

**Review of Commonwealth fisheries legislation:
Focus on the incorporation of the precautionary principle in the
Fisheries Management Act 1991**

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19 October 2012

Summary

This review of Commonwealth fisheries legislation provides a timely opportunity to develop a more practical and theoretically sound incorporation of the precautionary principle in the *Fisheries Management Act 1991* in order to assist decision-making under the Act. There is currently a mismatch between the legislative version of the precautionary principle and the circumstances in which the principle is intended to operate. This limits decision-making in support of the principle and creates concern – from commercial fishers to environmentalists – about insufficient transparency in fisheries management. It is submitted that the Act can be improved by taking one or both of the following actions:

1. revising the legislative formulation of the precautionary principle; and/or
2. providing details of the content requirements of the precautionary principle.

It is submitted that revising the *Fisheries Management Act 1991* in this manner will:

1. enhance the ability to make precautionary fisheries management decisions;
2. enhance the transparency of decision-making; and
3. reduce the frequency of merits and judicial review challenges to fisheries management decisions.

Background - legislation

The *Fisheries Management Act 1991* was amended in 1997 explicitly to require the Australian Fisheries Management Authority (AFMA) to pursue the precautionary principle in the carrying out of its functions.¹ The obligation placed on AFMA is that it must pursue, among other objectives, the objective of:

ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.²

A unique feature of this legislative incorporation of the principle is that the objective must be 'pursued'. This is a higher standard than what exists in every other piece of Commonwealth or State

¹ In 2006, the manner in which the precautionary principle was expressed was revised slightly.

² Section 3(1)(b).

legislation which includes the principle (which typically is 'must consider' or 'take into account'), thus giving AFMA the strongest precautionary mandate of any Australian government agency.

The definition of the principle that is used in all pieces of Australian legislation is identical, or substantively identical, to the definition that is provided in the 1992 Intergovernmental Agreement on the Environment (IGAE) (which was modelled on Principle 15 of the Rio Declaration on Environment and Development):³

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.⁴

Two issues need to be noted:

1. The threshold to 'trigger' the principle is very high.

Where there are threats of serious or irreversible environmental damage – this limits the use of the principle to situations of known risk (rather than uncertainty per se); thus it is preventative rather than truly precautionary.⁵

2. There is no requirement to do anything when the principle is triggered.

Lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation – this means other excuses can be found to avoid avoidance measures. The definition does not actually say what should positively be done,⁶ despite various content requirements being articulated elsewhere.⁷

Background - litigation

The exercise of the precautionary principle by Australian fisheries and environmental agencies has been the subject of litigation (in particular, it has been the basis of numerous merits appeals in administrative tribunals and specialist environmental courts). Early environmental litigation in Australia concerning the precautionary principle was generally initiated by third-party objectors to development consent.⁸ Essentially objectors argued that a statutory authority or government department failed to properly fulfil its legislative duty to take the principle into account when arriving at a decision. Put simply, the argument in these cases was that the administrative decision being reviewed, or the process leading to the decision, was not precautionary enough.

³ The IGAE was signed in May 1992 by the Commonwealth, States and Territories and the Local Government Association. The principle is one of four intended to inform environmental policy and programs at all levels of government.

⁴ Clause 3.5.1.

⁵ Warwick Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in Elizabeth Fisher, Judith Jones and René von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, 2006) 182-201, 189.

⁶ See Elizabeth Fisher, 'Is the Precautionary Principle Justiciable?' (2001) 13 *Journal of Environmental Law* 315-334, 325.

⁷ See, eg, Warwick Gullett, 'Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management' (1997) 14 *Environmental and Planning Law Journal* 52-69, 58 and Brian Preston, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific* (2006) 37.

⁸ Warwick Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in Elizabeth Fisher, Judith Jones and René von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, 2006) 182-201, 189.

Since 1999, agencies which have embraced the precautionary principle (most notably AFMA) have faced a series of legal challenges for being too precautionary (rather than for not being sufficiently precautionary).⁹ All of the challenges to fisheries decisions failed. This is likely explained by the general deference courts and merits tribunals give to departmental interpretation of legislation and the amorphous nature of the legislative incorporation of the precautionary principle. Nevertheless, courts and tribunals have struggled to construe fisheries and environmental legislation in a manner that supports a department's decision. The cases reveal there are limits to the discretion that exists within legislative precautionary mandates. The key stumbling block in around a dozen cases has been the threshold question. I note three examples:

- In *AJKA v AFMA* [2003] FCA 248, the Federal Court of Australia did not disturb the finding of the Administrative Appeals Tribunal (AAT) that the uncertain state of skipjack tuna stocks means there is a "risk of serious environmental damage". Thus the AAT considered that scientific evidence did not support a conclusion that there was a threat of serious or irreversible environmental damage yet it equated the level of uncertainty that existed with this high evidentiary standard. This reasoning is suspect.
- In *De Brett Investments Pty Ltd and AFMA* [2004] AATA 704, the AAT was not satisfied that the threshold of the precautionary principle had been met and could only affirm the decision under review by reliance on other legislative objectives.
- In the non-fisheries case of *Aldekerk P/L v City of Port Adelaide Enfield and Environment Protection Authority* [2000] SAERDC 47, the South Australian Environment Resources and Development Court overturned a Council's 'precautionary' decision to refuse to grant development consent when the scientific evidence was that there was no environmental threat. The Court was critical of the Council's reliance on the precautionary principle in a situation where it was not triggered, stating '[i]t cannot be used to prop up a decision that is unsupported by tenable evidence.'

Recommendation

It is proposed that two actions can be taken in the revision of the *Fisheries Management Act 1991* to align its version of the precautionary principle with the theory that underpins it¹⁰ and to provide clearer detail to fisheries managers about the steps they should take in order to make precautionary decisions. It is submitted that these actions will have the following benefits:

1. Decision-making under the Act will be more transparent.
2. There will be less likelihood that decisions taken under the Act will be challenged in the AAT or the courts by aggrieved persons.
3. There will be improved ability for AFMA to make precautionary decisions. (Noting that an enhanced precautionary *process* for decision-making could result in individual cases of expansion of fishing).¹¹

Recommendation 1: Revise legislative definition of the precautionary principle

⁹ See Warwick Gullett, Chris Paterson and Elizabeth Fisher, 'Substantive Precautionary Decision-making: The Australian Fisheries Management Authority's "Lawful Pursuit" of the Precautionary Principle' (2001) 7 *Australasian Journal of Natural Resources Law and Policy* 95-139, 112-129 and Jacqueline Peel, 'Taking a "Precautionary Approach" in Fisheries Management' in Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (Federation Press, 2005) 79-105, 85-95.

¹⁰ Warwick Gullett, 'Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management' (1997) 14 *Environmental and Planning Law Journal* 52-69, 54-57.

¹¹ Warwick Gullett and Paul McShane, 'In Defence of the Precautionary Principle' (2003) 21(4) *The Queensland Fisherman* 25-27, 25.

The threshold to trigger the principle can be lowered so that it will enable action to be taken where there is environmental uncertainty about consequences of decisions, not only where there is a high risk of serious or irreversible environmental damage. There are a number of potential expressions for consideration. Two examples:

- *Where there is insufficient information available to predict whether non-negligible environmental harm may occur.*¹²
- *When there are reasonable grounds for concern that activities may harm living resources and marine ecosystems even when there is no conclusive evidence of a causal relationship.*¹³

The threshold is important because it serves to avoid arbitrary application of the principle.¹⁴ Thus there must be some reason to assume the occurrence of an unacceptable environmental outcome. But it is patently not precautionary to wait until such time as there is evidence of 'serious' or 'irreversible' environmental damage.

Recommendation 2: Provide clear legislative content to the precautionary principle

The academic literature on the precautionary principle reveals that it has specific content (and that its application does not simply mean imposing moratoriums on fishing or prohibiting developments). Some overseas formulations of principle expressly include its content requirements, including the United Nations Fish Stocks Agreement and, to a lesser degree, the Convention on the Conservation of Antarctic Marine Living Resources. To date, this has not happened in Australian legislation. The closest we have is a handful of statements in Australia's Oceans Policy.¹⁵

Content requirements can include:

- using best available technology;
- basing decisions on best available information
- explicitly recognise uncertainty; and
- predetermining reference points and action to take if they are reached.

In particular, guidance can be taken from New Zealand. Its *Fisheries Act 1996* does not mention the precautionary principle but it is more precautionary than Australian fisheries legislation because it articulates content requirements:

¹² Warwick Gullett, 'Environmental Impact Assessment and the Precautionary Principle: Legislating Caution in Environmental Protection' (1998) 5 *Australian Journal of Environmental Management* 146-158, 149.

¹³ Modified from the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR convention) article 2(2)(a).

¹⁴ Deborah C Peterson, 'Precaution: Principles and Practice in Australian Environmental and Natural Resource Management' (2006) 50 *Australian Journal of Agricultural and Resource Economics* 469-489, 482.

¹⁵ Commonwealth of Australia, *Australia's Oceans Policy: Caring, Understanding and Using Wisely* (Australian Government Publishing Service, 1998), 19, 38, 39, 43.

Fisheries Act 1996 (NZ) s 10

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 information principles:

- (a) Decisions should be based on the best available information:
- (b) Decision makers should consider any uncertainty in the information available in any case:
- (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:
- (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

However, some care would need to be taken in adopting this version because, almost perversely, the excellent provision s 10(a) had the effect of precluding three important precautionary fisheries decisions by the New Zealand Fisheries Minister.¹⁶

Conclusion

Australia was one of the first countries to adopt the precautionary principle in legislation. While this is laudable, a shortcoming is that the version of the precautionary principle adopted is both vague and weak. There is now a perfect opportunity in the context of this review of Commonwealth fisheries legislation to adopt a modern and more workable formulation of the precautionary principle. It is submitted that the two recommendations made here would enhance transparency of fisheries management and provide more authority to AFMA to rely on the precautionary principle to support the full suite of fishing management decisions. In the task of providing an improved legislative definition of the precautionary principle, it is hoped that guidance is not sought from Canada's *Oceans Act 1996* which unhelpfully defines the precautionary approach simply as 'erring on the side of caution'.¹⁷

¹⁶ *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* (High Court, 4 March 2002); *Squid Fishery Management v Minister of Fisheries* (High Court, 11 April 2003); *Squid Fishery Management v Minister of Fisheries* (Court of Appeal, 13 July 2004). See also *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* (High Court, 23 February 2010). See Warwick Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in Elizabeth Fisher, Judith Jones and René von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, 2006) 182-201, 196-198 and Nicola R Wheen, 'How the Law Lets Down the "Down-Under Dolphin": Fishing-Related Mortality of Marine Animals and the Law in New Zealand' (2012) 24 *Journal of Environmental Law* 22pp.

¹⁷ Section 30(c).

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