IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2017-470-3
[2017] NZHC 1429

BETWEEN	ATTORNEY-GENERAL Applicant
AND	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST First Respondent
	(Continued next page)

Hearing: 29 May 2017

Counsel: N C Anderson, R H Dixon and E J Couper for Applicant
B O'Callahan and R B Enright for First Respondents
P Cooney and R Boyte for Second Respondent
S Gepp and M Wright for Royal Forest and Bird Society
L Blomfield for Hawkes Bay Regional Council
J Appleyard for Fishing Industry Interests
J Maassen and M Riordan for Marlborough District Council
J Pou and A Neems for Ngati Makino Heritage Trust, Ngati Ranginui Iwi Incorporated, Ngati Pikiao Environmental Society and Hokianga Collective
R B Enright for New Zealand Maori Council

Judgment: 26 June 2017

JUDGMENT OF WHATA J

This judgment was delivered by me on 26 June 2017 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar STEPHEN HEWLETT
Deputy Registrar
High Court of New Zealand
Date: 26/6/17

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AND BAY OF PLENTY REGIONAL COUNCIL

Second Respondent

AND ROYAL FOREST AND BIRD SOCIETY
HAWKES BAY REGIONAL COUNCIL
FISHING INDUSTRY INTERESTS
MARLBOROUGH DISTRICT COUNCIL
NGATI MAKINO HERITAGE TRUST
NGATI RANGINUI IWI INCORPORATED
NGATI PIKIAO ENVIRONMENTAL SOCIETY
HOKIANGA COLLECTIVE

Third Respondents

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Introduction

[1] The Trustees of the Motiti Rohe Moana Trust (MRMT) seek regional planning controls over fishing to maintain indigenous biodiversity and to provide for the relationship of Māori with their taonga. There was some doubt about the power of regional councils to control fishing. The Environment Court declared, in short, a regional council may impose controls on fishing techniques and methods provided the sole or dominant purpose of the control was a specified resource management purpose.[1]

[2] The Attorney-General appeals to this Court claiming s 30(2) of the Resource Management Act 1991 (RMA) expressly exempts fishing from regional council control except where the controls are incidental to provision for other activities in the coastal environment.

The key sections

[3] To understand the questions to be resolved by the appeal it is necessary to mention the key sections. Section 30 of the RMA sets out the functions of regional councils under the Act, including for present purposes subs (d)(i), (ii) and (vii):

> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> ...
>
> (d) in respect of any coastal marine area, the control (in conjunction with the Minister of Conservation) of–
>
> (i) land and associated natural and physical resources:
>
> (ii) the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area:
>
> ...
>
> (vii) Activities in relation to the surface of any water:
>
> ...

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[1] *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 240 at [66]. The full text of the Environment Court's declaration is attached as Appendix A.

[4] Section 30(1)(ga) also provides that every regional council shall have the following function:

> (ga) The establishment, implementation and review of objectives, policies and methods for maintaining indigenous biological diversity.

[5] But s 30(2) states:

> A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i)(ii) or (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

The questions

[6] Therefore, to resolve the appeal, I must answer two questions:

(a) What is the true scope of s 30(2) of the RMA?

(b) Can regional councils impose controls on fishing to maintain indigenous biodiversity pursuant to s 30(1)(ga)?

Overview

Scope

[7] Section 30(2), on its face, injuncts regional councils and the Minister of Conservation from controlling land, occupation of coastal space and the activities on the surface of water in the coastal marine area (CMA) to regulate fishing for the purpose (or object) of managing fishing or fisheries resources controlled under the Fisheries Act 1996 (FA).

[8] Fishing and fisheries resources are controlled under the FA to provide for the sustainable utilisation of those resources. The evident statutory policy at s 30(2) therefore is that the RMA's sustainable management purpose will be promoted by the sustainable utilisation of fisheries resources under the FA. But the FA does not purport to address, let alone control, all the effects of fishing on the wider environment (including people and communities).

[9] Rather, the sustainability function under the FA is focused on biological sustainability of the aquatic environment as a resource for fishing needs. By contrast, the RMA defines sustainability more broadly to include protection and environment more widely to mean ecosystems and their constituent parts (including people and communities), and all natural and physical resources.

[10] Given this, the two Acts can be reconciled by affording primacy to the FA on sustainable utilisation, namely:

(a) the sustainable utilisation of fisheries resources now and in the future; and

(b) the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs.

[11] Regional councils then remain tasked with the management of the effects or externalities[2] of fishing on the wider environment as defined by the RMA.

[12] A broader contextual analysis also reveals national level oversight under both Acts is enabled and key operational functionaries under both Acts are required to have regard to the strategies and methods promoted by each other, where relevant. This suggests parallel, complementary and overlapping management of fishing and the effects of fishing, but with clear primacy afforded to the FA, in terms of the specific regional functions at s 30(1)(d)(i), (ii) and (vii), to sustainably utilise fisheries resources.

[13] Overall, therefore, s 30(2) injuncts regional councils and the Minister of Conservation from exercising the functions specified at s 30(1)(d)(i), (ii) and (vii) to regulate fishing for the purpose of managing the utilisation of fisheries resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. However this does not prevent regional councils from

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2 "Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources." *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at [113], per Chisholm and Fogarty JJ.

exercising functions to control, when necessary, other effects or externalities of fishing activity on the environment as defined by the RMA.

Māori values

[14] The schemes of the FA and the RMA are largely complementary as they relate to matters Māori, but where they are in conflict, the former prevails. To elaborate, the FA does not purport to be an exclusive code for recognition of Māori values, but its coverage is special when giving effect to Treaty settlements. Conversely, RMA powers, functions and duties are generalised and controls must be developed in light of, among other things, FA provision for ensuring sustainability, including regulations relating to taiapure.

[15] Therefore, subject to the division of responsibility identified at [13], RMA functionaries may exercise their functions in respect of Māori interests, provided they do not impose controls that are inconsistent with the special provision made for Māori under the FA.

Indigenous biodiversity

[16] Given that the distinct legislative object of s 30(1)(ga) is not clearly secured under the FA, the injunction at s 30(2) is not sufficiently express to exclude the performance by the Council of its statutory function at s 30(1)(ga) to maintain indigenous biodiversity.

The answers

[17] A regional council must not exercise the functions specified at s 30(1)(d)(i), (ii) or (vii) to manage the utilisation of fisheries resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].

[18] A regional council may exercise its functions to manage the effects of fishing that are not directly related to biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].

[19] Subject to the division of responsibility noted at [107]-[114], a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the FA. See discussion at [115]-[118].

[20] Notwithstanding s 30(2), a regional council may perform its function at s 30(1)(ga) to maintain indigenous biodiversity within the CMA, but only to the extent strictly necessary to perform that function. See discussion at [119]-[130].

Background

[21] The current proceedings form part of the Bay of Plenty Regional Coastal Environmental Plan (RCEP) promulgation process. The RCEP was first notified in 2014 and is now partly operative. Some provisions remain at issue, including those relating to Motiti Island and the surrounding coastal waters including Otaiti (Astrolabe) Reef and a series of toka and reefs (the Motiti Natural Environment Management Area). These were the subject of an appeal to the Environment Court by the first respondents, MRMT, who are the kaumātua of Motiti.

[22] MRMT filed amended relief in relation to its appeal on 1 July 2016 seeking to introduce objectives, policies, methods and rules controlling fishing techniques and methods into the provisions of the RCEP pertaining to the Motiti Natural Environment Management Area. The second respondent, the Bay of Plenty Regional Council (BOPRC), sought strike out, which was declined. MRMT in parallel proceedings sought declarations that the objectives, policies, methods and rules were lawful if they had the sole or dominant purpose of, among other things, maintaining indigenous biodiversity or protecting taonga.

Environment Court decision

[23] The Environment Court, comprising Judge Smith and Commissioners Edmonds and Bunting, granted the declaration in a modified form. The Court concluded a functional overlap between the FA and the RMA was expressly anticipated by the legislature, reinforced by the fact that various parts of each Act discuss matters such as sustainability and use of plans, and have specific

requirements to take into account any relevant document generated under the other Act.[3]

[24] The Court noted that s 6 of the FA makes unenforceable any plan or coastal permit that provides for fishing allocation, but it does not affect the jurisdiction of the Council to make planning provisions. They observed it simply provides that certain matters are unenforceable in certain contexts.[4]

[25] Three preconditions were identified as necessary to trigger s 30(2):[5]

(a) the regional council must be performing a function specified at s 30(1)(d)(i), (ii), or (vii);

(b) the regional council must be controlling the taking, allocation or enhancement of fisheries; and

(c) the control must be for the purpose of managing fishing or fisheries resources.

[26] The Court concluded s 30(1)(ga) should not be read down by reference to the limits on s 30(1)(d). Rather, s 30(1)(ga) was said to require a broader assessment and to enable objectives, policies and methods to identify indigenous biological diversity issues whether they occur on land, in the CMA or otherwise. The High Court decision in *Property Rights in New Zealand Incorporated v Manawatu-Wanganui Regional Council* was considered to be binding insofar as it holds that s 30(1)(ga) is not precluded by the absence of functions elsewhere specified in s 30.[6] Accordingly, the Environment Court found indigenous biological diversity rules are not subject to s 30(1)(d) and therefore do not breach the first precondition of s 30(2).

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3 At [12]; citing *Reay v Minister of Conservation* [2014] NZHC 1844 [*Reay* (HC)]; upheld in *Reay v Minister of Conservation* [2015] NZCA 461 [*Reay* (CA)].

4 At [21] and [22].

5 At [32]-[33].

6 *Property Rights in New Zealand Incorporated v Manawatu-Wanganui Regional Council* [2012] NZHC 1272 [*Property Rights*].

[27] On controls to recognise and provide for the relationship of Māori with their taonga, the Court said the control fell to be assessed by reference to the third pre-condition. It considered the central issue was whether the sole or dominant purpose of the control was to manage fishing or fisheries resources. If not, then the control was not excluded by s 30(2). The Environment Court also held that whether or not a particular provision in a plan has a purpose of managing fishing or fisheries resources will need to be tested in each case, where relevant.[7]

[28] Overall, the Environment Court concluded that whether a control on taking, allocation or enhancement is for the purpose of maintaining indigenous biological diversity or other legitimate purpose (for example pursuant to s 6(e)) and whether there is a rational connection between that purpose and the control will need to be determined at a merits hearing.[8]

Summary of parties and argument

[29] The parties, including the interveners, fall into three camps.

[30] The first camp comprises the **Attorney-General**, represented by Mr Anderson, Ms Dixon and Mr Couper, and the **Fishing Industry Parties**,[9] represented by Ms Appleyard. They contend:

(a) The key phrase "for the purpose of managing fishing or fisheries resources" should be given its ordinary meaning and not be read in contradistinction to high level resource management purposes as the Environment Court concluded.

(b) The Court should have enquired whether, objectively assessed, the control is designed to manage fish or fisheries resources.[10]

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7 At [51].
8 At [61].
9 Comprised of The New Zealand Rock Lobster Industry Council, Fisheries Inshore New Zealand and The Paua Industry Council.
10 Citing *Commissioner of Inland Revenue v National Distributors Ltd* [1989] 3 NZLR 661 (CA) at 667.

(c) If a control is designed to manage fishing or fisheries resources controlled under the FA, it is caught by s 30(2).

(d) Incidental controls, designed to manage something other than fishing or fisheries resources, are not affected, such as providing for tidal energy generation, even though they may disenable fishing.

(e) The FA has a narrower focus than the RMA, but where they are in conflict, the more general provisions of the RMA must yield to the more specific FA applying the principle of *generalia specialibus non derogant*.

(f) The requirement to show that the control did not impinge on a FA function is supported by the legislative history and case law, and the explanatory note to the current version of s 30(2) makes clear that its purpose is to remove FA management from RMA control.

(g) Overlapping control may undermine Treaty of Waitangi (Treaty) settlements, including in terms of customary and commercial fishing rights.[11]

(h) The function to maintain indigenous biodiversity under s 30(1)(ga) is caught by s 30(2) to the extent that any methods used seek to employ the functions set out at s 30(1)(d)(i), (ii) or (vii) to control fishing.

(i) Parliament saw it necessary to expressly prohibit certain controls in the CMA by virtue of s 30(2), and any prohibition on the exercise of these functions must logically apply to preclude the operation of other functions within the CMA.

(j) The FA provides for ensuring sustainability, including the maintenance of biological diversity, so important environmental values, such as indigenous biodiversity, are subject to its regulation.

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[11] Referring to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 10, which requires provision for customary fishing rights.

(k) The Fishing Industry Parties also say the scheme of both Acts clearly show that the FA has primacy as the specific Act on fisheries matters. They add the RMA is permissive of fishing, as fishing is permitted unless expressly controlled by s 12(1) and (3) and s 30(2) expressly prohibits the exercise of functions that might disenable fishing. Conversely, it is heavily regulated under the FA.

(l) The Fishing Industry Parties conclude by saying that the Environment Court's declaration will have the effect of sharply cutting across FA controls and producing an impractical consequence, requiring merits hearings to determine whether plan rules are within RMA jurisdiction.

[31] The second group comprises three Councils – **BOPRC**, **Hawkes Bay Regional Council** (HBRC) and **Marlborough District Council** (MDC). They adopt similar though not identical positions:

(a) Mr Cooney and Ms Boyte (for BOPRC) contend, in short, that s 30(2) provides regional controls must not have a utilisation purpose, but does not prohibit controls for matters such as intrinsic values which are not directed to the utilisation of fisheries resources. They also say the methods of control specified at s 30(1)(d) cannot be used to perform the s 30(1)(ga) function.

(b) Ms Blomfeld for HBRC submits that direct control over fisheries resources is precluded, but indirect controls, not for an utilisation purpose, may be permissible. As to s 30(1)(ga), the HBRC supports the Attorney-General's position. Ms Blomfeld adds that Parliament deliberately separated out fisheries management within the CMA from the RMA, so it is unlikely it intended for this function to be exercised in the CMA.

(c) Mr Maassen, for MDC, submits that the reference to "the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996" simply defines the subject matter of the excluded control,

and that the mischief to be avoided was duplication of function. He therefore agrees with the Attorney-General that the Environment Court was wrong to find that s 30(2) permitted control if the sole purpose was a resource management one. He contends however, that s 30(1)(ga) imposes an independent function on councils to maintain indigenous biodiversity (a matter of international and national significance) which councils are obliged and empowered to perform through their rule-making capacity.

[32] The third camp comprises parties supporting the declaration including:

(a) **MRMT**, represented by Mr O'Callahan and Mr Enright. They contend that the scheme of the RMA and the language of s 30(1)(ga) and (2), properly construed, show that the former is not subject to the latter – it is a distinct laudable and permissible function. They note there has always been overlapping jurisdiction,[12] and the FA purpose of sustainable utilisation is not co-extensive with the RMA sustainable management purpose, with the FA affording primacy to resource use not protection. In their submission, the scope of s 30(2) should be limited to excluding controls directed to the utilisation objective. Because the values they seek to protect are not being protected by the FA, they contend they require and may be afforded protection under the RMA.

(b) **New Zealand Māori Council** (NZMC), represented by Mr Enright. He submits that an interpretation which is consistent with Treaty principles should be preferred and that s 30(2) should be construed in a way that fully recognises kaitiakitanga. Under such an interpretation, s 30(1)(ga) is not limited by s 30(2). He also says that there is nothing in the fisheries Treaty settlements that affects or is affected by proper recognition of kaitiakitanga, noting that there is

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12 Citing *Ministry of Works & Development v Tauranga County Council* (1987) 12 NZTPA 385 (HC).

nothing in the FA that protects intrinsic Māori values, except in terms of customary use.

(c) **Ngati Makino Heritage Trust and other iwi** (Ngati Makino),[13] represented by Mr Pou and Ms Neems. They submitted that there are two separate gates controlling fisheries – the first gate controls access to the fish, the second gate controls the effects of fishing, including on Māori values. The first gate is controlled by the FA, while the second gate is controlled by the RMA. In reality, the second gate is concerned only with pinpoints within quota management areas, but these pinpoints have considerable significance to iwi. Taiapure, which are a feature of the FA, provide only limited and often an impractical basis for recognition and protection of Māori values. Additional support for Māori relationship with the coastal environment is properly afforded by the RMA.

(d) **Royal Forest and Bird Protection Society of New Zealand Incorporated** (RFB), represented by Ms Gepp and Ms Wright. They submit that two clear distinct circles of influence can be drawn – within the FA circle resides allocation, sustainable harvesting and some effects of fishing, while within the RMA circle are the full gamut of resource management values (including protection) and effects, except effects of allocation, occupation and the effects of fishing on fisheries resources. They say that parliamentary records confirm the clear distinction between use issues subject to the FA and broader effects issue managed by the RMA, and that s 30(2) is intentionally circumscribed to apply only to the matters specified. As to the use of 'purpose' in s 30(2), an impermissible purpose is managing fisheries resources; permissible purposes are all RMA purposes not controlled under the FA.

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[13] Ngati Makino Heritage Trust, Maketu Taiapure Committee, Ngati Ranginui Iwi Incorporated Society, Ngāti Pikiao Environmental Society and the Management of the Hokianga O Ngā Whānau Hapū Collective. The parties were advised of my whakapapa to Ngāti Pikiao. No objection was raised to my sitting on this matter.

Approach to interpretation

[33] This case is about the interpretation of s 30(2). The usual rules apply. The interpretative task commences with the text, informed by the purpose,[14] and context,[15] including the statutory schemes of both Acts.[16] But in order to interpret the text it is necessary to understand the whole picture. I begin therefore with a detailed review of both statutes.

Fisheries Act 1996

[34] The FA lays out an elaborate scheme directed to the sustainable utilisation of fisheries resources, including the way, and rate at which, that resource is used. Relevantly, Part 3 of the Act provides for the setting of sustainability measures to control the method, location and rate of fishing. Parts 4, 5 6 and 7 provide for allocation among different fishing interests. Special provision is made for tangata whenua interests at Part 9. Aquaculture is separately addressed at Part 9A, and Part 16 contains a broad power to regulate to give "full effect to the provisions of this Act and for its due administration".[17]

Application of RMA

[35] Section 6 makes unenforceable RMA controls affecting the allocation of fisheries resources as follows:

> **6 Application of Resource Management Act 1991**
>
> (1) No provision in any regional plan or coastal permit is enforceable to the extent that it provides for—
>
> (a) the allocation to 1 or more fishing sectors in preference to any other fishing sector of access to any fisheries resources in the coastal marine area; or
>
> (b) the conferral on any fisher of a right to occupy any land in the coastal marine area or any related part of the coastal marine area, if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area.

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14 Interpretation Act 1999, s 5; *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [24].

15 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

16 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [6].

17 Fisheries Act 1996, s 297(1)(y).

Purpose and principles

[36] The purpose of the FA is twofold, expressing a composite policy that is concerned with providing for utilisation, subject to ensuring sustainability:[18]

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

[37] "Fisheries resources" has a wide meaning, being any one or more stocks or species of fish, aquatic life, or seaweed. "Aquatic environment" means the natural and biological resources comprising any aquatic ecosystem and includes all aquatic life and the oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists.[19]

[38] All persons exercising or performing functions under the FA in relation to the utilisation of fisheries resources or ensuring sustainability must take into account the following environmental principles set out at s 9:[20]

> (a) associated or dependent species should be maintained above a level that ensures their long-term viability;
>
> (b) biological diversity of the aquatic environment should be maintained; and

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18 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [*Sanford*] at [60]; Fisheries Act 1996, s 8.

19 Section 2.

20 Section 9. They must also take into account specified information principles in s 10.

(c) habitat of particular significance for fisheries management should be protected.

Sustainability measures and allocation

[39] In terms of sustainability, Part 3 of the FA envisages two primary forms of control – sustainability measures directed to both the way fishing is conducted (methods, techniques, size of fish, etc) and the rate of fishing (total allowable catch or TAC). Section 11 stipulates that the Minister must set or vary sustainability measures for one or more stocks taking into account:

(a) any effects of fishing on any stock and the aquatic environment; and

(b) any existing controls under this Act that apply to the stock or area concerned; and

(c) the natural variability of the stock concerned.

[40] In setting or varying any sustainability measure, the Minister must have regard to a number of statutory documents where relevant, including a regional policy statement or plan under the RMA or management strategy or plan under the Conservation Act 1987.[21] The Minister must also take into account relevant fisheries plans, conservation services or fisheries services.[22] The sustainability measures may relate to both the way fishing is conducted and rate.[23]

[41] The Minister must also produce a fisheries plan, which may include fisheries management objectives that support the purposes and principles of the Act, and strategies to achieve those objectives.[24] The strategies may include sustainability measures set out under this part of the Act and rules to manage the interaction between different fisheries sectors. The fisheries plan may also include conservation services and fisheries services.

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21 Section 11(2).
22 Section 11(2A).
23 Section 11(3).
24 Section 11A.

[42] Section 12 provides for consultation in respect of the exercise of sustainability measures. The Minister must consult with those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Māori, environmental, commercial, and recreational interests. The Minister must also provide for the input and participation of tangata whenua who have a non-commercial interest in the stock concerned, or an interest in the effects of fishing on the aquatic environment in the area concerned and have particular regard to kaitiakitanga.

[43] Section 13(2) states that the Minister must set a TAC for each management area that (in short):[25]

(a) maintains the stock at or above a level that can produce the maximum sustainable yield;

(b) will result in that stock being restored to or above a level that can produce the maximum sustainable yield; or

(c) will result in the stock moving towards or above a level that can produce the maximum sustainable yield.

[44] The Minister may set an alternative TAC if the purpose of the Act would be better achieved otherwise than pursuant to s 13(2), but it must ensure long-term viability and be no greater than a level allowing taking of another stock.[26]

[45] The Minister is also required to comply with fishing-related mortality regulations in s 14(f) of the Wildlife Act 1953 and s 3(e) of the Marine Mammals Protection Act 1978, and may take such measures as are considered necessary to further avoid, remedy or mitigate any adverse effects of fishing on the relevant protected species.[27] The Minister also has emergency powers to deal with sudden or significant changes in stock or the aquatic environment.[28]

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25 Section 13(2).
26 Sections 14, 14B.
27 Section 15.
28 Section 16.

Allocation

[46] Part 4 of the Act introduces the Quota Management System (QMS) and lays out a detailed framework for the allocation of quota, including the total allowable commercial catch (TACC). The Minister must make a stock or species subject to quota management if satisfied the current management of a stock or species:[29]

(a) is not ensuring the sustainability of the stock or species; or

(b) is not providing for the utilisation of the stock or species.

[47] The Minister may alternatively use any of the sustainability measures under s 11 (other than a TAC) to achieve the purposes of the Act. Before doing so, the Minister must consult with interested persons and the Minister of Conservation in relation to specified stock.[30]

[48] The TACC cannot exceed the TAC for stock which will already have been determined by the Minister.[31] In fixing the TACC the Minister is subject to the same consultation requirements as in setting sustainability measures pursuant to s 12.[32] The Minister is required to apportion the TAC among the various interests and demands referred to.[33]

[49] The reduction or increase of a TACC or the effect of an increase in the TACC is subject to a detailed formula, including the setting of quota management areas.[34] In order to alter a quota management area, the Minister must have regard to relevant considerations including non-commercial fishing interests and the biological characteristics of affected stock.[35] The Minister must also consult with interested parties in the relevant quota management area, including Māori, recreational,

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29 Section 17B(1).
30 Sections 17B(3) and (7).
31 Section 20(5).
32 Section 21.
33 *Sanford*, above n 18, at [52].
34 Sections 22-26.
35 Section 25(3).

commercial, and environmental interests, and provide for input of tangata whenua having particular regard to kaitiakitanga.[36]

[50] Alteration of a quota management area may occur subject to various criteria, including better achievement of the purpose of the Act, and where agreement has been reached with affected persons.[37] Alteration without agreement is also provided for, together with a mechanism for allocation of quota in accordance with any alteration.[38]

Rights to fish

[51] Part 6 addresses access to fisheries resources. Particularly relevant to the present case, s 89 states:

> **89 All fishing to be authorised by fishing permit unless specific exemption held**
>
> (1) No person shall take any fish, aquatic life, or seaweed by any method unless the person does so under the authority of and in accordance with a current fishing permit.
>
> ...

[52] Subsection (2) lists exceptions, including taking in accordance with amateur fishing regulations and any Māori customary non-commercial fishing regulations. Section 89B also provides an exception for customary rights protected under a customary rights order or an agreement. Section 91 sets out the takings authorised by a fishing permit. Section 92 deals with conditions of fishing permits and s 94 confers a right of review against decisions granting or declining to grant a permit.

Customary relationship

[53] Part 9 provides for recognition of customary fishing. Section 174 states:

> **174 Object**
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> The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal

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36 Section 25.
37 Section 25A.
38 Sections 25B and 26.

waters) that have customarily been of special significance to any iwi or hapū either—

(a) as a source of food; or

(b) for spiritual or cultural reasons,—

better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

[54] The Governor-General may from time to time order, by Order in Council, declare any area of New Zealand waters (which are estuarine or littoral coastal waters) to be a taiapure-local fishery.[39] A taiapure declaration must further the object set out at s 174 and regard must be had to the size of the area affected, the impact of the order on the general welfare of the community in the vicinity of the area and the impact of the order on persons having a special interest in the area.[40] The process for making such an order is dealt with by ss 178 through 181.[41]

[55] A committee of management, appointed on nomination of persons considered by the Minister to be representative of the local Māori community, may make recommendations as to regulations for the conservation and management of the fish, aquatic life or seaweed in the Taiapure-local fishery.[42] These regulations may, pursuant to s 185, override the provisions of any other regulations made under ss 297 or 298 of the Act.

[56] Section 186 also provides regulations as to customary fishing. It notes:

186 Regulations relating to customary fishing

(1) The Governor-General may from time to time, by Order in Council, make regulations recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mātaitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

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39 Section 175.

40 Section 176.

41 The Minister must notify every proposal and anyone who has any function, power or duty which relates to or could be affected by the proposal, may lodge an objection to it or submissions in relation to it or both. There is then an inquiry by a tribunal consisting of a judge of the Māori Land Court. It is deemed to be a commission of inquiry.

42 Section 184.

...

[57] Section 186A then provides powers for imposing controls on fishing in a taiapure by the Minister in relation to New Zealand fisheries other than South Island fisheries.

Other relevant provisions

[58] Emphasising the FA's comprehensive treatment of allocation of fisheries resources, there are also provisions dealing with a foreign allowable catch, fishing in the high seas, dispute resolution and administration of quota interests, including transfer and mortgages of quota.[43]

[59] Part 9A addresses aquaculture. The scheme of this Part makes it plain that aquaculture decisions are subject to the granting of coastal permits and separate determination is made by the chief executive as to whether the coastal permit will not have an undue adverse effect on fishing.

[60] Part 16 deals with regulations. Indicative of the comprehensive regulatory ambit of the Act, 25 different forms of regulation are enabled, including:[44]

> (y) Proving for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

[61] In addition, a specific power to make regulations to implement sustainability measures and to avoid, remedy or mitigate the effect of fishing-related mortality on any protected species under s 14F of the Wildlife Act 1953 or s 3E of the Marine Mammals Protection Act 1978 is provided for.[45]

Resource Management Act 1991

[62] It is common ground that:[46]

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43 Parts 5, 6A, 7 and 8.
44 Section 297(1)(y).
45 Section 298.
46 *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178, (2014) 18 ELRNZ 473 at [23].

> The RMA provides a comprehensive framework for the regulation of the use of land, water and air. It signalled a major change from the direct and control emphasis of the previous planning regime to the sustainable management of resources, with its composite objective of enabling people and communities to provide for their wellbeing while, among other things, mitigating, avoiding, or remedying adverse effects on the environment. The Act is carefully framed to provide control of the effects of resource use, including regulatory oversight given to functionaries at national, regional and district levels. In general terms, all resource use is amenable to its framework, unless expressly exempted from consideration.
>
> (citations omitted)

[63] Some elaboration is, however, necessary. As submitted by Ms Gepp, the RMA's comprehensive framework applies not only to the "use" of natural and physical resources, but also to their "development and protection".

Purpose

[64] Section 5 states that the purpose of the RMA is to promote the sustainable management of natural and physical resources where:

> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[65] Relevantly, s 6 of the Act provides that in achieving this purpose, all persons exercising functions under the Act must recognise and provide for a number of matters of national importance, including the preservation of the coastal environment's natural character, protection of significant indigenous vegetation and fauna, and the relationship of Māori with their taonga.[47]

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[47] Resource Management Act 1991, s 6.

Restrictions on use of the CMA

[66] The CMA is subject to specific control. Section 12(1) restricts the use of the CMA but the harvesting of fish is not subject to prohibition under s 12(1). Section 12(2) however prohibits occupation of the CMA unless allowed by a national environmental standard, a rule in a coastal plan or proposed coastal plan or by resource consent. Completing this specific framework of control, s 12(3) states:

> (3) Without limiting subsection (1), no person may carry out any activity—
>
> (a) in, on, under, or over any coastal marine area; or
>
> (b) in relation to any natural and physical resources contained within any coastal marine area,—
>
> in a manner that contravenes a national environmental standard, a rule in a regional coastal plan, or a rule in a proposed regional coastal plan for the same region (if there is one) unless the activity is expressly allowed by a resource consent or allowed by section 20A (certain existing lawful activities allowed).

[67] Similarly s 15A prohibits dumping and incineration of waste or other matter in the CMA unless allowed by resource consent. Section 15B prohibits the discharge of contaminants (including water) from ships or offshore installation unless it is permitted by a rule in a regional coastal plan or proposed coastal plan or after reasonable mixing will meet specified water quality standards and will not give rise to any significant effects on aquatic life.

[68] More general RMA controls also affect the use, development and protection of the coastal environment. Section 9 restricts land use activity unless allowed by a rule in a plan, by resource consent or as a qualifying existing use.[48] Section 14(1) restricts the use of open coastal water that contravenes a national environmental standard or a regional rule unless the activity is allowed by resource consent or a qualifying existing use.[49] Section 17 also imposes a general duty (not enforceable per se) to avoid, remedy or mitigate any adverse effect on the environment arising from an activity.

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48 Pursuant to section 10.

49 Pursuant to section 20A.

Functions

[69] Responsibility for developing relevant environmental standards and rules is divided among the Act's functionaries at a national, regional and district level. For present purposes it is only necessary to examine the national and regional level functions.

National matters

[70] Most relevantly for present purposes, national environmental standards can be promulgated under s 43 by the Governor-General in Council and regional councils are empowered to make rules under s 68. National environmental standards may prohibit or allow an activity. A rule or resource consent may not be more lenient than a national environmental standard.[50] More stringent rules and water conservation orders prevail over national environmental standards applying to water.[51]

[71] As regional plans must include or give effect to objectives or policies set out in national policy statements,[52] it is necessary to examine their purpose and operation. The purpose of a national policy statement is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the Act.[53] They are promulgated via a carefully scripted scheme, involving a s 32 cost benefit evaluation, a notified board of inquiry process, a board of inquiry report and Ministerial oversight.[54]

[72] Special provision is made for a New Zealand Coastal Policy Statement (NZCPS), involving the same scheme for national policy statements generally.[55] The Minister of Conservation has the function of preparing and then recommending the NZCPS for approval by the Governor-General (and then the approval of regional coastal plans in accordance with Schedule 1).[56]

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50 Section 43B.
51 Section 43C.
52 Section 55.
53 Section 45.
54 Sections 46A.
55 See section 57.
56 Section 28.

[73] The scope of a NZCPS is broad, involving among other things preservation of natural character, protection of characteristics of special value to tangata whenua and implementing international obligations.[57] In 2010 the NZCPS was published, including objectives and policies to protect indigenous biological diversity in the coastal environment. The significance of this is addressed at [119]-[128].

Regional matters

[74] Regional councils must perform the functions specified at s 30. They include general functions to achieve integrated management of resources of the region and management of effects of activities of regional significance. In addition, several functions correspond to the control of activities by regional councils in the coastal environment contemplated at ss 12, 14 and 15 of the RMA relating to use, occupation of and discharges to the CMA.[58] The relevant functions, subject to 30(2), are listed above at [3] and [4]. Section 30(3) provides that regional councils may control the effects of aquaculture activities on fishing.

[75] Regional policy statements and regional plans are integral to the performance of a regional council's functions. The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and the methods to achieve integrated management of the natural and physical resources of the whole region.[59] The regional policy statement must be prepared in accordance with, among other things, the regional council's functions under s 30 and any regulations made under the RMA.

[76] Councils must have regard to management plans and strategies prepared under other Acts and regulations relating to the sustainability, or the conservation, management or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mātaitai or other non-commercial Māori customary fishing) to the extent relevant to the resource management issues of the region.[60] The

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57 Section 58.
58 Section 30(1)(d).
59 Section 59.
60 Section 61.

regional policy statement must also give effect to a national policy statement or NZCPS.[61]

[77] The purpose of regional plans is to assist a regional council to carry out its functions in order to achieve the purpose of the Act.[62] A regional council must prepare any regional plan in accordance with a number of considerations,[63] and the plan must include objectives, polices and rules to implement policies. It must give effect to any national policy statement, NZCPS and any regional policy statement.

[78] Special provision is made for a regional coastal plan to achieve the purpose of the Act in relation to the CMA. The regional coastal plan may form part of a regional plan where necessary to achieve integrated management.[64]

[79] The Council may make rules for the purpose of carrying out its functions and achieving the objectives and policies of the plan, having regard to the actual and potential effect on the environment of activities, including, in particular, any adverse effect.[65] A rule may apply throughout the region or only to part of the region, and may be specific or general in its application. They have the force of a regulation under the Act.

[80] Illustrating the care taken in relation to management of activities in the CMA, a rule may specify a coastal activity is restricted only if the rule is in a regional coastal plan and the Minister of Conservation has required the activity to be so specified on the ground that the activity has or is likely to have significant or irreversible effects on a CMA, or occurs or is likely to occur in an area having

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61 Section 62.

62 Section 63.

63 Being its functions under s 30, Part 2, a direction given by the Minister of the Environment, any s 32 report and any regulations made under the Act. It must also have regard to any management plans or strategies prepared under other Acts and any regulations relating to ensuring the sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mātaitai or other non-commercial Māori customary fishing).

64 Pursuant to sections 63 and 64, the Minister of Conservation must approve that part of any regional plan which relates to the CMA. The Minister also has plan making powers that a regional council would have under s 30(1)(d) in relation to specified islands listed at s 31A.

65 Section 68.

significant conservation value.[66] Specific provision is also made for rules regulating dumping of waste within the coastal environment,[67] and aquaculture activities.[68]

[81] Special provision is made for recognition of protected customary rights carried out under Part 3 of the Marine and Coastal Area (Takutai Moana) Act 2011. A plan must not describe an activity as permitted if that activity will or is likely to have an adverse effect that is more than minor on a protected customary right.[69]

What is the scope of s 30(2)?

[82] Given its significance, s 30(2) is repeated for convenience:

> (2) A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.

[83] It is common ground that s 30(2) precludes control for preferential fisheries allocation purposes. That is readily inferable from the plain words used, and is consistent with s 6 of the FA, which makes unenforceable any rule purporting to confer preferential rights to fish to any fishing sector. The central issue is the extent s 30(2) purports to exclude control of fishing which is not directed to preferential allocation.

The text

[84] The plain meaning of s 30(2) is tolerably clear. There are three interrelated components to the section. The Environment Court and the parties described these components as pre-conditions. But that presupposes the application of s 30(2) must be established as if it were an exception to the normal operation of the Act. I prefer to approach the interpretative exercise without colouring its operation in this way.

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66 Section 68(4).
67 Section 68(9).
68 Section 68A.
69 Section 85A.

"A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii)"

[85] First, s 30(2) literally injuncts the performance of the following functions by regional councils and the Minister of Conservation in respect of the CMA: the control of land and associated resources, occupation of coastal space[70] and activities on the surface of water. These functions are concerned with control of resources that are necessary to enable fishing, rather than to achieve a specific resource management objective. Presumably any control must be for a legitimate resource management purpose, but the focal point of the control is the management of specified resources.

"to control the taking, allocation or enhancement of fisheries resources"

[86] Second, the injunction expressly relates only to a specified type of control, namely "the taking, allocation or enhancement of fisheries resources." There was no detailed consideration given to the meaning of "control" by the parties, but the ordinary meaning of control is to "regulate".[71] Taking includes fishing and fisheries resources include stocks of fish and aquatic life. Aquatic life means any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead and includes seabirds (whether or not in the aquatic environment).[72]

"for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996"

[87] The third component is the source of most controversy. Messrs Anderson and Maassen submitted that this component refers to the object or subject matter of the control function, namely to manage fishing and fisheries resources. Ms Gepp contended that it refers to the intended purpose of the control function, and that it must be for a resource management purpose not under FA control.

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70 Section 30(1)(d)(ii) also refers to extraction of minerals from the CMA, which is not relevant for present purposes.

71 Oxford English Dictionary (online ed, Oxford University Press): "...To exercise power or authority over; to determine the behaviour or action of, to direct or command; to regulate or govern."

72 Fisheries Act 1996, s 2.

[88] The plain meaning is, however, straightforward. The Oxford English Dictionary defines "purpose" and "manage" as follows:

> **purpose** That which a person sets out to do or attain; an object in view; a determined intention or aim.
>
> ...The reason for which something is done or made, or for which it exists; the result or effect intended or sought; the end to which an object or action is directed; aim.
>
> **manage** To control...; to exert one's authority or rule over.
>
> ...To conduct, carry on, supervise, or control (a war, undertaking, operation, affair, etc)

[89] Read as a whole, the plain meaning of this component is: for the purpose (or object, intention or aim) of managing (exerting authority over) fishing and fisheries resources controlled (regulated) under the FA.

[90] I agree with Messrs Anderson and Maassen that this part of the enactment defines the object or subject matter of the control function (managing fishing), rather than the motive for it. As Mr Anderson noted, all RMA decisions must have a resource management motive, so the injunction at s 30(2) would be largely illusory if that were the defining characteristic. Conversely, an RMA functionary plainly has no remit to manage fishing *per se*.

[91] Earlier iterations of s 30(2) referred to "*where the purpose of that control is to conserve...* "[73] That statutory phrase suggests that the focus of the provision was on specific purposes or objectives, rather than the subject matter of the control. The Environment Court in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council*[74] and *Golden Bay Marine Farmers v Tasman District Council*[75] approached the interpretation of s 30(2) on that basis in order to determine whether a proposed rule was subject to s 30(2). But the present iteration of s 30(2)

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[73] From October 1991 to September 1996 s 30(2) read "...where the purpose of that control is to conserve, enhance, protect, allocate or manage..." From June 1998 to January 2005 it read "where the purpose of that control is to conserve, use, enhance, or develop..." From January 2005 until the most recent amendment, it read "for the purpose of conserving, using, enhancing, or developing..."

[74] *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EnvC).

[75] *Golden Bay Marine Farmers v Tasman District Council* Wellington W42/2001, 5 September 2001 (EnvC).

refers simply to "managing fishing or fisheries resources" rather than to any particular objectives.

[92] But this does not mean that purpose is irrelevant. Only fishing and fisheries *controlled under* the FA are subject to s 30(2). The scope of control or regulation under the FA is defined by reference to purpose and function. I return to their significance below.

[93] In the result, s 30(2), on its face, injuncts regional councils and the Minister of Conservation from controlling land, occupation of coastal space and the activities on the surface of water in the CMA to regulate fishing for the purpose or object of managing fishing or fisheries resources controlled (regulated) under the FA.

Purpose

[94] A purposive analysis reinforces the literal interpretation, but, importantly, provides further clarity as to the scope of s 30(2).

[95] The FA is directed to the sustainable utilisation of fisheries resources and is concerned with the control of fishing and the effects of fishing on fisheries resources and the aquatic environment for that purpose. As the Supreme Court put it: "Fisheries are to be utilised, but sustainability is to be ensured".[76] And further:[77]

> This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the conserving of fisheries resources. Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

[96] In addition, the functions under the Act must be exercised with specific regard to the environmental principles specified at s 9, relevant regional plans, conservation strategies and the interests of affected persons (including Māori and environmental interests). The clear policy of the Act is to achieve a maximum

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76 *Sanford*, above n 18, at [39].
77 At [40].

sustainable yield via sustainability measures and a TAC. Allocation of fisheries stock is subject to an equally comprehensive framework, including the QMS and quota management areas, and consultation with interested persons on these matters is also required. Special provision is also made for recognition of rangatiratanga and customary rights.

[97] The RMA, by contrast, is an Act more generally directed to the sustainable management of all natural and physical resources, including the use, development and protection of those resources while controlling effects on the environment as defined by the RMA. A broad range of environmental values, some of national significance, must be considered. The RMA's scope is therefore much broader than the FA and, subject to the injunction at s 30(2), plainly encompasses the control of effects of fishing on the environment (including people and communities) for any legitimate resource management purpose. As noted, the RMA anticipates sustainable management of all resources unless expressly excluded.

[98] Nevertheless, on the issue of sustainable utilisation of fisheries resources, the FA clearly occupies the field.[78] As both Mr Cooney and Ms Blomfeld submitted, regional councils may not regulate fishing to achieve sustainable utilisation. Unfettered regional plan regulation of fisheries resources would jar heavily against the carefully calibrated control of fishing under a regime purpose built to achieve sustainable utilisation. To that extent I agree with Ms Appleyard that the RMA must be read down (if necessary) to avoid conflict between the two; that is the general must give way to the specific.[79]

[99] All of this was made clear in the 2011 explanatory note to the latest iteration of s 30(2), where it is stated:

> *Clause 66* amends section 30, which specifies the functions of regional councils. The amendments substitute *new subsections (2) and (3)* to clarify that a regional council and the Minister of Conservation cannot perform their functions to manage fishing or fisheries resources, but can perform their functions to avoid, remedy or mitigate the effects of aquaculture activities on fishing and fisheries resources.

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78 At [63].

79 This is to be contrasted with the Conservation Act 1987 which is also an Act of special rather than general application. See *Reay* (HC), above n 3, and the discussion below at [119]-[128].

[100] I do not consider however that there is any necessary conflict between the two regimes. The evident statutory policy at s 30(2) is that the RMA's sustainable management purpose will be promoted by the sustainable utilisation of fisheries resources under the FA.

[101] But, as Ms Gepp and Messrs O'Callahan and Enright submitted, the FA does not purport to address, let alone control, all the effects of fishing on the environment (including people and communities). In short, as I will explain below, the FA is internally focused on achieving a maximum sustainable yield of the fisheries stocks, within an evaluative frame set by the FA s 9 environmental principles.

[102] In this regard, I disagree with Mr Anderson's submission that the 2011 amendments have led to a substantial change in the operation of s 30(2), making earlier legislative history unhelpful.[80] The amendments "clarify" the interface between the two Acts: they do not purport to enlarge the scope of FA control for the purpose of s 30(2).

Context

[103] This purposive interpretation is also reinforced by a broader contextual analysis of both Acts. I have set out the relevant statutory provisions in some detail at [34]-[81], and this part of my judgment must be read in light of that review.

[104] Care has been taken by the legislative drafters to reconcile the performance of functions under the resource management and fisheries legislation. The exercise of specified functions to control fishing has been impermissible pursuant to s 30(2) from the inception of the RMA. Similarly, s 6 of the FA has always made clear that plan rules or coastal permits purporting to allocate fish among fishing sectors are unenforceable.

[105] In addition to the injunctions at s 30(2) of the RMA and s 6 of the FA, the two Acts provide for each other in the following ways:

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[80] The parliamentary records consistently refer to a division of responsibility based on a dichotomy between utilisation and non-utilisation values. See for example below at [110].

(a) The Minister of Fisheries is required to have regard to regional plans when setting out sustainability measures.[81]

(b) Aquaculture is expressly subject to RMA jurisdiction.[82]

(c) Harvesting of fish in the CMA is not expressly prohibited by the RMA.[83]

(d) The scope and content of any national environmental standard or any national policy statement (including any NZCPS) is not expressly subject to any injunction in favour of the FA.[84]

(e) A regional coastal plan must be prepared by a regional council in conjunction with the Minister of Conservation, in accordance with their functions at s 30. When making rules, a regional council must have regard to regulations relating to the sustainability, or the conservation, management or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mātaitai or other non commercial Māori customary fishing) to the extent relevant to the resource management issues of the region.[85]

(f) Section 30 includes functions that may limit fishing (for example enabling use of the CMA for energy generation or the control effects of fishing on the seabed).

(g) A regional plan must give effect to a NZCPS, which includes references to matters under FA control.[86]

[106] When considered in light of this analysis, national level oversight under both Acts is enabled and key operational functionaries under both Acts are required to

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81 Fisheries Act 1996, s 11.
82 Section 6(2).
83 Resource Management Act 1991, s 12.
84 Sections 43-55.
85 Sections 61, 68 and 74.
86 Section 67(3).

have regard to the strategies and methods promoted by each other, where relevant. This suggests parallel, complementary and overlapping management of fishing and the effects of fishing, but with primacy clearly afforded to the FA, in terms of the specific regional functions at s 30(1)(d)(i), (ii) and (vii), to sustainably utilise fisheries resources.

Where is the line to be drawn?

[107] I largely agree with Mr Maassen.[87] The sustainability function under the FA is largely focused on biological sustainability of the aquatic environment as a resource for fishing needs. This is revealed in a number of ways:

(a) As the Supreme Court commented in *Sanford*, "ensuring sustainability" in the FA is about future utilisation.[88]

(b) The second limb of sustainability defined at s 8(2) of the FA is directed to avoiding, remedying or mitigating adverse effects on the "aquatic environment", namely "natural and biological resources comprising any aquatic ecosystem". Conversely it is not directed to non-biological components of the aquatic environment.

(c) The environmental principles at s 9 expressly address sustainability in terms of important fisheries stock, habitat and biological diversity only.

(d) The sustainability measures and the scheme of allocation in general are primarily directed to the biological sustainability of the aquatic environment in order to achieve a maximum sustainable yield.

(e) The exceptions to this scheme are expressly provided for, namely Māori interests and protected wildlife.

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87 Mr Maassen defined the scope of exclusion by reference to the biological effects of fishing.

88 *Sanford*, above n 18, at [39].

[108] By contrast, the RMA defines sustainability in broader terms to include "protection"[89] and the environment more widely to mean ecosystems and their constituent parts (including people and communities), and all natural and physical resources. In short, it is not solely concerned with the biological sustainability of resources for utilisation.

[109] Given this, the two Acts can be reconciled by affording primacy to the FA on the utilisation of fisheries resources and on the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. Regional councils then remain tasked with the management of the other effects or externalities of fishing on the environment as defined by that Act.

[110] This construction largely accords with the statements made by the Select Committee dealing with the purposes and principles to be incorporated into the FA, namely:

> The Fisheries Bill introduces a clear statement of purpose for fisheries management by providing for the sustainable utilisation of New Zealand's fisheries resources. Its intention is to facilitate the activity of fishing while having regard to the sustainability of harvests and mitigating the effects of fishing on the environment. Therefore, it deals with fisheries resources that can be harvested and used sustainably either now or in the future. It does not deal with all aspects of the management of the aquatic environment, such as the protection of marine species and habitats, which is provided for through various statutes dealing with environmental management. To achieve the Bill's purpose, environmental principles, information principles and environmental standards are provided in Parts I and II. Principally these Parts deal with catch limits and other controls that restrain fishing activity...
>
> ...
>
> Many submissioners (sic) commented that the environmental principles did not include:
>
> - protection and maintenance of intrinsic values;
> - protection of areas of significant indigenous vegetation and significant habitants of indigenous fauna;
> - maintenance and protection of non-extractive uses of marine flora and fauna;

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89 Though the reference to conserving in the FA as an aspect of sustainable utilisation involves an element of protection for future needs.

- maintenance and enhancement of the quality of the environment; and
- protection of outstanding natural features.

> We do not support the inclusion of such principles in the environmental principles clause. These values are provided for explicitly in other legislation, such as the RMA, Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and the Wildlife Act 1953. Their inclusion into the environmental principles would introduce a range for non-utilisation values into the Bill and significantly undermine the interface with other statutes. The current interface reflects acceptance that fishing, like other activities, can be curtailed under the RMA and other statutes, on the basis of effects on matters such as intrinsic and amenity values.

[111] Overall, therefore, s 30(2) injuncts regional councils and the Minister of Conservation from exercising the functions specified at s 30(1)(d)(i), (ii) and (vii) to regulate fishing for the purpose of managing the utilisation of fisheries resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. However this does not prevent regional councils from exercising functions to control, when necessary, other effects or externalities of fishing activity on the environment as defined by the RMA.

[112] An illustration based on the evidence tabled in the Environment Court assists to elucidate the boundary. Dr Grace observed:

> Fishing is probably the most pervasive human activity which has impacted negatively on biodiversity throughout the seas and coastlines of New Zealand. There is now virtually nowhere that has not been fished, and its biodiversity impacted in some way, sometimes quite severely.
>
> An obvious local example in the Bay of Plenty is the impact on shallow rocky reef ecology of removal of large numbers of snapper and crayfish. Both snapper and crayfish are major predators on kina or sea urchins, and normally keep their numbers in balance on a healthy reef. When too many crayfish and snapper are taken by fishing (snapper are down to 10% of their pre-fished biomass in the Bay of Plenty and can no longer carry out their natural ecological services), kina multiply and eat the natural kelp forest, leading to virtually bare rock areas abundant with kina. These areas are called "kina barrens" and have lost a huge amount of their natural biodiversity which was supported by the kelp forest.

[113] Assuming Dr Grace's opinion is correct about the effects of harvesting snapper and crayfish, these effects on the biological sustainability (including diversity)[90] of the aquatic environment are expressly subject to FA control for the

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90 The maintenance of biological diversity of the aquatic environment is an environment principle

purpose of setting sustainability measures (see [39]-[45] above), quota allocation (see [46]-[48] above) and quota management areas (see [49]-[50] above). To that extent therefore (and subject to what I say about indigenous biodiversity) the exercise of the s 30(1)(d)(i), (ii) and (vii) functions to control this effect is not permitted. But RMA management of these effects is clearly envisaged at a national standards and regional policy level (see [69]-[81] above). Furthermore, RMA control is permissible insofar as the effects extend beyond biological sustainability of the aquatic environment as a resource for fishing needs, for example to effects on intrinsic values or the character of a place.

[114] It is not necessary or helpful to define the full range of matters that might legitimately trigger the s 30(1)(d) functions in respect of fishing activities. But to illustrate, control of fishing to provide for externalities not subject to FA control, such as intrinsic values, wāhi tapu, navigation, natural landscape, and non fishing commercial or recreational activity would likely fall outside the s 30(2) injunction.

Māori interests

[115] It is necessary to briefly address the extent to which the FA excludes regional level control to recognise and provide for Māori interests. The degree of overlap between the FA and RMA raises the prospect of conflict. As noted above, the FA makes special discrete provision for iwi rights, some aspects of rangatiratanga and customary relationship. The RMA also recognises and provides for the relationship of Māori with their taonga.[91] As Messrs Pou, O'Callahan, and Enright submit, and Mr Anderson agrees, Treaty of Waitangi principles must inform the interpretative exercise, and provision for Māori values, where relevant, is anticipated at every stage of the RMA policy and rule making process.[92]

[116] Nevertheless, I am satisfied that the schemes of the FA and the RMA are largely complementary as they relate to matters Māori, but where they are in conflict, the former prevails. To elaborate, the FA does not purport to be an exclusive code for recognition of Māori values, but its coverage is special when giving effect

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per the Fisheries Act 1996, s 9.

91 Section 6(e).

92 *McQuire v Hastings District Council,* above n 15, at [21].

to Treaty settlements, particularly at Part 9 of the FA which expressly, but discretely, provides for rangatiratanga. Conversely, RMA powers, functions and duties are generalised and controls must be developed in light of, among other things, provisions for ensuring sustainability, including regulations relating to taiapure.

[117] Moreover, as both Acts seek to recognise and provide for Māori interests, an interpretation which affirms rather than diminishes that recognition, consistent with the principles of the Treaty of Waitangi, is to be preferred.

[118] Therefore, regional councils may exercise their functions in respect of Māori interests, provided they do not impose controls that are inconsistent with the special provision made for Māori under the FA. This outcome reflects practice. As Ms Neems noted in written submissions, there are examples of protection of Māori interests in the form of rāhui which already feature in regional policy without objection. Beyond the division of responsibility identified at [111], it is unnecessary and to my mind unhelpful to be still more prescriptive about the relationship between the two Acts on matters Māori.

Can regional councils impose controls to maintain indigenous biodiversity?

[119] A regional council must establish, implement and review objectives and methods for maintaining of indigenous biodiversity. Policy 11 of the NZCPS states:

> **Policy 11 Indigenous biological diversity (biodiversity)**
>
> To protect indigenous biological diversity in the coastal environment:
>
> a. avoid adverse effects of activities on:
>
> i. indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
>
> ii. taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
>
> iii. indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
>
> iv. habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

v. areas containing nationally significant examples of indigenous community types; and

vi. areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

[120] The NZCPS also makes express provision for fisheries. Policy 2(f)(iii) requires that regard is had to regulations, rules and bylaws relating to ensuring sustainability of fisheries resources such as taiapure, mahinga mātaitai or other non-commercial Māori customary fishing. Policy 20(1)(f) also requires controlled use of vehicles on beaches, foreshore, seabed and adjacent public land where damage to the habitats of fisheries resources of significance to customary, commercial or recreational users.

[121] As noted, regional councils must give effect to any NZCPS.[93]

[122] Several of the respondents submit that as regional councils have a separate function to maintain indigenous biodiversity, and a duty to give effect to the NZCPS, then they must be able to impose controls on fishing to discharge this function, including in respect of land, occupation of coastal space and activities on the surface of water. This construction is said to be supported by the reasoning in *Property Rights in New Zealand Incorporated v Manawatu-Wanganui Regional Council* and in *Reay v Minister of Conservation*.

[123] In *Property Rights*, Kós J (as he then was) concluded that the existence of a limited function to control land at s 30(1)(a) did not bear on the jurisdiction to control land to maintain indigenous biodiversity pursuant to s 30(1)(ga).[94] In *Reay*, Pankhurst J noted that the FA and the Conservation Act 1987 are directed to two different purposes and concluded therefore that the FA did not preclude control of the fishery in the conservation estate. This finding was endorsed by the Court of Appeal, which noted:[95]

> It is common ground that commercial eel fishing is an activity for the purposes of the Act. It is also common ground that commercial fishing or the holders of the quota are not mentioned in the list of exceptions contained

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93 Resource Management Act 1991, s 55.
94 *Property Rights*, above n 6, at [32].
95 *Reay* (CA), above n 3, at [17].

> in subsections (3) and (4). In our view, if commercial fishing was intended to be excluded from the concession regime, that would have been a very significant exclusion warranting express words. There are none.

[124] And further:[96]

> ...Significantly, for present purposes, [the Conservation Act functions] include managing for conservation purposes all land and other natural resources under its administration, as well as preserving as far as practicable all indigenous fresh water fisheries and fresh water fish habitat. "Conservation" is defined as "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values and safeguarding the options of future generations".
>
> In the absence of any express exclusion it is difficult to see how a government department tasked with those functions and required by s 17(u) of the Conservation Act to consider "the effects" of an activity could be precluded from considering the effects of a commercial fishing operation on the sustainability of the relevant fish population and its habitat.

[125] The dicta in both cases must be read, however, in light of their material facts.[97] They were not concerned with the scope of an express statutory fetter on the exercise of specified functions in the CMA. Furthermore, this case is not about an absence of function (as in *Property Rights*), but an express injunction against it.

[126] Notably, the Minister of Conservation is not permitted to exercise the functions at specified at s 30(1)(d)(i), (ii) and (vii). Given the central role played by the Minister in relation to the approval coastal plans, the scheme of the RMA does not envisage the exercise of these functions to manage fishing or effects of fishing already subject to control under the FA.

[127] But the observations made in *Reay* illustrate the true significance of the purpose or object of an enactment. There is no duty to maintain indigenous biodiversity under the FA.[98] By contrast, the RMA has made express provision for the maintenance of indigenous biodiversity as a core function of regional councils. The NZCPS has also recently identified the protection of indigenous biodiversity as a matter of national significance, which regional councils must to give effect to in regional coastal plans.

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96 At [20]-[21].

97 *Fang v Ministry of Business, Innovation and Employment* [2017] NZCA 190 at [33].

98 There is only a duty to have regard to environmental principles, including the principle that biological diversity should be maintained.

[128] Given that the legislative object of s 30(1)(ga) is not clearly secured under the FA, it would be a bold step, as Pankhurst J put it in *Reay*, to suggest that s 30(2) injuncts the exercise of that particular function.[99] In this regard, the incorporation of the s 30(1)(ga) function into the legislative scheme without consequential alteration to s 30(2) suggests that it was not intended to be subject to it. I am satisfied therefore that the injunction at s 30(2) is not sufficiently express to exclude the performance by the Council of its statutory function at s 30(1)(ga) to maintain indigenous biodiversity.

Practical implications

[129] Ms Appleyard observes that unless the FA is a stand-alone Act, submissions and hearings on whether a plan control purporting to regulate fishing is lawful will be needed. But that is simply a corollary of the plain language of s 30(2). It is necessary to observe however that the ability of regional councils to exercise functions to provide for matters not subject to FA control does not open the door to carte blanche regional council regulation of the adverse effects of fishing on the aquatic environment. On the contrary, ordinarily primacy must be afforded to FA management of the effects fishing on the biological sustainability of aquatic environment, given the clear statutory policy underpinning the s 30(2) injunction. To illustrate:

(a) A council seeking to manage effects on, for example, intrinsic or Māori values must be careful not to duplicate the functions performed under the FA.

(b) A council seeking to recognise and provide for the relationship of Māori with their taonga must not derogate from the provision for Māori rangatiratanga made under the Part 9 of the FA.

(c) A regional council will need to be satisfied that the exercise of the function pursuant to s 30(1)(ga) to control fishing is demonstrably

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99 *Reay* (HC), above n 3, at [44].

necessary to maintain indigenous biodiversity per se. Similarly, any rules imposed must be strictly confined to this object.

[130] This is not an issue of motive or purpose. It is a matter of proof. The need for separate additional RMA control of the effects of fishing on the aquatic environment as defined by the FA will need to be clearly demonstrated, given the very careful calibration undertaken by FA functionaries when setting sustainability measures, fixing a TAC, allocating fisheries stocks, providing for rangatiratanga or making regulations to give effect to the FA's purpose.

The answers

[131] A regional council must not exercise the functions specified at s 30(1)(d)(i), (ii) or (vii) to manage the utilisation of fisheries resources or the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].

[132] A regional council may exercise its functions to manage the effects of fishing that are not directly related to biological sustainability of the aquatic environment as a resource for fishing needs. See the discussion at [107]-[114].

[133] Subject to the division of responsibility noted at [131] and [132], a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the FA. See discussion at [115]-[118].

[134] Notwithstanding s 30(2), a regional council may perform its function at s 30(1)(ga) to maintain indigenous biodiversity within the CMA, but only to the extent strictly necessary to perform that function. See discussion at [119]-[130].

Declaration

[135] While my reasoning accords in many respects with the reasoning of the Environment Court, I do not consider that the declaration correctly captures the correct scope of the injunction at s 30(2) by referring simply to a sole or dominant

purpose exception. That declaration places no limit on the extent to which a regional council may control fishing for that purpose. This could lead to unqualified incursion into the sustainable utilisation of fisheries resources under the FA and the functions performed under that Act. This would be impermissible given the evident statutory policy at s 30(2) that sustainable management is promoted by the sustainable utilisation of fisheries resources under the FA.

[136] For example, it is not sufficient to simply assert that additional control over fishing is appropriate because the dominant purpose of the control is to protect indigenous vegetation. An assessment will need to be made as to whether such control is permissible (see discussion at [111]-[114]) and, if so necessary, given biological sustainability of indigenous vegetation as a fisheries resource is already secured under the FA.

[137] Moreover, I am not minded to make any formal declaration, particularly given the broad subject matter affected by it. The effective operation of the two Acts envisages a symbiotic relationship, with some flexibility to meet the exigencies of the particular case. I have set out at [111]-[114], [129] and [130] how their interface should work in practice. However, I reserve leave to the parties to make submissions on the form of a declaration. To assist the parties, a declaration might take the following form:

> A regional council and the Minister of Conservation must not exercise functions in respect of the coastal marine area specified at s 30(1)(d)(i), (ii) and (vii) of the Resource Management Act 1991 to control land, occupation of coastal space or activity on the surface of water in order to manage the utilisation of fisheries resources and/or effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs.
>
> A regional council and the Minister of Conservation may exercise functions in respect of the coastal marine area to manage the effects of fishing not directly related to the biological sustainability of the aquatic environment as a resource for fishing needs, but only to the extent strictly necessary to manage those effects.
>
> Subject to the division of responsibility noted above, a regional council may exercise all functions in respect of matters Māori, provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996.

> The function of maintaining indigenous biodiversity stated at s 30(1)(ga) of the Resource Management Act 1991 is permissible within the coastal marine area, but only to the extent strictly necessary to perform that function.

Outcome

[138] The appeal is allowed in part. The declaration is set aside. Leave is reserved to the parties to make submissions on the proposed declaration in light of my judgment within 15 working days.

Costs

[139] The parties are discouraged from seeking costs. The present proceeding involved a matter of considerable public interest. Costs should lie where they fall. Leave is nevertheless granted to file submissions within five working days if necessary.

Appendix A: Environment Court Declaration

DECISION OF THE ENVIRONMENT COURT

A: The application for declaration is granted and a modified declaration made as follows:

(1) It is lawful (intra vires) for the Council to include objectives, policies and methods (including rules) in its proposed Regional Coastal Environment Plan in spatially defined parts of the coastal marine area that avoid, limit or discourage fishing techniques or methods with a sole or dominant purpose to achieve any or all of the following:

(a) maintain indigenous biological diversity;

(b) protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the coastal marine area;

(c) preserve the natural character of the coastal environment (including the coastal marine area);

(d) recognise and provide for the relationship of Māori and their culture and traditions with the ancestral waters and taonga;

(e) have particular regard to the exercise of kaitiakitanga;

(f) have particular regard to intrinsic values of ecosystems;

(g) take into account the duty of active protection of taonga, including restoration of mauri, as part of the principles of the Treaty of Waitangi.

(2) "Fishing" in the above declarations is as defined in s 2 of the RMA. For clarity, it includes disturbance of the seabed for the purposes of fishing. The declarations do not relate to aquaculture activities as defined in s 2 of the RMA.

(3) There may be other provisions that are justified to avoid, limit or discourage fishing techniques or methods but are not the subject of this application for declaration. Nothing in the above excludes or limits a merits-based consideration of whether the particular proposals are appropriate in the context of the proposed Regional Coastal Environment Plan.

B: Costs are reserved to be dealt with (if required) at the conclusion of the appeal.