IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 86/2018
[2019] NZSC Trans 3

BETWEEN **Shark Experience Limited**
Appellant

AND **PauaMAC5 Incorporated**
First Respondent

Attorney-General
Second Respondent

Shark Dive New Zealand Limited
Third Respondent (Abiding)

Hearing: 26 March 2019

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: S J Grey and S Elliott for the Appellant
B A Scott and S R Roberts for the First Respondent
J M Prebble and D Watson for the Second Respondent

CIVIL APPEAL

MS GREY:

May it please Your Honours, Ms Grey with Mr Elliott for the appellant.

WINKELMANN CJ:

Ms Grey and Mr Elliott.

MR SCOTT:

May Your Honours please, counsel's name is Scott. I appear for the first respondent with my friend, Ms Roberts.

WINKELMANN CJ:

Ms Roberts.

MR PREBBLE:

E ngā Kaiwhakawā, tēnā koutou. Ko Prebble ahau. Kei kōnei māua ko Ms Watson, mō te Whakahē Tuarua. May it please the Court, Prebble and Ms Watson for the second respondent.

WINKELMANN CJ:

Thank you, Mr Prebble. Ms Grey. Ms Grey, a preliminary matter is we have the application, respondent's application, to adduce further evidence.

MS GREY:

Yes, Ma'am.

WINKELMANN CJ:

And that's opposed by you?

MS GREY:

The appellant's position, Ma'am, is that it's not particularly relevant. It's accepted by the parties that it is a live issue but the actual details of that application submitted are not relevant. However, we don't take a strong view one way or the other.

WINKELMANN CJ:

All right. We'll just receive the evidence de bene esse.

MS GREY:

Thank you, Ma'am. So the question for the appeal today is whether the Court of Appeal was correct to hold that shark cage diving is an offence under section 63A of the Wildlife Act 1953 and the appellants have summarised their arguments in a three-page document which I understand Your Honours do have before you.

WINKELMANN CJ:

Yes.

MS GREY:

Thank you, Ma'am. The legal issue is largely a question of statutory interpretation issues superimposed on that and it relates to the interpretation of "hunt or kills" in section 63A of the Wildlife Act and the same section applies in section 63 in relation to terrestrial wildlife, so although the issue is particularly in relation to shark cage diving, it also applies to native birds and other native wildlife.

And the two alternate views are the view adopted by the High Court which my client prefers which is a narrower view where the definition of "hunt or kill" in section 2 of the Wildlife Act relates back always to hunt or kill and the more expansive interpretation adopted by the Court of Appeal which doesn't relate back necessarily to hunt or kill, and that's the two interpretations that we need to look at today.

And it's probably helpful to turn to the Wildlife Act into section 2, "hunt or kill", and just look at the definition, and the appellant's submission is that "hunt or kill" means what it says. It's a definition with three subclauses. The first subclause is actual hunt or kill, in relation to any wildlife, including the hunting, killing, taking, trapping, or capturing of any wildlife by any means, and I think that's reasonably straightforward and it's not in issue for this case. The second subclause is the subclause that's in issue, so includes pursuing, disturbing, or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing and capturing or

not, and then the third subclause, which again is not in issue in this case, relates to attempts to hunt or kill and to every act of assistance of any other person to hunt or kill.

And the crux of the case for the appellant is that all three parts of that definition relate back to hunt or kill, and so there's many activities where walking in the bush or feeding the ducks may disturb wildlife in the very broad sense but if they're not done to hunt or kill they're not within the definition of the Wildlife Act.

So that's the primary position for the appellant, and the submission is that that narrower interpretation of hunt or kill fits with the statutory scheme, it fits with the purpose of the Act, it fits with the language throughout the Act, the defences throughout the Act, and it also fits with widely accepted constitutional principles of law.

The permit that was originally issued for shark cage diving was issued with the wording "to attract wildlife". Now attracting wildlife is not within the definition of hunt or kill and it's submitted that for the Department of Conservation at that stage accepted that disturbing wasn't part of what was being done, they chose to issue the permit to hunt to attract wildlife and that was with the use of baits and what's known as berley which is a fine minced feed to encourage sharks to come closer to shark cage diving so that the people inside the cage can watch.

There is a difference between the parties as to the actus reus of hunt or kill and what type of mental element applies to hunt or kill. The appellant says that the language itself that's chosen by Parliament in the definition of "hunt or kill" is language which implicitly carries an intent in that language.

WILLIAM YOUNG J:
Well, it's true of some of it, undoubtedly.

MS GREY:

Yes.

WILLIAM YOUNG J:

Hunt, having a dog with the intention of hunting or killing, must be a purposive offence.

MS GREY:

Yes, Sir, and the word "hunt" itself –

WILLIAM YOUNG J:

Disturb, not necessarily so much.

MS GREY:

And my submission, Sir, is hunt, pursue and molest are all words that clearly do incorporate some intention into the word. "Disturb" can be read so as to incorporate some intention. For example, the example used in section 63A of the Wildlife Act which refers to disturbing a nest. So that's an example of where you can't really accidentally disturb a nest by scaring the nest.

WINKELMANN CJ:

Or in accordance with conventional criminal law you intend to disturb. That's a mens rea element.

MS GREY:

Yes, Ma'am, but the difficulty in this case is because the Wildlife Act is, at least parts of the Wildlife Act are public welfare type offences, there are certainly some offences where strict liability has definitely been excluded. There are some offences where it is, where mens rea is required and sections 63A, unfortunately, and 63B are silent because the section that deals with mens rea excludes sections 63A and 63B from the whole section about whether you require mens rea or not.

WILLIAM YOUNG J:

So we construe the Act, construe section 63A as if section 68AB were not there?

MS GREY:

That's correct, Sir, section 63AB(3), and my submission is that that applies to the definition of section 63A and also to the defences under section 63AB which my friends have relied on those defences. My submission is that because of section 63AB(3) we can't rely on the defences in section 63AB either.

WINKELMANN CJ:

68AB or 63?

MS GREY:

I'm sorry, Ma'am, 68AB.

WILLIAM YOUNG J:

68B does apply though.

MS GREY:

68B does apply, Sir, yes.

WINKELMANN CJ:

So you submit that the section 68AB(6) disapplies the entirety of the rest of section 68AB?

MS GREY:

In relation to those offences under section 63A, yes, Ma'am.

WINKELMANN CJ:

So it tells us nothing about whether or not it's strict liability or not?

MS GREY:

Yes, Ma'am, we go as if that section wasn't there and we read the other cues from the Act, and that's…

WINKELMANN CJ:

Would you say then that that means 63A and B are a separate code, if you like?

MS GREY:

Yes, effectively, Ma'am, I would say that, and sections 63A and B clearly do go together. They were incorporated at the same time, so section 63A is the offences and section 63B are the defences that go with those marine wildlife offences.

And so there is quite some discussion in my friends' submissions and in the Court of Appeal decision about whether the offence is strict liability or not. In my submission that is not at the crux of the issue. The crux of the issue is whether attracting wildlife or disturbing wildlife without an intention to hunt or kill is an offence under the Act and whether the activities that are related to shark cage diving, whatever the Court of Appeal may have meant were those activities, whether those activities amount to hunt or kill in terms of the Act.

WINKELMANN CJ:

Because you accept you intend to disturb the sharks by attracting them to the shark cage.

MS GREY:

Well, no, Ma'am, my clients don't accept that they intend to disturb the sharks in the sense that we say that "disturb" is used in the Act which we say is the –

WINKELMANN CJ:

Yes, that's left to one side, but just in the common sense use of the word, common use of the word, if you just isolate the word "disturb" you accept that

you're intending to cause them to deviate from their usual path and come to the cage.

MS GREY:
It's accepted that it may cause some sharks to deviate and clearly that is the hope that some sharks will deviate.

WINKELMANN CJ:
Well, that's why berley is used.

MS GREY:
Yes, Ma'am. But the crux of the argument is that whilst wildlife are absolutely protected under the Act, they're absolutely protected from hunt or kill, they're not absolutely protected from every interaction with humans.

GLAZEBROOK J:
Is there a middle ground there in terms of – and I say just to start with I found the idea of "pursuing" including "attracting" an odd one because "pursuing" doesn't seem to mean "attracting" to me. "Disturbing", that could actually do that, but whether "disturbing" means something more than a temporary disturbance and means something that is more long-term, assuming that it isn't, that we don't accept your primary submission being that it has to relate to hunting or killing.

MS GREY:
Yes, Ma'am, and I agree with that, Ma'am, and that was my argument in the High Court, with Judge Clark in the High Court, that disturbing is in the sense of section 63A(3), robs, disturbs, or destroys, or has in his possession any nest. It's more in that sense of physically, intentionally moving a nest or moving eggs rather than in the more looser sense of disturbing where you're going for a walk in the bush and a bird gets a little bit scared and flies away.

GLAZEBROOK J:

So it's not a – that "disturbed" can mean "wake something up and make it fly away" but your submission would be it means something – if it doesn't mean what you're suggesting, it does mean something more than merely temporarily upsetting the normal pattern?

MS GREY:

Yes, Ma'am, exactly, yes.

WINKELMANN CJ:

Something like picking up the snails and moving them?

MS GREY:

Yes, exactly, a physical disturbance that's got some consequence, and my reason for saying that is to say that any disturbance of any wildlife would amount to an offence under this Act would make a wide range of common activities illegal, whether it was done with any intent or not. Feeding the ducks in the park, putting a –

WILLIAM YOUNG J:

Sorry, is that because the ducks are protected outside the shooting season?

MS GREY:

Yes, Sir. The ducks, whether it's absolutely protected wildlife, partially protected wildlife or game, it's still an offence under section 63 which is the parallel sister offence for terrestrial wildlife, it's still an offence to hunt or kill. There are different penalties but it's the same wording of the offence.

GLAZEBROOK J:

Can you just take us to that just so that we have got it totally within our mind?

MS GREY:

Yes, absolutely, Ma'am. Section 63 of the Wildlife Act and at section 63(1), "No person may, without lawful authority, hunt or kill any absolutely protected

or partially protected wildlife or any game," and the offence that goes with that is – the penalty that –

WILLIAM YOUNG J:
So a duck is game?

MS GREY:
Yes, it is, Sir, yes. A duck is game and things like fantails and tuis and all the native birds are absolutely protected wildlife along with –

WILLIAM YOUNG J:
So feeding tuis…

MS GREY:
Would be an offence under section 63 if the interpretation adopted by the Court of Appeal is adopted.

WILLIAM YOUNG J:
Well, it would be a slightly tougher – it would have to – on the interpretation of the Court of Appeal there'd have to be some risk of harm. But it is likely to result in a deviation from usual practice for the bird?

MS GREY:
Yes, you're attracting the birds into your garden, you're giving – with a bird bath or with some kind of food. My submission is that whether you're looking at white pointer sharks or bellbirds or tuis or fantails, it's the same statutory language and there's almost the same offences.

ELLEN FRANCE J:
Just while we're looking at 63 and 63A, the heading of both is "Taking" and so that takes you back to the definition of "taking", doesn't it –

MS GREY:
Yes, Ma'am.

ELLEN FRANCE J:

– which does include taking, catching or pursuing by any means or device?

MS GREY:

Yes, Ma'am, and it's language that's generally used in the Fisheries type legislation, "taking" in the sense of trying to catch fish, but it has got also used in the Conservation of Migratory Species Convention which is the Convention that led to white pointer sharks being added to the Wildlife Act.

ELLEN FRANCE J:

And just remind me then, in the Convention, what's the concept of "take" there?

MS GREY:

I can turn you to the Convention. It is under tab 12 of the appellant's authorities, and the crux of that Convention of the Conservation of Migratory Species is to protect them, "Must be conserved for the good of mankind," recognising that these species travel between different countries, and conscious of the ever-growing value of wild animals from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view, concerned that these species migrate across boundaries, that the States are and must be protectors of the migratory species of wild animals that live within and pass through the national jurisdictional boundaries, and the crux I, my submission is Article II, Fundamental Principles, "The parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible," and Article II(2), "The Parties acknowledge the need to take action to avoid any migratory species becoming endangered."

WINKELMANN CJ:

But "taking" there, am I right, does include harassing or attempting to engage in any such conduct? So if you go back to Article I(i).

MS GREY:

Yes, Ma'am, I agree with that, it is a wider definition although it doesn't include disturbing which takes us back to the, where is the threshold, and my submission when you read the entire Convention the purpose is to protect those species from becoming further endangered. It's not to avoid any interaction with those species, and –

GLAZEBROOK J:

The word "harassing" could be seen as a strong form of disturbing and therefore might be a clue to what sort of disturbance might be being thought about.

MS GREY:

Disturbing. Yes, Your Honour, yes, I agree with that.

WINKELMANN CJ:

Because harassing an animal can cause it harm, can't it, as we know?

MS GREY:

It could, yes, it could cause it harm.

GLAZEBROOK J:

And in fact sometimes can immediately or eventually lead to death as well.

MS GREY:

Yes, if it was constantly chased in a repeated way or something more active.

GLAZEBROOK J:

Yes.

MS GREY:

Of course, my submission with the shark cage diving, the people are in the cage, the sharks are free to come and go, and the evidence before the Court is that most of the sharks take little if any notice at all of the cage. A few of them come past relatively frequently. Many of them come past once and

they're never seen again. But there's no predictable pattern between what the different sharks do. The sharks have got their own personalities, it seems, and they do their own thing and they're free to do that.

WINKELMANN CJ:
But you have bait, don't you?

MS GREY:
There's bait, yes, Ma'am, but the submission there is bait much like fishing and the same principle applies although in case of fishing there's a large number of baits. Shark cage diving, there are – under the code that was agreed between the parties and the Department of Conservation only one bait per day can be used, and once – if that bait accidentally gets taken by the shark, they can't use another bait.

WINKELMANN CJ:
So the hope is, one assumes, that the sharks are going to come and bite that bait.

MS GREY:
No, the hope is that the –

WILLIAM YOUNG J:
It's not, I think.

MS GREY:
The hope is the sharks will come and swim past.

WILLIAM YOUNG J:
But not get the bait?

MS GREY:
But not get the bait because once the bait –

WINKELMANN CJ:

Well, so, try and bite the bait, one assumes?

MS GREY:

Yes, once the bait is gone for the day then you're in the lap of the gods whether any more sharks happen to swim past, but there's no more ability to try and attract the sharks and that was part – my learned junior will cover that side of points but on the – the submission is that even if there is some form of disturbing, the risk of harm is so minimal because of the code of practice which is designed to avoid any harm, so that any harm from shark cage diving is negligible compared to, for example, harm from fishing, and the equipment used for shark cage diving is designed to avoid any chance of the sharks being caught because the – although there is one bait allowed per day, it's on a line that will just break. It's impossible to catch the shark and bring the shark in.

Turning onto the statutory scheme –

WINKELMANN CJ:

So have we dealt with the language, because I had a question about the language?

MS GREY:

Yes, yes, I'm sorry, Ma'am, yes.

WINKELMANN CJ:

You assume that that second clause is all one but the respondents make the point against you that actually that second clause is logically read as divided into two parts.

MS GREY:

Yes, Ma'am, my submission is it's all in the semicolons and there are three subclauses in that definition, and although the second clause has got – you could read it as two parts. It's all within the semicolon, and the entire of the

second clause is subject to “to hunt or kill”, and my submission is there’s no other way of reading that second clause that gives, has regard to the punctuation and the way it’s set out. If there had’ve been an intent to have “pursuing, disturbing or molesting wildlife” standing alone, there would have been another semicolon and there would have been four subclauses, but Parliament hasn’t chosen to do that.

WILLIAM YOUNG J:

Well, in the second section “hunt or kill” must have its ordinary meaning. It can’t have the statutory meaning because otherwise it’s entirely circular.

MS GREY:

Yes, and it is a difficult Act to start with and –

WILLIAM YOUNG J:

But it is, I mean, you really have to rely on a slightly non-literal approach to the wording because word for word the submissions against you are right, that the words, it’s a matter of grammar, “to hunt or kill”, applied to “taking or using a firearm, dog, or like method”. Now you can rely on, is it, noscitur a sociis, that you look at words like this by reference to the whole thing and you draw some support, I suppose, from the context.

MS GREY:

Yes, Sir, my submission that that second subclause includes pursuing, disturbing, or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not, so –

GLAZEBROOK J:

So you actually say, if I can just understand the submission, you say it also includes pursuing to hunt or kill wildlife whether this results in… So you would, rather than reading, “Using a firearm, dog, or like method to hunt or kill wildlife,” you would say that there isn’t an Oxford comma there effectively, but

there doesn't need to be an Oxford comma, that actually the "to hunt or kill wildlife" at the end relates to each of those words individually?

MS GREY:
Yes, Ma'am.

GLAZEBROOK J:
So grammatically you would say you're right and they're wrong?

WILLIAM YOUNG J:
Obviously you can. I mean people, as Justice Glazebrook has implied, you can get sort of hung up over commas, but I guess you could read –

GLAZEBROOK J:
The "to hunt or kill" –

WILLIAM YOUNG J:
– "or like method to hunt or kill wildlife" relates back to pursuing, disturbing, molesting, is the point.

GLAZEBROOK J:
Yes, to each word. It qualifies each word. The "to hunt or kill wildlife" qualifies each word. It doesn't just qualify the "using a firearm, dog, or like method".

MS GREY:
Yes, Ma'am, and I think –

GLAZEBROOK J:
So it could be reading, "Pursuing to hunt or kill wildlife, disturbing to hunt or kill wildlife, molesting to kill or hunt wildlife"?

MS GREY:
Yes, yes, exactly, Ma'am, and the comma that's in the middle between method to hunt or – where is it – "Molesting any wildlife," comma, "taking or using a firearm," I think those commas have to be there. You can't read the

sentence without the commas. I don't read any intention into where the commas are other than to help us physically differentiate between the words, but the semicolons are clearly significant.

O'REGAN J:

But the "or" before "molesting" seems to mean that those three words are all in one category and then the comma after "wildlife" suggests that "taking or using a firearm, or like method," is a different category and that's the bit that's qualified by the "hunt or kill".

MS GREY:

Yes, and my submission on that, Your Honour, is that pursuing, disturbing, or molesting are all verbs you may do in relation to wildlife and in relation to hunting or killing wildlife. The others are a slightly different type of action with a firearm, with a dog, with some other equipment.

WINKELMANN CJ:

Have you looked at the use of the expression "hunt or kill" in other Acts, because in the Animal Welfare Act 1999 it's referred to as – it's defined as, "Hunt or kill, in relation to animals, includes," and it separates out, "Hunting, fishing, or searching for any animal and killing," and in a separate subclause says, "Pursuing or disturbing any animal."

MS GREY:

Yes, and the –

WINKELMANN CJ:

Same approach in the Wild Animal Control Act 1977.

MS GREY:

Yes, and also I've looked, there is quite a lot of legislation that overlaps. The National Parks Act 1980, the Reserves Act 1977, the Conservation Act 1987 which respectively applied to taking type activities in national parks, in reserves and in Conservation land. So the Wildlife Act is a sort of backstop

legislation that covers all of the locations whereas the National Parks Act specifically prohibits the take, destroy or wilfully injuring or –

WINKELMANN CJ:
If you just pause for a moment. What my point is, my point is in these other Acts "hunt or kill" has separated out simply as including pursuing or disturbing any animal.

MS GREY:
Yes, and it's so a wider definition of "hunt or kill" than we have in the Wildlife Act.

WINKELMANN CJ:
Well, on one view, but on the other view it's actually simply the same words just slightly organised differently.

MS GREY:
Yes.

WINKELMANN CJ:
And the same suite of Acts really, because Wild Animal Control Act as well.

MS GREY:
But my submission on that, Ma'am, is that we do have to look at the definition in this Act. This is quite an old Act and it was specifically – the purpose of the Wildlife Act was to set up regimes for hunting wildlife and for hunting game and so that, in my submission, explains why Parliament may have related those definitions back to game. When the Act was set up, its purpose probably wasn't envisaging great white shark cage diving. It was envisaging hunting ducks and those type of animals. Since then we've had a whole series of other Acts that have provided additional protections in more specific precise language for a whole range of similar activities in national parks and reserves, on Conservation land and marine reserves.

WINKELMANN CJ:

It sort of goes a little bit to your argument, though, that it's illogical to include these things which aren't hunting and killing within the definition of hunting and killing because that has been done in other Acts.

WILLIAM YOUNG J:

What's that? Wild Animal Control?

WINKELMANN CJ:

Wild Animal Control Act and the Animal Welfare Act 1999. The Animal Welfare Act is 1999 and the Wild Animal Control Act is 1977.

MS GREY:

Yes, Ma'am. The issue in my submission is the threshold of what should be included, and I think everybody agrees, my friends all agree, it's been a very complicated Act to try and unravel exactly what Parliament did mean even before all the amendments along the way.

WINKELMANN CJ:

It's unlovely.

ELLEN FRANCE J:

Sorry, can I just check just in terms of that definition of "hunt or kill", what do you say the "whether this results in killing or capturing or not" means?

MS GREY:

That, my submission is that the purpose of "hunt or kill" in sections 63 and 63A was intended to link to the section 53 which was before the other Courts on when you could get authority to do those activities and the language is a little untidy but the intent was to have a coherent statutory scheme where there may be reasons where it's necessary to get a permit for an activity and that the ability, the jurisdiction to issue a permit, was intended to line up with the requirement for a permit.

WILLIAM YOUNG J:

If you look at the definition of “sale”, go slightly off piste here, the definition is very familiar to me because it’s very similar to the licensing statutory definitions for sale of liquor which include sell, also exposed for sale, all the preliminaries to a sale.

MS GREY:

Yes.

WILLIAM YOUNG J:

Now in a simple way, your argument is the definition of “hunt or kill” includes hunting and killing and all the preliminaries to it, even if it’s not effective.

MS GREY:

If they’re done for hunt or kill, yes.

WILLIAM YOUNG J:

Yes, yes, so you’re looking at, it’s like the definition of sale in that very generic sense.

MS GREY:

Yes, Sir.

WILLIAM YOUNG J:

Well, you’ll get later to the difficulty of reconciling a broader interpretation with the defence provisions, that, for instance, you gut fish in the course of a fishing operation. You disturb the shark but you haven’t got a defence because you haven’t killed it.

MS GREY:

Defence, yes, Sir, exactly, and that’s part of our overall submission, the coherency of the statutory scheme.

WILLIAM YOUNG J:

And your children feed ducks in the Christchurch botanic gardens and on your view of the broad interpretation they're disturbing the ducks.

MS GREY:

Well, in my submission, Sir, they're not disturbing.

WILLIAM YOUNG J:

No, on the broad approach that's been taken.

MS GREY:

Yes.

GLAZEBROOK J:

And actually when they feed them it is actually quite harmful for them because bread isn't good for them.

MS GREY:

Yes, so feeding the ducks or putting water out for the tuis or whatever, if that –

GLAZEBROOK J:

Well, water is probably good for tui but…

MS GREY:

But it's still attracting under the definition if –

GLAZEBROOK J:

It's still attracting them. Yes, I understand the argument.

MS GREY:

Yes. My friend's just pointed out with the Animal Welfare legislation the "hunt or kill" definition is quite clearly separated into two subclauses again.

WINKELMANN CJ:

Yes, that was my point. I said it was separated into a separate clause.

MS GREY:

Yes, “Hunting, fishing, or searching for any animal and killing, taking, catching, trapping, capturing, tranquilising, or immobilising any animal by any means,” and then (b), “Pursuing or disturbing any animal.”

WINKELMANN CJ:

Yes, and it says “and hunting or killing” has a corresponding meaning, so it’s just the same definition effectively split up into subclauses.

MS GREY:

But my submission is the Parliament has made very clear in that definition that “pursuing or disturbing” do stand alone whereas in the Wildlife Act it’s not nearly as clear what Parliament intended or we wouldn’t be here, but my submission is that the three subclauses are the best guidance that we’ve got of Parliament’s intent.

WINKELMANN CJ:

And your simple submission is that it’s this Act we have to construe, not the Animal Welfare Act?

MS GREY:

Yes, Ma’am, exactly, and just the further guidance with that is in Part 1 of the Act there’s the sections about establishing wildlife sanctuaries and reserves, and the definitions, that Parliament has chosen different language in those sections for the offences under those sections, I think it’s section 18 – I’ll have a look in my submissions – but the difference between the wording that was used in section 63A for disturbing a nest and the offences in relation to wildlife sanctuaries and when you need a permission to operate in a wildlife sanctuary, there “disturb” does stand alone whereas in section 2 it doesn’t stand alone. My submission is that’s within the same Act. Parliament must have intended it to be used in a different sense.

WINKELMANN CJ:

There's another issue about the language, isn't there, which was the Court of Appeal's point about redundancy, if this is linked to hunting and killing because it means that attempts are covered twice.

MS GREY:

Yes, Ma'am, that's what the Court of Appeal said, and my submission that there's another way of interpreting that and "attempt" could include an unsuccessful attempt, so somebody shoots a gun to try and kill wildlife, they miss, that's still an attempt to kill, but –

WILLIAM YOUNG J:

There has to be – there normally has to be proximity between the actus reus and the attempt and the completed crime which can lead to awkward issues that I think we had, or I think we've had it anyway, in the case of sexual offending. So the intermediate section of the definition could encompass action so in a broad sense represent attempts but where the fish actually isn't on the line or where you haven't got close enough to the crime to satisfy the requirements for an attempt. We also sometimes do say the same thing more than once. "I give, devise and bequeath," well, that's standard legalese but it's three words that mean the same thing.

MS GREY:

It is. It's very dangerous when you're trying to precisely understand exactly what Parliament was thinking when they came up with each individual word and they perhaps weren't thinking about it as much as we've been thinking about it when we've –

GLAZEBROOK J:

Especially something as badly drafted as this, to actually look at fine drafting and expect consistency between the sections when there isn't consistency on whatever interpretation you have.

WINKELMANN CJ:

Just picking up on that first point Justice Young made though, what would be the policy reason for making actions which are connected vaguely to hunting but which aren't proximate enough to justify charging attempt, criminalising those but not criminalising other identical actions which are not connected to hunting? Why would you criminalise one set of actions but not the other? What's the policy reason for that?

MS GREY:

My submission is that none of these parts are intended to be criminalised unless there is an intention to hunt or it's done for the purpose of hunting and it's simply different examples and different situations where you may do an activity or use some equipment for hunting. For the avoidance of doubt Parliament has included that second subclause and third subclause.

O'REGAN J:

So do you accept that it is covering attempts twice on your interpretation?

MS GREY:

I accept it may cover attempts twice, some forms of attempts, but that for the avoidance of doubt the third subclause covers attempts in the commonly accepted attempts to commit a crime.

WILLIAM YOUNG J:

Well, under the Crimes Act 1961 doing an action with the intention of committing an offence fits the literal definition of the crime of attempting to commit a crime. However, there is an additional element there usually required of proximity. So doing an act with the intention of committing an offence isn't necessarily an attempt unless you're well along the way to actually achieving the ultimate intent of crime.

MS GREY:

And with the intention part required by the Crimes Act, the attempts, whereas under the Wildlife Act I think there's no requirement for intent if the purpose is the hunt or kill. It's subtle.

WILLIAM YOUNG J:

Well, that is the intent.

MS GREY:

Well, intent in the actus reus is the way we've found easiest to describe it. You're doing the action to hunt or kill, whatever the action may be, whether you're successful or not, but you're undertaking a course of activity to hunt or kill would capture it under the Act. Undertaking the course of that activity because you're going to the bush to take some photographs of tuis and you may scare a couple of tuis as you walk through the bush isn't to hunt or kill and isn't an offence.

WINKELMANN CJ:

So that's really a very tortuous definition of "hunt or kill" if all you intended to do was criminalise actions that you take with the intention of hunting or killing in its conventional meaning.

MS GREY:

Yes.

WINKELMANN CJ:

But that point I've just made is against you. I'm just saying it's quite an extensive definition which seems to extend the normal meaning if all it's attempting to do is capture attempts to hunt or kill intentionally.

MS GREY:

That's true, Ma'am, but for whatever reason Parliament has put the words there and there's, my submission, no easy way of making every word important once and with no overlap at all. The clearest is my original

submission, three subclauses, the middle subclause are the type of activities that may be included when they're done to hunt or kill. That's the most sense that we've been able to make out of that and in a way that doesn't – and the same as His Honour, Justice Young's point with "sale". It's another way of expanding slightly on a definition to help explain. Whether it does help or not is probably a moot point but the intent is to help explain the intended scope but it doesn't mean that it covers each individual aspect standing alone, and the –

If I can move on to the point about the statutory scheme and the coherence of the scheme, the first point is the point we looked at in the Court of Appeal with the ability to obtain authority for actions which may be done for good conservation purposes matching up with the defences. It's still not perfect but it's much closer if "hunt or kill" is given the narrower meaning adopted by the High Court. If "hunt or kill" is given the broad meaning, there's a huge array of activities that would be within the scope of that definition but for which there is no ability to get a permit at all, and a lot of them are conservation type purposes, tagging wildlife and – or watching wildlife, counting wildlife for research and development purposes, but under the Act you can't get a permit or authorisation to do those things.

The second aspect of that coherency of statutory scheme is this part about the defences and if we accept that section 68AB doesn't apply the defences in section 68AB because section 68AB(6), then the only defences are the defences under section 63B, 68B, sorry, 68B, defences to offences in respect of marine wildlife, and the first couple are not relevant particularly. They're outside the New Zealand Fisheries waters. But 68B(3), where any person is charged with an offence, it is a defence if it's done for stress or emergency and necessary for preservation, protection, or maintenance of human life, or where a person is charged under (4) with killing or injuring or being in possession of any marine wildlife. They do not apply the defence if the person proves the death or injury was accidental or incidental and the requirements of section 63B, which are the reporting requirements, were complied with and it's a defence if the defendant proves the death or injury

took place as part of a fishing operation and the requirements of section 63B were complied with.

So then what it puts us in is a somewhat ludicrous position where if you're fishing and you attract wildlife, if you kill it you have a defence, but if you attract it and you don't kill it you don't have a defence.

WILLIAM YOUNG J:
The example that's given in your submissions is effectively a commercial fishing vessel cleaning fish, say in the vicinity of the Titi Islands –

MS GREY:
Yes.

WILLIAM YOUNG J:
– between February and June. It's putting far more berley in the water than your operation does. It is, if anything, more likely to attract sharks who, on my limited understanding of the evidence, will be exposed to the risk of injury as they compete for the food source.

MS GREY:
Irrespective of whether it's…

WILLIAM YOUNG J:
They can't get authorisation under section 53 because they are not catching or killing.

MS GREY:
Yes.

WILLIAM YOUNG J:
They can't, don't have a defence under section 68B because likewise there is in fact no killing or injuring.

MS GREY:

Yes, Sir. So we have a very wide cast of –

WILLIAM YOUNG J:

How did the Court of Appeal deal with that argument?

MS GREY:

They didn't deal with it, Sir. We have a very wide cast offence and we have a much narrower defence.

WINKELMANN CJ:

I think they did address it actually, didn't they?

MS GREY:

They didn't address that point, I don't think, Ma'am.

GLAZEBROOK J:

What do you say about the total absence of fault defence? You don't need to deal with that now but that's what's said against you, that there is actually a defence outside of the statutory scheme.

WILLIAM YOUNG J:

But you say – I mean, if you're dropping berley in the water you're doing exactly the same thing as – and you know it attracts sharks, and the offence is to disturb sharks, and the fact you're doing it for a good reason wouldn't be a defence probably?

MS GREY:

Yes, and that, I agree, Sir, where if it's a strict liability offence –

WILLIAM YOUNG J:

Well, strict or not. I mean you are doing something which you know you're at least reckless as to whether it will induce sharks to behave in a particular way.

MS GREY:

Yes, and the risks of the harm that might happen to the sharks is the same whether you're doing it for fishing or for any other purpose.

GLAZEBROOK J:

Well, that might be an argument then for reading up the word "disturb" to mean a permanent change to behaviour in some manner and not merely the smallest risk of injury, because if you read it in that way then one can't imagine any circumstances in which you would give a permit for doing that. So if – or if your disturbance is actually intended to hurt the animal even if you're not wanting to hunt or kill it, say, "I'm chucking rocks at it. I don't intend to kill it. I don't intend to hunt it. I just think if I'm having a good time chucking rocks."

MS GREY:

Rocks.

WILLIAM YOUNG J:

One of the arguments that's not really advanced as an alternative is to treat the words "catch or kill" in section 53 or "death or injury" in section 68AB as covering the same ground as "hunt or kill". Now that's perhaps a bit of a stretch with the language.

MS GREY:

Yes, Sir, and that was really what the High Court did but –

WILLIAM YOUNG J:

It didn't actually. The case was put to the High Court on the basis that the language "catch or kill" covered the same ground as "hunt or kill" and that therefore you could grant – therefore the director could grant an authorisation.

MS GREY:

That was the director's case. My client's case was that hunt or –

WILLIAM YOUNG J:

Does this mean it's, in fact the way the case is run, does that mean it's common ground that "catch or kill" doesn't cover the same ground as "hunt or kill"?

MS GREY:

In the Court of Appeal all the parties –

WILLIAM YOUNG J:

I know that all the parties said it did.

MS GREY:

Yes.

WILLIAM YOUNG J:

But no one's saying that at all now. So is everyone saying it doesn't?

MS GREY:

Yes, but my client's stuck to the point that – the argument we've said throughout is this is not a hunt or kill because there's no intent to hunt or kill and so the permitting issue is an issue for the Director-General of Conservation but it's not an issue that my clients have ever said that a permit is required. They obtained one when they were told they needed one but they've never taken the view that they required one. And there was no leave requested or obtained for that point.

WILLIAM YOUNG J:

Slight difficulty because I mean it does seem to – if we were to construe the statute as a whole, one would want to integrate the meanings as best we can, not necessarily the whole that they, the sections mean the same, cover the same ground, but we want to have an interpretation which covers acceptably what seem to me to be the three critical sections: section 63A, section 53 and section 68AB.

MS GREY:

Yes.

WILLIAM YOUNG J:

Section 68B I mean, I'm sorry.

WINKELMANN CJ:

Well, there would have to be an implicit authorisation of hunting, wouldn't there, to be able to catch alive or kill?

MS GREY:

Yes. There's have – and under the Wildlife Act there's no ability to get an authorisation to hunt but not – and if you're not trying to catch or kill, yes, yep.

WILLIAM YOUNG J:

So unless "catch or kill" is read by reference to the definition of "hunt or kill" then preliminaries to killing an animal are arguably not covered although perhaps you'd have to make sense of it to say they are but you can't have lesser interference with an animal authorised which is perhaps a little odd.

MS GREY:

Yes, and that was one of the arguments in the lower Courts that the fact that you can get a permit to catch or kill by implication you should be able to get a permit to do a lesser activity if the officers in charge consider there was a good reason to do that, but neither of the lower Courts agreed with that point.

GLAZEBROOK J:

And you say your client didn't take the point because your client didn't think it needed a permit in any event?

MS GREY:

Yes. My client's position throughout has been that it's not hunting or killing wildlife and so it doesn't need a permit.

GLAZEBROOK J:
It was happy to get one if it was told to but it didn't feel it needed one?

MS GREY:
Yes, Ma'am, it did what it was told to do and it followed all the procedures and complied with the code of conduct, code of practice, and it still does comply with the code of practice which was a voluntary code anyway.

So we've covered the statutory coherence with that ability to permit. There is one other part of the Act, Part 1 of the Act, there is one other way that could be obtaining a permit. If the areas where shark cage diving is done was created as a wildlife sanctuary or reserve, and that is provided for in the Act, if that statutory process is followed and if there is then a reserve or sanctuary refuge set up, it then connects to Part 3B of the Conservation Act and the concessions regime under that Act, so there is then a statutory process for getting authorisations to observe wildlife or take wildlife or do any of another array of activities in the reserve, but that process of setting up a reserve hasn't been followed but it is technically available in the Act.

GLAZEBROOK J:
But that would be a reserve for all purposes, wouldn't it, which wouldn't be particularly sensible in terms of a fishing area?

MS GREY:
No, although the discussions we've had, it could potentially be reserve over the summer months for sharks for part of the year but not over the winter months when the sharks aren't there or something like that.

WINKELMANN CJ:
Can you take us to that part where there is authorisation for taking and observation of wildlife in a sanctuary?

MS GREY:

Section 14AA, granting of concessions in wildlife sanctuaries, wildlife refuges, and wildlife management reserves. So where one of those areas set up it then connects to Part 3B of the Conservation Act.

WINKELMANN CJ:

So that could be, on the respondents' interpretation, a coherent scheme, couldn't it, which is that basically it's hands off wildlife outside that sanctuary except when you need to catch or kill them for scientific research purposes? So if you want to engage with them just by following them around in a boat and observing them, you do that in a wildlife sanctuary pursuant to a concession.

MS GREY:

Yes. The submission is that within a wildlife sanctuary more activities are constrained than outside a sanctuary. So the hunt or kill no longer is the critical threshold. There's another definition. Within a wildlife sanctuary you can't do any activities, any sort of interference with wildlife, without a concession.

WINKELMANN CJ:

So that's the other way of looking at it, which is that – yes, okay.

GLAZEBROOK J:

I think the sanctuaries are relatively unusual because there's not many, especially marine sanctuaries, so…

MS GREY:

And it's different from a marine reserve. There's plenty of marine reserves but that's got different rules again.

GLAZEBROOK J:

Yes.

MS GREY:

That's part of the challenge. There's national parks and reserves and conservation areas and marine reserves and they've all got their own rules on top of the rules that we've got here under the Wildlife Act, and that is one in my submission quite important point that irrespective of the definition of "hunt or kill" that's adopted under the Wildlife Act that our native species have got a lot of other protections. It's not like this is the only protection. So most of the native species are in national parks or reserves anyway and so they have all of those extra protections from any kind of interference.

WINKELMANN CJ:

But that wouldn't inform our interpretation of the Act, would it, because we're not likely to assume there was no intention to protect them when they're outside those protected areas?

MS GREY:

No, no, that's true, Ma'am. All I'm saying, Ma'am, is that there are extra protections again within most of the parts of New Zealand where the native species are found or the majority of native species.

The next point in my outline of submissions is 9.2, avoiding absurdity and public confidence in the law, and we touched on this already, this point about it would criminalise recreational activities such as fishing and feeding the ducks, feeding native birds and some academic research if protected species are attracted and caused to deviate from their normal behaviour, and it is submitted that that is a very important consideration to interfere with an array of common activity making that activity illegal without very clear language in a statute that the public can easily access, and –

O'REGAN J:

But do you accept that on the Court of Appeal analysis there would still have to be a risk of harm?

MS GREY:

On the Court of Appeal analysis, yes, Your Honour. My submission, though, is that that risk of harm is not coming from any statutory basis. It's something that the Court of Appeal came up with to deal with this problem, so the scope of "hunt or kill" under their definition was so wide it clearly created a problem, but even the risk of harm, in my submission, creates other problems because the question is whether it is a risk of harm when you do an activity, so in this case shark cage diving, but driving a car you might, in the worst scenario, hit a native bird. Do you look at the worst possible scenario or do you look at the likelihood of that happening or do you look at the mitigating steps that you take to try and avoid it happening? So it actually becomes a lot more complicated than the Court really looked at when it came up with that risk of harm. I think there's several different dimensions to risk of harm, the likelihood of the harm, the severity of the harm. You sort of get into an RMA type test of what it might be. And again with the risk of harm with fishing, the very type of harm that the experts hypothetically say could happen with shark cage diving can happen equally with fishing, so does that mean that every time somebody is fishing in an area that there might be a protected species, it's also – it fails the Court of Appeal's test of harm test anyway so it doesn't really help us very much.

O'REGAN J:

Well, that would depend on the level of intention needed, won't it?

MS GREY:

Well, my submission, the intention part is difficult again because if the Court of Appeal is right and any disturbance is a hunt or kill then whether you intend to disturb becomes an irrelevant question and it then defaults back to what's the risk of harm, and so if you're fishing and you might cause two sharks to swim together and crash into each other or crash into your boat or take a hook, then that's the very type of risk of harm that potentially triggers an offence of hunt or kill. So whatever test we put on it, it almost makes it more complicated rather than fixing the problem that we are concerned about.

WILLIAM YOUNG J:

Well, there's more language of "hunt or kill" in this section than there is of causing harm, so it's a more ambitious statutory interpretation exercise to read into the section or the definition providing it causes harm or risks harm to an animal.

MS GREY:

Yes, Sir, thank you.

GLAZEBROOK J:

Unless you read "disturb" as having that connotation which I think is what the Court of Appeal was doing. It just might be that they set the threshold a bit low in terms of risk of harm and –

WILLIAM YOUNG J:

What about pursuit? What about pursuit, because pursuit, unless – I don't know. Make it tired. I'm not sure.

MS GREY:

Well, in my submission the obvious way of making it all consistent is pursue to hunt and kill where it –

WINKELMANN CJ:

What happens if you just chase something until you kill it through exhaustion, for instance, which is not – I don't say it facetiously because you can do that by following a marine animal by boat.

MS GREY:

And if you kill it, it's a breach of the Wildlife Act, no question.

WINKELMANN CJ:

By reason of what if you're not intending, if you just –

MS GREY:

Because you have killed it, so an actual kill is a breach. There's no question about that.

WINKELMANN CJ:

Hunt or kills, right.

WILLIAM YOUNG J:

Just with dolphin watching, where does that fit in into this regulatory scheme?

MS GREY:

It doesn't fit under this scheme but it's dealt with by the Marine Mammals Protection Act 1978, so dolphins have their own statutory scheme, and again it's similar but slightly different language. It covers "harass" and some other language like that specifically without reference back to "hunt or kill", and there's also regulations under the Marine Mammals Protection Regulations 1992 that require any commercial activity to have a permit.

O'REGAN J:

But presumably you're not allowed to put something in the water to attract them, or are you allowed to?

MS GREY:

Under the Marine Mammals Protection, I don't believe that attract itself is covered under, is defined, but –

WILLIAM YOUNG J:

Swimming with dolphins would alter the behaviour of dolphins but it's presumably a different statutory regime.

MS GREY:

And the Department definitely issued permits for those type of activities because they're commercial activities they've dealt with. But dolphins aren't scheduled under the Wildlife Act. But I didn't cover at the start, the way the

Wildlife Act works every land animal is covered under the Wildlife Act unless it's exempted or scheduled at a lesser level. Marine mammals are only protected if specifically scheduled, the seventh schedule, and there are also a range of species like corals and manta rays and giant groper and various species that have been scheduled under – but most fish are not covered by the Wildlife Act.

So just continuing on from the absurdity type argument is again the certainty argument and a fundamental principle of criminal law jurisprudence is people are entitled to know what the criminal law is. Our criminal laws are codified and it becomes very complicated for people who are undertaking day-to-day activities like swimming that step on a species to learn that they may have accidentally broken the law without intending to do so.

GLAZEBROOK J:
If you do say "pursue" means exactly what the Chief Justice was saying actually, get in a boat and pursue it or get in a car and pursue an animal or whatever it happens to be, and "disturb" means harass in the sense of intending to actually disturb them, then accidentally stepping on something or feeding a duck won't come within that, will it?

MS GREY:
That's right. The threshold is higher and it does –

GLAZEBROOK J:
So you don't have to go as far as saying you have to be intending to hunt or kill? You could just say that defining those terms in a way that – well, "harass" is probably about the best way of –

MS GREY:
Mmm, of disturb.

GLAZEBROOK J:

– putting that because it's difficult to see how you can accidentally harass something.

MS GREY:

Harass, mmm, and that's my point within my written submissions. "Molest," "molest" carries an intent to cause harm. You can't accidentally molest something, or accidentally hunt something. I think the Chief Justice's point about "pursue", if you pursue it until it drops, that's –

GLAZEBROOK J:

No, obviously a killing, but if you just pursue it for fun and it doesn't actually happen to die.

MS GREY:

Yes.

WINKELMANN CJ:

But its, say, reproductive cycle is disturbed, something like that, you know, an obvious thing.

GLAZEBROOK J:

Well, it's not a good thing to pursue anything.

WINKELMANN CJ:

Animals to exhaustion.

GLAZEBROOK J:

Yes.

MS GREY:

And at some point the pursuit would become a hunt.

GLAZEBROOK J:

Yes.

MS GREY:

If you pursue it momentarily, my submission that wouldn't be a hunt or kill, but if you chase it for a long time and you're actively following it and you're trying to find out where it's living and what it's doing, at some point that may become a hunt even if you're not physically intending to catch it. It's a question of degree and it's really difficult because the language doesn't give us a clear line, but – and perhaps the answer is that the higher threshold of harass and again with pursue, just momentarily a child chasing a duck isn't a harassment or a pursuit, but chasing it for three hours through the bush and through the countryside is.

WINKELMANN CJ:

So can we just go back to "pursue" then. What do you say is the situation in relation to "pursue"? Do you have to be pursuing something to catch it or kill it for it to be hunting?

MS GREY:

To hunt or kill and –

WINKELMANN CJ:

Yes, but that's a definition. I'm trying to find out what you say hunting or –

MS GREY:

Where the line –

WINKELMANN CJ:

Because you're reading the definition into the definition in a sense, aren't you?

MS GREY:

Yes.

WINKELMANN CJ:

You're reading the definition into the definition.

MS GREY:

And the definition is written into the definition by the statute which is what makes it complicated.

WILLIAM YOUNG J:

You can hunt a person without intending necessarily to catch – well, probably you want to get in touch with them but without the necessity of wanting to kill them.

WINKELMANN CJ:

So you want to engage with them.

WILLIAM YOUNG J:

But hunting an animal, it would – I mean, I'm just looking at dictionary definitions, that the dictionary definitions in relation to animals do carry a connotation of killing. They tend to be to pursue a wild animal for sport or food. "In the autumn they hunted for deer." Synonyms chase, give chase to, pursue, stalk, course, hunt down or run down.

WINKELMANN CJ:

So can I go back to my question which is if you pursued it for a lengthy period of time without intending to catch it or kill it, do you accept that might amount to hunting?

MS GREY:

That could be a hunt.

WINKELMANN CJ:

You're accepting that "hunting" can have meanings other than catching or killing? I'm not trying to trip you.

MS GREY:

Yes. No, I accept that. I accept that but I think it's got to be more than just a brief interaction. It's got to be a significant interaction that's got some sort of intent to hunt which –

WILLIAM YOUNG J:

Well, dictionary definitions, to chase and try to catch or kill an animal, that's the Cambridge dictionary.

MS GREY:

Yes, we do, we have the –

WILLIAM YOUNG J:

"To chase and try to catch and kill an animal or bird for food, sport or profit."

GLAZEBROOK J:

Well, I suppose just the pursue pursuit, it comes down to if you're just purely pursing it because you think that's quite fun. You don't intend to catch it. You don't intend to – you just like seeing it in this case swim away, but in another case run or fly away, because that gives you a thrill. Under your definition that wouldn't be covered because you don't have that intent, but under the broader definition of saying that that sort of harassment or pursuit is a separate category but nevertheless serious enough that it has to be a pursuit, like a police pursuit, which is something more sustained.

WILLIAM YOUNG J:

Well, that means "hunt", you know, to hunt to try to find someone or something, hunting for the pot of gold at the end of the rainbow, the police are hunting for the terrorist responsible for this.

MS GREY:

Yes.

WILLIAM YOUNG J:

But the dictionary seemed to treat those as distinct meanings, as distinct usages of the word.

MS GREY:

Of "hunt", yes, yes, and the – we –

GLAZEBROOK J:

Look for, you mean?

WILLIAM YOUNG J:

Just in ordinary English language is "hunt" used in respect of animals otherwise than in respect of catching and killing?

MS GREY:

In the context of hunt and animals, the dictionary definition tends to suggest hunt to catch the animal.

WINKELMANN CJ:

But taking us back to the Act, we know that the dictionary definition hasn't been adopted. We know that there has been an extension of it. If it had been intended nevertheless to be anchored from the dictionary definition wouldn't the language just have been something like to hunt or kill and take every step connected to that purpose or something simple like that? It seems to be intended to go past that, and I think you're accepting that because you were saying, for instance, pursuing perhaps brings something else in.

MS GREY:

Yes. My submission is the clearest line is to do the activity to hunt or kill. That is a clear line that's consistent with the three subclauses in the definition and it makes sense and it's a feasible coherent interpretation of the Act. My – I accept that an alternative way of looking at it is more as Your Honour suggested.

GLAZEBROOK J:

So you're not accepting that that is the case. You're saying it is a possible fallback that your client would be – if they couldn't have their primary definition they would accept a fallback on those grounds but not by, a bit like the permit, not by choice but…

MS GREY:

But if that's the way it is, that's the way it is, yes, yes, but my – the only – in my submission, the clear way of interpreting what Parliament has said in that definition is the three subclauses which each relate back to hunt or kill and that's – it may not be perfect but it's tidy, clear, everyone can understand what it is and it's got some logic to it and it fits with the statutory scheme and with the defences, because we still have the problem with the defences if we have some other definition of "pursue". If somebody is pursuing with a camera because they want to get a really good photo of something, they don't want to catch it, they've got absolutely no desire to harm the animal at all, under the Court of Appeal's definition that's an offence, there's no defences available and we have the problem of at what point does a short pursuit become an unacceptable pursuit, and there is no clear line on that.

WINKELMANN CJ:

Perhaps any pursuit of a wild animal is an unacceptable pursuit.

MS GREY:

Yes, Ma'am, although my submission would be that that would be what –

WINKELMANN CJ:

Because it's an intentional act of pursuit, isn't it? It's –

GLAZEBROOK J:

It would be under the code of conduct if you're talking about camera and wildlife photography. So there are quite major codes of conduct in terms of how close you can get and what you can do, so…

MS GREY:

Under the code of practice for shark cage diving there are rules about what you can do and where you can put your bait, you can have one bait, and which direction you drag it in so that there's less chance of any interaction with the cage, all those types of things, to avoid unwanted harm, and similarly with Marine Mammals Protection Act there are distances that you can drive your boat from dolphins and –

WINKELMANN CJ:

So you would say against what I just said that, for instance, if you were in a little runabout and you were 100 metres behind, gently hurtling along behind a shark you can see in the distance, you are pursuing it but you're not in any case, sense, disturbing it, so that wouldn't be something that would be intended to be caught?

MS GREY:

Well, that's an interesting point, Ma'am, because "pursue" and "disturb" and "molest" are the three verbs that Parliament has chosen and so in my submission "pursue" and "molest" both clearly that level of intention within the word. The "disturb" is the one where we can interpret it to mean harass or mean a high level of –

WILLIAM YOUNG J:

I think "disturb" and "molest" you can interpret perhaps with a bit of a stretch as encompassing disturb or molest so as to cause harm.

MS GREY:

Yes.

WILLIAM YOUNG J:

Pursuit, maybe not.

GLAZEBROOK J:
But the idea there would be probably if you see something in the distance and think you'll get a bit closer, that's not pursuit. It's just if when you do get closer and it takes off and you take off after it at an unacceptable distance, because there are acceptable distances for…

MS GREY:
Yes.

GLAZEBROOK J:
Well, just in terms of avoiding running them over with the propeller and matters of that nature.

MS GREY:
Yes.

GLAZEBROOK J:
So assuming you're on the sea at that…

WINKELMANN CJ:
This is the photographer's code, is it?

GLAZEBROOK J:
Well, it's – yes, there is a photographer's wildlife code in terms of what you, how you interact with wildlife, and I mean I imagine there's similar ones for when you're just hiking and matters of that kind.

MS GREY:
There's certainly a tourist code now for interacting with New Zealand and causing no harm and all those types of things as well, not particularly for wildlife but…

There's the criminal certainty issue that we've touched on, and the excessive scope and risk of harm criterion, and just the point there it's not clear whether

the risk is based on the hypothetical worst case scenario or the worst case of that particular interaction, and it opens another can of worms trying to define where that boundary comes down for any – part of the problem, my submission, with the Court of Appeal's finding is it was looking at a hypothetical activity. It didn't define the activity so we don't know even exactly what the Court of Appeal meant by "shark cage diving" and it was looking at the hypothetical worst risk, not what normally happens in the normal course of events, and it was looking at the hypothetical harm from before the code of practice was developed from some very early cases according to the evidence of Mr Duffy for the Department of Conservation and then Mr Enarson, the expert from Canada.

So it's another complication with the finding of the Court of Appeal that we've got a very open-ending finding that something's a criminal activity because it might hypothetically cause harm without enough definition of exactly what is meant by that activity or which aspects of that activity trigger the offence or which level of harm triggers the offence or if there are any mitigating steps that the persons wanting to do the activity can do to avoid triggering the offence. It's one of the difficulties with declaratory judgments with a hypothetical case rather than a hearing where there's a charge against someone and a series of specific actions happened that the Court, the Judge can consider whether that amounts to an offence or not. But –

WINKELMANN CJ:
So we have been going through the different parts of that definition because I suppose there's an obvious question. You're arguing that the interpretation that the Court of Appeal adopted over-criminalises?

MS GREY:
Yes, Ma'am.

WINKELMANN CJ:
And over-protects. And the contrary point of view is that the interpretation you're advocating for under-protects and therefore under-criminalises. So it

leaves wildlife open to being molested, harassed, pursued, so long as it's not in the course of trying to catch or kill?

MS GREY:

Yes, Ma'am, I accept that is a possible criticism but there are answers to that. The first answer, of course, is that it's a very old Act and I think each Court has said that it may well be time for Parliament to update the legislation so it does apply to the current situation, everybody knows what it means, and the second point is that there are already a lot of other Acts of Parliament which I've touched on, the National Parks Act, the Reserves Act and the Conservation Act, which covers most of the areas where wildlife live and more clarity about what's allowed and what's not.

WINKELMANN CJ:

Which has got the issue I raised with you before which is doesn't cover them outside those areas.

MS GREY:

That's correct, Ma'am, but if there is a residual risk outside those areas and Parliament considers that that is significant enough to require legislation, then the correct approach is for Parliament to amend the law to cover that rather than through some back door approach of trying to extend the law. We have the Dog Control Act 1996 so it's an offence for dogs to molest any human, animal, stock, pet, wildlife. So one way or another there's a high degree of protection from different legislation. Of course, the Fisheries Act 1996, no person shall take fish, aquatic life or seaweed except under authority or except under recreational or customary fishing rights. So there is an array of other legislation that covers most of this, so any of the residual risks, you know, if a kiwi turned up in your city garden at night and you chased it, that could be a hypothetical – chase it without wanting to catch it, that could perhaps be a hypothetical case that does turn on this point but it's a very rare example where if the kiwi's in a national park or a reserve it's already covered by other legislation anyway.

WINKELMANN CJ:

But if they're in the Dome Valley they're fair game? Well, maybe not. So the kiwi is actually covered another piece of legislation, isn't it?

MS GREY:

It's certainly covered if it's a national park or if it's in a –

WINKELMANN CJ:

What happens if it's not, it's only this Act?

MS GREY:

National park or in a reserve and it's covered by the Reserves Act and under the Conservation Act it covers any conservation area.

WINKELMANN CJ:

Okay, but these are all place-specific but there's nothing that covers, for instance, the kiwi outside those geographic zones beyond this, beyond section 63?

MS GREY:

No, not that I'm aware of and, of course, just the Dog Control Act, if a dog were to chase a kiwi or someone were to hunt a kiwi with a gun in an inappropriate location. I don't believe we find a lot of kiwis in, outside of the national parks unfortunately these days anyway, but tuis and other birds, and that's where we come back to the common activity, is it okay to put a bird bath out to feed native birds or not? Really that's probably the – and feeding the ducks. They're the type of points that are much more likely to arise.

Just the final point is the constitutional point under the New Zealand Bill of Rights Act 1990 section 6 which requires the interpretation at least infringes upon protected rights and freedoms, and my submission is the freedom of movement, expression, and the freedom to fish which is protected under the Marine and Coastal Area (Takutai Moana) Act 2011 are all protected rights and freedoms and if there is any dispute how "hunt or kill" in sections 63 and

63A should be interpreted then the Bill of Rights Act requires the narrower interpretation that least impacts on the rights and freedoms of individuals, and my submission is that the fact that the High Court found a different interpretation to the Court of Appeal, they both are clearly possible interpretations, and for the section 6 reason alone the narrower High Court interpretation should be preferred.

WINKELMANN CJ:
Are you still maintaining your argument relies on the Magna Carta 1297, or are you giving that away?

MS GREY:
Ma'am, I like the Magna Carta because if we don't refer to back to these fundamental constitutional documents we tend to lose them.

WINKELMANN CJ:
Yes, but this is not the place for campaigns to support the continued interest in the Magna Carta. Do you maintain your argument?

MS GREY:
Only to the extent that it again requires that the rights and freedoms of the public are there to the extent that they're removed by legislation, and my submission that relates to that is if it's to be removed by legislation it needs to be done in a clear way that people understand that those rights have been removed.

So if that's okay with Your Honours I'll hand over to my junior who can address the factual issues.

WINKELMANN CJ:
Yes.

MS GREY:
Thank you, Ma'am.

MR ELLIOTT:

Your Honours, I'm conscious of the time so I'll just make it as far as I can before 11.30 and then stop.

WINKELMANN CJ:

Well, it's not a significant issue, is it, Mr Elliott?

MR ELLIOTT:

No, no. It might take more than five minutes but not long.

WINKELMANN CJ:

We should be able to do – perhaps. Right.

MR ELLIOTT:

Over to Your Honour. Just stop me when you want to stop. Now Ms Grey's obviously talked to you about why the Court of Appeal's interpretation is wrong but if we're stuck with it what I want to address is the fact that the factual conclusions that it reached were nonetheless not supported by the evidence. Now very briefly I understand my learned friends for the first respondent, PauaMAC, have taken issue with whether this is open to be argued on the basis of the question on which leave was granted. I'm happy to address that if Your Honours wish or I can leave it.

WINKELMANN CJ:

Go ahead and address it, Mr Elliott.

MR ELLIOTT:

Very briefly, the question on which leave was granted was whether the declaration –

WINKELMANN CJ:

No, sorry, just proceed to the factual argument.

MR ELLIOTT:

Sorry, yes, Your Honour. So the Court of Appeal said, right, pursuing and disturbing mean what they mean. Unfortunately, they didn't really then go on to say what they mean. There wasn't – not necessarily that there should have been but there wasn't any reference to the normal definitions of those words, the dictionary definitions and so on. They just went from that to their two primary factual conclusions, and these are, paragraph 45 of the decision, where they say that shark cage diving amounts to pursuing because it uses berley and baits as attractants to bring the animal to the cage. That is pursuing the same as an angler using bait to draw fish to hook. Now I'm only going to echo what Justice Glazebrook said which is, in the first instance, I do take issue with that conflation. To me, "pursuing" means just as the Chief Justice has said, pursuing something, chasing something. Luring is quite different. Here the sharks are free to come and go as they wish. If they swim away, the shark cage divers don't pursue them.

The second factual finding they made was that it also amounts to disturbing, and here they say, "Attractants are designed to cause the animal to deviate significantly from its natural swimming pattern," and they then went on to draw support for those conclusions from the evidence of Mr Clinton Duffy for DOC. Now this is where, as I read it, the Court brought in its risk of harm criterion, but the evidence that was referred to was very brief and I've set this out in the written submissions so I don't want to labour it but effectively what Mr Duffy said was these are the potential risks that may arise from shark cage diving. Now shark cage diving is undertaken around the world in many different ways.

WINKELMANN CJ:

Aren't they the same risks that are identified in the code of practice?

MR ELLIOTT:

Yes, but –

WINKELMANN CJ:

And the Court of Appeal said, and used that, they relied on the code of practice as identification of risk as well, didn't they?

MR ELLIOTT:

Yes, that's correct, Your Honour. What I would submit to the Court, and this follows on from my learned senior's point about is it the hypothetical worst case scenario harm or the actual harm in the case, and in my submission it has to be the actual harm in the case. So what has to be distinguished between is the worst hypothetical case of some rough-shod operation in, you know, an unregulated country to what Shark Experience does in its operations. Now it operates and has done since 2013 in compliance with the code of practice. Now that, as Mr Enarson said, is one of the most restrictive codes in the world and in my submission it ameliorates, if not eliminates, all of those risks. That's its stated purpose. Its stated purpose in the code is to identify and mitigate all potential risks to great white sharks from cage diving.

Now I accept, as I must, that it's rarely possible to entirely eliminate all risks absolutely but that's –

WINKELMANN CJ:

But your point is that the risks that the Court of Appeal relied upon were risks that were identified and addressed in the code of practice? That's your point?

MR ELLIOTT:

Yes, Your Honour, and I think the best evidence of that comes from the fact that DOC issued authorisations in conjunction with the code, so keep in mind DOC is responsible for administering the Welfare Act, sorry, the Wildlife Act. So its job is to make sure that the purposes, protective purposes, are met. Now it has always taken the view that shark cage diving is an offence under the Act but, and it didn't have to do this, there is no obligation on it whatsoever, it chose to issue authorisations to the shark cage dive operators and in my submission the only conclusion that can be drawn from that is that in DOC's view compliance with the code mitigated or eliminated the risks to

such a degree that it met with the protective purposes of the Act and so in the Court of Appeal's words the risk of harm was so unlikely such that this does not amount to an offence under the Act.

Very briefly, there's just two points, two additional points I want to address. One is there's some evidence referred to in my learned friend's submissions for PauaMAC regarding the risk of harm and the references there are made to the affidavits from Stormalong Stanley where submissions are made that shark cage diving changes the feeding instincts of the great whites and increases their aggression. That's at paragraphs 23 and 24.4 of my learned friend's submissions. All I can say in relation to Mr Stanley is he's not an expert, he's not qualified to give that evidence and he's not objective either. He is the director of one of the respondents.

They also draw support in terms of the risk of harm from some screenshots from Shark Experience's website. Again, all I'll say about that is that they are old photos, they don't show risk of harm, they show sharks, they show divers, they show cages. That's what you get when you have shark cage diving. And to the extent that the particular photo attached to my learned friend's submissions suggests somehow that the shark is about to get the bait or is going to crash into the cage, if Your Honours look at the code of practice, and that's, I'll just give you the reference, that's bundle C2, page 336, and the page that I want to refer you to is –

WILLIAM YOUNG J:
Sorry, what page?

MR ELLIOTT:
C2, if you go to 349, Your Honour. Sir, it's volume 3, C2. I'm working off the soft copy, sorry, Sir. It should have a picture of a diagram on it. 349, Your Honour.

WINKELMANN CJ:
Yes.

MR ELLIOTT:

This is just a very brief point to show, the picture shows, you know, a shark as I'm sure my learned friend would say imminently close to the cage or about to bite on the bait. I won't go through the code in full but if you read it you can see it's incredibly prescriptive about the baits that may be used, how many, how they are able to be handled and, for example, in this diagram where they're allowed to be thrown to ensure they don't make contact with the cage and so on.

WINKELMANN CJ:

Yes, so they also rely upon the affidavit from one of the locals, Ms Cave of Horseshoe Bay, Stewart Island, who talks about the locals' observations.

MR ELLIOTT:

Again, Your Honour, all I would say about that is that you have the evidence which is largely consistent of two qualified experts, marine biologists, naturalists, both of whom – one at least of whom is for DOC and it's much of that evidence that we actually rely upon.

WINKELMANN CJ:

So we do get this chart at the back of volume 2 on page 498 about the number of great whites seen in the area. Can you help us with what that chart shows us in Mr Duffy's affidavit? It's C2 498.

MR ELLIOTT:

C2 498.

WINKELMANN CJ:

It's morning tea time. Perhaps you could help us after the morning tea break. We'll take the morning adjournment.

MR ELLIOTT:

Yes, sure.

WINKELMANN CJ:

You'll only be a few minutes after we come back, won't you, Mr Elliott?

MR ELLIOTT:

Yes, Your Honour.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.48 AM

WINKELMANN CJ:

Mr Elliott.

MR ELLIOTT:

Thank you, Your Honour. The question you asked before the break was what the diagram, figure 1 on C2, page 498, meant. It's referred to in Mr Duffy's affidavit at paragraph 18 and as I read it it's a plot graph showing the change in number of shark spottings. Now it's a bit hard to read because unfortunately it's black and white but it doesn't actually show an increasing trend in population. What Mr Duffy says in paragraph 18 is, "This data does not indicate any increase in relative abundance over the study period. Relative abundance has varied between years with sharks appearing to be most abundant in 2012 but then least abundant in 2013."

WINKELMANN CJ:

What paragraph is that?

MR ELLIOTT:

18, Your Honour, of Mr Duffy's affidavit. That's on page B-112. Probably more to the…

GLAZEBROOK J:

Sorry, what page did you say?

MR ELLIOTT:

B-112, so volume 2, B-112.

GLAZEBROOK J:

Yes, of course.

MR ELLIOTT:

Volume 2, yes. I'm trying to see who's working off the electronic and who's working off the…

WINKELMANN CJ:

Right, go ahead, Mr Elliott.

MR ELLIOTT:

Yes, Your Honour. The other thing to keep in mind is that, of course, sharks have been protected since 2007, so hopefully the very point of that is to increase population numbers, so to the extent there is a general increase in my submission it reflects no more than that. If you read the paragraph up from the one I just referred to, so 17 of Mr Duffy's affidavit, he talks there about obviously operational influences on the results, such as the fact that the year that showed the greatest number was also the year they took the most pictures. So I don't think one can draw too much from the diagram. Does that answer Your Honour's question?

WINKELMANN CJ:

Yes, thank you.

MR ELLIOTT:

There's just two additional points I'd like to cover. The first is, in my submission, the Court of Appeal was to some degree influenced or swayed by the commercial nature of shark cage diving. Now obviously it is a, you know, a commercial operation, but I think the Court of Appeal drew too much on that in finding that it was an offence. What the Court of Appeal said at 58, now this was in the context of talking about whether it could be authorised, but in my

submission it shows the thinking of the Court, they said, "Allowing the interaction provides no protective benefit to the shark, so there is no justification for the risk." That –

WINKELMANN CJ:
What paragraph, sorry?

MR ELLIOTT:
That was at 58 of the Court of Appeal decision, Your Honour. It's about half way down.

WINKELMANN CJ:
Yes.

MR ELLIOTT:
It says in other words yes. But in my submission that ignores the evidence of Mr Duffy who at 25 of his affidavit, and this is referred to in my written submissions in paragraph 11.5, where his ultimate conclusion about the effect on sharks from cage diving was that where responsibly conducted shark cage diving can have a net conservation benefit for sharks, including great whites, and that reflects two things. The first is scientists know remarkably little about great whites. That's always in the documentaries. And the shark cage divers provide a lot of useful information to DOC in this case. The code of practice specifically requires the operators to keep a daily log of events, to report monthly to DOC and they are required to provide access to any photo or video footage and they are also required to report any harm incidences to DOC immediately.

WINKELMANN CJ:
That's just kind of regulating their conduct, isn't it? Is that actually helping DOC?

MR ELLIOTT:

No, Your Honour. If you actually look at the code, it actually talks about this specifically. It is a conscious decision. I'll just find the paragraph.

WINKELMANN CJ:

Well, they may have to have a mens rea but what are they reporting?

O'REGAN J:

But does this really matter? Why are we dealing with this?

MR ELLIOTT:

Well, Sir, if it's not irrelevant, in my submission the Court of Appeal spent too little time looking at whether or not this actually met the actus reus of the words and were influenced in my submission unfairly by what they saw as the commercial nature of this activity. They called it anthropocentric, which I had to look up, but in my submission when you're looking at this and when you're weighing this there is always a balancing test. When you're weighing the risk of harm to sharks, my fundamental submission is that shark cage diving provides a net conservation gain for great whites, not a net conservation –

WILLIAM YOUNG J:

It would be quite a hard issue to determine in a prosecution in the District Court.

O'REGAN J:

And even more so in a second appeal in the Supreme Court, I would have thought.

MR ELLIOTT:

Well, Sir, I –

WILLIAM YOUNG J:

Although here your complaint, which I have some sympathy for, is that it was really dealt with on the fly in the Court of Appeal by reference to evidence

addressed to something else that is unregulated, which I take it to be unregulated shark cage diving. That's your point, that's the primary point?

MR ELLIOTT:
Yes, yes, Your Honour.

WINKELMANN CJ:
Are you addressing us as to whether a declaration – because this – you wanted to raise the point as to whether a declaration should have been issued, or are you just arguing it was issued in too broad a terms? What's your point about the declaration?

MR ELLIOTT:
In the terms, no, I mean the declaration sought from the Court of Appeal was actually much more specific, the declaration sought by PauaMAC. I didn't appear in the Court of Appeal Your Honour but –

WINKELMANN CJ:
I'm asking you what the appellant's position is in relation to the declaration.

MR ELLIOTT:
So the specific declaration sought now by the appellant is set out in the application for leave to appeal. It's a little bit wordy so I can read it if you'd like, but it is bundle, volume 1 A-002, so it's right at the beginning. The difficultly, as we say, is that the Court of Appeal didn't define "shark cage diving" and what we say is you have to look at how it is specifically undertaken by Shark Experience and determine whether or not there is, even on its interpretation of risk of harm, and what about that, even on the Court of Appeal's interpretation gives rise to an offence because you can undertake shark cage diving unrestricted in compliance with a code, with attractants, without attractants, you can undertake it in respect of non-protected species, and the difficulty with this case as it sits on the Court of Appeal's decision today is that if someone is out there shark cage diving for Mako sharks, which are not protected, and a great white turns up,

have they committed an offence or not. So I think all the parties are agreed that what is really sought from the Court, whatever the outcome, is a specific declaration about what the terms mean and what, if anything, amounts to an offence.

WILLIAM YOUNG J:
The declaration made by the Court of Appeal looks a bit broad.

MR ELLIOTT:
It's very broad Sir. Unworkably broad in my submission.

WILLIAM YOUNG J:
But I mean on the other hand we can hardly make a negative declaration, can we. We can hardly say providing the shark divers do this, this, and this, comply with a code of conduct, use only certain types of berley etc, it's not an offence, because we just, I mean A, it's not what we normally do and B, we don't have the evidence anyway.

MR ELLIOTT:
No Sir, what has been sought by the appellants is a positive declaration.

WILLIAM YOUNG J:
Well it's a sort of a negative declaration. What you're doing isn't a breach of the law.

MR ELLIOTT:
Well what we're saying is that if you do what Shark Experience does, which is use attractants to bring sharks to a cage with no intention to harm, catch or kill them, and not doing any of those things, you are not committing an offence because –

GLAZEBROOK J:
Well that's really basically just saying if you're interpretation is accepted then it's not an offence.

MR ELLIOTT:

Yes, I mean I suppose the other possibility is that, and the Court has done this in other declaratory judgment cases, is just to set aside the declaration of the Court of Appeal, in which case arguably we go back to the High Court, but I think what everyone's looking for is as much clarity as the Court can give us. I accept that is tricky in the circumstances in terms of how you word it, my learned friends for the other parties may have something to say about that, but whatever is done the Court of Appeal's is just simply too broad. Unless there's any questions those are the submissions for the appellant.

WINKELMANN CJ:

Thank you Mr Elliott. Mr Scott?

MR SCOTT:

I have got a short oral note which I'm really just going to use myself but if it's of use to Your Honour. I've also given Your Honours a one page what I call a cheat sheet. I have trouble remembering the section numbers and the flow of the 63, 67, 68, so I've just got a cheat sheet there of the relevant sections that we're referring to. I've also included then my breakdown of the definition of "hunt" and "kill" which appears in the written submissions.

Now the first point made in the submissions Your Honours is that this is really only supposed to be, leave was only sought and granted in respect of a narrow question of statutory interpretation associated with the activity of shark cage diving and whether it constituted offence. There is no more generalised appeal where leave was not sought nor granted to challenge or disrupt the factual findings, or the factual analysis undertaken by the Court.

Now I elaborate on that in some detail in my submissions Your Honour but really there are really two elements to that challenge that permeates much of my friend's submissions, oral and written, and that focuses on the – those submissions really focus on, as my friend has just been dealing with, whether the activity we're dealing with here actually – what is the activity that constitutes shark cage diving which really in my submission focuses on the

use of attractants or not, and in my submission, and I'll come to it, that's really uncontroversial, and second what is the risk of harm? So the two factual things that permeate that are how are these animals brought to the use vessels, through the use of attractants, and what risk does that fundamentally pose to the animals?

Now in my submission the best way just to understand, (a) the importance of attractants in the –

GLAZEBROOK J:
Aren't we starting at the wrong end, because don't we have to look at what the interpretation is before we look at the facts?

MR SCOTT:
Yes, well, yes, it is important, Ma'am, and –

GLAZEBROOK J:
Well, because if, in fact, the interpretation in that has been indicated then it doesn't matter and if the interpretation is the higher view of what "disturb" actually means and in fact a mens rea to disturb, then again it doesn't matter, does it?

MR SCOTT:
No, it certainly doesn't matter if it's men, if it's mens rea and it certainly doesn't matter if it ultimately is about hunting or killing if it has to have the ultimate purpose of hunting and killing because –

GLAZEBROOK J:
Well, all I'm suggesting is that aren't we better starting with what the meaning is and then you can address us?

MR SCOTT:
Very happy.

GLAZEBROOK J:
It's up to you, I guess –

MR SCOTT:
No.

GLAZEBROOK J:
– but it's a bit difficult to understand the submission if we don't know what the definition actually is.

MR SCOTT:
Very happy to do that and circle back to those at the end, thank you.

GLAZEBROOK J:
Well, especially if you're saying there's no ability to challenge because if in fact the factual findings have nothing to do with what the interpretation is, then it's a bit difficult to see why we have to be stuck with factual findings.

MR SCOTT:
I'm happy with that, Ma'am. So if I can just come to the core interpretative issue then, so the key question really does, on section 63A and the definition of "hunt or kill", the appellant's submissions, and really in my submission it comes down to what I set out in my first paragraph of my primary submissions, Your Honour, when I ask the question when Parliament stated that "hunt or kill" also includes pursuing, disturbing, or molesting wildlife, did it intend to deliberately expand the level of protection beyond just hunting or killing in the ordinary sense of those words or was that a deliberate move when they said "also includes" and you'll see that that's a feature then of that definition in my cheat sheet where they, when the breakdown, it includes hunting or killing, taking –

WILLIAM YOUNG J:

Say you have just slightly re-organised that so that there was a return after "or like method", so it read, "Taking or using a firearm, dog, or like method," new line, "to hunt or kill wildlife, whether this results in killing or capturing or not"?

MR SCOTT:

Well, in my –

WILLIAM YOUNG J:

I mean that's in a sense the argument that I guess in a way Justice Clark accepted, and that seems to me to be the syntactical argument that would go against you.

MR SCOTT:

Yes, my submission, the key thing in terms of the syntax –

WILLIAM YOUNG J:

You say "wildlife" is repeated?

MR SCOTT:

– is the "wildlife" repeats. It's the repetition of "wildlife".

WILLIAM YOUNG J:

Except could be we sometimes repeat things.

MR SCOTT:

Well, in my submission it makes perfect sense for them to have done that.

WILLIAM YOUNG J:

Well, sorry, just pause there. Say the first "any wildlife" were not there, it would be a bit odd, "Pursuing, disturbing, or molesting," comma, "taking or using a firearm, dog, or like method," and then, "to hunt or kill wildlife." "Pursing," "disturbing" and "molesting" are I suppose transitive verbs that require an object.

MR SCOTT:

Yes, “wildlife”.

WILLIAM YOUNG J:

Whereas “to hunt or kill” doesn’t. So it’s a bit clunky. It’s not necessarily – it’s by no means the most – well, I don’t know whether it’s the most obvious. It’s not the only reading of the section but it would actually ease quite a lot of difficulty in relation to integrating the section without the definition with section 53 and section 68B.

MR SCOTT:

Yes, well, perhaps I’ll come back to section 53 in a moment, but in terms of my submission it is significant that they have first of all broken into these three subparts so that, if you like, the activities that really involve touching, likely bringing you into a contact, the actual ones, and I accept that “hunting” has got that broader connotation, and if I just mention there –

WINKELMANN CJ:

Can you just slow that down because I didn’t pick up what you just said in your last sentence?

MR SCOTT:

Yes sorry, so there’s essentially these three parts, which I've shaded on my cheat sheet. We’ve got the first element what it includes, so hunting and killing includes, hunting, killing, taking, trapping, capturing any wildlife. So those are ones which really on the ordinary sense are about physically getting hold of it, or trying to really get hold of it, and hunting, and certainly in terms of the definitions which I've included in the bundle Sir from the Oxford in the context of animals does include, the first definition is very much about the act of chasing wild animals for the purpose of catching or killing them but the second one, b. is the pursuit of a wild animal, the act of simultaneously seeking or endeavouring to find or search it out. So –

WILLIAM YOUNG J:

Sorry where's that definition?

MR SCOTT:

That's in the green volume, volume 2. Appellant's authorities, green volume 2, tab 14, there's a number of definitions there, and about the third page in there is the definition of "hunt" and the first one is that more classical one about animals for the purpose of catching and killing them, and then b. about two –

GLAZEBROOK J:

Sorry, can you please wait a second. I'm just trying to find your first definition. To go in pursuit of wild animals or to engage in the chase or am I on the wrong part of the definition?

MR ELLIOTT:

So I'm on the third column of that third page, about two-thirds of the way down "hunt".

O'REGAN J:

The second reference to "hunt". There's also a reference further up the page.

MR SCOTT:

Yes.

O'REGAN J:

So you're looking at the second one are you?

MR SCOTT:

I'm looking at the second one Your Honour is.

WILLIAM YOUNG J:

So that's to pursue wild animals or game for the purpose of catching or killing, to chase for food or sport, so where, sorry?

WINKELMANN CJ:

No, you're looking at the bottom one aren't you?

MR SCOTT:

I'm looking at 1.b. about two centimetres below…

WILLIAM YOUNG J:

But isn't that in relation to animals.

WINKELMANN CJ:

Where are we?

GLAZEBROOK J:

I'm on a different…

WILLIAM YOUNG J:

It's, "b. trans. To go eagerly in search of, search for, seek (esp. with desire and diligence)," is that right?

GLAZEBROOK J:

Okay, I see where you are.

WILLIAM YOUNG J:

And then you've got c. but those are normally –

WINKELMANN CJ:

To follow, to hound, to track, to pursue –

WILLIAM YOUNG J:

Okay, "To follow (as a hound does); to track," but that's got a catching and killing connotation.

MR SCOTT:

I was really just using the second 1.b. So 1. is the act of hunting, so I'm two-thirds of the way down on 496 on the third column.

GLAZEBROOK J:
Why are we looking at the noun definition when it's a verb?

MR SCOTT:
Yes, the act of hunting.

GLAZEBROOK J:
So I would have thought we were on the page over, which is where I was, which is the verb.

MR SCOTT:
Yes, and that's the one that we have included in the submission Your Honour, to go in pursuit –

WILLIAM YOUNG J:
"Of wild animals or game; to engage in the chase."

MR SCOTT:
And then to pursue wild animals for the purpose of catching or killing.

WILLIAM YOUNG J:
So these are pretty – "The dog kinds.. love to hunt in company. One day the son went froth to hunt."

MR SCOTT:
The key point I was making, Your Honour, I've diverted myself, is that those first ones really all, in the blue, are really all about classically hunting or killing as we think of those in everyday parlance. The second –

WILLIAM YOUNG J:
So blue and green are really about hunting and killing in the orthodox sense, and you say there's a herniating big different category in the pink?

MR SCOTT:

No, I don't say it's a herniating big difference, what I say Your Honour is that purposively interpreted we're dealing with absolutely protected animals here. So fundamentally we're talking about absolutely protected and partially protected animals. So what sort of protection would you expect Parliament would be providing for something that's absolutely protected. Is it just that it won't be hunted or killed in the ordinary sense of those words, or attempt to do it, or do you expect it to go wider than that, and as we see in virtually every piece of legislation that deals with these protected species, including the Marine Mammals Protection Act, I'll come to in a moment, we see a wider suite of protections. We see it in the international convention where we see the word "harassing" being used. We see here three words, pursuing, disturbing, molesting wildlife, and then in addition, some of those other preparatory acts of using a firearm, a dog, or a method to hunt or kill wildlife. So they are, in my submission, they all, when you interpret it purposively and think about what Parliament's intending, it's trying to capture a suite of activities unlike the hunting or killing where you're ultimately getting hold of it and killing it, a suite of activities which are nevertheless human activities which are harmful to wildlife and that's where the Court of Appeal's genius, if you like, their interpretation which looks to take a purposive approach to those words is simply to say, well, there must be some limits around those words. What are they? Well, they are to be found, the Courts tells us, by reference to the purpose of the Act which is all about ensuring that these absolutely protected species have an appropriate level of protection, so the Court looks to then fashion and discuss how that might play out in the particular context or particular circumstances, also having regard to the defences, and the defences are not here limited, as my friend suggests, to just the defence in relation to marine mammals, to those in 68B for marine wildlife which can only be used in circumstances of death or injury, but also the general defences under 68AB are available. Now, so –

WILLIAM YOUNG J:

68AB.

MR SCOTT:

68AB.

WINKELMANN CJ:

This is the section that doesn't apply.

MR SCOTT:

It's an important proposition so I should just focus on the section. So the history of these sections is important. It is set out in my submissions in more detail. But just starting back at 63, the offence provision, so 63 has been there broadly in those terms since the Act was first enacted in 53. Subsection (1) was actually recast in the 1996 amendments that were brought in, but relatively it was modernised more than substantively changed, and then when the Fisheries Act was amended in 1996, when the new Fisheries Act was created in 1996, the new section 63, 63A, was incorporated and along with it came the reporting provision, 63B, and then the defence provisions which we see in what is now 68B. In those days it didn't say defences to offences in respect of wildlife, marine wildlife. It just said defences. That was added as a result of amendments in 2000. But –

WINKELMANN CJ:

Sorry, can I? The Fisheries Act brought in section 63A and what else?

MR SCOTT:

It brought in 63A and then also brought in 63B, the reporting requirements for essentially those fish, marine species, and then brought in the defence provision in 68B. But we didn't have 68, critically we didn't have 68AB at that time. That was inserted in front of 68B later in the 2000 amendments. So at the time they passed in 2000, when 68AB is inserted, there is already a strict liability regime in place.

WILLIAM YOUNG J:

Where's the strict liability regime come from?

MR SCOTT:

So that, in my submission, flows from the fact that 63A followed by 63B was, in my submission, contemplating the fact that this was a strict liability offence. Sorry, isn't –

GLAZEBROOK J:

How did – can you –

MR SCOTT:

It isn't explicit. I accept it's not express at that stage. It becomes very express in 2000 and we've got the select committee report which –

WILLIAM YOUNG J:

Okay, well, just as a – say you're charged under section 63B with taking or using a dog to hunt or kill wildlife. How is that an absolute offence?

MR SCOTT:

63B?

WILLIAM YOUNG J:

An offence under section 63A –

MR SCOTT:

Yes.

WILLIAM YOUNG J:

– and the charging document says you committed an offence in that you did take a dog to hunt or kill wildlife.

WINKELMANN CJ:

Why don't we use section 63A, so –

MR SCOTT:

63A only relates to marine wildlife.

WILLIAM YOUNG J:

Sorry. Section 63, I'm sorry.

MR SCOTT:

Yes. So at –

WINKELMANN CJ:

So say we go out in a boat with a spear gun hunting down a great white –

WILLIAM YOUNG J:

No, because I'm reading this as actually more with a hunt with a dog or gun.

MR SCOTT:

So in that case we have 63 and then it's essentially a *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) issue about whether or not –

WILLIAM YOUNG J:

Why? But you have to prove an intention to hunt or kill wildlife under section 63, if that part of the definition is invoked.

WINKELMANN CJ:

Wouldn't it be the same under section 63A?

MR SCOTT:

It's a question then whether under applying *MacKenzie* principles the Court would have interpreted that as requiring mens rea.

WILLIAM YOUNG J:

I think I might have interpreted it if say I'll require it to be proved that the gun was taken too, ie, with the intention of hunting or killing wildlife.

MR SCOTT:

Ultimately we don't need to answer the question but as to –

WILLIAM YOUNG J:

Sorry, I don't quite understand the argument really. The same expression, it's effectively the same offence in substance, section 63 and section 63A. There's a very extensive definition of "hunt or kill". The charging sheet I want you to contemplate is that so-and-so did hunt or kill in that he did take a dog to hunt or kill wildlife. Now isn't that a mens rea offence?

MR SCOTT:

Yes, Sir, but that's because effectively it becomes an attempts provision.

WILLIAM YOUNG J:

No, no, it's just, well, I was going to get onto that –

GLAZEBROOK J:

The person says, "I was taking the dog for a walk. I had absolutely no intention to use the dog for anything at all."

WILLIAM YOUNG J:

So where's the onus of proof? Wouldn't the onus of proof be on the prosecution to prove that the intention was to use the dog to hunt or kill?

MR SCOTT:

Yes.

WILLIAM YOUNG J:

So that's an – it's not an absolute offence.

MR SCOTT:

Well, that's because those are effectively in the nature of attempts provisions. They are something you are doing inchoate and en route to the ultimate question, the ultimate act of hunting or killing.

WILLIAM YOUNG J:

Well, how can you hunt accidentally?

MR SCOTT:

Sorry?

WILLIAM YOUNG J:

If, say, I allege that you committed the offence of hunt or kill in that you hunted a pig or something.

MR SCOTT:

Yes.

WILLIAM YOUNG J:

Now how can you hunt accidentally?

MR SCOTT:

Well, depending on your approach to hunt, Sir –

WILLIAM YOUNG J:

No, if that's the only language, if that's the only bit of the definition that's invoked.

MR SCOTT:

Well, Sir, because you could perfectly well say someone is effectively hunting even though they may not intending to be. So someone who's chasing an animal through the bush, someone's – there's a kiwi –

WILLIAM YOUNG J:

But isn't it a word that just necessarily connotes a purpose?

MR SCOTT:

Well, someone who, in ordinary parlance, someone who is out following a kiwi and then starts following it and then starts chasing it and then starts really getting close to it, could well be said to be hunting it.

WILLIAM YOUNG J:

Say they think it's a kea. I mean, there are all sorts of variations, but there are certainly offences in there that are not absolute, attempting to commit an offence, being a party to the commission of an offence would be mens rea offences.

MR SCOTT:

Yes, Sir, and there I've put in the authorities that confirm that, that –

WILLIAM YOUNG J:

Well, wouldn't it be sensible to construe the whole thing as mens rea given that it carries two years' imprisonment?

MR SCOTT:

Well, because it can't be, Sir, because Parliament tells us that – well, first of all there's –

WINKELMANN CJ:

Well, can I just, if we move off the language, just "using to" suggests, how can you use something to do something unless you intend to use it to do that?

MR SCOTT:

What we know from, respect to, is from 63B it's beyond doubt because once we get 63B included and as a result of the amendments incorporated into the Act in 2000, sorry, 68B, AB, sorry, 68AB, we then see very clearly, in subparagraph 1, in any prosecution listed in subsection (5), the prosecution must prove intention, and then in (2) and (3), in any prosecution for an offence not listed in (5) it's not necessary to prove intention to commit the offence.

WILLIAM YOUNG J:

Well, what about the last –

ELLEN FRANCE J:

But then you have to deal with subsection (6) which puts these two sections in a different category.

MR SCOTT:

Well, in my submission it doesn't ultimately because what that – that section is not saying that section 63 is except what – it says 6, 63A and 63 shall continue to apply, so that's just simply recognising, in my submission, terms of the legislative history, and I've tried to – I've managed to find the select committee report but in my submission that simply confirms that because they were proceeding on the basis they were already strict liability –

WILLIAM YOUNG J:

Perhaps they were proceeding on the basis that it would be for the Court to decide in a particular case.

MR SCOTT:

No, in my submission they would –

WILLIAM YOUNG J:

I mean, wouldn't you just approach it on the basis that we – in determining whether an offence has been committed under these sections we just put a line through section 68AB because that's what the legislature has told us to do in subsection (6)?

MR SCOTT:

In my submission that's not what the legislature has said there. It says they shall continue to apply, as if the section had not been enacted. It doesn't say, so it doesn't for example, if they wanted to achieve the intention Your Honour was saying, they would have said back in subsection (2) when they said, "Any prosecution for an offence… not listed in subsection (5)," they would have said or section 63A.

GLAZEBROOK J:

But why would they have done that, just left out subsection (6) and then if it wasn't listed in subsection (5) then it was a strict liability offence.

MR SCOTT:

Because that is where they were looking to carve out the particular sections, or the particular offences in the Act –

GLAZEBROOK J:

What on earth would they do that for?

MR SCOTT:

Because that's what –

GLAZEBROOK J:

If they were already strict liability offences why wouldn't they just leave them as being clearly strict liability offences under section 68AB?

WINKELMANN CJ:

Yes, so why would they, let's give you a chance to answer, why would they carve it out in this fashion?

MR SCOTT:

Because if they wanted to be clear that these offences, the offences in section 63A, were in fact to be mens rea, were in fact mens rea offences, that is the logical place you would do it. you would put them with subsection (5). Those are mens rea, these ones are mens rea, you will have dealt with them together.

WILLIAM YOUNG J:

Perhaps the legislative draftsman thought of the point we'd be making that an offence of having a dog with the intention of hunting or killing is a bit hard to describe as a non-mens rea offence so we'll just leave it for the Courts to decide when the situation arises.

MR SCOTT:

But what you're effectively saying then Your Honour is that the whole, the most important offences in these sections, which Parliament intended to go, all to be mens rea, were not in fact mens rea. The whole of section 63 effectively, Your Honour, is saying then is not mens rea. As well as 63A.

GLAZEBROOK J:

Sorry, I don't quite understand that.

WILLIAM YOUNG J:

All I'm simply saying is section 68AB(6) may possibly mean what it says.

MR SCOTT:

Well in my submission what section, the more logical reason and the unusual wording around section 63 where they say, continues to apply, they knew section 63 was – they're bringing in a specific or generalised absence of fault defence regime, and we know that from the select committee report and I will take you to it in a moment. They're bringing that in in 2000. It's sitting on top of what, in my submission, clearly Parliament, when Parliament amended the Fisheries Act in 1996, and brought in a new Fisheries Act of which these amendments be it section 63A and the counterpart defence provisions were part of, they were bringing in wide-ranging offence provisions, change to the offence provisions in the Fisheries Act moving everything to strict liability, specific mens rea offences, everything else strict liability. They've done exactly the same progressively in this section, these sections over time, and all they were trying to do, and I accept it's unusual wording, but all they were trying to do in subsection (6) was make it clear that that existing regime continues to apply as if this had not been enacted. But in my submission it's absolutely clear on the –

WILLIAM YOUNG J:

But doesn't it mean that subsections (1), (2) and (3) don't apply?

MR SCOTT:

No, what it says Sir, the critical wording is “remains”, that any prosecution in subsections (1) and (2), in any prosecution, then you only have to prove mens rea in respect of subsection (5) and the defences are available for everything else. In any prosecution.

WILLIAM YOUNG J:

So you say subsections (1) and (2) apply to section 63A?

MR SCOTT:

Absolutely Sir.

WILLIAM YOUNG J:

All right.

WINKELMANN CJ:

And you were going to take us to the select committee report.

GLAZEBROOK J:

Can you say why that is the case on the language?

MR SCOTT:

Because it comes to the same point, Your Honour, that section 63, 68AB(6) is not intending to –

GLAZEBROOK J:

I'm not really interested in intent, I'm just asking you why on the language when it says this section doesn’t apply, as if the section hadn’t been enacted, that actually you say subsections (1) and (2) of that section do apply to section 63 or 63B.

MR SCOTT:

With respect, that’s not what the section says Your Honour, that’s the critical point. It doesn’t say section 63A and 63B don’t apply. It says they continue to apply as if the section had not been enacted.

WILLIAM YOUNG J:

Yes, well they say as if the section –

MR SCOTT:

So they just, they're simply not affected by –

GLAZEBROOK J:

All right, do you say that section 68AB(1) and (2) apply to 63 and 63A, and if so how do you reconcile that with the wording of subsection (6)?

MR SCOTT:

Because I reconcile, I do say that subsections (1) and (2) apply to section 63A, and I reconcile that on the basis that the intention of –

GLAZEBROOK J:

I'm not really very interested in intention at the moment, I want to know about the wording.

MR SCOTT:

Well the wording, that subsection (6) does not say it does not apply. It says 63A and 63B continue to apply as if this hadn't been enacted. And I say if Parliament had intended to make, which is, simply to ensure, if they thought those provisions were mens rea and they wanted them to continue as mens rea, they would have added it after subsection (5), that is the logical place.

WILLIAM YOUNG J:

Or vice versa. If they had thought there were absolute offences they would have put them in the absolute offences category.

MR SCOTT:

Well what we know, Your Honour, is that the select committee thought that everything other than those subsection (5) offences were going to be –

WINKELMANN CJ:

Can I just ask you a couple of questions before we go to the select committee. So when we look at does section 68AB pick up in a list at (5) offences which were already there, or is it only picking up in that list new offences, sorry offence? I'm just trying to –

MR SCOTT:

I think, yes, I think 66, the one that might be Your Honour, 66A(3), when that came in…

WINKELMANN CJ:

Because what I'm trying to see is were they going back through the Act and doing a tidying up and making clear what was already there, or were they simply covering off things which were new. Because if the former it's strange that they didn't…

MR SCOTT:

So 66A came in later in 2017 so that doesn't help us. In my submission the select committee report is useful though.

WINKELMANN CJ:

Before we go to that, is your argument therefore that when they say section 63A and section 63B continue to apply as if this section had not been enacted, all they're saying is that they stay there but it doesn't stop the additional defence in section 68AB applying.

MR SCOTT:

Correct. And we can see at –

WINKELMANN CJ:

Adding in a new defence you say doesn't affect the application of section 63A and B?

MR SCOTT:

It simply means, Your Honour, that you've got two defences. So you've got the standard defences apply, the normal absence of fault defences apply to everything, that's what subsections (2) and (3) tell us.

WILLIAM YOUNG J:

The truth is it would have been a nonsense to say that these offences were absolute offences because some of them aren't.

MR SCOTT:

Well they're not, strict liability Your Honour means?

WILLIAM YOUNG J:

Yes, because obviously some of the permutations covered by section 63A, and section 63 for that matter, and the definition "hunt or kill" can't be strict liability offences.

MR SCOTT:

Yes Your Honour and the Court has grappled – I accept Your Honour's point and the Court has grappled with this in the context of when you have an attempts provision within a strict liability context. So my paragraph 76 of my main submissions I refer to the Court of Appeal's decision in *Yu v New Zealand Customs Service* [2016] NZAR 626 (CA), referring back to a decision of Justice Clifford and Bryant, paragraph 66 on page 18 of my main submissions, where the Court has said that even when offences are strict liability, attempt provisions by their nature just have to have a mens rea component to them. I'll give Your Honour a moment to find paragraph 76. So Your Honour is right that there are, because of certain, the nature of certain offences they can only be done essentially with attempt and even in a strict liability context that's a gloss the Court has looked to read in on top of strict liability offences, and I accept that could certainly apply with some of the particular wording, and in particular the dog one Your Honour is referring to me, but the select committee was pretty clear –

WINKELMANN CJ:

So where is the select committee report?

MR SCOTT:

So the select committee report is in the respondent's authorities, volume 2, second to last tab, third to last tab 47.

WILLIAM YOUNG J:

It doesn't actually address what is the current section 68AB(6), it's referring to another subsection (6).

MR SCOTT:

No, at page 4 of the report, this is the report back of the, what was the Wildlife (Penalties) Bill, which we can see becomes the Wildlife (Penalties) Remedial Measures Bill that we see in the legislation, we see that on page 2, at the end of the first paragraph they change the name of the Bill, and that's the name it ends up in terms of the enactment. Then on page 4 they discuss the defences, and there had been a proposal to have a reasonable excuse defence in the legislation which they removed and so the very last paragraph on page 4, "We recommend the insertion of a new section 68AB," generalised no fault provision, mens rea, "This provides that, except in a small number of mens rea offences, all other offences under the Act are to be strict liability in nature."

WILLIAM YOUNG J:

Was this subsection we're looking at in the Bill at the time?

MR SCOTT:

This includes, this Bill includes that subsection, so you then see that –

WILLIAM YOUNG J:

Okay, where's the Bill?

MR SCOTT:

So the Bill is on the back of it, so behind, just carry on after the report Sir, and if you go through to page, the 68AB starts on page 12 of the Bill and then we have subsection (6) over on page 13 of the Bill. So that, the select committee are inserting that provision at the time.

WINKELMANN CJ:

So when they say "except for a small number of mens rea offences" aren't they referring to the ones that are listed in AB?

MR SCOTT:

Yes, they're referring to the ones listed in subsection (5) of AB. So those are the only mens rea offences in the Act. Subject as you say Your Honour –

WILLIAM YOUNG J:

But they don't deal with subsection (6), was that there already?

MR SCOTT:

No, so that gets, no, so subsection (6) is added as part of their amendment, so that when they, there was no section 68AB at all before this select committee report, they insert this is a new mens rea *MacKenzie* defence.

WILLIAM YOUNG J:

Section 63B isn't a defence provision, is it, although it feeds into a defence provision.

MR SCOTT:

Correct Sir.

WILLIAM YOUNG J:

It is actually in itself a defence provision, isn't it?

O'REGAN J:

68 you're looking at?

WILLIAM YOUNG J:

63B?

MR SCOTT:

63B is really, I think of it as a reporting requirement.

WILLIAM YOUNG J:

Yes, what it is a reporting provision, but all it does is create another offence.

MR SCOTT:

Yes, if you don't report.

WILLIAM YOUNG J:

Yes, so in itself it's not a defence, although it's picked up later.

MR SCOTT:

No but the other importance of it Sir is it does recognise the fact that it assumes that you can do these things accidentally and incidentally so –

WILLIAM YOUNG J:

Well maybe but it just says if you do you've got to report it. I know there are other offences like it.

MR SCOTT:

Yes Sir, so it hasn't, Your Honour is fundamentally right though, it has not introduced some sort of generalised or even of marine species, *MacKenzie* absence of fault defence. That then comes in 2000.

WILLIAM YOUNG J:

Sorry, section 63B, I mean presumably it may well be a mens rea offence because you can only report what you know about.

MR SCOTT:

Yes. With respect we don't need to deal with it, all I need to deal with –

WILLIAM YOUNG J:

Sorry, I think you might have to, mightn't you, because if you're right it's by accident, it's become a, it's a mens rea, it's a strict liability offence.

MR SCOTT:

Well my submission is clear, the select committee, it really confirms my interpretation in respect to that report. It's saying they thought as a result of the amendments they were making in 2000, building on everything that had gone before, the only section, the only provisions that were going to be mens rea offences were the ones that they'd listed in subsection (5). That's what the section says –

WILLIAM YOUNG J:

But if they thought that they were wrong. I mean you would concede that, that they thought that they were wrong.

MR SCOTT:

Yes, well the Court then, I accept Sir adds a gloss to that and in many case say some of these sections such as attempts provisions simply cannot be committed because of their nature without some intent, and there may be some other ones that also have intent, as Your Honour was raising about the dog, but we come back to the critical words of "disturb, molest and pursue" and do they need intent, and in my submission they are simply part of the strict liability regime. They aren't words –

WINKELMANN CJ:

Why do you need to argue that? Why do you want to argue that they're strict liability because doesn't it make it really kind of harder for you actually? Wouldn't it be easier for your case to argue that there's an intent needed, you have to intend to disturb?

MR SCOTT:

Well, it may make it easier, with respect, Ma'am, but I don't think it makes it right.

WINKELMANN CJ:

You're arguing not because it's a logical part of your argument, a necessary part of your argument? You're just arguing because you think it's correct?

MR SCOTT:

That is the – in my submission, that is what – reflecting the intent of Parliament.

GLAZEBROOK J:

Well, isn't the – well, you are actually making it much more likely for us to accept the appellant's argument in fact but…

MR SCOTT:

But the –

GLAZEBROOK J:

Because pursuing, disturbing, molesting any wildlife, if that can be seen as part of the attempt they're going to much more likely need – but –

MR SCOTT:

Of course, it doesn't help –

GLAZEBROOK J:

– and in any event, and especially the firearm and the dog. So that second stage does look more intent to me than the first stage where I can understand a strict liability. If you kill it then you've got problems.

MR SCOTT:

Why would Parliament have intended clearly that, in my submission, they clearly intended that 63 would be strict liability because there's no equivalent carve out –

GLAZEBROOK J:

Well, they may not have been actually looking at the definition of "hunt" and "kill" in such a way that you're suggesting we do. They may have thought

there's strict liability if you hunt or kill in the normal sense of the word. They often don't get this stuff right.

MR SCOTT:
Yes.

ELLEN FRANCE J:
See at section 63 as it was initially enacted, "Every person commits an offence who, without legal authority, the proof for which shall be on the person charged, hunts or kills."

MR SCOTT:
Yes, that was the initial formulation.

ELLEN FRANCE J:
Yes.

MR SCOTT:
Yes, it was changed. It was modernised. But that was the only substantive wording that was taken out when it was modernised in…

WINKELMANN CJ:
Isn't the most likely explanation for section 68AB(6) that which Justice Young suggested, I think it was Justice Young, that it was just too hard to work out whether, what the intent stages of section 63A was and therefore they carved it out?

MR SCOTT:
No, in my submission the select committee report is unambiguously clear and entirely consistent with 63A.

WILLIAM YOUNG J:
I'm glad they did it unambiguously clearly.

MR SCOTT:

The only –

WILLIAM YOUNG J:

Wouldn't have wanted to have to deal with this case if it had not been clear.

MR SCOTT:

The only provisions that they believed were going to carry mens rea, and it's always subject to any gloss from the Court, but, attempts and the like, but the only provisions that were going to be mens rea were those listed in subsection (5). It could not be clearer.

WINKELMANN CJ:

Well, where does it say that? Can you just help me, unambiguously clearly?

MR SCOTT:

So that's a result of – sorry, in the select committee report they say that in the last paragraph on page 4.

ELLEN FRANCE J:

What the Amendment Act itself says in its purpose provision at section 3(d) is to clarify the basis of liability for offences by indicating which offences are offences of strict liability and which offences require the prosecution to prove that the defendant intended to commit the offence. That's what the Amendment Act itself said. I don't know whether that helps you or not.

MR SCOTT:

I think it does. I think it comes back to my proposition that Parliament assumed, based on subsections (2) and, sorry, (2) and (3) of 68AB that the only mens rea offences would be those listed in subsection (5).

WILLIAM YOUNG J:

I don't want to put this tendent to you because it's not really intended tendentiously but effectively what subsection (6) should have read is

subsections 63(a) and 63(b) continue to apply but subject to subsections (1), (2) and (3), or (1), (2), (3), (4) and (5).

MR SCOTT:
That would have been…

WILLIAM YOUNG J:
But subject to this Act, subject to the section.

MR SCOTT:
Yes.

GLAZEBROOK J:
But why would you need to if you just – why would you even need to put subsection (6) in? That's what I can't understand.

MR SCOTT:
And frankly, in my submission, it was out of some sort of abundance of caution. We simply don't know what the drafter did –

GLAZEBROOK J:
But abundance of caution for what reason?

MR SCOTT:
Well, because they were concerned that because they were strict liability provisions already that somehow this was going to be seen as affecting that in some way. I don't fully understand the logic of it. What I do understand, with respect, is if they had intended that 63 and 63A, if they had intended – there's no logical reason for the maker to differentiate between the two – if they had intended 63 and 63A not to be mens rea offences, they would have put them after subsection (5) or before subsection (5).

WILLIAM YOUNG J:
But on your view, on your argument, the section means exactly the same as it would've if subsection (6) wasn't there?

MR SCOTT:

Well, you could say that's just another way, with respect, of saying that it's there for the avoidance of doubt or they're just trying to clarify, poorly, an intent. In my submission they – you didn't need that – I don't think you needed – in my submission you wouldn't need that provision at all but they were, out of an abundance of caution, they were trying to make it clear that what they were doing was not carving across what they had already done.

GLAZEBROOK J:

I just don't see why it would do, because if they were already strict liability why wouldn't, why would it cut across it?

MR SCOTT:

It's not clear but what is more of it though, Ma'am, is my alternative proposition, that had they intended them not to be mens rea, sorry, had they intended them to be mens rea –

GLAZEBROOK J:

Well, no, that doesn't, frankly, doesn't mean anything to me because if you say that's nothing to do with it then, and they carry on, then they just carry on.

WINKELMANN CJ:

This is not necessary for your argument at all, is it, Mr Scott? You're just simply submitting it to us this is the correct, having spent a lot of time with this legislation, you're just saying this is the correct interpretation but it's not necessary for your argument?

MR SCOTT:

No, correct, Ma'am, and also, Ma'am, it doesn't help with the shark tag on because of course here they are very deliberate. There's no – this is not a situation where they're not intending to put berley in the water and track the sharks.

WILLIAM YOUNG J:
No, they're not intending to harm the sharks.

MR SCOTT:
No.

WILLIAM YOUNG J:
So it might be material.

WINKELMANN CJ:
So I'm just conscious of the time so I'm thinking we've grilled you enough on this but you're helping us so…

MR SCOTT:
So just continuing with the interpretive analysis, and I'm at paragraph 5 of my hand-up note, but – so the appellant's approach is unashamedly that the words in pink, the intermediate level 2 words, they say are simply words that "pursue", "disturbing", "molesting" and they are things that occur, activities occurring in the lead-up to or intermediate actions they call them on the lead-up to hunting or killing. In my submission that is wrong and that they the – this provision was deliberately intended to provide a broader range of protections for these wildlife.

Before I forget I'll just provide Your Honour with the reference to the equivalent provisions in the Marine Mammal Protection Act which does a similar, provides similar protection. So that's in the appellant's volume 1, blue volume, a slightly newer Act, 1978, and it's an offence under – tab 7, and it's an offence to take any marine mammal under section 9, which is on page 16 of the Act, so every person comments an offence who takes or possesses on board any marine mammal, and then the definition of "take" which is relevant, back on page 5, "Take includes (a) to take, catch, kill, injure," and includes attracts, "poison, tranquilise, herd, harass, disturb or possess," marine mammals, so very much in the same ilk as the other…

WINKELMANN CJ:

So I referred Ms Grey earlier to those other Acts and what strikes me, when you refer to that as well, is that there's a series of Acts which are taking a word which doesn't naturally bear all the meanings they then give it, so it seems to be a style of drafting.

MR SCOTT:

Absolutely. They all have, yes, and even in the international convention, which Her Honour Justice France referred to, that has got the same version of "take" but includes within that the word "harass". So it is very much the way that virtually all of these provisions are drafted, whereas they take a simple word "hunt or kill, take" and then they embody into that additional layers of protection, why, because fundamentally in the case of these sections are dealing with absolutely protected species. There's a very small number of partially protected, just a couple of species, but fundamentally these sections are just looking to protect our absolutely protected predominantly native, if not solely native, many endangered species. Is it likely, I simply ask, that Parliament intended that the only level of protection that they would have is that those animals not be hunted or killed or attempts to hunt or kill them. It's completely to be expected, in my submission, that Parliament would have expected, would have intended in my submission to do exactly what it did with the pink section, it put into the middle of that very deliberately words that were intended to considerably broaden that to effect a range of activities that don't, that go well beyond the actual touching, necessarily interfering with those animals ultimately killing them, but also ones that, where it doesn't necessarily mean you come into contact with those animals at all, but where you are harassing, where you are disturbing, molesting or pursuing them, and that's where the –

WINKELMANN CJ:

Did you look at those other Acts that I referred Ms Grey to which is the Animal Welfare Act et cetera, because it just occurred to me that they've used effectively the same words but they've just used better setting out.

MR SCOTT:

Yes, and every one of them unfortunately, or fortunately, every one of them has slightly different formulations but you're right, the fundamental of them is the same Your Honour. I have looked at them all. They all have that same, that common approach of condensing everything into one or two, in our case two words, and then defining that very broadly to cover a suite of much broader activities. Why? For the purpose I have said. So that then is the importance, Your Honour, of the Court of Appeal's analysis and in paragraphs, if I can refer Your Honours to paragraphs 43 and 44 of the Court of Appeal's judgment where it dealt with that. The Court knew there had to be some bounds on those words, pursuing, disturbing, molesting, and not surprisingly in my submission it simply adopted a purposive approach to understand those words in the context of the legislation. So in the context of legislation where as I set out in my submissions the scheme of this Act is dealing with a broad range of animals, many of which have no forms of protection. You come down to what is a relatively smaller, a much smaller number of native species which we're wanting to protect, what is the level of protection being afforded to those species. So the Court then adopts a purposive approach to that and said, and it really comes down to the end of paragraph 44 of the Court of Appeal's judgment, "Where the line is to be drawn will come down to the risk the act presents for the animal." In my submission that is a perfectly sensible approach for the Court to take and the analysis there in those two paragraphs, in my submission, provides a very sensible framework going forward for when, and it's always going to be a question of fact on each particular case as to whether someone has crossed the line or not, and we won't –

WILLIAM YOUNG J:

So what's the line, substantial harm, risk of harm?

MR SCOTT:

Well potential harm. Both Justice Mallon, in the earlier decision of *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC) and Justice Williams in this decision also identified potential harm. So it's not just

a question of actual harm, it comes down to potential harm, so the potential for –

WILLIAM YOUNG J:
That's quite a low level.

MR SCOTT:
Quite a low level.

WILLIAM YOUNG J:
How do you deal then with the example of the commercial fisherman or perhaps the amateur fisherman cleaning fish at sea and attracting sharks by dropping the –

MR SCOTT:
So taking the commercial, which I know a little bit better than, acting for the commercial industry rather than not a recreational fisher. The commercial fishing industry regularly faces this issue across a broad spectrum of their business now where they are expected through international conventions and domestic law to continually modify and change their fishing practices to reduce risks. So to take the, to take one another protected species under the Wildlife Act, one of the three or four species that is declared is deepwater corals. There are three or four species of deepwater coral which are included, so there are rules which have just been, on the, both domestically and on the high seas which now, if fishing vessels even, you know, catch a very small amount of that coral they're expected to move on. They can't just carry on that activity.

WILLIAM YOUNG J:
Okay, no I understand that, but just assume someone is cleaning fish off the Titi Islands and it attracts sharks and they bang into each other.

MR SCOTT:

Yes, so the question then on this analysis, what is the risk of harm or potential harm. So if, for example, you just, fisherman, they were doing it once and they just threw some fish over and some sharks came round and ate it and swam away, then there's no reason for them to see there's any potential risk or harm or potential harm. If, however, suddenly a whole, you know, what's a group of fish called, a school of these sharks turned up, they don't normally act in that way, they're relatively solitary, but say a group of sharks all turned up together and got into a feeding frenzy over it, and you could see they were getting damaged, if the next day those fishermen did that same thing again, they could well get –

WILLIAM YOUNG J:

But why wouldn't it be an offence the first time they did it, because they know that's likely to happen?

MR SCOTT:

Well they don't know, that's the whole point, they don't know it's likely to happen. It's not –

GLAZEBROOK J:

But if it's not mens rea it doesn't matter whether they know it's likely to happen or not. If it does happen –

MR SCOTT:

They have the defence, they –

GLAZEBROOK J:

It's strict liability.

MR SCOTT:

They have the defences available to them under section 68 –

GLAZEBROOK J:
Well where do they have their defences available if section –

MR SCOTT:
They have the defence available –

WINKELMANN CJ:
We're in the loop.

GLAZEBROOK J:
I didn't understand you to say the defences were available under section 68AB, they're available too, so the whole section applies?

MR SCOTT:
Well that –

GLAZEBROOK J:
Oh okay, sorry.

WINKELMANN CJ:
Yes, that's the whole point.

GLAZEBROOK J:
I was obviously in an alternate universe.

WINKELMANN CJ:
So Mr Scott we're having some difficulty, you can tell that, with your no mens rea argument, and it just seems to make it unnecessarily hard for you. I understand your argument. I myself don't, I'm not following it as closely, as well as you would like me to at the moment but it does seem to make it unnecessarily difficult for your case, to say that it's strict liability because then you do get into difficult and fanciful areas.

MR SCOTT:

Well with respect the difficulty Your Honours then face because I'll, with respect, put it back to Your Honours because if I'm wrong then Your Honours face the issue that, in terms of 60, Your Honour, the carve out if you like Your Honour says relates to 63A, but section 63 is that then strict liability or not because on its face there's no, subsection (6) definitely does not apply to subsection – to section 63 –

WINKELMANN CJ:

So your point, I mean then I can see the force of that point, that it's illogical to distinguish between section 63 and section 63A, and that's really your best point on that isn't it, really, if we go around and around.

MR SCOTT:

Yes, and there's nothing to suggest that Parliament was looking to, that the select committee were looking to distinguish –

WINKELMANN CJ:

They could not logically intend to differentiate between section 63 and section 63A, yet they have said that section 63 –

WILLIAM YOUNG J:

I suppose they're dealing with marine animals and this is fisheries legislation.

WINKELMANN CJ:

Yes.

MR SCOTT:

No, this one isn't though Your Honour. This Bill, the amendments that were made in 2000 was not part of the Fisheries Bill.

WILLIAM YOUNG J:

Oh was it not?

MR SCOTT:

It was just a generalised revamp of the –

GLAZEBROOK J:

No, no, but the bringing in, no I think Justice Young's point is bringing in those two sections was related to the fisheries regime, so the distinction is that you leave it in the fisheries regime where it is.

WILLIAM YOUNG J:

Okay.

MR SCOTT:

But when they came to standardise all the provisions in 2000 it was just a general provision which wasn't fisheries focused at all, and in my submission it's very clear they intended those to be mens rea offences. Not to be mens rea offences.

ELLEN FRANCE J:

The difficulty I have, even if you're looking at 63(1) is that "hunt" does seem to indicate a purpose, that you need a, I'm putting to one side the extended definition, but if you're just talking about hunting it seems odd to me to say you don't have to be intending to do that. "I'm hunting for Mary." Well, I'm intending to…

MR SCOTT:

But in my submission it's still not a normal use of language at all to simply, or for a Court to say you may not have been intending to, and so in many cases, in virtually all cases the person will probably have mens rea, even though on my approach they don't need it.

WILLIAM YOUNG J:

How can you hunt for someone without intending to do it?

MR SCOTT:

Well your actions can be objectively assessed as amounting to hunting, even if you don't intend it.

WILLIAM YOUNG J:

Even though it's a word that intrinsically is purposive?

MR SCOTT:

Even if –

GLAZEBROOK J:

So it may be related to the actus reus but it's not specifically mens rea, that you can't hunt unless you are actually intending to hunt, and you can't go out with a dog to hunt or kill unless you're going out with the dog to hunt or kill. If you go out with the dog for a walk –

MR SCOTT:

Yes, I agree with that, in the same way as with attempt provisions, you can't attempt to do something unless you're intending to do it.

WINKELMANN CJ:

So notwithstanding section 68AB, section 63 remains a mixed mens rea strict liability offence.

MR SCOTT:

Yes.

WINKELMANN CJ:

Just as section 63A is.

MR SCOTT:

Correct Ma'am. In relation to –

GLAZEBROOK J:

Well you say not mens rea, it's just that it's implicit in the wording of the actus reus that you have to have the intent.

MR SCOTT:

With some of those words, yes, and –

GLAZEBROOK J:

If you do then it's strict liability and then killing obviously, if you kill then you don't have to have a mens rea in terms of killing.

MR SCOTT:

You wouldn't, yes. So you see that in Justice Mallon's formulation in *Solid Energy* where she talked about, she didn't say it always had to happen, but it normally with these words, the action would be directed at the animal, which is another way of saying, she was contrasting with someone's walking through the bush and they just, a bird flies away. If you're talking about being purposively interpreted, if you're talking about these words, "molest, disturb" they do have the connotation that there is something directed at the animal as well as that idea of it must have something which causes or potential to cause harm.

WINKELMANN CJ:

There is something very strange about section 68AB in itself. "The prosecution must prove that the defendant intended to commit the offence." I'm a little bit confused –

GLAZEBROOK J:

Well I suppose that would be, that you intended to do the things that led to the killing, although then why you have an accidental defence I don't know.

MR SCOTT:

Well the defence then only applies to the other ones that are not those mens rea offences in subsection (5) and we see that in subsection (3) is the

converse of that. "It is a defence in any prosecution for an offence not listed in subsection (5)," if you can prove there's a total absence of fault.

WINKELMANN CJ:
All right.

MR SCOTT:
The only other point I want to make in relation to section 63A is that, and the counterpart in section 63, is in relation to, we make the point in the submission that counterintuitive with section 63A(c), that you could, the Act clearly intends that you can disturb – well if one takes my other point, just staying with section 63, you can disturb a nest and be guilty of an offence of strict liability but that you couldn't, you're not guilty of disturbing the wildlife itself unless on my friend's approach you're also intending to ultimately hunt or kill it. So, and perhaps –

WINKELMANN CJ:
So what section is that?

MR SCOTT:
Sorry both section 63(1)(c) –

GLAZEBROOK J:
No, I don't think, her argument is specifically related to the syntax, isn't it, of "hunt or kill" and, "Rob, disturb, destroy, or have in his or her possession the nest," isn't anything to do with, it doesn't even use the word "hunt or kill".

MR SCOTT:
I understand Ma'am, but it would be strange then if you could be liable for the acts which don't involve any hunting or killing of any animal at all, of simply disturbing its nest –

GLAZEBROOK J:

Well it does actually because if you disturb the nest then often the birds, for instance, won't come back to the nest and so there won't be young in it.

MR SCOTT:

Yes, but that would support the view thought that when Parliament was using "hunt or kill" –

GLAZEBROOK J:

Well you are killing the birds then aren't you?

MR SCOTT:

Yes, but when you're using "hunt or kill" that is actually consistent that when it's talking about disturbing in the context of "hunt or kill" it was also intended to have that wider meaning and not just a disturbance that would result in hunting or killing, but a disturbance that would have some lesser harmful impact.

GLAZEBROOK J:

I think it's a wide bow you're drawing from a specific provision to nest but okay.

MR SCOTT:

It's really just contrasting with why would Parliament have intended to protect, clearly to protect the disturbance of a nest, irrespective of whether it results in any death. There's no requirement that it results in any death of anything, but on my friend's –

WINKELMANN CJ:

Is your point that there's no reason, there is an illogical difference then between, for instance, the protection in (a) and (c) in section 63A. So on Ms Grey's argument there has to be, everything that's done that's harmful has to be done pursuit of hunting and killing in the narrow dictionary sense no matter what the definition, but section 63A then extends to protect the nest…

MR SCOTT:

Irrespective of whether anything's been hunted or killed, correct.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Well nests are a particular issue though in respect because what it will mean is that even if you touch it sometimes the bird won't come back so all of the chicks, the next generation is gone.

MR SCOTT:

That maybe the case, yes, but it's not –

GLAZEBROOK J:

Sometimes I think if you disturb the nest they don't make another one.

MR SCOTT:

And I agree with that Your Honour, and that supports my submission, the view that when you look at similarly the word "disturb", there can be a series of disturbances that can occur that have harmful effects to animals, that don't actually involve hunting or killing it, that the Act would be intending to try and protect or prevent, given the scheme of the Act and the absolute protected status of these animals.

WINKELMANN CJ:

We'll take the luncheon adjournment. How much longer do you think you'll be?

MR SCOTT:

Not much longer Ma'am. I think in terms of the allocation of time I don't have much longer.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:
Mr Scott.

MR SCOTT:
As Your Honour pleases. So if I can just try and summarise where I think I've got to there in terms of the discussion we're having, really four propositions I think summarise where I've got to in those submissions, which is first that there's no logical reason to assume that Parliament intended to draw some distinction between section 63 and section 63A in terms of the level of protection that was being offered to these absolute protected species. So no distinction to be drawn. Second, we know that section 63 is a strict liability defence, given section 68AB, and third, in terms of section 68AB(6), whatever it means and was intended to mean in my submission it certainly doesn't mean, and wasn't intended to mean that mens rea was to be required for section 63A because the sole purpose of listing the provisions in subsection (5) was to identify the mens rea offences that would be in the Act. If Parliament had intended that these offences be mens rea, they would be listed in subsection (5) along with a number of other sections. So whatever it means, and I can't offer Your Honours a definitive view on that, it was certainly not to turn them into, or leave them as mens rea offences.

WINKELMANN CJ:
I suppose one possible argument is that section 63A is more clearly a mixed, possible argument is that section 63 is clearly a mixed, it's clearly mixed. Well not clearly mixed. One argument is that it is mixed, so it wasn't easily categorised and there is a small difference between it and section 63.

MR SCOTT:
Not really in terms of the actual activities criminalised. They both have got that same formulation, essentially the hunting or killing of protected species, buying or selling and then robbing or disturbing. All those three elements are there in each of them. But I suppose at the end, this is probably the fourth

point, that probably matters most in the sense that because in my submission I accept that some of the – despite the fact that I say that clearly that leaves you with strict liability provisions, I accept that some of the actions described, or the activities is probably a better way described in the offence provisions in both section 63 and 63A, are more naturally understood as involving intentional acts but, the critical point is, but there's no legal requirement to prove it. So they may more naturally be acts which hunting and the like –

GLAZEBROOK J:
How can that be? If they're more naturally – well either they are understood as involving intentional acts and you have to prove that because otherwise you haven't proved the offence, or they're not.

MR SCOTT:
Well that would be, well, I say they don't because that requires mens rea, and in my submission they don't.

GLAZEBROOK J:
Well then what do you prove if, if it's hunting, what do you have to prove in terms of hunting?

MR SCOTT:
So it maybe normally able to establish hunting by showing a series of actions which show, and in fact if someone was deliberately doing it then it would be, then they are simply committing the act.

WILLIAM YOUNG J:
Say it's equivocal.

MR SCOTT:
It really is those equivocal ones. It doesn't matter whether they are ultimately intending or not. If the Court views those acts as amounting to it, you simply don't –

WILLIAM YOUNG J:

Sorry, just pause there, you don't use this argument in relation to being with a dog with intent to hunt or kill. So it seems to me once you've accepted that that's a mens rea offence you've sort of sold the pass on this and the hunt is a word that seems to me to be incapable in its ordinary usage of not connoting a purpose.

MR SCOTT:

Well it's simply not something that has to be proven. It may be inferred. It may be likely. But the question is, is it agreeing that it's something the prosecution has to prove beyond reasonable doubt? No, it maybe in many cases if someone is actually engaging in activities of that nature, it will be obvious. But it's simply not something that has to, with those words, to be proven.

WILLIAM YOUNG J:

What would be obvious? That they were doing it for a purpose?

MR SCOTT:

In many cases that they were doing it for a purpose.

WILLIAM YOUNG J:

Okay, in that case it's proved, the purpose is proved. And if it's not obvious what happens?

MR SCOTT:

If it's not obvious it's a question of whether objectively assessed they are –

WILLIAM YOUNG J:

I think you've lost me on this point, I don't know about my colleagues.

GLAZEBROOK J:

Yes, I don't think you're going to really manage anything –

WINKELMANN CJ:

I mean it seems the most logical to read it as that you have to intend to hunt, if it's hunting, you have to intend to molest, which might be less than hunting, that's your argument. You have to intend to disturb, you have to intend to pursue, but you have to do those things intending to, and your argument is you don't have to show that you have to…

GLAZEBROOK J:

Well is your argument, can I perhaps try and put it this way. What you're saying is if objectively what you're doing is molesting, then you don't have to prove you were intending to molest, it's enough to prove that objectively there was a molesting, is that the argument?

MR SCOTT:

Correct.

GLAZEBROOK J:

Right.

WILLIAM YOUNG J:

Even though a definition of "molest" is to pester or harass?

GLAZEBROOK J:

If objectively what you're doing look as though you're pestering, then instead of you inferring a mens rea, you don't have to have the mens rea, isn't that the argument?

MR SCOTT:

Exactly.

WILLIAM YOUNG J:

Well it sort of works in different ways with different components of it.

MR SCOTT:

Yes.

WILLIAM YOUNG J:
Be easiest with “disturb”, not so easy with “pursue”.

WINKELMANN CJ:
Yes.

WILLIAM YOUNG J:
Particularly difficult with “hunt” I think and impossible when it comes to having a dog with the intention of hunting or killing.

MR SCOTT:
But with respect that’s what Parliament – the alternative then is to –

WILLIAM YOUNG J:
The alternative is to construe subsection (6) as meaning what it says, and –

MR SCOTT:
No, the alternative is to treat it like with the attempt provisions and say there are some words that actually do, notwithstanding what Parliament has said, that some, because Your Honour has that same issue then with section 63, that the whole of section 63 is strict liability plainly given section 68AB –

WILLIAM YOUNG J:
I understand the 63, 64, 63A problem.

MR SCOTT:
I'm sorry Sir?

WILLIAM YOUNG J:
I understand the section 63, section 63A problem that there’s no logical reason to differentiate.

GLAZEBROOK J:
But the problem really is – well all you’re really saying, in most of these cases if what objectively you’re doing is molesting or hunting, then you actually did

intend to do it, but in the very odd cases where you didn't intend to do it, just proving that objectively it would amount to what everybody would think of as hunting, that's enough.

MR SCOTT:

That's correct. So the essence of that argument is that these activities, the ones in the pink middle section, are discrete activities and that one of the major dividing lines between myself and my friend's arguments is she says those words, those middle sections are simply actions taken on route. They are leading to, they are intermediate steps towards hunting or killing. In my submission they're obviously discrete activities which are criminalised and need to be looked at separately. So that then gets to the question then of if they are to be looked at as discrete activities which have been criminalised, what line is drawn round those to deal with this question of the workability and practicality of the section, and that's when I simply rely on, in my submission, the Court of Appeal's analysis in paragraph 43 and 44 which is a –

GLAZEBROOK J:

Well, is that good enough though if you – so let's assume that these are strict liability offences and we have the berley thrown over and that disturbs the natural path of the great white because it comes over to look at it. There's absolutely no intention of having anything to do with the great white. You're just chucking waste over the side so you don't take it home and you don't have it on your boat.

MR SCOTT:

And I simply say there's no risk of –

GLAZEBROOK J:

So objective – well, why isn't there a risk, because you say there's a risk in terms of baiting for the shark diving –

MR SCOTT:

Yes.

GLAZEBROOK J:

– because they might come and disturb their natural pattern, they might bump into each other, they might bang their heads on the boat, they might be hurt, so why isn't there that same risk every time the fisherman throws it over, which is a different point, so it's a different point from the strict liability but if it is strict liability then the fact that you were just fishing and just chucked it over the side has nothing to do with it.

MR SCOTT:

So in my submission it would be very, it's likely to be very rare cases where just chucking odd pieces of fish or even –

GLAZEBROOK J:

Well, why?

MR SCOTT:

Because –

GLAZEBROOK J:

You're a commercial fisherman, you're a fisherman. You do that every time you go out. You know that it's May to whatever, September, and you know the great whites are around.

MR SCOTT:

Well, that's simply not in fact a problem for commer – we're short on evidence on this but that's not what – really the contrast, I suppose, a better way for me to answer it in terms of the evidence rather than me – is to –

GLAZEBROOK J:

I don't think it does answer on the evidence because – well, maybe – well, tell me why it answers on the evidence then.

MR SCOTT:

Yes, because when one looks at actually what this Act, what's involved in shark cage diving, it's actually not just throwing berley in the water but the photographs you can see on the back of my submissions which come from the evidence, the key thing is the way they use the bait on a line and they drag the line and they bring the vessel, the animals right up to the boat, partly for the effect of an open mouth, partly because they want them nice and close to the boat, so there's that process you see in all those photographs of them dragging the line.

WILLIAM YOUNG J:

But that's intention, isn't it? That's because they are intentionally drawing the shark right up to the boat.

GLAZEBROOK J:

Well, you throw some bait over with a hook.

MR SCOTT:

Yes.

GLAZEBROOK J:

So you've got a wriggling whatever it is on a hook and what you're trying to do is to catch whatever you're perfectly allowed to catch under the – and in fact the great white comes along and swallows it and hurts its mouth.

MR SCOTT:

And there are specific defence provisions in there in section 68B for exactly that, if it's been conducted as part –

GLAZEBROOK J:

No, no, because you're saying it just comes under section 63.

MR SCOTT:

No, this is a great white shark so it's still – it's under 63A and therefore the defence provisions are available because you're dealing with a marine, marine wildlife, you've got the defence provision available to you under section 68B which says that if it's accidental –

WILLIAM YOUNG J:

But only if you injure or kill it.

MR SCOTT:

Sorry, Sir?

WILLIAM YOUNG J:

Only if you injure or kill it.

MR SCOTT:

Yes, so if you catch it.

WILLIAM YOUNG J:

But say you don't. Say you just attract it and it's at risk of being injured or killed.

MR SCOTT:

Yes, so then if someone takes issue with that then you've got the general defence provisions under –

WILLIAM YOUNG J:

Of what?

MR SCOTT:

Under 68AB(3) which would not be available to you if you were doing it regularly, and that is an issue, absolute issue, faced by commercial fisherman every day of the week. They face the risk if that they involve in repeated behaviour, particularly with sea birds, there's a huge sea bird mitigation programme by the fishing industry where they have to continuously avoid and

put in place practices which are continually adapted to try and avoid any capture of particularly sea birds, albatrosses and the like.

WINKELMANN CJ:

Is there another way of narrowing the scope of the reach of this provision which is to take the approach Justice Glazebrook suggested which is to give more meaning to the particular words, so, for instance, "disturb", to give it a narrower meaning or make it a higher threshold, whichever way you want to articulate that, rather than just putting a super-added requirement of risk of harm across the whole thing? It's a more natural thing to do from a statutory interpretation point of view, isn't it?

MR SCOTT:

Yes, that is certainly an approach, I think, and that is obviously a purposive approach to the interpretation of the word, to characterise in the context of the scheme of the Act. The difficulty with that will be trying to find replacement words, I suppose, to achieve the –

WILLIAM YOUNG J:

Well, say substantial harm. Disturb, pursue, molest in a way that produces substantial harm, or is likely to produce substantial harm.

MR SCOTT:

Yes, and in my submission that's, so that is really, and that is really very similar to the Court of Appeal except rather than going from – the risk of harm or potential risk of harm you've added the word "substantially" in there.

WILLIAM YOUNG J:

The trouble with the risk of harm is that, and I know you'll go back to section 68AB, but it's a low threshold then incidental activity, the feeding of bread to a duck is caught by the offence.

MR SCOTT:

Yes and I understand Your Honour is concerned particularly in the context that has arisen in this case, but the difficulty Your Honours face with respect is Your Honour's findings are going to be applied not only in respect of this activity, but also in respect of all those species, just as I say, and you can say I'm taking the more extreme one, or the kiwi or the kakapo, all those, you know, birds that are not only protected but endangered. So with those birds is it enough, is it adequate protection for, in our society that we simply say clearly it's not enough just to say they can't be killed or hunted, it's got to be something more than that, so disturb, molest, what will they mean in that context. If someone's in the bush, you and I are out in the bush, where we see some kiwis, one of our kids take off after the kiwis, what is acceptable. What's going to pose that risk. In my submission the threshold should be low, it should not be high, it should be a low threshold which looks to recognise that these are absolutely protected species. Relatively few in the scheme of all the wildlife that we have in New Zealand, but they have been designated this, it should be a low level of protection to recognise kiwis, kakapo and those sort of things –

WINKELMANN CJ:

High level of protection?

MR SCOTT:

A high level of protection, to recognise those facts.

WILLIAM YOUNG J:

Well it's as the Chief Justice put, I mean there's a risk of over-criminalisation and a risk of under-criminalising.

MR SCOTT:

Yes and what we grapple with, and what the Court of Appeal was grappling with in paragraphs 43 and 44, was trying to work out what the, where that line quite expressly the Court said, but there are limits, and the Court went on to describe those and said that a line ultimately will be drawn by the risk that the

acts present to the animals, and in my submission that's an appropriately low level test recognising the absolute protected nature of these species, recognising there are defence provisions. Recognising there is prosecutorial discretion to come up to –

GLAZEBROOK J:
Well I don't think I'd ever interpret something because there's prosecutorial discretion.

MR SCOTT:
It's simply recognises that there is a continuing interaction between humans and this wildlife, this Act recognises that, I'm not trying to pretend it doesn't exist, but it is trying to provide an appropriate level of protection given their status.

GLAZEBROOK J:
Well I have to say that I'm not impressed at all by the idea of prosecutorial discretion because it's used in – if you don't have a certain criminal code –

MR SCOTT:
Yes I understand that.

GLAZEBROOK J:
– that says this is what's criminalised, this is what isn't, and then you rely on saying oh well if it's not very serious they won't prosecute, then frankly you don't have a certain criminal code at all.

MR SCOTT:
So in my submission the key is in this paragraphs 43 and 44 and whether the test, the line created by a purposive approach to risk of harm or substantial harm, in my submission substantial harm would be a wrong test to impose because –

WILLIAM YOUNG J:

What about molest, if you just construed molest as implying malicious intent, that would pick up the person harassing the kiwi.

MR SCOTT:

If you implied, yes, certainly if someone had malicious intent, but often that won't be the case. So if someone, you know, there will be those –

GLAZEBROOK J:

But you say we look at it objectively so if objectively it looks as though it's malicious intent because objectively it's molesting that would be enough for you, you say.

MR SCOTT:

Yes Ma'am. And there will be just a continuum of behaviour that at a point it's going to cross a line, so you're just following it in the bush, no one can object. At a point you start running and you start chasing it and it starts running away, at a point it's going to cause a risk of harm, and at that point you've committed the offence.

WINKELMANN CJ:

So you're saying that really the purpose of the legislation would not be served by a bright-line kind of test because it's protecting too much in too diverse a circumstance and too diverse – and it's a generic group of things.

MR SCOTT:

Correct.

WINKELMANN CJ:

So you can't just do a bright-line test and say –

MR SCOTT:

Yes, right outside in a whole range of real-world circumstances that are going to arise in the sea and terrestrial and in all sorts of circumstances. But these are ultimately absolutely protected.

WILLIAM YOUNG J:

I think it might be in the Crown submissions. We do sometimes have in our criminal law liability depending on "how long is a piece of string?" issues like "indecent", like what's reasonable self-defence, what's disorderly, what's offensive.

MR SCOTT:

Those are in my submissions.

WILLIAM YOUNG J:

It's not ideal.

MR SCOTT:

No, I know, Sir, and those are in my submissions and I listed a number of those and in a number of those actually, the Courts acknowledged directly that they involve objective and subjective components in that test and that's because there's a public welfare component to it. We are trying to achieve a purpose. We're trying to teach people, the community, something in that process. We're trying to set a line but unfortunately, it will never be a bright line, because the circumstances are just too infinite. The variety of circumstances is such that we simply cannot, through Your Honour's point, create that bright line.

So just finally, two points, if I could. Just one relates back to those facts and I suppose my friend tries to suggest that somehow, the code of practice is an answer to the fact that they've got a code of practice which tries to protect –

WINKELMANN CJ:

So now we're delving into the facts of this case?

MR SCOTT:

Sorry, we're now, yes.

WINKELMANN CJ:

So you're moving onto the facts of this case?

MR SCOTT:

Yes.

WILLIAM YOUNG J:

Can I just ask you, the declaration that cage diving is an offence necessarily builds in questions of fact?

MR SCOTT:

Yes, I accept that.

WILLIAM YOUNG J:

And on the Court of Appeal's approach, it necessarily builds in a conclusion that whatever the level of harm that has to be established, it has been established here?

MR SCOTT:

Correct, Sir.

WILLIAM YOUNG J:

And we did grant leave to appeal on the question whether they were entitled but whether the Court of Appeal was correct to conclude that this was an offence?

MR SCOTT:

Yes, so –

WILLIAM YOUNG J:

So the factual issue is before us, isn't it?

MR SCOTT:

Well, when one looks at the application for leave, it focused entirely on interpretive issues. I accept though the way the leave has been drawn – sorry, in that sense, I say no, that really, this was dealing solely with the interpretive issue –

WILLIAM YOUNG J:

But how can it be just an interpretive issue?

MR SCOTT:

But I accept though that in reality, that depending on what Your Honour's views take of those interpretive issues, that may then colour what's an appropriate declaration to make but to the extent that there are challenges to the factual underpinning, in my submission, they should have been subject to, made it clear that that was going to be the subject of an appeal and leave should have been sought and granted to challenge those. But in some senses, these issues have never really been a focus of this case.

WILLIAM YOUNG J:

The harm has been. It's perfectly clear that there is an attempt to attract sharks to the bite in the cage?

MR SCOTT:

Yes.

WILLIAM YOUNG J:

Well, that's not in dispute. But what is in dispute, as I understand it, is whether harm is associated with what happens or risk of harm.

MR SCOTT:

It's slightly more nuanced than that, Sir. The issue that this case really started about was whether there was a behavioural change occurring because of the attracting of sharks regularly to vessels. The pāua divers were concerned that that was going to change the behaviour –

WILLIAM YOUNG J:
No, I understand that.

MR SCOTT:
So no one really – there was not a particular focus on whether this activity caused a danger to the sharks per se. It was all about whether it changed over to humans.

WILLIAM YOUNG J:
So it might have been unwise to make a finding of fact on it then?

MR SCOTT:
Well, no, that simply reflects the way the case has morphed over time. So the proceedings started as really solely a question of human safety and they've now, as the way that proceedings do sometimes, not a true pyramid as we move up the appellate structure, we're now dealing with the sole question of whether an offence is created.

WILLIAM YOUNG J:
But that's a question that's been dealt with on the basis of evidence that was not addressed to that issue?

MR SCOTT:
Yes, correct, Sir, in the sense that the evidence that was originally filed was not directly at issue but in my submission, it is absolutely clear on the evidence before the Court, and where the Court of Appeal had found no difficulty in relying on, is that when you look at something like the code of practice, the shark cage divers, Mr Scott explains in his evidence that they were involved in the preparation of that document. It was later adopted by DOC. That document sets out in detail, it's in the yellow volume, the first document, sets out in detail just a long list of risks posed to sharks by shark cage diving, a range of which relate to the use of attractants but a long list of other ones as well. They grade them as high, medium, low, and they put in

place a whole lot of mitigation measures. On the evidence, it just is starkly obvious that there are a range of risks to this animal from this activity.

WILLIAM YOUNG J:
And is there evidence to say that when the code of practice is complied with, those risks are at a particular threshold?

MR SCOTT:
Well, there's then a prior question of "Is the code of practice actually adhered to?"

WILLIAM YOUNG J:
Well, that's obviously a question of fact too?

MR SCOTT:
Well, yes, but the purpose then of those photographs was to show exactly the sort of things that aren't supposed to be happening under the code of practice are actually happening on the photographs on the website.

WILLIAM YOUNG J:
Well then perhaps a declaration could've been made, "Shark fishing otherwise than in accordance with the code of practice" is an offence?

MR SCOTT:
No but the real question is "Does this activity" – maybe it can be mitigated, maybe it can't, maybe it can to a certain extent, well, not, depending on how well things are done. That's not the question. My submission of the question is "Does this activity, the luring of sharks to vessels using feed and blood attractants, pose a risk or a potential risk of harm to the sharks?"

GLAZEBROOK J:
Well, that can't be right because if the risk can be eliminated then it doesn't pose a risk?

MR SCOTT:

Yes, well, the whole – sorry, the purpose of the code of practice is to recognise that there are –

GLAZEBROOK J:

Well, of course there are risks. I mean, there are risks in certain practices, but if they can be eliminated, then there isn't a risk of harm, is there?

MR SCOTT:

Well, if they can be eliminated, that's correct.

GLAZEBROOK J:

Well, isn't that the point that Justice Young's making to you?

MR SCOTT:

Well, yes, but that's –

GLAZEBROOK J:

It was their evidence to say whether the code of practice did or did not eliminate those risks either totally or to a degree that would mean they're so negligible that they don't come within the risk of harm?

MR SCOTT:

No, I can't say to Your Honour there has been evidence focused on that question.

GLAZEBROOK J:

Well then how come the declaration has been made in the terms it was?

MR SCOTT:

What I can show Your Honour is that in terms of the code of practice, which does list a series of risks, identifies those, categorises them in great detail, and then we have other evidence, the photographs and the like which show that sharks bashing into cages with lures in their mouth, that bait not supposed to be taken but being taken in virtually every one of those – a

number of one of those photos, bait being lured, pulling those sharks right up to the vessel and in some cases, the bait actually in their mouth, including with the lines. Those are all things that the code of practice is designed to prevent. This organisation is publishing to the world on its website that it is not complying with that code of practice.

WILLIAM YOUNG J:
That's an issue that's not directly related to the declaration?

MR SCOTT:
Yes, I understand Your Honour's point.

WILLIAM YOUNG J:
You're saying cage fishing as in fact carried out is a breach of the Wildlife Act. What the Court of Appeal said is cage diving is a breach of the Wildlife Act.

MR SCOTT:
What the Court of Appeal says on that is that they acknowledge that the shark cage divers don't accept that there is a degree of harm but they say that the potential for that harm is enough. So this is another one of those sort of almost threshold points about how high should the bar be but the…

WILLIAM YOUNG J:
But they'd made a flat declaration that shark cage diving is an offence?

MR SCOTT:
Yes.

WILLIAM YOUNG J:
Can you justify that?

MR SCOTT:
In my submission, on the facts before the Court, that was an appropriate declaration to make. What the Court looked at was the code of practice, they looked at what was happening, and they concluded that this activity per se in

all circumstances, not just some, this activity by its nature poses a – they didn't say a material risk but I would certainly add "material", it says "a real risk" to those animals but they just said it poses a potential risk and harm.

WILLIAM YOUNG J:
And you say that's okay even though the evidence hadn't been directed to that issue and even though they haven't considered necessarily other forms of, all possible forms of shark cage diving?

MR SCOTT:
So the key to shark cage diving is that attracting, as we talked earlier, of the animals to the vessels, and I accept there are potentially shades of grey, I suppose, on how that actually occurs but in terms of the material that was before the Court, there was no shade of grey. There was simply no one was disputing that there is this process of attracting sharks through the bait, that they come up close to the cage, that there are lures used, that there are bait –

WILLIAM YOUNG J:
But you say that any diving exercise that involves lures is an offence?

MR SCOTT:
I would say any activity, what we see described here, where you're taking a large chunk of bait, putting it in the water and using that to drag the –

WILLIAM YOUNG J:
Say they didn't do that.

MR SCOTT:
Sorry?

WILLIAM YOUNG J:
Say they didn't do that.

MR SCOTT:
So how are they attracting then the –

WILLIAM YOUNG J:
Well, just with the berley.

MR SCOTT:
Well, that, I mean that's not what they do. That's not what shark cage – that's how they attract – that's how they create this experience. You see in the photographs, all those photographs on the back of my submission, Your Honour, you'll see they've got – you will see the bait there and virtually every one of those photographs on a lure, on a line.

WILLIAM YOUNG J:
But presumably they take the view they're entitled to do that, that's why they're doing it?

MR SCOTT:
Well, that's what create – that's what lures the animal right up to the shark cage. Without that they wouldn't come up to the shark cage.

WINKELMANN CJ:
So the point Justice Young's making is why would you issue a declaration that shark, that cage diving per se is an offence rather than limit it to where a bait is used?

MR SCOTT:
Yes. Well, it's certainly the – it's the attractant. So what – it's the –

WINKELMANN CJ:
Yes. Well, it's the berley?

MR SCOTT:
Yes, it's absolutely the berley. It's the attracting of the vessels, sorry, of the sharks to the vessel through berley and through bait, and but it's particularly the, in terms of the risks that are posed, and you just can look at those photographs you've got, the line actually in the shark's mouth on many

occasions. You've got the shark coming up and banging right into the side of the shark cages.

WINKELMANN CJ:
Well, is it really the use of bait then? What does it matter if they attract it with berley and it just swims around with nothing to bite on?

MR SCOTT:
Well, they're wanting – the essence of shark, you know, in terms of this for them –

WINKELMANN CJ:
I know that but just assuming – let's just assume that they were happy as a tourist experience just to have the shark swim in the distance maybe, because you're saying without the bait it won't come to the cage.

MR SCOTT:
Yes.

WINKELMANN CJ:
What say that they were content to just take their chances of sharks swimming by in the distance or perhaps swimming by close up?

MR SCOTT:
So there will become a point when it becomes more like marine mammal watching, you know, whale watching, which is at the other end of the spectrum, the same provisions apply. I took Your Honour to that provision, da-da, harass, pretty much, and those activities off Kaikoura, they simply go out, the vessel simply – there's no bait, there's no berley, there's nothing. The vessel simply drives around until it comes across a whale.

WINKELMANN CJ:
So if they didn't use bait or berley, you would say it's not an offence?

MR SCOTT:

Correct, absolutely.

WILLIAM YOUNG J:

They wouldn't bother doing it, is your position?

MR SCOTT:

Yes, absolutely.

WINKELMANN CJ:

And that's what you said in your submissions, isn't it?

MR SCOTT:

If they didn't use bait or berley, it would not be an offence.

ELLEN FRANCE J:

The declaration though is very broad.

MR SCOTT:

Yes.

ELLEN FRANCE J:

Shark cage diving is an offence.

MR SCOTT:

Yes. I can't other than agree with you, Your Honour, that it is very broad. And it would be fair to say I was a little surprised when I saw the breadth of it but I think what the Court was trying to do rightly, and this really comes to my last point about the declarations per se, the parties are seeking certainty where both parties have come to this Court, right in this Court seeking counter-declarations. No one is asking, suggesting, the Court shouldn't delve in and actually provide the parties with an answer here. The parties are looking for certainty. No one wants to see people being prosecuted and having these issues determined in a criminal prosecution, so the more the Court can help obviously to provide that certainty –

ELLEN FRANCE J:

Well, that does raise questions about the use of the declaration in terms of future criminal liability.

MR SCOTT:

Yes.

WINKELMANN CJ:

Right, so just thinking about –

MR SCOTT:

So I fear I've had my…

WINKELMANN CJ:

Is that your submissions, Mr Scott?

MR SCOTT:

Yes, thank you, Ma'am.

WINKELMANN CJ:

What about costs, before you sit down?

MR SCOTT:

Yes, so we certainly – well, the costs have, to date in every step of the process, the costs have been left to lie where they fall. We certainly have sought costs at both other stages but in both other stages the Courts have said –

WINKELMANN CJ:

So have costs been fixed?

MR SCOTT:

Sorry, we have sought costs at – we ask for costs to be fixed, thank you, Ma'am.

WINKELMANN CJ:

Yes, and were they fixed in the lower Courts?

MR SCOTT:

No.

WINKELMANN CJ:

And did you – are you content? Did you want them fixed in the lower Courts or…

MR SCOTT:

We would like them fixed. Well, sorry, in the High – in both previous Courts, the Courts made orders that the costs should lie where they fall, so…

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

And that is not subject to appeal?

MR SCOTT:

And that wasn't subject to appeal, correct.

Unless there's any matters I can assist Your Honours with, I think I've had my fair share of time.

WINKELMANN CJ:

Thank you. Thank you, Mr Scott. Mr Prebble.

MR PREBBLE:

Thank you, Your Honours. There are three key issues before you. There's obviously the first issue about the correct approach to "hunt or kill" and the Crown says that definition is broad and inclusive and is not limited to either intentional hunting or subsidiary acts of an activity that has an overall aim of hunting or killing. The second is, is shark cage diving hunting or killing under

the Wildlife Act and we say it is because it amounts to hunting, pursuing, disturbing and molesting sharks, and the third issue is can and should the Court uphold the declaration of the Court of Appeal that it is an offence in advance of any potential criminal prosecution, and on balance we say there is jurisdiction and the Court should exercise its discretion to confirm the activity is an offence, but obviously that is an on-balance view and we can come to that and the reasons for it.

I will try and touch just on the highlights given obviously we've heard now from the other two parties. I'd like first to just address the scope of the provision, so "hunt or kill" and section 63A because that is quite key to then understanding what kinds of activities it affects, and the appellant, as we've heard, argues the offence is strict liability for the killing, as I understand it, but not for the hunting. For the hunting the appellant argues some form of intention or purpose is required and with respect we disagree. We say the entire offence under 63A is strict liability and I'll just very briefly go through the reasons for why. We have a slightly different approach to the first respondent with respect to 63A, 63B and 68B. So when one looks at 63A, obviously there's the offence provision, hunt or kill any absolutely or partially protected marine wildlife. We then come to 63B which provides for reporting of accidental or incidental death or injury, and so that provides, first, in subsection (1) for where it is part of a given under the Fisheries Act somebody accidentally or incidentally kills or injures, and then (2), outside of the Fisheries Act if you otherwise accidentally or incidentally kill any marine wildlife you need to report it effectively.

That then ties into section 68B, and 68B is the defence to the offences in respect of marine wildlife, and where we see 68B(4), a person who is charged with a killing or injuring or being in possession has a defence under either, (a), that the defendant proved the death or injury was accidental or incidental and they complied with the reporting requirements, or (b) is that they show the death or injury or possession of took part of a fishing operation. Now this provision is quite critical because what it shows there is effectively a no fault defence. So if you can show that it was accidental or incidental then you have

a defence provided the reporting requirements are met, and that's quite important for why this is outside 68AB(6). That provisions shows therefore that the prosecution doesn't need to prove in –

WILLIAM YOUNG J:
Sorry, doesn't need to prove?

MR PREBBLE:
Doesn't need to prove intention as part of the offence because it's clearly showing that there's a defence in circumstances where it was accidental, therefore if you had to prove intention as part of 63A you wouldn't then have this defence in the first place.

WILLIAM YOUNG J:
What about recklessness?

MR PREBBLE:
Yes.

WILLIAM YOUNG J:
Sort of *Cameron* style recklessness. You're engaging in an activity where you know that there is a substantial risk that sharks will be attracted.

MR PREBBLE:
We have considered recklessness, Your Honour, and the approach we take to this is that the legislation is trying to provide a strict liability defence. Therefore if you have mens rea elements you would effectively not be able to access this defence. So if you are reckless or if you have actual intention, knowledge or recklessness, then obviously it wouldn't be caught within something that's purely accidental.

WILLIAM YOUNG J:
But so to give the example we've been discussing, commercial fishermen clean their fish at sea, they know it's going to attract sharks, sharks come

around, bang their heads on the boat or in a feeding frenzy, attack each other. That's not really accidental, because I know fishermen know perfectly well that that's likely to happen?

MR PREBBLE:

And the answers to that as we see it is that firstly, you would say there isn't necessarily an action which is going to amount to an offence so you'd have to show that there was something that was…

WILLIAM YOUNG J:

Like one of disturbance? You're disturbing their normal behaviour by putting stuff in the water they might like?

MR PREBBLE:

And on that, we would say that it's not necessarily of a sufficient level – that would be the first point, as to whether or not it is of a sufficient level to amount to a disturbance under 63A, that even if you potentially could show that that was the case, you then have to prove whether or not there was sufficient knowledge and recklessness to effectively put the defence away from the accused in that situation.

WILLIAM YOUNG J:

But you say there's knowledge and recklessness isn't required, as I understand it?

MR PREBBLE:

So that's right, Your Honour, I do say that.

WILLIAM YOUNG J:

What if they don't kill or injure the marine animal but merely disturb it in other ways?

MR PREBBLE:

We've addressed that in our submissions and what we say in respect of that is 68B doesn't remove the ability to access the common law no-fault defence and so 68B is effectively saying for injury or death, you've got a defence if you can show that it was accidental or incidental. But if there's no injury, so if something is more minor than an injury, there's nothing in this provision that would say you can't access the common law defence which is recognised by section 20 of the Crimes Act for those activities that are less than injury, provided you don't have intention and you've taken all reasonable steps.

And the reason that we take this approach to these provisions is Your Honours have asked about 68AB and why 68AB(6) is there and what we are effectively saying is that 63A and 63B would continue to apply because they came in in 1996, they were part of the Fisheries Act reforms. They were there to ensure that by-catch or things which were unintendedly caught didn't necessarily result in an offence and so that's why those provisions effectively provide strict liability defences in those circumstances, provided the reporting requirements are met. That reporting requirement is very important because essentially, you get the benefit of the defence of injury or death if you have reported the catch in the first place. And so it's really incentivising reporting of live catch or reporting of incidental actions that result in injury or death.

WINKELMANN CJ:

Is there no similar defence for section 63 breaches?

MR PREBBLE:

No. If they had intended 63A offences to come under section 68AB, it would remove the ability or the requirement to report. And so you'd simply have access then to the defence provision in 68AB(3) that you didn't have intention and you'd taken all reasonable steps and you wouldn't have had to report in order to get the available defence under 68B. And so why those provisions were left alone is they provide a code, essentially, to ensure that in circumstances of injury or death, you have reported it, and then you have the available defence under 68B. It incentivises reporting, and the reason that is

important is because it goes into – there's provisions in the Act in section 14 that deal with population management planning and that's around obtaining the data from the fishing activities to ensure that the Department can work out what is the maximum number of sustainable mortality for any particular species.

GLAZEBROOK J:
So your submission is different from the first respondent's in the sense that you say section 68AB is actually irrelevant?

MR PREBBLE:
It is, for the purposes of 63A.

GLAZEBROOK J:
Yes.

MR PREBBLE:
Yes.

GLAZEBROOK J:
Which is how I would have read it as well.

MR PREBBLE:
Yes, Your Honour, and that's not to say that it imports mens rea into 63A because it's quite clear that there's a defence in 68B for those circumstances where you didn't have intention, so where you've done it accidentally or incidentally, you have a defence, provided you've reported it, and that is really saying "You've only got your defence, whether you've injured or killed it, where you've reported it", and that's important because the Department uses that information then for management of species in the marine setting which links into the Fisheries Act, and the key provision on that is section 14F and it provides for population management plans where –

GLAZEBROOK J:

Is this in the Fisheries Act?

MR PREBBLE:

Sorry, no, that is in the Wildlife Act, 14F, and it provides for assessing threatened nature of species and putting in place maximum allowable levels of fishing related mortality. So at 14F(1)(f) there's requirements there to effectively work out how much by-catch is tolerable, and so I guess the reason I'm putting this forward is to provide an explanation for why when they inserted 68AB they decided to leave 63AB and 68B alone and that is it's effectively a code providing a no-fault defence where you've reported it, and so the incentive to obtain that defence is ensuring reporting which provides information for the Department to use in terms of the population management planning.

WINKELMANN CJ:

So it would be inconsistent to give this other free-wheeling defence which isn't coupled with the reporting requirement?

MR PREBBLE:

So what we have said in our submissions is it doesn't make logical sense to say if something is other than injury, and I think there can be a reasonably elastic approach to injury to address some of the concerns that are being raised here around how broad is that concept, but putting aside what injury actually means, if you can assume that something is significant enough to warrant a prosecution under 63A but isn't injury then we see no reason why the common law no-fault defence wouldn't still apply because there's nothing expressly to say otherwise in applying decisions such as the *MacKenzie* decision and section 20 of the Crimes Act. It's clear that that no-fault provision would need to be expressly disapplied for it to be accessed, and so therefore if you've got something less than injury and you can show that you had effectively no intention and you took reasonable steps, you can access that.

WILLIAM YOUNG J:

So I understand you say section – we basically don't need to worry about section 60AB(3) because that's effectively mopped up in the reporting regime?

MR PREBBLE:

68AB(3) is the no-fault defence that applies to all wildlife other than marine species, and for marine species the defence is 68B but if you're outside that defence we do say there's nothing inconsistent with being able to still access the common law defence through application of section 20 of the Crimes Act.

WINKELMANN CJ:

So, Mr Prebble, am I correct in understanding you then that really the whole point of section 68AB(6) is to stop that section 68AB defence being available here because really it's – the defence that's available in respect of marine wildlife is coupled to the reporting requirements?

MR PREBBLE:

Yes, absolutely, Your Honour.

WILLIAM YOUNG J:

Except that it does.

MR PREBBLE:

Sorry if that was a roundabout way of getting to that point.

WILLIAM YOUNG J:

Although it would be a bit odd if the Courts – it might be a bit odd if the Courts then said, "Oh, well, you can't rely on section 60AB(3) but you can rely on a common law defence which is precisely the same.

MR PREBBLE:

Well, only for those interferences that are more minor than injury or death, so it does make sense in a sense.

GLAZEBROOK J:

And there's no reporting requirement in respect of anything that's less than that?

MR PREBBLE:

Yes, yes.

O'REGAN J:

So do you say that section 68B overrides the common law defence if you haven't reported and you do injure?

MR PREBBLE:

Yes, yes.

WINKELMANN CJ:

Excludes it?

MR PREBBLE:

Yes. And the reason for going through this is really to get to the broader point which is what is the scope of 63A and we say 63A requires that the actus reus is demonstrated but not any mens rea. It's not a mens rea offence because it's clear in 68B that you can accidentally or incidentally effectively hunt or kill, and then access the defence –

WINKELMANN CJ:

And that's what the Court of Appeal said?

MR PREBBLE:

And that's also what the Court of Appeal said and it relied on that –

WILLIAM YOUNG J:

But can you really hunt or – can you really hunt without an intention?

MR PREBBLE:

Well, I was going to come to that, Your Honour, because I accept that some of the words imply more action that's directed more towards things where you may have a degree of intention, and clearly "hunt or kill" can encapsulate both intentional actions but also unintentional actions that –

WILLIAM YOUNG J:

Well, "kill" can, just in the ordinary use of the word "hunt".

MR PREBBLE:

Well, our approach to this provision is that "hunt or kill", the actual phrase which is in bold, doesn't have a meaning. The meaning that is given to it is all of the levels that the legislation provides, and so it is – there's a decision in the bundle –

GLAZEBROOK J:

That probably makes it worse though, actually, because when you look at those bundled things some of them quite clearly do require an intention such as a dog.

MR PREBBLE:

Well, I'll come to the dog point because I may take a slightly different approach on that, but the reason for that is it is a term of art. It is essentially saying "hunt or kill" is one defined phrase, means all of those levels. It doesn't then have any other meaning built into that particular phrase. It's what has been ascribed by Parliament and, as Your Honour has pointed out, there are other pieces of legislation that does a similar approach when dealing with protected species. When you then look at the various levels, it's –

WINKELMANN CJ:

Yes. (inaudible 15:05:41) –

GLAZEBROOK J:

Hunt or kill means hunt or kill.

MR PREBBLE:

Well, hunt or kill includes hunt or kill which I guess I would say that then means –

WILLIAM YOUNG J:

How do you trap something –

GLAZEBROOK J:

Which I think has ordinary meaning.

WILLIAM YOUNG J:

How do you trap something accidentally?

MR PREBBLE:

Well you might seek to trap something that is unprotected. You might seek to trap –

WILLIAM YOUNG J:

You have to set a trap.

WINKELMANN CJ:

You could trap something –

WILLIAM YOUNG J:

You might catch the wrong animal.

O'REGAN J:

Well, you try to trap animal A and animal B gets trapped.

WILLIAM YOUNG J:

Yes, I suppose that's true.

MR PREBBLE:

You might seek to trap something other than what you end up with.

WINKELMANN CJ:

Or else you just accidentally trap it, for instance, a box that you set up might fall on it or something.

MR PREBBLE:

Absolutely, and I agree –

WINKELMANN CJ:

But it's an unlikely scenario.

O'REGAN J:

Pretty unlikely to be prosecuted for that.

MR PREBBLE:

I agree with Justice Glazebrook's formulation that it is objectively looking at the actions because we are removing the mens rea components. We have to look at the actions objectively to work out whether or not we're in the definition and some of them will be things that almost in terms of the voluntariness, in terms of the actus reus, you would anticipate will go hand-in-hand with an intentional act to actually hunt but some of them don't.

WILLIAM YOUNG J:

Pursuing? Can you really pursue someone without intention?

MR PREBBLE:

Well, for example, what if you took your vehicle onto the beach or some other form of method and you were going along, I don't know, kite surfing, or something that resulted in you, without any idea you were doing it, running down or chasing down some protected species like dotterel?

WILLIAM YOUNG J:

That might be a disturbance or killing.

MR PREBBLE:

It might be that, but it might also be pursuit because objectively you're looking at it and if the thing is trying to run away from you, you might say, well, objectively speaking it looks like you're going after it, but you probably would also fit in other aspects of the definition and that really goes to confirm how the definition itself is very broad. There are three levels to it, and certainly that middle level is trying to expand it well beyond normal or orthodox ideas of hunting or killing for the purposes of capturing and killing.

WINKELMANN CJ:

So going out intending to kill something, intending to run it down and shoot it and capture it in some ways, is sufficient but it's not necessary.

MR PREBBLE:

No, yes, that's right.

WINKELMANN CJ:

So if you went out and chased it just for fun for a couple of hours, that would also be –

MR PREBBLE:

Yes.

WINKELMANN CJ:

– without proving that you're ever intending to catch it?

MR PREBBLE:

Absolutely. Your mental element is irrelevant for the purposes of that and I guess –

GLAZEBROOK J:

Well, that's other than the mental element though because isn't that just the second limb that you say if you're pursuing it, even if you're not intending to catch it? But that's nothing to do with the mental element. I mean, it might be

but your argument is pursuing is enough without any intention of hunting or killing?

MR PREBBLE:
Absolutely, Your Honour, yes.

GLAZEBROOK J:
The mental element might be are you intentionally pursuing it or accidentally pursuing it or incidentally pursuing it?

WINKELMANN CJ:
I mean do you have to prove that you're intentionally pursuing it?

WILLIAM YOUNG J:
Is going along behind something, pursuit?

MR PREBBLE:
No, no. I –

WINKELMANN CJ:
As coincidentally, for instance.

MR PREBBLE:
I don't believe you need to establish intention because –

WILLIAM YOUNG J:
Sorry, you?

MR PREBBLE:
You don't need to establish intention.

WILLIAM YOUNG J:
So going behind someone, something, is a pursuit?

MR PREBBLE:

Potentially, if you look at it objectively and see what is involved, and so –

GLAZEBROOK J:

Well, if you – what you'd say is if you see something running away, even if you didn't intend to pursue it and even if you didn't mean to pursue it, it would be an offence but subject to the common law defence assuming you don't hurt or kill it actually?

MR PREBBLE:

Yes, that's correct, and that is the way we see this definition working. I think it is important to say that the words themselves do imply a level of interference that is beyond minor or de minimis, so when we're looking at the wording, and I know this has come up in terms of trying to work through other practical examples, it does use words, words such as obviously hunt, pursue, disturb, molest. There's all within those words a degree of interference that is beyond minor. It's not simply touching. It's something that – it connotes a level of interference, and the Court of Appeal settled on, well, harm or potential harm, but it's really – it's not saying, "I don't think that decision is suggesting that there's an additional element of harm or potential harm," it's really saying that if you've got that involved what really is then likely are these, these words are likely to have been met. I mean there's ways of formulating that. Another way of looking at it that we have considered is you could say it's got to involve actions that are proximate, sustained and direct. It's implying that the level of interference is more than minor when you look at the nature of the wording that's involved.

GLAZEBROOK J:

So you had "proximate"? Sorry, just so I can get it down.

MR PREBBLE:

Proximate, sustained, and direct.

WILLIAM YOUNG J:

So you say no harm's required?

MR PREBBLE:

Harm – we say that you don't need harm.

WILLIAM YOUNG J:

So feeding tuis sugar water, is that…

MR PREBBLE:

I wouldn't say that that was within the offence. I mean, I think harm and potential harm is another way of capturing the same idea.

WINKELMANN CJ:

Doesn't it have to be for the purposes of the legislation, really? Because isn't it aimed at protecting them so it's not something, it's just not any action, it has to be something that carries a risk of harm?

MR PREBBLE:

I agree with that, Your Honour. I think we're circling around the same concept which is that there are these interferences that will amount to an offence are more than minor things which is also therefore likely to be harmful to the species and that you can obtain by looking at the nature of the wording which is – the wording themselves is more than minor. It's more than something that you would say is de minimis. It can open a level of interference that is, as I said, sustained, proximate, and direct but harm or potential harm is another way of effectively saying the same thing, that you've got have a level of interference that is –

WINKELMANN CJ:

Well, it is generally speaking the language of harm, isn't it? "Molesting, pursuing, hunting, killing", these are all things that sound like you wouldn't want them to be happening to the kiwi.

MR PREBBLE:

And if there's a level of harm then we would say the definition is likely to therefore be met but what I guess I'm saying is –

GLAZEBROOK J:

It does leave aside the point of, you have likely to be harm, the Court of Appeal said "potential for harm" –

MR PREBBLE:

"Harm or potential harm".

GLAZEBROOK J:

– and then the question is how much harm does it have to be and how permanent does the harm have to be, even in terms of the risk?

WILLIAM YOUNG J:

So just looking, I know the submission was made, well, shark cage diving always involves berley and bait, but I don't think that's true. I looked at a DOC report and there are operations which use acoustic attracting methods. In California, bait isn't permitted.

MR PREBBLE:

Yes, I understand the evidence from Mr Duffy was that there was no real certainty around the acoustic methods because it was also –

WILLIAM YOUNG J:

Around, sorry, the what?

MR PREBBLE:

No certainty that the acoustic methods actually work because I think they were undertaken in the same area that they were using berley and bait, so whether or not it was actually the acoustic methods or whether or not it was berley and bait, he does briefly touch on that in his affidavit.

WILLIAM YOUNG J:

And what about the Californian experience where actual bait isn't permitted?

MR PREBBLE:

So I think the approach that the Court of Appeal has taken is to really say, "We looked at the, what are settled, what are the settled attributes of this activity," and we know that there's the use of the berley, there's the use of bait to draw, lure in, sharks to close proximity to cages. That is essentially what the Court of Appeal looked at in then finding that it was or amounted to something that was an offence, and it moved on to say, at paragraph 46, "We are fortified in these conclusions by the evidence in respect of risk to sharks," and so to some extent it appears that the Court has really said pursuing, disturbing, is hunting or killing because they are pursing them in the same way as of a bait or a fly or to draw a fish to an angler's hook, so that's at paragraph 45, is pursuing the fish. Further, attractants are designed to cause the animal to deviate significantly.

WILLIAM YOUNG J:

Why, on that very broad base is why isn't feeding bread to a duck an offence?

MR PREBBLE:

Well, feeding bread to a duck is probably going to result in – it's not going to be sufficiently harmful. It's not –

WILLIAM YOUNG J:

Yes, no, but that's the point, that's exactly the point I'm trying to make –

GLAZEBROOK J:

Well, actually it probably is because it's not good for them to eat the bread so…

WILLIAM YOUNG J:

But you're assuming harm. What I was challenging you on was the proposition –

GLAZEBROOK J:

Actual harm.

WILLIAM YOUNG J:

– that harm wasn't required, which I took to be your submission that it was enough that the sharks were doing something different from what they might otherwise be doing.

MR PREBBLE:

My submission, Your Honour, is that harm or potential harm, or harm or risk of harm, which is what the Court of Appeal said, is another way of getting to the same point of saying that there needs to be something that is more than minor and it's effectively saying it's got to be proximate, direct or sustained. They're the same concepts that –

WILLIAM YOUNG J:

But what about something that's minor but that is proximate, direct and sustained but only has a minor impact?

MR PREBBLE:

It may not suffice to being an offence. I think the reality is you're going to have to look at every action and the evidence associated with it, and what those words within hunt or –

WILLIAM YOUNG J:

It's pretty tough if you want to know what you can do. You want to do an activity and you want to know what you have to do not to be committing an offence. I mean effectively you're saying you've got to, you know, give the mark a wide berth.

MR PREBBLE:

I think we're saying, actually, that the wording itself requires a reasonable level of interference beyond minor activities and so we're actually –

WILLIAM YOUNG J:

And do you say there is that interference here?

MR PREBBLE:

And we say that interference is here but we're also saying this definition needs to be –

WILLIAM YOUNG J:

But why did the Director-General grant a permit then, grant an authorisation, if there was an unacceptable level of interference or harm?

MR PREBBLE:

Well, that has been raised by the appellants as demonstrating therefore that there's absolutely no harm and I'm not –

WINKELMANN CJ:

Can I just ask you, can you keep that question in your mind, before you move on to the facts of the case, can we just go back to that threshold you're setting which is harm or risk of harm and you keep on saying that it could be proximate, direct, an alternative way of formulating it is to say proximate, direct or sustained, but that in itself seems to be not proximate enough to the purpose of the legislation. Isn't something focused on the risk of harm more consistent with the purpose of the legislation?

MR PREBBLE:

Certainly we support the harm or potential harm but just to be very clear we have supported that. What I was trying to suggest to Your Honours is that if you considered that it sat outside that definition somehow wrongly by the Court of Appeal implying that you needed to fit within the words and you needed harm, I guess what I'm say is the harm or potential harm sits within the words themselves, and another way of saying it is the words require or connote a level of interference that is beyond minor, and the way to describe that was I guess giving the word of proximate, sustained or direct, but we are effectively saying the definition that best meets the purpose of the legislation,

and we are dealing here with absolutely protected species, is one that involves making it an offence to interfere with protected species in a harmful or potentially harmful way.

WINKELMANN CJ:

So taking it back to Justice Young's question which is that the Director-General had granted this licence, presumably having gone through a process where he's had a look at these applications which address the risks that have been identified in the guideline. So how can it be that it reaches that threshold?

MR PREBBLE:

It's obviously a question that would need to be put to the decision-maker but I understand the Department's role in that was really to try and provide some degree of regulation to an existing activity –

WILLIAM YOUNG J:

You could have said no. On your current theory of the law, you are perfectly entitled to say "This is just an offence. Do it any more and we'll prosecute you".

MR PREBBLE:

And I think in some respects, in light of the Court of Appeal decision, I think the guidance from the Court may be signalling that the Court –

WILLIAM YOUNG J:

May be, sorry?

MR PREBBLE:

Sorry, the guidance from the Court of Appeal decision may be suggesting that in fact, the Department should have said no –

WILLIAM YOUNG J:

Well, of course they should have, on the Court of Appeal's approach, because A, it's an offence, and B, it's not within the authorisation provision.

MR PREBBLE:

No, but beyond that, Your Honour, in terms of – there's no obvious benefit to sharks and I think that's something which we haven't sought to challenge, obviously, we haven't challenged the Court of Appeal's decision with respect to 53 but it –

WILLIAM YOUNG J:

But I'm just saying on the face of it, you have given an authorisation which presupposes a conclusion that a prima facie legal activity is insufficiently harmful to prevent it being authorised.

MR PREBBLE:

I think that the approach that the Department took was to apply the code of conduct or code of practice with respect to shark cage diving and do its best to therefore provide some level of regulation and mitigation of effects.

WILLIAM YOUNG J:

Sorry, I might be wrong, the authorisation is premised on the fact that they were hunting or killing sharks?

MR PREBBLE:

And that within section 53, which is catch alive or kill, there was an ability to authorise that activity. That's correct, Your Honour, and –

WILLIAM YOUNG J:

Well, if they didn't think it was an acceptable risk to sharks, they would have just said no, wouldn't they?

MR PREBBLE:

You'd assume so, yes, and so to some extent, I think you could say that they must have thought by putting in place that authorisation which required adherence to the code of practice, the level of mitigation may bring down the level of potential effects to becoming manageable, such that it's mitigated for the purposes of the sharks.

WILLIAM YOUNG J:

So are you seeking to defend the declaration that was made?

MR PREBBLE:

Yes, Your Honour. In the Court of Appeal?

WILLIAM YOUNG J:

Yes.

MR PREBBLE:

Yes.

WILLIAM YOUNG J:

So you say that shark cage diving is in any iteration unlawful? However it's performed, the essence of shark cage diving is necessarily an offence under section 63A?

MR PREBBLE:

We say that because it involves the hunting, intentional hunting –

WILLIAM YOUNG J:

I know that but you're saying you're not really interested in the mechanisms by which they do it, for instance, attracting sharks acoustically or using the methods in California which don't involve bait?

MR PREBBLE:

We're saying that the activity before the Court – and so the Court was –

WILLIAM YOUNG J:

But that's not the declaration that was made.

ELLEN FRANCE J:

That's not the form of the declaration.

GLAZEBROOK J:

That's not the declaration.

MR PREBBLE:

That's correct, Your Honours, in the sense that the declaration on its face is quite broad.

WILLIAM YOUNG J:

Well, that's what I asked you, are you seeking to defend it?

MR PREBBLE:

Well, what we would say is the declaration, if you considered closely the decision itself, is a little bit more elaborate than that. I accept on its face, it's holding shark cage diving as an offence but when you look at the decision itself, it's more elaborate than that. It's saying "shark cage diving as the Court has described it", and we in our submissions deal with that just briefly at footnote 2 where really, what the Court was saying is if you look at its paragraphs 7(a), 45, and 10, it was really saying luring absolutely protected great white sharks to submerged cages using attractants and using berley and baits designed to cause the animal to deviate significantly from its natural swimming pattern to bring them to the cages is an offence. That's the –

WILLIAM YOUNG J:

So even if there's no harm? It's another iteration.

MR PREBBLE:

The Court's really saying, the Court of Appeal is saying it was bolstered in finding it was an offence by the evidence around harm. So it's really, the

harm element confirmed for the Court that it was something that was serious enough to fall within the wording of the definition “hunt or kill”.

These issues do go to the third issue which perhaps I could move to unless you had further questions from me in respect of the actual definition and the application of the purpose of the legislation?

WINKELMANN CJ:
I mean, I suppose that if you were divorced from the facts of this case, you could say that using attractants and baits and shark cage diving might be an offence but you couldn’t really say it would on every case, could you? That’s a criminal standard and you’d have to investigate the facts of each occurrence of it.

MR PREBBLE:
That is perhaps one of the biggest difficulties here with the Court and the exercise of discretion which is why we spent some time on that under section 10 under the Declaratory Judgments Act because –

WILLIAM YOUNG J:
I’m not so worried about the exercise of discretion. I’m more worried about whether the declaration’s accurate.

MR PREBBLE:
So the declaration itself is obviously on its face broad but when you look at the declaration in light of the decision, then you see there is greater detail as we’ve set out in our main submissions. There is the possibility that in any one case, perhaps they could try and undertake the activity with less harm because they’re adhering to the code of practice but the actual fundamentals of that activity, which is the luring of great white sharks through the berley and the bait to the cages arguably is sufficient to say “that’s hunt or kill”.

WILLIAM YOUNG J:

There is an argument again that shark cage diving is a good thing for sharks. I don't quite know how it's developed but that's an argument that's out there, I think, isn't it?

MR PREBBLE:

I did hear that in terms of the net conservation gain but obviously, this Act is focused on specific offences to specific individual species and so I don't think you could try and suggest that because it might have a net conservation gain outcome that somehow, that doesn't necessarily make it an offence.

WILLIAM YOUNG J:

I think net conservation gain for sharks. I don't think it's as great for sea lions or…

MR PREBBLE:

I think possibly to re-emphasise where the Crown is coming from on this, the key issue that we would like clarity on is really the interpretation to section 63A and "hunt or kill". And the reason that we're seeking that clarity is because obviously, this provision has a significant effect as to its scope with respect to all of our absolutely protected and partially protected species and just to re-emphasise that, we are saying therefore that a definition which focuses only on intentional hunting or killing, in the sense of you want to go out and capture it and kill it, is not fit for purpose for the legislation nor for the wildlife that the Act is seeking to protect. And so a broader definition is required in order to achieve the purpose of the Act. The purpose will largely be defeated if you're only going to say "All of the forms of New Zealand's wildlife that are absolutely protected" –

WILLIAM YOUNG J:

What do you mean by "largely defeated"?

MR PREBBLE:

Sorry, Your Honour?

WILLIAM YOUNG J:

What do you mean by "largely defeated"? It will leave gaps.

MR PREBBLE:

Well, it'll mean – this provision is effectively the key provision for providing protection for our wildlife outside of those areas which has already been talked about, spatially protected areas, and that's not a reason to essentially say, "Well, we don't care about the wildlife outside of those areas."

WILLIAM YOUNG J:

No, of course not, but I'm saying that I'm just trying to get my head around the significance of it. You said that a restrictive interpretation of "hunt or kill" would largely be inconsistent with the purpose of the Act.

MR PREBBLE:

Yes, and the reason for that is because there's very little orthodox, or ordinary, hunting or killing of our protected species.

WILLIAM YOUNG J:

Which is probably because of the statute.

WINKELMANN CJ:

Or not. But your point is not many people are out there hunting kiwi but they might be out there chasing around and –

MR PREBBLE:

Interfering with them, and as we say, going back to the workability of it, if it so happens that truly they were not at fault then they can access the no-fault provisions, and so the level of risk that an overly broad interpretation is going to result in indeterminate liability, that's not the case. You can access the no-fault provisions, and that for terrestrial species does expressly exist in section 68AB(3). And so just to re-emphasise in terms of the purpose of the legislation and what the Crown is concerned with, it's to obtain some guidance from the Court that clarifies that "hunt or kill" is broader obviously than

intentional forms of hunting and killing, and that must be so given the strict liability nature of it. It also must be so given the way the definition is set out and as the levels have been already traversed as my friend has set out for the Court as well.

WINKELMANN CJ:
Sorry, just going back, how do you justify having authorised the conduct then supporting the making of a declaration that says it's an offence?

MR PREBBLE:
The Department's approach was that it was an offence and therefore needed authorisation. So the Department's approach was this activity is an offence, therefore you need to authorise it. The way to authorise it – it reached the view that you could authorise it under section 53 and it decided, and I guess that decision is a matter of record now, that it decided it could satisfy itself that that was in line with the purpose of the legislation to provide an authorisation for shark cage diving under section 53, and I take Your Honour's point that does that imply somehow that the level of harm has been eliminated. I don't think that is necessarily the case.

WILLIAM YOUNG J:
Well, it may suggest that an assessment of the level of harm is consistent with the wildlife protection policies of the statute.

MR PREBBLE:
It may be, but it doesn't take away from the fact that without that authorisation it would still be an offence, and that's the reason for obviously providing the authorisation.

WINKELMANN CJ:
And what do you say about the mismatch between the defence and the – you say the mismatch between the defence and the offence is just in fact this act? It's just how it is?

MR PREBBLE:

We argued in the High Court, as Your Honour will have seen, we argued that essentially they're the same. The meaning of "catch alive and kill" should mean or be interpreted to mean the same as "hunt or kill"? Is that the line of –

WINKELMANN CJ:

Yes.

MR PREBBLE:

Yes, and we were unsuccessful obviously in the High Court but the Court also went further in terms of what it actually said amounted to "hunt or kill". In the Court of Appeal we argued for the same broad interpretation of "hunt or kill" because it is an offence that doesn't require intention, and to provide an ability to authorise that we argued for a wider interpretation to "catch alive and kill", such that it effectively meant the same thing. If the Act had so defined it, it would mean "hunt or kill", but we were unsuccessful on that and the Court of Appeal has found that not only is the wording so different that it's not, just not possible to stretch it, but also it was quite focused on the idea that you needed to provide authorisations under 53 only in circumstances where there was real benefit to wildlife and wasn't really convinced as you read the decision that shark cage diving potentially protected or advanced the protection of the species. It was more of an, as we've heard, anthropocentric activity in a kind of tourist sense, therefore not obviously something that could be granted within the scope of 53 properly understood, and we haven't sought to cross-appeal on that point, so you can take that as acceptance of, or the Crown's acceptance of that position as reached. It means that it's not that there's a mismatch, it's just there are some actions, if they are not able to be authorised under 53, that potentially will become offences, and most likely those will be things which don't have an underlying benefit to the protection of the species.

WILLIAM YOUNG J:

It's not insoluble, the mismatch, but it does at least give rise to sort of awkward lines of thought that someone's given an authorisation to catch or kill

but not pursue or disturb or molest. You'd have to say, well, it's implicit in the – anything that's part of catching or killing is implicit in the authorisation, but as soon as you go to that point you start to wonder, well, perhaps the two things must be treated as meaning the same or that's the way the legislature was thinking when this scheme was put in place.

MR PREBBLE:
Obviously there's arguments that can –

WILLIAM YOUNG J:
That was your thinking. It no longer is.

MR PREBBLE:
Yes, Your Honour, and we haven't sought to cross-appeal on that point.

WILLIAM YOUNG J:
No, I understand that.

MR PREBBLE:
So at the end of the day if Your Honours were to find that actually a greater symmetry could be achieved then I don't think that is problematic per se provided that the finding on "hunt or kill" is one which is adequately wide, as we say, to ensure that there's protection provided for absolutely and partially protected species and that means it isn't limited, it clearly isn't limited to intentional forms of hunting or killing, and that's the primary concern that the Crown brings to this proceeding. There's obviously then is there enough certainty with the nature of the activity of shark cage diving to say that it's an offence, and we have suggested that there is enough certainty to find that it is because it involves, as our submissions traverse, hunting, pursuing, disturbing and molesting. If the Court has concerns about that, that's also why we've set out in some detail for the Court's benefit the discussion on exercise of discretion here because really that's where it becomes a key issue as to whether or not the Court should uphold a declaration in advance of any form

of actual criminal proceeding that tests whether or not this activity is an offence.

WILLIAM YOUNG J:

Well, say the appellant carries, resumes shark cage diving using the South Australian or acoustic attracting device or adopts the Californian system, would a District Court be required to find them guilty on the basis of the declaration? Probably.

MR PREBBLE:

It would depend on the wording of the declaration and the underlying meaning.

WILLIAM YOUNG J:

I'm talking about the Court of Appeal's declaration.

MR PREBBLE:

Again, that would depend on the evidence as to, I guess, the nature of the activity and whether or not there was a degree of whether you say it's harm but the action involved was sufficiently harmful, potentially harmful. Another way of saying it, as I've said, is proximate.

WILLIAM YOUNG J:

It's another way of saying that the declaration doesn't answer the – you're saying the declaration wouldn't answer the case.

MR PREBBLE:

Well, as we've set out in our submissions, a declaration in the civil Courts is not binding on the Courts in the criminal jurisdiction. It is potentially relevant to it and that's why the Courts are often in, you know, there's many cases that say it's very cautious about providing a declaration in advance because all the facts may be slightly different or just marginally different and it will have a potential bearing on the way that any criminal proceeding proceeds in the future, and so we have set that out as to being key issues for why the Court is

cautious in providing certainty in advance of any act or action in the future, and what we are saying there is – and that really is the third issue which is should the Court provide a declaration in this case, and there are really cases that confirm the Courts need to exercise caution because there could be factual disputes. The facts need to be settled in order to provide a declaration and it will potentially be seen as usurping the role of a future criminal proceeding on that very question. That's not to say the Courts haven't been prepared to provide declarations though where the facts are sufficiently settled and there's no risk that in providing that declaration you will find an activity unlawful that is actually lawful, and that's in the *Attorney-General v Able* [1984] 1 QB 795 decision which we've referred to in our submissions around a booklet that assisted suicide and whether or not you could say that that distribution of it was creating an offence. The Court was saying, "Well, no, not necessarily, because there's too many variables in the future to know whether or not that actual booklet is responsible for the person committing suicide. We're not therefore prepared to say simply because you disseminate this booklet it will be an offence. We're not going to provide you with a declaration." That can be contrasted with other cases where the Courts have been prepared, like in the *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) decision to provide clarity in advance of any criminal proceeding, and it does appear that there needs to be a degree of factual certainty and that the Courts are prepared to say there's no risk of declaring something unlawful that would actually potentially be lawful in future.

And that is why we say that this question, which is really I think what Your Honours have been exercised most about, is whether or not this activity is an offence is one that goes in our submission to the discretion of the Court and why it is a balanced equation for Your Honours as to whether the Court should be prepared to find conclusively that shark cage diving is an offence in advance of any shark cage diving actually occurring and it being tested in the criminal Courts. And so we have accepted that it is a balanced equation and we note in our submissions that in the High Court and the Court of Appeal, we actually suggested to the Court that it potentially should just say it might be and the Court has obviously gone further in the Court of Appeal.

I have done my best at suggesting to Your Honours that the elements of shark cage diving are sufficiently settled enough to say that this is an offence. But if Your Honours were to find that you were concerned that that isn't the case then one way of dealing with it is to provide the guidance on sections 63A and 2 and the scope of the provision and potentially provide some guidance on shark cage diving as to whether or not it could amount to an offence but without going further than that, and that has been done as in that case of *Able* that I described where the Court said if these factors are satisfied, it may well be that this is an offence but obviously in the future, it will need to be tested in a criminal setting.

Those are the submissions for the Crown unless Your Honours have further questions for me.

WINKELMANN CJ:
What about costs, Mr Prebble?

MR PREBBLE:
In terms of costs, the client's prepared to abide the decision that the Court reaches on costs.

WINKELMANN CJ:
Thank you, Mr Prebble. Ms Grey.

MS GREY:
Thank you, Your Honours. Just a few quick points to pick up on some of those points. I think all the parties agree that there is need for clarity and what we have at the moment is not helpful and goes too far. And Your Honours' point at the very most, the declaration that it might be an offence with some indications of what aspects of the activity might trigger the offence would be helpful for all the parties.

There are numerous problems with the finding of the Court of Appeal. One of my regional clients has gone out of business because they're called

Shark Diving New Zealand. They felt that they simply couldn't continue operating with that name and there's real problems with advertising, what can they say in their adverts? It makes it extremely difficult to continue to operate for the appellant that is operating now.

I think we all share the view that the law is incredibly difficult to understand what is intended but it would be extremely helpful to have some sort of clarity and the appellants' submission remains that the law says what it means and means what it says and the only clear line is to interpret "hunt or kill" by reference to those three semicolons, each part of which refers back to "hunt or kill", and that clarity's needed for the criminal law codification principles and constitutional principles so the public know, as well as my clients knowing, what they can do.

It's submitted it's not a major issue with the gaps in the law. The Court of Appeal decision last year was not appealed by the Crown and prior to then, there were no issues with the scope of the Wildlife Act. It's an issue that's come up with shark cage diving but there's never been an issue about whether kiwi are adequately protected, or other species, and my submission is that because they are already covered by an array of other legislation that the risk that's been pointed out to you is a hypothetical problem more than a real problem. And although the Wildlife Act may present some difficulties in some rare circumstances if there are gaps, my submission is it's a much bigger difficulty if we lose fundamental principles of constitutional law that the public don't know what the criminal law is.

Just on the point of the evidence about shark cage diving, the Crown's own expert Mr Duffy says at paragraph 21 about the "potentially harmful cage dive practices occurring in the period between the start of cage diving in May 2008 and the development of the Cage Diving Code of Practice". There is no expert evidence that I can find of harmful practices when the Code of Practice is complied with and indeed, that was the very purpose of the Code of Practice, and I accept it makes some difficulty referencing to a Code of Practice that can't lawfully be incorporated into a permit that can't be issued

but somewhere in that is, in my submission, a position that a lawful activity can go ahead in compliance with the best practical means to avoid harm which is what has been adopted with the shark cage diving Code of Practice.

And similarly, in paragraph 25 of Mr Duffy's evidence, this is the paragraph that my friend referred to, "A recent review of shark diving tourism by Gallagher et al. (2015) concluded that under the right conditions and if done in a precautionary, responsible manner, shark diving can provide a net conservation benefit for some species, including great white sharks." And when you look back at the definition of "conservation" in the Conservation Act, "conservation" has a broader meaning than simply protection. "Conservation means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations."

So if you look at "conservation" in its statutory sense, it's consistent with Mr Duffy's expert evidence for the Department and the Department's decision to issue a authority when they believed they had the authority to do so for shark cage diving in recognition that although there were some hypothetical possible harms, they could be mitigated by following the Code of Practice and indeed, the net conservation gain of the data and monitoring and research that was obtained from shark cage diving and from the reporting, and the benefit the public could enjoy and their increased awareness of sharks, is all a conservation gain that offsets any hypothetical minor risk.

So in my submission, the declaration issued by the Court of Appeal was too wide, it's contrary to the definition of "hunt or kill" in the Act, and that declaration should be overturned by this Court, and any guidance you can give us would be much appreciated.

WINKELMANN CJ:
Ms Grey, what do you say about costs?

MS GREY:

The case has been extremely difficult for my clients. The third respondents have abided by the decision of the Court in this round although they were successful in the High Court, unsuccessful in the Court of Appeal, so their position's a little unusual, and I'm no longer acting for them –

WINKELMANN CJ:

Yes.

MS GREY:

– but I think it's important their position be understood. The appellant, I think their primary objective is to get some clarity so that they can continue their business and at least know what they can and can't do, and otherwise abide by the decision of the Court on costs.

WINKELMANN CJ:

Thank you, Ms Grey. Thank you, counsel, for your submissions. We're much assisted. We will reserve our decision and release it in the usual course through the registry.

COURT ADJOURNS: 3.45 PM