



Marine Stewardship Council and the Fisheries Standard Review: Identifying out of scope fisheries

Author: Russell Smith and Caterina Fortuna
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**Marine Stewardship Council and the Fisheries Standard
Review: identifying out of scope fisheries**

Russell F. Smith III and Caterina Fortuna, Consultants

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Acronyms, Abbreviations and Glossary of Terms

ADD	Acoustic Deterrent (or dissuasive) Devices
AIDCP	Agreement on the International Conservation Program
EPBC Act	Australia Environment Protection and Biodiversity Conservation Act 1999
EU	European Union
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
MMPA	Marine Mammal Protection Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
RFMO	Regional Fisheries Management Organization
WCPFC	Western and Central Pacific Fisheries Commission

Introduction

The authors have prepared this report in support of the Marine Stewardship Council's (MSC) work to define scope criteria to be used to exclude fisheries that allow the intentional harassment or killing of marine mammals from entering the assessment process for MSC certification. The authors were asked to focus on definitions of "*intentional*" and "*harassment*" that could be used in connection with this scope criteria and to ensure that any change made to existing scope requirements is clear and auditable. In addition, the authors were asked to investigate how relevant fisheries management authorities (e.g., regional fishery management arrangements and national or regional management authorities) have defined related practices that have been banned.

Methods

The investigation of the definitions of "*intentional*" and "*harassment*" currently utilized in legal text that requires the protection of marine mammals was conducted using various online resources. It examined the methods that multiple jurisdictions used to protect marine mammals interacting with managed fisheries and the role that these terms played in those efforts. Searches were conducted in scholarly journals for previous consideration of the questions presented. National legislation and regulations were reviewed for Australia, Chile, the European Union, India, New Zealand, South Africa, and the United States. These jurisdictions were chosen, in part, to provide a geographically diverse sample. Judicial opinions from federal courts in Australia, New Zealand, the United Kingdom, and the United States, and from the European Court of Justice were also reviewed. In addition, measures currently in force in various regional fisheries management organizations, including the Inter-American Tropical Tuna Commission (IATTC)/Agreement on the International Conservation Program (AIDCP), the Indian Ocean Tuna Commission (IOTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the Western and Central Pacific Fisheries Commission (WCPFC) were reviewed.

Results

We have identified approaches common to the efforts of several jurisdictions to protect marine mammals from intentional killing and harassment. For example, none of the jurisdictions have defined "*intentional*", relying instead on concepts like unintentional and incidental. In contrast, some common approaches to defining "*harassment*" have developed. In addition, the use of the term "*take*" has emerged as a common way of broadly classifying actions that harm marine mammals. Finally, and not surprisingly, the actions covered by some jurisdictions are more comprehensive than others.

Australia

It is a criminal offense under Australian law for a person to kill or injure a cetacean in the Australian Whale Sanctuary¹ or in the waters beyond the outer limits of the Sanctuary.² The **principle of strict liability**³ applies to the issue of where the violation occurred.⁴ Under one provision, strict liability also applies to whether the person intended to take the action and whether the person intended for the action to result in the death or injury of a cetacean.⁵ Where strict liability is applied, questions like what the accused intended or the accused's state of mind are not relevant. However, even in situations where strict liability applies, a defendant may argue as a defense that when they acted, they reasonably believed that the facts were such that they could legally take actions that harmed or killed cetaceans.

¹ The Australian Whale Sanctuary is comprised of all of Australia's sea out to the boundary of its Exclusive Economic Zone, except for waters within the limits of a State or the Northern Territory or waters where the rights have been vested in a State or the Northern Territory. Australia Environment Protection and Biodiversity Conservation Act 1999 ("EPBC Act"), Sec. 225(2).

² EPBC Act, Sec. 229 and 229A.

³ Application of the principle of strict liability eliminates most defenses. See Australia Commonwealth Criminal Code 6.1.

⁴ EPBC Act, Secs. 229 and 229A.

⁵ EPBC Act, Secs. 229(1A) and 229A(2).

Glossary

Strict liability - Under Australian criminal law, fault does not need to be established for the elements of an offense that are subject to strict liability. This means that the prosecution does not have to prove any variety of fault. However, a defendant can defend against the charge by demonstrating that when taking the action, they reasonably believed a set of facts which, if true, would have made their action legal.

Australian law also defines limited circumstances where injuring a cetacean does not constitute a violation of these provisions.⁶ These include actions taken based on a permit issued by the Minister.⁷ Certain conditions must be met for a permit to be issued. The Minister may issue a permit if they are satisfied that the actions authorized by the permit "*will contribute significantly to the conservation of cetaceans*" or that interference with cetaceans "*is incidental to, and not the purpose of, the taking of the action.*" To apply this criterion, the Minister must judge the intent of the individual or entity seeking the permit. However, the law does not provide a definition of "*incidental*", "*purpose*", or "*intent*".

The Minister may also issue a permit if they find that taking the permitted action will not harm the cetacean's conservation status or that the action is not inconsistent with a recovery or wildlife conservation plan that is in place. The Minister must also find that the permit holder "*will take all reasonable steps to minimize the interference with the cetaceans.*" In addition, the Minister may issue a permit for whale watching operations conducted in a manner that is consistent with any regulations adopted for such activity and in line with exiting conservation and recovery plans of the concerned species.⁸ Permits may not be granted to kill a cetacean or to take one for live display.⁹

Under Australian law, any person who "*takes, trades, keeps, moves or interferes with a cetacean*" that is in the Australian Whale Sanctuary or the waters beyond its outer limits commits an offense under one of two provisions.¹⁰ The phrase "*[i]nterfere with*

⁶ EPBC Act, Sec. 231

⁷ EPBC Act, Sec. 238

⁸ EPBC Act, Sec. 238(3)

⁹ EPBC Act, Sec. 238(4)

¹⁰ EPBC Act, Sec. 229B(1)

a cetacean" includes actions that "*harass, chase, herd, tag, mark or brand the cetacean.*"¹¹ As with the provisions on killing or injuring a cetacean, the principle of strict liability applies to the element of the offense concerning whether the violation occurred in Australian waters.¹² For the provision under which less severe penalties are applied, strict liability also applies to whether the person took the action as alleged and whether that action interfered with the cetacean.¹³ Australia has not defined the term "*harass*" as it is used in this context.

All dugongs, seals, and sea lions occurring within Australian waters are listed as marine species¹⁴ (some species are also listed as migratory) and protected against actions to kill, injure, take, trade, or move them without a permit. Australia provides these protections through provisions that are very similar to those that protect whales.¹⁵ The Minister is authorized to issue a permit allowing a person or entity to undertake specified actions that harm an animal listed as a marine species providing certain conditions are met. However, the Minister must not issue a permit if not satisfied that the impact on listed marine mammals of the proposed action is incidental and not the purpose of the action.¹⁶

Chile¹⁷

Consistent with its creation of a "*whale sanctuary*" in its national waters, Chile has adopted protections for cetaceans and other marine mammals. Under Chilean law, "*[i]t is prohibited to kill, hunt, capture, harass, have, possess, transport, disembark [...] any species of cetacean*" found in or that has been in the whale sanctuary.¹⁸ Violation of this prohibition is a crime that can result in imprisonment. The prohibition against possessing a cetacean includes both live and dead cetaceans, and the whole or parts of the cetacean.¹⁹

¹¹ EPBC Act, Sec. 229B(4)

¹² EPBC Act, Secs. 229B and 229C.

¹³ EPBC Act, Sec. 229C(2).

¹⁴ EPBC Act, Secs. 248 and 249

¹⁵ EPBC Act, Secs. 254-254(C).

¹⁶ EPBC Act, Sec. 258(3)(b).

¹⁷ This discussion of Chilean law is based on the review of unofficial translations.

¹⁸ Chilean General Law No. 20,293, to Protect Cetaceans and Introduce Amendments to the General Law No. 18,892 on Fisheries and Aquaculture of 2008, Art. 2.

¹⁹ Chilean General Law No. 18,892 on Fishing and Aquaculture of 1989, as amended, (Chilean Law of Fishing and Aquaculture), Art. 135bis.

There are exceptions to these prohibitions. For example, a person with a permit may possess a cetacean for research or rehabilitation purposes.²⁰ A permit may also be obtained to possess or transport a dead cetacean. In addition, causing the accidental death of a cetacean is not a crime, provided that there is compliance with applicable safety regulations.²¹

The Chilean Undersecretariat of Fisheries and Aquaculture has the authority to establish management measures that include "*good fishing practices to avoid, minimize or mitigate the incidental capture of aquatic mammals, birds and reptiles.*"²² In addition, marine mammals that are accidentally caught must be returned "*to the sea, unless they are severely damaged or injured.*"²³ Fishing vessels are required to have a plan for releasing accidentally caught cetaceans.²⁴ There is no applicable definition of "*intentional*" or "*accidental*".

For whale watching activities, Chilean law prohibits "*carry[ing] out any act of harassment or persecution that alters the behavior of any specimen, or that involves forcing physical contact with any specimen causing abuse, stress or physical damage to it. One or more regulations will establish the procedures and requirements to which the cetacean sighting registry will be submitted, as well as the observation of mammals, reptiles and hydrobiological birds.*"²⁵ Although it does not define "*harass*", Chilean law describes outcomes that the prohibition against harassment seeks to avoid.

²⁰ Chilean Law of Fishing and Aquaculture, Art.135bis.

²¹ *Id.*

²² Chilean Law of Fishing and Aquaculture, Art. 4(e).

²³ Chilean Law of Fishing and Aquaculture, Art. 135ter.

²⁴ Chilean Law of Fishing and Aquaculture, Art. 4.

²⁵ Chilean Law of Fishing and Aquaculture of 1989, as amended, Art. 13E.

European Union

Article 12 of the European Council's Habitat Directive requires member states to prohibit the capture or killing of certain listed animal species, including some marine mammals. It also requires that Member States take measures to prohibit the "*deliberate disturbance*" of these animals "*particularly during the period of breeding, rearing, hibernation and migration*".²⁶ Member States are also required to monitor "*incidental*" capture and killing of these animals and take steps to ensure that "*incidental capture and killing does not have a significant negative impact on the species concerned*".²⁷ The directive does not define "*intent*" or "*deliberate*" or "*harassment*" or "*incidental*".

Article 11.1 of the EU Regulation on The Conservation of Fisheries Resources and The Protection of Marine Ecosystems Through Technical Means further defines the restrictions mandated by Article 12 of the Habitats Directive. It requires that "*[t]he catching, retention on board, transshipment or landing*" of certain marine mammals be prohibited.²⁸ It also requires that Member States adopt laws that provide that no harm is done to live animals that are caught contrary to the regulation and that such animals must be immediately released.²⁹ Some exceptions permit animals that have been caught accidentally to be retained so that they can be treated for injuries or so that research can be conducted on incidentally killed animals. EU Member States that permit animals to be retained on board after being caught accidentally must also implement a requirement that competent national authorities be informed promptly when an animal is retained on board.³⁰

The European Council has also adopted a regulation on the Conservation of Fisheries Resources and the Protection of Marine Ecosystems³¹, portions of which have been implemented in a Commission regulation.³² Among other things, these instruments identify geographical areas in which acoustic deterrent (or dissuasive) devices (ADD) must be used on certain types of fishing gear to avoid incidental catches of cetaceans. They also define the performance characteristics required of

²⁶ European Council Directive 92/43/EEC, Art. 12, paragraph 1.

²⁷ European Council Directive 92/43/EEC, Art., paragraph 4.

²⁸ Regulation (EU) 2019/1241 of the European Parliament and of the Council (20 June 2019), Art. 11.1.

²⁹ *Id.* at Art. 11.2.

³⁰ *Id.* at Art. 11.3.

³¹ *Id.*

³² Commission Implementing Regulation (EU) 2020/967 (3 July 2020).

ADDs, including maximum emitting power.³³ This Commission Implementing Regulation focuses on how effective the devices are in deterring bycatch of cetaceans. None of these EU regulations provide guidance on how such devices should be used including on how to avoid harm caused by cumulative or prolonged exposure to the sound(s) emitted. For example, if ADDs are deployed by a large fleet of vessels in the same area, the cumulative impact could be to exclude a group of marine mammals from a large area of their habitat or to cause them physical harm. Furthermore, while the Annex to the Implementing Regulation does not include more powerful pingers (e.g., Dolphin Deterrent Devices and Dolphin Interactive Devices), the use of such devices can be authorized by Member States if they "*are at least equally effective in the reduction of incidental catches of cetaceans as the acoustic deterrent devices with the technical specifications or conditions defined in the Annex*".³⁴ There is nothing in this legislation on the use of such devices to deter depredation of fishing gear by marine mammals.

India

India's Wild Life (Protection) Act protects listed species of terrestrial and marine animals, birds, and plants. Some, perhaps all, marine mammals found in the federal waters off the coast of India are covered. The Act prohibits hunting any wild animals included on one of four schedules created under the Act.³⁵ Wild animals are added to the schedules based on their conservation status. The Chief Wild Life Warden may permit the hunting of wild animals that are otherwise protected under the Act under limited circumstances. This includes when the animal has become "*dangerous to human life or is so disabled or diseased as to be beyond recovery*".³⁶ The Chief Wild Life Warden may also permit the hunting of wild animals that do not warrant the highest level of protection if they are found to be a threat "*to property, including standing crops on any land*".³⁷ "*Hunting*" is defined as:

³³ Commission Implementing Regulation (EU) 2020/967.

³⁴ *Id.*, paras. 2-3.

³⁵ The Wild Life (Protection) Act, 1972, Section 9.

³⁶ *Id.*, Section 11(a).

³⁷ *Id.*, Section 11(b).

- (a) killing or poisoning of any wild animal or captive animal and every attempt to do so;
- (b) capturing, coursing, snaring, trapping, driving or baiting any wild or captive animal and every attempt to do so;
- (c) injuring or destroying or taking any part of the body of any such animal.³⁸

New Zealand

New Zealand's Marine Mammal Protection Act of 1978 proscribes holding or taking any marine mammal without a permit.³⁹ Under the Act, "*take*" is defined as including "*to take, catch, kill, injure, attract, poison, tranquillise, herd, harass, disturb, or possess*".⁴⁰ It is also an offense under the Act to take a marine mammal without a permit.⁴¹ However, it is a defense to the offense of taking a marine mammal without a permit if the defendant proves that the death or injury was **accidental** or **unintentional** and **proper notice was given** to New Zealand authorities about the take.⁴² "*Accidental*" and "*unintentional*" are not defined in the Act.

In the regulations governing commercial operations for marine mammal watching, New Zealand law provides that:

"*Harass*" includes to do any act that—

- (a) Causes or is likely to cause injury or distress to any marine mammal; or
- (b) Disrupts significantly or is likely to disrupt significantly the normal behavioural patterns of any marine mammal.⁴³

³⁸ Section 2(16)

³⁹ New Zealand Marine Mammal Protection Act of 1978, Section 4.

⁴⁰ *Id.*, Section 2(a)(1).

⁴¹ *Id.*, Section 9(1).

⁴² *Id.*, Section 26(4).

⁴³ New Zealand Marine Mammals Protection Regulations, 1992, R. 2.

South Africa

In South Africa, the principal Act guiding the utilization of living marine resources is the Marine Living Resources Act 1998 (Act No 18 of 1998). This Act explicitly endorses the concept of "*ecological sustainable development*" and recognizes the need to "*protect the ecosystem as a whole, including species which are not targeted for exploitation*" (Sections 2a and e) as its guiding principles. Furthermore, in the General Policy on the Allocation and Management of Long Term Commercial Fishing Rights (2005), the South African government commits to "*implementing an Ecosystem Approach to Fisheries Management by 2010*".

South African law provides that the Minister of Environmental Affairs must develop a list of species that are endangered, vulnerable, or otherwise in need of protection.⁴⁴ These species receive special protection. Under South African law, "a person may not carry out a restricted activity involving" a listed species without obtaining a permit.⁴⁵ The Biodiversity Act defines "*restricted activity*" concerning "*a specimen of a listed threatened or protected species*" as including "*hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving [...] or injuring with intent to hunt, catch, capture or kill any specimen*".⁴⁶ "[H]aving in possession or exercising physical control over any specimen of a list threatened or protected species" is also a restricted activity.⁴⁷ While "intent" is referenced in the law, it is not defined.

The Minister has identified certain activities that do not require a permit. A permit authorizing the catching, capture, or release of a listed marine species is not required where the listed marine species is caught as bycatch, released live in the water from which it has been caught, and caught by a person with a valid permit to fish for a marine fish species.⁴⁸ "*Bycatch*" is defined as "*a specimen or number of specimens of a listed threatened or protected marine species that is accidentally*

⁴⁴ No. 10 of 2004: National Environmental Management: Biodiversity Act, 2004, para. 56.

⁴⁵ Biodiversity Act, 2004, para. 57.

⁴⁶ Biodiversity Act, 2004, para. 1.(1).

⁴⁷ Biodiversity Act, 2004, para. 1.(1).

⁴⁸ Threatened or Protected Marine Species Regulations, para. 64.

*caught, while fishing for a target species for which a permit has been issued in terms of the Marine Living Resources Act".*⁴⁹

The Act also gives the Minister authority to define restricted activities. Pursuant to this authority, the Minister has defined "*harassing a specimen of a listed threatened or protected marine species*" as a restricted activity.⁵⁰ The regulations also provide that "*'harassing' means behaviour or conduct that threatens, disturbs or torments a live specimen of a listed threatened or protected marine species.*"⁵¹ The regulations also provide specific examples of behavior that constitute harassment, such as "*driving through a school of dolphins.*"⁵²

United States

Section 102(a) of the Marine Mammal Protection Act (MMPA) makes it unlawful for a person or vessel subject to the jurisdiction of the United States to take any marine mammal, with some exceptions.⁵³ This prohibition explicitly includes commercial fishing in a US-regulated fishery using "*any means or methods of fishing in contravention of any regulations or limitations*" adopted for that fishery.⁵⁴ Section 118(a) prohibits "*the intentional lethal take of any marine mammal in the course of commercial fishing operations*" except⁵⁵ "*if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours.*"⁵⁶

For the purpose of the MMPA, "*[t]he term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.*"⁵⁷

As applied to fishing activities, the US MMPA provides that:

⁴⁹ Threatened or Protected Marine Species Regulations, para. 64.

⁵⁰ Threatened or Protected Marine Species Regulations, para. 1.(1).

⁵¹ Threatened Or Protected Marine Species Regulations, Ch. 1, 1.(1).

⁵² Threatened Or Protected Marine Species Regulations, Ch. 1, 1.(1).

⁵³ 16 U.S.C. §1372(a).

⁵⁴ 16 U.S.C. §1372(a)(5).

⁵⁵ 16 U.S.C. §1387(a)(5).

⁵⁶ 16 U.S.C. §1371(c).

⁵⁷ 16 U.S.C. §1361(3)(13).

(A) The term "*harassment*" means any act of pursuit, torment, or annoyance which—

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.^{58 59}

One exception to the prohibition on the "take" of marine mammals is for deterrence. Fishers may take steps to deter marine mammals from damaging gear or catch "so long as such measures do not result in mortality/serious injury (M/SI) of a marine mammal."⁶⁰ The MMPA requires the Secretary of Commerce to publish a "*list of guidelines for use in safely deterring marine mammals.*" The Secretary is also directed to "*recommend specific measures for deterring marine mammals listed as endangered species or threatened species under the US Endangered Species Act.*" Furthermore, the Secretary has the authority to prohibit the use of forms of deterrence that it determines, using the best scientific information available, have a significant adverse effect on marine mammals.

The US National Marine Fisheries Service (NMFS) is finalizing the guidelines and recommended specific measures called for in the MMPA.⁶¹ As part of this process, NMFS has evaluated potential deterrents for inclusion in the specific measures. These include acoustic deterrents. Through this process, NMFS has looked at the impact that the use of deterrents would have on marine mammals, with a focus on determining the potential for mortality/serious injury. However, it has not considered the effectiveness of specific measures or devices in reducing marine mammal bycatch.

⁵⁸ 16 U.S.C. §1361(18)(A).

⁵⁹ There is a somewhat different definition for harassment when applied to military readiness or scientific research activity conducted by or on behalf of the U.S. Government. In those cases, "'harassment' means— (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered." 16 U.S.C. §1361(18)(B).

⁶⁰ 16 U.S.C. §1371(4)(A)(1).

⁶¹ Guidelines for Safely Deterring Marine Mammals (Proposed Rule), 85 Fed. Reg. 53673) (Aug 31, 2020).

In some fisheries, NOAA requires the use of acoustic devices to reduce interactions between marine mammals and commercial fishing gears. For example, the Harbor Porpoise Take Reduction Plan requires pingers on gillnet gear in specific areas during specific times.⁶²

Regional Fishery Management Organizations

The IATTC, the IOTC, and the WCPFC each have adopted conservation measures concerning setting a purse seine net on a school of tuna that is associated with certain non-target species. **IOTC** resolutions prohibit fishing vessels from intentionally setting a purse seine net around a cetacean or a whale shark "*in the IOTC area of competence, if the animal is sighted prior to commencement of the set.*"⁶³ If a cetacean or whale shark is unintentionally encircled, vessels are required to take steps to release safely the animal and report the incident.⁶⁴ Neither "*intentionally*" nor "*unintentionally*" has been defined by the IOTC.

The relevant **WCPFC** conservation and management measure is similar to the measures adopted by the IOTC. It prohibits vessels from setting a purse seine net on a school of tuna associated with a cetacean where the animal is sighted prior to the commencement of the set. It also provides that if a cetacean is unintentionally encircled with a purse seine net, the vessel should take reasonable steps to ensure its safe release, and the incident should be reported.⁶⁵ Neither "*intentionally*", nor "*unintentionally*" have been defined by the WCPFC. Both the IOTC and the WCPFC rely on self-reporting by the vessel captain or master to implement this obligation. If an observer is on board (the WCPFC has 100% observer coverage on purse seine vessels), the observer should also report to the flag state if they have seen a cetacean before the set commenced. If the animal is sighted before the set is commenced, the vessel is considered to have intentionally set on the animal.

The **IATTC** has taken a different approach concerning the protection of marine mammals. In concert with the Agreement on the International Dolphin Conservation

⁶² Harbor Porpoise Take Reduction Plan, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/harbor-porpoise-take-reduction-plan>, (last visited 7/9/2021).

⁶³ IOTC Resolution 13/04, paragraph 2; IOTC Resolution 13/05, paragraph 2.

⁶⁴ IOTC Resolution 13/04, paragraph 3; IOTC Resolution 13/05, paragraph 3.

⁶⁵ WCPFC Conservation and Management Measure 11-03.

Program, IATTC permits setting purse seine nets around dolphins associated with schools of tuna but requires that steps be taken to avoid physical harm to the dolphins. There is also a limit on the number of dolphins that can be killed per year using this fishing method. When a fishing vessel reaches its limit, it must stop setting on dolphins.

Discussion

Intentional

None of the jurisdictions reviewed have a specific definition of "*intentional*" related to the protection of marine mammals. In Australia, the question of intent is specifically not an issue with regards to some violations. However, in other cases, where the intent is relevant, standards for assessing it may be incorporated into the language used to describe the permitted type of activity. For example, Australian law provides that a marine mammal may not be killed or injured in any activity unless the actor obtains a permit from the Minister. The Minister can only issue a permit if, among other things, they are convinced that the injury or death "*is incidental to, and not the purpose of, the taking of the action* [...]."⁶⁶

Likewise, New Zealand gets to the question of intent without providing a definition. It prohibits holding or taking a marine mammal without a permit.⁶⁷ However, if an actor proves that the death or injury was accidental or unintentional and gave proper notice to New Zealand authorities about the take, the actor has a defense to any action resulting from the holding or taking of the marine mammal without a permit.⁶⁸ New Zealand puts the burden on the defendant to prove that the death or injury of the animal was not intentional to escape liability. Chile takes a similar approach, providing that causing the death of a cetacean is not a crime provided that the death was the result of an accident and there was compliance with applicable safety regulations.⁶⁹

The United States also approaches the question of "*intent*" in a somewhat indirect manner. Although there is no definition of "*intent*", regulations define "*incidental*" as "*with respect to an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.*" 50 CFR § 229.2.

The EU has set objectives with respect to the actions that the Member States must take to protect marine mammals. These include the adoption of "*mitigation measures to minimise and where possible eliminate the catching of* [marine

⁶⁶ EPBC Act 1999; section 238(4)(b).

⁶⁷ New Zealand Marine Mammal Protection Act of 1978, Section 4.

⁶⁸ New Zealand Marine Mammal Protection Act of 1978, Section 26(4).

⁶⁹ Chilean Law of Fishing and Aquaculture, Art. 135bis.

mammals and other protected species] *by fishing gear*." Facts such as whether required mitigation measures have been implemented, or other behavior such as whether dead marine mammals are released immediately or retained to be used as bait, can be considered when determining whether acts were intentional.

Finally, none of the RFMOs have defined "*intentional*".

Harassment

There are similarities in the way some jurisdictions define "*harassment*". For example, US law includes a definition of "*harassment*":

(A) The term "*harassment*" means any act of pursuit, torment, or annoyance which:

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.⁷⁰

Furthermore, US law divides harassment into different categories. "*Level A harassment*" is described in paragraph (i) above, while "*Level B harassment*" is described in paragraph (ii).⁷¹

New Zealand also has a definition of "harass": "*Harass' includes to do any act that:*

(a) *Causes or is likely to cause injury or distress to any marine mammal; or*

(b) *Disrupts significantly or is likely to disrupt significantly the normal behavioural patterns of any marine mammal*".⁷²

⁷⁰ 16 U.S.C. §1361(3)(18A).

⁷¹ 16 U.S.C. §1361(3)(C) and (D).

⁷² Marine Mammal Protection Regulations 1992, Rule 2.

It uses the term "harass" to define what it means to "take" a marine mammal.⁷³ The law provides that no person shall take a marine mammal without a permit.⁷⁴ It also uses "harass" to define certain offenses.⁷⁵

We note that the US and New Zealand definitions are similar in scope and structure. They both recognize two types of harm: physical harm and disruption of behavior. South African law also includes a definition of "harassing". "*[H]arassing' means behaviour or conduct that threatens, disturbs or torments a live specimen of a listed threatened or protected marine species.*" The regulations also provide specific examples of behavior that constitute harassment, such as "*driving through a school of dolphins.*"⁷⁶

While Chilean law does not define "*harassment or persecution*", in the context of whale watching activities, it describes this conduct as being prohibited when it "*alters the behavior*" or "*involves forcing physical contact with any specimen causing abuse, stress or physical damage.*" In effect, Chilean law can be read to define "*harassment or persecution*" in this context as negative behavior that has one or more of these outcomes for whales. Arguably, this language can be referenced as informing how "*harass*" should be understood in other contexts in the statute.

Australian law does not define "*harassment*" of a marine mammal. Instead, harass is one of the verbs used to define the term "*interfere*".⁷⁷ It is illegal to interfere with a cetacean or marine mammal under Australian law.⁷⁸ EU law does not define any of these notions for wildlife, but a Member State can define them at the national level.

Sustainable fisheries

An ecosystem-based approach to the sustainable management of fisheries should consider, at some point, the potential for ADDs to increase noise pollution in the

⁷³ Take means "to take, catch, kill, injure, attract, poison, tranquillise, herd, harass, disturb, or possess...." NZ Marine Mammal Protection Act of 1978, section 2(1).

⁷⁴ NZ Marine Mammal Protection Act, section 4(1)(b).

⁷⁵ See e.g., "Every person commits an offense against this Act who . . . (b) uses any vehicle, vessel, aircraft, or hovercraft to herd or harass any marine mammal." NZ Marine Mammal Protection Act, section 23(2)(b).

⁷⁶ *Id.*

⁷⁷ "Interfere with a cetacean includes harass, chase, herd, tag, mark or brand the cetacean." EPBC Act 1999; section 229B(4).

⁷⁸ EPBC Act; sections 229B and 229C

environment and represent “harassment” for marine mammal species. The MSC should include these aspects in its Standards at the assessment stage.

Table 1: Possible Definitions

TERM	APPROACH
Intentional – option 1	No definition necessary
	<p>MSC could follow the lead of various governments and RFMOs and not attempt to define "<i>intentional</i>" or "<i>unintentional</i>". This could happen in two ways. The first would be to let the MSC Assessor determine whether the harassment of marine mammals that occurs in a fishery seeking certification is intentional or not.</p> <p>The second would be take an approach that is similar to Australia’s use of strict liability. Using this approach, the assessor would be directed that if permitted practices in the fishery resulted in harassment the fishery would be ineligible to be considered for certification regardless of whether harassment was a motivation for the practice. This approach has the benefit of being simple but requires that the definition of "<i>harassment</i>" be very carefully drafted in order to avoid casting too wide a net.</p>
Intentional – option 2	"Any result of a purposeful action that could reasonably be foreseen is considered an intentional result of the action."
	This approach is derived from the way in which several jurisdictions decide whether behavior resulting in harm to a marine mammal is a violation. In these cases, there is no explicit effort to determine whether the action was " <i>intentional</i> ". Instead, these jurisdictions look to other factors that serve as indicators of the mental state of the person causing the harm. These include factors such as whether the person has complied with relevant safety regulations (Chile).
Intentional – option 3	<i>"With respect to an act that results from, but is not the purpose of, carrying out an otherwise lawful action."</i>
	This definition is based on the U.S. definition for “incidental”.

Harassment	<p>The term "<i>harassment</i>" means any act of pursuit, torment, or annoyance which—</p> <p>(i) has the potential to injure a marine mammal or marine mammal stock⁷⁹ in the wild; or</p> <p>(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.</p>
<p>This language is from the US MMPA. It is a preferred approach because it focuses on the types of harm that are to be avoided rather than trying to list specific types of activities that could result in that harm.</p>	
Incidental	<p>The term "<i>incidental</i>" describes consequences or results which were neither intended nor anticipated. Consequences or results caused by efforts to take, catch, kill, injure, attract, poison, tranquilize, herd, harass, disturb, or possess a marine mammal would not be considered incidental.</p>
<p>An alternative approach would be to avoid using the term "intentional". For example, MSC could adopt a standard that provides that MSC will only consider for evaluation fisheries where the harm or potential harm to marine mammals is incidental to fishing operations. The United States has a regulatory definition of "<i>incidental</i>": "<i>concerning an act, a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.</i>" New Zealand has adopted a similar approach in that it prohibits the "<i>take</i>" of a marine mammal, but a violation is excused if the take was accidental and reported to authorities. The advantage of this approach is that it avoids the use of a term, "intentional", whose meaning may be clouded by its use in other contexts. However, it replaces it with another term that needs to be defined as precisely as possible, which is always difficult.</p>	

⁷⁹ The Marine Mammal Protection Act defines a marine mammal stock as a group of individuals "*of the same species or smaller taxa in a common spatial arrangement that interbreed when mature.*" This is often used as synonym of "putative population" or "unit to conserve" (Taylor *et al.* 2007).