch[ing] alive or kill[ing]". Unlike s 63A, purpose is critical under s 53(1). So, the sections are not mirror images of each other. And the authorisation must be consistent with the wider purpose of the Act. Although the Director-General can authorise "catch[ing] alive or kill[ing]" "for any purpose", that does not mean he or she could authorise the killing of threatened species for sport or private commercial gain. "Any purpose" must be taken to mean any purpose consistent with wildlife protection or in this particular context the protection of great white sharks in the New Zealand marine environment.

[53] Without in any way attempting to be definitive or exhaustive, the focus of authorisation is likely to be primarily scientific research, although it might include capture for the purpose of removal to a safer environment (for the shark), the culling of diseased animals that might threaten the larger population or to address over

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[26] Ross Carter *Burrows and Carter: Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 403–406.

population.[27] That said, the term "catch alive" can be given an appropriately elastic interpretation consistent with the Act's purpose. For example, it would include tagging or attaching tracking devices by means other than actually taking custody or possession of the animal.

[54] Second, the fact that "kill" is used in both ss 63A and 53(1) does not mean that the whole extended meaning of "hunt or kill" was intended to be imported into "catch alive or kill". In fact, the reverse inference is the more obvious one to draw from the intentional use of a different and plainly narrower phrase. "Catch alive or kill" is, as we have said, the narrower common usage meaning of hunt — to pursue an animal for the purpose of catching it alive or killing it.

[55] Third, and relatedly, "hunt or kill" is used in the Act as a term of art — that is a specific phrase with its own special and singular meaning. This is confirmed in *Kirkby v Ngamoki* where Barker J held that "hunt or kill" is one rather than two separate offences.[28]

[56] It is also confirmed in the way "hunt or kill" is presented in s 2. All three words in the phrase are bolded so that it appears as **"hunt or kill"**. This suggests that the "or" is intended to be part of the definition and not merely a means of separating the words being defined. By contrast the "or" is not bolded in the definition of "**concession** or **concession document**". In that definition both terms are intended to have precisely the same meaning, that is they are intended to be interchangeable. The drafter took a similar approach with "**wildlife sanctuary** or **sanctuary**". Put simply, the extended meaning of "**hunt or kill**" was intended to be the meaning of the phrase, not of its individual components.

[57] It follows that when "kill" appears in the statute without "hunt", it is not intended to carry with it the whole extended meaning of "hunt or kill". Rather, in that particular context, and subject to statutory purpose, "kill" is intended to carry its ordinary meaning and so, by extension, is "catch alive".

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27 This was the purpose with respect to the giant snails in *Solid Energy New Zealand Ltd v Minister of Energy*, above n 14. Whether it would include removal for purely anthropocentric purposes is a matter we address under the next heading below.

28 *Kirkby v Ngamoki* HC Rotorua M172/84, 11 July 1985 at 4.

[58] Fourth, this interpretation is consistent with the relevant statutory purpose which is the protection of absolutely protected wildlife and the careful regulation of human interaction with such species. On the evidence, shark cage diving is primarily a commercial adventure tourism activity. Its purpose is anthropocentric. Any scientific or other insights about the sharks that may be gained from the activity are ancillary to the primary human purpose of private or personal entertainment. We have already discussed the risks to the wellbeing of the shark which the Director-General considered could be presented by shark cage diving. The authorisations were designed to mitigate those risks. To that limited extent they are protective. But the risk to sharks can be completely removed by not allowing its authorisation. In other words, allowing the interaction provides no protective benefit to the shark, so there is no justification for the risk. It is therefore not necessary to read s 53(1) as if it covers shark cage diving to ensure consistency with the Act's purpose. To the contrary, the Act's purpose can be better achieved if s 53(1) is read to exclude shark cage diving.

[59] Finally, we acknowledge that the offence under s 63A is to hunt or kill "without lawful authority". Plainly the section contemplates that the Director-General will be empowered to provide such authority under s 53(1). But it does not follow that the drafter's intention was that the Director-General should be able to authorise any "hunt[ing] or kill[ing]" of any kind and for any purpose. As we have said, the constraints are at two levels. First, the activity to be authorised must fit the narrower descriptor "catch alive or kill". And second, only those instances of "catch[ing] alive or kill[ing]" that promote the Act's wider purpose may be authorised.

[60] We conclude that s 53(1) may not be used to authorise shark cage diving.

Is public safety relevant?

[61] In the event that we are wrong in our conclusion with respect to s 53(1), we now go on to consider whether the safety of the public, and pāua divers in particular, is a mandatory or permissible relevant consideration in the grant of authorisation under that provision.

[62] We do not consider there is a proper basis to find that public safety is a mandatory relevant consideration in every authorisation. There will no doubt be circumstances where the authorisation relates to areas where there are no other humans in the vicinity or where the activity is not inherently dangerous — for example, taking shellfish at low tide or taking protected eggs. There can be no blanket rule.

[63] But the Director-General's concession that public safety is a permissible relevant consideration was properly made. "Catch[ing] alive or kill[ing]" can be a dangerous activity involving weapons or traps capable of injuring (or worse) innocent (human) third parties who may be in the vicinity. The power to impose conditions is contained in s 53(5). It relevantly provides as follows:

> **53 Director-General may authorise taking or killing of wildlife for certain purposes**
>
> …
>
> (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:
>
> …

[64] The provision is broadly worded and the power is described in s 53(5) as a general one. The list of the matters that may (without limitation) be the subject of conditions includes the means, area and duration of the activity. Public safety can comfortably be a factor in any assessment of the method, place and time of the "catch[ing] alive or kill[ing]". Indeed, we venture, it would in some circumstances be quite irrational for the Director-General to ignore public safety when considering whether, and if so how, to grant an authority under s 53.

[65] In this case there is a genuine debate about whether the use of berley and bait in relatively close proximity to pāua divers will present a heightened risk to their safety. PauaMAC5 submits the activity is causing shark behaviour to change so that they have, or will come to, associate divers with prey. The shark cage operators deny this. The final assessment will be a matter for the Director-General, but the issue is plainly not one that can be rationally ignored given the broad terms of s 53(5).

[66] We conclude that if the Director-General does have the power to authorise shark cage diving, he or she must give consideration to the possible effects of shark cage diving on local pāua divers in the context of this particular case. But, as we have said, the final assessment is for the Director-General to make.

Conclusion

[67] The effect of this judgment is that shark cage diving is an offence that cannot be authorised by the Director-General. We are aware that this places Shark Dive and Shark Experience in a very difficult position through no fault of their own. However, the Act has never been "fit for purpose" in respect of this activity. In the meantime, those two companies have, through the expenditure of capital and effort since 2008, built up profitable ventures which they thought were perfectly lawful. It will be for Parliament to consider whether these activities should be permitted by amending legislation that provides for authorisation with the clarity of modern drafting norms.

Result

[68] Shark cage diving is an offence under s 63A Wildlife Act 1953.

[69] The Director-General of Conservation has no power under s 53 to authorise this activity.

[70] Therefore although we differ from Clark J on the question of whether shark cage diving is an offence, we nonetheless agree, albeit for different reasons, with her conclusion and consequent declaration with respect to the Director-General's authorisation power under s 53(1). The appeal must therefore be dismissed.

[71] In the circumstances, it is appropriate that we make no award of costs.

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