

MARINE MAMMALS PROTECTION ACT 1978

The law relating to the protection, conservation and management of marine mammals within New Zealand waters is governed by the Marine Mammals Protection Act 1978 (the Act). The Act has received relatively little publicity and has been little tested in Court to date. Given some of the penalties available under the Act it should be more widely known amongst skippers, otherwise a *“dolphin (or seal, or whale) encounter”* could prove to be very costly.

The Department of Conservation (DOC) is responsible for administering the Act.

One of the most important features of the Act is that it restricts the right to take marine mammals, whether alive or dead, from their natural habitat without first obtaining a permit from the Minister of Conservation. Most people are, or should be, aware that they are not allowed to intentionally capture or kill marine mammals, however they may not be aware of wider restrictions. The word *“take”* is expressly defined in the Act to include to take, catch, kill, injure, attract, poison, tranquillise, herd, harass, disturb, possess, brand the mammal, or separate any part of a marine mammal from a carcass. It is an offence to attempt to do any of these things. Accordingly if a vessel does anything to, for example, attract, or disturb a marine mammal it could be interpreted under the Act as *“taking”* a marine mammal. Also if anyone removes any part from a dead marine mammal this also may be interpreted as taking that mammal.

The range of activities covered by the definition *“take”* becomes very important when the penalties that can be imposed for taking a marine mammal without a permit are considered. Every person who does take without a permit commits an offence and is liable to imprisonment for up to 6 months, or a fine of up to \$250,000 together with an additional fine not exceeding \$10,000 in respect of every mammal involved in the offence. In addition all vessels, vehicles, aircraft, gear, equipment and apparatus used in respect of the commission of the offence are automatically forfeited to the Crown and can be disposed of as the Minister of Conservation sees fit. This power of forfeiture is obviously a draconian one and there is no express right to have the vessel released back set out in the Act. This contrasts with the Fisheries Legislation where there is an express right to apply to have the vessel redeemed from the Crown after it has been forfeited. It is probable that DOC would allow vessels and equipment to be redeemed upon payment of a redemption fee (probably set at approximately 10% of the value of the items seized) but this cannot be guaranteed. It is not clear whether the forfeiture provisions cover the extended definition of take discussed above or are limited to a narrower definition of take analogous to *“catch”*; but we recommend you not be the first to test the issue in Court. The risks of forfeiture are especially serious given the wide view of what constitutes *“used in commission of the offence”* under the Fisheries Legislation. Vessels may be forfeit even if the connection between the use of the vessel and the offence is minimal.

Accordingly skippers should be very careful to ensure that their vessels are never used to interfere with live marine mammals and that no-one on board is tempted to remove any *“trophies”* from dead marine mammals. The skipper's vessel may be at risk in these circumstances.

There are some qualifications to the above. For example you are entitled to collect bones, teeth, ivory or ambergris that have already separated naturally from a dead marine mammal provided DOC is notified as soon as possible and are given details of the time, place and circumstances under which these items are found. On finding a dead marine mammal it is permissible to send the mammal or any part of it to DOC for research purposes (after having first received authorisation from DOC to do so).

You are entitled to give assistance and medication to a stranded, sick or injured mammal, provided relevant details are forwarded to DOC as soon as possible. You are also entitled to move a marine mammal in the interest of public safety, or the well being of the mammal, or to destroy sick, distressed or troublesome mammals, provided you do so under the direction of DOC.

It is also a defence to any charge if the offence took place in an emergency and was necessary for the protection of human life, or if you can establish that the killing or injuring was accidental and that you then immediately informed DOC of the accident.

The Act imposes a number of obligations with regard to reporting sightings of marine mammals in distress or dead.

For offences which do not relate to the taking of marine mammals the fine ranges from \$30,000 to \$10,000, but property is not forfeit to the Crown.

Accordingly, before a vessel operator considers doing anything to, or with, a marine mammal (dead or alive), they should contact DOC and obtain authorisation. If it is not possible to contact DOC before taking any action in an emergency, then the Department should be notified as soon as possible after the event.

DOC Officers, Fishery Officers and the Police are authorised to enforce the Act. Officers have wide powers of search and if they have reason to believe that a breach of the Act has occurred they have the right to inspect or examine any vessel or vehicle. In the course of this search the Officer is entitled to open any container or other item in the vessel and to seize and take away any items which he has reason to believe will be evidence of a breach of the Act. A search warrant is required before an officer can enter a private dwelling. Once they have obtained the warrant then they may enter any dwelling house or vessel at any time and using force if necessary.

Under the Act the Minister of Conservation is entitled to set up marine mammal sanctuaries. To date two sanctuaries have been established. The first sanctuary was set up in 1988 in the Banks Peninsula area for the purpose of protecting Hector's Dolphins. Between 1 November and the end of February no-one is allowed to use set nets within the sanctuary area. For the rest of the year set nets may be used but may only be set during the day and must be no more than 30 metres long. Only one net can be set from the vessel and the vessel must remain tied to the net when it is set.

The second marine mammal sanctuary was established in 1993 around the Auckland Islands to protect breeding sea-lions and prohibits commercial fishing within 12 nautical miles of the Islands.

The Act covers the issue of permits by DOC to take marine mammals, but commercial permits covering "*Whale Watch*" type of operations are covered by the Marine Mammal Protection Regulations 1992, made pursuant to the Act. Apparently the original permits issued for whale watching operations were called permits to harass marine mammals, but that title has now gone. The regulations prohibit any commercial operator from carrying on a commercial operation unless it has received a permit from DOC. A commercial operation is an operation carried out for any form of hire or reward in which people are transported, conveyed, conducted or guided where a purpose is to view or come into contact with any marine mammal. It covers shore based commercial operations and aircraft, but in most circumstances, does not apply to commercial fishing vessels during the time they are fishing. Regulations set out criteria for issuing permits and some of the criteria that those permits must meet. Part III of the Regulations regulate appropriate behaviour around marine mammals.