IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-300
[2024] NZHC 3824

UNDER	the Judicial Review Procedure Act 2016 and the High Court Rules 2016, Part 30
IN THE MATTER OF	an application for judicial review
BETWEEN	THE ENVIRONMENTAL LAW INITIATIVE Applicant
AND	DIRECTOR-GENERAL OF THE MINISTRY FOR PRIMARY INDUSTRIES First Respondent
	DIRECTOR-GENERAL OF CONSERVATION Second Respondent
	THE ATTORNEY-GENERAL Third Respondent
	MINISTER OF CONSERVATION Fourth Respondent
	Continued…

Hearing:	14-17 August 2023
Counsel:	D M Salmon KC, D A C Bullock and S J Humphrey for Applicant J M Prebble and K F Gaskell for First to Fourth Respondents B A Scott and G T Carter for Fifth to Ninth Respondents
Judgment:	13 December 2024

JUDGMENT OF GWYN J

Continued…

AND

COMMERCIAL FISHERIES SERVICES LIMITED
Fifth Respondent

FISHERIES INSHORE NEW ZEALAND
Sixth Respondent

DEEPWATER GROUP LIMITED
Seventh Respondent

NEW ZEALAND ROCK LOBSTER INDUSTRY COUNCIL
Eighth Respondent

PAUA INDUSTRY COUNCIL
Ninth Respondent

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Introduction

[1] The Environmental Law Initiative (ELI), the applicant in this judicial review proceeding, brings claims directed at the protection of marine wildlife and mammals in Aotearoa New Zealand, of which there are more than 17,000 known species. Many of these species are vulnerable and threatened with extinction. ELI says one of the main threats to the survival of these species is commercial fishing activities. Commercial fishing can lead to protected species being caught accidentally or otherwise injured or harmed, while a commercial fisher is fishing for another species (bycatch). In this proceeding, bycatch is used to refer to bycatch of protected species of marine wildlife and marine mammals.[1]

[2] The applicant's evidence is that all fishing methods have the potential to catch protected species, but the methods of fishing which result in the majority of bycatch of protected species are trawling, longlining and set netting.

[3] As Matthew Hall's evidence for ELI put it:[2]

> Commercial fishing activity generates noise, light and smells. Bait, fish and offal are also often discarded. These factors can attract foraging seabirds, marine mammals and turtles which can then be killed or injured by fishing gear. In addition, protected species often feed on and target the same species as fishers and therefore can be caught accidentally when they are both in the same area.

[4] There are three legal regimes imposing obligations on commercial fishers to report catch and other related matters. They are the Fisheries Act 1996 (and regulations made under it), the Wildlife Act 1953 and the Marine Mammals Protection Act 1978 (MMPA). The Fisheries Act is administered by the Ministry for Primary Industries | Manatū Ahu Matua (MPI) and the Wildlife Act and MMPA are administered by the Department of Conservation | Te Papa Atawhai (DOC).

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1 Marine Mammals Protection Act 1978 [MMPA], s 2; Wildlife Act 1953, ss 2 and 3; and Fisheries Act 1996, s 2.

2 Affidavit of Matthew Hall (9 February 2023) at [29].

Parties

[5] ELI is a charitable trust with the primary objective of supporting the effective protection of Aotearoa New Zealand's natural resources and environment. Its stated purpose in bringing these proceedings is to ensure that relevant legislation relating to the reporting of interactions between commercial fishing activities and protected species is properly interpreted and complied with. It also seeks to ensure that DOC and the Minister of Conservation are exercising their discretion to consider using population management plans (PMPs), a tool provided for under the Wildlife Act and the MMPA to specifically address fishing-related causes of mortality of protected species and marine wildlife and marine mammals, on a lawful basis.

[6] The first and second respondents are the Director-General of MPI and the Director-General of Conservation. The Attorney-General is the third respondent, on behalf of DOC. The Minister of Conservation is the fourth respondent.

[7] The fifth respondent, Commercial Fisheries Services Ltd (FishServe), was joined to the proceeding at its request on 12 September 2022, on the basis that FishServe's interests are affected by the first to third causes of action. FishServe is a private company and is a subsidiary of New Zealand Seafood Industry Council Ltd (NZSIC, replaced in 2013 by Seafood New Zealand Ltd) which provides registry-based services[3] to MPI relating to the administration and operation of the quota management system under the Fisheries Act.

[8] The sixth to ninth respondents are seafood industry sector representative entities, which collectively represent commercial quota owners for their respective sectors in Aotearoa New Zealand.[4] They were joined to the proceeding on 12 September 2022, at their request, because their interests are affected by the fourth to eighth causes of action which relate to the Wildlife Act and the MMPA.

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3 See [30] below for more information about registry-based services.

4 The Fisheries Amendment Act 1986 introduced a quota management system which restricted the output for most significant commercial finfish species by way of individual allocations of quota rights to take fish. A quota is the holder's share of the total allowable commercial catch in a particular fishery.

ELI's claims

First to third causes of action

[9] The first cause of action arises under the Fisheries Act and relates to the contracting out by the Director-General of MPI of registry service functions, particularly of "catch and effort reporting", to FishServe. As part of carrying out that function, FishServe receives returns and reports of bycatch of non-fish or protected species (NFPS returns) from commercial fishers.

[10] The second and third causes of action challenge specific decisions by the Crown to publish a statutory *Gazette* notice nominating FishServe's offices as the place for receipt of certain returns (*Gazette* notice), and a circular prescribing how commercial fishers should submit reports (Technical Circular). The decisions to issue these instruments are challenged solely on the basis that they assume the lawful contracting out of reporting obligations to FishServe, which is challenged in the first cause of action.

[11] The allegation underlying all three causes of action is that the Director-General of MPI failed to carry out the assessments and consideration of options required by s 294 of the Fisheries Act, in relation to the contracting arrangements with FishServe,[5] which were agreed in 2013, and were current at the time of hearing.[6]

[12] On the first cause of action, I conclude that the Director-General had a statutory duty to receive NFPS reports and was required to carry out an assessment under s 294 of the Fisheries Act before entering into the 2013 Registry Services Delivery Agreement (RSDA) with FishServe and variations to the RSDA, but failed to do so.

[13] I also conclude that the Director-General was required to carry out an assessment under s 294 of the Fisheries Act on the introduction of NFPS reporting in 2008, but failed to do so.

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5 See [42] below.
6 See [48] below.

[14] I make declarations as to unlawfulness in respect of those contracting arrangements. However, since the hearing the Director-General has carried out an assessment under s 294 of the Fisheries Act in respect of a 2023 renewal of the RSDA. In those circumstances I decline to make an order setting aside the 2013 RSDA and subsequent variations or to make the consequential orders sought under the second and third causes of action.

Fourth, fifth, seventh and eighth causes of action

[15] The fourth, fifth, seventh and eighth causes of action, against DOC and the Attorney-General, relate to the administration and enforcement of provisions in the Wildlife Act and the MMPA. Both Acts are administered by DOC.

[16] On these causes of action, I find DOC had an unlawful policy that NFPS reporting was adequate to allow commercial fishers to meet their obligations under s 63 of the Wildlife Act and s 16 of the MMPA.

[17] I also find that DOC had an unlawful policy of non-investigation and non-prosecution of offences under ss 63A and 63B of the Wildlife Act ss 9 and 16 of the MMPA.

[18] I make declarations accordingly but decline to grant an order of mandamus requiring DOC to put in place a system under which the reporting requirements of the Wildlife Act and the MMPA can be complied with.

Sixth and ninth causes of action

[19] This is a claim that the Director-General of Conservation has unlawfully failed to exercise their discretion to approve a PMP under the Wildlife Act and/or the MMPA.

[20] On these causes of action, I find:

(a) The Director-General of Conservation's refusal or failure to exercise the discretion to prepare and present to the Minister of Conservation for

approval any PMP under s 14I of the Wildlife Act and s 3H(1) of the MMPA since 1 October 1996 was unlawful;

(b) Section 14G(a) of the Wildlife Act and s 3F(a) of the MMPA do not preclude the inclusion of a maximum allowable level of fishing-related mortality in a PMP where the threatened species could not achieve a non-threatened status within 20 years.

[21] I decline to grant an order in the nature of mandamus requiring the Director-General of Conservation to consider whether to prepare any PMPs under s 14I of the Wildlife Act or s 3H of the MMPA.

Contracting out functions, duties and powers under s 294 of the Fisheries Act (first to third causes of action)

Legislative and factual background

[22] Under the Fisheries Act 1983 there was no express power for the chief executive of the Ministry of Agriculture and Fisheries, and subsequently the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa, to approve the performance of their statutory functions, duties and powers by a third party under contract. The Fisheries Act 1996 includes provisions for both the devolution of certain of the chief executive's functions, duties and powers and contracting out of certain functions, duties and powers.

[23] The Fisheries Act 1996 (Fisheries Act) was enacted on 13 August 1996. Part 15 of the Act deals with fisheries administration, including by contracting with outside agencies. Under the subheading "Administration generally", s 294 provides:

> **294 Use of outside agencies in performance of functions under Act**
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> (1) The chief executive may perform his or her functions, duties, and powers,—
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> (a) by his or her own employees; or
>
> (b) by entering into an arrangement or contract with any other agency or any other instrument of the Crown or any corporation sole, body of persons (whether corporate or unincorporate), or individual.

(2) Before deciding to perform any function, duty, or power by an arrangement or contract under subsection (1), the chief executive shall take into account the following matters:

(a) whether the function, duty, or power might be more efficiently provided by the chief executive's own employees:

(b) the desirability of retaining institutional knowledge within the Ministry:

(c) whether entering into such an arrangement or contract will limit the chief executive's ability to adequately meet his or her statutory obligations.

(3) In deciding how to perform any function, duty, or power under subsection (1)(b), the chief executive shall give due consideration to the advantages and disadvantages of different options.

(4) Before entering into any arrangement or contract under subsection (1)(b), the chief executive may, after consultation with the Minister, set contract standards and contract specifications or both which shall be complied with by the other party to the arrangement or contract.

(4A) The chief executive may, after consultation with the Minister and the other party to the arrangement or contract, amend or revoke contract standards and contract specifications set under subsection (4).

(5) No arrangement or contract under subsection (1)(b) between the chief executive and any other party (other than an agency of the Crown or other instrument of the Crown) may provide for that other party (or person acting on behalf of that other party) to perform or exercise any power that is conferred or imposed on fishery officers (other than honorary fishery officers or examiners) by or under this Act.

(6) Nothing in this section or in any arrangement or contract entered into under the authority of this section relieves the chief executive of the obligation to perform or ensure the performance of any function, duty, or power imposed on the chief executive by this Act or any other Act.

[24] Section 294 originated from cl 274 of the Fisheries Bill 1994. During the first reading of the 1994 Bill, the Minister of Fisheries set out the intention of reforming the delivery of fisheries management services:[7]

> The last major policy initiative given effect in the Bill is the reform of the delivery of fisheries management services. This is provided in parts XIII, XV, and XVI. At present the great majority of services are supplied by MAF Fisheries. The provision of such services by a Government department is not sustainable in a cost-recovery environment. A viable fishing industry requires services that are not core Government services to be devolved to the private sector. Broadly, all services except for enforcement and prosecution, allocation of harvesting right, and liaison and dispute resolution, will be

[7] (6 December 1994) 545 NZPD (Fisheries Bill 1994 – First Reading, Doug Kidd).

> contestable. The provision of fishery stock assessment research, which is currently conducted by MAF Fisheries, will be transferred to a Crown research institute.

[25] Section 295 of the Fisheries Act permits the chief executive of the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa to notify decisions to contract out functions under s 294(1)(b) and to appoint specific places for returns and where other information required to be submitted under the Act could be provided or received.

[26] These provisions came into force on 1 October 1996.

[27] As to devolution, in November 1998 Cabinet decided that registry functions undertaken by the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa should be devolved to quota-based organisations. This reflected a policy view that the private sector would be more efficient at delivering data processing and registry services than central government. In addition the Ministry was facing significant capital investment requirements to replace its aging computer systems.

[28] On 8 September 1999 Parliament enacted the Fisheries Act 1996 Amendment Act 1999. The Amendment inserted a new pt 15A into the Fisheries Act, which permitted the making of Orders in Council devolving certain prescribed functions, duties and powers of the chief executive of the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa to "approved service delivery organisations", provided certain requirements were met.

[29] Under this devolution model, legal responsibility for delivery of the devolved functions, duties and/or powers of the chief executive would be transferred to the approved delivery service organisation. This is in contrast to contracting out under s 294(1)(b), where legal responsibility remains with the chief executive.

[30] "Registry based services" describes services which enable a commercial fisher or associated person to undertake or report on their various fishing, related activities, or obligations under the Fisheries Act. It includes services to support activities such as quota trading, processing of annual catch entitlement, permitting, registration of

fishing vessels, catch balancing, the receipt and processing of monthly reports, as well as catch and effort reporting.

[31] Commercial fishers are required to submit various information and data relating to fisheries activity under the Fisheries Act and associated regulations. This data is submitted through a range of systems, one of which is the "catch and effort system".

[32] The catch and effort system includes databases and programmes which collect, validate, and contain catch and effort data provided by commercial fishers through catch and effort returns. "Catch and effort returns" (or reports) describe the returns used by fishers to report on their fishing activity during a fishing trip, including NFPS catch returns.

[33] "Catch and effort data" is collected and used by scientists for the purpose of assessing the sustainability of Aotearoa New Zealand's fisheries and other research purposes, including risk assessments for non-fish or protected species, as well as monitoring the implementation of regulatory measures (such as the fishing-related mortality limit for sea lions) and enforcement. The data is of key strategic importance to MPI's sustainability decisions, policy evaluation and fisheries management.

[34] Catch and effort data required to be provided on catch and effort returns, and how those returns are to be completed, was previously defined in the Fisheries (Reporting) Regulations 2001 (FRR 2001) and, prior to that, in the Fisheries (Reporting) Regulations 1990 (FRR 1990). The requirement to provide NFPS catch returns was introduced to the FRR 2001 in 2008, via a new reg 11E. Catch and effort data required to be submitted is now defined in pt 1 of the Fisheries (Reporting) Regulations 2017 (FRR 2017) and Circulars, including NFPS catch reports.

Contracting out arrangements

[35] Since the Fisheries Act was enacted in 1996 and amended in 1999 the Crown has entered into a number of contracting arrangements with FishServe and its parent company Seafood New Zealand Ltd.

[36] The Crown first entered into a contract with FishServe, together with Datacom Employer Services Ltd (Datacom), in August 1999 (the 1999 Agreement). The 1999 Agreement included the catch and effort function. The chief executive undertook a s 294 assessment prior to entering into the Agreement.

[37] In February 2001 the Ministry developed a framework for the assessment of recommended delivery options (devolved/transferred, contractual, or Ministry-delivered) to establish a new delivery model for registry-based services required by the 1996 Act. This is the Revised Devolved and Contracted Services Framework (2001 RDCS Framework).

[38] The 2001 RDCS Framework sets out the criteria by which functions, duties and powers under the Fisheries Act may be assessed for their appropriateness for either devolution or contracting out. The 2001 RDCS Framework involves a two-step process:

(a) First, an assessment as to whether the function, duty or power is appropriate for devolved/transferred delivery under pt 15A. This assessment is to be made by the Minister of Fisheries after consultation with the Minister for the Environment.

(b) If the function, duty, or power fails that assessment, then the function, duty or power is assessed (by the chief executive) as to its suitability for delivery by an external agency under contract in terms of s 294.

[39] The specific criteria governing which functions are appropriate for contracting out under s 294 are out set out in the 2001 RDCS Framework as follows:

> … [E]ach function, duty or power should be assessed against the following criteria:
>
> Consider whether the function, duty or power:
>
> - is a core component of the Government's stewardship role;
> - establishes fisheries management policy or regulatory framework;
> - creates or allocates access rights;

- is critical to the Ministry's Treaty obligations;
- is critical to international fisheries management;
- sets standards for other services;
- monitors or audits any other services;
- enforces the criminal regulatory environment.

> If the answer to all of these questions is "No" then the function, duty or power should, in principle be delivered by an external agency under contract. This decision in principle will be subject to the formal statutory assessment required to be undertaken by the Chief Executive under section 294 of the Fisheries Act 1996 prior to any contract being signed.

[40] The 2001 RDCS Framework attaches in an appendix assessments and applications of the criteria to the main functions, duties and powers of the chief executive at the time the Framework was agreed. The appendix does not include detailed reasoning on the application of the criteria to each function, duty or power.

[41] The 2001 RDCS Framework recommended that specific tasks required to support the catch and effort system be contracted under s 294(1)(b). The recommendation was that the catch and effort function not be transferred under pt 15A (devolution), because of the importance and different use of catch and effort data (in contrast to data contained in other statutory reports used to support the administration of the quota management system).

[42] In March 2001 the Crown entered into a new agreement with NZSIC and FishServe which replaced the 1999 Agreement. The new agreement was for the provision of interim registry services under the 1983 Act, and transitional services required by the 1996 Act, until 30 September 2001. Two additional sets of services were included in this agreement (high seas permits and transitional services) and a further s 294 assessment was undertaken for those additional functions.

[43] On 6 June 2001 the chief executive carried out a s 294 assessment in relation to registry-based services. It includes (at Appendix A) a detailed list of registry-based services to be performed under contract or arrangement, including those within the catch and effort function. It includes the following tasks supporting the catch and effort system:

(a) the issuing of catch and effort return books;

(b) maintaining a database of all persons required to furnish catch and effort returns;

(c) receiving and maintaining a computerised record of information contained from catch and effort returns;

(d) notifying any person required to furnish a catch and effort return if that return is overdue;

(e) notifying the Ministry of any outstanding overdue catch and effort return;

(f) if appropriate, requesting any amendment to a catch and effort return; and

(g) undertaking a process to validate catch and effort returns in accordance with specifications issued by the chief executive.

[44] On 21 September 2001 the Crown entered into an agreement with FishServe described as a registry services delivery agreement for the performance of various functions, duties and powers of the chief executive of the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa under the Fisheries Act 1996, including reporting services relating to catch and effort as listed in Schedule A (2001 RSDA).

[45] On 10 September 2004 the chief executive carried out a review of the 2001 RSDA, which was extended for a further three years.

[46] The 2001 RSDA as amended in 2004 was amended again on several occasions. In August 2008 the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa engaged consulting firms Bruce Shallard & Associates and Deloitte to review the model of devolution of fisheries services and "determine what lessons could be learned". The Shallard review looked primarily at the arrangements in place for devolution functions. It did not examine specific functions, duties and powers that were contacted

out to FishServe or express an opinion on whether the requirements in s 294 of the Fisheries Act continued to be met in connection with those services.

[47] On 30 September 2009, the Crown entered into a new contract with FishServe (2009 RSDA). Before doing so the Crown exempted FishServe from the usual government processes for procurement. There is no record of any s 294 assessment being carried out.

[48] On 30 September 2013 the Crown entered into another new contract with FishServe (2013 RSDA). This agreement as subsequently varied remained in force as at the time of the hearing. Prior to entering into the 2013 RSDA the Crown exempted FishServe from the usual government procurement requirements. There is no record of any s 294 assessment having been carried out.

[49] The 2013 RSDA relevantly provided that:

(a) The fixed term of the agreement was 10 years beginning on 1 October 2013;[8]

(b) FishServe would provide the functions, duties and powers of the chief executive in sch A[9] subject to the terms and conditions in the agreement, including specifications,[10] directions,[11] and technical requirements;[12]

(c) MPI could give directions to FishServe which modified its duties and obligations under the agreement in certain circumstances;[13] and

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8 2013 RSDA, cl 4.

9 Clause 5.

10 Defined in cl 1.2 of the agreement to mean Contract Standards and Specifications set under s 294(4A) of the Fisheries Act.

11 Defined in cl 1.2 of the agreement to mean directions given under cl 19.1 of the agreement.

12 Defined in cl 1.2 of the agreement to mean data quality services standards and specifications, data exchange dictionaries, technical operating standards including overview documents, guidelines (defined as including written guidelines preparing by MPI including under cl 9 of the agreement) and instructions (defined as written instruments from MPI in accordance with cl 19 regarding the interpretation of any statute or rule of law relevant to the provision of services).

13 2013 RSDA, cl 19.

(d) FishServe could also request MPI to issue instructions on the interpretation of laws relevant to the performance of its duties.[14]

[50] Schedule A of the 2013 RSDA lists the services to be provided by FishServe, including:

(a) The functions, duties and powers relating to regs 5 to 13 of the FRR 2001 (in pt 2). These relate to the catch, effort and landing returns;

(b) "Catch effort services" (in pt 3) which is described as including the following tasks:

(i) Receive returns in accordance with standards and specifications:

(ii) Maintain a database of persons required to furnish returns:

(iii) Maintain a computerised record of information obtained from returns:

(iv) Undertake a process to validate returns in accordance with standards and specifications:

(v) Notify the Ministry of any outstanding overdue returns.

[51] MPI's evidence is that, over time, the amount of catch and effort data required to be submitted by fishers has progressively increased and become more detailed and the methodology for fishers reporting such data has become more automatic.

[52] The evidence of Kimon George (Manager, Data and Insights, Science and Information Directorate within Fisheries New Zealand | Tini a Tangaroa)[15] describes how the way in which NFPS reports are delivered has changed over time.

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14 Clause 20.

15 The relevant provisions of the Fisheries Act 1996 are administered by the Ministry for Primary Industries | Manatū Ahu Matua (MPI). Fisheries New Zealand | Tini a Tangaroa Fisheries is the division of MPI responsible for fisheries.

[53] In 2017 MPI contracted FishServe to develop an electronic reporting system. As a result, commercial fishers now subscribe to e-logbook software and record and send reports electronically, using an application programming interface provided by FishServe. FishServe receives the data through its electronic reporting system. FishServe then undertakes primary and secondary validation of the data received, before sending the data to MPI. FishServe performs secondary validation of reports by assessing them against business rules recorded in a Data Quality Specifications and Standards Document.

[54] MPI receives electronic reports in XML format. The evidence was that NFPS reports are stored in an operational data store system, then transferred to an enterprise data warehouse. Mr George explained that this data can then be viewed by authorised MPI staff, including Fisheries New Zealand | Tini a Tangaroa staff and fisheries officers, who can access it through different applications.

[55] The Crown says these changes are due to technological improvements; regulatory changes (such as the introduction of new returns and implementing electronic reporting of catch and effort data); changes to standards and specifications and data quality standards issued by MPI; increased need or requests for data from scientists and other catch and effort users; and to ensure compliance with Aotearoa New Zealand's international obligations such as under South Pacific Regional Fisheries Management Organisation (including data on fishing impacts on marine mammals, seabirds, reptiles, and other species of concern).[16]

[56] The most recent variation to the 2013 RSDA occurred on 22 December 2022 when the Crown and FishServe agreed to include among the services to be performed by FishServe under sch A of the agreement, functions associated with reporting by commercial fishers under the FRR 2017.

[57] There is no record of a s 294 assessment being carried out at this time.

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[16] South Pacific Regional Fisheries Management Organisation *CMM 02-2022 Conservation and Management Measure on Standards for the Collection, Reporting, Verification and Exchange of Data* (binding from 02 May 2022).

[58] The 2013 RSDA was due to expire on 1 October 2023. As at the date of hearing, the process for renewing the agreement had commenced, with the Crown confirming that FishServe will have an exemption from the Crown's usual procurement framework.[17]

ELI's submissions

[59] ELI submits that the chief executive has a statutory duty (or function) to receive NFPS catch reports under s 189 of the Fisheries Act and reporting regulations. It says this duty/function has not been validly contracted to FishServe because of the chief executive's failure to carry out a s 294 assessment for the 2013 RSDA and subsequent amendments.

[60] ELI's claim is confined only to the contracting out arrangements from 2013 onwards. It does not challenge any devolution orders.

[61] ELI says that the functions being contracted out to FishServe have changed significantly since 2001. Prior to 2008 the only policy in place to facilitate reporting of fishing interactions with protected species was the Non-Fish Incidental Catch Return (NFICR) published by the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa. There was no legally binding obligation on fishers to submit the form and it did not cover all protected species under the Wildlife Act or MMPA.

[62] The Fisheries (Reporting) Amendment Regulations 2008 were made on 25 February 2008. These regulations inserted a new reg 11E into the FRR 2001 requiring fishers to submit NFPS reports to the Director-General of MPI.

[63] The reasons for introducing the reporting of NFPS bycatch, through the NFPS Catch Return, were summarised by Mr George who noted:[18]

> 58.1 There was no legal requirement to report nil catches, so it was uncertain whether a failure to report meant that no protected species were caught. The amendment to the Fisheries (Reporting) Regulations required

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17 As discussed at [124] below, in relation to relief, after the hearing, the parties entered into a renewal of the 2013 RSDA, following a s 294 assessment by the Chief Executive.

18 Affidavit of Kimon George (13 April 2023).

fishers to report on their fish catch return whether protected species were caught (and therefore trigger whether a NFPS catch return was required).

58.2 The data provided in the non-fish incidental catch form could not be used to extrapolate total catch of protected species, nor to explore factors affecting captures of protected species because the dataset was considered to be incomplete.

58.3 The non-fish incidental catch form required fishers to duplicate some information provided in the fish catch report.

58.4 By receiving the data through the catch and effort system, [Ministry of Fisheries] would be able to link the protected species data more efficiently with other data; and therefore, obtain a better understanding of the whole fishing event.

58.5 The non-fish incidental catch form covered seabirds and marine mammals, whereas the Wildlife Act requirements also included reporting on marine reptiles, protected fish species, and some species of coral. There was no legal requirement for the non-fish incidental catch form (in itself) to be completed.

58.6 Data collection was not consistent or across all fisheries. There was a lack of knowledge about the existence of the non-fish incidental catch form by some fishery sectors; and uncertainty as to which authority (Ministry of Fisheries or DOC) data should be reported to.

[64] ELI says that the introduction of a requirement to submit NFPS reports, through reg 11E to the FRR 2001 involved the introduction of a new "duty" or "function" for the chief executive, or a material change to the duty or function, and therefore a further s 294(2) and (3) analysis was required before that duty or function could be performed by contract.

[65] The applicant also submits that the Crown carried out s 294 assessments in relation to the new agreements on 29 March 2001, 6 June 2001 and 10 September 2004 and it is inconsistent with its own past practice for the Crown now to say that it can continue to rely on its 2001 assessment.

[66] ELI's further submission is that the introduction of mandatory electronic reporting in the FRR 2017 required extensive changes to the manner and form of reports and the technical infrastructure required for the submission, receipt and processing of reports, as reflected in the successive technical circulars issued under the new Regulations. This was also a material change, requiring a s 294 assessment.

Crown submissions

[67] The Crown in response says that these is no duty on the chief executive to receive NFPS catch reports but, in any event, the chief executive did properly carry out a s 294(2) and (3) assessment, as required by the Act, in 2001. It says the requirement to submit NFPS catch reports was not an additional "function, duty or power" for the purpose of s 294 and s 294 does not require ongoing assessments each time a new agreement is entered into, or an existing agreement is varied.

[68] The Crown says that s 294 requires:

(a) The chief executive to make an assessment under s 294(2), *before deciding* that a function, duty, or power should be performed externally by way of contract or arrangement.

(b) *In deciding* how to perform such function, duty, or power under subs (1)(b), s 294(3) requires the chief executive to give due consideration to the advantages and disadvantages of different options.

(c) Once the subs (2) and (3) assessments have been undertaken, and a decision made that a particular function should be performed externally, the chief executive may enter into a contract or arrangement for the delivery of that function, duty, or power.

(d) Subsequently, the chief executive is not required to undertake ongoing s 294(2) and (3) assessments before entering a new written contract or varying the specific requirements for that function, duty, or power.

(e) Section 294(4) allows the chief executive *before entering* any arrangement or contract under subs (1)(b) to set contract standards and specifications. Those standards and specifications may be amended or revoked, pursuant to subs (4A).

[69] The Crown submission is that the words "function, duty, or power" in s 294 are intended to provide for a broader activity than, for example, the receipt of

additional data contained in a return or report required (amongst various others) by regulatory amendment. In this case "catch and effort" was intended by Parliament to be a relevant "function" for the purposes of s 294. The services listed in Appendix A of the s 294(2) and (3) assessment defined the catch and effort function able to be performed by way of an external arrangement or contract.

[70] Those services continue to encompass the catch and effort function currently carried out by FishServe under the 2013 RSDA. Accordingly, no further s 294(2) and (3) assessments have been required.

[71] Nor, in the Crown's submission, did the requirement for permit holders to submit NFPS catch reports under reg 11E of the FRR 2001 in 2008 create a new duty or function of the chief executive for the purposes of s 294. That additional requirement was a duty on permit holders, not the chief executive. The function(s) of receiving and processing data through the catch and effort system remained the same.

[72] The Crown says that the benefit of the NFPS data to another government department (and the fact that it is required under other legislation) does not create a new function for the chief executive of MPI.

[73] In response to ELI, the Crown says this cannot be characterised as a "set and forget" regime because of MPI's ability to monitor the performance of contracted services.

[74] In relation to ELI's submission that the Crown did carry out s 294 assessments in relation to earlier variations, the Crown says the March 2001 agreement was subject to a s 294 assessment but only in relation to the two additional functions (high seas permits and transitional services) introduced by way of that agreement.

[75] The Crown says the 10 September 2004 agreement, was not a formal assessment under s 294(2) and (3). It was a review of the delivery of the services being carried out in accordance with cl 14 of the agreement.

FishServe's submissions

[76] FishServe also provided submissions on the first to third causes of action. These broadly supported the Crown's position.

[77] FishServe says that, after the 2001 assessments under s 294(2) and (3), the chief executive was not legally required to make the same assessment again every time a new contract was entered in to, renewed or varied.

[78] Amendments to the reporting regulations, including the introduction of NFPS catch reports in 2008, did not alter the functions, duties and powers that had been contracted to FishServe. FishServe says that was "just another catch and effort report." The significance of the particular information in a report does not matter — rather, it is about the function of receiving the information.

[79] The change to mandatory electronic reporting from 2017 changed only the method, not the function, of receiving and processing catch and effort returns.

Discussion

Was a s 294 assessment required for the 2013 RSDA?

[80] Section 294(2) and (3) are principally directed at the overarching policy or philosophical decision, required at the point at which the chief executive is considering whether a particular function, duty or power should appropriately be contracted out, rather than be performed by the Crown, and, if so, how it should be carried out. In that sense it is, as the Crown contends, a decision to be made *before* entering into a specific contract for that service.

[81] But it is not a one-off, general assessment. The assessment will need to be carried out in respect of specific contracts, having regard to the specific terms of the proposed contract. The s 294(2) and (3) assessments will not be separable from consideration of a particular possible contracting party and form of contract. As the 2001 RDCS Framework noted:

> Until such time as contractual arrangements to deliver the functions, duties and powers are negotiated with a service provider, the obligations imposed on the Chief Executive under section 294 cannot be adequately assessed.

[82] I agree with the Crown that s 294 is not directed at the current performance by the incumbent, of its contractual obligations. As the Crown says, performance issues can be addressed through the monitoring and review provisions of the particular contract. But those provisions are plainly not the appropriate means to (re)consider the underlying decision whether a particular function, duty or power should be contracted out, or continue to be contracted out.

[83] The Crown also refers to s 294(4) which allows the chief executive to set contract standards and specifications which must be complied with by the other party, and allows the chief executive to amend or revoke contract standards and specifications. Again, that is not the appropriate provision to reconsider whether a particular function, duty or power should be contracted out, or continue to be contracted out.

[84] The "whether" and "how" decision referred to at [80] above, cannot be a forever decision. The chief executive must retain the ability to review that decision, independent of the chief executive's ability to change the standards and specifications in a particular contract and to monitor and possibly sanction the performance of a particular contract.

[85] On the interpretation of s 294 advanced by both the Crown and FishServe, a decision under s 294(2) to perform a function, duty or power by contracting out is in effect a once in a lifetime decision. FishServe points out that the chief executive is not obliged to do a s 294 assessment before bringing any function back in-house, though recognising the need to have regard to contractual obligations and MPI preparing itself to resume carrying out the functions in question. But in my view it is artificial to suggest that the chief executive would do so without a review.

[86] The Crown says this is not a "set and forget" regime, relying on the chief executive's ability to monitor the performance of the contracted service. But as discussed above, monitoring of the performance of a specific contract is a different

issue, separate from the chief executive's ability to revisit the question whether, having regard to the factors in s 294(2), contracting out of the function remains the best option. If there is no trigger for a further s 294 assessment, which is the logical outcome of the Crown's position, then it is in effect a set and forget arrangement.

[87] As noted above, the applicant says that the Crown in fact carried out s 294 assessments in relation to the new agreements on 29 March 2001, 6 June 2001 and 10 September 2004. The Crown disputes that the September 2004 assessment was a "s 294 assessment"; rather it was a check that the contract was being performed in accordance with its terms.

[88] The 29 March 2001 briefing from the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa to the chief executive recommended that he sign the attached Registry Services Agreement between the Ministry, NZSIC and FishServe for the provision of certain registry-based functions to be provided under the Fisheries Act 1983 and the Fisheries Act 1996.

[89] The briefing noted that when entering into the Registry Services Agreement in August 1999 the Director-General made a formal assessment under s 294 in relation to those services. It says:

> As this proposed contract, in the main, replicates the existing contract it is unnecessary to revise this assessment in full.
>
> However, the proposed contract includes the provision of two additional sets of services – high seas permitting and transitional services. As these services have never previously been contracted it is necessary to analyse the criteria contained within section 294 and the advantages and disadvantages of the proposed delivery options to determine whether the proposed contractual arrangement with [NZSIC] and [FishServe] is consistent with your statutory considerations under section 294.

[90] At the time of the 6 June 2001 assessment, registry services were still prescribed by the Fisheries Act 1983. From 1 October 2001 the provisions of the Fisheries Act 1996 relating to the new quota and catch balancing regime, and associated registry services and reporting, were to take effect, together with the FRR 2001. The 6 June assessment (which is headed "Section 294 Assessment") sets out

the catch and effort services now to take effect and which it was proposed would be contracted out. As the decision paper to the chief executive notes:

> As Chief Executive you now need to decide, using section 294 as a guide, which of the remaining of [sic] registry services required by the 1996 Act you will deliver under contract and which services you will deliver through your own employees.

[91] The registry services were then assessed against the 2001 RDCS Framework.

[92] It is clear that, on its face, the March 2001 decision was a s 294 assessment, but (as the Crown says) only in respect of two additional services; it was not a reassessment of registry services previously included in the August 1999 Agreement.

[93] The 6 June 2001 assessment was also plainly a s 294 assessment in relation to registry functions to be governed by the provisions of the Fisheries Act coming into effect in October 2001, together with the FRR 2001.

[94] The September 2004 decision paper (titled "A review of the Contract to Deliver Registry Services under the Fisheries Act 1996") set out the framework used in the 2001 assessment, under which the following factors were considered:

a) The efficiency of delivery services;

b) The desirability of retaining institutional knowledge;

c) The ability to meet ongoing statutory obligations.

[95] A more detailed assessment was then set out under each of those headings.

[96] While no consistent pattern can be derived from how the Crown approached each of those changes, they do demonstrate an awareness of the Crown that a review of some kind was required. The September 2004 review is instructive. While it is stated to be "guided by s 294", it captures the key requirements of a s 294 assessment. Section 294 does not prescribe the form or mode of an assessment and the September 2004 assessment demonstrates that there is some flexibility in how a s 294 assessment is carried out. It may require more or less detail, depending on the particular context. For example, whether the chief executive is considering the contracting out of a

particular function for the very first time, or is considering the renewal of an existing contractual arrangement.

[97] Section 294 is relevant both at the point of an initial decision whether a function, duty or power should be contracted out, and at any subsequent reconsideration of whether the functions, duties or powers remain the same and/or whether any of the factors set out under s 294(2) have changed.

[98] A s 294 review will be appropriate not only when new functions, duties or powers have arisen, but when, for example, the Ministry's capability or state of its institutional knowledge has changed. It will also be relevant when some overriding statutory obligations have changed. It may also be relevant when there has been a significant change in the number, capability or availability of external service providers to carry out particular functions, duties and powers.

[99] A logical trigger point to assess these factors, by means of a s 294 assessment, is — as with the September 2004 assessment — when a contract is coming up for renewal.

[100] I conclude that the Director-General of MPI was in breach of s 294 in not carrying out assessments under s 294(2) and (3) of the Act before entering into the 2013 RSDA and each subsequent variation.

Did the introduction of NFPS reports and/or electronic reporting require a s 294 assessment?

[101] Second, I turn to the question whether the introduction of the NFPS reports was a new function, duty or power and, for that reason, required the chief executive to undertake a fresh s 294 assessment. While, strictly speaking, I do not need to address this question because of my finding that an assessment was required in relation to the 2013 RSDA, I do so for completeness.

Duty to receive

[102] As a preliminary point, the Crown responds to the applicant's submission that the chief executive has a duty or obligation to receive NFPS catch reports by saying

reg 11E of the FRR 2001 (and subsequently reg 8 of the FRR 2017) imposed an additional requirement on *permit holders*, but did not impose a new duty or function on the chief executive.

[103] That is correct in that the provisions concerning NFPS reports do not explicitly impose a duty on the chief executive.

[104] Section 189 states:

> (a) The following persons [including holders of fishing permits] shall keep such accounts and records, and provide to the chief executive such returns and information, as may be required by or under regulations made under this Act: holders of fishing permits, special permits, licences, or other authorities or approvals issued or granted under this Act entitling the holder to take fish, aquatic life, or seaweed by any method for any purpose:
>
> …

[105] However reg 11E of the FRR 2001, and subsequently reg 8 of the FRR 2017, require permit holders to return NFPS catch returns to the chief executive. And, as the Crown acknowledges, the "stewardship" of catch and effort data, including the NFPS data, continues to be carried out by the chief executive.

[106] Further, s 294 is about the chief executive's functions, duties and powers. Contracting out any of those functions, duties and powers is an implicit acknowledgement of the existence of a duty. By the 2013 RSDA the Crown had contracted out management of registry services, which includes tasks in relation to catch and effort reports; those reports are defined to include NFPS reports.

[107] I conclude that the chief executive does have a function or duty to receive NFPS reports, which has in turn been contracted to FishServe to perform.

Is the duty or function new?

[108] As to whether the requirement to submit (and receive) NFPS reports is a new duty or function, the Crown says function, duty or power is defined broadly and because of the breadth of that definition what is included within it is unlikely to change very frequently. It says the existing function of receiving and processing data through

the catch and effort system encompassed NFPS reporting and therefore remained the same.

[109] "Specified functions, duties, or powers" is not defined in s 294 or elsewhere in pt 15 of the Fisheries Act. It is defined in s 296A of the Fisheries Act, for the purposes of pt 15A of the Act. Part 15A allows for devolution of the chief executive's functions, duties or powers.

[110] Other than highlighting the philosophical and practical differences between the devolution and contracting out models, the s 296A definition does not assist in the consideration of when a s 294 assessment, in respect of contracting out, rather than devolution, is required.

[111] The 2001 RDCS Framework attempts definitions of the words in the following terms:

> As the Act does not provide explicit definitions of some key terms, for the purposes of this analysis:
>
> …
>
> *'Duty'* as it relates to the term 'functions, duties and powers' in section 296A of the Act is defined as:
>
> > "an activity or obligation which the Chief Executive is required to perform"
>
> '*Power'* as it relates to the term 'functions, duties and powers' in section 296A of the Act is defined as:
>
> > "something which enables the Chief Executive to perform a certain thing"
>
> '*Function'* as it relates to the term 'functions, duties and powers' in section 296A of the Act is defined as:
>
> > "any activity of the Chief Executive which is not a duty or a power"
>
> (emphasis in original)

[112] The Crown provided examples of what, in its view, the terms mean and emphasise that they are at a higher level than the receipt of data contained in a new form:

(a) "power" refers to something the chief executive is empowered to do under the legislation, such as issuing a high seas permit under s 113H or promulgating circulars;

(b) "duty" refers to something that the chief executive has an obligation to do, such as keeping a fishing vessel register, a permit register and high seas permit register under s 98(1); as

(c) "function" refers to a particular activity of the chief executive to operate the legislation, such as the catch and effort function.

[113] Schedule A of the 2013 RSDA lists the services to be provided by FishServe, including:

(a) in Part 2 — regulations 5–13 of the FRR 2001; and

(b) in Part 3 — "catch effort services" which is described as including (amongst others):

(i) to receive returns in accordance with standards and specifications;

(ii) to maintain a database of persons required to furnish returns;

(iii) maintain a computerised record of information contained from returns;

(iv) undertake a process to validate returns in accordance with standards and specifications;

(v) notify the Ministry of any outstanding overdue returns.

[114] As set out in Appendix A to the 6 June 2001 s 294 assessment, the function, duty or power in issue here relates to registry-based services required by the Fisheries Act to be delivered under contract. By defining catch and return efforts in their entirety

as a function, it becomes a self-fulfilling proposition that no changes to the type or nature of the returns/reports will ever warrant a further assessment under s 294.

[115] That approach does not account for the fact that what is encompassed within the particular function, duty or power may vary in a significant way. The introduction of NFPS reporting is, in my view, such an example. Significantly, the 2001 s 294 assessment pre-dated the introduction of NFPS reporting in 2008 by approximately seven years. It is essential to meet a different purpose than the purpose of the other catch and effort reports. Although NFPS reports are included within the "catch and effort" function, they are not "fishing returns" of the same kind as other returns required to be submitted by commercial fishers of their activity during a fishing trip.

[116] I agree with the applicant that NFPS reports perform a unique and important function among catch and effort reports. They show interactions between commercial fishing activities and certain protected species. While they are relevant to the "sustainability" limb of the Fisheries Act purpose, they are also necessary for compliance with the Wildlife Act and the MMPA, which are protection and conservation statutes.[19] NFPS reports are required for a different purpose and a different agency than other catch and effort reports.

[117] While, from an administrative perspective FishServe is simply offering what it calls a "sophisticated 'mailbox'", it is more than "just a new form" as one MPI witness described it.

[118] It is not appropriate to assess the significance of NFPS reports through an administrative lens. Rather, it must be assessed from the perspective of the Director-General's statutory functions and responsibilities, having regard to the purpose of the NFPS reports to meet the requirements of the Wildlife Act and MMPA, with the Director-General of Conservation being the responsible official in relation to those statutes.

[119] As considered in more detail in relation to the fourth, fifth, seventh and eighth causes of action below, from the introduction of NFPS reporting in 2008, DOC was

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[19] Discussed in more detail at [241]–[244] below.

(erroneously) relying exclusively on compliance by commercial fishers with reg 11E and subsequently reg 8, as discharging fishers' separate reporting obligations under s 63B(3) of the Wildlife Act and s 16(3) of MMPA. As ELI suggests, a clearer delineation between the functions relating to NFPS reports and other catch and effort reports might have meant DOC did not misinterpret or overlook what was required by way of reporting under the Wildlife Act and the MMPA.

[120] When examined from the Director-General's perspective, I agree that the introduction of NFPS reporting was not simply a change in one form, but rather involved the introduction of a new function for the Director-General (and thus FishServe) to perform under contract and therefore required the Director-General of MPI to carry out an assessment under s 294 of the Fisheries Act. It is not contested that the Director-General did not do so.

Electronic reporting

[121] The introduction of electronic reporting is, in my view, different. It did not change the nature or scope of the underlying duty or function. The information collected did not change, merely the tools by which it was done. I have considered whether the change in technical infrastructure required to enable this might have required an assessment by the Director-General under s 294(3). However, because the substance of the function/duty did not change, I conclude that the introduction of electronic reporting did not, in and of itself, amount to a new function, duty or power requiring a s 294 assessment. For the avoidance of doubt, I record that the relief set out below is not intended to refer to the 2022 contract which provided for the introduction of electronic reporting.

Relief

[122] The applicant seeks declarations in relation to the breach of s 294 and an order setting aside the 2013 RSDA.

[123] In respect of the first cause of action, against the first respondent, I grant the following declarations:

(a) The Director-General of MPI breached s 294 of the Fisheries Act by failing to carry out an assessment under subss (2) and (3) before entering in to the 2013 RSDA and each subsequent renewal (prior to the date of hearing).

(b) His decisions to enter into the 2013 RSDA and each subsequent renewal (prior to the date of hearing) were therefore unlawful.

(c) The 2013 RSDA and subsequent renewal (prior to the date of hearing) were therefore unlawful.

[124] I decline to make an order setting aside the 2013 RSDA. Relief in judicial review is discretionary.[20] I acknowledge that there is a strong presumption that a successful applicant is entitled to a remedy, but in my view the particular circumstances here mean that is not appropriate. The 2013 RSDA was to expire on 30 September 2023, some six weeks after the hearing. As at the date of hearing, Fisheries New Zealand | Tini a Tangaroa was working on a renewal of the agreement. Subsequently, counsel advised the Court that the Chief Executive had renewed the contractual arrangements with FishServe (and the approved delivery service organisation transfer order), commencing 1 October 2023. Notwithstanding the Crown's position in this litigation, a s 294(2) and (3) assessment was undertaken on 19 September 2023, before entering the contract, on an "avoidance of doubt basis".

[125] In respect of the second and third causes of action against the first respondent, it follows from my finding that the 2013 RSDA was unlawful, that the secondary legislative instruments which assumed that contract out was lawful, were not validly issued. I grant the following declarations:

(a) A declaration that the FishServe Notice 2014 (No 2) was unlawful;

(b) A declaration that the chief executive's decision to issue the Technical Circular was unlawful.

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[20] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Elias CJ and Arnold J.

[126] In light of the conclusion at [124], it necessarily follows that I decline to set aside and quash the FishServe Notice 2023/*Gazette* notice and the Technical Circular, as sought in the second and third causes of action.

Administration and enforcement of Wildlife Act and MMPA (fourth, fifth, seventh and eighth causes of action)

[127] The fourth and fifth causes of action relate to the Wildlife Act and the seventh and eighth causes of action plead mirror claims in respect of the MMPA. The claims are against DOC and the Attorney-General.

[128] The Wildlife Act and the MMPA impose parallel obligations on commercial fishers to submit reports about interactions with protected species, separate from the obligation to submit NFPS reports under the Fisheries Act.

[129] The applicant says that DOC has relied on commercial fishers submitting NFPS reports as also satisfying their obligations to submit reports under the Wildlife Act and MMPA but the reporting obligations under those Acts are wider than the obligations to submit NFPS reports under the Fisheries Act; there are gaps in NFPS reporting which mean it cannot serve as a substitute for reporting under the Wildlife Act and the MMPA.

[130] In relation to each Act the applicant says DOC's policy of reliance on NFPS reporting is unlawful and reflects a failure to administer the provisions of the Wildlife Act and the MMPA. The applicant seeks declarations that DOC has acted unlawfully in its approach to the administration and enforcement of the Wildlife Act and MMPA reporting provisions. In its amended statement of claim the applicant also sought, in respect of both Acts, an order of mandamus requiring DOC to put in place a system under which the reporting requirements of the Acts can be complied with. At hearing it advised it no longer sought an order of mandamus.

[131] The reporting regimes under each of the Fisheries Act, the Wildlife Act and the MMPA are discussed below.

Fisheries Act reporting regime

[132] Under the Fisheries Act, commercial fishers must provide information required under relevant regulations. The power to make these regulations sits with the responsible Minister (now the Minister for Oceans and Fisheries of New Zealand, but referred to in this judgment as the Minister of Fisheries).

[133] Since the relevant reporting provisions of the Wildlife Act and MMPA came into force on 1 October 1996 there have been three successive sets of regulations under the Fisheries Act regime requiring the submission of different kinds of reports: the FRR 1990, issued under the Fisheries Act 1983; the FRR 2001; and the FRR 2017, issued under the Fisheries Act 1996.

[134] The regulations did not impose mandatory obligations on commercial fishers to submit reports about the interactions of commercial fishing activities with protected species until 2008, when (as already discussed in relation to the first to third causes of action) NFPS reporting was introduced. Prior to that, the only policy in place to facilitate reporting of fishing interactions with protected species was the NFICR published by the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa (and discussed in more detail at [168] below).

[135] The Fisheries (Reporting) Amendment Regulations 2008 (2008 Regulations) were made on 25 February 2008. These regulations made several changes to the FRR 2001, including inserting a new reg 11E, requiring the submission of NFPS returns. Regulation 11E of FRR 2001 provided:

> (1) A permit holder who takes non-fish species or protected fish species listed in Parts 2A, 2B or 2C of Schedule 3, whether alive or dead, or on whose behalf non-fish species or protected fish species are taken, whether alive or dead, must complete and return to the Chief Executive non-fish and protected species catch returns.

[136] The 2008 Regulations also amended sch 2 to include template form 13 for NFPS returns and amended sch 3 to include lists of species for which NFPS returns needed to be submitted.

[137] The obligation to submit NFPS reports was carried forward into the FRR 2017. The current requirement is set out in reg 8 which provides:

> **8 Non-fish species or protected fish species catch reports**
>
> (1) A permit holder must provide a non-fish species or protected fish species catch report to the chief executive if the permit holder catches (whether intentionally or not) 1 or both of the following:
>
> (a) a non-fish species that is specified in a circular:
>
> (b) a fish species that is declared to be a protected fish species by a circular.
>
> (2) The report must record—
>
> (a) the species and quantities caught; and
>
> (b) the fishing method that resulted in the catch; and
>
> (c) the date, time, and location of the fishing; and
>
> (d) any additional information specified in a circular.
>
> (3) The permit holder must,—
>
> (a) if required to complete a fish catch report, complete and provide the report at the same time as the fish catch report; and
>
> (b) in any other case, complete and provide the report before the close of the day on which the permit holder becomes aware of the non-fish species or protected fish species catch.

[138] Schedule A of the 2013 RSDA sets out the Director-General's "statutory functions duties and powers, functions duties and powers in regulations, and other non-statutory duties contracted to FishServe under this Agreement". These include the functions, duties and powers under the FRR 2001, including regs 5–13. Those regulations refer to various "returns", including catch, effort and landing returns. The regulations impose duties on fishers to submit the requisite returns. Those requirements were carried through into the 2008 Regulations and FRR 2017.

[139] Amongst the Director-General's statutory "functions, duties and powers" contracted to FishServe is the requirement in relation to "Catch Effort Services" to "receive returns in accordance with standards and specifications". This encompasses NFPS reports submitted under the FRR 2017.

[140] The Director-General of MPI has issued a circular elaborating on the requirements of reg 8 — the Fisheries (E-Logbook Users Instructions and Codes) Circular 2022 (Codes Circular 2022). Part 3 of the Codes Circular 2022 concerns NFPS catch reports. It discusses when the chief executive considers an NFPS report must be submitted; sets out the requirements of NFPS reports; and provides instructions on how reports should be filled in.

[141] It also includes definitions of terms for the purposes of NFPS reports under reg 8(1).

[142] Schedule 2, pt 2 of the Codes Circular 2022 sets out lists of species for which NFPS reports must be submitted.

Wildlife Act reporting regime

[143] The Wildlife Act is the principal means by which wildlife in Aotearoa New Zealand is protected from harm, including death and injury.[21]

[144] The Wildlife Act creates separate obligations on commercial fishers to submit reports, which are based in this distinct purpose.

[145] The Wildlife Act applies to "wildlife" and "marine wildlife" as a subcategory of wildlife. Under the Act:[22]

> (a) "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 sch 6 (being animals that are wild animals subject to the Wild Animals Control Act 1977);
>
> (b) "animal" as used in the definition of "wildlife" is defined to mean any mammal (not being a domestic animal or a rabbit or a hare or a seal or

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21 *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [45].
22 Section 2(1).

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 s 7B and any marine species declared to be an animal under s 7BA; and also includes the dead body or any part of the dead body of any animal;

(c) "marine wildlife" means any marine species, or individual of a species, defined as wildlife under the Act; and

(d) "marine species" as used in the definition of "marine wildlife" means any species inhabiting or found in or on the sea or foreshore.

[146] The Wildlife Act declares all wildlife to be subject to the Act[23] and, except in the case of wildlife for the time being specified in schs 1–5, wildlife is absolutely protected throughout Aotearoa New Zealand and its fisheries waters.

[147] Wildlife for the time being specified in sch 2 are declared to be partially protected throughout Aotearoa New Zealand, except where sch 2 provides otherwise.[24]

[148] It is an offence to, among other things, hunt or kill any absolutely or partially protected marine wildlife without lawful authority.[25]

[149] Where a person is charged with the killing or injuring or being in possession of any marine wildlife contrary to the Act, the defendant has a defence if:[26]

(a) the provisions of s 68B(1)–(3) do not apply; and

(b) the death or injury was accidental or incidental or the death or injury to, or possession of, the wildlife occurred as part of a fishing operation; and

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23 Section 3.
24 Section 5.
25 Section 63A.
26 Section 68B(4).

(c) the requirements of s 63B of the Wildlife Act were complied with.

[150] Section 63B of the Wildlife Act imposes requirements relating to reporting of interactions with protected species of marine wildlife. Section 63B(1) applies to commercial fishers. It provides that commercial fishers must provide certain reports in certain prescribed circumstances (s 63B(1) reports):

> (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.

[151] Section 63B(1) refers to the obligation to submit s 63B(1) reports to "rangers" or "such other person as the Director-General may from time to time specify by notice in the *Gazette*". The Director-General of Conservation has not specified any other person to receive reports by any notice under this subsection.

[152] Section 63B(3) and (4) of the Wildlife Act set out what s 63B(1) reports must contain:

> (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.
>
> (4) In addition to providing the particulars required by subsection (1) or subsection (2), a person required to report an event to which that subsection applies shall provide to the Director-General such other particulars relating to the event as the Director-General may require for the purposes of this Act.

[153] The Director-General of Conservation has not required the provision of any other particulars under s 63B(4).

[154] Failure to provide a s 63B(1) report when required is a criminal offence which is punishable by a fine of up to $10,000.[27]

MMPA reporting regime

[155] The MMPA is directed at the protection, conservation and management of marine mammals in Aotearoa New Zealand.

[156] Under s 2(1) of the Act, "marine mammal" is defined as including:

> (a) any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment; and
>
> (b) all species of seal (Pinnipedia), whale, dolphin, and porpoise (Cetacea), and dugong and manatee (Sirenia); and
>
> (c) the progeny of any marine mammal; and
>
> (d) any part of any marine mammal

[157] Under s 3A of the MMPA, DOC is responsible for administering and managing marine mammals in accordance with the section.

[158] Under s 4 of the MMPA, despite any other Act, but subject to the MMPA, no person shall hold any marine mammal in captivity or take any marine mammal in or from its natural habitat or any other place without a permit.

[159] Under s 9(1) of the MMPA any person who takes, has in their possession, exports, imports, has on board any vessel, vehicle, aircraft, or hovercraft, or has control of any marine mammal, otherwise than under the MMPA or a permit, commits an offence.

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[27] Wildlife Act, ss 63B(5) and 67(1)(fb).

[160] The MMPA includes a defence provision in similar terms to that in s 68B(4) of the Wildlife Act. Where a person is proceeded against for killing or injuring a marine mammal contrary to the MMPA, the defendant has a defence if:[28]

(a) the provisions of s 26(1)–(3) do not apply;

(b) the defendant proves the death or injury was accidental or incidental; and

(c) the requirements of s 16 of the MMPA were complied with.

[161] Section 16 of the MMPA relates to reporting of interactions with protected species of marine mammals. Section 16(1) applies to commercial fishers and requires them to provide certain reports in certain prescribed circumstances (s 16(1) reports):

> (1) Where any person, in the course of fishing pursuant to any licence, permit, or permission granted or given under the Fisheries Act 1983, accidentally or incidentally kills or injures a marine mammal he shall—
>
> (a) if fishing from a vessel, record the event in the vessel's log and report the event in writing to an officer or a fishery officer (as defined in section 2(1) of the Fisheries Act 1996) 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 an officer or a fishery officer (as defined in section 2(1) of the Fisheries Act 1996) as soon as practicable.

[162] "Officer" is defined as meaning a marine mammal officer appointed under s 11 of the MMPA.[29] Every warranted officer, fishery officer appointed under s 196 of the Fisheries Act and every constable shall be a marine mammals officer for the purposes of the Act.[30]

[163] Section 2(1) of the Fisheries Act defines "fishery officer" to mean:

> (a) a person deemed by section 196(2) to be a fishery officer:

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28 MMPA, s 26(4).
29 Section 2(1).
30 Section 11(1).

> (b) a person appointed in accordance with section 196(1) to be a fishery officer and holding a warrant under section 198:
>
> (c) a person appointed under section 197 to be an honorary fishery officer and holding a warrant under section 198:
>
> (d) a person appointed under section 222 to be an examiner and holding a warrant under section 198

[164] Section 196(1) of the Fisheries Act provides a general power for the appointment of fishery officers under the Public Service Act 2020. Subsection 196(2) deems every officer in command of any vessel or aircraft of the New Zealand Defence Force and every constable to be a fishery officer.

[165] Section 16(3)–(3A) of the MMPA set out what s 16(1) reports must contain:

> (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 mammal killed or injured, or a general description of the mammal; and
>
> (c) a description of conditions and the circumstances of the event.
>
> (3A) In addition to providing the particulars required by subsection (1) or subsection (2), a person required to report an event to which that subsection applies shall provide to the Director-General such other particulars relating to the event as the Director-General may require for the purposes of this Act.

[166] Under s 16(4) and (6) of the MMPA failing to submit a s 16(1) report is an offence, punishable by a fine of up to $10,000.

History

[167] As discussed, the relevant provisions of the Wildlife Act and the MMPA came into force on 1 October 1996. The NFPS reporting framework was not introduced until 2008.

[168] Ms Clemens-Seeley (Marine Science Advisor in DOC's Marine Bycatch and Threats team) gave evidence of a project initiated by the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa in 1996–97 to create an NFICR form. However, as Mr George's evidence for DOC noted, it was not mandatory for commercial fishers to

complete and submit this form and it did not cover the reporting requirements of the Wildlife Act or the MMPA.

[169] In the course of the Crown's preparation to introduce NFPS reporting under the Fisheries Act, on 11 September 2007, DOC officials briefed the Minister of Conservation, recommending that he propose a paper to the Cabinet Economic Development Committee recommending a Bill to "align and streamline" the reporting provisions under the Fisheries Act and under the Wildlife Act/MMPA.

[170] The proposed Cabinet paper recorded that the proposed deadline for fishers to submit NFPS reports after catches was going to be longer than the corresponding deadlines in the Wildlife Act and MMPA and that DOC "[did] not have the systems in place to manage compliance effectively". The paper noted that:

> The proposed amendment would use the established Ministry of Fisheries systems to obviate the need for the Department of Conservation to establish a costly, parallel, reporting system and data management system to check that all required reports [under the Wildlife Act and MMPA] have been made.

[171] As the Speaking Points included as part of the departmental submission noted:

> Current compliance problems for the fishing industry (in particular) caused by ill-matching of incidental catch (i.e. by-catch) reporting provisions under Marine Mammals Protection Act and Wildlife Act with those in fisheries reporting regulations.
>
> Has resulted in poor quality information on incidental catch of marine mammals and marine wildlife being provided to DOC and to [Ministry of Fisheries].

[172] MPI and DOC had also consulted with industry about the proposal. The correspondence between them highlights the concerns of the fishing industry representatives about the potential for dual reporting frameworks under the Fisheries Act and Wildlife Act/MMPA and commercial fishers being potentially exposed to penalties for reporting offences. Correspondence between the NZSIC and the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa in February 2008 confirms that during these discussions DOC agreed to propose legislative amendments to align the reporting regimes and address these issues.

[173] The evidence is that the proposed legislative amendment did not proceed. On 17 July 2008, shortly before the NFPS reporting requirements were introduced, DOC wrote to the NZSIC to inform them of the delay in proceeding with the amendment and addressing what fishers should do, given the impending divergence between the NFPS reporting requirements and the existing Wildlife Act/MMPA regime. DOC confirmed that:

> In the period from 1 October 2008 until the Wildlife Act and the MMPA are amended, DoC would not prosecute under the Wildlife Act or under the MMPA in relation to the requirement to report within 48 hours of the arrival of the vessel in port, provided fishers report under [Ministry of Fisheries'] NFPECR[31] regime, and unless there were aggravating factors involved in a specific case.

[174] As I will come to, Ms Clemens-Seeley's evidence is that the position concerning prosecutions reflected in the 17 July 2008 letter is no longer DOC's position.

[175] The FRR 2017 sets out the current requirements for commercial fishers reporting to the catch and effort system, including fish catch reports and NFPS catch reports. The Codes Circular 2022 continues to prescribe what information is to be provided on catch and effort reports and how that information is to be submitted.

[176] Ms Clemens-Seeley's evidence is that DOC has worked collaboratively with MPI in the intervening period to ensure NFPS catch reports contain the data required by DOC.

ELI's submissions

The "gap" — Differences between the Fisheries Act and Wildlife Act/MMPA requirements

[177] The applicant says the history reflects an assumption by DOC that NFPS reporting would satisfy the reporting requirements of the Wildlife Act and MMPA, except for the requirement to submit reports in a more timely manner under the latter Acts. Consistent with that assumption, DOC had a policy or practice of regarding commercial fishers as being bound by reporting obligations relating to marine wildlife

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[31] Presumed to be NFPSCR, that is, a Non-fish/Protected Species Catch Return.

under the Fisheries Act and FRR 2017, including obligations to submit NFPS reports to the Director-General of MPI, and not separate reporting obligations under the Wildlife Act and the MMPA.

[178] That policy or practice was affected by errors of law about the purpose, scope and substance of the Fisheries Act and the Wildlife Act/MMPA. The Fisheries Act purpose is to provide for utilisation of fisheries resources, while ensuring sustainability.[32] The Wildlife Act and MMPA are conservation statutes, with protective purposes only. That means there are differences in the scope and substance of the reports required.

[179] As to scope, the applicant notes that while both regimes apply to permit-holders under the Fisheries Act, NFPS reports under the Fisheries Act must only be submitted where a fisher "catches" a species that is listed in the Codes Circular 2022, whereas s 63B(1) and s 16(1) reports must be submitted whenever a fisher "accidentally or incidentally kills or injures" any species of marine wildlife or marine mammal. The ordinary meaning of "injuring" is "causing physical harm to" or "harm or impair" which can occur without "catching" a species, as that term is used in reg 8 of the FRR 2017 and elaborated on in pt 3 of the Codes Circular 2022.

[180] In addition, while the list of species for which NFPS reports must be submitted in the Codes Circular 2022 is exhaustive, the definitions of "marine wildlife" and "marine mammal" in the Wildlife Act and MMPA respectively are open-ended. The categories are not co-extensive.

[181] Section 63B(1) Wildlife Act and s 16(1) MMPA reports must therefore be provided for a wider range of interactions with protected species, and for more species, then NFPS reports.

[182] The content of reports also varies. NFPS reports must include the matters set out in reg 8(2) of the FRR 2017 and pt 3 of the Codes Circular 2022. Section 63B(1)

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[32] Fisheries Act, s 8. The different purposes of the three Acts is discussed in more detail at [240]–[249] below.

and s 16(1) reports must include the matters set out in s 63B(1) and (4) of the Wildlife Act and s 16(3A) and (3) of the MMPA, respectively.

[183] While there is some overlap between the required content of NFPS and s 63B(1) and s 16(1) reports, the latter must contain descriptions of "the conditions and circumstances of the event" giving rise to the reporting obligation. Those descriptions are not required for NFPS reports.

[184] The applicant submits that the effect is that all s 63B(1) and s 16(1) reports must therefore contain more information than NFPS reports.

[185] There are also differences in the designated recipients of the reports. NFPS reports must be provided to the Director-General of MPI. They therefore become the property of MPI.

[186] Section 63B(1) reports must be provided to "rangers" appointed or deemed to have been appointed by the Director-General of Conservation for the purposes of the Wildlife Act, which is administered by DOC. They therefore become the property of DOC.

[187] Section 16(1) reports must be provided either to marine mammal officers or fishery officers. Section 11 of the MMPA states that marine mammal officers hold their office "for the purposes of this Act" which is also administered by DOC. The definition of "marine mammal officer" also includes appointed fishery officers. Section 16(1) reports therefore become the property of DOC.

DOC "policy"

[188] The applicant says the history reflects DOC's policy or practice whereby it has erroneously assumed that compliance by commercial fishers with their NFPS reporting obligations under the Fisheries Act would also meet their obligations under the Wildlife Act and the MMPA, when it would not.

[189] There is no evidence of DOC, or any other government department, having taken any steps to ensure that commercial fishers complied with the mandatory

reporting obligations under the Wildlife Act and MMPA between 1996 and 2008, when the NFPS was introduced via reg 11E of the 2008 Regulations.

[190] The applicant also says there is no evidence that, at that time, DOC appreciated the full extent of the differences between the NFPS and Wildlife Act/MMPA reporting frameworks. DOC referred only to the differences in timeframes for the submission of reports. Although the FRR 2017, which introduced new requirements for NFPS reports to be submitted electronically and immediately, thereby addressed the specific issue of different timeframes for submission of NFPS and s 63B(1) and s 16(1) reports, it was not until these proceedings were filed that DOC appeared to appreciate and acknowledge the broader gaps between the regimes.

Failure to investigate and prosecute

[191] The applicant's fifth and eighth causes of action allege a failure by DOC to take necessary steps to allow for the investigation and prosecution of offences under ss 63A and 63B of the Wildlife Act and ss 9 and 16(4) of the MMPA, respectively, and to investigate and prosecute such breaches, in breach of its duty to do so.

[192] For a period from 1 October 2008, the failure to prosecute was based on DOC's express position, as set out in the 17 July 2008 letter (referred to at [173] above).

[193] That failure, ELI says, is a result of the policy discussed above, based on DOC's erroneous assumption that NFPS compliance also ensured compliance with the Wildlife Act and the MMPA.

[194] Further, although DOC had confirmed to fishers by the 17 July 2008 letter that it would not prosecute for breaches of the Wildlife Act and MMPA reporting requirements, except where there were aggravating factors, pending amendment of those Acts, no amendments in fact occurred.

[195] Although DOC's evidence is that it ceased to apply its position of non-prosecution once the FRR 2017 took effect, the applicant says DOC has not produced any documentary records to demonstrate the alleged change in policy or position.

[196] The applicant says that, even if DOC had in fact changed its enforcement policy at that point, it would still on its own admission have had a blanket policy of non-enforcement of the Wildlife Act/MMPA reporting regimes in place for nearly 10 years.

[197] The applicant supports its argument by reference to the evidence of the limited systems in place to ensure that DOC had access to NFPS report information throughout the relevant period (while noting that, in any event, that information was legally inadequate for the Wildlife Act/MMPA regimes). Mr George's evidence for DOC was that historically MPI provided DOC with NFPS data only in response to ad hoc requests from DOC or by providing annual reports on NFPS catch data. MPI did not begin providing employees in DOC's Conservation Services Programme (CSP) with a dataset that included some NFPS information on a monthly basis until September 2020. MPI then did not begin sending DOC's CSP team an "NFPS data report" on a daily basis until November 2022 (after the applicant's claim was filed). DOC says that members of its National Compliance Team have had access to the daily NFPS data reports from MPI since April 2023. Ms Clemens-Seeley produced a memorandum of understanding dated 28 April 2023 pursuant to which MPI undertakes to provide NFPS data to DOC daily.

Who receives the reports?

[198] The applicant accepts that, under the MMPA, s 16(1) reports may be submitted to anyone who meets the definition of "fishery officer" under s 2(1) of the Fisheries Act.

[199] But it says the position under the Wildlife Act is different. Section 63B(1) reports must be submitted to DOC "rangers" who may be appointed or deemed to be appointed under the Wildlife At.

[200] The Director-General of DOC is not a "ranger" under the Wildlife Act. In practice, NFPS reports are submitted to FishServe, which is also not a "ranger" under the Wildlife Act.

[201] The applicant says that the deeming provision under s 38(4) of the Wildlife Act (any fishery officer who has been "appointed under Part 11 of the Fisheries Act 1996 to exercise powers in relation to freshwater fisheries") indicates that only fishery officers who were appointed for the specific purpose of exercising powers in relation to freshwater fisheries are deemed to be "warranted officers". This type of appointment, the applicant says, appears to have been possible under the old fisheries legislation. The Fisheries Act 1983 included a specific Part V dealing with management of freshwater fisheries. However, this part was repealed when the Fisheries Act 1996 was enacted and the relevant definition of deemed "warranted officers" in s 59(9) of the Conservation Act was not amended. It appears that this reflects those freshwater functions having been transferred to DOC by the Conservation Law Reform Act 1990.

[202] The applicant says that MPI cannot retrospectively expand the definition of deemed "warranted officers" in the Conservation Act to include all fishery officers (not just those appointed in relation to freshwater fisheries) when this was not Parliament's words or intention. Parliament only intended and provided for a particular subcategory of fishery officer to qualify as a deemed "warranted officer" under s 59(9).

[203] ELI also says that the reply evidence from Ms Clemens-Seeley and Mr George on this issue fails to provide any detail about the purpose or nature of the appointment of any of the fishery officers who have access to NFPS reporting. It says there is no evidence of the warrants provided to these officers or the specific powers granted under them. As a consequence, there is no evidential basis on which the Court may infer that those officers were appointed to exercise powers in relation to freshwater fisheries. The applicant says it appears unlikely that they were.

DOC's submissions

The "gap"

[204] DOC accepts that the scope and substance of reporting is wider under the Wildlife Act/MMPA reporting frameworks than under the Fisheries Act. The gap between the two regimes was acknowledged by Ms Clemens-Seeley in her evidence,

which annexed a letter from DOC to FishServe, dated 24 April 2023 (the DOC letter), in which DOC noted the discrepancies. The DOC letter recorded:[33]

> **Gap between FRR 2017 and WA [Wildlife Act] and MMPA**
>
> 6. As noted above, DOC considers there to be gaps between the current reporting requirements under the FRR 2017 (with regards to NFPSC [non-fish species or protected fish species catch] Reports) and reports required under s 63B WA and s 16 MMPA. For clarity, I have set out these gaps below:
>
> **6.1 The requirement to report:**
>
> 6.1.1 The requirement to submit a NFPSC Report under the regulation 8 of the FRR 2017 is initiated when a non-fish species or protected fish species (as specified in the Codes Circular) is caught. Catch (for the purposes of NFPSC reports) is defined in the Codes Circular as meaning "fixed, entangled or trapped in such a way that it cannot move freely or free itself".
>
> 6.1.2 In contrast, the WA and MMPA require reporting when a fisher "accidentally or incidentally kills or injures" any marine wildlife or marine mammal.
>
> 6.1.3 As such, the requirement for a report under the WA and MMPA is broader than that under the FRR 2017. In particular, it includes collisions with vessels and interactions with fishing gear where marine wildlife or a marine mammal is killed or injured but able to free itself.
>
> **6.2 The description of conditions and circumstances:**
>
> 6.2.1 The FRR 2017 require a NFPSC Report to include:[34]
>
> (a) the species and quantities caught;
>
> (b) the fishing method that resulted in the catch;
>
> (c) the date, time, and location of the fishing; and
>
> (d) any additional information specified in a circular.
>
> 6.2.2 The WA and MMPA require any report submitted under those sections to contain:[35]
>
> (a) the location of the area where the event took place;

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33 Footnote lightly edited for clarity.
34 Regulation 8(2)(a)–(d).
35 Wildlife Act, s 63B(3); and MMPA, s 16(3).

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

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

6.2.3 DOC considers the current reporting regime does not adequately cover what the WA and MMPA require, largely in the description of the conditions and circumstances of the event under the WA and MMPA.

(a) Currently, information is provided about the fishing effort that takes place at the time of the interaction, and some fishing methods provide information about the circumstances of seabird captures.

(b) However, reporting does not currently include the nature of the interaction, details around the stage of fishing in which the interaction occurred, whether and in what way any gear was involved, and the conditions in which the animal was released and the event ended.

[205] But, DOC says, while there was initially a "gap", it has only recently been identified and DOC is actively seeking to fix it. It is now largely resolved, or in the process of being resolved. Commercial fishers are aware of the issue and have taken steps to address it, pending a longer-term solution. Simon Lawrence's evidence for MPI foreshadowed circulation of a discussion paper proposing changes to reporting to resolve the potential gaps. Finally, DOC says there is no evidence of non-compliance (noting that in the past it has been difficult to prove non-compliance by fishers, but the rollout of cameras on boats will assist with this).

Did DOC have a policy or practice of regarding commercial fishers as being bound only by reporting obligations relating to marine wildlife under the Fisheries Act and FRR 2017?

[206] DOC says it had no policy or practice in place on what to report. Rather, it had an "internal operational view" that compliance with the Fisheries Act reporting mechanisms (to a fishery officer via FishServe) "can enable compliance" with the Wildlife Act and MMPA. Even if that internal view is characterised as a policy, it cannot be unlawful to seek to have one reporting regime, set up under the Fisheries

Act, and securing greater compliance with the Wildlife Act and the MMPA, rather than costly parallel reporting regimes.

[207] Further, it says that in order to bring this challenge against DOC the applicant has to establish a duty on DOC to put in place a policy or framework to enable reporting, either express or implied, within s 63B and s 16. There is no such statutory duty. Rather, the obligations rest with commercial fishers.

Failure to investigate and prosecute

[208] DOC accepts that a decision not to prosecute because of an unlawful general policy — in effect an abdication of discretion — is reviewable.

[209] DOC denies that it has or had a policy not to enforce the reporting requirements under s 63B and s 16. It acknowledges that it has a duty to consider enforcement steps when a breach arises, and Ms Clemens-Seeley's evidence is that it is guided by internal enforcement and prosecution policies. These clarify that there is a discretion on whether to take action after considering factors that include the strength of the evidence, public interest in bringing the action, the purpose of the Act and te Tiriti o Waitangi | Treaty of Waitangi considerations.

[210] Nor has there been a complaint to DOC about illegal fishing arising from the "gap" in reporting. DOC has not issued a policy or direction not to prosecute including over injury where species are able to move freely. There has been no abdication of its enforcement role.

[211] The position DOC indicated in the 17 July 2008 letter to the fishing industry (that it would not prosecute under the Wildlife Act and MMPA, in relation to the requirement to report within 48 hours, provided fishers reported in accordance with the NFPECR regime) was adopted at a time when draft legislation was in preparation to consolidate timing and reporting, where commercial fishers were going to report under the Fisheries Act only. It was written to provide some comfort on timing issues.

[212] The letter said only that DOC would consider not taking action if the only issues related to the time delay in reporting between the Wildlife Act, MMPA and

reporting requirements under the Fisheries Act. It did so because of concerns about duplication between the reporting regimes. DOC says the letter did not state DOC will not take action in circumstances of injury where species are not caught. That is an erroneous inference made by ELI. It was not a blanket policy of not prosecuting under the Wildlife Act and the MMPA. Rather, DOC would use its discretion to not prosecute if the issue was only one of timing of provision of the reports.

[213] In any event, as Ms Clemens-Seeley's evidence affirms, that discretion on timing is no longer DOC's stance. Once the FRR 2017 required daily electronic reporting, that "gap" between the two regimes no longer existed. That part of the applicant's claim is therefore moot.

[214] DOC also says this claim depends on an inference by the applicant that commercial fishers have been carrying out unlawful fishing activity and DOC has failed to act. It disputes that there is any evidential basis for such an inference.

Recipients of the reports

[215] As to whether reports are provided to the appropriate person, the Crown acknowledges that the Director-General has not specified an "other person" to whom s 63B reports must be provided. But it says that s 38 of the Wildlife Act defines persons as "rangers" for the purposes of the Act. Section 38(4) provides that rangers include warranted officers appointed or deemed to be appointed under s 59(1) and (9) of the Conservation Act. Section 59(9) of the Conservation Act confirms that fishery officers appointed under pt 11 of the Fisheries Act (to exercise powers in relation to freshwater fisheries) are deemed warranted officers, and in turn rangers for the purpose of the Wildlife Act pursuant to s 38(4). It says that all fishery officers at MPI have powers in relation to freshwater fisheries.

[216] Fishery officers are rangers for the purpose of receiving reports from commercial fishers under s 63B of the Wildlife Act, along with warranted officers. Fishery officers and warranted officers do in fact receive NFPS catch reports from commercial fishers through the Fisheries Act mechanisms, via FishServe. FishServe passes the information to MPI, where there are 90 fishery officers who are designated

fishery officers in compliance roles, and who have access to the data that is automatically transferred by FishServe to MPI.

Seafood Industry Representatives' submissions

[217] The Seafood Industry Representatives accept that there is a potential difference between the "trigger" for the reporting requirements in relation to NFPS reporting under the Fisheries Act on the one hand, and the Wildlife Act and the MMPA on the other, but say that the materiality of this difference is unclear and, on the evidence, unknown.

[218] The "trigger" giving rise to the obligation to report in the Wildlife Act and the MMPA is "accidentally or incidentally kills or injures" marine wildlife or marine mammals. The trigger in reg 8 of the FRR 2017 is where a fisher catches (whether intentionally or not) non-fish or protected species.

[219] Although "catch" is not defined in the FRR 2017 or Fisheries Act, it is defined in the Codes Circular 2022 (issued pursuant to reg 47) as:

> **catch** means that the non-fish or protected species has become fixed, entangled, or trapped in such a way that it cannot move freely or free itself. It does not include, for example, birds that strike the warp, unless they are actually caught, or birds that are snagged briefly but then free themselves.

[220] For the nine years prior to the FRR 2017, reg 11E of the FRR 2001 used the word "takes" (rather than "catches") in respect of the requirement to provide NFPS reports. "Take" is defined in the Fisheries Act to mean fishing, and fishing is broadly defined to mean catching, taking or harvesting, and includes any activity reasonably expected to result in that, and any operation in support or in preparation.

[221] The NFPS catch return form attached to the FRR 2001 referred to "incidental catch" and "caught".

[222] Accordingly, the Seafood Industry Representatives submit that, to the extent there is a difference between the triggers under the various reporting requirements, that difference relates to potential events where a fisher may, in the course of fishing, observe the accidental or incidental death or injury of marine wildlife or marine

mammals, but where the marine wildlife or marine mammals are not "caught" as defined in the Codes Circular 2022.

[223] The Seafood Industry Representatives also say there is no evidence before the Court as to the extent to which this may have occurred. It says it is not a "material real-world" issue — if there had been evidence, it could have been produced by the applicant, for example from government observers.

[224] Ian Clement, a former chief executive of Deepwater Group Ltd (the seventh respondent) also noted that observers themselves are not even required to report such events. The evidence of Dr Jeremy Helson, Chief Executive of New Zealand Seafood Ltd, is that, as a matter of practical reality, it would generally be difficult for fishers engaged in fishing to try and assess if there has been injury or death of protected species which are not caught, even assuming they saw it occur.

[225] In any event, the Seafood Industry Representatives say that as soon as DOC advised FishServe and their representatives that it considered there was a gap in the reporting, that was closed by a Notice and FAQs being sent by FishServe to all vessel operators explaining the difference and how NFPS reports could be used to provide this information. That Notice and FAQs said:

> **Reminder: Reporting under the Marine Mammals Protection Act and the Wildlife Act**
>
> As you are already aware, under the NFPS reporting you are required to report captures of non-fish and protected species.
>
> However, under the Marine Mammals Protection Act 1978 and Wildlife Act 1953 every fisher also has an obligation to record and report any interaction that injures or kills a marine mammal or marine wildlife (seabirds, reptiles, corals or protected fish species), *even if not captured*. For example, a seabird hits a warp wire and is injured or killed but lands in the sea, rather than on the vessel; or a marine mammal collides with a vessel and appears to result in injury or death.
>
> This reporting obligation is in addition to the general reporting you already provide under the NFPS reports. The requirements include providing a description of the conditions and the circumstances of the interaction (i.e. what happened) that caused injury or death. To do this, you should use the Notes field in the NFPS report to record a brief description of what happened.
>
> The information you submit through your electronic logbook is received by FishServe and provided to MPI and the Department of Conservation.

Please contact the FishServe helpline on **04 460 9555** or use the online contact form if you have any questions or require assistance.

FAQ for Reminder Notice

Why am I getting this notice?

You received this notice because you are either the contact for the permit holder or you are a nominated reporter for a permit holder. This means you are a Fishing Company administrator or a Skipper.

How is it different to what I already do?

While previously only the non-fish and protected species that were "caught" needed to be reported, a review by DOC of the laws governing NFPS reporting indicates that all interactions, even those where the animal or fish are not caught but have interacted with the vessel or fishing equipment causing injury or death, need to be reported.

Why is this happening?

Recently we received a letter from DOC that raised concerns about the reporting of non-fish and protected species and identified that the current reporting regime wasn't exactly in line with what DOC now considers needs to be reported. This notice is to ensure the commercial fishing industry is aware of DOC's current position.

Will the e-logbook change?

Not yet. For that to happen MPI would need to update the electronic reporting circular. In the meantime to ensure you are complying with the law you need to use the existing e-logbook fields to report all interactions, including adding a brief description of interactions in the Notes field.

What do I need to write in the Notes field?

The additional information on the interaction should briefly explain what happened, which will be different for every situation and different fishing technique.

I'm not sure if the animal was injured so should I report it?

We appreciate that there are real practical difficulties for fishers in trying to accurately report interactions (including whether there has been any injury or mortality) when the species is not caught and on the vessel. However, you need to as best you can with the information available.

If I don't know the exact species, what should I report?

There is a generic bird code for each group (eg Albatrosses, Gulls and Terns, etc) and for mammals there is an "other" code for those that you can't identify.

[226] The Seafood Industry Representatives also disagree with the applicant's submission that NFPS reports do not satisfy the requirement of the Wildlife Act and the MMPA to provide a "description of the conditions and circumstances of the event". That phrase is not defined in the Wildlife Act and the MMPA. NFPS reports, including when linked to the fishing event report, provide a significant amount of information which, the Seafood Industry Representatives say, is relevant to the conditions and circumstances of the event. This is summarised in the evidence of Dr Caroline Read as including:

- vessel name and length;
- NFPS event date and time, and latitude and longitude;
- the fishing method and gear used and target species;
- the NFPS species code, name and group code (if known);
- whether the NFPS was uninjured, injured, dead or decomposed;
- in the case of seabirds, the seabird capture code;
- any notes about the event, which can include descriptions about what happened. An example from a NFPS catch report recorded in FishServe's system is: "caught in tori line during tow. Tori line hauled in and bird set free";
- detailed fishing event data, including the mitigation devices being used, trawl/set start and end/haul latitudes and longitudes, and whether the vessel has a Protected Species Risk Management Plan.

[227] The Seafood Industry Representatives say that the current reporting is significantly more extensive than NFPS catch reports under the FRR 2001.

[228] The Seafood Industry Representatives acknowledge that DOC wrote to FishServe and the industry representatives on 24 April 2023 (as set out at [204] above) and suggested that certain additional information should be provided by fishers as part of the "conditions and circumstances" in NFPS catch reports.

[229] But they say that DOC's position fails to appreciate the extent of information already being provided by fishers in NFPS catch reports and is inconsistent with DOC's previous acceptance that NFPS reports provided significant amounts of

information. Nevertheless, the Seafood Industry Representatives are willing to discuss this.

[230] The applicant says the list of species in the Codes Circular is exhaustive, but the definition of marine wildlife and marine mammals in the Wildlife Act and the MMPA are open-ended. Hence, there is a gap between the two regimes. In response, the Seafood Industry Representatives say that while the Codes Circular 2022 includes a list of species codes for a particular range of NFPS, it also states that a species code should be entered if possible, but otherwise to enter the "other" or "unidentified species" code. Accordingly there is no "gap", because the Wildlife Act and the MMPA require the species to be recorded "if known". In any event, species codes can be added to the Codes Circular 2022 from time to time.

[231] In response to ELI's submission that NFPS catch reports are provided to the Director-General of MPI and not to "rangers", as required under s 63B(1) of the Wildlife Act, the Seafood Industry Representatives say that the current position is that NFPS reports submitted through FishServe are provided almost immediately (well within 48 hours) by MPI to warranted officers (rangers) at DOC, as well as to fishery officers.

[232] The Seafood Industry Representatives endorse the Crown's submissions and evidence that fisheries officers have always been "rangers" as defined for the purpose of the Wildlife Act, because they all have powers in relation to freshwater fisheries, as well as "marine mammal officers" for the purpose of the MMPA.

[233] In response to DOC's submission regarding its own obligation to receive reports, the Seafood Industry Representatives accept that the ultimate obligation to report in accordance with s 63 of the Wildlife Act and s 16 of the MMPA is on fishers. In the absence of a framework provided by the Crown to enable such reporting, commercial fishers would be required to do their best to comply, based on the requirements of those pieces of legislation.

[234] But the Seafood Industry Representatives agree with the applicant that the Crown should take (and says it has taken) steps to ensure that fishers can practically comply with the reporting requirements, as required by rule of law principles.

[235] The Seafood Industry Representatives say that in the particular context it was appropriate for the seafood industry to rely on the single reporting regime which the Crown put in place. Both MPI and DOC were involved in the establishment of the NFPS reporting regime and, at the time, DOC considered that it met the reporting requirements of the legislation for which DOC was responsible. The seafood industry reasonably assumed that MPI and DOC were acting together in relation to the reporting regime and, if necessary, rely on the common law doctrine that the Crown is one and indivisible.

[236] Finally, the Seafood Industry Representatives submit that DOC did not have a policy or practice not to enforce the reporting requirements or not to prosecute in circumstances where the authority was known to be unlawful. Rather, they say that DOC (and MPI and the seafood industry) may have potentially misunderstood the scope of the Wildlife Act and MMPA reporting obligations in the "real-world context" of fishing operations.

[237] The Seafood Industry Representatives' submissions also addressed what they say is the assumption, implicit in the declarations sought by the applicant, that fishers have been acting unlawfully. They rebut that assumption, noting:

(a) the events (if any) where fishers have observed incidental mortality or injury of marine wildlife or marine mammals in the course of fishing, where the wildlife is not caught, is unknown.

(b) Since the statutory reporting requirements were introduced in 1996, the seafood industry has been reporting in the manner approved by the Crown and, since 2008, regulated.

(c) The applicant's evidence in reply acknowledges that any non-compliance by commercial fishers is a direct result of failures by the

Crown in the way it set up a system to enable commercial fishers to comply.

(d) It would be inappropriate to make declarations of criminality in a judicial review proceeding where Crown approval or sanctioning, has occurred.[36]

[238] In terms of relief, the Seafood Industry Representatives say that the question now is moot because, to the extent there are potentially differences between the reporting regimes, "steps have been taken" to resolve the differences. They refer to the FishServe Notice and FAQs to all vessel operators explaining the difference in the way in which NFPS catch reports can be used to provide the relevant information (set out at [225] above). That should not be taken as implying that fishers have been failing to report in accordance with the Wildlife Act and MMPA.

[239] As to the time within which reports are provided, since about 2017 (and earlier for larger deep-water vessels using electronic reporting), NFPS reports have been occurring daily. The Crown has confirmed that the information is now being provided to DOC rangers (warranted officers) as well as fishery officers.

Discussion

Purpose of the legislation

[240] It is useful to start with an analysis of the purpose of each of the three pieces of legislation — the Fisheries Act, the Wildlife Act and the MMPA.

[241] The long title to the Wildlife Act notes that the Act is to, among other things "consolidate and amend the law relating to the protection and control of wild animals and birds". The Act does not contain an express purpose clause.

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[36] Citing *Southern Pallet Recycling Ltd v Worksafe New Zealand* [2022] NZHC 1042, (2022) 18 NZELR 873 at [42] as an example of a criminal proceeding, in a regulatory context, where the Judge said she could "see no reason why" a proceeding could not be stayed under s 147 of the Criminal Procedure Act 2011 where the enforcement authority had formally approved or sanctioned the very act which it subsequently sought to prosecute and where the defendant had reasonably relied on that advice.

[242] Part 1 of the Act is **Protection of wildlife**. In pt 1, s 3 provides:

> **3 Wildlife to be protected**
>
> 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.

[243] The Wildlife Act was considered by the Supreme Court in *Shark Experience Ltd v PauaMAC5 Inc*.[37] A majority of the Court observed that the Wildlife Act is "the principal means by which wildlife in New Zealand, including many of its most endangered species, are protected"; and that it is the "fall-back protection mechanism in cases not specifically provided for by other legislation".[38] The Court went on to say, "The Wildlife Act, then, is the 'mainstay of statutory protection of animals in the environment'."[39] The majority said "[t]he purpose of the Act is to protect wildlife".[40]

[244] The MMPA, like the Wildlife Act, does not contain a specific purpose clause. The long title to the Act notes that the MMPA makes provision for the "protection, conservation and management of marine mammals within New Zealand and within New Zealand fisheries waters". This Court has recognised that the long title of the MMPA fairly states its "overall purpose".[41]

[245] The purpose of the Fisheries Act is "to provide for the utilisation of fisheries resources while ensuring sustainability". "Utilisation" and "ensuring sustainability" are in turn defined.

[246] As the majority of the Supreme Court explained in the *Kahawai* case:[42]

> [39] Section 8(1) … expresses a single statutory purpose by reference to the two competing social policies reflected in the Act. Those competing policies are "utilisation of fisheries" and "ensuring sustainability". The meaning of each term in the Act is defined in s 8(2). The statutory purpose is that both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system. But

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37 *Shark Experience Ltd v PauaMAC5 Inc*, above n 21.
38 At [45] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ.
39 At [46].
40 At [66].
41 *Hart v Director-General of Conservation* [2023] NZHC 1011, [2023] 3 NZLR 42 at [48].
42 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [*Kahawai* case] at [39]–[40].

> recognising the inherent unlikelihood of those making key regulatory decisions under the Act being able to accommodate both policies in full, s 8(1) requires that in the attribution of due weight to each policy [the weight] given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.
>
> [40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the conserving of fisheries resources. Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.
>
> (citations omitted)

[247] Although the Crown and the Seafood Industry Representatives emphasise the "ensuring sustainability" purpose of the Fisheries Act, as the Supreme Court noted in the *Kahawai* case, that purpose is concerned with future *utilisation* of fisheries resources. More recently the Supreme Court in *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc*[43] noted that the two elements of the Fisheries Act purpose — sustainability and utilisation — are complementary and said "utilisation of stock includes its conservation, and the Act pursues sustainable utilisation to meet the reasonably foreseeable needs of future generations". That too emphasises that it is sustainability for the purpose of utilisation.

[248] That is a very different purpose from the protection and conservation purposes of the Wildlife Act and the MMPA.

[249] The different purposes necessarily result in the differing scope and substance of commercial fishers' reporting obligations under the Fisheries Act, compared with the Wildlife Act and the MMPA.

Is there a gap?

[250] I accept that NFPS reporting cannot be a substitute for Wildlife Act/MMPA reporting, because it is narrower in scope and substance (reports must be submitted for fewer species, in fewer circumstances, and contain less information), as discussed

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[43] *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] NZSC 111 at [15].

above. DOC accepts that, as at the time this proceeding was filed, compliance with the letter of the FRR 2017 and Codes Circular 2022 would not lead to compliance with the Wildlife Act and the MMPA in several material respects. It accepts that NFPS reporting in its current form is limited in scope and substance. That means it cannot be a valid substitute for Wildlife Act/MMPA reporting, even if provided to DOC more promptly than was previously the case.

[251] Although Ms Clemens-Seeley said in her evidence that DOC considers it has made clear its position to FishServe and the fishing industry what must be reported, in fact, as the applicant submits, FishServe (standing in the shoes of the Director-General of MPI) has not made clear to fishers how they can comply with the Wildlife Act and MMPA reporting regimes.

[252] FishServe has provided advice to fishers about one aspect of the Wildlife Act and MMPA regimes (the wider scope of interactions captured),[44] but not others. As the applicant submits, the FishServe Notice is not law and is not binding. FishServe cannot compel fishers to provide information relating to this or any other unique aspect of the Wildlife Act/MMPA regimes. It does not require fishers to do anything.

[253] The Notice is also incomplete and uncertain in that it appears to foreshadow possible changes to the regime in the future, to align the reporting regimes. For example, under the question "Will the e-logbook change?"

[254] The Notice does not mention that fishers must submit reports for interactions of death or injury to any protected species, including species not listed in sch 2 to the Codes Circular 2022. Nor does the Notice provide guidance on what information must be provided of the conditions and circumstances of captures, as required by the Wildlife Act and MMPA. The proposed use of the "Notes" field is not in itself adequate to meet the statutory requirements and, as ELI submits, to change years of previous practice.

[255] Nor is there consistency between DOC's understanding of the situation and its expectations of commercial fishers, and the fishing industry's view of the situation.

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44 Set out at [225] above.

[256] In the DOC letter of 24 April 2023 (referred to at [204] and [228] above), DOC referred to two previous meetings regarding fishers' obligation to report the accidental death or injury of protected species under s 63B of the Wildlife Act and s 16 of the MMPA. The letter stated its purpose as to set out DOC's expectation on the content and scope of those reporting obligations. It said:

> DOC considers this information to be critical to understanding and mitigating harmful protected species interactions and informing likelihood of post-release survival. It is our hope that this increased clarity provides legal certainty of the reporting obligations and in turn provides appropriate information for effective and nuanced bycatch reduction as mandated under the WA and MMPA.

[257] Notwithstanding that letter, as Ms Clemens-Seeley observes, DOC, FishServe and the stakeholder representative entities (SREs) are "not in complete agreement" on the extent of the issue.

[258] That is something of an understatement. The evidence of Mr Clement and Dr Helson indicates that the Seafood Industry Representatives do not accept any changes to reporting are required.

[259] Mr Clement said:

> To my knowledge, DOC did not consult with [Deepwater Group Ltd] or other SREs in relation to the contents of this letter. I am concerned about the extent of additional information DOC appears to consider is required to report on the 'conditions and circumstances' of the protected species interaction event. I do not accept that it is in any sense "critical" that this information be provided, as suggested in the letter. If the information was critical to enabling DOC to perform their role, I believe they would have asked for the information years earlier, and would be collecting that information themselves on their own Observer reporting forms. Until we have the opportunity to discuss this with DOC is difficult to understand the rationale.

[260] Dr Helson said:

> At this stage [Fisheries Inshore New Zealand Ltd] is unable to accept DOC's position in relation to the additional and prescriptive information it considers is required in NFPS reports. Until this issue can be discussed and resolved, FishServe and other SREs have supported FishServe to issue a reminder to vessel operators about reporting obligations under the WA and MMPA, utilising the current NFPS catch report to record the interaction and its Notes field to record additional information on conditions and circumstances. I understand that the content of the reminder is annexed to the affidavit of Caroline Read.

[261] It is apparent there is no agreement between DOC and the Seafood Industry Representatives on this question.

[262] I accept the applicant's submission that, as at the time of the hearing, DOC was in effect continuing to rely on fishers complying with their obligations under the NFPS reporting framework as discharging their obligations under the Wildlife Act and the MMPA. that is so even though DOC acknowledges the NFPS reporting is inadequate for that purpose — it does not require fishers to submit reports that comply with the Wildlife Act and MMPA — and where there is no consistency between DOC and commercial fishers as to what is required.

[263] The Crown has the power to change the situation by amending the FRR 2017 and Codes Circular 2022, but it had not done so at the time of hearing. Nor had it published any public guidance. Post-hearing, counsel for the Crown respondents advised that, as foreshadowed by Mr Lawrence, a discussion paper proposing changes to non-fish and protected species catch reporting had been released by MPI for consultation.

Does DOC have a duty to put in place a reporting system?

[264] Before considering whether DOC had a "policy" in relation to what reporting was required, there is a preliminary question as to whether DOC was required to put in place a reporting system for fishers.

[265] The applicant submits that DOC had and still has a duty to take some positive steps to ensure commercial fishers could and can comply with their obligations under the Wildlife Act and MMPA. As discussed above, the Seafood Industry Representatives broadly agree with that submission.

[266] DOC's position is that it had no such statutory duty, the obligations rest with fishers.

[267] I do not think DOC's bald proposition, that it had no duty to ensure that commercial fishers can comply with the s 63B and s 16 reporting obligations, can be sustained. Such a duty is implicit in the relevant provisions of the legislation — the

Wildlife Act and MMPA — under which DOC is the department with responsibility for administration of the legislation, the appointee or deemed appointee of the rangers or officers required to receive relevant reports, and the authority with statutory responsibility for enforcement of its criminal provisions.

[268] As the text *Statute Law in New Zealand* explains, a government department responsible for administering a piece of legislation is involved from the start, and required to maintain the currency of the legislation once enacted.[45]

> **(iv) Government departments and ministries**
>
> "The principal sources of legal reform are in fact the departments of state." It is impossible to overestimate the role of government departments in the legislation-making process. They are involved in the preparation of all Government Bills, more than 90 per cent of the total legislative output each year.
>
> …

[269] The administering agency has a stewardship role. In a footnote to *Statute Law in New Zealand*, Ross Carter notes:[46]

> The chief executive of a department or departmental agency was, on and after 18 July 2013, responsible to the appropriate Minister for the stewardship of the legislation administered by the department or departmental agency: State Sector Act 1988, s 32(1)(d)(ii) (emphasis added). On and after 7 August 2020, departments' or departmental agencies' chief executives have been responsible to the appropriate Minister for supporting that Minister to "act as a good steward of the public interest", including by "maintaining the currency" of legislation administered by their agency (Public Service Act 2020, s 52(1)(d)(ii)). But public service chief executives are also responsible to the Commissioner for: (a) upholding the public service principles when carrying out their responsibilities and functions; and (b) ensuring that the agencies they lead or carry out some functions within also do so: s 12(2) and (5). Those principles include to proactively promote stewardship of the public service, including of the legislation administered by agencies: s 12(1)(e).

[270] Mai Chen too notes, in *Public Law Toolbox*:[47]

> In 2013, as part of the National Government's *Better Public Services* initiative, s 32 of the State Sector Act 1988 was amended to make it clear that one of the principal responsibilities of departmental chief executives is the

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45 Ross Carter *Burrows and Carter: Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 62–63.

46 At 246, n 227.

47 Mai Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [8.71] and [8.89] (footnote omitted, emphasis added); and see Legislation Act 2019, s 68.

> "stewardship" of the legislation administered by their department. To assist departments in discharging this new statutory responsibility, the government has set out some "initial expectations for regulatory stewardship", which start with the expectation that departments will "*monitor, and thoroughly assess at appropriate intervals, the performance and condition of their regulatory regimes to ensure they are, and will remain, fit for purpose*".
>
> (emphasis added)

[271] The Cabinet Manual reflects this proposition:[48]

> The main point of contact between the Minister and a public service agency is the chief executive. Chief executives are responsible to their portfolio Ministers, under section 52 of the Public Service Act 2020, for:
>
> …
>
> (d) supporting their portfolio Minister to act as a good steward of the public interest, including by maintaining public institutions, assets, and liabilities; *maintaining the currency of any legislation administered by their agency*; and providing advice on the long-term implications of policies;
>
> …
>
> (emphasis added)

[272] And in a 2013 report, the Treasury provided guidance about regulatory stewardship.[49] That guidance included, amongst other things, to:

> …
>
> - maintain a transparent, risk-based compliance and enforcement strategy, including providing accessible, timely information and support to help regulated entities understand and meet their regulatory requirements, and
>
> - ensure that where regulatory functions are undertaken outside departments, appropriate monitoring and accountability arrangements are maintained, which reflect the above expectations.

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48 Cabinet Office *Cabinet Manual 2023* at [3.13].

49 Treasury | Kaitohutohu Kaupapa Rawa *Regulatory System Report 2013: Guidance for Departments* (April 2013) at [1.1] and [1.2] (footnotes omitted). See also at 4 where the report notes "This guidance document should be read by those responsible for the development, implementation, monitoring, evaluation, and review of the regulatory regimes administered by your department."

[273] These statements also reinforce the basic rule of law principle that the law must be clear to enable those bound by it to comply. As a Full Court of this Court said in *Borrowdale v Director-General of Health*:[50]

> The rule of law requires that the law is accessible and, so far as possible, intelligible, clear and predictable. As Lord Bingham has explained extrajudicially, if individuals are "liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty".[51]

[274] That clarity is lacking here. I conclude that DOC did have an obligation to put in place a reporting regime to enable fishers to meet their reporting obligations under the Wildlife Act and the MMPA.

Was there a DOC "policy" regarding what to report?

[275] The "policy" alleged by ELI is a policy on DOC's part that NFPS reporting would meet fishers' obligations under the Wildlife Act and the MMPA.

[276] DOC places some reliance on the fact that s 63B and s 16 provide a defence to commercial fishers against strict liability offending. It points to the need for fishers to report adequately if they wish to rely on the defence against offending. DOC says that there is no rule of law issue in complying with the provisions which are clear on their face as to what they require. In short, DOC says the duty and obligation is for commercial fishers to determine what they will, or will not, report under the Wildlife Act and MMPA.

[277] But s 63B and s 16 are not just about providing commercial fishers with a defence. They impose a mandatory obligation to report in certain circumstances.

[278] There is a corresponding obligation on DOC, as the responsible department to receive the reports (currently contracted to FishServe). For DOC to assert otherwise amounts to an abdication of its responsibility in relation to the legislation.

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50 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [291].
51 Tom Bingham *The Rule of Law* (Penguin, London, 2010) at 37.

[279] DOC says that its view (even if characterised as a policy or a decision) was lawful and principled, being aimed at securing greater compliance with the Wildlife Act and MMPA, under one reporting regime, set up under the Fisheries Act. It emphasises that it cannot be unlawful to seek to have one reporting regime, rather than parallel reporting regimes.

[280] However, the question is not whether that is a lawful and laudable aim, but whether the current single reporting regime meets the requirements imposed by all three relevant statutes. Nor does that aim address the question whether DOC had an unlawful policy not to enforce Wildlife Act and MMPA obligations, because they did not fit within the existing single reporting mechanism.

[281] While, generally speaking, decision-makers are encouraged to adopt policy rules or guidelines in order to promote administrative efficiency and consistency and certainty of decision-making,[52] policy rules must not impede the exercise of a decision-maker's statutory functions,[53] and policy may not be inconsistent with any enactment.[54] "The policy cannot deny the power which the law has conferred."

[282] DOC also says it had no policy as pleaded by the applicant and made no "statutory decision" amenable to judicial review. But there is no magic in the label "policy". In this case there is no significant difference between a policy and an "internal position", given that position shaped DOC's actions (or inaction) for some seven years. It was more than an "administrative reassurance to the public".[55]

[283] The policy, the decisions arising from it, and the explanations given for it,[56] lead to the conclusion that DOC had accepted that commercial fishers complying with the Fisheries Act/NFPS reporting framework was sufficient to discharge fishers'

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52 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [23.2.5(1)].

53 At [23.2.5(3)] and 1024, n 240.

54 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.74].

55 *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2003] 2 NZLR 600 (CA) at [74], referring to the Privy Council decision in *O'Neil v Commissioner of Inland Revenue* [2001] UKPC 17, [2001] 3 NZLR 316.

56 *Westhaven Shellfish v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [53].

obligations under the Wildlife Act and the MMPA. DOC's position amounted to "purposeful inaction".[57]

[284] DOC's 'policy' did for the relevant period impede its exercise of its statutory functions. The policy had potential legal repercussions for fishers, who properly relied on DOC getting it right.[58]

[285] I find it was a reviewable policy and was based on an error of law.

[286] DOC says its position from 2008 is now outdated, because of ongoing discussions between DOC, FishServe and commercial fishing representatives. Commercial fishers have been advised to include more information under the "Notes" field in electronic reports to meet their Wildlife Act and MMPA obligations.

[287] I accept, as the applicant submits, that for as long as the NFPS framework does not require fishers to submit reports that comply with the Wildlife Act and the MMPA, DOC will be accepting a potential level of non-compliance with those regimes and exercising a de facto policy or practice of non-prosecution. As Cooper J said in *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council*:[59]

> I consider it is wrong in principle for a Council to both maintain a bylaw and say it will not enforce it. Citizens are entitled to regulate their affairs in accordance with the law, and should not be dependent on enforcement policies able to be changed without the formality and publicity attendant on the actual rule-making process.

[288] That case involved a bylaw, this case concerns two current Acts of Parliament, where the point has even more force.

Failure to investigate and prosecute

[289] The applicant says DOC has acted unlawfully by failing to discharge its statutory duty to investigate and prosecute offences under ss 63A and 63B of the

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57 Joseph, above n 52, at [23.3.5].

58 See, for example, *Cancer Society of New Zealand v Ministry of Health* [2013] NZHC 2538, [2013] NZAR 1461 at [23].

59 *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, [2014] NZAR 1217 at [62].

Wildlife Act and ss 9(1) and 16(4) of the MMPA in connection with commercial fishing. It seeks an order in the nature of mandamus requiring DOC to fulfil its duty to investigate and prosecute.

[290] At least for a period, DOC did have a stance that it would not prosecute certain breaches in certain circumstances. To recap, the 17 July 2008 DOC letter said:

> In the period from 1 October 2008 until the Wildlife act and the MMPA are amended, DoC would not prosecute under the Wildlife Act or under the MMPA in relation to the requirement to report within 48 hours of the arrival of the vessel in port, provided fishers report under [Ministry of Fisheries'] NFPECR regime, and unless there were aggravating factors involved in a specific case.

[291] DOC says that is no longer its position.

[292] In *R v Commissioner of Police of the Metropolis, ex parte Blackburn*[60] the English Court of Appeal observed that, while the Commissioner of Police had a discretion not to prosecute, he could not adopt a stance of non-prosecution of certain offences.

[293] In *Polynesian Spa Ltd v Osborne*,[61] the High Court reiterated the position taken in *Hallett v Attorney-General*:[62]

> *Hallett* is authority for the proposition that judicial review is only likely to be obtained in such a case [involving a challenge of a decision not to prosecute] where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought.

[294] While the DOC letter limited the exemption from prosecution in certain respects — only for a failure to report within the time limit and not if there were aggravating factors — nevertheless, it can be characterised as a general policy not to prosecute in the *Blackburn* sense.

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60 *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, [1968] 2 WLR 893 (EWCA); and see *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC) at 102, to similar effect.

61 *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [69].

62 *Hallett v Attorney-General* [1989] 2 NZLR 96 (HC) at 102.

[295] There is no evidence before the Court of specific instances of non-compliance by fishers with their reporting obligations. But DOC's reliance on an absence of evidence sits uncomfortably in circumstances of DOC's own regulatory failure. Where DOC has elected not to investigate and/or prosecute, it is reasonable to infer that some fishers (through no fault of their own) may not have met their reporting obligations under the Wildlife Act and the MMPA.

[296] On balance however my conclusion is that, while DOC's policy was unlawful, there is insufficient evidence to reach a conclusion that DOC failed to discharge its statutory duty to investigate and prosecute.

Who receives the NFPS reports?

[297] As to who receives the NFPS reports, ELI says the requirement under s 63B(1) to submit reports to DOC rangers was (at least historically) not complied with. Deemed rangers do not include all fishery officers.

[298] DOC's evidence is that there are 95 fishery officers at MPI who have access to the catch and effort database providing NFPS catch report data from FishServe. But the applicant says there is no evidence of the warrants provided to these officers or the specific powers granted under them. As a consequence, there is no evidential basis on which the Court may infer that those officers were appointed to exercise powers in relation to freshwater fisheries. The applicant says it appears unlikely that they were.

[299] As the applicant acknowledges, the point is a narrow one, given its primary submission is that NFPS reporting cannot be a substitute for Wildlife Act and MMPA reporting. It also acknowledges that DOC has since taken steps to ensure that NFPS reporting information is forwarded to appointed warranted officers who are unquestionably deemed rangers under the Wildlife Act. But it says the point is important in order to assess historical compliance by DOC with the provisions of the Wildlife Act and the MMPA.

[300] I have concluded that DOC had a duty to receive the reports submitted by commercial fishers. A necessary corollary of that conclusion is that the recipients of

those reports were required to be the statutorily designated "rangers" and "fishery officers".

[301] I am satisfied that ELI has established that, at least historically, the reports were not being received by DOC rangers or fishery officers. However, I accept that DOC has taken steps to ensure that the reports are received by those designated by statute to receive them.

[302] As Professor Joseph KC explains a declaration will not (or might not) be issued where, among other things, it will not achieve a useful purpose.[63] In these specific circumstances, I see little utility in a specific remedy in relation to this aspect of the claim, and decline to give one.

Relief

[303] The applicant seeks declarations that DOC's Wildlife Act and MMPA "reporting policies" are unlawful (fourth and seventh causes of action) and that DOC has failed to discharge its statutory duty to investigate and prosecute offences under the Wildlife Act and the MMPA (fifth and eighth causes of action).

[304] DOC opposes the second declaration sought on the basis it infers unlawful fishing by commercial fishers, without evidence as to any particular case, and with insufficient consideration of whether there is in fact sufficient overlap in all of the evidence provided to satisfy the statutory requirements, or of the types of harm caused when wildlife/marine mammals are not caught.

[305] The Seafood Industry Representatives also say any relief in relation to reporting is now moot, relying on the Notice and FAQs to fishers by FishServe.

[306] The Court should be slow to consider any relief that assumes breaches have occurred, or that fishers have been acting unlawfully, relying on the Supreme Court decision in *Shark Experience v PauaMAC5*:[64]

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63 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1180, cited in *Borrowdale v Director-General of Health*, above n 50, at [289].

64 *Shark Experience*, above n 21, at [111].

> 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. Although not binding on the criminal court, the existence of a declaration risks prejudicing the integrity of subsequent criminal proceedings. 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 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.

[307] I am not satisfied on the evidence before me that DOC has in fact adequately addressed the gap as at the date of hearing, notwithstanding its awareness of the problem, and having regard to the lack of agreement between DOC and the Seafood Industry Representatives as to what is required.

[308] However, in the overall circumstances of the case I am satisfied that a declaration will be sufficient vindication and that the Director-General of DOC will abide the decision of the Court in respect of future reporting without the need for other formal orders.

[309] In respect of the fourth and seventh causes of action, against the second and third respondents, I make the following declarations:

(a) DOC's policy from the date of the introduction of the Fisheries (Reporting) Amendment Regulations 2008 (the NFPS date) to 24 April 2023 (being the date of the DOC letter) that NFPS reporting was adequate to allow commercial fishers to meet their obligations under s 63B of the Wildlife Act and s 16 of the MMPA was unlawful.

(b) DOC's policy from the NFPS date to 24 April 2023 was unlawful because it did not require reporting for all species and/or all types of event for which reports must be submitted under s 63B of the Wildlife Act, and s 16 MMPA, and/or for inclusion of additional information about the conditions and circumstances of the event.

[310] For the reasons noted above, I decline to grant an order for mandamus requiring the Crown to put in place a system under which the reporting requirements of the Wildlife Act and the MMPA can be complied with.

[311] Under the fifth and eighth causes of action ELI also seeks a declaration that DOC has acted unlawfully by failing to discharge its statutory duty to investigate and prosecute offences under ss 63A and 63B of the Wildlife Act and ss 9(1) and 16(4) of the MMPA in connection with commercial fishing in Aotearoa New Zealand between 1996 and the present because, between 1996 and 24 April 2023, it misconstrued the scope of the legislative requirements of the two Acts because of its reporting policy in respect of each; and from 24 April 2023 to the present, it has failed to take any steps to rectify the acknowledged gap.

[312] As I have found, DOC did misconstrue the scope of the requirements under the Wildlife Act and the MMPA between 1996 and 24 April 2023 and did advise commercial fishers that it would not prosecute in certain circumstances. Without giving commercial fishers the tools to comply, DOC has not had information to decide whether to prosecute. This amounts to a de facto decision not to prosecute. Although DOC now acknowledges the correct position it did not provide any written or documentary evidence to support its assertion that it has abandoned this policy. Nor has it written to the fishing industry to clarify its position.

[313] However, I conclude there is insufficient evidence to reach a conclusion that DOC has failed to prosecute breaches of the statutory reporting requirements. In those circumstances I decline to grant the declaration sought by the applicant.

PMPs — unlawful failure to exercise discretion (sixth and ninth causes of action) against Director-General of Conservation

[314] Population Management Plans are legislative tools aimed at addressing fishing-related causes of mortality, and promoting conservation of protected species of marine wildlife and marine mammals under the Wildlife Act and MMPA. A distinguishing characteristic of a PMP is that it can contain a maximum allowable level of fishing-related mortality (MALFiRM). A MALFiRM is a bycatch limit which, if exceeded, can result in mandatory closure of fisheries.

PMP provisions

[315] Both the Wildlife Act and the MMPA empower the Director-General of Conservation to prepare and present, and the Minister of Conservation, to approve PMPs for threatened species or other species of wildlife,[65] or for threatened species or other species of marine mammal,[66] respectively.

[316] The provisions governing PMPs were inserted into the Wildlife Act and MMPA through the Fisheries Act 1996 and came into force on 1 October 1996.

[317] Section 14I of the Wildlife Act provides for the procedure for preparing and approving PMPs:

(a) The Director-General of Conservation must prepare the plan and carry out consultations with a wide range of stakeholders following a prescribed process.[67]

(b) The Director-General must then prepare a summary of the submissions received, may amend the draft PMP, and must send the draft to Te Pou Atawhai Taiao O Aotearoa | New Zealand Conservation Authority and the Minister of Oceans and Fisheries.[68]

(c) The Director-General may produce an updated draft based on Te Pou Atawhai Taiao O Aotearoa | New Zealand Conservation Authority's feedback before sending the final draft and summary of submissions to the Minister of Conservation.[69]

(d) The Minister may then approve the plan subject to the concurrence of the Minister of Fisheries after considering the relevant statutory

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65 Wildlife Act, ss 14I(1) and 14F.
66 MMPA, ss 3H and 3E.
67 Wildlife Act, s 14I(1)(a)–(g).
68 Section 14I(1)(h)–(j).
69 Section 14I(1)(k)–(l).

provisions, the submissions and any other matters that they consider relevant.[70]

(e) The Minister of Fisheries may concur after considering the impacts of the MALFiRM on commercial fishing and any other matters they consider relevant.[71]

(f) The Minister of Conservation may then approve the plan,[72] which shall be notified in the *Gazette*.[73]

[318] The legislative scheme under the MMPA is materially identical.[74]

[319] Section 14F(1) of the Wildlife Act provides the Minister of Conservation with a power of approval. The Minister "may from time to time approve a [PMP]" in respect of one or more species, "being threatened species or other species of marine wildlife", containing any of the matters listed in s 14F(1)(a)–(i).

[320] Section 2(1) of the Wildlife Act defines "threatened species" as "any marine wildlife that is for the time being declared by a notice under subs (1A) to be a threatened species".

[321] Among the matters that a PMP may provide are:

(a) … the MALFiRM for the species, in Aotearoa New Zealand fisheries waters, which would allow the criteria specified in s 14G to be met;[75]

(b) … subject to s 14H, if a level has been set under paragraph (f), the MALFiRM for the species, in specified areas within Aotearoa New Zealand fisheries waters;[76]

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70 Section 14I(1)(m).
71 Section 14I(1)(n).
72 Section 14I(1)(o).
73 Section 14I(2).
74 MMPA, ss 3H(1)(a)–(g), 3E(1)(h)–(j), 3H(1)(k)–(l), 3H(1)(m), 3H(1)(n) and 3H(1)(o).
75 Wildlife Act, s 14F(1)(f).
76 Section 14F(1)(g).

[322] For marine wildlife ranging outside Aotearoa New Zealand fisheries waters, the MALFiRM set under s 14F(1)(f) or (g) shall be based on:[77]

> … a fair and equitable consideration of the proportion that the estimated fishing-related mortality of that species within those waters is to the total estimated fishing-related mortality of that species in all waters (including waters outside New Zealand fisheries waters).

[323] Section 14G governs the setting of MALFiRMs generally and provides:

> In determining the maximum allowable level of fishing-related mortality for threatened species or any other marine wildlife under section 14F(1)(f), the Minister,—
>
> (a) in the case of any threatened species, shall determine a level of fishing-related mortality which should allow the species to achieve non-threatened status as soon as reasonably practicable, and in any event within a period not exceeding 20 years:
>
> (b) in the case of any other marine wildlife, shall determine a level of fishing-related mortality which should neither cause a net reduction in the size of the population nor seriously threaten the reproductive capacity of the species.

[324] Section 14H provides for area-based MALFiRMs. However, under s 14H(1), these can only be set for populations of "threatened species" and more specifically threatened species which are geographically or genetically discrete, and for areas corresponding to areas defined as fisheries management areas or quota management areas under the Fisheries Act. Under s 14H(2) in setting area-based MALFiRMs, the Minister of Conservation must determine a level of fishing-related mortality for such a discrete population "which should neither cause a net reduction in the size of the population nor seriously threaten the reproductive capacity of that population".

Fisheries Act, s 15

[325] The Fisheries Act reflects changes made to the Bill as introduced to provide the Minister of Fisheries with greater powers. As introduced, the Bill provided that the Minister only had such powers where a PMP was made under the Wildlife Act or MMPA.[78]

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77 Section 14F(2).
78 Fisheries Bill 1994 (63-1), cl 13.

[326] Following the select committee stage, the powers were significantly expanded to their current form. The Primary Production Committee said of the changes:[79]

> **Fishing related mortality**
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> Clause 15 allows the Minister, by regulation, to collect information from fishers regarding the fishing related mortality of protected species. The Minister has a duty to ensure that maximum allowable fishing related mortality levels of protected species in Population Management Plans under the Wildlife Act 1953 and the Marine Mammals Protection Act 1978 are not exceeded.
>
> Most submissioners were opposed to this provision in the Bill, as introduced, either because it does not incorporate an ultimate target of zero fishing related mortality of protected species, or on the other hand, because the Minister is required to take action where a Population Management Plan has been approved. The Royal Forest and Bird Society and the Environmental and Conservation Organisations of New Zealand argued that the Bill should also provide an incentive to develop improved fishing practices.
>
> ….
>
> *We agree that Population Management Plans are the best way to set maximum levels of fishing related mortality. But, we also recommend that, after consultation with the Minister of Conservation, the Minister of Fisheries have the power to take appropriate measures to reduce the impact of fishing related mortality where there is no approved Population Management Plan*. Where there is a Population Management Plan the Minister should also be able to recommend other controls such as method and area restrictions to reduce the impact of fishing related mortality.
>
> (emphasis added)

[327] The additional provisions intersect with the powers to make PMPs under the Wildlife Act and the MMPA. In particular:

(a) under s 15(1) of the Fisheries Act, if a PMP has been made, the Minister for Oceans and Fisheries must take all reasonable steps to ensure the MALFiRM set by the PMP is not exceeded, and may take other measures they consider necessary "to further avoid, remedy, or mitigate any adverse effects of fishing on the relevant protected species";

(b) under s 15(2), "in the absence of a [PMP]" the Minister may, after consulting with the Minister of Conservation, "take such measures as

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[79] Fisheries Bill 1994 (63-2) (select committee report) at xii and xiii (emphasis added).

[they consider] are necessary to avoid, remedy or mitigate the effect of fishing-related mortality on any protected species, and such measures may include setting a limit on fishing-related mortality"; and

(c) under s 15(5), the Minister for Oceans and Fisheries may prohibit all or any fishing or fishing methods in an area including to ensure a MALFiRM set under a PMP is not exceeded.

(d) The Minister may recommend the making of such regulations under s 298 that the Minister considers "necessary or expedient for the purpose of implementing any measures referred to in subs (1), (2) or (3). (Section 15(4)).

(e) The Minister may prohibit all or any fishing or fishing methods in an area either:

(i) for the purpose of ensuring a MALFiRM set by a PMP is not exceeded (s 15(1)(a)); or

(ii) for the purpose of ensuring that any limit on fishing-related mortality is not exceeded (s 15(2)).

[328] The applicant pleads that, since 1 October 1996, the Director-General has neglected or refused to exercise their discretion to prepare a PMP and present it to the Minister for approval under s 14I(1) of the Wildlife Act. Similarly the Director-General has neglected or refused to exercise their discretion to prepare a PMP and present it to the Minister for approval under s 3H(1) of the MMPA.

[329] ELI's case essentially fell under four broad claims:

(a) DOC has incorrectly interpreted the 20-year provisions in s 14G of the Wildlife Act and s 3F of the MMPA;

(b) DOC and the Minister of Conservation have erroneously interpreted the provisions governing the making of MALFiRMs for non-threatened species;

(c) DOC has failed to consider relevant considerations, in particular it has not received complete s 63B(1) reports under the Wildlife Act or s 16(1) reports under the MMPA; and

(d) DOC has taken into account irrelevant considerations, in particular the potential difficulty of monitoring compliance with PMPs.

Issues

[330] The more detailed issues arising from the pleadings, the evidence and the submissions before the Court can be conveniently stated in the following terms:

(a) Is the power to impose a PMP a discretionary power?

(b) Has there been a non-exercise/failure to exercise the power to impose a PMP by the Minister?

(c) Is the non-exercise by the Minister of a discretionary power judicially reviewable?

(d) Is that failure unlawful?

(i) Did/does DOC have a policy against PMPs?

(ii) Should the legislative scheme as a whole be considered in assessing whether the Minister had refused or failed to exercise the discretionary power?

(iii) Has DOC incorrectly interpreted the phrase "… as soon as reasonably practicable, and in any event within a period not exceeding 20 years"?

(iv) Is DOC mistaken in its view that PMPs containing MALFiRMs remain "biologically impossible" for many species?

(v) Can a PMP contain a MALFiRM for species not declared to be threatened?

(vi) Has DOC failed to have regard to relevant considerations (s 63B reporting)?

(vii) Has DOC had regard to irrelevant considerations (perceived difficulties in enforcement)?

Is the power to impose a PMP a discretionary power?

[331] A PMP is prepared by the Director-General under s 14I of the Wildlife Act.[80] There is no guidance as to when the Director-General should initiate a PMP process.

[332] The Minister has a discretion to initiate the process; it is not mandatory. That is different from cases involving applications. In general, "[g]reater latitude applies where the power is for initiating proposal and/or procedures rather than determining applications"[81].

[333] The answer to the first question is yes, the power to impose a PMP is a discretionary power.

Has the discretion been exercised?

[334] ELI says that, since 1 October 1996, there have been a number of threatened species and other species of marine wildlife which have had a high risk of fishing-related mortality and other human sources of mortality to the species, including:

(a) The black petrel (*procellaria parkinsoni*);

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80 The equivalent provision of the MMPA.

81 Joseph, above n 52, at [23.2.5(3)], citing *Hamilton City v Electricity Commission* [1972] NZLR 605 (HC) at 634–635 and *Attorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750 (CA) at [36].

(b) The Salvin's albatross (*thalassarche salvini*);

(c) The Westland petrel (*procellaria westlandica*);

(d) The flesh-footed shearwater (*puffinus carneipes*);

(e) The Southern Buller's albatross (*thalassarche bulleri)*;

(f) The Gibson's albatross (*diomedea antipodensis gibsoni*);

(g) The leatherback turtle (*dermochelys coriacea*)

(h) Bamboo coral (*chathamisis bayeri*); and

(i) Bubblegum coral (*paragorgia alisonae*)

[335] In relation to the MMPA, the applicant says that, since 1 October 1996, there have been a number of threatened species and other species of marine mammal which have had a high risk of fishing-related mortality and other human sources of mortality to the species, including:

(a) Hector's dolphin (*cephalorhynchus hectori*);

(b) Māui dolphin (*cephalorhynchus hectori maui*); and

(c) New Zealand sea lion (*phocarctos hookeri*).

[336] It is common ground that DOC has never presented a PMP to the Minister of Conservation to consider for approval. Nor has the Minister ever directed that one be presented or exercised their discretion to approve or not approve a PMP.

[337] DOC has carried out preliminary investigations into the possibility of developing a PMP on four occasions:

(a) once in 1996 for the Wandering Albatross;

(b) twice in 1996–1997 and 2005–2009 for the New Zealand sea lion; and

(c) once between 1999–2006 for the Hector's dolphin.

[338] The most far advanced of these was the 2005–2009 New Zealand sea lion PMP investigation. DOC carried out the legislatively prescribed public consultation on a draft PMP, before the Director-General decided not to proceed, in or about July 2009.

[339] ELI challenges what it says is the policy choice by DOC and the Minister of Conservation to erroneously foreclose or write off PMPs completely as one valid and effective policy response for mitigating the impacts of bycatch, over a long period of time.

[340] I note at this juncture that, while DOC agrees that a PMP has not been advanced for any species since 2009, it says that does not amount to a failure or refusal to exercise the discretion. Not only is the power to initiate the PMP process discretionary, but it sits within an overall scheme that anticipates that, while PMPs are an important mechanism, other tools might be utilised instead. This submission is more conveniently addressed in the context of the interpretation of the "20 year rule", at [395]–[418] below.

[341] I conclude that the Director-General of Conservation has not exercised the discretion to present a PMP and the Minister of Conservation has not exercised the discretion to approve a PMP.

Is the non-exercise by the Minister of a discretionary power amenable to judicial review?

[342] It is clear that a refusal or failure to exercise a statutory discretion can be amenable to judicial review on orthodox grounds. At a broad level, the exercise of statutory powers must be consistent with the purposes and principles of the

empowering legislation.[82] A failure to exercise a discretionary power may be reviewable where the failure has frustrated the object of the Act which conferred it.[83]

[343] More specifically, judicial review is available, for example, where the decision-maker has made an error of law in the construction of a statute, has improperly fettered or narrowed the exercise of their discretion, has failed to have regard to relevant considerations, has taken into account irrelevant considerations, or has proceeded on the basis of a material mistake of fact.

[344] I find that the non-exercise of the discretion to prepare and approve a PMP is amenable to judicial review.

Did DOC have a policy against PMPs? Should the legislative scheme as a whole be considered in assessing whether the Minister has refused or failed to exercise the discretionary power?

[345] These two issues are logically considered together.

[346] ELI alleges that, because there has not been a PMP attempted since 2009, this supports an argument that DOC has an unlawful policy against their use and has effectively fettered the Minister's discretion to utilise PMPs as a potential tool.

[347] DOC accepts that a policy can fetter a decision-maker, but only if the policy adopted by the decision-maker denies entirely the power for which the law was conferred.[84]

[348] DOC says the Department, Director-General and Minister do not have a policy against PMP use. The evidence shows that initially they were very much DOC's favoured tool. The reasons why it halted PMP processes were complex and not because DOC had closed its mind to the use of the PMP provisions. The evidence for DOC outlines various factors including legal risk, scientific disputes over modelling

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82 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 196–197 per Cooke J.

83 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694 (HL); and *RM v The Scottish Ministers* [2012] UKSC 58 at [47].

84 *Westhaven Shellfish v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [45], [48], [49] and [53], cited in *Mitchell v Chief Executive Officer, Department of Corrections* [2015] NZHC 347 at [78].

and the status of the relevant species, which meant in those cases where PMPs were attempted, it was ultimately determined that use of a PMP was not the best mechanism at that time.

[349] In a 2010 review into the PMP provisions in both the Wildlife Act and the MMPA, DOC identified a number of "problem areas" which hampered DOC's ability to implement a PMP successfully. These included the references in s 14G(a) of the Wildlife Act and s 3F(a) of the MMPA to the need to determine a MALFiRM for a threatened species which would "allow the species to achieve non-threatened status as soon as reasonably practicable, and in any event within a period not exceeding 20 years".

[350] Nor has DOC ever had a blanket ban on PMPs. When stopping the New Zealand sea lion PMP in July 2009, the Director-General of DOC noted that doing so would not preclude developing a revised or alternative PMP, or examining other alternative management methods, later on.

[351] After the initial attempts to put PMPs in place, DOC has instead worked with MPI and used other processes and mechanisms for providing protection and to achieve the purpose of the Wildlife Act and the MMPA.

[352] It has largely focussed on Threat Management Plans (TMPs), described by Laura Boren, who gave expert evidence for DOC, as an "adequate alternative" to a PMP. In discussing that a holistic approach is necessary to address the range of threats to marine mammal species, Ms Boren says:

> It doesn't matter what the Plan is called (TMP or PMP), the fundamental need to expedite action as more information on species and threats so that decision makers can make decisions on the best available, robust information.

[353] DOC's evidence was that the information included in a TMP is flexible. It can include research plans, strategies for communication and engagement, non-regulatory measures and regulatory measures under the relevant legislation. The information in a TMP allows a species to be assessed by outlining information about threats to that species and proposed management of those threats.

[354] An example of a TMP is the Hector's and Māui dolphins TMP introduced by DOC in 2007, updated in 2020. This TMP provides a population outcome for each species and objectives for fisheries management. It is considered a significant TMP, notably leading to new protections for the species including amendments to four MMPA sanctuaries, introduction of fishing restrictions and prohibition of drift netting.

[355] DOC says that, when considering the reasonableness of not utilising or considering utilisation of the PMP provisions after 2009, it must be reasonable to consider these other steps taken to protect threatened species, as well as the suitability of the PMP mechanism. The requirement for the concurrence of the Minister of Fisheries, having considered the impact of the MALFiRM on commercial fishing,[85] supports that submission that it is the purpose of the legislation *as a whole* that must be taken into account.

[356] The Minister of Fisheries' broad complementary powers regarding fishing-related mortality, under s 15 of the Fisheries Act[86] also support that view.

[357] The respondents emphasise that the Minister of Fisheries was deliberately conferred powers to take appropriate measures to reduce fishing-related mortality under the Fisheries Act and invite the Court to conclude from that, that both Acts provide tools developed to address fishing-related mortality and the associated impacts on protected species.

[358] Not only is the power to initiate the PMP process discretionary, but it sits within an overall scheme that anticipates that, while PMPs are an important mechanism, other tools might be utilised instead. Section 15 of the Fisheries Act expressly contemplates that PMPs are not the only way to provide for limits to fishing impacts on protected species. DOC says that the deliberate conferral of the s 15 powers on the Minister of Fisheries highlights that both Acts provide tools developed to address fishing-related mortality and the associated impacts on protected species.

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85 Wildlife Act, ss 14F and 14I(1)(m) and (n).
86 Detailed at [327] above.

[359] The Crown respondents emphasise that the Minister has a wide discretion to initiate and determine PMPs. The overarching purpose is protection of species and PMPs are neither mandatory, nor the only mechanism available. Here, not utilising PMPs has not undermined or thwarted the purpose of the Wildlife Act and the MMPA.

[360] From that, DOC says, it is clear that what must be scrutinised are factors such as the purpose of the Acts, the particulars of the species at issue, what mechanisms are already in play and what is the best tool to provide for them. This aligns with the approach being taken by DOC. In particular DOC notes that under the Fisheries Act, utilisation has as a bottom-line, ensuring sustainability. That requires avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment, including protected species.[87]

[361] While protection of the species is a core purpose of both the Wildlife Act and the MMPA,[88] the PMP provisions were arguably designed to be consistent with the Fisheries Act purpose of ensuring sustainability:

(a) Section 14F(1)(h) of the Wildlife Act provides for PMPs to provide recommendations to the Minister for Fisheries on measures to mitigate the fishing-related mortalities.

(b) Section 14G(a) of the Wildlife Act is not intended to close fishing per se but to avoid, remedy or mitigate the impact on protected species. The Wildlife Act is not a no-take regime, but a regime that restricts fishing to the extent the species can recover from being threatened. In the case of s 14G(b) for non-threatened species, to ensure that fishing-related mortality does not seriously threaten the reproductive capacity of the species.

[362] Viewed in light of the legislative scheme as a whole, there could be legitimate reasons to prefer the protective provisions of the Fisheries Act over the PMP provisions in the Wildlife Act and the MMPA. Not utilising the PMP provisions in those circumstances would amount to a valid exercise of discretion.

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87 Fisheries Act, s 8; and *Kahawai* case, above n 42, at [39].
88 *Shark Experience Ltd v PauaMAC5 Inc*, above n 21, at [8]–[11].

[363] The Seafood Industry Representatives framed their submission in similar terms. They say that, rather than DOC abdicating its responsibilities under the Wildlife Act and the MMPA, it and MPI, the Seafood Industry and other stakeholders have adopted a collaborative approach and have used a number of regulatory and non-regulatory tools to achieve the purposes of the Fisheries Act, the Wildlife Act and the MMPA. The absence of a structured plan, in the form of a PMP, does not mean that the core purposes of all three Acts have not been central to the decision-making, or that the outcomes achieved without using PMPs have been constrained by this.

[364] The Seafood Industry Representatives note that the only operative mechanism in a PMP in terms of fishing is the MALFiRM, but under s 15 of the Fisheries Act, the Minister of Fisheries, in consultation with the Minister of Conservation, can impose a fishing-related mortality limit (FRML). A FRML is considerably more flexible than a MALFiRM as its process requirements are simpler, it is not constrained by the 20-year criterion and an area-based limit is not restricted to threatened species.

[365] Mr Clement's evidence for the Seafood Industry Representatives discussed the PMP process undertaken by DOC for sealions, although not ultimately proceeded with. Mr Clement noted the longstanding use of a combination of regulatory and non-regulatory measures put in place to manage the interaction between the SQU6T squid fishery and sealions since the 1991–92 fishing season. These have included FRMLs imposed under s 15 of the Fisheries Act through operation plans, and the successful development and implementation by the Seafood Industry of sealion exclusion devices (SLEDs).

[366] In 2009 a decision was made by the Director-General of DOC to stop the development of the sealion PMP and, instead, DOC introduced a Species Management Plan for sealions, subsequently replaced by a TMP in 2017. The evidence for the Seafood Industry Representatives is that, throughout this period, annual FRMLs under s 15 of the Fisheries Act continue to be in place and bycatch was mitigated by the use of SLEDs, as well as other non-regulatory measures under operational plans. The Seafood Industry Representatives point to the acknowledgement from Dr Constantine, the applicant's marine mammals expert, that there has been a "marked decline" in sealion bycatch, largely due to the introduction of SLEDs.

[367] In relation to Māui and Hector's dolphins, DOC, MPI and the Seafood Industry have put in place regulatory and non-regulatory measures to reduce the risk of fishing-related mortality. A TMP provides the framework for all regulatory measures under both the Fisheries Act (significant set net and trawl closures around Aotearoa New Zealand, the banning of drift nets and FRMLs for the west coast of the North Island and for South Island subpopulations) and the MMPA (marine mammal sanctuaries). A TMP was considered a more direct route to achieve improvement management, in light of the expert evidence that it was biologically implausible to expect recovery within 20 years.

[368] The Seafood Industry Representatives also pointed to an array of fisheries regulations in place requiring the use of mitigation devices to minimise seabird harm.

[369] The thrust of the submissions for both DOC and the Seafood Industry Representatives is that the intention of the Wildlife Act and the MMPA has not been thwarted by the absence of PMPs. The applicant has not explained what could have been achieved using a PMP (with a MALFiRM implemented under s 15 of the Fisheries Act) that could not be achieved using other statutory mechanisms such as a FRML (also implemented under s 15 of the Fisheries Act).

[370] ELI acknowledges that the Crown respondents and various industry representatives have taken some steps to attempt to mitigate the impacts of bycatch on certain protected species over time, but says that the effectiveness of other measures taken to mitigate the impacts of bycatch of protected species is of limited, if any, relevance to its claim. The risks remain: it says the experts agree that commercial fishing bycatch poses a present and ongoing risk to the conservation status of many protected species. The risk has not been eliminated by the use of other measures.

Discussion

[371] As a preliminary point, DOC says there is no specific decision to not initiate a PMP, under challenge. Rather, the claim is based on an inference that the concerns voiced by DOC about the PMP process must mean that they have actively decided not to pursue PMPs and to have therefore fettered the decision-makers' discretion.

[372] While it is the case that ELI does not challenge any individual decision not to put in place a PMP, nothing turns on that for the purpose of this judicial review. DOC acknowledges that it has made no attempts, in 14 years, to initiate the process for a PMP. It is that overall failure or refusal, rather than a failure or fettering of discretion in relation to any particular PMP, that is challenged.

[373] DOC puts some reliance on the sustainability limb of the Fisheries Act purpose to support its submission that the legislative purposes of all three Acts are consistent and it is the overall legislative scheme that is relevant in assessing whether the Minister has "failed" to exercise the PMP discretion or has thwarted the purpose of the Wildlife Act/MMPA. DOC argues that the PMP provisions were "arguably designed" to be consistent with the Fisheries Act purpose of providing for the utilisation of fisheries resources *while ensuring sustainability* (emphasis added). In support of that submission DOC notes that the Wildlife Act is not a no-take regime, but a regime that restricts fishing to the extent the species can recover from being threatened.

[374] The respective purposes of the Fisheries Act, Wildlife Act and MMPA are relevant to that submission.

[375] The long title to the Fisheries Act states:

> An Act—
>
> (a) to reform and restate the law relating to fisheries resources; and
>
> (b) to recognise New Zealand's international obligations relating to fishing; and
>
> (c) to provide for related matters

[376] The purpose of the Fisheries Act is contained in s 8:

> **8 Purpose**
>
> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
>
> (2) In this Act,—
>
> **ensuring sustainability** means—
>
> (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment

> **utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

[377] That provision was discussed by the Supreme Court in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* (the *Kahawai case*). As the Court said there:[89]

> [39] Section 8(1) appears in Part 2 of the Act headed "Purposes and principles". It expresses a single statutory purpose by reference to the two competing social policies reflected in the Act. Those competing policies are "utilisation of fisheries" and "ensuring sustainability". The meaning of each term in the Act is defined in s 8(2). The statutory purpose is that both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system. But recognising the inherent unlikelihood of those making key regulatory decisions under the Act being able to accommodate both policies in full, s 8(1) requires that in the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.
>
> [40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the conserving of fisheries resources.[90] Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

[378] That is consistent with several earlier cases concerning s 15 of the Fisheries Act, which have addressed the balancing of the Fisheries Act utilisation objectives and conservation values. As the Court of Appeal observed in *Squid Fishery Management Co Ltd v Minister of Fisheries*[91] in the context of a harvestable species, the balancing requires "utilisation to the extent that it is sustainable". The Court of Appeal cited *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries*[92] and *Kellian v Minister of Fisheries*[93] also addressed the issue. In the former the Court of Appeal said: "In terms of their purpose, the Acts (1996 more than 1983) recognise or even emphasise that fisheries are to be used …". And in *Kellian*, the Court said: "As the

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89 *Kahawai* case, above n 42, at [39]–[40].

90 Conserving involves the concept of "conservation" which is defined in s 2 to mean: "the maintenance or restoration of fisheries resources for their future use."

91 *Squid Fishery Management Co Ltd v Minister of Fisheries* CA39/04, 13 July 2004 at [75].

92 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [46].

93 *Kellian v Minister of Fisheries* CA150/02, 26 September 2002 at [34].

appellants rightly say, the Act both in its terms and by comparison with its 1983 predecessor emphasises utilisation of fisheries."

[379] More recently, in *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc*,[94] the Supreme Court, citing the *Kahawai* case, emphasised that utilisation may not jeopardise sustainability, but noted it is sustainability for the purpose of utilisation.

[380] As noted above, the MMPA does not have a purpose provision. The long title to the Act is:

> An Act to make provision for the protection, conservation, and management of marine mammals within New Zealand and within New Zealand fisheries waters

[381] The MMPA is the principal means by which the protection, conservation and management of marine mammals is achieved in Aotearoa New Zealand.

[382] The Wildlife Act is concerned with the protection of wildlife in Aotearoa New Zealand from harm, including death and injury.

[383] What is clear from the authorities on s 8 of the Fisheries Act, is that sustainability of the fisheries resource means sustainability for future exploitation of fisheries as a resource. The Fisheries Act is not about protection or conservation per se. It is not about preservation and protection of a species for the purpose of maintaining their intrinsic value.

[384] While the regimes are clearly linked for this purpose, I do not think it is not correct to say that the PMP provisions are designed to be "consistent with" the sustainability limb of the Fisheries Act purpose.

[385] As discussed at [327] above, the Minister of Fisheries has an implementation role under s 15 of the Fisheries Act – they are required to take all reasonable steps to ensure that any MALFiRM set in a PMP is not exceeded. In addition the Minister of

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94 *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc*, above n 43, at [83].

Fisheries may take other measures to avoid, remedy, or mitigate the effect of fishing-related mortality on any protected species (in addition to a PMP or in the absence of a PMP).

[386] It is clear from the legislative history that the powers conferred on the Minister of Fisheries to impose FRMLs under s 15 of the Fisheries Act were intended to be subsidiary to actions taken under the Wildlife Act and MMPA. The Primary Production Committee report noted that it considered the PMP provisions to be the better way to set maximum mortality levels.[95]

[387] Measures taken under s 15 of the Fisheries Act are not a substitute, or alternative, for consideration of a PMP under the Wildlife Act or the MMPA. Steps under the Fisheries Act are intended to supplement or assist in the implementation of PMPs, or to be used in the absence of PMPs.

[388] I am sympathetic to the difficulties DOC encountered in the past when trying to initiate PMPs and I am not critical of the Department in looking to find ways that might achieve the same purpose, but without similar problems. However, although a summary of the consultations carried out as part of the 2010 review was published later that year, no legislative reforms were subsequently introduced, and no further steps were taken to consider or develop PMPs.

[389] In the absence of legislative change, DOC has in effect looked to work around the PMP provisions to find other ways of mitigating the impact on protected species. Without doubt some of the measures described by the DOC and Seafood Industry Representatives' witnesses have had positive impacts. I accept that, as DOC submits, while TMPs are not themselves mandatory, they are a mechanism by which decisions can be made that go on to be implemented under legislation. Once implemented, the regulations flowing from a TMP have statutory force and fishers are required to comply with those regulations.

[390] The Hector's and Māui dolphin threat management plan is an example of this.

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95 See [326] above.

[391] But while both the PMP and TMP processes may ultimately result in secondary legislation, there are significant differences. The setting of PMPs is for the Minister of Conservation, acting under conservation legislation. They have the specific purpose of protecting wildlife and marine mammals from harm (principally fishing related mortality). I agree with ELI's submission that PMPs are more mandatory in character than TMPs and are better suited to assist the conservation of vulnerable species and those requiring immediate action. A TMP, on the other hand, is a voluntary process, not provided for by any specific legislation. The Minister of Fisheries, acting under the fisheries legislation is, as previously discussed, subject to a different statutory purpose. The purposes of the three relevant pieces of legislation are not synonymous.

[392] The Seafood Industry Representatives' submission suggests that the onus in this proceeding was on ELI to explain what could have been achieved using a PMP (with a MALFiRM implemented under the Fisheries Act) that could not be achieved using other statutory mechanisms such as a FRML (also implemented under s 15 of the Fisheries Act). But that is a different question from whether the Minister of Conservation's policy not to initiate a PMP undermined or thwarted the purpose of the statutory PMP provisions. As the United Kingdom Supreme Court said in *RM v The Scottish Ministers*:[96]

> The fundamental flaw in the Ministers' argument is to assume that a failure to exercise a discretionary power can only be unlawful – or, to put the matter differently, to assume that an obligation to exercise a discretionary power can only arise – where the exercise of the power is necessary to make effective a legal right. That is too narrow an approach, as was made clear in *Padfield*, where the same argument was advanced and rejected. As Lord Reid explained in that case at p 1033, the case of *Julius v Bishop of Oxford* is itself authority for going behind the words which confer a statutory power to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in *Julius* at pp 222-223, "there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty".

[393] Effectively, the Seafood Industry Representatives invite me to conclude that other measures, such as TMPs, were more effective than a PMP would be. It is simply

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96 *RM v The Scottish Ministers*, above n 83, at [46].

not possible to make that comparison where there has been no PMP put in place. As counsel for ELI submit, it is a baseline of nothing.

[394] On this question I conclude:

(a) While DOC may have had valid concerns about the difficulties involved in implementing a PMP, the decision or failure to utilise the PMP provisions since 2009 do amount to a de facto policy against using that mechanism.

(b) Measures taken by the Minister of Fisheries under s 15 of the Fisheries Act and other steps to mitigate bycatch of protected species are supplementary to, but not directly substitutable for, PMPs.

(c) The failure to use PMPs has thwarted the intention of the Wildlife Act and MMPA provisions to have a statutory process, resulting in mandatory, statutorily enforceable limits on bycatch.

Interpretation of the "20-year rule"

[395] ELI says that DOC has incorrectly interpreted the reference to 20 years[97] as a cap, prohibiting the imposition of a PMP containing a MALFiRM for a threatened species where it could not be determined that the MALFiRM would return the species to a non-threatened state within 20 years, for whatever reason.

[396] The applicant says this is an overly narrow construction, given the context, history and purpose of the Wildlife Act and the MMPA. Such an interpretation is contrary to the purposes of that legislation, and would produce perverse results. It says the words "and in any event within a period not exceeding 20 years" must be illustrative only.

[397] ELI says the phrase does not impose a mandatory jurisdictional constraint, for two principal reasons.

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97 Wildlife Act, s 14G(a); and MMPA, s 3F(a).

[398] First, it says that what amounts to a non-threatened species (s 3F(b) of the MMPA and s 14G(b) of the Wildlife Act) is a matter for the Minister to determine in the exercise of their discretion under s 2(1A) of the Wildlife Act or s 2(3) of the MMPA. It is not a matter of fixed definition under the Act. In principle, the Minister could revoke a determination of threatened status at any time, provided they have regard to relevant international and domestic standards before doing so. Those standards are only factors to be taken into account, not statutory tests. This reality must inform the determination of MALFiRMs under s 14G(a) of the Wildlife Act and s 3F(a) of the MMPA.

[399] Second, even if "threatened status" in s 14G(a) of the Wildlife Act and s 3F(a) MMPA had a fixed definition and notices could only be revoked where a species no longer met the criteria for threatened status under particular international or national standards in any case, any interpretation of the words "achieve a non-threatened status as soon as reasonably practicable, and in any event within a period not exceeding 20 years" grounded in the literal text of the provisions would mean that PMPs containing MALFiRMs would not be available for some of the species most in need of protection. The applicant says that Parliament cannot have intended that PMPs should be available for some threatened species that could recover quickly, but not for those which are highly vulnerable, slow to mature, and/or face a combination of threats.

[400] ELI says that, considering the context and purpose of those sections in light of the general principles in s 10(1) of the Legislation Act 2019, s 14G(a) of the Wildlife Act and s 3F(a) of the MMPA must be interpreted as simply permitting the determination of MALFiRMs that would allow the species to achieve a non-threatened status as soon as reasonably practicable. The alternative would be to attribute an intention to Parliament that PMPs containing MALFiRMs should not be available for species that are "too far gone". That, the applicant says, would be wholly inconsistent with the purposes of the provisions.

[401] The Crown is not unsympathetic to the applicant's argument, but says that a purposive interpretation cannot be applied if it will do violence to the wording of the

statute.[98] The Crown says the wording means what it says, even though for many species this makes the provision difficult to achieve in a real-world setting. To construe the provision in the way advocated for by ELI would render redundant the words "and in any event within a period not exceeding 20 years".

[402] DOC relies on the intention and legislative scheme being to provide a different level of protection for threatened species and non-threatened species. This intention was achieved by having a different MALFiRM threshold for threatened species, where the restrictions on the fishing industry are in theory more severe and enabled more specific area closures. DOC suggests that the greater restrictions imposed on fishers where the aim is to enable recovery of a species more quickly, led to the cap of 20 years.

[403] Similarly, the Seafood Industry Representatives say that on a plain reading the criteria in s 14G(a) of the Wildlife Act and s 3F(a) of the MMPA are clear and unambiguous and link back to s 14(1)(f) and s 3E(f) respectively ("the maximum allowable level of fishing-related mortality for the species, in New Zealand fisheries waters, which would allow the criteria specified in section 14G/3F to be met:").

[404] The Seafood Industry Representatives say ELI's interpretation would effectively require the Court to strike a line through the italicised words in the phrase "as soon as reasonably practicable, *and in any event within a period not exceeding 20 years*". The words "and in any event" are directory, as are the words "within a period not exceeding 20 years". They are not illustrative of what is meant by "reasonably practicable". The purpose is to impose criteria, including a time period within which the MALFiRM should allow a threatened species to achieve non-threatened status. If this is not biologically achievable for some — even many — threatened species, that is a matter for Parliament to address.

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98 *Northland Milk Vendors Assoc v Northland Milk Ltd* [1988] 1 NZLR 530 (CA) at 537 per Cooke P. See also *Transpower New Zealand Ltd v Commerce Commission* HC Wellington CIV-2011-485-1032, 4 November 2011 at [17(c)].

Discussion

[405] The phrase "and in any event within a period not exceeding 20 years" has an apparently plain meaning, as urged by the respondents — that is, a "cap" of 20 years.

[406] But the words cannot be interpreted in a vacuum. The wider legislative scheme and the purpose of the provision is integral to understanding the meaning of the words. As s 10(1) of the Legislation Act mandates:

> The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

[407] The literal meaning of words in the statute does not automatically trump the purpose and context of the particular legislation.[99] As Tipping J said in *Commerce Commission v Fonterra Co-operative Group Ltd*:[100]

> even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5 [now s 10 of the Legislation Act 2019].

[408] As already discussed, the Wildlife Act and the MMPA have a protection and conservation purpose, respectively. The relevant sections in the Wildlife Act and the MMPA were inserted specifically to reaffirm DOC's responsibility for protecting and conserving protected species in the face of the impacts of commercial fishing.

[409] The explanatory note to the Fisheries Bill stated:[101]

> Attention is also drawn to the amendments set out in the *Sixth Schedule*. The Wildlife Act 1953, the Marine Reserves Act 1971, and Marine Mammals Protection Act 1978 are consequentially amended to protect species that may be caught by fishers as bycatch…

[410] When introducing the Fisheries Bill, the Minister of Fisheries said:[102]

> It is also proposed in this Bill that the Wildlife Act be amended to include marine species and that correspondingly its coverage be extended to the 200-

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99 *Hua v Department of Corrections* [2024] NZCA 59, [2024] 2 NZLR 204 at [32], citing *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32] and [41]; *Fuati v Jin* [2023] NZCA 165 at [81]; *Kiwi v Commissioner of Police* [2023] NZCA 106, [2023] 2 NZLR 776 at [106]; and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [88]–[94].

100 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

101 Fisheries Bill 1994 (63-1) (Explanatory Note) at VI.

102 (6 December 1994) 545 NZPD (Fisheries Bill 1994 – First Reading, Doug Kidd).

> mile limit. Amendments to both this Act and the Marine Mammals Act are proposed to allow the Minister of Conservation to establish maximum allowable levels of human-induced mortality for protected marine species. This is to be done through the development of population management plans. Such plans will also recommend the maximum allowable fishing mortality of protected species, which is a subset of the annual human-induced mortality. The Minister of Fisheries will be responsible for implementing any measures needed to ensure that the maximum allowable fishing mortality is not exceeded. These maximum levels of fishing mortality are to be set by the Minister of Conservation with the concurrence of the Minister of Fisheries.
>
> …

[411] The Production Committee's report on the Fisheries Bill explained the general intent of the PMP provisions in the following terms:[103]

> The Bill, as introduced, provided for the establishment of maximum allowable levels of fishing related mortality of protected species, and for these levels to be specified in Population Management Plans. These provisions are intended to improve the management of the bycatch of protected species.

[412] The Primary Production Committee also noted:

> To ensure that the total protection of marine species and areas continues, the Bill amends various conservation statutes to enable [DOC] to fulfil its role in the marine environment. These amendments include:
>
> …
>
> - amending the [MMPA] to allow the Minister of Conservation to establish [MALFiRMs] for protected marine species. This is to be done through the development of population management plans. Such plans will also recommend the maximum allowable fishing mortality of protected species…

[413] As the applicant submits, the apparently clear wording appears at odds with the overall purpose of the PMP provisions and the purpose of the Wildlife Act and the MMPA.

[414] There is no information available to suggest that the 20-year provision was based on any scientific assessment. That too supports the interpretation that 20 years is intended as a goal, rather than a cap.

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[103] Fisheries Bill 1996 (63-2) (select committee report) at XLIX.

[415] The submissions for DOC suggest that 20 years was intended as a cap because of the greater restrictions that would be placed on commercial fishers. That may well be a logical connection, but it is not a rationale that is explained in the legislation itself, or in the background materials.

[416] If the "20-year rule" is interpreted as a mandatory limit, it would (as the applicant submits) have no regard for the differences between species or the reason why a species could not be returned to non-threatened status within that period: whether that was considered to be so because of the particular breeding characteristics of the species, the precarity of its conservation status, threats other than commercial fishing bycatch, or a combination of these factors. I do not think such a perverse outcome was contemplated. When the words are read in light of their purpose, the more appropriate interpretation is that the words "*and in any event within a period not exceeding 20 years*" have no practical significance.

[417] As the Supreme Court noted in *Fitzgerald v R*:[104]

> Reaching a meaning different to the plain or ordinary meaning is a conventional outcome of statutory interpretation, where that is necessary to correct errors in statutory expression and to achieve clear legislative purpose. To use the words of Cooke P, there is a "general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose".

[418] I conclude that the Minister construed the words "as soon as reasonably practicable, and in any event within a period not exceeding 20 years", and therefore their power to approve PMPs, too narrowly.

Error of fact in the assessment of the biological ability of various species to meet the 20-year rule?

[419] As to the claim that DOC has made a material mistake of fact in assuming the 20-year criterion would render MALFiRMs biologically implausible for many species, there is a significant expert disagreement on this question, between the experts for DOC and those for the applicant.

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[104] *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [61] (footnotes and citations omitted).

[420] In its 2010 review report (referred to at [349] above), DOC said:

> DOC views this goal [20 years] as biologically impossible for many species due to the age at which sexual maturity is attained and the low fecundity rates of many species. For example, a typical albatross may not reach reproductive maturity until 10 years of age, may produce a maximum of one chick per year every two years, and may live to over 40. For such a species 20 years represents less than one average generation period. The proposals below will allow a meaningful, realistic assessment of any proposed MALFiRM.

[421] And in their evidence in this proceeding, all four of the DOC expert witnesses (Laura Boren, David Lundquist, Igor Debski and Clinton Duffy) considered that a fundamental issue with the PMP provisions is that it is biologically very difficult to move certain key species to being not threatened within 20 years, because of their long-lived nature and low reproduction rates.

[422] Their evidence is that marine mammals are long-lived species and, in general, the time it takes them to reach sexual maturity means that, even if all threats were removed, the threatened species would not be able to move to a non-threatened status within 20 years.

[423] The MALFiRM for threatened species is not biologically feasible for many seabirds. The biological characteristics of the most vulnerable seabirds, being long-lived, having delayed maturity and being slow to reproduce, mean that improvements at a population level resulted from reduced bycatch will be slow to manifest. For highly threatened species it is reasonable to expect recovery to take multiple generations and for species such as the Antipodean albatross, a single generation period is estimated to be longer than 20 years.

[424] For species such as leatherback turtles and highly migratory sharks, the inability to address the human-induced mortality occurring outside Aotearoa New Zealand waters means it would be difficult, if not impossible, to ensure the 20-year target could be met. The low biological productivity of these species means recovery to non-threatened status would likely take longer than 20 years, even with very low levels of fishery related mortality.

[425] Dr Godoy and Dr Borrelle, for the applicant, accept that it would be difficult for a PMP containing a MALFiRM to return vulnerable species of seabird and the leatherback turtle to a non-threatened status within 20 years, but consider this to be possible. Dr Constantine's view is that PMPs containing MALFiRMs could return the Māui and Hector's dolphin species and populations to non-threatened status within 20 years, if coupled with other efforts to reduce human sources of mortality to these species.

[426] In *Bryson v Three Foot Six Ltd*,[105] the Supreme Court clarified that mistake of fact was to be treated as a manifestation of "error of law". The Court said an applicant seeking to rely on a mistake of fact "faces a very high hurdle".[106]

[427] The alleged fact must have played a material part in the decision-maker's reasoning.[107]

[428] The Court's jurisdiction relates only to demonstrable errors of law. As the Court of Appeal said in *New Zealand Fishing Industry Assoc v Minister of Agriculture and Fisheries*:[108]

> … to jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion; and that it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may be reasonably held.

[429] While here there are some overlaps and some concessions made by various of the expert witnesses, ultimately the Court is left with legitimately held, but differing views as to whether it is possible to return certain species to a non-threatened status within 20 years. It cannot be said here that there is a demonstrable error of fact on which the Court could act.[109]

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105 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

106 At [27].

107 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] 1 QB 1044 at [66]; and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [92].

108 *New Zealand Fishing Industry Assoc v Minister of Agriculture and Fisheries* [1998] 1 NZLR 544 (CA) at 552, cited in *ANZ Sky Tours Ltd v New Zealand Tourism Board* [2019] NZHC 925, [2019] NZAR 951 at [67].

109 *Ririnui v Landcorp Farming Ltd*, above n 20, at [76], [98] and [110]; and see generally Taylor, above n 54, at ch 15.

Can a PMP contain a MALFiRM for species not declared to be threatened?

[430] A PMP may be approved for a "threatened" species, or "other species of marine wildlife". "Threatened species" is not defined per se. It means any marine wildlife that is for the time being declared by a notice under s 2(1A) of the Wildlife Act to be a threatened species. Section 2(1A) provides that the Minister of Conservation, after having regard to any relevant international standards and any relevant standards applying within Aotearoa New Zealand, may from time to time, by notice, declare any species of marine wildlife to be a threatened species for the purposes of the Act. A declaration under subs (1A) is secondary legislation.[110]

[431] ELI argues that whether a species is "threatened" is a matter for the Minister to determine in the exercise of his or her discretion. As at the date of hearing, only two species of marine mammals and no species of marine wildlife had been declared to be threatened. All other species are not threatened for the purposes of the Wildlife and the MMPA.

[432] The applicant says that it is open to the Minister to make PMPs containing MALFiRMs for vulnerable species which have not been declared to be threatened, under s 14G(b) of the Wildlife Act or s 5F(b) of the MMPA. Under those provisions the Minister may set a MALFiRM at a level which should:

> … neither cause a net reduction in the size of the population nor seriously threaten the reproductive capacity of the species.

[433] ELI says there is no real dispute that maintaining the level of a relevant population is substantially easier to achieve than the 20-year provision (however that is interpreted). The applicant's evidence is that PMPs containing MALFiRMs which would not cause a net reduction in the population of the species could have been set for a wide range of vulnerable species, although noting that under s 14H of the Wildlife Act and s 3G of the MMPA, MALFiRMs for species other than "threatened species" cannot be area based. The applicant's experts maintain that Aotearoa New Zealand-wide MALFiRMs could still be valuable policy tools.

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110 Section 2(2).

[434] The experts are agreed that, under the NZTCS, there are four key categories for resident species (data deficient, threatened, at risk and non-threatened). The DOC experts have considered the 20-year rule on the basis that "threatened" under the Wildlife Act and the MMPA would likely equate to "threatened" under the New Zealand Threat Classification System (NZTCS).[111] The parties' experts agree the NZTCS is the key classification framework used (sometimes in combination with the International Union for the Conservation of Nature (IUCN) Red List) for assessing a species' status. The relevant provisions in the Wildlife Act and MMPA must also rely on the NZTCS and IUCN Red List by referring to relevant international and domestic standards.[112]

[435] The respondents say it is not clear whether the applicant considers "threatened" under the legislation must equate to threatened under the NZTCS or can include those species that are at risk.

[436] While acknowledging the difficulties in a achieving the 20-year MALFiRM test, DOC says the factual difficulty in achieving the MALFiRM cannot mean deliberately avoiding the wording and intent of the Act, by not first fixing the relevant species with an appropriate status to recognise their population level.

[437] Similarly, the Seafood Industry Representatives say that ELI's proposal would amount to DOC inappropriately seeking to evade the clear wording of the Act.

[438] In summary, the practical difficulties in achieving the MALFiRM cannot allow DOC to circumvent the 20-year criteria for threatened species by considering it non-threatened; that would be to deliberately avoid the wording and intent of the Act.

Discussion

[439] In light of the finding above on interpretation of the "20-year rule", it is not strictly necessary to consider this aspect of the applicant's claim, but I do so for completeness.

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111 "Threatened" includes nationally critical, nationally endangered, nationally vulnerable and nationally increasing.

112 Section 2(3) of the MMPA and s 2(1A) of the Wildlife Act.

[440] As discussed earlier, Parliament intended that the PMP process would distinguish between threatened and non-threatened protected species, placing more stringent criteria on threatened species.

[441] I agree with the respondents that the appropriate legal starting point for any PMP process must be to ensure the species is appropriately classified under the Act, given it relies on the NZCTS for that basis and because the later tests for MALFiRM anticipate such decisions have been made. It would be unlawful to remove that classification unless and until the species was no longer threatened.

[442] It would be an inappropriate use of DOC's powers (and possibly an improper purpose) to effectively circumvent the 20-year criterion (if the respondents' interpretation of that criterion were to be upheld) by effectively pretending that a species was not threatened (and not declaring it as such) when it was threatened — that is, classified as vulnerable for the purpose of the NZTCS.

[443] I dismiss this aspect of the applicant's claim.

Mandatory relevant considerations

[444] Finally, in relation to PMPs, the applicant says when deciding whether to put in place a PMP there has been a failure to consider a mandatory relevant consideration, being fisher reported data pursuant to s 63B of the Wildlife Act and s 16 of the MMPA.

[445] ELI points to DOC's failure to receive complete reports under s 63B(1) of the Wildlife Act and s 16(1) of the MMPA (as pleaded in relation to the fourth, fifth, seventh and eight causes of action) and says that has meant a failure to consider relevant materials (data), when deciding whether to put a PMP in place.

[446] ELI also notes that DOC has not been regularly receiving NFPS reports submitted to FishServe since 2008. Until relatively recently, NFPS data was provided only annually, in summary form, or in response to ad hoc requests.

[447] ELI says that s 14I(i)(a) of the Wildlife Act and s 3H(1)(a) of the MMPA do not expressly set out the factors that the Director-General must consider when

preparing a PMP. Sections 14I(1)(m) and 3H(1)(m) permit the Minister of Conservation when deciding whether ultimately to approve a PMP to take into account such other matters as they consider to be relevant.

[448] ELI says that, by situating the PMP provisions within the Wildlife Act and MMPA, it can be inferred that Parliament considered that DOC would have available to it the information required to be submitted under s 63B of the former and s 16 of the latter, to enable it to make informed decisions about measures to address the effects of commercial fishing on protected wildlife.

[449] Failure to put in place systems to receive s 63B(1) or s 16(1) reports, inevitably led DOC and the Minister to fail to take into account mandatory material considerations when deciding what mitigation options to put in place and discounting the possibility of implementing PMPs.

[450] In response, the respondents say that even if s 63B and s 16 data is a mandatory consideration, that cannot mean a decision is flawed simply because the dataset obtained under those provisions might be said to be incomplete. The mandatory consideration will be to ensure the decision is made on the best available information existing at the time.[113] A limited subset of data does not mean a failure to have regard to a mandatory consideration.

[451] There are multiple sources of information available, with observer data being the most robust.

[452] On ELI's argument, it would be prohibitively difficult for DOC to ever initiate a PMP process and, ironically, the applicant's submission would impede the ability to access the PMP provisions.

[453] The Seafood Industry Representatives agree with DOC that, while the NFPS data may be relevant, it is of permissive relevance only and is not a mandatory relevant consideration. Decisions should be made on the best available information — here,

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113 *New Zealand Federation of Commercial Fishermen Inc v Ministry of Fisheries* [2010] NZHC 54 at [40].

the evidence of the DOC scientists and the applicant scientists is that data from observers is the most robust. Data from NFPS catch reports is compiled in MPI's catch and effort database which at all times has been available to (and used by) DOC scientists and managers.

Discussion

[454] As I concluded in relation to the fourth, fifth, seventh and eighth causes of action, DOC has not received complete reports under s 63B(1) or s 16(1), addressing instances of the killing of or injury to protected species.

[455] Nor, as I concluded, did DOC regularly receive NFPS reports submitted to FishServe since 2008. Until recently that data was only provided annually in summary form or in response to ad hoc requests.

[456] In the Court of Appeal's decision in *CREEDNZ*, Cooke J said:[114]

> …it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid [on the ground of failing to consider a relevant consideration].

[457] Here, s 14I(1)(a) of the Wildlife Act and s 3H(1)(a) of the MMPA do not expressly set out the factors that the Director-General of Conservation must consider when preparing a PMP. But s 14F(1)(b) and (c) of the Wildlife Act and s 3E(1)(b) and (c) of the MMPA are relevant. These provisions state that "an assessment of any known fisheries interaction with the species" and "an assessment of the degree of risk caused by fishing-related mortality" are matters that may be contained in a PMP. The reporting of accidental or incidental death or injury caused in the course of commercial fishing (under s 63B(1) of the Wildlife Act and s 16(1) of the MMPA) is plainly relevant to those provisions and, in my view, that information is impliedly identified by the statute.

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[114] *CREEDNZ Inc v Governor-General*, above n 82, at 183; and *W v Counties Manukau Health Ltd* [1995] 2 NZLR 560 (HC). Reiterated by Cooke P in *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 33.

[458] DOC's reliance on *New Zealand Federation of Commercial Fishermen Inc v Ministry of Fisheries* to argue that it was required to have regard only to the best available information at the time, is inapt, given that the information ELI says was relevant but lacking, was (as I have found) not available because of DOC's own oversight or failure to recognise what was required by the Wildlife Act/MMPA reporting obligations and to ensure implementation of a system that allowed for that reporting. If ELI had been in a position to seek review of a specific decision, I would have concluded that reports under s 63B of the Wildlife Act and s 16 of the MMPA were mandatory relevant considerations. However, for the reasons noted at [371] above, this judicial review is a challenge to a general failure to exercise the discretion to introduce a PMP. In those circumstances, where there is no specific decision-making process being scrutinised, I do not think I can conclude that the Minister failed to take account of a mandatory relevant consideration.

Taking into account irrelevant factors

[459] ELI also submit that DOC had regard to an irrelevant consideration (the potential difficulty in monitoring compliance of MALFiRMs under PMPs) when considering whether to initiate a PMP. It refers to evidence from some of the defence witnesses as to the potential difficult of monitoring compliance with PMPs, given the limits of existing fishery observer coverage.

[460] ELI says, first, that this does not reflect a contemporaneous assessment by DOC or the Minister about the feasibility of enforcing any particular PMP for any particular species, at a particular point in time. Rather it appears to inform a general reluctance on the part of DOC or the Minister to consider PMPs.

[461] Further, ELI says that a general reliance on the limits of existing observer coverage is, on its own, an irrelevant consideration, because observer coverage is something that is entirely within the Crown's control. The Crown could appoint more fishery observers and use existing mechanisms to recover the associated costs from the fishing industry if it considered that to be necessary.

[462] ELI accepts that, when considering whether a PMP is appropriate for a particular species at a particular time, the Crown may legitimately consider the ability

of monitoring compliance with the MALFiRM. However, if it determines there would be difficulties, it must also consider the appropriateness of investing additional resources in monitoring to achieve the conservation objectives of the PMP and MALFiRM. It must ask itself the right question.

[463] In response, the Crown says that the evidence does not support a conclusion that potential difficulties of monitoring compliance with PMPs have influenced a decision by the Director-General to not initiate the PMP provisions. It notes that the rollout of cameras on boats, together with the increasing sophistication of sharing data with MPI, will assist with future statutory decisions.

Discussion

[464] It appears that the applicant relies on the evidence of Ms Clemens-Seeley, who records that DOC has limited ability to monitor against bycatch limits, should one be set. "In particular, there is limitation in observer coverage and fisher reported data can be unreliable, therefore it could be difficult to robustly monitor when a bycatch limit was met". Ms Clemens-Seeley does go on to note that the rollout of cameras on boats may change that ability to monitor against bycatch limits in the future.

[465] That general observation does not provide a sufficient evidential basis on which the Court could conclude that this difficulty was a material factor in the Director-General deciding not to implement the process for a PMP. In any event, it is not for the Court to involve itself in the question of what resource should be applied to monitoring compliance.

Relief

[466] In respect of the sixth cause of action, against the second respondent, I grant:

(a) a declaration that the refusal or failure of the Director-General of Conservation to prepare and present any PMP to the Minister of Conservation for approval under s 14I of the Wildlife Act since July 2009 was unlawful; and

(b) a declaration that s 14G(a) of the Wildlife Act does not prohibit the inclusion of a MALFIRM as part of a PMP where a threatened species could not achieve a non-threatened status within 20 years or if no fishing-related mortality was permitted.

[467] In relation to the ninth cause of action, against the second respondent, I grant:

(a) a declaration that the refusal or failure of the Director-General of Conservation to prepare and present any PMP to the Minister for approval under s 3H(1) of the MMPA since 1 October 1996 was unlawful; and

(b) a declaration that s 3F(a) of the MMPA does not prohibit the inclusion of a MALFIRM as part of a PMP even where a threatened species could not achieve a non-threatened status within 20 years or if no fishing-related mortality was permitted.

[468] I decline to grant the third declaration sought, that whenever a species has not been declared to be a "threatened species" under s 2(1A) of the Wildlife Act or s 2(3) of the MMPA, the Director-General of Conservation may prepare and the Minister of Conservation may approve a PMP containing a MALFiRM which should neither cause a net reduction in the size of the population nor seriously threaten the reproductive capacity of the species under s 14G(b) of the Wildlife Act or s 3F(b) of the MMPA, respectively, provided the other requirements of ss 14E–I of the Wildlife Act and ss 3E–H of the MMPA are met.

[469] I decline to grant an order in the nature of mandamus requiring the Director-General of Conservation to consider whether to prepare any PMPs under s 14I of the Wildlife Act or s 3H of the MMPA. I accept the submission for the Crown respondents that such mandatory relief would be too general (for example, it is unclear to which marine species it would relate) and would require an inappropriate level of ongoing supervision by the Court.[115]

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115 *Bleakley v Environmental Risk Management Authority* (2005) ELRNZ 289 (HC) at [41].

[470] I also accept that, in light of the Court granting the declaratory relief set out above, the Crown will have regard to those orders and the Director-General will take the orders into account in making appropriate discretionary decisions in the future.

Costs

[471] The applicant is entitled to costs. If the parties are unable to reach agreement, they have leave to file memoranda (not exceeding five pages each) by 14 February 2025.

Gwyn J

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