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Balancing short term impacts and long term interests in fisheries management decisions

Abstract
In the latest of a series of merits review decisions by the Administrative Appeals Tribunal (AAT) concerning the correct construction to be given to the Australian Fisheries Management Authority's (AFMA's) statutory objective to ensure that the exercise of the precautionary principle is 'pursued', the AAT has affirmed the decision under review as having being made reasonably and correctly in pursuit of the principle. This article explains the reason for the AAT's recent decision in Craig Justice v Australian Fisheries Management Authority and Executive Director, Department of Fisheries Western Australia (hereafter Justice v AFMA) which affirmed AFMA's implementation of the consultative approach required by legislation and provided further support for AFMA's interpretation and implementation of its statutory requirement to manage fisheries in a manner consistent with the precautionary principle.

Keywords
long, short, impacts, fisheries, term, management, balancing, decisions, interests

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articles

Balancing short term impacts and long term interests in fisheries management decisions:

Justice v Australian Fisheries management Authority

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In the latest of a series of merits review decisions by the Administrative Appeals Tribunal (AAT) concerning the correct construction to be given to the Australian Fisheries Management Authority's (AFMA's) statutory objective to ensure that the exercise of the precautionary principle is 'pursued', the AAT has affirmed the decision under review as having being made reasonably and correctly in pursuit of the principle. This article explains the reason for the AAT's recent decision in *Craig Justice v Australian Fisheries Management Authority and Executive Director, Department of Fisheries Western Australia (hereafter Justice v AFMA)*[1] which affirmed AFMA's implementation of the consultative approach required by legislation and provided further support for AFMA's interpretation and implementation of its statutory requirement to manage fisheries in a manner consistent with the precautionary principle.

Background to the case

As with the recent series of AAT appeals concerning AFMA,[2] the argument put by the applicant in *Justice v AFMA* was that AFMA did not exercise its powers correctly in terms of its legislative objectives. Section 3 *Fisheries Management Act* 1991 (Cth) (hereafter FM Act) states that certain objectives 'must be pursued' by AFMA in the performance of its functions. These objectives, expressed in s3(1), as amended in 1997,[3] 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 and 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 economic efficiency in the exploitation of fisheries resources; 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.

In addition, s3(2), as amended in 2001,[4] 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 [Australian Fishing Zone] 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;
>
> 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.

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The question of whether all or only some of the s3(1) objectives must be pursued by AFMA in making a decision in the performance of its functions, and the corollary issue of what amounts to sufficient 'pursuit' of each mandatory objective, are not settled.[5] The AAT did not address these crucial issues in *Justice v AFMA* but an assumption that the mandatory objectives should be pursued simultaneously does seem to be implicit in its decision.[6] Furthermore, the AAT's reasoning seems to reflect an acknowledgement that the balance between the twin central objectives in fisheries management of biological sustainability and economic efficiency guides decision-making in accordance with the FM Act. More specifically, the decision indicates that ecologically sustainable fisheries management is necessary for the proper pursuit of *long-term* economic efficiency.[7] Furthermore, the AAT noted the complexity of AFMA's fisheries management task and that the 'bare recital of these objectives and functions masks the reality of translating them into policies, principles and operational administration of the Act.'[8]

It is not only the administrative framework of the FM Act that needs to be taken into account in decision-making under the Act. Broader environmental policy statements and international legal instruments need to be taken into account when construing and giving effect to the powers under the Act. For example, the definition of the 'precautionary principle' for the purpose of the Act is contained in the 1992 Intergovernmental Agreement on the Environment (IGAE).[9] Likewise, AFMA's management decisions should be influenced by developments in legal regimes governing high seas areas adjacent to the AFZ, particularly in relation to highly migratory species such as tuna. This requirement has now been specifically incorporated into AFMA's decision-making framework by the recent amendment to the FM Act to include the objective s3(2)(c) (above) to ensure that conservation and management measures in Australia implement Australia's obligations under international fisheries agreements.[10] The High Court of Australia has also expressed the view that there is a legitimate expectation that Commonwealth discretion will be exercised in conformity with the terms of international conventions to which Australia is a party.[11] Of relevance to the case at hand (as discussed below), Australia is a member of the Indian Ocean Tuna Commission (the IOTC) which was established pursuant to a multilateral agreement in 1996.

That fisheries management in Australia is becoming increasingly complex due to greater awareness of the intricacies and interlinked nature of marine ecosystems across state, national and international jurisdictions is evident in the case of *Justice v AFMA*. The case illustrates how AFMA routinely faces the challenge of seeking to discharge its responsibility to pursue statutory objectives that are in tension. This occurs where balance is sought between short-term impacts and long-term benefits such as where AFMA tries to achieve 'optimum utilisation'[12] of fisheries resources and 'economic efficiency'[13] in the exploitation of these resources. For example, in a rapidly developing fishery it is difficult to explore the bounds of exploitation when the impacts on stock are unlikely to be known until the limits of the fishery are reached, at which time it may be too late and remedial management measures will need to be put in place. Yet evidence of costs to operators in the short-term is more readily ascertainable than evidence of the long-term sustainability benefits that will be realised from a particular measure. However, if a precautionary approach is implemented in pursuing optimum utilisation and economic efficiency simultaneously, then cautious management arrangements can legitimately be put in place to ensure that financial gains are realised from the resource but that sustainability is not jeopardised. Yet such an approach may draw criticism from some commercial fishing operators for being inappropriately – and arguably unlawfully under the FM Act – financial burdensome in the short- to mid-term.

The AAT application

The applicant, a commercial fisher, applied to AFMA under s32 FM Act for a 2000/2001 fishing permit for the Southern and Western Tuna and Billfish Fishery (SWTBF) which would authorise the applicant to conduct fishing operations throughout the SWTBF. AFMA granted a fishing permit to the applicant but imposed a restriction permitting fishing only in the area of the SWTBF south of latitude 34^0 South (which delimits the boundary between the WTBF and the STBF), near Margaret River, WA. The applicant appealed the decision to refuse to grant a

fishing permit for the entire SWTBF on a number of grounds and sought the removal of the restriction line on the permit.

The specific grounds of review were that the 34^0 South line is arbitrary, has no biological basis and does not meet AFMA's statutory objectives. The applicant's principal arguments were that the decision to restrict the permit area did nothing for the pursuit of AFMA's ecologically sustainable development objective, created economic inefficiencies and was contrary to the implementation of efficient and cost-effective fisheries management.

The Executive Director of the Fisheries Department of Western Australia (Fisheries WA) was joined as a party to the proceedings. The grounds cited for applying to be joined included the fact that Fisheries WA manages waters that overlap with waters for which AFMA has management responsibilities, that there are concerns about bycatch (principally shark bycatch), the sustainability of fishstocks and the potential impacts on WA's recreational fisheries.

The fishery

The SWTBF encompasses both the Western Tuna and Billfish Fishery (WTBF) and the Southern Tuna and Billfish Fishery (STBF). It covers the entire coast of South Australia, Western Australia, the Northern Territory and the Queensland coast west of Cape York to the limit of the AFZ (a distance of 200 nautical miles; shorter where there is a shared Exclusive Economic Zone boundary with Indonesia, East Timor and Papua New Guinea). The STBF (south of 34^0 South) and the WTBF (north of 34^0 South) are defined as separate fisheries in the *Fisheries Management Regulations* 1992. However, the fisheries are managed consistently, with the border between them effectively being treated as an internal boundary.

Each of the five principal species taken in the SWTBF – bigeye tuna, yellowfin tuna, albacore tuna, broadbill swordfish and skipjack tuna – is believed to comprise separate Indian Ocean and Pacific Ocean stocks. Pacific stocks are managed as part of the Eastern Tuna and Billfish Fishery (ETBF) and the Indian Ocean stocks are managed in the AFZ as part of the SWTBF. AFMA receives advice from the Southern and Western Tuna Management Advisory Committee (SWTMAC) when making management decisions for the fishery. AFMA also considers reports from the IOTC. The IOTC is, among other things, charged with promoting the conservation and optimum utilisation of tuna species, thus encouraging sustainable development of the species. Conservation and management measures are binding on members of the IOTC. The IOTC has noted concerns about the rapid development of longline fisheries targeting broadbill swordfish off both eastern and western Australia.

History of the line at 340 South

The FM Act came into effect in 1992, however, under transitional arrangements from the *Fisheries Act 1952* (Cth), Commonwealth Fishing Boat Licences (CFBLs) continued in effect until February 1995. Following the expiry of these transitional arrangements, fishing permits were granted allowing fishing for tuna and billfish using a specified method in specified waters. Thirteen sub-areas were designated within the SWTBF to which access could be granted under those permits.. These sub-areas were consistent with areas of access that operators had historically been entitled to in accordance with their CFBLs under the *Fisheries Act* 1952.

In May 1995, AFMA announced that separate Management Advisory Committees (MACs) were to be established for the southern fishery and the western fishery. Then, in August 1998, the AFMA Board decided to remove all internal boundaries other than the line at 34^0 South. In doing so, the Board indicated that retention of that boundary might depend on a review of all tuna fisheries that was due to take place in early-1999.

Following public consultation on the integration of Australia's tuna fisheries and 'acknowledging the increase in investment and effort in the SWTBF in the past 12 months',[14] the AFMA Board decided in December 1999 to:

> (a) determine as a matter of urgency to develop and implement a management plan, that will effectively manage fishing effort, by early-2001;
>
> (b) retain the 34^0 South boundary until that management plan is implemented; and
>
> (c) that when the management plan is implemented, the 34^0 South boundary will be removed.

At the same time, the Board also decided to amalgamate the two existing MACs into the one SWTBMAC and to treat stocks as a single fishery.

AFMA acknowledged in its evidence in *Justice v AFMA* that the line at 34^0 South existed for historical reasons and had developed as an administrative boundary, but that it now served as an effort control that should remain in place until more effective and orderly management of effort could be implemented through a management plan. To that end, in July 2000, AFMA circulated a discussion paper on future management options for the SWTBF and ETBF. The principal proposal contained in the discussion paper was for Statutory Fishing Rights, under which a total allowable catch (TAC) would be established and each operator would be granted a tradeable portion of the TAC in the form of individual transferable quotas (ITQs). An independent Allocation Advisory Panel (AAP) would be established to make recommendations to the Board on allocation of the ITQs. Following extensive consultation, SWTBMAC strongly endorsed this proposal at its meeting in February 2001. The AFMA Board accepted the SWTBMAC recommendation at its meeting on 31 May 2001 and at its 10-11 October 2001 meeting it formally appointed the AAP, which was due to report back at the end of January 2002. As at April 2002, a draft report was being prepared for presentation to the AFMA Board.

In the interim, removal of the line was subject to an earlier AAT application in *Dixon v AFMA*[15] concerning a commercial pelagic longline fishing permit. In that decision, the AAT also affirmed AFMA's decision not to remove the line and allow the applicant to fish throughout the SWTBF. The AAT supported the precautionary approach taken by AFMA in managing the fishery. It confirmed that, on balance, maintaining the boundary was consistent with the pursuit of AFMA's statutory objectives in the long-term. This view was premised on the fact that a management plan was being developed and would be in place within a reasonable timeframe.

Contentions of the parties

The applicant's contentions included, relevantly, that:

- the policy of retaining the line at 340 South is contrary to the pursuit of AFMA's ecologically sustainable development (ESD), economic efficiency and efficient and cost-effective fisheries management objectives;
- the retention of the boundary will hinder the implementation of a management plan; and
- even if the AAT upholds AFMA's policy, that the applicant has special circumstances that justify departure from that policy in his case. The circumstances listed relate to the investment he has made in the fishery, his legitimate expectation that the line will be removed and the unfair advantage other operators who have access north of the line have.

AFMA contended in response that that the main issues to be addressed in managing the SWTBF include inadequate knowledge of the resource base, an existing management framework with limited ability to constrain fishing effort, the extent to which unconstrained increase in investment and fishing effort reduces the economic efficiency of the fleet as a whole, and the pursuit of ESD. AFMA's principal argument was that the imposition of the area restriction was in pursuit of its statutory objectives; in particular, that it ensures that in

the absence of a management plan the exploitation of fisheries resources is conducted in a manner consistent with the exercise of the precautionary principle. This argument rested on the uncertainty about stock structure of the key tuna and billfish species and the likelihood that removing the 34^0 South restriction would activate latent fishing effort which would increase catches and cause unknown impacts to the species. The challenge was characterised as finding a way to 'devise a means of restraining effort and investment while encouraging exploitation of fisheries resources and maximising economic efficiency, as well as keeping the costs of fisheries management to a minimum.' [16]

In meeting this challenge, AFMA noted that the pursuit of sustainability requires that the impacts on particular species within the AFZ must be weighed against implications for the Indian Ocean stocks as a whole. In view of the uncertainty about stock structure of the key target species, it was contended that the precautionary approach to management dictates that AFMA should limit the growth and effort of catches, at least until more information is available to develop more sophisticated management arrangements. As such, AFMA contended that the line at 34^0 South plays a significant role in restraining additional investment and effort in the fishery and should therefore be retained until those management arrangements exist.

In relation to the development of management arrangements, AFMA noted that the development of a management plan is a protracted and complex process, requiring extensive consultation with the fishing industry, other government agencies, conservation groups and State and Territory governments. Removing the boundary would introduce a degree of instability into the fishery, with increases in fishing effort and the number of active fishers leading to tension within the industry and pressure for the imposition of new constraints on operators. That tension and pressure would impede the effective development of a management plan.

Fisheries WA contended that the fisheries management regime that existed under State law, as well as international considerations, were relevant to AFMA's exercise of its statutory functions. Its concerns about the potential impacts on recreational fisheries, bycatch and sustainability of fish stocks within WA also extended to Indian Ocean fish stocks within the jurisdiction of the IOTC. It argued that the fisheries issues involved 'constituted a case of adaptive but cautionary management'.[17]

Issues to be decided

The AAT characterised the issues to be decided in the following terms:

> Whether AFMA's policy to retain the line as a fishing boundary on the permit is unlawful, or not warranted in the light of its legislative objectives, requires consideration of current knowledge of the fishstocks in the fishery and the wider Indian Ocean stock, and any concerns about overall sustainability. In order to establish such parameters a range of other issues must be examined, including the question of whether the effect of retaining the line is likely to constrain effort and investment in the fishery, possibilities of latent effort being activated, and the need to meet Australia's international obligations.
>
> There is also the question of whether removal of the boundary would threaten pursuit of AFMA's statutory objectives, including ecological sustainable development (ESD). The latter also involves consideration of whether the precautionary principle might be triggered by some threshold test. The implications of retaining the line must also be assessed in terms of whether it induces economic inefficiencies in the fishery in the short-term until a management plan is established. If the policy is found to be lawful, it must also be determined whether there are cogent reasons for departing from the decision under review. [18]

Decision of the AAT

The AAT found that AFMA's policy was lawful, and that retention of the line is consistent with the pursuit of all of its objectives,[19] particularly in terms of long-term sustainability. The AAT also noted that given the multiple functions that AFMA is charged with fulfilling, trade-offs are inevitable in its decision-making.[20]

The AAT found that the effect of the line at 34^0 South was to act as a de facto biological boundary between species mainly inhabiting subtropical waters, compared with cooler southern waters. It relied on the scientific evidence presented by witnesses for AFMA and Fisheries WA in coming to this conclusion. The AAT noted in its decision that there was not complete agreement as to whether retention of the line acted as a disincentive to overcapitalisation or whether latent effort would be activated if the line was removed.[21] Nevertheless, the decision supports AFMA's view of the line as a useful interim control at the current stage of development of the management plan, even though it is not an optimum means of attempting to limit overcapitalisation or effort in the SWTBF.

Retention of the line was found to be consistent with the pursuit of ESD in the long-term. This is because overall the scientific evidence presented revealed that there is currently limited knowledge of some fishstocks that are targeted in the fishery. According to the AAT, the evidence 'urges a precautionary approach until better information becomes available' and the impacts can therefore be managed more effectively. The AAT noted the evidence of CSIRO Principal Research Scientist, Dr John Gunn, in which he drew a distinction between a precautionary approach at the policy level, and the more severe scientific test (as embodied in the IGAE formulation of the principle), in deciding whether a threshold has been reached which would then invoke the precautionary principle. In the present case, there was no suggestion that serious or irreversible damage is currently being caused to fishstocks to an extent that necessitates urgent and severe restriction. Rather, the suggestion was that a careful evaluation to avoid such a predicament, through an assessment of the risk-weighted consequences of various options, is advisable. As such, constraint of catch levels in the short-term is consistent with the pursuit of ESD. The approach the AAT took in this regard is more consistent with the meaning of the precautionary principle as it has developed internationally rather than the restrictive meaning given to it in Australia as encapsulated in the IGAE formulation of it.[23] It did this by supporting AFMA's decision to refuse to extend fishing effort north of the line at 340 South in recognition of the need to avoid where possible allowing activities in the absence of confident predictions of future environmental effects. The decision provides further confirmation that AFMA can lawfully pursue the precautionary principle in circumstances where the threshold test of 'serious or irreversible damage' has not been met.[24] Although this would only be the case to the extent that such an approach is not inconsistent with other mandatory objectives.

The AAT applied the same long term approach in finding that retention of the line was also found to be consistent with the pursuit of economic efficiency for the fishery as a whole. It supported AFMA's decision to countenance short-term inefficiencies rather than put at risk the long-term viability of the industry and was consistent with the decision of the Federal Court in *Bannister Quest*[25] that it was 'out of place' for AFMA to have regard to social or equity considerations or the 'efficiency of an individual fisherman's operation relative to that of other fishermen.'[26]

In making these findings the AAT also concluded that AFMA had been thorough in its policy-making process and had 'followed due process in a very consultative manner, hence policy is well grounded and interested parties cannot complain of lack of natural justice. Policy development has not been arbitrary, but formulated using well established procedures, permitting all industry participants to have a voice.'[27] Furthermore, the AAT rejected the applicant's contention that retention of the line would hinder development of the management plan. Rather, it preferred the view that removal of the line at this stage in the development of the management plan would create confusion and complexity in the allocation of ITQs and would

therefore be contrary to the pursuit of the efficient and cost-effective fisheries management objective. In relation to the special circumstances cited by the applicant as disadvantages to him, the AAT found that the same conditions could be said to apply to other participants in the fishery and no evidence was produced to indicate that the applicant had been discriminated against individually or had markedly different circumstances to others.

Conclusion

The AAT affirmed the decision under review and concluded that what is clear from the evidence is that 'at this stage of the SWTBF a cautious management approach is essential.'[28] The decision confirmed that AFMA's purported implementation of the precautionary principle in the circumstances of the case was consistent with its legislative objective and indicates that the AAT will afford AFMA a degree of flexibility in how it decides to 'pursue' the precautionary principle when fulfilling its fisheries management functions. Its willingness to do so seemed to be in recognition of the complexity of the task AFMA faces, and in reliance on the thorough consultative processes that are followed in making contentious decisions.

* *The views expressed in this article are those of the authors and not necessarily those of the Australian Fisheries Management Authority.*

1. [2001] AATA 49. Decision 30 January 2002.

2. See, e.g. *Dixon v AFMA* [2000] AATA 442, *Arno Blank v AFMA* [2000] AATA 1027, *Latitude Fisheries v AFMA* [2000] AATA 1025, *AJKA v AFMA* [2001] AATA 258. The decision of the AAT in *AJKA v AFMA* is currently subject to a Federal Court review. See Gullett, W., Paterson, C. and Fisher, E. 2001. Substantive precautionary decision-making: the Australian Fisheries Management Authority's 'lawful pursuit' of the precautionary principle. *Australasian Journal of Natural Resources Law and Policy*. 7: 95-140.

3. Schedule 2 *Fisheries Legislation Amendment Act* 1997 (Cth) (re inclusion of the precautionary principle in s3(2)(b)).

4. *Fisheries Legislation Amendment Act* (No. 1) 1999 (No. 143) (re inclusion of s3(2)(c)). Schedule 2 commenced 11 December 2001.

5. See Gullett, Paterson and Fisher, n. 2.

6. The AAT stated (at para 77) that long-term economic benefit of the industry and ESD are 'equally important' statutory objectives.

7. Para 79. Cf Nicholls, D. and Young, T. 2000. Australian fisheries management and ESD – the one that got away? *Environmental and Planning Law Journal*. 17: 272-93 at 275.

8. Para 27.

9. Section 4 *Fisheries Management Act 1991* (Cth).

10. *Fisheries Legislation Amendment Act* (No. 1) 1999 (No. 143).

11. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-88 per Mason CJ and Deane J; at 298-303 per Toohey J; at 303-5 per Gaudron J.

12. s3(2)(b).

13. s3(1)(c).

14. Para 15.

15. [2000] AATA 442. Decision 5 June 2000.

16. Para 29.

17. Para 73.

18. Paras 38-39. See Re Drake and Minister for Immigration and Ethnic Affairs (No. 2) (1979) 2 ALD 634 at 645.

19. However, the AAT did not specifically consider all objectives, such as s3(1)(e).

20. Para 27.

21. Para 74.

22. Para 71.

23. See Gullett, W. 1997. Environmental protection and the 'precautionary principle': a response to scientific uncertainty in environmental management. *Environmental and Planning Law Journal.* 14(1): 52-69 and Fisher, E. 2001. Is the precautionary principle justiciable? *Journal of Environmental Law.* 13: 315-34.

24. See also *AJKA v AFMA* [2001] AATA 258 at para 86.

25. *Bannister Quest Pty Ltd v AFMA* (1997) 77 FCR 503.

26. At 521.

27. Para 69.

28. Para 95.