IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 86/2018
[2019] NZSC 111

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

Hearing:	26 March 2019
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	S J Grey and S P H Elliott for Appellant B A Scott and S R Roberts for First Respondent J M Prebble and D J Watson for Second Respondent
Judgment:	11 October 2019

JUDGMENT OF THE COURT

A **The application for leave to adduce further evidence is dismissed.**

B **The appeal is allowed.**

C **The Court of Appeal's declaration that "Shark cage diving is an offence under s 63A Wildlife Act 1953" is set aside.**

D **There is no order as to costs.**

REASONS

WINKELMANN CJ, WILLIAM YOUNG, GLAZEBROOK AND O'REGAN JJ
(Given by Winkelmann CJ)

Table of Contents

Introduction

[1] The appellant, Shark Experience Ltd, ran a business offering the opportunity to view great white sharks from close quarters.[1] Divers were lowered in cages off the side of boats anchored in Foveaux Strait, off the northern Tītī Islands, east of Stewart Island. This is an area in which great white sharks are known to aggregate. The divers watched and photographed sharks attracted to the area by the use of berley and bait. The boats did not chase the sharks, and Shark Experience followed a code of practice prepared by shark cage divers and adopted by the Director-General of Conservation, designed to avoid the risk of harm to the sharks.[2]

[2] It is an offence under s 63A of the Wildlife Act 1953 (the Act) to hunt or kill a great white shark. Section 2(1) of the Act defines the phrase "hunt or kill" 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 and every act of assistance of any other person to hunt or kill wildlife

[3] Shark Experience appeals against the Court of Appeal's declaration that shark cage diving is an offence under the Act.[3] The Court of Appeal held that shark cage diving is, for the purposes of the Act, to "hunt or kill" the great white shark, even though the activity is unconnected to hunting or killing the sharks as those words are commonly understood.[4] Because of that declaration, Shark Experience has ceased offering shark cage diving adventures.

[4] Shark Experience argues that the Court of Appeal erred in adopting this extended definition of "hunt or kill". It says the language of s 63A, and the Act's purpose, do not support this interpretation, and that the Court of Appeal's definition

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1 The great white shark is the common name for the white pointer shark (*Carcharodon carcharias*).

2 The third respondent, Shark Dive New Zealand Ltd, ran a similar cage diving business. Shark Dive New Zealand was a defendant in the proceedings brought by PauaMAC5 Inc in the High Court but abides the decision of this Court. The Director-General of Conservation was the Crown respondent in the Courts below, but the Attorney-General has been substituted as Crown respondent in this Court.

3 *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, [2019] 2 NZLR 1 (Cooper, Clifford and Williams JJ) [CA judgment] at [68].

4 At [45].

creates indeterminate criminal liability and incoherence in the statutory scheme. It also argues that c 29 of Magna Carta 1297 (Eng) and s 6 of the New Zealand Bill of Rights Act 1990 require a narrower reading. Shark Experience argues in the alternative that, even if the interpretation adopted by the Court of Appeal is correct, the Court was wrong to find that shark cage diving fell within that interpretation, or to issue a declaration in such broad terms.

[5] The first respondent, PauaMAC5 Inc, represents commercial pāua quota owners, who operate in the same area. It fears its divers' lives are being put in danger by the operation of shark cage diving businesses in their place of work. It says the use of berley and bait attracts greater numbers of sharks to the area and produces more aggressive behaviour. While that is the background to PauaMAC5 bringing these proceedings, its initial focus was whether the Director-General of Conservation had power to authorise shark cage diving operations under s 53 of the Act. That provision allows authorisation of some activities that would otherwise be offences under s 63A. If the Director-General had that power, the question was then whether, as contended by PauaMAC5 in the High Court, public safety was a mandatory consideration. The focus has shifted through the course of the litigation.

[6] In the High Court, the Director-General argued that without authority under s 53, shark cage diving was an offence under s 63A.[5] He initially maintained that human safety was not relevant to his consideration of granting authority under s 53. However, in the Court of Appeal he conceded it was a permissible relevant consideration. The issues in that Court therefore narrowed to whether shark cage diving was an offence under s 63A, and if so whether it could be authorised under s 53. On this further appeal, the issue of s 53 authorisations has fallen away. It is common ground that shark cage diving cannot be authorised under s 53.[6]

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5 *PauaMAC5 Inc v Director-General of Conservation* [2017] NZHC 1182 (Clark J) [HC judgment].

6 The approved question on which leave was given was "whether the Court of Appeal was correct to hold that shark cage diving is an offence under s 63A of the Wildlife Act 1953": *Shark Experience Ltd v PauaMAC5 Inc* [2018] NZSC 121 [Leave judgment].

The legislation

[7] The Act was introduced as "a consolidation, with amendments, of the Animals Protection and Game Act 1921–1922",[7] but has itself been amended on numerous occasions since its enactment in 1953. The long title of the Act describes its purpose as follows:

> An Act to consolidate and amend the law relating to the protection and control of wild animals and birds, the regulation of game shooting seasons, and the constitution and powers of acclimatisation societies

Scheme of protective regime

[8] The Act performs several tasks, including the regulation of game hunting,[8] and protection of wildlife.[9] The Act defines "wildlife" as "any animal that is living in a wild state".[10] An "animal" is further defined.[11]

[9] The Act creates a tiered system of protection with different levels of protection for different categories of wildlife.[12] All wildlife is declared to be "absolutely protected",[13] but then, through a series of provisions and schedules, levels of protection are removed. Because of this drafting technique, it is not possible to extract an exhaustive list of absolutely protected wildlife from the Act. What is clear, however, is that the Act extends the number of species subject to absolute protection well beyond the numbers protected under the legislation it replaced. It was a drafting technique which avoided the risk of inadvertently omitting species.[14]

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7 Wildlife Bill 1953 (17-1) (explanatory note) at i.

8 Part 2.

9 Part 1.

10 Section 2(1) definition of "wildlife": "**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 Animal Control Act 1977)".

11 Section 2(1) definition of "animal": "**animal** means any mammal (not being a domestic animal or a rabbit or a hare or a seal or other marine mammal), any bird (not being a domestic bird), any reptile, or any amphibian; and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B and any marine species declared to be an animal under section 7BA; and also includes the dead body or any part of the dead body of any animal".

12 Sections 3–8.

13 Section 3.

14 Colin M Miskelly "Legal protection of New Zealand's indigenous terrestrial fauna – an historical review" (2014) 25 Tuhinga 25 at 32.

[10] There is a second aspect to the protective regime. The Act empowers the Governor-General to declare wildlife sanctuaries, refuges, management reserves and districts.[15] But it is the tiered scheme of protection with which we are concerned.

[11] This scheme is in Part 1 of the Act, and is given effect through s 3, which provides that:

> Subject to the provisions of this Act, all wildlife is hereby declared to be subject to this Act and (except in the case of wildlife for the time being specified in Schedule 1, Schedule 2, Schedule 3, Schedule 4, or Schedule 5) to be absolutely protected throughout New Zealand and New Zealand fisheries waters.

[12] Mr Scott for PauaMAC5 provided a helpful analysis of Part 1 which we adopt with some amendment. Sections 4–7C create six categories of wildlife with differing levels of protection from absolute to no protection. Specifically:

(a) wildlife that is absolutely protected;[16]

(b) wildlife that is "partially protected", so that if the wildlife's presence is causing injury or damage to land, the owner or occupier of that land may hunt or kill it;[17]

(c) wildlife that is "game", which can be hunted at certain times of the year subject to various restrictions, and is controlled by Part 2 of the Act;[18]

(d) wildlife that is "not protected" at all, which includes animals such as horses, sheep, possums and mice;[19]

(e) wildlife that is "wild animals" such as goats, deer and pigs, primarily controlled by the Wild Animal Control Act 1977;[20] and

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15 Sections 9, 14, 14A and 37.
16 Section 3.
17 Section 5 and sch 2.
18 Sections 4 and 6; and schs 1 and 3.
19 Section 7; and schs 4, 5 and 8.
20 Section 7A and sch 6.

(f) certain unprotected animals such as ferrets, stoats, polecats and weasels which can only be farmed, bred or sold with approval.[21]

Offence provisions

[13] The regime is given teeth by the offence provisions and reporting obligations contained in Part 5 of the Act. From enactment it was an offence under s 63 to "hunt or kill" wildlife, however the definition of animal meant that the protection, and hence this offence, did not extend to marine species but was rather focused upon terrestrial animals. Section 63, in its current form, provides:

> **63 Taking protected wildlife or game, etc**
>
> (1) No person may, without lawful authority,—
>
> (a) hunt or kill any absolutely protected or partially protected wildlife or any game:
>
> (b) buy, sell, or otherwise dispose of, or have in his or her possession any absolutely protected or partially protected wildlife or any game or any skin, feathers, or other portion, or any egg of any absolutely protected or partially protected wildlife or of any game:
>
> (c) rob, disturb, or destroy, or have in his or her possession the nest of any absolutely protected or partially protected wildlife or of any game.
>
> (1A) Every person who contravenes subsection (1) commits an offence and,—
>
> (a) in respect of an offence committed in relation to absolutely protected wildlife, is liable on conviction to the penalty set out in section 67A(1):
>
> (b) in respect of an offence committed in relation to partially protected wildlife, is liable on conviction to the penalty set out in section 67C(1):
>
> (c) in respect of an offence committed in relation to game, is liable on conviction to the penalty set out in section 67E(3).
>
> (2) Nothing in subsection (1) applies in respect of any marine wildlife.

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21 Section 7C and sch 8.

[14] Section 63A, the provision the focus of this appeal, was inserted into the Act in 1996, extending protection to some marine wildlife.[22] It provides:

> **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.

[15] As can be seen from its text, this section, in large part, mirrors the provisions of s 63. At the same time another new provision, s 7BA, was inserted, extending the definition of "animal" to encompass the marine species listed in sch 7A of the Act, with the effect that the listed species are absolutely protected.[23] The punishment for the offence of hunting or killing an absolutely protected marine species is either a fine or imprisonment.[24]

Great white sharks given absolute protection

[16] Great white sharks were added to sch 7A of the Act, thereby extending absolute protection to them.[25] This was to give effect to New Zealand's international obligations under the Convention on the Conservation of Migratory Species of Wild Animals 1979 (the Convention).[26] The Convention recites the states parties' acknowledgment that they are and must be the protectors of the migratory species of wild animals that live within or pass through their national boundaries.[27] New Zealand has accepted an obligation under art 3(5) to prohibit the "taking" of species which are

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22 Fisheries Act 1996, s 316(1).
23 Section 316(1).
24 Wildlife Act, s 67(1)(fa).
25 Wildlife (White Pointer Shark) Order 2007, cl 3.
26 Convention on the Conservation of Migratory Species of Wild Animals 1651 UNTS 333 (opened for signature 23 June 1979, entered into force 1 November 1983) [Convention]. New Zealand became a state party to the Convention in 2000.
27 At 356.

listed as endangered, including the great white shark.[28] Article 1(1)(i) defines "taking" as meaning "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct". Article 3(5) provides that exceptions to this prohibition may only be made if the taking is for scientific purposes, for the purpose of enhancing the propagation or survival of the species, to accommodate the needs of traditional subsistence users or if extraordinary circumstances so require.

Defences

[17] Section 68B provides a defence to offences under s 63A which entail injuring or killing marine wildlife. The defence is available if the death or injury was accidental or incidental or took place as part of a fishing operation *and* the reporting obligations created under s 63B have been complied with. We set s 68B out later in the judgment.

Authorisation provisions

[18] Additionally, as mentioned earlier, s 53 empowers the Director-General of Conservation to authorise persons to "catch alive or kill" any wildlife. Stripped down to its most relevant provisions, s 53 provides:

> **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.
>
> (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

[28] New Zealand has accepted this obligation as a "Range State" under the Convention. For the great white shark (*Carcharodon carcharias*) see: *List of Range States of Migratory Species Included in the CMS Appendices* UNEP/CMS/COP11Inf.6/Rev.1 (11 November 2014) at 13.

> in any other country or in some other part of New Zealand, or for any scientific or other purpose approved by the Director-General, or 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.
>
> …

Judgment under appeal

[19] We start with a brief description of the High Court decision.[29] Clark J found that shark cage diving did not fall within the s 2 meaning of "hunt or kill". The Judge reasoned that the words "pursuing, disturbing, or molesting" were necessarily connected to, and qualified by, the words "hunt or kill" which appear in the same part of the definition. On this interpretation, pursuing, disturbing or molesting protected wildlife is only hunting or killing (and therefore prohibited under the Act) if it occurs for the purpose of hunting or killing, in the ordinary meaning of those words. It followed from that finding that no authorisation under s 53 was required.

[20] The Court of Appeal disagreed. It said these conclusions did not take account of the fact that the definition of "hunt or kill" expressly includes attempts.[30] To disturb, molest or pursue a protected species for the purpose of hunting or killing would be an attempt to hunt or kill, but attempts are already provided for in the definition. Therefore, the Court of Appeal reasoned, pursuing, disturbing or molesting must logically mean something other than attempting to hunt or kill.[31]

[21] Secondly, the Court of Appeal said "hunt or kill" must be construed in its statutory context and in light of the underlying statutory purpose.[32] Comprehensive coverage of a wide range of actions that bring a risk of harm to wildlife reflects the Act's purpose of absolute protection of specified species. The Act gives the phrase an

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29 HC judgment, above n 5.
30 CA judgment, above n 3, at [39].
31 At [39].
32 At [40].

extended non-exclusive meaning, and so must be intended to include the ordinary meaning of hunt or kill as well as a wider meaning.[33] That this is so is made plain by the fact that it expressly includes to "take or trap" which, although analogous to hunting, would not generally attract that description.[34] In this way, the Court of Appeal reasoned that the definition is extended to cover the taking of eggs and the trapping of kiwi for conservation purposes.[35]

[22] Finally, the Court of Appeal said the statutory scheme suggests there is no requirement for proof of an intention to hunt or kill. The Court was satisfied that the necessary implication of the overall statutory scheme (and in particular ss 68B and 63B in combination) is that the offence in s 63A is one of strict liability.[36] Since it is a defence to such a charge that the injury or death to the animal was accidental, incidental or occurred as part of a fishing operation, and that the reporting obligation in respect of that death or injury was complied with, it cannot be an element of the offence that the defendant intends to hunt or kill the animal.

[23] The Court of Appeal said, however, that not every pursuit or disturbance would amount to hunting or killing:[37]

> 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.

[24] On this view, where the line is to be drawn will come down to the risk a prohibited act presents to the animal. In the case of shark cage diving, the Court of Appeal was satisfied that it did amount to "pursuing" or "disturbing" great white

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33 At [40].
34 At [40].
35 At [40].
36 At [27]–[28].
37 At [43].

sharks and was therefore hunting or killing them for the purposes of s 63A. The Court said the use of berley and bait as attractants was pursuing the sharks 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.[38] Further, attractants are designed to cause the animal to deviate significantly from its natural swimming pattern, so disturbing the animal. The Court was satisfied that there was evidence of a potential for harm to the animal flowing from the activity sufficient to cross the harm or potential harm threshold.[39]

[25] As to s 53, the Court of Appeal rejected Shark Experience's argument that "catch alive or kill" in that provision imports the defined phrase "hunt or kill".[40] It explained that the phrase "hunt or kill" is used in the Act as a term of art, noting that the definition includes the word "or" as part of the phrase.[41] It follows, the Court said, that when "kill" appears in the statute without "hunt", it is not intended to carry the whole extended meaning of "hunt or kill".[42] 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".[43] It said the words "catch alive or kill" were to be given their ordinary meaning, and that meaning captured only a subset of actions falling within the defined term "hunt or kill".[44]

[26] The Court declared shark cage diving to be an offence under s 63A of the Act.[45]

Issues on appeal

[27] There are three issues before us:

(a) the meaning of the phrase "hunt or kill";

(b) whether shark cage diving using attractants is hunting or killing within the meaning of the Act; and

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38 At [45].
39 At [47].
40 At [54]. As noted earlier, this issue is not pursued on this appeal.
41 At [55].
42 At [57].
43 At [57].
44 At [57].
45 At [68].

(c) whether shark cage diving should have been declared an offence under s 63A of the Act, in light of that meaning.

[28] The first issue is one of statutory interpretation. As with all tasks of statutory interpretation, and by reason of s 5 of the Interpretation Act 1999, the meaning of the expression "hunt or kill" as defined in the Act, must be ascertained from the text of the Act and in light of its purpose. This Court said in *Commerce Commission v Fonterra Co-operative Group Ltd*:[46]

> In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The meaning of "hunt or kill"

[29] As the parties acknowledge, the definition is particularly difficult to construe. Part of that difficulty lies in the use of the words "hunt" and "kill" in accordance with their usual meaning as part of an extended definition of the expression "hunt or kill". Part lies in the fact that the overall statutory scheme has been repeatedly amended over the course of the sixty-plus years since its enactment, causing the Act to lose some coherence.

[30] Shark Experience maintains that the ordinary and grammatical reading of the s 2 definition is that the words "pursuing, disturbing, or molesting" are connected to, and qualified by, the words "hunt or kill". Ms Grey for Shark Experience argues that it is an available interpretation that all of the relevant actions, "pursuing, disturbing, or molesting", are to be read as connected to the words "to hunt or kill". On this reading, what is prohibited is disturbance of protected wildlife connected to hunting or killing, and pursuing or molesting protected wildlife in the course of hunting or killing.

[31] Shark Experience argues that, contrary to the Court of Appeal's conclusion, reading the clause in this way does not duplicate the latter part of the definition which

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[46] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnote omitted).

relates to attempts, because attempts are generally understood to cover failed efforts, not preliminary steps.

[32] We construe the definition as follows.

The language of the provision

[33] It is helpful at this point to repeat the definition of "hunt or kill" 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

[34] On our analysis, the definition of "hunt or kill" operates on three levels as follows:

(a) The first level is "includes the hunting, killing, taking, trapping, or capturing of any wildlife by any means;". This describes the non-extended meaning of hunting, killing, trapping or capturing,[47] actions that would be captured in accordance with common usage of these words.[48]

(b) The second level is "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;". We read this as extending the meaning of the expression "hunt or kill" beyond the common usage of those words to include both acts incidental to hunting or killing wildlife ("taking or using a firearm, dog, or like method to hunt or kill wildlife"), and also to other kinds of potentially harmful actions ("pursuing, disturbing, or molesting any

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47 Because the words "hunting" and "killing" are being used to define the phrase "hunt or kill", we proceed on the basis that they are used in the definition in accordance with common usage, or else the definition would be circular.

48 The other component is taking, which has its own inclusive definition. See s 2(1) definition of "take": "includes taking, catching, or pursuing by any means or device, and also includes the attempt to take". The other element is pursuing, which is included elsewhere in the definition of "hunt or kill" and discussed below.

wildlife") that are not necessarily connected to hunting or killing in a common usage sense.

(c) The third and final level is "and also includes every attempt to hunt or kill wildlife and every act of assistance of any other person to hunt or kill wildlife". As is common ground, this deals with attempts or the giving of assistance.

[35] Our reasons for reading this definition in this way are as follows. The syntax of the second level of the definition suggests that it contains two quite separate phrases: the first phrase, "pursuing, disturbing, or molesting any wildlife", and the second phrase, "taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not". That these two phrases are distinct is made clear by the presence of the word "wildlife" in both parts. The repetition of that word suggests each are independent parts of the definition.

[36] Further, while we acknowledge the argument that pursuing and disturbing are actions that can naturally be read as incidental to the act of hunting (or indeed killing), the use of the word "molesting" suggests an action which is an end in itself.[49] This supports the interpretation that these three words extend the definition beyond those acts purely incidental to hunting or killing animals.

[37] Shark Experience argues the second level of the definition ought to be read as one. This on the basis the definition was to be split in accordance with its semicolons, and no further. If that approach is taken, the words "to hunt or kill wildlife" colour the whole of the second level of the definition. But this argument, based on punctuation, ignores the use of the disjunctive comma after the first appearance of the word "wildlife". We see nothing in the language or punctuation of the second level of the definition to suggest the words "to hunt or kill wildlife" are intended to attach to the words "pursuing, disturbing, or molesting any wildlife".

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[49] JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol IX defines "molest" as "1. *trans* To cause trouble, grief, or vexation to; to vex, annoy, put to inconvenience … 2. To interfere or meddle with (a person) injuriously or with hostile intent": at 973.

[38] We therefore turn to the argument regarding the relationship between the various levels of the definition. The Court of Appeal said that to adopt Shark Experience's interpretation would be to render redundant the third level of the definition which captures attempts. Shark Experience argues there is no redundancy because the second level of the definition captures preliminary steps, and not failed efforts. It is the latter with which the law of attempts is concerned. From this we understand Shark Experience to argue that the second level of the definition might be read as capturing steps not sufficiently proximate to hunting or killing as to amount to attempts; actions taken in the early preparatory stages, say, of a hunting expedition. On this analysis, the second level is to be read as extending the definition of attempts, for the purposes of this Act, to encapsulate actions where there is insufficient proximity to hunting or killing, or insufficient intent, for the purposes of s 72(3) of the Crimes Act 1961.

[39] There are difficulties with this argument. As a matter of the structure of the clause, it is natural to read the "attempt" level (the third level) as the sweeper part of the definition, catching conduct that is not a completed offence falling within the first two levels of the definition. It addresses "every attempt to hunt or kill wildlife". It would be unusual if the definition was structured as Shark Experience suggests, which would have the second level in effect the sweeper for conduct not serious enough to fall into the category of attempts.

[40] On our approach, the definition of "hunt or kill" can be seen as a list of prohibited actions relating to wildlife. The choice of the phrase "hunt or kill" as the defined term does not have any particular significance in determining the meanings of the items in the list. It might be thought improbable or unlikely that the phrase "hunt or kill" was chosen as a catch-all phrase for a collection of prohibited actions, some unrelated to hunting or killing in their common usage. But in other, later, Acts, the use of this phrase in just that manner is beyond question. For example, in the Animal Welfare Act 1999, an Act which sets out the obligations of animal owners or people in charge of animals, the following definition appears:[50]

> **hunt or kill**, in relation to animals, includes—

[50] Section 2(1) definition of "hunt or kill" and "hunting or killing".

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

(b) pursuing or disturbing any animal;—

and **hunting or killing** has a corresponding meaning

[41] Similarly, in the Wild Animal Control Act 1977, which makes provision for the control of harmful species of introduced wild animals, "hunt or kill" is defined as including:[51]

hunt or kill, in relation to wild animals, includes—

(a) hunting or searching for any wild animal, and killing, taking, trapping, capturing, having in possession, tranquillising, or immobilising any such animal by any means:

(b) pursuing, disturbing, or molesting any such animal:

(c) taking or using any dog, firearm, vehicle, vessel, aircraft, net, snare, trap, poison, or like method while engaged in hunting any such animal, whether or not this results in capturing or killing any such animal:

(d) attempting to hunt or capture or kill any such animal while engaged in recreational, commercial, or guided hunting or hunting to capture live wild animals for export, farming, sale, breeding, exchange, public display, scientific, or other purposes:

(e) engaging in a wild animal recovery operation

Statutory purpose

[42] PauaMAC5 argues that the Act's object is the protection of New Zealand's wildlife from harassment. Such a purpose, it argues, is consistent with Parliament using the vehicle of the Act for fulfilment of its international obligations under the Convention to protect great white sharks. Shark Experience responds that an interpretation which links the listed acts to the purpose of hunting or killing is consistent with the overall scheme of the Act; its use to fulfil the Convention obligations is also consistent with a narrow reading. It argues that the Convention and its "conservation" purpose recognises and provides for interactions with wildlife for

51 Section 2(1) definition of "hunt or kill".

appreciation, recreation and enjoyment, provided there is no taking, or hunting or killing of the wildlife.

[43] In contrast, says Shark Experience, the Court of Appeal's interpretation produces absurd outcomes, criminalising a wide range of innocent conduct such as walking in the bush, feeding the ducks and fishing. It would prevent academic studies which, although important for the conservation of the protected species, will cause them to deviate from their normal behaviour. The scope of activities which could lead to liability is potentially so wide and uncertain that people could not reasonably alter their behaviour to ensure compliance with the law.

Analysis

[44] This is not an Act concerned only with the regulation of hunting activities. As we have noted, one of the principal purposes of the Act is the protection of wild animals.[52] That is apparent from its long title, but also from the scheme of the legislation itself, including as it does, provision for the creation of wildlife sanctuaries, refuges and management reserves.

[45] It is also relevant that the Act is the principal means by which wildlife in New Zealand, including many of its most endangered species, are protected. The Act is the fall-back protection mechanism in cases not specifically provided for by other legislation.[53] For example, no Act other than the Wildlife Act specifically protects the kiwi from being disturbed or molested in its natural habitat. We acknowledge that s 30A of the Animal Welfare Act makes it an offence to wilfully or recklessly ill-treat an animal in a wild state. However, the threshold for ill-treatment under that Act is to cause an animal to suffer "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".[54] The Animal Welfare Act is also concerned with the welfare of animals generally, rather than having as its focus the protection of species in the wild.

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52 Long title and s 3.

53 For example, under any protections granted by the Wild Animal Control Act, the Marine Mammals Protection Act 1978, the Conservation Act 1987, the Trade in Endangered Species Act 1989 or the Animal Welfare Act 1999.

54 Section 2(1) definition of "ill-treat".

[46] The Wildlife Act, then, is the "mainstay of statutory protection of animals in the environment".[55] Shark Experience's submission that its interpretation is consistent with, and even that it better promotes the purposes of, the Convention cannot stand in the face of the broad protective purposes of the Convention. As earlier noted, the parties to the Convention undertake to protect great white sharks from killing, fishing, capture *and* harassment.

The statutory context

[47] Shark Experience and the respondents each point to aspects of the overall statutory scheme they say supports the interpretation for which they argue.

Strict liability offence?

[48] The Court of Appeal said it was a necessary implication of the statutory scheme that s 63A was a strict liability offence. This flowed from the availability of the s 68B defence of accidentally or incidentally killing or injuring protected marine wildlife.[56] If liability under s 63A was limited to intentional acts, the Court reasoned, the defence would not be necessary.

[49] The respondents argue that the extended interpretation adopted by the Court of Appeal is supported by the fact that the offence is a strict liability offence. If proof of mens rea is not required, it is sufficient, on the respondents' arguments, that the act (the pursuit, disturbance or molestation) is proven.

[50] Section 68B provides in material part:

> **68B Defences to offences in respect of marine wildlife**
>
> …
>
> (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,—

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55 Neil Wells and MB Rodriguez Ferrere *Wells on Animal Law* (2nd ed, Thomson Reuters, Wellington, 2018) at 544.

56 CA judgment, above n 3, at [27]–[28].

(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.

[51] The availability of the s 68B defence is conditional upon compliance with s 63B, which requires reporting accidental or incidental "kill[ing] or injur[ing]" of marine wildlife.[57] Section 63B provides in material part:

63B Reporting of accidental or incidental death or injury

(1) If any person, in the course of fishing pursuant to a permit, licence, authority, or approval issued, granted, or given under the Fisheries Act 1996, accidentally or incidentally kills or injures any marine wildlife, he or she shall,—

(a) if fishing from a vessel, record the event in the vessel's log and report the event in writing to a ranger, or to such other person as the Director-General may from time to time specify by notice in the *Gazette*, and in such manner as may be so specified, not later than 48 hours after the arrival of the vessel in port; and

(b) in any other case, report the event in writing to a ranger, or to such other person as the Director-General may from time to time specify by notice in the *Gazette*, and in such manner as may be so specified, as soon as practicable.

(2) Any person (other than a person to whom subsection (1) applies) who, by any means whatever, accidentally or incidentally kills or injures any marine wildlife, shall, as soon as practicable, report the event to a ranger or a fishery officer (as defined in section 2(1) of the Fisheries Act 1996).

(3) Every report under subsection (1) or subsection (2) shall include—

(a) the location of the area where the event took place; and

(b) the species (if known) of the marine wildlife killed or injured, or a general description of the wildlife; and

(c) a description of the conditions and the circumstances of the event.

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[57] We note that subs (5) of this provision creates an additional offence of failing to report an accidental or incidental death or injury, punishable by a fine not exceeding $10,000: s 67(fb). This produces the rather illogical outcome that a person who accidentally or incidentally kills or injures any wildlife and does not report this death or injury may be exposed to higher penalties than someone who deliberately does so.

…

(5) Every person who contravenes subsection (1) or subsection (2) commits an offence and is liable on conviction to the penalty set out in section 67(fb).

[52] Shark Experience responds that the offence is not purely strict liability, but rather provides for a mixture of strict liability and mens rea offence. It says that, as the language of the provision makes clear, while it is sufficient (subject to defences) to prove that the defendant *killed* an absolutely protected species without proof of any intention to do so (because the offence is result focused) it is nevertheless necessary to prove that any pursuit, disturbance or molestation is done for the purpose of hunting or killing. Shark Experience points to s 68AB which clarifies which provisions are strict liability, excluding from that category, s 63A.

Analysis

[53] Before addressing the significance of these defence provisions, it is necessary first to say something about the law of mens rea in connection with criminal offences. The wording of the offence, read in its statutory context, determines the elements of that offence.[58] However, the starting point when construing provisions creating criminal liability is that a "guilty mind" (or mens rea) is an essential ingredient of criminal liability, absent a contrary statutory indication or an overriding judicial history.[59] Just what is a guilty mind is offence specific. It may involve no more than the intentional doing of an act (for example, an assault). Other offences require additional mens rea, such as an intention to produce a particular result (for example, assault with intent to injure). In some cases, the additional mens rea entails proof of knowledge in connection with a state of affairs (for example, in the area of controlled drugs, proof of knowledge that the substance is a controlled drug, or recklessness as to that point).[60]

[54] We agree with the Court of Appeal that it is implicit in the provision of the s 68B defence that an intention to kill or injure protected marine wildlife need not be proved for an offence to be made out under s 63A. Moreover, the s 68B defence

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58 *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 664 per Cooke P and Richardson J.
59 At 668.
60 See *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161.

strongly suggests the prohibited acts are not limited to acts done in the course of, or for the purpose of, "hunting" or "killing" in their common usage sense. That is because the availability of the defence is not limited to bycatch circumstances, and expressly extends to accidental or incidental death or injury caused by "[a]ny" person, and by "any means whatever".[61] Since the defence responds to the offence, it suggests that acts done outside of hunting in its common usage sense may fall within s 63A.

[55] Section 68AB is another provision which is relevant to the issue of defences. Both the appellant and respondents rely upon the provisions of s 68AB as supporting their arguments. Section 68AB provides:

> **68AB Mens rea and strict liability offences**
>
> (1) In any prosecution for an offence under any of the provisions listed in subsection (5), the prosecution must prove that the defendant intended to commit the offence.
>
> (2) In any prosecution for an offence under a provision that is not listed in subsection (5), it is not necessary for the prosecution to prove that the defendant intended to commit an offence.
>
> (3) It is a defence in any prosecution for an offence not listed in subsection (5) if the defendant proves—
>
> (a) that the defendant did not intend to commit the offence; and
>
> (b) that,—
>
> (i) in any case where it is alleged that anything required to be done was not done, the defendant took all reasonable steps to ensure that it was done:
>
> (ii) in any case where it is alleged that anything prohibited was done, that the defendant took all reasonable steps to ensure that it was not done.
>
> (4) The defence provided in subsection (3) is in addition to any other defence or excuse provided by this Act.
>
> (5) The provisions are—
>
> (a) section 17(6)(c) (which relates to hunting or killing waterfowl where a person knows that food has been placed or artificial waters formed):
>
> (b) section 40(1) (which relates to obstructing a ranger):

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61 Section 63B(2).

(c) section 58(1)(a) (which relates to shooting at, killing, disabling, or injuring a homing pigeon):

(d) section 59(5A) (which relates to interfering with vehicles, animals, equipment, or supplies brought onto land):

(e) section 59(6) (which relates to obstructing the Director-General or an authorised officer in the exercise of powers):

(f) section 65(2) (which relates to receiving wildlife):

(g) section 66(2) (which relates to wilfully continuing an offence):

(h) section 66A(3) (which relates to failing to give or produce evidence of identifying information or giving false identifying information).

(6) Sections 63A and 63B continue to apply as if this section had not been enacted.

[56] For offences other than those listed in s 68AB(5) it is not necessary to prove that the defendant intended to commit the offence, and neither s 63 nor s 63A are listed there. But this picture is complicated by s 68AB(6) which provides that ss 63A and 63B "continue to apply as if this section had not been enacted". This means that s 68AB applies to s 63 but not s 63A. Shark Experience relies upon this as evidence that the s 63A offence is not one of strict liability.

[57] At first blush, s 68AB(6) seems a strange provision, since s 63A is almost identical to s 63, altered only to take account of the different wildlife the subject of the provision. The legislative history of s 68AB does not assist as to why s 63A is singled out in this way.[62] It seems likely to us that the answer lies in the scheme of the Act. At the time of the enactment of s 68AB, a statutory defence to s 63A already existed in the form of s 68B, linked, as we have mentioned, to the reporting requirements in s 63B. The latter provision serves broader fishery protection objectives. The s 68AB defences would conflict with that regime, and in that context, the carve out is explicable.

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[62] In the Wildlife (Penalties) Bill 2000 (248-2) (select committee report) at 4, the Committee recommended the insertion of s 68AB which it said provides that, except in a small number of mens rea offences, all other offences under the Act are to be strict liability in nature. There is no reference to the reason for the exclusion of s 63A from the scheme thereby created.

[58] We accept the argument the respondents make in reliance on ss 68B and 68AB that, as a matter of statutory interpretation, it is not necessary to prove an intention to commit the s 63A offence. This follows from the existence of the s 68B defence which assumes, as we have outlined, strict liability for killing or injuring. It also flows from the absence of any language in s 63A, or any policy reason, to suggest that proof of a guilty mind (in a s 68AB sense) should be an element of s 63A but not s 63.

[59] However, we see s 68AB as something of a side issue. Section 68AB clarifies only that proof of an intention *to commit the offence* is not required. In terms of our earlier discussion in connection with the concept of "guilty mind", we consider that this means that for offences other than those listed in subs (5), it is not necessary to prove an intention to do any of the prohibited acts to an animal knowing of its protected status. But it does not follow that there is *no* mental element to any of the actions falling within the definition of "hunt or kill" (for example, to pursue or disturb an absolutely protected species). Shark Experience's argument is not that proof of an intention to commit the offence is required, but rather that the defendant did the act in the course of, or for the purpose of, hunting or killing.

[60] That brings us back to the point that the elements of the offence are to be determined by construing the section, and to our starting point that there is nothing in the language of the provision which suggests that the prohibited acts must be done in the course of, or for the purpose of, hunting or killing.

[61] As to what other mental element there is, we have already found that it is not necessary to prove intent to kill or injure, to prove intent to commit the offence, or to prove that the defendant had knowledge that the animal is protected. But some of the prohibited acts listed in the definition of "hunt or kill" themselves contain a mental element. We therefore take each of the prohibited acts in turn.

Hunting

[62] It is implicit in the prohibited act of "hunting" that the defendant intends to hunt. To hunt something, you must intend to catch or kill it. It is not possible to accidentally or unintentionally hunt an animal.

Pursuing

[63] The dictionary meaning of the word "pursue" includes to follow with intent to overtake for some purpose – usually capturing in some way.[63] It is implicit in the act of "pursuing" that the defendant intends to chase the animal. Travelling the same path through water as a marine species as a matter of chance is not pursuing it if there is no intention to follow. In the context of this Act, we are satisfied that "pursuing" is to be construed as to mean intentionally chasing. We use the word "chase" because we do not consider the term was intended to capture merely following an animal at a safe distance.

[64] The Court of Appeal has given "pursue" a broader meaning than intentionally chasing to include, as a prohibited action, luring a protected animal.[64] On its analysis, the use of baits and berley to attract sharks amounts to pursuit.[65] Shark Experience argues that the Court of Appeal erred in this as "pursue" does not naturally bear this meaning. It argues that if such activity was intended to be prohibited, the language of luring or attracting would have been used.

[65] We agree that the meaning the Court of Appeal gave to the word "pursue" is neither consistent with the natural and ordinary meaning of the word pursue, nor with the statutory purpose. Pursuing something normally entails following it or chasing it. Luring an animal with the use of attractants is not normally spoken of as pursuing it, although if the purpose for which attractants are used is catching or killing the animal, it is likely to be prohibited as the act of hunting.[66]

[66] The purpose of the Act is to protect wildlife. Pursuing an animal in the sense of chasing it for whatever reason can be stressful for the animal, and so prohibiting pursuit of an animal is consistent with that purpose. But attracting an animal to food, or to scent, thereby allowing the animal to be observed is not necessarily, on its own, obviously harmful.[67] We accept Shark Experience's submission that adopting the

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63 See JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol XII at 887.

64 CA judgment, above n 3, at [45].

65 At [45].

66 If the use of lures or attractants risks harm to the animal, it may also amount to molesting or disturbing it.

67 Provided any food is not in itself harmful to the animal.

broader interpretation of "pursue" favoured by the Court of Appeal would over criminalise conduct. The Court of Appeal attempted to manage this risk by adding the "risk of harm" gloss to both this and the prohibited act of disturbing protected wildlife. On our interpretation of "pursue", the addition of that gloss is not necessary.

Molesting

[67] The verb molest is more elusive of meaning than the others. The *Oxford English Dictionary* gives the following two meanings of molest:[68]

(a) "To cause trouble, grief, or vexation to; to vex, annoy, put to inconvenience".

(b) "To interfere or meddle with (a person) injuriously or with hostile intent. Now almost exclusively in negative contexts".

[68] In context, we consider that molest means intentionally troubling, distressing or injuring a protected animal.

Disturbing

[69] In common usage, it is possible to disturb something without intending to do so. We agree with the Court of Appeal that, as with the word killing, disturbing is a word that prohibits a result and not an action. It follows that an intention to disturb need not be proved.[69] While this imposes strict liability for a disturbance, we have already noted the imposition of strict liability is consistent with the overall statutory scheme, which clearly contemplates liability under s 63A for accidental acts.

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68 Simpson and Weiner, above n 49, at 973.

69 Compare *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC) at [83] where Mallon J held that, for the purposes of the Wildlife Act, "disturb" includes only acts intentionally directed at the animal.

[70] Beyond that however, settling on a meaning for this word becomes more difficult. The *Oxford English Dictionary* lists among possible meanings:[70]

(a) "To agitate and destroy (quiet, peace, rest); to break up the quiet, tranquillity, or rest of (a person, a country, etc); to stir up, trouble, disquiet."

(b) "To throw into a state of physical agitation, commotion, or disorder; to agitate."

(c) "To agitate mentally, discompose the peace of mind or calmness of (any one); to trouble, perplex."

(d) "To interfere with the settled course or operation of; to put out of its course; to interrupt, derange, hinder, frustrate."

(e) "To move anything from its settled condition or position; to unsettle."

[71] Shark Experience argues that the narrowest of these interpretations, that in (e) above, should be adopted – so that what is prohibited is moving a protected animal from a settled position in the wild. It also adds the further limitation that the act of disturbance occurs in the course of the act of hunting, an argument which we have already rejected. It says that this interpretation would ensure consistency with other usages of the term "disturb" within the Act, including s 63A(c) which provides that anyone commits an offence who "robs, disturbs, or destroys, or has in his or her possession the nest of any absolutely or partially protected marine wildlife". However, in our view, any action captured by this very narrow definition would already fall within the prohibited act of "take".[71] We do not therefore consider that such a narrow interpretation is appropriate.

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70 JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol IV at 872.

71 Wildlife Act, s 2(1) definition of "take": "**take**, and all references thereto, includes taking, catching, or pursuing by any means or device, and also includes the attempt to take".

[72] We start from the premise that, as appears from the dictionary definition, the word "disturb" can carry many different meanings. We accept Shark Experience's argument that a definition of "disturb" which captures acts breaking up the peace or tranquillity of protected wildlife would cast too broad a net. It would result in criminalising actions such as walking through the bush, or swimming in the sea, since each of those will often result in startling wildlife, and some of that wildlife may be protected. Such conduct would be criminalised even though it carried with it no real risk of harm to the wildlife. We are confident it was not Parliament's intention to expose people to the risk of criminal liability in such circumstances.

[73] That favours a narrower construction, as does the statutory context. The statutory purpose suggests a meaning for the word "disturbing" which prohibits conduct carrying a real risk of significant harm. If "disturbing" is construed to have a meaning closer to harm in this way, it fits both with the dictionary definition of disturbing and the purpose of the Act.

[74] Construing the word in its statutory context and, in particular, placing it within the context of the list of the other prohibited actions, leads us to conclude that what is intended to be prohibited is action which physically or mentally agitates the protected wildlife to a level creating a real risk of significant harm. Such an interpretation is consistent with the meaning of the verb "disturb" in its common usage sense. It imbues the conduct thereby prohibited with a character in keeping with the other prohibited acts: conduct which carries a real risk of significantly harming a protected animal.

[75] Our approach differs a little from the Court of Appeal. The Court of Appeal adopted a broad interpretation of the words "pursuing" and "disturbing" but then applied "risk of harm" as an additional element to the offence. As noted above, we have approached the issue by construing the nature of each prohibited act by reference to the ordinary or dictionary meaning of the word (narrower in each case than that adopted by the Court of Appeal) and in accordance with the statutory context and purpose.

Coherence of the statutory scheme: ss 53 and 63A

[76] Shark Experience argues that, unless the defined term is limited to conduct associated with hunting and killing in their common usage sense, there is a mismatch between the offence and authorisation provisions.

[77] It argues the interpretation applied by the Court of Appeal results in a mismatch between s 63A and the authorisation provisions in s 53. It follows, Shark Experience says, that a person who disturbs wildlife in the course of undertaking conservation activities has committed an offence, with no prospect of having this conduct authorised. But it submits, if its narrow interpretation of "hunt or kill" is adopted, this mismatch is eliminated, since no offence could arise unless the acts were committed for the purpose of hunting or killing. That better fits with the s 53 authorisation regime, as authorisation would not be needed for conservation activities or scientific studies which did not entail catching alive or killing, as they would not entail the commission of an offence.

Analysis

[78] Section 53(1) empowers the Director-General to authorise a person to "catch alive or kill" a partially protected or absolutely protected species.[72] It must follow from such an authorisation that the pursuing and disturbing incidental to that catching or killing would thereby also be authorised. However, lesser interferences with the great white shark which involve "pursuing, disturbing, or molesting" unconnected to catching alive or killing may not be authorised, even if they are undertaken for conservation or scientific purposes. There is then, as Shark Experience submits, a mismatch between the s 63A offence and the power to authorise.

[79] We acknowledge that this gap would not exist on Shark Experience's interpretation. On its interpretation, these lesser activities would not be unlawful unless undertaken for the purpose of, or in the course of, hunting or killing the wildlife

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[72] The power to authorise under s 53 is, on the bare words of the provision, relatively unconstrained. It appears that the catching alive or killing authorised may, in accordance with the wording of s 53, be for any purpose approved by the Director-General of Conservation. But, in reality, the power to authorise is constrained by the purpose of the Act, wildlife protection, and most relevantly, for the purpose of this appeal, protection of great white sharks, or any other purpose consistent with the Act.

within the ordinary meaning of those words. And thus, if the hunting was undertaken to "catch alive or kill" for conservation or scientific purposes, it could be authorised under s 53.

[80] This gap does not however lead us to conclude that Shark Experience's interpretation is correct. First, as we have noted, frequent amendment of the Act has caused it to lose some coherence. As the Court of Appeal said, "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".[73]

[81] Secondly, it seems to us that the prohibited acts, on the interpretation we have adopted, are narrow enough in scope to allow scientific or conservation research to be undertaken without committing a prohibited act. Moreover, it is hard to conceive of the circumstances in which it would be appropriate to authorise the pursuit, disturbance or molestation of partially or absolutely protected wildlife if those actions are not connected to authorised catching or killing of that wildlife.

Claimed incoherence: ss 63A and 68B

[82] Shark Experience argues that the Court of Appeal's definition introduces further incoherence to the statutory scheme because the defence in s 68B can only apply if the protected wildlife has been killed or injured. There is no defence available if wildlife is accidentally disturbed or molested without causing death or injury. Again, Shark Experience argues that this mismatch is avoided by the narrow interpretation it proposes.

[83] We accept that there is an asymmetry between the offence and defence provisions because the defences available under s 68B are not available where the prohibited act does not result in death or injury. We also agree that this asymmetry would not be present were Shark Experience correct that it is necessary to show that any of the prohibited acts were done with an intention to hunt or to kill.

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[73] CA judgment, above n 3, at [50].

[84] Again, however, we are not persuaded to adopt Shark Experience's interpretation by this mismatch or asymmetry. First, as we have already found, s 63A, read together with s 68B, makes plain that liability under s 63A does extend to accidental or unintentional acts. Secondly, as Mr Prebble for the Attorney-General argues, the common law absence of fault defence would be available if a partially or absolutely protected animal is, through no fault of the defendant, disturbed, but not injured or killed. That defence is available in the case of strict liability offences unless its availability is clearly excluded by the provisions of the legislation.[74] We say that because s 68B provides a no fault defence for killing or injuring an animal. There is no reason why a no fault defence should not also be available where lesser harm is inflicted.

Consistent with purpose?

[85] Were we to adopt the narrow interpretation Shark Experience urges upon us, the protective regime for absolutely and partially protected wildlife would consist only of protection against hunting and killing (in the common usage sense) and acts incidental thereto, and the limited protection afforded by the Animal Welfare Act. That would leave species such as dotterels, kiwi and kea exposed to acts of harassment and molestation.

[86] Shark Experience argues that the interpretation adopted by the Court of Appeal over criminalises. The interpretation at which we have arrived, based upon our consideration of the text and scheme of the Act, reduces the extent of the acts criminalised. We consider that adopting the still narrower interpretation urged upon us by Shark Experience under regulates and thereby under criminalises, leaving wildlife exposed to harmful conduct. Such an interpretation would not be consistent with the purposes of the Act.[75]

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74 *Millar*, above n 58, at 668. The Crimes Act 1961, s 20(1) provides that all rules and principles of the common law which render any circumstances a defence to any charge shall remain in force and apply in respect of a charge to any offence under the Crimes Act or any other enactment, except insofar as they are altered by or inconsistent with that Act or any other enactment.

75 The one aspect of the statutory scheme which might give some cause for concern in respect of over criminalisation is the provision that it is an offence to "disturb" absolutely and partially protected wildlife. This is, however, addressed by the application of a risk of significant harm threshold.

New Zealand Bill of Rights Act and Magna Carta arguments

[87] Shark Experience argues that c 29 of Magna Carta and s 6 of the New Zealand Bill of Rights Act each require that we adopt an interpretation that least infringes upon the freedom of expression, freedom of movement, and liberty of the person,[76] inherent in the activity of shark cage diving.

[88] Ms Grey submits that the Court of Appeal's interpretation entails the imposition of severe penalties for strict liability public welfare type offences, and that to impose loss of freedom by imprisonment and seizure of private property in the absence of a clear obligation or mens rea runs contrary to s 22 of the New Zealand Bill of Rights Act and c 29 of Magna Carta. The latter provides:

> **29 Imprisonment, etc contrary to law. Administration of justice**
>
> NO freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him,[1] but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.
>
> 1 deal with him,

[89] Ms Grey did not press this point in oral argument. She was right not to. The Wildlife Act is part of the "law of the land" and by its terms authorises the imposition of fines and a sentence of imprisonment where it applies. The point Ms Grey makes regarding mens rea has already been addressed in our analysis above.

[90] Similarly, Shark Experience argues that the Court of Appeal's interpretation of "hunt or kill" unreasonably infringes on its rights of freedom of movement and freedom of expression as affirmed in the New Zealand Bill of Rights Act. It argues "hunt or kill" ought to be narrowly construed to minimise the infringement upon those rights.

[91] We are not persuaded that the provision, however it is construed, amounts to a restriction upon freedom of expression. Shark cage diving is not, on any view, conduct

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76 New Zealand Bill of Rights Act 1990, ss 14, 18 and 22.

which could fall within the protective boundary of s 14. Nor does it amount to a restriction on freedom of movement for the purposes of s 18. Shark Experience's boats are free to travel and divers free to dive in the area. The restriction in our interpretation of the Act restricts a form of conduct rather than free movement about the ocean.

Conclusion on meaning of "hunt or kill"

[92] To conclude this interpretative analysis, we are satisfied that the definition of "hunt or kill" captures within the s 63A offence conduct which is unconnected to the common usage meaning of hunting and killing, extending to pursuing, molesting and disturbing protected wildlife, whether or not those prohibited acts take place in the course of, or for the purpose of, hunting or killing or otherwise. We are satisfied that the overall statutory scheme supports this interpretation, as does the Act's purpose. This interpretation does not lead to incoherence in the statutory scheme, nor to over or indeterminate criminalisation. The nature of the prohibited acts, together with the availability of the s 68B and common law "no fault" defence, create a coherent framework from which exposure to criminal liability can be sufficiently predicted.

[93] We summarise the nature of the prohibited acts as follows. In the s 2(1) definition of "hunt or kill":

(a) "hunting" means an intentional act committed if a person is proved to have had an intent to hunt;

(b) "killing" means causing the death of a protected animal. An intention to kill need not be proved;

(c) "pursuing" means to intentionally chase but does not include luring or attracting or merely following the animal at a safe distance;

(d) "disturbing" means an action which physically or mentally agitates the protected animal to a level creating a real risk of significant harm; and

(e) "molesting" means intentionally troubling, distressing or injuring a protected animal.

[94] There is no requirement to prove an intent to commit the offence in s 63A. Aside from the prohibited act of "hunting", there is also no requirement to prove that any of the prohibited acts listed above are committed in the course of, or for the purpose of, hunting or killing in the ordinary usage sense of those words. Attempting any of the prohibited acts would also constitute an offence under s 63A.

[95] It is unnecessary to comment on those prohibited acts in the definition of "hunt or kill" that were not the subject of argument before this Court. We therefore make no comment on the prohibited acts of "trapping", "capturing", and "taking or using a firearm, dog, or other like method".

Is the conduct "hunting or killing"?

[96] The Court of Appeal found that because Shark Experience uses berley and bait as attractants to bring the sharks to the cage, this is pursuing them in the same way that the use of bait or a fly to draw a fish to an angler's hook is pursuing the fish.[77] And since the attractants are designed to cause the animal to deviate significantly from its natural swimming patterns, that amounts to a disturbance of the animal.[78]

[97] The Court then applied its risk of harm threshold to the conduct in question, concluding that shark cage diving carried with it a risk of harm.

[98] Shark Experience argues that shark cage diving does not fit within the meaning of pursuing or disturbing for the purposes of the definition. In any case, counsel argues that the Court of Appeal had an inadequate factual foundation to find that the activity carried with it a risk of harm. The Court had conflicting evidence before it as to the impact of the use of bait and berley on shark behaviour in association with the activity. Although the material before the Court did suggest some risk associated with shark cage diving using attractants, the Court of Appeal, counsel argues, failed to address

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77 CA judgment, above n 3, at [45].
78 At [45].

the evidence that the Code of Practice was designed and accepted by the Director-General of Conservation as adequately addressing those risks.[79]

[99] The respondents support the Court of Appeal's reasoning in connection with the meaning of pursuing or disturbing. The Attorney-General argues that, in any case, the conduct in question would also amount to hunting the great white shark as it entails seeking them out, even if only for the purpose of observing them at close quarters.

[100] However, PauaMAC5 resists Shark Experience's attempts to revisit the Court of Appeal's factual findings that the activity carried a risk for great white sharks. It argues that this is beyond the limited scope of the grant of leave.

Analysis

[101] We see the issues raised by Shark Experience as to whether there was a sufficient evidential basis for the declaration as implicit in the approved question ("whether the Court of Appeal was correct to hold that shark cage diving is an offence under s 63A of the Wildlife Act 1953").[80] We therefore address these arguments, prefacing our discussion by clarifying that we address only shark cage diving using attractants.

Hunting

[102] We do not consider that shark cage diving can be characterised as hunting for the purposes of s 63A, as there is no intention on the part of the operators or divers to catch or kill the sharks.

Pursuing

[103] On the interpretation we have adopted, shark cage diving using attractants does not involve pursuing the animal, since there is no suggestion that the boats or divers chase the sharks.

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79 Department of Conservation *Commercial Great White Shark Cage Diving New Zealand: Code of Practice* (November 2015).

80 Leave judgment, above n 6.

Molesting

[104] We did not hear full argument on whether shark cage diving using attractants could amount to molesting. The Attorney-General advanced brief written submissions that it was molesting because it was "troubling" or "annoying" sharks. But that issue does not seem to have been addressed in the judgments of the lower Courts and Shark Experience has not engaged with the Attorney-General's argument. We therefore do not consider it appropriate to decide the issue.

Disturbing

[105] Whether shark cage diving using attractants amounts to disturbing sharks turns on whether there is a real risk that luring a shark to a particular location with bait or berley will physically or mentally agitate or stress the shark to a level creating a significant risk of harm.

[106] There was some evidence as to the risk of injury to sharks. Mr Duffy, a Technical Advisor for the Department of Conservation, identified a number of risks to the sharks including entanglement in lines; entrapment in cages; injuries caused by collisions with cages and support vessels; ingestion of ropes, decoys and other equipment; and injuries resulting from aggressive interactions between sharks. He referred to a number of potentially harmful cage diving practices occurring in the period between the start of the cage diving industry in May 2008 and the development of the Code of Practice.

[107] The Court of Appeal relied on Mr Duffy's evidence for its finding that shark cage diving using attractants created a potential for harm to sharks such as to amount to disturbing. But as Shark Experience points out, the Court failed to address the impact that the Code of Practice had upon those risks. Nor did it address the fact that Mr Duffy acknowledged in his evidence the potentially harmful practices he identified occurred in the period of time before the Code of Practice came into force.

[108] We do not propose to undertake our own fact-finding exercise in relation to this issue. Our reasons for this are as follows. The issue of risk of harm to sharks only emerged as an issue in the Court of Appeal. In the High Court, argument focused upon

whether great white sharks stayed in the area longer, and were more aggressive, evidence relevant to the risk to the pāua divers. The evidence was tailored to that issue. It followed that although Mr Duffy addressed risk of harm in the manner we have set out, the witnesses who provided evidence for Shark Experience and Shark Dive New Zealand did not respond to this evidence.

[109] On this further appeal, we have a different interpretation of the word "disturbing" than that adopted by the Court of Appeal. The evidence produced in the High Court was not directed to this test and we therefore do not consider it appropriate to make a finding whether shark cage diving using attractants amounts to disturbing for the purposes of the Act. This observation applies equally to the issue of whether the activity amounts to molesting sharks for the purposes of the Act.

A declaration?

[110] As addressed below, we also do not consider that this is an appropriate case in which the discretion to issue a declaration should be exercised. The issue of the declaration involved the resolution of a mixed question of law and fact, and relates to the legality of proposed future conduct. The appropriateness of issuing a declaration was addressed by the Attorney-General in argument, although it was not a point taken by Shark Experience which itself seeks a declaration that the conduct is not unlawful.

[111] A declaration is a discretionary remedy.[81] There is jurisdiction to issue a declaration where it relates to a matter which might be the subject of a criminal prosecution, but it is a discretion which is exercised with extreme caution. This is because the declaration may have the effect of usurping the function of the criminal court and, in particular, may usurp the role of the fact-finder in any later criminal prosecution.[82] Although not binding on the criminal court, the existence of a declaration risks prejudicing the integrity of subsequent criminal proceedings.[83] It is difficult to predict how the existence of such a declaration might play out in the context of a trial. We also cannot discount the risk that declaring the activity lawful or

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81 Declaratory Judgments Act 1908, s 10.
82 *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) at 243.
83 At 244.

unlawful would have an effect upon future prosecutorial decisions. We consider that these considerations weigh heavily against the issue of a declaration in this case.

[112] So too does the second, and related, point, that the declaration concerns future conduct.[84] Even were we satisfied as to the lawfulness of shark cage diving as it has been practised in the past, we cannot rule out the possibility that changes in practice or conduct in the individual case will impact on the legality of the activity. The facts before the court may not necessarily be the facts which exist at some future time when shark cage diving takes place.

[113] The Attorney-General contends that this risk of issuing a declaration not sufficiently responsive to the facts of future cases is reduced in this case, to such an extent it can be discounted. It follows, the Attorney-General says, from the fact the offence is one of strict liability, that establishing an offence has been committed requires an assessment of the facts to determine whether conduct objectively amounts to hunting or killing, in the defined sense.

[114] As we have held, we do not see proof of the offence in connection with shark cage diving as inevitably turning only upon objective assessments of the facts. We do not therefore discount the risk identified.

[115] Another consideration for us is that the factual basis for any declaration is contested, and as we have already noted, incomplete. As Mr Prebble for the Attorney-General noted, courts are reluctant to issue a declaration where the proceeding is fact sensitive or involves disputed factual material, or where there is insufficient evidence before the court to determine a question of fact.[85] On our assessment, all these considerations apply in this case. The nature of any risk to sharks is sensitive to how the operations are run. Future operations may be quite different. Mr Prebble argued that the facts were not disputed on the critical issue of risk because the operational facts of shark cage diving were not in dispute, and there was clear, uncontradicted evidence of physical harm. We have already addressed the adequacy of the factual basis and our view that the evidence on the point was incomplete.

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84 At 244.

85 *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [48], [51] and [55].

[116] Finally, Mr Prebble argued that there is a public interest sufficient to outweigh any countervailing consideration. The parties all seek a declaration. There are strongly held concerns from a number of perspectives. The pāua divers and many residents are concerned the ongoing practice is one that could lead ultimately to a death in the community. The Attorney-General raises issues such as the wellbeing of sharks and compliance with New Zealand's obligations under the Convention. And, finally, shark cage diving operations are central to the livelihood of those associated with running Shark Experience.

[117] We acknowledge that in some cases the public interest in the issue of a declaration may be so great as to outweigh the countervailing considerations we have identified.[86] We also acknowledge the interests of those who have pursued these issues through litigation. But, in this case, the factual sensitivity of any prosecution and the evidential deficiency satisfy us that we should not grant a declaration. This judgment does, however, set out the principles against which the lawfulness of any future shark cage diving operation can be assessed.

Application for leave to adduce further evidence

[118] The Attorney-General applied for leave to adduce further evidence in the form of an affidavit from an employee of the Department of Conservation, Ms Long, Director for Planning, Permissions and Land. The affidavit provides updating information about shark cage diving in the area in issue in this judgment, and information on shark cage diving activities elsewhere. It also describes other activities involving interactions between people and marine species.

[119] We do not regard this evidence as relevant to the issues on appeal, and so, it follows, it does not meet the established threshold for admission.[87] We therefore dismiss the application for leave to adduce further evidence.

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86 *Auckland Area Health Board*, above n 82, at 243–244.

87 See *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124 at [16]; and *New Health New Zealand Inc v South Taranaki District Council* [2017] NZSC 162 at [8]–[10].

Conclusion

[120] It follows that we are satisfied the Court of Appeal:

(a) was correct to find that the expression "hunt or kill" captures conduct unrelated to hunting or killing in the common usage sense of those words; but

(b) erred in issuing a declaration that shark cage diving is an offence under s 63A of the Act.

Result

[121] The application for leave to adduce further evidence is dismissed.

[122] The appeal is allowed.

[123] The Court of Appeal's declaration that "Shark cage diving is an offence under s 63A Wildlife Act 1953" is set aside.

[124] Because each party has enjoyed a measure of success, we make no order for costs.

ELLEN FRANCE J

[125] I agree with the approach to the interpretation of the relevant provisions of the Wildlife Act 1953 in general and with the orders set out in the reasons given by Winkelmann CJ. There are, however, three aspects on which I take a different view on the reasoning. These points can be stated briefly.

[126] The first point relates to the conclusion that the word "pursue" cannot include luring a protected animal.[88] Section 63A, the offence provision in issue, relates to "taking" absolutely or partially protected marine wildlife. "Take" is defined to include "pursuing by any means or device".[89] Given that and the context, it seems to me there

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88 See the reasons given by Winkelmann CJ above at [64]–[66] and [93](c).
89 Wildlife Act 1953, s 2(1) definition of "take".

may well be a good argument that, as the Court of Appeal found, pursue may include luring a protected animal using attractants.[90] I would prefer, however, to leave this point open until the issue arises in the context of a criminal prosecution. It seems to me that some of the difficulties arising in this case reflect in part the problems of trying to deal with a provision creating an offence in a factual vacuum.[91] I see those problems as telling strongly against granting a declaration in a case like the present.

[127] My second point concerns the conclusion that "disturb" prohibits conduct carrying a real risk of "significant" harm.[92] I agree it is necessary to construe the word "disturb" as conduct carrying a real risk of harm, but I do not consider that harm must be significant. I see that additional requirement as unnecessary given the protective regime established by the Act.[93] Further, it seems to me that the word "disturb" is used in the same sense throughout the Act. The requirement that the harm be significant does not fit readily with the use of the word "disturb" in other parts of the Act. In particular, the various references in the Act to disturbing a nest do not on their face embody any requirement for significant harm.[94] Nor does the provision prohibiting disturbing, opening or tampering with any cage or other receptacle used for the carriage of homing pigeons envisage a requirement for significant harm.[95] Indeed, it is arguable that those provisions suggest any interference or disturbance with the nest or cage will suffice.

[128] Finally, I would describe the words "pursue" and "molest" as words which on the face of it embody some purpose or deliberate action. In the context of provisions which it is agreed impose strict liability it is preferable to use that language rather than that of intention.

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90 *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, [2019] 2 NZLR 1 (Cooper, Clifford and Williams JJ) at [45].

91 See *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718 (HL); and *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) at 243–244.

92 See the reasons given by Winkelmann CJ above at [73]–[74]and [93](d).

93 Wildlife Act, long title and s 3.

94 Section 63(1)(c). See also ss 9(2)(g) and 14(3).

95 Section 58(1)(b).