FISHERIES MANAGEMENT

"In defence of the precautionary principle"

In the February, QSIA President John Olsen referred to the "precautionary principle" in his "President on the Line" column. Warwick Gullett and Paul McShane* from the Australian Maritime College have asked for space to respond and that response is published here.

JOHN Olsen's provocative editorial "Precautionary principle needs sensible definition" in the February 2003 issue of *The Queensland Fisherman* re-ignited the debate about the merits of the principle as a basis for fisheries management decision-making.

The principle is criticised as being a "pie in the sky" concept which nonetheless is a "sledgehammer head of power without an actual measure of substance for controlling its use", thus rendering uncertain the "prognosis for economic stability and industry certainty".

The "indiscriminate" use of the principle, "used so flagrantly" in the fishing industry, leads Olsen to pose the question "is such a principle just a hammer designed as an uncontrolled tool of curtailment for the commercial fishing industry?" Not only does Olsen misrepresent the principle, the expression of such concerns could create more tension between fisheries industry and fisheries management.

Olsen's argument is as follows:

1. The principle is too vague to form the basis for decision-making.
2. No effective control can be exercised over the use of the principle.
3. The principle is used excessively with respect to the commercial fishing industry with the effect or purpose of curtailing it.

Each of these unsupported claims is contestable.

The first point to note is that the legal authority for fisheries management agencies to base their decisions on the precautionary principle is not as solid as is commonly thought. There are only three pieces of Australian fisheries legislation which expressly include the principle. These are the two major Commonwealth Acts and the NSW Act.

The Australian Fisheries Management Authority (AFMA) is unique among Australian environmental management agencies in that its statutory objective with respect to the principle ("ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with ... the exercise of the precautionary principle") must be "pursued".

This creates a positive duty on AFMA to advance precautionary management in the exercise of its functions and stands in stark contrast to all other legislative inclusions of the principle which require merely that it be considered in the process of decision-making.

Nevertheless, every piece of Australian fisheries legislation, including Queensland's *Fisheries Act* 1994, refers to either "sustainability" or "ecologically sustainable development" (ESD) in their objectives and there is a sound argument that this entails the *implicit* legislative adoption of the principle by virtue of it being part of the ESD concept.

However, a legislative mandate to make decisions on the basis of the precautionary principle is substantially weaker where it has not been *expressly* included in legislation. Further, in all cases where the principle must be considered or pursued, it must be done so in accordance with the advancement of other legislative objectives. In some cases these may include consideration of social impacts and in all cases they include consideration of economic objectives (eg AFMA must endeavour to maximise "economic efficiency in the exploitation of fisheries resources").

Some definitional certainty

At the heart of Olsen's concerns about the principle is the lack of an adequate definition of it. Yet, where the principle is used in legislation, it comes with a definition. Every piece of Australian legislation which includes the principle defines it in a manner substantively identical to the definition contained in the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act):

"The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage."

Although critics would have justification for labelling this definition unclear, we can see that it offers more substance than the dictionary definition of "precautionary" Olsen provides in his editorial. Further, the meaning of specific sections in legislation is not determined by a literal or grammatical reading of the words.

The meaning is determined in light of the purpose of the legislation. As such, the legal content of the precautionary principle is more tangible than what one might glean from a dictionary. To understand its legal content, reference must be had to the wider concept of ESD. When this task is narrowed to the fisheries management context, we can see, as the literature attests, that there are some straightforward and clear instructions provided by the principle.

These include, among other things:

1) using the best available scientific information in decision-making;
2) explicitly recognising the level and type of uncertainty that may exist concerning the environmental consequences of human activities (for example, predictions of stock resiliency to a certain amount of fishing effort); and
3) allowing the level of regulations pertaining to a human activity with environmental impacts to increase once pre-determined target reference points (such as for stock biomass) are exceeded.

The principle is thus concerned with the decision-making *process* in situations of uncertainty rather than determining particular outcomes. It is not a radical or unwieldy "pie in the sky" concept.

Perhaps the most significant aspect of the principle is its call to increase the knowledge base on which decisions are made. As such, a decision to *increase* the quota of a targeted species may be consistent with the precautionary principle if it is made with support of a convincing stock assessment.

The principle can also assist by justifying quick responsive action when there is reason to assume — but not yet conclusive proof — that

environmental harm may occur (such as where the use of anti-fouling agents is reasonably thought to be resulting in farmed oyster mortality).

The principle would not, for example, permit the closure of a fishery, or the establishment of an area restriction, in the absence of any evidence pointing to the harmfulness of existing practices. Where such evidence exists, a range of precautionary measures may be adopted. Rather than restricting effort, the first "precautionary" measure may be to increase monitoring.

The next level of precautionary intervention, where some evidence can support it, may be to trial an area restriction within the fishery. Yet if fish stocks rebound, then such a precautionary measure can be revoked.

The "cost" to industry Olsen fears *may* in certain circumstances be more restrictions in the short term to better ensure long term viability — yet the cost of not implementing precautionary measures may be catastrophic. Stock collapses attest to this.

Improving definitional certainty

Nevertheless, the legislative definition of the principle in Australia is unsatisfactory because it does not clearly spell out the measures that are needed to give effect to it. Guidance for a more sensible legislative definition of the principle can be taken from a number of sources.

Although New Zealand's *Fisheries Act* 1996 does not mention the principle, it is more precautionary than Australian legislation. This is because it states more clearly – albeit briefly – how decision-making should proceed in situations of uncertainty. It does this in a manner similar to the dot points above. It was, however, the 1995 decision of New Zealand's High Court in *Greenpeace New Zealand v Minister for Fisheries* (the orange roughy case) which prompted this level of detail to be included in the legislation.

Similarly, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) does not include the principle expressly but states that harvesting of marine species shall be conducted in accordance with the principles of:

1) preventing population decline to levels which threaten recruitment;
2) maintaining ecological relationships between harvested, dependent and related species; and
3) minimising the risk of ecosystem changes that are not potentially reversible in 20-30 years.

However, the greatest assistance can be gained from the 1995 UN Straddling Fish Stocks Agreement. The text provides 900 words of specific guidance for the application of the principle in fisheries management. Article 6 of the Agreement provides the most detailed articulation of any international legal document of what the principle entails.

Among other thing, it provides that:

"Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information."

This is expanded in Annex II which is entitled "Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks". It is, however, hoped that guidance for any revision of Australian legislation is not sought from Canada's *Oceans Act* 1996 which defines the precautionary principle simply as "erring on the side of caution".

Appropriate use of precaution in fisheries management

Olsen's second concern, that control cannot be exercised over the "indiscriminate" use of the principle, is also wrong.

The ambit of discretion fisheries managers have to base their decisions on the precautionary principle is necessarily constrained by the purpose of the legislation and the need to achieve other legislative objectives.

Where commercial fishers feel aggrieved by a fisheries management decision which arguably was based improperly on the precautionary principle (such as where no evidence existed to justify the imposition of a massive reduction in quota for a targeted species) judicial review (and possibly merits review) avenues are available to them.

The law is well developed on the point of abuse of power by government officials and aggrieved individuals or companies need only avail themselves of these opportunities. It is, of course, conceded that clearer legislation is to be preferred over resort to litigation. The principle has not, as Olsen calls it, become a "runaway" train.

Rather, the principle is valuable and useful and its use is necessarily constrained by the law. When — or if — clearer detail is forthcoming in legislation, it will provide more certainty for industry than where legislation simply includes statements about achieving sustainability.

The final concern expressed by Olsen — that the principle appears to be used excessively to target commercial fishers — is also without foundation. Neither the form nor the substance of the principle reveals an intent to curtail commercial fishing activities. Rather, the principle seeks to ensure the long-term sustainable exploitation of fish stocks — surely an objective held by all commercial fishers.

That some hard management decisions need to be made in response to evidence such as stock decline of targeted species and mortality of threatened species is a product of the increasing demands being placed on marine resources and an increased awareness and resolve to manage the marine environment sensibly. Such hard decisions should not simply be blamed on the precautionary principle.

It is unavoidable that there will be different interpretations of scientific data and different opinions about what management measures are appropriate. This would be the case even if the precautionary principle were absent from the formal policy setting. What the principle does do, however, is assist in the making of decisions in such situations of uncertainty.

Legislative reform needed

The lack of modernisation of the principle in Australia is remarkable given that it has been entrenched for more than 10 years in the environmental management scene.

Although many commentators round the world applauded Australia for being one of the first countries to include the principle in legislation in the early 1990s, our legislation is no longer cutting edge.

This is because the formulation of the principle in Australia was modeled on the version contained in the famous 1992 Rio Declaration on En-

vironment and Development. Unfortunately, with the exception of Canada's *Oceans Act* 1996, the Rio Declaration contains the vaguest formulation of the principle to be found in any legal document in the world.

The apparent haste with which this version of the principle was included in Commonwealth and State legislation resulted in a missed opportunity for Australia to provide a more workable formulation of it.

That such a vague formulation has become entrenched in Australia is regrettable because it has led both to the articulation by stakeholders of the type of concerns in Olsen's editorial and perpetual frustration by environmental and fisheries managers who are left with little instruction about how to lawfully exercise their legislative duty to consider the principle or pursue the exercise of it.

Yet we should not think that we are destined to remain stuck with this version of the principle. We need to heed Olsen's call for a "sensible definition" of the principle. This must take place in legislation.

Although a search for a definitive prescriptive definition of the principle will be fruitless, even if narrowed to the fisheries management context, there are nevertheless many opportunities for clarifying in legislation how the principle should be used. This would go a long way to removing any misconceptions that the principle is vague, without substance and produces inconsistent outcomes.

While we respectfully disagree with Olsen's commentary about the principle, the fact that such opinions are commonplace in the commercial fishing sector lend urgency to the need for a more workable formulation of the principle to be included in fisheries legislation.

Tension between fisheries managers and commercial fishers is unnecessarily increased where the purpose of the principle, and the exercise of it, is misrepresented.

The objectives of fisheries managers (as expressed in the legislation they are bound to implement) are consistent with the objectives of commercial fishers – namely ensuring the long-term viability of the industry by safeguarding the integrity of the marine environment.

Different opinion on fisheries management issues will always emerge in individual cases. But these "problems" should be tackled through debate over the strength of the scientific evidence and not blamed on the precautionary principle.

Reading

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LATE NEWS

Another strong year for seafood: production $2.4B

FIGURES just released by the Federal Government show seafood production remained strong last year, again topping $2.4 billion.

Despite a rising Australian dollar and sluggish world economic growth, the value of Australian seafood production at $2.41 billion has remained virtually identical to the previous year.

Australian Seafood Industry Council CEO Russ Neal described the figures as "a good news story for all sectors of industry, associated sectors such as transport and exporting, and for the Australian economy".

"Each year more than $2 billion is returned to the Australian economy from export earnings," Mr Neal said.

"That stays in Australia and helps create more than 100,000 Australian jobs.

"The figures also underline the tremendous demand quality, safe Australian seafood harvested sustainably against tough legislation."

The latest figures on fisheries production are contained in *Australian Fisheries Statistics 2002*, launched by Federal Minister for Fisheries Senator Ian Macdonald.

The figures have been compiled by the Australian Bureau of Agricultural and Resource Economics (ABARE) in conjunction with the Fisheries Research & Development Corporation (FRDC).

They show:

- **gross value of production (GVP) for 2001-02 of $2.41 billion;**
- **seafood as the fourth largest food industry in Australia;**
- **production volumes up 1.8% to 233,350 tonnes a yearp.a.**
- **aquaculture rising to $733 million GVP; and**
- **leading export markets as Japan ($680m), Hong Kong ($428m) and Chinese Taipei ($145m).**

All the details next month.