

CHAPTER IV  
**LEGISLATIVE  
OBJECTIVES**

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## ECOLOGICALLY SUSTAINABLE DEVELOPMENT

4.1 'Sustainable development' has emerged as the principal objective of countries in the environment and development arena, including for fisheries management. The concept was accepted rapidly by the international community following detailed enunciation of it in the 1987 Brundtland Report 'Our Common Future'<sup>1</sup> and the adoption of Agenda 21 at the 1992 United Nations Conference on Environment and Development. The modern concept can be dated further back to Boulding's 1966 'spaceship earth' metaphor and the 'steady-state' concept developed during the 'limits to growth' debate in the 1970s.<sup>2</sup> The most prominent definition of the concept is provided in the Brundtland Report as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>3</sup> Although there is debate concerning definitions of 'sustainable development', the philosophy underlying the concept is not contentious: it captures misgivings about the nature of development and about social and technological ability to avoid further deterioration of environmental quality.<sup>4</sup>

A central tenet of the concept is that human activities must be modified due to ecological exigencies. Achievement of sustainable development presupposes intervention in decision-making processes. The legitimacy of this intervention is based on limited understanding of the full consequences of human activities on the environment and the recognition that environmental deterioration limits economic development. Sustainable development is considered to permit only those economic activities that do not jeopardise, and to support environmental management approaches that ensure, the maintenance of environmental quality over an indefinite time period and the advancement of distributional equity among existing and future generations.

4.2 In Australia, the sustainability concept is generally expressed as 'ecologically sustainable development' (ESD). ESD has been accepted and promoted as the key objective in natural resource planning and development since 1992. The 1992 *National Strategy for Ecologically Sustainable Development*<sup>5</sup> (NSED) defines ESD as 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. The NSED outlines essential approaches for achieving ESD. These include considering national implications of local activities and taking long-term rather than short-term views in environmental decision-making. ESD is also at the core of the 1992 Intergovernmental Agreement on the Environment (IGAE). The IGAE was signed by the Commonwealth, states and territories:

1. World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987.
2. K.R. Boulding, 'The Economics of the Coming Spaceship Earth' in H. Jarrett (ed), *Environmental Quality in a Growing World Economy*, Johns Hopkins University Press, Baltimore, 1966, pp. 3-14; D.H. Meadows, D. Meadows, J. Randers and W.W. Behrens III, *The Limits to Growth*, Universe Books, 1972.
3. World Commission on Environment and Development, *Our Common Future*, Oxford University Press, 1987, p. 43.
4. See S. Dovers, *Environment and Sustainability Policy: Creation, Implementation, Evaluation*, The Federation Press, 2005.
5. Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development*, Australian Government Publishing Service, 1992.

and the Australian Local Government Association. It set up a framework for improved environmental management throughout Australia. It aims to provide a mechanism to facilitate a cooperative national approach to the environment, better definition of the roles of the respective governments, greater certainty in decision-making and better environmental protection.

ESD is found in all major pieces of Australian environmental legislation and policy documents. It is entrenched in Australia's premier piece of environmental legislation, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The Act defines 'ecologically sustainable use' of natural resources as use of natural resources 'within their capacity to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations'.<sup>6</sup> The Act also identifies five principles of ESD:<sup>7</sup>

- decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- if 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;
- the principle of inter-generational equity — that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; and
- the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- improved valuation, pricing and incentive mechanisms should be promoted.

4.3 Sustainability is the overarching objective of fisheries management in Australia. All pieces of Australian fisheries legislation either refer to ESD<sup>8</sup> or a variant of it, such as 'sustainability'.<sup>9</sup> There are varying expressions and definitions of the concept across the jurisdictions. Some fisheries legislation contain detailed expressions of the concept.<sup>10</sup> Recent comprehensive reviews of fisheries legislation in the Northern Territory and South Australia<sup>11</sup> gave attention to, among other things, the objective of harmonising the expression of legislative fisheries management objectives with Commonwealth legislation. A driver for such reviews is the requirement that fisheries for which export approval of a product is sought must be demonstrated as being ecologically sustainable under the EPBC Act.<sup>12</sup>

<sup>1</sup> Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 528.

<sup>2</sup> Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3A.

<sup>3</sup> Fisheries Management Act 1991 (Cth) s 3A; Fisheries Management Act 1994 (NSW) s 3(2)(c); Fisheries Act 1995 (Vic) s 3(a); Fisheries Act 1994 (Qld) s 3(1); Fisheries Act 1988 (NT) s 2A(a); Fisheries Act 2000 (ACT) s 3(a), (b).

<sup>4</sup> Living Marine Resources Management Act 1995 (Tas) s 7(1); Fish Resources Management Act 1994 (WA) s 3(2)(b). Note that 'sustainability' is not expressly included in the Torres Strait Fisheries Act 1984 (Cth).

<sup>5</sup> However, one of its objectives is to 'protect and preserve the marine environment': s 8(b).

<sup>6</sup> See, eg, Fisheries Management Act 2007 (SA) s 7(5).

<sup>7</sup> See Department of Primary Industries, Fisheries and Mines (NT) 2006, *Review of the Fisheries Act 1988*, Discussion paper, Fisheries Management Act 2007 (SA).

<sup>8</sup> See (5.3)-(5.12).

ESD is typically located in objectives provisions in environmental and fisheries legislation. This is intended to guide the making of decisions under substantive provisions. A difficulty is that, although ESD is a commonsense and easily understood concept at a general level,<sup>13</sup> application in practice may not be straightforward. It is essentially an aspirational, never-ending objective. Although the five principles of ESD identified in the EPBC Act provide some definition to the concept, they do not prescribe exactly what needs to be done in the case of individual decisions made under legislation. It is common for policy documents to be developed to assist decision-making by detailing how legislative objectives are to be applied. These can assist decision-makers faced with multiple imprecise and potentially conflicting objectives. However, care needs to be taken in drafting such guiding policy documents. If they misconstrue the legislative objectives they can be declared invalid and result in decisions made under them being overturned.<sup>13</sup> The placement of ESD in legislation imbues it with legal meaning and content. The legal parameters of the concept and its constituent principles have taken shape as a result of litigation where aggrieved individuals have challenged decisions made under legislation. Much of this litigation has concerned application of the concept as it exists in federal fisheries legislation. The next section reviews the manner in which objectives are included in Australian fisheries legislation and the principal cases in which their application has been challenged.

## LEGISLATIVE FISHERIES MANAGEMENT OBJECTIVES

4.4 The increasingly complex political, social, scientific and technical environments in which Australia's fisheries are managed means that the drafting of fisheries management objectives is complicated. The objectives of fisheries legislation need to achieve an appropriate balance between ensuring the exploitation and conservation of fisheries resources. This means that fisheries legislation, unlike many pieces of environmental legislation, include an exploitation-oriented objective in addition to the ESD objective. The manner in which legislative objectives are expressed necessarily shapes the manner in which decisions can be made and powers exercised. Fisheries managers are faced with the challenge of making lawful decisions in situations where uncertainty exists regarding the correct interpretation to be given to various, potentially conflicting, legislative objectives. The decisions that they make can have significant ramifications, including financial consequences for commercial fishers.

### Judicial review and merits review

4.5 Decisions that negatively affect individuals may be challenged. There are two methods available to challenge administrative decisions: judicial review and merits review. Judicial review cases can only be heard in courts and are limited to a determination of whether or not the decision under review was made lawfully. Merits review, where it is available, allows for a

13. See, eg, *Humane Society International Inc v Minister for the Environment and Heritage* (2003) 126 FCR 205; *Australian Fisheries Management Authority v Graham* (2003) 127 FCR 436; *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503. See also *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634.

more wide-ranging review of administrative decisions. The tribunals or various state specialist environmental courts empowered to hear merits review appeals are able to substitute a new decision for the one being reviewed. Although judicial review is always available, it is an expensive and complicated option which, if successful, only leaves the applicant with a court determination that a legal error has been made, and the flawed decision is set aside. A successful merits review action, on the other hand, may result in the applicant's preferred decision being made.

The ability for aggrieved individuals to lodge merits review challenges to fisheries management decisions (such as, for example, commercial fishers aggrieved by the declaration of area restrictions) differs from jurisdiction to jurisdiction. This is because the right to merits review only exists in statute. The availability and procedures for review are therefore governed by the legislation under which the particular decision was made. In some jurisdictions, there is limited ability to review fisheries management decisions while in other jurisdictions merits review is available for a wide range of decisions. In New South Wales, for example, merits review of some fisheries decisions can be heard in the Land and Environment Court<sup>14</sup> or the Administrative Decisions Tribunal.<sup>15</sup> Merits review to the Administrative Appeals Tribunal (AAT) is available for many, although by no means all, decisions made under the Fisheries Management Act 1991 (Cth). However, a number of recent amendments to the Fisheries Management Act 1991 (Cth) do not allow certain decisions to be appealed to the AAT. For example, in 2004, s 41A was inserted into the Act enabling the Australian Fisheries Management Authority (AFMA) to expand its ability to use its directional power as the principal tool to introduce new fisheries management measures for fisheries for which a plan of management currently does not exist.<sup>16</sup> The ability to issue directions for particular fisheries enables management measures to be introduced quickly when exigencies arise, rather than needing to rely on the more cumbersome process of licence or permit condition variation. However, no consequential amendment was made to s 165 of the Act to allow recourse to the AAT for fishing concession holders aggrieved by the effects of direction notices. As such, the ability for fishers to seek merits review of new regulations which affect their fishing operations (such as area conditions or closing or partially closing a fishery) was reduced. Nevertheless, the majority of AFMA decisions under the Act are reviewable by the AAT and in fact AFMA regularly faces challenges to its decisions in the AAT and the Federal Court.

Many of these cases have concerned the application of ESD principles. Most of the case law on the interpretation of fisheries management objectives concerns federal fisheries legislation. There is yet to be a significant appellate court consideration of the nature of the objectives of state or territory fisheries legislation. However, the manner in which the Federal Court and the AAT have considered Commonwealth fisheries legislation is instructive to the interpretation of state and territory fisheries legislation.

14. See, eg, *Sustainable Fishing and Tourism Inc v Minister for Fisheries* (2000) 106 LGERA 322.

15. Administrative Decisions Tribunal Act 1997 (NSW) ss 5(a), 8, 55(1). See, eg, *Murumaci v Minister for Fisheries* [2003] NSWADTAP 37. In Western Australia, for example, certain decisions are appealable to the State Administrative Tribunal: Fish Resources Management Act 1994 (WA) s 149. See, eg, *Lunzgo and Executive Director, Department of Fisheries* (WA) [2005] WASAT 218.

16. Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004 Sch 1.

## Commonwealth

4.6 The Fisheries Management Act 1991 (Cth) is the principal piece of Commonwealth fisheries legislation. It provides the objectives and framework for fisheries management. The objectives of the Act are set out in s 3. This section was amended in 1997, 1999, 2004 and 2006. On some occasions it was to add objectives related to new international law obligations and on other occasions it was to clarify the expression of existing objectives.

Section 3(1) provides that certain objectives 'must be pursued' by AFMA in the performance of its functions (and by the Minister in the administration of the Act). These objectives are:

- (a) implementing efficient and cost-effective fisheries management on behalf of the Commonwealth; and
- (b) 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; and
- (c) maximising the net economic returns to the Australian community from the management of Australian fisheries; and
- (d) ensuring accountability to the fishing industry and to the Australian community in AFMA's management of fisheries resources; and
- (e) achieving government targets in relation to the recovery of the costs of AFMA.

Section 3(2) lists second-order objectives. It provides that 'regard' is to be had to the objectives of:

- (a) ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over-exploitation; and
- (b) achieving the optimum utilisation of the living resources of the AFZ; and
- (c) ensuring that conservation and management measures in the AFZ, and the high seas implement Australia's obligations under international agreements that deal with fish stocks; and
- (d) to the extent that Australia has obligations:
  - (i) under international law; or
  - (ii) under the Compliance Agreement or any other international agreement;
 in relation to fishing activities by Australian-flagged boats on the high seas that are additional to the obligations referred to in paragraph (c) — ensuring that Australia implements those first-mentioned obligations;

but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales.

Section 3(2) relates principally to the achievement of long-term sustainability of fisheries and thus supports the later part of s 3(1)(b). It also aims to ensure that Australia's domestic legal regime is consistent with Australia's international fisheries obligations. For example, the expression 'optimum utilisation' in s 3(2)(b) is intended to fulfil Australia's obligation under the Law of the Sea Convention to 'promote the objective of optimum utilization of the living resources' in the Exclusive Economic Zone.<sup>17</sup> The 'imperative nature'<sup>18</sup> of the s 3(1) objectives (that they shall be 'pursued') requires a higher standard to be satisfied than the requirement to

'regard' the s 3(2) objectives. The duty to pursue the s 3(1) objectives means that AFMA is obliged to seek to achieve them, which is not the case with respect to the s 3(2) objectives.<sup>19</sup>

The s 3(1) objectives are also listed in the Fisheries Administration Act 1991 (Cth) together with the additional objective of ensuring that fisheries exploitation both within the Australian Fishing Zone and on the high seas is carried on consistently with Australia's international fisheries obligations.<sup>20</sup>

### Interpretation of objectives

4.7 The complexity of AFMA's task of managing fisheries has been noted by the AAT in a number of cases. For example, in *Justice v Australian Fisheries Management Authority*, the AAT commented that:<sup>21</sup>

The bare recital of [the] objectives and functions masks the reality of translating them into policies, principles and operational administration of the Act. Given that multiple functions are involved, tradeoffs are inevitable in AFMA's decision-making.

Numerous cases have arisen concerning the proper application of AFMA's legislative objectives. Most of these cases were merits review cases heard by the AAT, although a few have been litigated in the Federal Court (either by way of judicial review<sup>22</sup> or review of an AAT decision<sup>23</sup>). The cases illustrate the difficulty in conceptualising the nature and limits of the power of fisheries authorities and the challenge fisheries managers face when endeavouring to ensure their decisions are consistent with legislative objectives that are neither precise nor clear in their application, and which may appear to conflict with each other. Most of the case law has concerned AFMA's ESD objectives and its economic objectives.

4.8 **Ecologically sustainable development** The s 3(1)(b) ESD objective was considered by the Federal Court in 1997 in *Bannister Quest*.<sup>24</sup> The section, as it was then expressed, did not include the precautionary principle. To ascertain the meaning of the objective, Drummond J considered the second reading speech of the Act and the 1989 policy document 'New Directions for Commonwealth Fisheries Management in the 1990s'. He concluded:<sup>25</sup>

Section 3(1)(b), on its true construction, requires AFMA, in pursuing this objective in the performance of its functions, to limit its consideration to matters that relate to two things,

17. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3; [1994] ATS 31; ILM 21 p 1261 (entered into force for Australia and generally 16 November 1994), art 62.
18. *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503 at 513 (Drummond J).
19. *Ibid*.
20. Fisheries Administration Act 1991 (Cth) s 6(ba), (bb). The obligation placed upon AFMA to pursue these objectives in performing its functions is reinforced by s 16(1).
21. *Justice and Australian Fisheries Management Authority and Department of Fisheries Western Australia* [2002] AATA 49 at [27] (Davis B). See also *Bolding and Australian Fisheries Management Authority* [2001] AATA 235 at [66]; *Gilmore and Australian Fisheries Management Authority* [2005] AATA 943 at [85].
22. See, eg, *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503; *Donohue v Australian Fisheries Management Authority* [2000] FCA 901.
23. See, eg, *P W Adams Pty Ltd v Australian Fisheries Management Authority* (1995) 60 FCR 387; *Australian Fisheries Management Authority v Graham* (2003) 127 FCR 436; *Fearnley v Australian Fisheries Management Authority* [2006] FCAF 3.
24. *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503.
25. *Ibid* at 526 (Drummond J).

ensuring the biological sustainability of fish stocks and ensuring the protection of the marine environment upon which those fish resources depend.

This was a restrictive definition of ESD which did not allow for the taking into account of social and equity issues, despite these being accepted in general environmental policy documents as being key components of ESD. For example, the principles of intra- and intergenerational equity are included in the main policy documents adopted shortly after the enactment of the Fisheries Management Act 1991 (Cth) and the Fisheries Administration Act 1991 (Cth), especially the *National Strategy for Ecologically Sustainable Development* (NSESD).<sup>26</sup> However, the NSESD could not shed light on the meaning of s 3(1)(b) or inform how it is to be construed. This was because the NSESD is a policy document promulgated by the executive government (not parliament) and it was adopted after the enactment of the legislation.<sup>27</sup> The words of the section focus on environmental matters and the relevant extrinsic material contain no mention of social and equity issues. On the facts of the case, AFMA was found to have misconstrued this objective when it gave effect to a policy which took into account social and community issues.<sup>28</sup> Following the decision in *Bannister Quest*, the then Managing Director of AFMA declared that social and community matters were of no concern to AFMA.<sup>29</sup> Social and equity considerations arise in the fisheries management context in situations other than an individual fishing operator's economic well-being. They arise also in relation to community members as a whole in situations where a fishery is closed or severely restricted, either by bureaucratic decision-making or overfishing, due to resultant economic decline.<sup>30</sup>

4.9 In 2003, a major report, *Looking to the Future: A Review of Commonwealth Fisheries Policy* recommended that a definition of 'ESD' be included in the Fisheries Management Act 1991 (Cth) and that it be consistent with the definition afforded to it in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). In 2006, the definition of ESD provided in the EPBC Act was inserted into both the Fisheries Management Act 1991 (Cth)<sup>31</sup> and the Fisheries Administration Act 1991 (Cth).<sup>32</sup> This was intended to harmonise the concept with the EPBC Act and to enable AFMA to consider social factors when formulating fisheries management measures.<sup>33</sup> However, it remains uncertain whether the amendment has resulted in the intended expansion of the matters that may lawfully be considered by AFMA in the pursuit of its ESD objective. This is because the contemporaneous extrinsic materials considered by Drummond J in *Bannister Quest* remain important aids to the interpretation of the Act. These documents do not identify social matters as being relevant to fisheries management. Furthermore, the fisheries legislation still does not expressly oblige AFMA to consider social matters when performing its functions

26. See (4.2).

27. *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503 at 549 (Drummond J).  
Ibid at 549–50 (Drummond J).

29. F R Hardin Jones, 'A Problem with Ecologically Sustainable Development in Australian Waters' (2000) 133(J) *Papers and Proceedings of the Royal Society of Tasmania* 17–19 at 17.

30. See, eg, G Waitt and K Hartig, 'Ecologically Sustainable Fishing in Theory and Practice: Individual Transferable Quotas in Australia's South East Fishery' (2000) 31 *Australian Geographer* 87–114 at 111.

31. Fisheries Management Act 1991 (Cth) s 3A.

32. Fisheries Administration Act 1991 (Cth) s 6A.

33. Parliament of Australia, House of Representatives, 2006, Fisheries Legislation Amendment (Cooperative Fisheries Arrangements And Other Matters) Bill 2005, second reading speech, Hansard, 28 February 2006, p 119.

4.10 **Precautionary principle** International grounds well for the precautionary principle owes much to its rapid advancement in international fisheries documents. The most detailed articulation of the 'precautionary approach' is in the 1995 UN Fish Stocks Agreement.<sup>34</sup> In light of the uncertainties that bedevil fisheries management, it is not surprising that the precautionary principle features prominently in fisheries policy. The principle is highly appropriate for fisheries management because uncertainties abound in the marine environment, especially in terms of limited knowledge of ecological processes and the level of impact fishing activities have on target species, associated and dependent species and marine habitat. It has become clear that many of the data used in the assessment of fisheries resources and fisheries management measures contain errors, and that many common assessment models grossly simplify fisheries systems.<sup>35</sup> It is, for example, a difficult if not a futile task to determine accurately the maximum sustainable yield (MSY) of a targeted species because of the need, among other things, to identify the abundance of the stock when fish do not lend themselves to observation. In addition to knowing stock size, to determine the MSY of a species accurately it is also necessary to know previous harvest levels and the life cycle, fecundity and recruitment patterns of the species. This information may be unavailable or unreliable.<sup>36</sup> It is also common for assessments to be made of the catch that can be taken of a particular species without knowledge of relative population strengths of predator species, and species upon which they prey. For example, in a rapidly developing fishery, it is difficult to determine the appropriate bounds for exploitation when the impact on stocks are unlikely to be known until the limits of the fishery have been reached, at which time it may be too late and remedial management measures will need to be put in place.

In 1997, the Fisheries Management Act 1991 (Cth) was amended explicitly to require AFMA to pursue the precautionary principle in the carrying out of its functions. The s 3(1)(b) objective read, in part, that AFMA must pursue the objective of ensuring fishing activities are conducted 'in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle'. In 2006, the manner in which the precautionary principle was expressed was revised slightly.<sup>37</sup> The obligation placed on AFMA now is that it must pursue the objective of:

34. United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks (opened for signature 4 December 1995) 34 ILM 1542 (entered into force 11 December 2001). See D Vanderzwaag, 'The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas and Rising Normative Tides' (2002) 33 *Ocean Development and International Law* 165–188; J Ellis, 'The Straddling Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law' (2001) 32 *Ocean Development and International Law* 289–311. The Fish Stocks Agreement is included in the Fisheries Management Act 1991 (Cth) Sch 2. See also A Weier and P Loke, *Precaution and the Precautionary Principle: Two Australian Case Studies*, Productivity Commission Staff Working Paper, 2007, pp 15–45.

35. J A Wilson, J M Acheson, M Metcalfe and P Kleban, 'Chaos, Complexity and Community Management of Fisheries' (1994) 18 *Marine Policy* 291–305.

36. S B Kaye, *International Fisheries Management*, Kluwer, 2001, p 163. See also G L Kesteven, 'MSY Revisited: A Realistic Approach to Fisheries Management and Administration' (1997) 21 *Marine Policy* 73–82 at 75–6; D M Dzidzornu, 'Four Principles in Marine Environmental Protection: A Comparative Analysis' (1998) 29 *Ocean Development and International Law* 91–123 at 99–100.

37. Fisheries Legislation Amendment (Cooperative Fisheries Arrangements And Other Matters) Act 2006 (Cth) ss 2, 5.

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.

The cases discussed below which concerned AFMA's application of the precautionary principle were litigated prior to the 2006 amendment. The rephrasing of the objective in 2006 possibly de-emphasises the duty on AFMA to ensure the exercise of the precautionary principle.

The precautionary principle has, for the purpose of the Act, the same meaning as in cl 3.5.1 of the Intergovernmental Agreement on the Environment (IGAE).<sup>38</sup> The IGAE definition reads:

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.

In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- (ii) an assessment of the risk-weighted consequences of various options.

4.11 The inclusion of the precautionary principle in the Act in 1997 followed a 1996 report by the Australian National Audit Office (ANAO) which was highly critical of AFMA's management approach. It stated that 'AFMA's decision-making regarding the limits placed on commercial fishing are, almost without exception, set in favour of maintaining viable fish catches even in the face of precautionary or contrary stock assessments'.<sup>39</sup> However, in 1997, the Commonwealth Parliament's Standing Committee on Primary Industries, Resources and Rural and Regional Affairs concluded an inquiry into AFMA and was critical of the passage above by ANAO, stating that there was insufficient evidence to support the allegations and there was evidence that AFMA was reducing catch levels where species were under threat. However, the committee did not conclude that AFMA 'always takes a suitably conservative approach in the best interests of fish stocks'.<sup>40</sup>

The exercise of the precautionary principle by AFMA has been the subject of numerous merits appeals in the AAT. The difficulty faced by AFMA is that, despite the inclusion of a definition of the principle in legislation, it is unclear when or how to apply the principle. For example, detail is lacking about exactly how decision-makers should assess 'risk-weighted consequences' and what level of evidence is required to trigger the principle. One concern with the formulation of the principle in Australian legislation is that it is phrased in preventive rather than precautionary language. It does this by focusing on risk (including 'serious' and 'irreversible' damage) rather than uncertainty, which is the essence of the principle.<sup>41</sup> The

38. The IGAE is set out in the National Environment Protection Council Act 1994 (Cth) Sch.

39. ANAO Report, 1995/1996 Number 32.

40. D Nicholls and T Young, 'Australian Fisheries Management and ESD: The One That Got Away?' (2000) 17 *Environmental and Planning Law Journal* 272-93 at 274, 276.

articulation of the principle for the purposes of the Fisheries Management Act 1991 (Cth) (and for most other Australian legislation which includes the principle) provides that where there are serious threats to the environment, the fact that there is scientific uncertainty over those threats should not be used as the reason for not taking action to prevent harm. The principle itself only mandates what should not be done rather than what should be positively done. The limited support given to the principle in fisheries legislation has resulted in management decisions being challenged for being too precautionary.<sup>42</sup> These cases stand in contrast to early litigation in Australia concerning the principle which arose in circumstances where objectors asserted a failure on the part of the relevant government department or agency to consider or apply the principle.<sup>43</sup>

4.12 AFMA has routinely based management decisions, at least in part, on the precautionary principle. AFMA has stated that it applies precaution when it makes decisions about the use of fisheries resources where gaps remain in the data and information upon which to base sound fisheries management. It has stated further that, in practice, this means that it 'acts on the best available information and, where necessary, takes steps to protect those resources and their supporting environment without waiting for scientific certainty'.<sup>44</sup> Since 1999, AFMA has faced a serious of challenges to a range of decisions in the AAT for arguably applying precaution which was not warranted in the circumstances.<sup>45</sup> The cases concerned challenges to area restrictions, or other conditions,<sup>46</sup> on commercial fishing permits,<sup>47</sup> refusal to grant fishing permits,<sup>48</sup> cancellation of permits,<sup>49</sup> the setting of catch limits,<sup>50</sup> and a decision not to remove gear restrictions.<sup>51</sup> Some cases concerned interim management arrangements. In each case, the AAT affirmed the decision under review. The

41. W Gullett, 'Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management' (1997) 14 *Environmental and Planning Law Journal* 52-69 at 60.

42. W Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons For Judicial Review' in E Fisher, J Jones and R Von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects*, Edward Elgar, 2006, pp 182-201.

43. See, eg, *Leath v National Parks and Wildlife Service* (1993) 81 LGERA 270.

44. Australian Fisheries Management Authority, *Annual Report 1999-2000*, p 7.

45. See J Peel, 'Taking a "Precautionary Approach" in Fisheries Management' in J Peel, *The Precautionary Principle In Practice: Environmental Decision-Making and Scientific Uncertainty*, The Federation Press, 2005, pp 79-105; W Gullett, C Paterson and E Fisher, 'Substantive Precautionary Decision-Making: the Australian Fisheries Management Authority's "Lawful Pursuit" of the Precautionary Principle' (2001) 7 *Australian Journal of Natural Resources Law and Policy* 95-139; K Crosthwaite and W Gullett, 'Balancing Short Term Impacts and Long Term Interests in Fisheries Management Decisions: *Justice v Australian Fisheries Management Authority*' (2002) 2(*June*) *National Environmental Law Review* 39-46.

46. *De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704.

47. *Dixon and Australian Fisheries Management Authority and Executive Director of Fisheries WA and Northern Territory of Australia* [2000] AATA 442; *Arno Blank v Australian Fisheries Management Authority* [2000] AATA 1027; *Justice and Australian Fisheries Management Authority and Department of Fisheries Western Australia* [2002] AATA 49.

48. *Ajkea v Australian Fisheries Management Authority* [2001] AATA 258 (the AAT decision was unsuccessfully appealed to the Federal Court of Australia: *Ajkea P/L v Australian Fisheries Management Authority* [2003] FCA 248); *Latitudes Fisheries Pty Ltd v AFMA* [2000] AATA 1025 (the Federal Court on appeal upheld the AAT decision: *Latitudes Fisheries Pty Ltd v Australian Fisheries Management Authority* [2002] FCA 416).

49. *Rhodes and Australian Fisheries Management Authority* [2005] AATA 707.

50. *Fisher and Australian Fisheries Management Authority* [2005] AATA 936.

51. *Bolding and Australian Fisheries Management Authority* [2001] AATA 235.

AAT afforded AFMA considerably flexibility in how it arrived at its decisions<sup>52</sup> and in most cases did not enquire deeply as to whether the threshold of the principle had been reached.<sup>53</sup> In some cases, the AAT found the threshold for its operation had not been reached<sup>54</sup> or could not be determined.<sup>55</sup>

**4.13** The most detailed consideration of the precautionary principle by the AAT is found in the 2004 case of *De Brett Investments*.<sup>56</sup> The case concerned a challenge to the imposition of a requirement on holders of tuna fishery permits that entire shark carcasses be landed, not just their fins. This measure was aimed at minimising the practice of removing fins from shark caught by tuna fishers, facilitating the identification of shark caught incidentally and encouraging the release of live sharks. The AAT considered case law on the precautionary principle and concluded.<sup>57</sup>

At the practical level for us, the precautionary principle means that we must assess whether there is an indication that there will be some serious or irreversible environmental damage if a certain course is followed, including the course of taking no action at all. That means that we must assess the possible consequences and gravity of those courses' being followed together with the risk of those consequences' occurring. That assessment must be carried out having regard to all sources of evidence; it is not limited to scientific evidence. If the assessment leads us to conclude on the balance of probabilities that there is a threat of serious or irreversible damage to the environment that is not a bare possibility, full scientific certainty in the sense we have explained that concept should not be used as a reason for postponing measures to prevent environmental degradation. Caution should be exercised. The outcome of our assessment in applying the precautionary principle must be weighed with the other objectives in s. 3(1) of the Act and a decision reached.

By focusing on the threshold of the precautionary principle, the AAT in this case adopted a fairly strict textual approach to the interpretation of the legislative objective. This is something that is necessary to a degree in order to avoid arbitrary application of the principle.<sup>58</sup> However, the AAT found itself unable to determine whether the threshold had been reached due to unreliable catch data, unknown stock numbers of shark, unknown mortality rates of sharks caught and released, and poor knowledge of biological characteristics of shark species. The AAT commented:<sup>59</sup>

52. See D C Peterson, 'Precaution: Principles and Practice in Australian Environmental and Natural Resource Management' (2006) 50 *Australian Journal of Agricultural and Resource Economics* 469–89; J Peel, 'Taking a "Precautionary Approach" in Fisheries Management' in J Peel, *The precautionary principle in practice: Environmental Decision-making and Scientific Uncertainty*, The Federation Press, 2005, pp 79–105; W Gullett, C Peterson and E 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.
53. See *Bolding and Australian Fisheries Management Authority* [2001] AATA 235; *Green and Australian Fisheries Management Authority* [2004] AATA 426; *Rhodes and Australian Fisheries Management Authority* [2005] AATA 707.
54. See *Ajeka v Australian Fisheries Management Authority* [2001] AATA 258; *Dixon v Australian Fisheries Management Authority* [2000] AATA 442; *Justicia and Australian Fisheries Management Authority and Department of Fisheries Western Australia* [2002] AATA 49; *Latitude Fisheries Pty Ltd v Australian Fisheries Management Authority* [2000] AATA 1025.
55. *De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704.
56. *Ibid.*
57. *Ibid.* at [162].

This is a matter for concern but it leaves us in a position in which we are unable to form a view as to the consequences of imposing, or not imposing, a finning condition. We cannot assess the consequences that are likely to follow either course or the risk of their doing so for we simply do not have the information. That means that we cannot assess whether there is a threat of serious or irreversible environmental damage within the meaning of the precautionary principle.

The AAT nevertheless affirmed the decision under review despite the principle not being activated because other legislative objectives provided sufficient support for the decision, especially the objective related to minimising bycatch.<sup>60</sup> The AAT also noted that the finning condition was an interim measure that would be subject to periodic review and it was a more cost-effective and reliable measure for ensuring adherence to bycatch limits than other methods, such as relying on fishers to accurately record shark interactions in logbooks.<sup>61</sup>

The manner in which the precautionary principle is included in federal fisheries legislation differs from its inclusion in state and territory fisheries legislation. As seen below, most state fisheries legislation does not explicitly recognise the principle. Those states that do expressly include the principle in their fisheries legislation do so in the standard manner for environmental legislation: a duty is created to consider the principle when administering the legislation. The New Zealand Fisheries Act 1996 (NZ) includes the principle in a more robust fashion,<sup>62</sup> which may explain why the principle has featured prominently in departmental and ministerial fisheries management decisions in New Zealand.<sup>63</sup> Clearer articulation of precautionary objectives in legislation would respond to community expectations of demonstrable ecologically sustainable fishing practices and would benefit fisheries managers who increasingly seek guidance as to how to ensure that the exercise of discretionary statutory powers is legally defensible, for example, in relation to whether, or under what conditions, new fishing permits can be issued, and how to determine total allowable catches. The fishing industry also may be supportive of such an approach for providing greater certainty in the management of fisheries.

**4.14 Economics** AFMA's two principal economic objectives are 'implementing efficient and cost-effective fisheries management' and 'maximising the net economic returns to the Australian community from the management of Australian fisheries'.<sup>64</sup> Another objective is to achieve government targets in relation to cost recovery.<sup>65</sup> The two principal objectives have

58. See D C Peterson, 'Precaution: Principles and Practice in Australian Environmental and Natural Resource Management' (2006) 50 *Australian Journal of Agricultural and Resource Economics* 469–89 at 482; W Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in E Fisher, J Jones and R von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects*, Edward Elgar, 2006, pp 182–201, 199; E Fisher, 'The Precautionary Principle as a Legal Standard for Public Decision-making: The Role of Judicial and Merits Review in Ensuring Reasoned Deliberation' in R Harding and E Fisher (eds), *Perspectives on the Precautionary Principle*, Federation Press, 1999, pp 83–98, 90.
59. *De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704 at [170].
60. See the latter part of *Fisheries Management Act 1991* (Cth) s 3(1)(b).
61. *De Brett Investments Pty Ltd and Australian Fisheries Management Authority* [2004] AATA 704 at [179].
62. *Fisheries Act 1996* (NZ) s 10.
63. See W Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in E Fisher, J Jones and R von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects*, Edward Elgar, 2006, pp 182–201; S Mascher, 'Taking a Precautionary Approach: Fisheries Management in New Zealand' (1997) 14 *Environmental and Planning Law Journal* 70–9.
64. *Fisheries Management Act 1991* (Cth) s 3(1)(a), (c); *Fisheries Administration Act 1991* (Cth) s 6(a), (c).
65. *Fisheries Management Act 1991* (Cth) s 3(1)(e); *Fisheries Administration Act 1991* (Cth) s 6(e).

