IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA408/2017
[2019] NZCA 532

BETWEEN	ATTORNEY-GENERAL Appellant
AND	THE TRUSTEES OF THE MOTITI ROHE MOANA TRUST First Respondent
	BAY OF PLENTY REGIONAL COUNCIL Second Respondent
	MARLBOROUGH DISTRICT COUNCIL Third Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Fourth Respondent
	NEW ZEALAND MĀORI COUNCIL Fifth Respondent
	THE NZ ROCK LOBSTER INDUSTRY COUNCIL, FISHERIES INSHORE NEW ZEALAND AND THE PAUA INDUSTRY COUNCIL Sixth Respondents
	NGATI MAKINO HERITAGE TRUST, NGATI RANGINUI IWI INCORPORATED, MAKETU TAIAPURE COMMITTEE, NGATI PIKIAO ENVIRONMENTAL SOCIETY AND THE MANAGEMENT COMMITTEE OF THE HOKIANGA O NGA WHANAU HAPU COLLECTIVE Seventh Respondents

Hearing: 9 and 10 July 2019

Court: Miller, Collins and Wild JJ

Counsel:	N C Anderson and S J Jensen for Appellant B O'Callahan and R B Enright for First Respondent M H Hill and R M Boyte for Second Respondent J W Maassen and B D Mead for Third Respondent S R Gepp and P D Anderson for Fourth Respondent R B Enright for Fifth Respondent J M Appleyard and A Hill for Sixth Respondents J M Pou for Seventh Respondents
Judgment:	4 November 2019 at 11.30 am

JUDGMENT OF THE COURT

We answer the questions of law in [81] of this judgment.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] The general question before us is whether regional councils may prohibit fishing in specified parts of the coastal marine area to maintain indigenous biodiversity when the biodiversity concerned includes fish species the taking of which is separately regulated under fisheries legislation for a different purpose: their sustainable utilisation.

[2] This is a question of law. It arises in the following way. The Resource Management Act 1991 (RMA) assigns to regional councils, in conjunction with the Minister of Conservation, a number of functions to do with the coastal marine area, which covers the area between mean high water springs and the outer limits of the territorial sea.[1] The councils exercise control through regional plans that incorporate objectives and policies promulgated in a coastal policy statement issued by the Minister.[2] Under s 30(1)(d) the functions of regional councils and the Minister in the coastal marine area include control of (i) land and associated natural and physical resources, (ii) the occupation of space in and extraction of natural materials from the coastal marine area, and (vii) activities in relation to the surface of water.

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1 Resource Management Act 1991 [RMA], s 2. The definition is a little more extensive than our summary, but the differences are not material for our purposes.

2 Coastal policy statements are a species of national policy statement issued under ss 56–58 of the RMA.

[3] However, there is an express limit to the power conferred. It yields in some circumstances to fisheries legislation. A regional council and the Minister of Conservation "must not perform" the three s 30(1)(d) functions just listed "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". So provides s 30(2) of the RMA.

[4] The RMA also assigns to regional councils, in s 30(1)(ga), the function of establishing, implementing and reviewing objectives, policies and methods for maintaining indigenous biological diversity in their regions. That function extends to the coastal marine area. It is not among those expressly subject to the jurisdictional limit in s 30(2).

[5] The circumstances that led to the appeal indicate that it is a matter of no small importance. The Bay of Plenty Regional Council ("the BOP Council" or "the Council") has agreed to prohibit fishing in three areas of outstanding natural character; Ōtāiti (including Te Papa, Te Porotiti and Okaparu reefs), Motunau Island, and Motuhaku Island. The Council accepts that it will thereby exercise its control of land and resources in the coastal marine area.[3] It is acting to protect indigenous biodiversity from the effects of unsustainable fishing activity that has been permitted under the Fisheries Act. There is undisputed evidence that overfishing of snapper and crayfish, in particular, has allowed kina to flourish and destroy kelp forests that nurture other species, leaving near-monocultures that are known as kina barrens.

[6] There is much overlap between the power that the Council claims to control resource use in the coastal marine area and the powers of the Minister of Fisheries under the Fisheries Act. Snapper and crayfish are among fisheries resources controlled under the Fisheries Act. The Minister of Fisheries might have halted fishing in the same areas to protect them and the aquatic environment, but did not.

[7] Supported by the Attorney-General, the Council contends that its jurisdiction over fishing resources that are controlled under the Fisheries Act is ultimately defined not by subject matter or effect but according to the purpose for which it acts. It says

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3 Land includes land that is under water, s 2.

it may prohibit fishing in specified parts of the coastal marine area so long as its purpose is that of maintaining indigenous biodiversity rather than that of managing fishing for the Fisheries Act objective of sustainable utilisation. This is to accept that the prohibition in s 30(2) can apply when the Council acts to maintain indigenous biodiversity. But the Council contends that it may intervene so long as it does not do so for a Fisheries Act purpose.

[8] The Fishing Industry Parties (the collective sixth respondents) respond that regional councils have no authority to control fishing to maintain indigenous biodiversity, for to do so is to manage fishing resources controlled under the Fisheries Act. It matters not that a council's ultimate purpose in prohibiting fishing may be that of maintaining indigenous biodiversity rather than achieving sustainable utilisation: the power to intervene rests with the Minister of Fisheries alone. It has been exercised often in the past to protect the aquatic environment, and it could have been exercised here. They say that if the Attorney and other respondents are correct, regulatory control over fisheries will be duplicated, regional councils will perform fisheries management functions for which they lack institutional competence, and jurisdictional disputes will proliferate.

[9] Other interested parties, who include the Motiti Rohe Moana Trust (the Trust) and Marlborough District Council, promote a wider interpretation of a regional council's powers, saying that the function of protecting indigenous biodiversity is not subject to the prohibition in s 30(2) and a regional council need not exercise particular restraint when performing that function in the coastal marine area. Rather, the RMA and Fisheries Act are complementary, each serving in different ways to protect the environment.

The appeal

[10] This is an appeal by leave on four questions of law[4] from a judgment of Whata J holding that s 30(2) does not prohibit the Council from acting to maintain indigenous biodiversity in the coastal marine area if it acts a) for the purpose of protecting indigenous biodiversity and b) only to the extent strictly necessary to

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4 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2018] NZCA 67 [Leave decision].

perform that function.[5] The Judge added the "strictly necessary" qualification because he reasoned that the Fisheries Act regime prevails where there is conflict, since it specifically addresses "the utilisation of fisheries resources" and "the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs".[6] He declined to make declarations to that effect, reasoning that the subject matter was too broad and there was a need for flexibility in application.[7]

[11] The questions of law are:[8]

Question one:

> Does s 30(2) of the Resource Management Act 1991 only prevent a regional council from controlling activity in the coastal marine area if the purpose of those controls is either to manage the utilisation of fisheries resources or to maintain the sustainability of the aquatic environment as a fishing resource?

Question two:

> Can a regional council exercise all of its functions under the Resource Management Act concerning the protection of Māori values and interests in the coastal marine area provided that they are not inconsistent with the special provision made for Māori interests under the Fisheries Act 1996?

Question three:

> (a) To what extent, if any, does s 30(2) of the Resource Management Act prevent a regional council from performing its function to maintain indigenous biodiversity under s 30(1)(ga)?
>
> (b) In answering this question, is it correct to say that it is only appropriate for a regional council to exercise this function if it is strictly necessary to achieve that purpose?

Question four:

> Did the High Court err by setting aside the declaration made by the Environment Court and should it have made a different declaration?

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5 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429, (2017) 20 ELRNZ 1 [First judgment of Whata J].

6 At [109].

7 At [137]; and see *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1886 [Second judgment of Whata J].

8 Leave decision, above n 4.

[12] The Attorney, whose appeal it is, no longer seeks an answer to questions one and two. They remain live, however, because this Court has reasoned that they must be addressed when answering questions three and four.[9] The sixth respondents, the Fishing Industry Parties, who are among a number of intervenors in this Court, have helpfully assumed the burden of arguing questions one and two from an appellant's perspective.

The circumstances leading to the appeal

[13] In 2014 the BOP Council proposed a Regional Coastal Environment Plan (the Plan). The area subject to the Plan included the immediate surroundings to Motiti island, offshore Tokau Reefs and the Astrolabe Reef/Ōtāiti (which is considered taonga and waahi tapu by local hapu). These areas fall within the Motiti rohe (boundary or area).

[14] Mr Nepia Ranapia, affiliated with Ngāti Pau, Ngāti Kauaewera and Ngāti Takahanga, explains the importance of the Motiti rohe to tangata whenua:

> Otaiti, together with the other islands, reefs and toka (rocks) in the sea surrounding Motiti, is spiritually connected to a rock on Motiti known as Te Kopu Whakāiri/Tu Whakāiri — the womb of this sacred island. In this respect, Otaiti is one of the physical anchors which hold the spiritual essence — the mauri — which allows the kaitiaki to exist. Any work which disturbs the kaitiaki on the reef will inevitably harm the people on the island through this spiritual connection with Te Kopu Whakāiri/Tu Whakāiri.

[15] The Trust originally opposed the proposed Plan in general terms for not complying with principles of the Treaty of Waitangi and the Council's failure to apply mātauranga Māori or engage with local Māori with connections to Motiti and its waters.

[16] We interpolate that the Trust does not speak for particular iwi or hapu with claims to the area. It was described to us as a marae-based group. The trustees are kaumātua of Motiti, and the Trust's primary objective is to act on behalf of Nga Hapu o Te Moutere o Motiti for the purposes of resource management, fisheries, aquaculture

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9 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* CA408/17, 14 February 2019 [Minute of Asher J].

and other matters within the Motiti rohe moana. The other parties acknowledged, as do we, the important service the Trust has performed by pursuing this case.[10]

[17] After the Council had heard submissions, the Trust filed an appeal in the Environment Court.[11] Mediation failed, as did the Council's application to strike out the appeal.[12] The Trust also filed a separate application for declarations. The strike-out and declarations applications were initially to be heard together but were split due to time constraints.[13] This has ultimately resulted in the decision on appeal, stemming from the Environment Court's decision on the declaration application, being somewhat divorced from the factual setting of the dispute, a point which must be borne in mind when considering the questions we are to answer.

[18] The Environment Court heard the application in 2016, concluding that s 30(1)(ga) was not caught by the s 30(2) limitation and therefore regional councils had jurisdiction to create objectives, policies, and methods to maintain indigenous biodiversity.[14] It reasoned that functional overlap between the Fisheries Act and the RMA was anticipated by the legislature, which did not intend to read down s 30(1)(ga) to make it subject to s 30(2) when it had expressly made certain s 30(1)(d) provisions subject to the subs (2) limitation.[15]

[19] It granted declarations in favour of the Trust:[16]

> (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

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10 After the hearing, on 1 October 2019, the Court received a letter from Te Patuwai Tribal Executive Committee questioning the Trust's standing on the basis it does not represent any hapu or iwi of Motiti island. The Committee requested that this judgment be deferred until after the Waitangi Tribunal's determination about the appropriate mana whenua of Motiti and requested to be involved in the appeal as intervenor. We decline these requests. The Trust does not claim to speak on behalf of any Motiti hapu and the decision does not determine who holds mana whenua status. The substantive merits of the Environment Court decision are not before us.

11 Another appeal against the natural heritage provisions of the Plan was also brought: *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZEnvC 045; and *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.

12 *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 190, [2017] NZRMA 87 [EnvC Strike-out decision].

13 *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 240 [EnvC declaratory judgment] at [3].

14 At [40].

15 At [39].

16 At [66].

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.

[20] The Attorney appealed to the High Court. Whata J held that a regional council is precluded by s 30(2) from exercising its functions in s 30(1)(d)(i), (ii) and (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.[17] However, it may exercise its functions to manage effects of fishing that are not directly related to biological sustainability of the aquatic environment as a resource for fishing needs, including "matters Māori" (provided they are not inconsistent with the special provision for Māori interests under the Fisheries Act) and to maintain indigenous biodiversity within the coastal marine area under s 30(1)(ga) to the extent it is "strictly necessary" to perform that function.[18] The Judge set aside the Environment Court

[17] First judgment of Whata J, above n 5, at [131].
[18] At [132]−[134].

declarations but declined to make any to supplant them, primarily because he was being asked to do so in the abstract rather than by reference to a set of facts.[19]

[21] In essence, the Judge's approach was that the more general statute, the RMA, must give way to the more specific statute, the Fisheries Act, to the extent there is a conflict between the two.[20] But overlap need not result in conflict. The Judge drew a distinction between the sustainability functions of the RMA and Fisheries Act:[21]

> … the sustainability function under the [Fisheries Act] 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.

He therefore afforded primacy to the Fisheries Act for the sustainable utilisation of fisheries resources now and in the future, and the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs.[22] Regional councils would remain tasked with managing the effects or externalities of fishing on the wider environment under the RMA.[23]

[22] In a second judgment, Whata J confirmed his decision to not make a formal declaration.[24]

[23] On 11 May 2018, the Environment Court released an interim judgment declaring that a rule prohibiting the damage, destruction or removal of flora and fauna within three marked areas of the Motiti Natural Environment Management Area was to be included in the Plan.[25] The Court held that the Plan in its original form did not adequately protect and enhance areas of significant biodiversity within the region.[26]

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19 At [138]; and Second judgment of Whata J, above n 7, at [20].
20 First judgment of Whata J, above n 5, at [98].
21 At [9]. Also see [107]−[108].
22 At [10] and [109].
23 At [11] and [109].
24 Second judgment of Whata J, above n 7.
25 *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 067 [EnvC Interim Judgment].
26 At [154].

The Court noted that the Minister for Primary Industries has taken no steps to protect the area.[27] The judgment was expressly subject to the outcome of this appeal.[28]

The Crown position throughout proceedings

[24] The Attorney has maintained the ultimate position that a regional council's exercise of its s 30(1)(ga) function will inevitably engage specified s 30(1)(d) functions and thus trigger the s 30(2) bar. But his stance on the overarching relationship between the RMA and Fisheries Act shifted between the High Court and oral argument in this Court. In the High Court and indeed in written submissions on appeal to this Court, the Attorney took the view that where fishing or a fisheries resource could be regulated under the Fisheries Act, that same activity or resource could not be regulated by a regional council under the RMA. He emphasised that biological diversity mechanisms are already in place under the Fisheries Act thus there would be little need for further RMA controls.

[25] In argument in this Court, the Attorney took a narrower view of the Fisheries Act's primacy. He conceded that regulation of fishing or fisheries resources by the Fisheries Act does not mean that same activity or resource cannot be regulated under the RMA. Rather his focus was on the purpose of the control; a specified control could not be put in place by a regional council for a Fisheries Act purpose, that is, sustainable utilisation. However, sustainable utilisation could be the consequence or effect of such a control without triggering s 30(2). Thus his reading of subs (2) is now that it prevents regional councils from performing the specified s 30(1)(d) functions to control the taking, allocation or enhancement of fisheries resources where its purpose (objectively ascertained) is to manage fishing or fisheries resources for sustainable utilisation.

Our approach to the issues

[26] We begin by identifying relevant functions and powers of regional councils in the coastal marine area. They include the obligation to give effect to the New Zealand Coastal Policy Statement, which we next examine. It contains a policy intended to

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27 At [155].
28 At [158].

protect indigenous biodiversity. We consider the origins of that policy in the 1992 Convention on Biological Diversity. We then consider the purpose and scheme of the Fisheries Act and what it has to say about protecting indigenous biodiversity. We lastly turn to the four questions of law.

The functions and powers of regional councils in the coastal marine area

[27] We turn to the relevant provisions of the RMA.

[28] Section 30 confers extensive functions on regional councils, including the control of land and resource use for purposes ranging from land development to soil and water conservation. These functions are to be exercised to give effect to the Act, the primary purpose of which is to promote the sustainable management of natural and physical resources.[29] Sustainable management recognises among other things the needs a) for people and communities to provide for their wellbeing while sustaining the potential of natural and physical resources to meet the needs of future generations, and b) to avoid, remedy or mitigate adverse effects on the environment, which is defined to include ecosystems and their constituent parts, including people and communities.

[29] When exercising their functions regional councils must provide for matters of national importance, which include preservation of the character of the coastal marine area, protection of outstanding natural features, and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.[30] The protection of significant habitats of indigenous fauna is also a matter of national importance.[31] Particular regard must be had to, among other things, kaitiakitanga and the ethic of stewardship.[32]

[30] In s 12 the RMA generally prohibits certain activities in the coastal marine area. They include any activity in, on, under or over the coastal marine area, or in relation to any natural and physical resources in it, if carried out in a manner that

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29 RMA, s 5.
30 Section 6.
31 Section 6(c).
32 Section 7.

contravenes a national environmental standard or a rule in a regional coastal plan unless allowed by a resource consent or the RMA.

[31] A regional council's authority to control activities in the coastal marine area is found in s 30. For the most part the meaning of s 30 is not in dispute, and in the interests of economy we will not set it out in full. We quote those parts that are in dispute, italicising relevant terms that receive a definition:

> **30 Functions of regional councils under this Act**
>
> (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* in the region, 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 water:
>
> …
>
> (ga) the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous *biological diversity*:
>
> …
>
> (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.
>
> (3) However, a regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control aquaculture activities for the purpose of avoiding, remedying, or mitigating the effects of aquaculture activities on fishing and fisheries resources.

…

[32] The meaning of s 30(2) lies at the heart of the appeal. We have noted that s 30(1)(ga) is not among the provisions expressly subject to it. But the Attorney, supported by the Council, says that when regulating indigenous biodiversity in the coastal marine area a regional council must almost inevitably exercise the functions conferred on it by the specified provisions of s 30(1)(d) to which the prohibition in s 30(2) does apply.

[33] We have mentioned the definition of *coastal marine area*. *Land* includes the sea bed and *natural and physical resources* includes water. It will be seen that s 30(1)(d)(i) is apt, if read alone, to authorise a regional council to control fishing in the coastal marine area.

[34] The RMA adopts the Fisheries Act definitions of *fisheries resources* (any 1 or more stocks or species of fish, aquatic life or seaweed) and *fishing* (the catching, taking or harvesting of fish, aquatic life or seaweed).[33] "Control", which is used in both ss 30(1)(d) and s 30(2), is not defined.

[35] Turning to terms used in s 30(1)(ga), *biological diversity* is very widely defined. It means the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems.[34] *Ecosystems* in turn include people and their communities.[35] Biological diversity also forms part of the definition of *intrinsic values*:[36]

> **intrinsic values**, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—
>
> (a) their biological and genetic diversity; and
>
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience

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33 Fisheries Act 1996, s 2.
34 RMA, s 2.
35 See definition of "environment" in s 2.
36 Section 2.

[36] A regional council must prepare a regional plan in accordance with, among other things, its functions under s 30.[37] Councils create policies, objectives, and methods to address a targeted resource use (in this case, fishing). For the purpose of carrying out the given function, and achieving the objective or policy, s 68(1) provides that a council may include a rule in a regional plan to that effect.[38] Such rules are then given force by s 12(3) which prohibits persons from carrying out any activity in, on, under or over any coastal marine area in a manner that contravenes a rule in a regional coastal plan.

[37] A regional council must also prepare such a plan with regard to the Crown's interests in the coastal marine area,[39] and must give effect to the New Zealand Coastal Policy Statement (NZCPS).[40]

The New Zealand Coastal Policy Statement (NZCPS)

[38] We have noted that a council must give effect to the NZCPS,[41] the purpose of which is to state objectives and policies to achieve the objectives of the RMA in relation to the coastal environment.[42] It may address, among other things, the Crown's interests in the coastal marine area and the implementation of international obligations affecting the coastal environment.[43] The Minister of Conservation is responsible for preparing it,[44] and it is through the NZCPS that the Minister exercises control in the coastal marine area in conjunction with regional councils.

[39] The NZCPS 2010 contains a number of relevant objectives and policies. They include protection of indigenous biodiversity, preservation of areas of outstanding natural character, and recognition of the cultural relationships of tangata whenua with areas of the coastal environment. Policy 11 requires mitigation of significant adverse effects on certain indigenous ecosystems and habitats, including

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37 Section 66(1)(a). A regional plan includes a regional coastal plan: s 43AA.
38 With the exception of subs 30(1)(a) and (b) functions.
39 Section 66(2)(b).
40 Section 67(3)(b). See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [79]; the NZCPS is given effect in the objectives and policies of the regional plan.
41 Section 67(3)(b).
42 Section 56.
43 Section 58.
44 Sections 28 and 57.

habitats that are important for recreational, commercial, traditional or cultural purposes.

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

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

(i) areas of predominantly indigenous vegetation in the coastal environment;

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

(v) habitats, including areas and routes, important to migratory species; and

(vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

(Citations omitted)

New Zealand's international obligation to protect indigenous biodiversity

[40] New Zealand ratified the Convention on Biological Diversity (the Biodiversity Convention) in 1993.[45] After reciting that the contracting parties are conscious of the value of biological diversity, which is intrinsic but also, among other things, social, cultural and economic in nature, the Convention obliges parties to:

> Article 8. In-situ Conservation
>
> Each Contracting Party shall, as far as possible and as appropriate:
>
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity:
>
> (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity:
>
> (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use:
>
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings:
>
> ...

[41] The Convention also obliges contracting parties, in art 9(d), to regulate the ex-situ collection of biological resources so as not to threaten ecosystems and in-situ populations of species.

[42] It is not in dispute that New Zealand has sought to implement these obligations through s 30 and the NZCPS.[46]

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45 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993) [Biodiversity Convention].

46 In 2000, the government also published a 20-year Biodiversity Strategy to affirm its commitments under the Biodiversity Convention: *The New Zealand Biodiversity Strategy* (New Zealand Government, National Policy Document, February 2000).

Indigenous biodiversity and the Fisheries Act

[43] As Whata J explained, the Fisheries Act creates an elaborate and comprehensive scheme for the sustainable utilisation of fisheries resources.[47] The Act regulates commercial, customary and recreational fishing. With some exceptions, no one may take fish, aquatic life or seaweed unless acting under the authority of a permit issued under the Act.[48] The Minister of Fisheries regulates what can be taken by setting a total allowable catch for each quota management stock that maintains the stock at or above a level that can produce the maximum sustainable yield.[49] A species must be classified as a quota management stock if the Minister is satisfied that current management is not ensuring its sustainability or not providing for its utilisation.[50] Part 4 of the Act sets up the quota management system, providing for the total allowable commercial catch (which cannot exceed the total allowable catch),[51] and for the allocation of commercial fishing quota.

[44] The Act's objective is that of providing for utilisation of fisheries resources while ensuring their sustainability:

> **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.

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47 First judgment of Whata J, above n 5, at [34].
48 Fisheries Act, s 89.
49 Section 13.
50 Section 17B.
51 Section 20.

[45] It will be seen that ensuring sustainability has two dimensions: maintaining the potential of fisheries resources to meet the needs of future generations and avoiding, remedying or mitigating adverse effects of fishing on the aquatic environment. "Fisheries resources" means any one or more stocks or species of fish, aquatic life or seaweed, and "aquatic environment":[52]

> (a) means the natural and biological resources comprising any aquatic ecosystem; and
>
> (b) includes all aquatic life and the oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists

[46] The Act adopts a set of environmental principles, requiring all those exercising or performing functions, duties or powers under it to take them into account. They are:

> **9 Environmental principles**
>
> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:
>
> (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:
>
> (c) habitat of particular significance for fisheries management should be protected.

[47] The Minister of Fisheries may set sustainability measures after taking into account the effects of fishing on any stock and the aquatic environment.[53] Before doing so the Minister must have regard to, among other documents, any regional plan under the RMA, which itself will give effect to the NZCPS. Sustainability measures may be directed to the catch limit, the characteristics (such as size) of any stock that may be taken, the methods by which it may be taken, the areas from which it may be taken, and seasons within which it may be taken.[54] The Minister may from time to time create a fisheries plan which may include strategies to achieve sustainability measures.[55] Fishing areas may be closed temporarily and the methods

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52 Section 2.
53 Section 11.
54 Section 11(3).
55 Section 11A.

used to take fish restricted if there has been a significant adverse change in the aquatic environment.[56]

[48] As Ms Appleyard, for the Fishing Industry Parties, pointed out, these protective powers have been exercised on a number of occasions. She referred to:

(a) the Fisheries (Auckland and Kermadec Areas Commercial Fishing) Regulations 1986 which prevents trawling and seining in several areas, such as in the Bay of Islands;[57]

(b) the Fisheries (Set Net Prohibition from Pariokariwa Point to Hawera) Notice 2012 which prohibits the use of set netting methods in areas around Pariokariwa Point and Hawera;

(c) the Fisheries (Seabird Mitigation Measures—Bottom Longlines) Circular 2018 which sets mandatory mitigation measures that apply to all commercial fishers using the method of bottom longlining — to mitigate seabird mortality; and

(d) other regulations also prevent various fishing methods in certain commercial fishing areas.[58] To take one example relevant to the Marlborough area, the Fisheries (Challenger Area Commercial Fishing) Regulations 1986 prohibit trawling and drag netting in Queen Charlotte Sound, restrict trawling in Pelorus Sound and close the area around Maud Island entirely to all commercial finfishing.[59]

[49] We accept that, as Mr Anderson submitted for the Attorney, the Act recognises the complex interconnected nature of marine ecosystems. It defines "aquatic environment" very broadly and the Act recognises that its biological diversity should

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56 Section 16.
57 Reg 4(e).
58 See the Fisheries (Central Area Commercial Fishing) Regulations 1986; Fisheries (Challenger Area Commercial Fishing) Regulations 1986; Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Regulations 1986; and Fisheries (South-East Area Commercial Fishing) Regulations 1986.
59 Regs 2DA, 3 and 7.

be maintained. It also states that habitats of particular significance for fisheries management should be protected. There is no express duty to maintain biodiversity for its own sake, but the Act recognises that biodiversity matters to the sustainability of fisheries resources that depend on the aquatic environment.

[50] It remains the case, however, that the Fisheries Act pursues sustainable utilisation; it exploits the potential of fisheries resources to meet human needs over time, and it interests itself in the aquatic environment because that sustains fisheries resources. So its objectives include avoiding or mitigating the adverse effects of fishing on the aquatic environment and it pursues protection of habitat where that is of particular significance for fisheries management. Although it recognises that biological diversity should be maintained, it allows that principle to be weighed against other considerations, notably that of setting total allowable catches at levels that can produce the maximum sustainable yield. Over-fishing in a popular recreational fishing area might not have significant implications for the sustainability of a given fishing stock, or the aquatic environment, throughout what is likely to be a much larger quota management area; if so, the Minister might not think it necessary to intervene.

Question One: Does s 30(2) of the RMA only prevent a regional council from controlling activity in the coastal marine area if the purpose of those controls is either to manage the utilisation of fisheries resources or to maintain the sustainability of the aquatic environment as a fishing resource?

[51] This brings us to the meaning of the prohibition in s 30(2) of the RMA. We make several points about it.

The two statutes pursue different objectives

[52] The first point is that the relevant provisions of the two statutes pursue different objectives. Section 30(1)(ga) of the RMA is concerned with protecting indigenous biodiversity. The Fisheries Act is concerned with sustainable utilisation of fisheries resources, and only to the extent appropriate to secure future stocks does it require decisionmakers to protect the aquatic environment. Plainly these legislative objectives overlap. Equally plainly, the RMA objective of protecting indigenous biodiversity is

much broader than that of sustaining yields of quota management species in the following ways:

(a) It is broader in scope in that the Fisheries Act protects fish, aquatic life and seaweed, while s 30(1)(ga) protects all forms of indigenous organisms and their ecosystems.

(b) It protects indigenous biodiversity not just as a resource but for its intrinsic value and for its "ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values".[60]

(c) Its remedial or protective purpose is not limited to the effects of fishing. For example, Ms Gepp noted that the Fisheries Act does not deal with the effects of fishing on areas of outstanding natural character.

(d) It permits a regional council to set what may be a different baseline for permissible effects on indigenous biodiversity in any given area.

Maintenance of indigenous biodiversity was deliberately assigned to regional councils

[53] The legislative history confirms that the function of maintaining indigenous biodiversity was established in legislation to fulfil obligations assumed under the Biodiversity Convention. Kós J helpfully summarised the legislative history in *Property Rights in New Zealand Inc v Manawatu-Wanganui Regional Council*:[61]

> [7] In February 2000 the government issued the New Zealand Biodiversity Strategy. It was issued in part-fulfilment of New Zealand's international obligations under the 1992 Rio Convention on Biological Diversity. The Strategy document had the goal of establishing a framework to arrest the decline in indigenous biodiversity that had followed settlement and subsequent human exploitation of the country's natural resources. The Strategy records that New Zealand, one of the last places to be settled by humanity, has gone on to achieve one of the worst records of indigenous biodiversity loss on the planet. There was the loss of our larger bird species following initial human habitation. By the start of the seventeenth century about a third of the country's original forests had been replaced by grasslands. From the mid-nineteenth century expanding European settlement "started

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60 Biodiversity Convention, above n 45, preamble.

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

> a new wave of forest destruction". A further third or so of our original forestation has been converted to farmlands. Extensive modification of wetlands, dunelands, river and lake systems, and coastal areas has also occurred.[62]
>
> [8] The same month a ministerial advisory committee proposed that regional councils take a lead role in managing biodiversity affected by private land management.[63] One consideration influencing that view was that regional council administrative boundaries, being catchment-based, more closely aligned with ecological boundaries than did territorial boundaries. Another was that regional councils' existing biophysical functions generally were more closely related to biodiversity management than the broader functions of territorial authorities, so that regional council staff held expertise in many areas of direct [relevance] to biodiversity.
>
> [9] In its final report, in August 2000, the committee recommended that regional councils take the — not just *a* — primary governance role in indigenous biodiversity:[64]
>
> > On the question of sub-national governance, we have firmed in our preliminary views that regional councils should assume the primary governance role for biodiversity.
> >
> > In our preliminary report we identified a number of reasons for our preference for regional council leadership. Further policy work supported our reasoning, as did the majority of submissions. Some urged that the contribution of territorial authorities should not be under-estimated (or under-valued). We agree, and our proposal for regional leadership should not be construed as being critical of territorial authorities. We do, however, find the case for a regional integrated approach compelling.

[54] As that passage notes, regional councils were assigned the primary governance role in maintaining indigenous biodiversity. This brings us to a significant point, which is that the legislative history records that a choice was made not to establish this important function under the Fisheries Act for the coastal marine area but rather to assign it to regional councils under the RMA. As Whata J recorded, the Primary Production Select Committee responsible for what became the Fisheries Act 1996 explained the purposes of the proposed legislation and resisted the inclusion of wider

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62 *New Zealand Biodiversity Strategy*, above n 46, at 4.

63 *Bio-what? Addressing the effects of private land management on indigenous biodiversity* (Ministry for the Environment, Preliminary Report of the Ministerial Advisory Committee, February 2000) at 35.

64 *Final Report of the Ministerial Advisory Committee on Biodiversity and Private Land* (Ministry for the Environment, Final Report of the Ministerial Advisory Committee, August 2000) at 65–67.

environmental values, reasoning that they were provided for explicitly in other legislation, notably the RMA:[65]

> 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. …
>
> …
>
> Subclause 3(2) of the Bill, as introduced, is intended to make it clear that allocation of access to fisheries between fishing sectors (including marine farmers), is a role contained in fisheries legislation rather than the Resource Management Act 1991 (the RMA). At the same time, it recognises Government policy that the interaction of fishing on other coastal activities is controlled under the RMA.
>
> Many submissioners commented on the interface with the RMA. Fishing industry trade organisations argued that fishing and its effects should be controlled under the Fisheries Act and recommended that the boundaries between the Fisheries Bill and the RMA be expanded upon and further defined. Other submissioners noted that the policy of subclause 3(2) was hard to follow and needed to be plainly stated.
>
> Clause 6 clearly states that no provision in any regional plan or coastal permit is enforceable to the extent that it:
>
> - provides for the preferential coastal or marine access to one or more fishing sectors; or
>
> - confers a right to occupy any space in the coastal marine area if the right to occupy would exclude any other fisher from fishing in any part of the coastal marine area.
>
> Clause 6 clearly conveys the policy of precluding the RMA from having the effect of allocating access to fisheries, either through rules in regional plans or through the granting of coastal permits. At the same time clause 6 recognises the need for the RMA to control the interaction of fishing with other coastal activities.
>
> …

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65 Fisheries Bill 1994 (63–2) (select committee report) at ii, vii and viii; and see First judgment of Whata J, above n 5, at [110].

> Many submissioners commented that the environmental principles did not include:
>
> - protection and maintenance of intrinsic values;
> - protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
> - maintenance and protection of non-extractive uses of marine flora and fauna;
> - 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 of 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.

[55] This passage suggests that s 30(1)(ga), which was added to the RMA in 2003, has significant work to do.[66] It was included to give effect to New Zealand's obligations under the Biodiversity Convention. In the coastal marine area it is an important part of a legislative scheme that reflects the objectives and policies of the NZCPS.

The two statutes "look at" each other

[56] As Ms Gepp submitted for Royal Forest and Bird, the two statutes "look at" each other. Section 30(2) refers to the Fisheries Act, providing that a regional council must not:

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[66] We also note that s 30(2) was replaced in 2011 by s 9 of the Resource Management Amendment Act (No 2) 2011. Prior to this amendment subs (2) and (3) relevantly provided:

> (2) A regional council and the Minister of Conservation may perform the functions specified in subsection (1)(d) to control the harvesting or enhancement of aquatic organisms to avoid, remedy, or mitigate—
>
> (a) the effects on fishing and fisheries resources of occupying a coastal marine area for the purpose of aquaculture activities:
>
> (b) the effects on fishing and fisheries resources of aquaculture activities.
>
> (3) However, 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 harvesting or enhancement of aquatic organisms for the purpose of conserving, using, enhancing, or developing any fisheries resources controlled under the Fisheries Act 1996.

(a) exercise certain functions;

(b) to control the taking, allocation or enhancement of fisheries resources;

(c) for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act.

[57] From the other direction, s 6(1) of the Fisheries Act provides, consistent with s 30(2), that no provision of a regional plan is enforceable to the extent that it provides for the allocation of access to any fisheries resources in the coastal marine area to one or more fishing sectors in preference to any other fishing sector:

> (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.
>
> …

As Mr Maassen for the Marlborough District Council submitted, this would plainly preclude a regional council from introducing controls that sought to maintain indigenous biodiversity by limiting fishing to, say, recreational fishers.

[58] We accept the submissions of counsel, notably those appearing for the Trust, the Marlborough District Council and Royal Forest and Bird, that the two statutes are evidently intended to complement one another. They both apply to the coastal marine area, and both allow decisionmakers under them to impose controls to protect biodiversity. Decisions taken under one statute may be informed by decisions taken under the other. So, for example, s 11 of the Fisheries Act must be taken to recognise that the need for sustainability measures, and their nature and extent, may be

influenced by existing controls in a regional plan (or for that matter, in a management strategy or plan under the Conservation Act 1987).[67]

Maintaining indigenous biodiversity is a discrete function

[59] The next point is that the intrinsically important function of maintaining indigenous biodiversity is not subordinated to other functions of regional councils. Counsel referred us to *Property Rights*, in which the appellant argued that s 30(1)(ga) conferred on regional councils no power to make rules controlling the use of land to maintain indigenous biodiversity.[68] When rejecting this plainly incorrect claim Kós J explained that a regional council's power to make rules extends to any function conferred on it under the Act, including that of maintaining indigenous biodiversity.[69] He added that the function of maintaining indigenous biodiversity is broader than that of controlling the use of land, though it may include such controls.[70] We agree.

In this case maintaining indigenous biodiversity engages other council functions

[60] That said, counsel for the Attorney and the Council submitted that the controls needed to maintain indigenous biodiversity are in practice likely to require the exercise of functions that are expressly subject to s 30(2). In this case the Council proposes to prohibit the removal, damage or destruction of any flora or fauna in three specified areas of the Motiti natural environment, which would include restricting fishing. As Ms Hill submitted for the Council, that means it is acting to control the taking of fisheries resources. She and Mr Anderson agreed that the use of the control function in s 30(1)(d)(i) (the control of land and associated natural and physical resources) is "nearly unavoidable" if the Council is to maintain indigenous biodiversity in this way. As noted at [33] above, the definitions of "land" and "natural and physical resources" are very broad. Ms Hill pointed out that a council will engage s 30(1)(d)(i), and potentially subs (d)(ii) and (vii), if it authorises activities in the coastal marine area that would otherwise be prohibited under s 12. She accepted that the BOP Council's controls will in fact engage s 30(1)(d)(i) and illustrated the point with a table

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67 *Reay v Minister of Conservation* [2015] NZCA 461 at [20]–[21].
68 *Property Rights in New Zealand Inc*, above n 61.
69 At [30].
70 At [32].

demonstrating how a range of activities taken to preserve indigenous biodiversity in the coastal marine area would do so.

[61] We agree that the controls will engage s 30(1)(d)(i) and potentially subs (d)(ii) and (vii) in this case, and perhaps in many cases. No counsel drew our attention to an example in which a control that prohibited the taking of fisheries resources from the sea bed or water column in the coastal marine area would fail to do so. This point has implications for Whata J's conclusion that the s 30(1)(ga) function of maintaining indigenous biodiversity should be exercised only to the extent strictly necessary, as we explain below.

[62] The legislation evidently contemplates this overlap in functions. That conclusion results from the shared control assigned to regional councils and the Minister of Conservation under s 30(1)(d). The protection of indigenous biodiversity is vested in a regional council, not the Minister, under s 30(1)(ga), but as explained above the Minister is responsible for the NZCPS, which specifies objectives of the RMA in the coastal marine area.[71] It is presumably for this reason that s 30(1)(d) speaks of regional councils exercising control in the coastal marine area "in conjunction with" the Minister of Conservation.

The objective of the prohibition in s 30(2)

[63] Turning to the language of s 30(2), the prohibition that it enacts is aimed at the act of managing fisheries resources to control their taking, allocation or enhancement. These are all Fisheries Act concepts; that Act defines what fisheries resources are and it authorises the Minister to manage their taking, allocation or enhancement by setting total allowable catches, allocating taking rights to commercial, recreational and customary fishers, and establishing sustainability measures, all for the objective of ensuring that fisheries resources are used sustainably. Section 6 of the Fisheries Act confirms that the allocation of rights of access to fisheries resources is the sole responsibility of the Minister.

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[71] The objectives are specified in the RMA, s 58(1).

Regional council functions in practice

[64] The question which next arises is how a council may decide when a control implemented under s 30(1)(d)(i), (ii) or (vii) will contravene s 30(2). Counsel agreed that the purpose of a control is to be gauged objectively. Mr Anderson, for the Attorney, identified five indicia; they are necessity, type, scope, scale and location:

(a) *Necessity* means whether the objective of the control is already being met through measures implemented under the Fisheries Act;

(b) *Type* refers to the type of control. Controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management;

(c) *Scope*: a control aimed at indigenous biodiversity is likely not to discriminate among forms or species;

(d) *Scale*: the larger the scale of the control the more likely it is to amount to fisheries management;

(e) *Location*: the more specific the location and the more significant its biodiversity values, the less likely it is that a control will contravene s 30(2).

[65] Ms Appleyard took issue with these criteria, but we have rejected the premise of her submissions, which was that a regional council cannot control the activity of fishing where that activity is regulated under the Fisheries Act. We have accepted that it may do so provided it does not act for Fisheries Act purposes. We consider that the five indicia may provide some objective guidance when assessing whether a given control would contravene s 30(2) in any given factual setting.

Duplication of function and institutional competence

[66] We deal finally with the questions of duplication and institutional competence. Ms Appleyard argued that Parliament cannot have intended to assign to regional councils functions that ought to be managed centrally by an agency with the institutional resources and competencies to do so. She argued that fisheries management is a highly specialised discipline requiring expertise, scientific knowledge and specific regulatory and enforcement capability, all of which regional councils lack. For the BOP Council Ms Hill readily acknowledged that it lacks the resources and expertise to undertake fisheries management. But that function is not synonymous with the local protection of indigenous biodiversity. And we have explained above, overlapping responsibilities in the coastal marine area are a deliberate choice on the legislature's part.

Conclusion: a regional council may perform its s 30 functions in the coastal marine area provided it does not act for Fisheries Act purposes

[67] For these reasons the answer to question one is a qualified "yes". The effect of s 30(2) is that a regional council may control fishing and fisheries resources in the exercise of its s 30 functions including the listed s 30(1)(d) functions provided it does not do so to manage those resources for Fisheries Act purposes, which include those mentioned in [44] above.

Question Two: Can a regional council exercise all of its functions under the RMA concerning the protection of Māori values and interests in the coastal marine area provided that they are not inconsistent with the special provision made for Māori interests under the Fisheries Act?

[68] We can deal with this question quite shortly.

[69] The Fisheries Act makes special provision for Māori, giving effect in part to Treaty settlements. Part 9 recognises customary fishing rights. Section 174 provides:

> **174 Object**
>
> The object of sections 175 to 185 is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu 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.

[70] Under s 175 an area of New Zealand fisheries waters may be declared a taiapure-local fishery having regard to its special significance to an iwi or hapu as a source of food or for spiritual or cultural reasons.[72] A committee of management must be appointed.[73] It may make recommendations for conservation and management of fish, aquatic life or seaweed in the fishery. In this way the Act provides for the exercise of kaitiakitanga or guardianship over the fishery. The Act also allows the Governor-General to make regulations providing for customary fishing for food gathering that is not commercial or for pecuniary gain.[74]

[71] These provisions are not directly applicable in this case. The Trust does not seek to establish a taiapure around the reefs that are to be the subject of protection, nor does it seek to provide for customary fishing rights there. It supports the Council's proposal that all fishing be prohibited. Such a ban may align with Māori cultural norms and interests. The ban has the effect of a rāhui, a tool used from ancient times to prohibit the taking of an identified species for cultural reasons, and a prohibition on taking a species or damaging habitat is an expression of kaitiakitanga.

[72] Some of the submissions before us indicate that in other circumstances conflict could arise between Māori commercial or customary fishing rights and the exercise of a regional council's power to protect indigenous biodiversity. Notably, the New Zealand Māori Council, which is the fifth respondent, takes the position that s 30(2) would preclude a regional council from banning fishing in a taiapure fishery. Other intervenors submit that when an area has been declared a taiapure fishery it is unlikely that a council would find it necessary to ban fishing there in the interests of protecting indigenous biodiversity. We do not need to decide these points and we do not have all the information we might need to do so. Still less can we decide whether or how s 30(2) would apply when Māori commercial fishing

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72 Fisheries Act, s 177.
73 Section 184.
74 Section 186.

interests are engaged. That would raise Treaty considerations that have not been addressed in argument.

[73] For present purposes, what may properly be said is that the control of fisheries under the Fisheries Act extends to provision (in part 9) for taiapure-local and customary fishing, and a regional council may be required to bear that in mind when determining in any particular setting whether s 30(2) precludes the exercise of its functions under s 30(1)(d)(i), (ii), and (vii). This is a sufficient answer to question two. It is consistent with Whata J's reasoning, which was that the two statutes are complementary as regards matters Māori but where they are in conflict the Fisheries Act prevails.[75]

Question Three: To what extent, if any, does s 30(2) of the RMA prevent a regional council from performing its function to maintain indigenous biodiversity under s 30(1)(ga)? In answering this question, is it correct to say that it is only appropriate for a regional council to exercise this function if it is strictly necessary to achieve that purpose?

[74] We turn to question three. As noted above, Whata J concluded that the function of maintaining indigenous biodiversity is not subject to s 30(2).[76] Recognising that the Fisheries Act regime must however prevail, he held that a regional council may exercise its control over indigenous biodiversity but must do so "only to the extent strictly necessary" when dealing with fisheries resources controlled under the Fisheries Act. He concluded that any control over fishing must be demonstrably necessary to maintain indigenous biodiversity.[77] In his second judgment he clarified this reasoning, explaining that it was not intended to establish a test but rather summarised his reasons.[78]

[75] In their cross-appeal the Trust sought to exclude the language of strict necessity, arguing that s 30(2) does not constrain the function of protecting indigenous biodiversity. The Attorney's position, as noted above, is that a council will inevitably use one of the s 30(1)(d) controls to controlling fishing in the coastal marine area.

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75 First judgment of Whata J, above n 5, at [14] and [16]. We note that under s 6 of the Fisheries Act a regional plan may not give any fishing sector preferential access to fisheries resources.

76 At [128].

77 At [130].

78 Second judgment of Whata J, above n 7, at [23(c)].

If he is wrong in that, he supports the judgment below on this point. For the most part, other respondents argued that the language of strict necessity is unnecessary and unworkable.

[76] The Act does not specify that the function of maintaining indigenous biodiversity is subject to s 30(2). We have recognised above that it is an independent and important function. The legislation nowhere says that it may be exercised only when strictly necessary. To that extent we agree with Mr Enright, for the Trust, and Mr Maassen, who forcefully advanced this point. It is not the case that a regional council may exercise its power of maintaining indigenous biodiversity only when strictly necessary when dealing with fisheries resources controlled under the Fisheries Act. But any controls imposed under subs 30(1)(d)(i), (ii) or (vii) are expressly subject to s 30(2). For reasons given at [60] above, the particular controls to be imposed in this case will engage s 30(1)(d)(i) (and potentially subs (d)(ii) and (viii)). That being so, those controls are subject to s 30(2) in the terms we have expressed. More than that it is not necessary to say. We answer question three accordingly.

Question Four: Did the High Court err by setting aside the declaration made by the Environment Court and should it have made a different declaration?

[77] The Environment Court made declarations to the effect that the BOP Council could lawfully include provisions in the Plan for spatially defined parts of the coastal marine area to achieve the purpose of maintaining indigenous biological diversity.[79] In his first judgment Whata J disapproved of those declarations and indicated that he was not minded to make any formal declaration himself having regard to the broad subject matter and the need for flexibility in the application of the two Acts.[80] He invited submissions.

[78] In his second judgment Whata J remarked that the submissions had fortified him in his conclusion that declarations ought not be made.[81] Declarations in answer to the broad, essentially hypothetical questions posed would run the risk of overreach or oversimplification. His reasons were that:

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79 EnvC Declaratory judgment, above n 13.
80 First judgment of Whata J, above n 5, at [137].
81 Second judgment of Whata J, above n 7, at [16].

> [20] … in this case, I was not invited to interpret the scope of a statutory power in light of, or for the purpose of application to a particular set of facts. Rather, I was invited by the Attorney-General to define the scope of s 30(2) and the relationship between s 30(1)(ga) and (2) without regard to any particular fact scenario.
>
> [21] For the reasons expressed at length in the judgment, I resolved that primacy is generally afforded to the FA on the sustainable utilisation of fisheries resources and the management of the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs, but the two Acts envisage overlapping control of fishing and the effects of fishing. The legality of control in disputed areas will need to be worked out at the finer grain, including in respect of rules relating to Māori matters or interests and the application of s 30(l)(ga). As Ms Dixon submits, RMA Schedule 1 hearings are the appropriate forums for such analysis.
>
> [22] Finally, I do not accept that a declaration brings greater clarity to the general public than the answers provided at [131]–[134], upon which any declaration might be based. Conversely, a declaration may give the illusion, as Mr Maassen suggests, of finality when closer scrutiny in the particular circumstances of the case may be required.

[79] A number of the parties appearing before us contended that declarations ought to be made,[82] while others resisted for the reasons given by Whata J.[83] The arguments in support were that:

(a) declarations are needed to remedy a lack of clarity about implementation of s 30 mechanisms;

(b) absent declarations, there is much room for argument about the meaning of the Court's judgment;

(c) assistance is needed for parties who are likely to engage in advocacy under the RMA without the assistance of legal counsel; and

(d) any ambiguity in the declarations would be resolved by reference to the circumstances of this case.

[80] We think that Whata J was right, and for the reasons he gave. Declarations are not appropriate in this case. The questions of law arise in a factual setting but they

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82 The first, fourth, fifth, and seventh respondents.
83 The Attorney-General and the second and third respondents.

have come before us in a way that separates them from that setting. They are expressed in a very general way. We have sought to answer them in their legal and factual context, and to the extent appropriate. It would be very difficult to craft declarations that neatly encapsulate the reasons we have given. The consequence is that our reasons must be interpreted to determine whether the answers we have given apply in any given setting, but that is unavoidable.

Decision

[81] We answer the questions as follows:

(a) Question One: Does s 30(2) of the RMA only prevent a regional council from controlling activity in the coastal marine area if the purpose of those controls is either to manage the utilisation of fisheries resources or to maintain the sustainability of the aquatic environment as a fishing resource?

The effect of s 30(2) is that a regional council may control fisheries resources in the exercise of its s 30 functions including the listed s 30(1)(d) functions provided it does not do so to manage those resources for Fisheries Act purposes. See the discussion at [51]–[67] of the judgment.

(b) Question Two: Can a regional council exercise all of its functions under the RMA concerning the protection of Māori values and interests in the coastal marine area provided that they are not inconsistent with the special provision made for Māori interests under the Fisheries Act?

The control of fisheries under the Fisheries Act extends to provision for taiapure-local and customary fishing, and a regional council may be required to bear that in mind when determining in a particular setting whether s 30(2) precludes the exercise of its functions under s 30(1)(d)(i), (ii) or (viii). It is otherwise not necessary or appropriate to answer the question in this case. See discussion at [68]–[73] of the judgment.

(c) Question Three: To what extent, if any, does s 30(2) of the RMA prevent a regional council from performing its function to maintain indigenous biodiversity under s 30(1)(ga)? In answering this question, is it correct to say that it is only appropriate for a regional council to exercise this function if it is strictly necessary to achieve that purpose?

The RMA does not specify that the function of maintaining indigenous biodiversity in s 30(1)(ga) is subject to s 30(2). It is not the case that a regional council may exercise this function only when strictly necessary when dealing with fisheries resources controlled under the Fisheries Act. But any controls imposed under s 30(1)(d)(i), (ii) or (vii) are subject to s 30(2). Section 30(1)(ga) policies can be subject to s 30(2) where specified s 30(1)(d) functions are also invoked. See discussion at [60]–[61] and [74]–[76] of the judgment.

(d) Question Four: Did the High Court err by setting aside the declaration made by the Environment Court and should it have made a different declaration?

No. Whata J was correct for the reasons he gave. The questions of law have been separated from their factual setting and are expressed in a very general way. It would be difficult to craft declarations that encapsulate the reasons we have given. See discussion at [77]–[80] of the judgment.

Costs

[82] The answers that we have given result in the Attorney enjoying a degree of success on the appeal. It would not be appropriate to award costs against the Trust, which has also enjoyed some success and deserves credit for taking the action that has led to the BOP Council imposing the controls at issue in this case. The other parties are intervenors. In the circumstances costs will lie where they fall.

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