Substantive precautionary decision-making: the Australian fisheries management authority's 'lawful pursuit' of the precautionary principle

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Recommended Citation
Gullett, Warwick; Paterson, Christopher; and Fisher, Elizabeth: Substantive precautionary decision-making: the Australian fisheries management authority's 'lawful pursuit' of the precautionary principle 2001, 95-139.

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Abstract
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objective to ensure that the exploitation of fisheries resources is conducted in a manner consistent with
the exercise of the precautionary principle. The most recent of a series of Tribunal decisions which have
affirmed the Authority’s interpretation and application of the principle as contained in the Fisheries
Management Act 1991 (Cth) is discussed in detail, together with Federal Court rulings concerning the
content of the Authority’s statutory obligation to ensure that fisheries exploitation maximises economic
efficiency and is consistent with ecologically sustainable development. The wider relevance of the
decisions is explored with respect to state fisheries legislation and the growing expectation that the
management of Australian fisheries will be in a manner consistent with the precautionary approach
adopted in international fisheries agreements.

Keywords
authority, lawful, pursuit, principle, fisheries, australian, making, decision, precautionary, management,
substantive

Disciplines
Law

Publication Details
Gullett, W, Paterson, C and Fisher, E, 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, 2001, 95-139.
SUBSTANTIVE PRECAUTIONARY DECISION-MAKING: THE AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY'S "LAWFUL PURSUIT" OF THE PRECAUTIONARY PRINCIPLE

WARWICK GULLETT*, CHRIS PATERSON** and ELIZABETH FISHER***

ABSTRACT: In this article, the authors review recent Administrative Appeals Tribunal decisions concerning the Australian Fisheries Management Authority's exercise of discretionary powers in pursuit of its statutory objective to ensure that the exploitation of fisheries resources is conducted in a manner consistent with the exercise of the precautionary principle. The most recent of a series of Tribunal decisions which have affirmed the Authority's interpretation and application of the principle as contained in the Fisheries Management Act 1991 (Cth) is discussed in detail, together with Federal Court rulings concerning the content of the Authority’s statutory obligation to ensure that fisheries exploitation maximises economic efficiency and is consistent with ecologically sustainable development. The wider relevance of the decisions is explored with respect to state fisheries legislation and the growing expectation that the management of Australian fisheries will be in a manner consistent with the precautionary approach adopted in international fisheries agreements.

The authors would like to thank Kelly Crosthwaite, Legal Officer, Australian Fisheries Management Authority and Marc Wilson, Australian Team Leader, Tonga Fisheries Project, Ministry of Fisheries, Tonga for commenting on earlier drafts of the paper. Any errors or omissions are those of the authors.

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The regulation of fisheries has always been an example of attempting to manage a finite resource in circumstances of sharp socio-economic pressures and large scientific uncertainties.¹ It is thus not surprising that the precautionary principle has been a popular inclusion in conventions, statutes and policies that govern fisheries decision-making.² As a principle that states that scientific uncertainty should not be a reason to not take protective action, the precautionary principle promises a means of addressing the problems at the root of past fishery collapses. However, unresolved issues remain concerning the principle’s implications for decision-making in fisheries management. Will it improve fisheries management, and if so, will it also lead to better decision-making?

In Australia, the application of the precautionary principle has been a regular subject of merits and judicial review challenges in tribunals and courts. In 2000-2001, the Australian Fisheries Management Authority (’AFMA’) was subjected to a number of legal challenges to its purported use of precaution in making decisions concerning the placing of conditions on a pelagic longline fishing permit, excluding fishing in a certain area and refusing to grant permits.

¹ See, for example, J Bertram “Facts and Figures About the Fisheries” (1866) 4 Fortnightly Review 745 and M McGarvin “Twelve Late Lessons” in European Environmental Agency Late Lessons from Early Warnings (2001).

² Examples at the international level include:
(ii) the FAO Code of Conduct for Responsible Fisheries 1995, adopted by the 28th Session of the FAO Conference, 31 October 1995. The Code derives from the International Conference on Responsible Fishing held in 1992 in Cancun, Mexico. The Declaration of Cancun was adopted unanimously and is contained in Papers Presented at the Technical Consultation on High Seas Fishing Rome 7-15 September 1992 FLPL/84/1215 (Supp) 1993; and

Examples at the national level include:
(i) Australia: Fisheries Management Act 1991 (Cth) s 3(1)(b);
(iii) New Zealand: Fisheries Act 1995 (NZ) s 10;
(iv) South Africa: Marine Living Resources Act 1998 Chapter 1, Article 2(b); and
for longline and purse seine fishing. The resulting decisions enable us to consider whether and how the principle will improve fisheries management and decision-making. This article, in exploring these issues, focuses upon one recent Federal Administrative Appeals Tribunal (‘AAT’) decision, AJKA Pty Ltd v Australian Fisheries Management Authority (‘AJKA v AFMA’). In that decision the AAT considered whether the decisions under review were lawfully made in pursuit of AFMA’s statutory objective to ensure that the exploitation of fisheries resources is conducted in a manner consistent with the exercise of the precautionary principle. In upholding AFMA’s decisions, the AAT gave insights into the application of precaution.

This article is divided into four parts. First, there is a discussion of the problems of uncertainty in fisheries management, in particular concerning the regulation of fishing for skipjack tuna (the fish in question in AJKA v AFMA), and the operation of AFMA’s management objectives. The second section is a brief discussion of the precautionary principle, its inclusion in Commonwealth fisheries legislation and the way in which it has been utilised by AFMA as evidenced in three recent AAT appeals. The third section is a discussion of AJKA v AFMA. The case is important in that it not only builds on previous case law but also introduces the idea of “lawful pursuit” of the precautionary principle. The final section discusses the implication of this concept for fisheries regulation more generally, together with the implications for domestic fisheries management of developing international precautionary standards.

I. SKIPJACK TUNA AND FISHERIES REGULATION

Of central importance to analysis of the use of precaution in the case in question — which deals with a permit to fish for skipjack tuna in Australian waters — is an understanding of the characteristics of the species and its contribution to fish production in the South Pacific.

A. SKIPJACK TUNA

Skipjack tuna (Katsunon pelamis) are found widely throughout the tropical and subtropical areas of the world’s oceans and form a valuable component of the tuna resource of the Pacific and Indian oceans. This resource, which includes other species such as yellowfin tuna, southern bluefin tuna, bigeye tuna and albacore tuna, is fished extensively by a large number of countries, providing them with a range of social and economic benefits.4

The distribution and abundance of skipjack tuna is determined by the interaction of skipjack physiology, the highly productive nature of the species, and oceanographic and biological features such as water temperature, salinity, dissolved oxygen, thermocline structure, bottom topography, water transparency, current systems, water masses, biological productivity and prey


availability. These complex interactions typically result in skipjack forming large, productive and highly migratory size-specific schools above the thermocline and within the 15°C or warmer isotherm of the world’s oceans. The combination of the schooling and physiological characteristics of skipjack with oceanographic features such as the thermocline make them particularly vulnerable to capture by purse seine and pole-and-line fishing methods. These methods have been used to take large catches of skipjack, particularly in the Western and Central Pacific Tuna Fishery (‘WCPTF’) which for the last decade has taken approximately one million tonnes per annum. The importance of the skipjack tuna resource to the small island states of the Pacific region and the many other nations involved in its utilisation, as well as the significant contribution of this resource to global fisheries production, highlights the need for it to be exploited in a sustainable manner.

B. SKIPJACK TUNA FISHERIES IN AUSTRALIAN WATERS

Skipjack tuna are widespread in Australian waters. Their distribution varies seasonally such that in summer they can be found as far south as southern Tasmania, though in late winter and spring they are rarely observed south of the New South Wales – Victorian border. Commercial operators in Australia’s Eastern Tuna and Billfish Fishery (‘ETBF’) predominantly catch the species, although small catches have been taken in the Southern Tuna and Billfish Fishery (‘STBF’) and the Western Tuna and Billfish Fishery (‘WTBF’). Recreational fishers also take small quantities.

The ETBF, STBF and WTBF are multi-species, multi-method fisheries in which such methods as long-lining, pole-and-line, purse seining as well as minor line methods (trolling, rod and reel, and hand-lining) are employed to catch tuna. The management areas of the ETBF, STBF and WTBF are illustrated in Figure 1. These fisheries are contiguous with fisheries for tuna located in a wider region

7 GD Sharp “Behavioral and Physiological Properties of Tuna and their Effects on Vulnerability to Fishing Gear” in GD Sharp and AE Dizon (eds) The Physiological Ecology of Tunas (1978) pp 397-449. However, since the early-1990s there has been relatively little pole-and-line fishing.
9 BB Collette and CE Nauen “Scombrids of the World. An Annotated and Illustrated Catalogue of Tunas, Mackerels, Bonitos and Related Species Known to Date” FAO Fisheries Synopsis 125(2) (1983).
of the western and central Pacific Ocean, the Indian Ocean and Indonesian waters.

The evolution of skipjack catch in Australian waters has been determined by wider trends in Australian tuna fisheries. Prior to the mid-1980s, skipjack tuna was mainly taken as bycatch during fishing activities for southern bluefin tuna ('SBT') off the New South Wales coast. However, a decline in SBT catches and the development of export markets for sashimi-grade Australian caught SBT resulted in skipjack becoming the key tuna species targeted in Australian waters for use in domestic canning. Catches of skipjack increased accordingly, particularly in the area of the ETBF where, during 1991-92, catches were reported to have reached 7,000 tonnes. However, in subsequent years, catches of skipjack have been variable, dropping to as low as 826 tonnes in 1997-98 from 4,689 tonnes in 1996-97 and increasing to approximately 4,600 tonnes in 1998-99.

C. THE ROLE OF THE AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY

Management of the ETBF, STBF and WTBF is undertaken by AFMA. AFMA is a statutory authority established on 3 February 1992 pursuant to s 5 of the Fisheries Administration Act 1991 (Cth) with the responsibility for managing fisheries in the Australian Fishing Zone ('AFZ'), that is, those waters adjacent to Australian territory within the limits of the Exclusive Economic Zone ('EEZ') but outside the jurisdiction of the states or the Northern Territory. AFMA’s functions relate principally to the regulation of Australian fisheries by devising management plans, allocating statutory fishing rights under those plans, granting fishing permits and setting catch and gear limits. Arguably AFMA’s most important objective is to ensure that the exploitation of fisheries resources is conducted in a manner consistent with the principles of ecologically sustainable development ('ESD').

In the period preceding the establishment of AFMA, the Australian fishing industry experienced significant structural changes largely brought about by overcapitalisation and problems with stock levels in major fisheries. These pressures facilitated the transition to more controlled management arrangements. The establishment of AFMA as a public service body with the specific purpose

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10 P Ward et al note 8 above.
12 Fisheries Administration Act 1991 (Cth) s 7. AFMA's responsibilities are detailed further in the Fisheries Management Act 1991 (Cth).
of managing fisheries was influenced, as was that of its counterparts in other countries and subnational jurisdictions, by the ongoing process of the "modern fisheries management experiment" as described by Stephenson and Lane.\(^{13}\) This series of 'experiments' applied modern scientific, economic and political ideas to the development of philosophical constructs or 'wide use' paradigms for fisheries management. The result was an increasing set of regulatory measures - such as limited access, total allowable catches ('TACs'), fishing effort controls and market based mechanisms including individual transferable quota systems - being imposed primarily by governments through policy intervention in an attempt to achieve targets for fisheries management based upon the idea of balancing the economic performance of a fishery with resource sustainability. Recent developments demonstrate the increasingly complex legal and policy setting for fisheries management in Australia. These include new objectives for marine resource management associated with the introduction of Australia's Oceans Policy in late-1998,\(^{14}\) the new requirements for the preparation of strategic environmental assessments for Commonwealth managed fisheries under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'),\(^{15}\) together with amendments to the EPBC Act to include recent changes to the now repealed *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth) that removed the automatic exemption of most marine fish from wildlife export controls to ensure exemptions are available only for marine species harvested in accordance with sustainable and ecologically-based management arrangements.\(^{16}\) In addition, there is an increasing expectation that Australia will give domestic effect to the increasing array of international fisheries instruments.\(^{17}\)

Many of the objectives and functions of AFMA detailed in the *Fisheries Management Act 1991* (Cth) and the *Fisheries Administration Act 1991* (Cth) reflect the influence of the 'wide-use' fisheries management paradigm on the development of Australian fisheries management systems. In some cases this approach has been effective. A number of fisheries have developed considerably and some individual fisheries are now significant export earners and vital contributors to the economic and social well-being of coastal communities. Nonetheless, some Australian fisheries are over-fished, many are fully fished and the status of others remains uncertain. While current calls of a general crisis in Australian fisheries may be overstated, it has become increasingly important that AFMA pursue its ESD objective effectively as community concern

\(^{13}\) RL Stephenson and DE Lane "Fisheries Science in Fisheries Management: A Plea for Conceptual Change" (1995) 52 *Canadian Journal of Fisheries and Aquatic Sciences* 2051.


\(^{15}\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 147-154.

\(^{16}\) *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* (Cth).

\(^{17}\) This is discussed in Part IV.
regarding the management of Australia’s fisheries increases, in large part due to a growing awareness that the long term sustainability of fish resources may be jeopardised by high levels of fishing in the short term. Thus the achievement of AFMA’s management objectives, including the ESD objective, is of critical importance not only to the maintenance of stock levels and ecological integrity, but also to the interests of fishers, who typically seek secure long-term fishing rights, and the broader community which becomes reliant on the economic and social benefits of successful fisheries. The legal context and operation of AFMA’s statutory objectives will now be considered.

(i) AFMA’s statutory objectives

Section 3 of the *Fisheries Management Act 1991* (Cth) states 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, expressed in s 3(1), as amended in 1997, 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, s 3(2), as amended in 2001, 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

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18 *Fisheries Legislation Amendment Act 1997* (Cth) Schedule 2.
19 These objectives are replicated in *Fisheries Administration Act 1991* (Cth) s 6. The obligation placed upon AFMA to pursue these objectives in performing its functions is reinforced by *Fisheries Administration Act 1991* (Cth) s 16(1).
20 *Fisheries Legislation Amendment Act* (No. 1) 1999 (No. 143) (re inclusion of s 3(2)(c)). Schedule 2 commenced 11 December 2001.
(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.”

The principal objectives for AJKA v AFMA are those contained in s 3(1)(b) and (c). Section 3(2) can be understood as relating principally to the avoidance of bycatch and the achievement of long term sustainability of fisheries and thus supports the latter part of s 3(1)(b). It is to be noted that the formulation of the requirement to “regard” the s 3(2) objectives requires a lower standard to be satisfied than for s 3(1) objectives, which are to be “pursued”.

The question then arises of whether all or only some of the s 3(1) objectives must be pursued by AFMA in making a decision in the performance of its functions. The duty to pursue the objectives is clearly mandatory due to the use of the word “must”. Each of the objectives is linked with the word “and” which is normally understood to mean that the parts to which it pertains are to be treated conjunctively rather than disjunctively. However, the question of whether s 3(1) is to be read in this way is not settled. In the Federal Court case of AFMA v PW Adams Pty Ltd (‘Adams’),21 Justice Sheppard read s 3(1) as requiring AFMA to take into account all the s 3(1) objectives, although he added:

“No doubt there will be cases in which the minister may give varying degrees of weight and emphasis to this or that objective. So long as each objective is pursued, there will be no breach of duty. But if one of the objectives is not pursued at all, then that will not be the case.”22

Justices Tamberlin and Lehane, however, thought differently. They indicated that s 3 could not not be construed as compelling AFMA to consider each statutory objective in making every decision made for the purpose of performing its functions because of the differences in the nature, level and importance of particular decisions that are taken by AFMA.23 Justice Drummond in Bannister Quest Pty Ltd v AFMA (‘Bannister Quest’)24 accepted this view, although he considered that the importance of the policy decision before him was such that all of the s 3(1) objectives were required to be taken into account in the making of that decision.25 More recently, Justice Branson opined that s 3(1) could not

“be construed as intending to impose on AFMA an obligation to ensure that every action or step that it takes is one which, standing alone, can be

24 Bannister Quest Pty Ltd v AFMA (1997) 77 FCR 503.
25 Bannister Quest Pty Ltd v AFMA (1997) 77 FCR 503 at 514.
characterised as an action or step taken in pursuance of its objectives. Such a construction ... would make the administration of AFMA virtually impossible.}\(^{26}\)

Nicholls and Young have argued along similar lines to that of Justice Sheppard.\(^{27}\) They argued that in relation to the ESD and economic efficiency objectives in sub-ss (b) and (c) respectively (which qualify the “exploitation of fisheries resources”), AFMA cannot “simply dismiss one objective and apply the other”. The proper approach, they submitted, is that exploitation of fisheries resources is permitted provided that ESD can be ensured and the exploitation is undertaken with economic efficiency. In this way, they argued that seeking maximum economic efficiency in the exploitation of a fishery “is not inconsistent with the application of ESD or the exercise of the precautionary principle” because AFMA can only pursue economic efficiency in circumstances where it was able first to pursue the precautionary objective.\(^{28}\)

The problem with this approach, it is submitted, is that the *Fisheries Management Act 1991 (Cth)* does not prioritise the objectives so it is not valid to state that the pursuit of the economic efficiency objective in sub-s (l)(c) is dependent on the already pursued ESD objective in sub-s (b). Further support for this argument can be found when one considers the existence of the other objectives that must be “pursued”: sub-s (a) concerns “efficient and cost-effective fisheries management”; sub-s (d) concerns accountability to the fishing industry and the public; and sub-s (e) concerns cost recovery. The pursuit of one or more of these other objectives in a given situation, although not necessarily inconsistent with the objectives in sub-ss (b) or (c), may not actually be in the pursuit of them. A factual situation may arise in a fishery such that it may be necessary for decision-making to occur to achieve one statutory objective but which will not permit the achievement of other objectives.\(^{29}\) However, a decision made in such circumstances should not be considered an unauthorised exercise of power for failing also to be in pursuit of objectives which, on the facts, are not relevant to the decision.

Where the exercise of the precautionary principle and the maximisation of the economic efficiency objective are both considered to be relevant to a particular fisheries management issue, the differences in what each objective requires may mean that it is impossible for both of them to be pursued. Consider, for example, a decision to set a conservative TAC for a species about which uncertainties abound. The decision would be considered lawfully in pursuit of the exercise of the precautionary principle because it was made in recognition of

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\(^{26}\) *P.W. Adams Pty Ltd v Australian Fisheries Management Authority* (1998) 49 ALD 68 at 76.

\(^{27}\) D Nichols and T Young note 11 above.

\(^{28}\) As above p 276.

\(^{29}\) For example, pursuit of the s 3(1)(e) cost recovery objective is unlikely to be relevant in situations where AFMA is performing its function expressed in *Fisheries Administration Act 1991 (Cth)* s 7(c) to consult with members of the public in pursuit of its objective in *Fisheries Management Act 1991 (Cth)* s 3(1)(d) to ensure accountability to the Australian community.
the fact that fish stocks may take a long time, if ever, to recover from a crash and that the effects of overfishing are slowly reversible. However, it could be argued that it unlawfully fails to pursue the maximisation of economic efficiency in the exploitation of fisheries resources – at least in the short term – because it could be argued that a higher TAC (which generally would generate more revenue) would still enable the maintenance of stock levels. In this situation it would be open to argue that the TAC was too precautionary and was thus inconsistent with the application of the maximising economic efficiency objective. A construction of s 3 that would require the pursuit of both sub-ss (b) and (c) would render such a precautionary management decision unlawful.

An approach to reduce the potential inconsistency between these objectives, which it is submitted would give effect to the purpose of the Act, is to interpret the economic efficiency objective as applying over a long period rather than in the context of one or two fishing seasons. This would be more in line with the longer time frame view for environmental protection embodied in the precautionary principle. As such, AFMA would be obligated to pursue precautionary exploitation of fisheries resources except where to do so would be inconsistent with the long-term economic efficiency of such exploitation. Yet arguably, such precautionary management would, by definition, be at least in part pursuing long-term economic efficiency.

Support for such a statutory construction can be found in Justice Drummond’s decision in Bannister Quest. In the Justice’s opinion (at 515), a reading of the Commonwealth’s “New Directions for Commonwealth Fisheries Management in the 1990s” policy document (extrinsic material relevant to the interpretation of Act) showed:

"that this particular objective is directed to requiring AFMA to manage each fishery so as to bring about a situation in which the maximum aggregate profits that can be generated by the body of operators working a particular fishery, being a level of profits which will be maintainable in the long term from the resources of the particular fishery, are achieved. As the "New Directions" document repeatedly asserts, in such a situation the objectives of sustaining the fishery resources in the long term and maximising the resource rent that the Commonwealth can extract from those working the public resources of the fishery for their own individual benefits are both realised" (emphasis added).

However, an unresolved issue is exactly how long a “long term” management perspective should be. It is suggested here that it should at minimum be as many fishing seasons as equate the life cycle of the target species. A complication here is that there is significant interspecies variability in the life-history characteristics of most fished species, with maximum age being no exception. See 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 National Environmental Law Review (forthcoming).

Note that AFMA considers that its legislative objectives are “mutually reinforcing when applied in balance”. AFMA states rather unclearly that “[M]anagement decisions require all legislative objectives to be considered relative to the particular management objectives at the time, noting that not all legislative objectives may be considered as equally important in all instances.” It also indicates that it makes a judgment on a case-by-case basis on the “relative weighting” that should be given to each objective, although it usually gives “primary importance” to pursuing sustainability in fisheries.
There are two ways courts can approach this issue. The first approach is that they can read s 3(1) literally and hold that all objectives must be pursued, albeit given different weight. In doing so, courts cannot be too exacting in determining what amounts to sufficient “pursuit” so that they do not invalidate a potentially large range of decisions which are clearly in pursuit of some objectives but are less clearly in pursuit of others. This approach may be one the courts will take. For example, Justice Drummond in Bannister Quest phrased the duty to pursue the objectives as requiring that they be taken into “account”, as did Justices Tamberlin and Lehane in Adams. Such a requirement is satisfied relatively easily.33 Using this approach, a decision would not be set aside if there were minimal evidence that all the objectives had been considered to some degree. However, the preferred approach is to construct the provision in such a way as to promote the purpose of the Act.34 To this end, it is submitted that the Commonwealth Parliament would only have intended that, for a decision to be validly made, it must in some way pursue those statutory objectives which are relevant to the making of that decision. A decision made in the pursuit of one objective should satisfy the legal test for decisional validity so long as it is not inconsistent with the pursuit of another relevant objective or gives manifestly unreasonable paramountcy to the pursuit of one relevant objective over another. This approach would support the purpose of the Act in so far as it would not invalidate a decision made in the pursuit of one or more objectives but which understandably fails also to be in pursuit of irrelevant objectives. It would also enable the courts to require a relatively high standard to be met for a decision to be considered in “pursuit” of an objective, and thus avoid the standard being reduced merely to that of considering the objective in the making of the decision.

In the application of either approach, the lawful exercise of AFMA’s discretionary powers is complicated. In the first situation, where AFMA must pursue all of its statutory objectives, it must ensure that every decision it makes in the exercise of its functions in some way furthers each of the at times disparate objectives. In the preferred situation, where AFMA need only pursue relevant objectives, it still must constantly have regard to the various ill-defined and potentially conflicting objectives in order to determine those which are relevant to the particular function it is seeking to carry out in the case at hand. In both situations, AFMA must consider the appropriate course of action to take in the pursuit of the relevant objective or objectives.

The debate above should not simply be understood as legalistic exercises in rather convoluted reasoning or products of poor statutory drafting. Rather, the difficulties involved in conceptualising the nature and limits of AFMA’s power reflect the core difficulties at the heart of fisheries regulation as well as broader questions about the nature of legitimate administrative power. In regards to the former, the question of balance between incommensurable objectives can be

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34 Acts Interpretation Act 1901 (Cth) s 15AA(1).
seen in other fishery regulatory regimes. Implicit in the judicial debate on the topic are two interrelated matters. First, how should administrative bodies weigh up such factors and secondly, how far should a court and tribunal interfere in such a process? These two factors have clearly influenced past interpretations and, as we shall see, have also influenced the way in which the precautionary principle has been interpreted.

D. UNCERTAINTY IN FISHERIES DECISION-MAKING

The outcomes of the ‘modern fisheries management experiment’ are well known. Many commentators consider that the experiment has not been able to provide the basis for the development of the institutional arrangements necessary for achieving sustainable outcomes in the world’s fisheries. Fisheries collapses continue to occur and it is generally considered that the ‘race for the fish’ is more evident now than ever before. The concern about fishery collapses in Australia is indicative of concern about trends in world fisheries. Concern in the Australian context has concentrated on the effects of fishing on commercial and recreationally important fish stocks and other marine resources, equity issues regarding the allocation of fishing rights, and the need for mechanisms to resolve conflicts associated with the expanding multiple-use aspect of fisheries resources.

35 See, for example, the US Magnuson-Stevens Fishery Conservation and Management Act Public Law 94-265. For discussion, see JL McHugh “Fisheries Management Under the Magnuson Act: Is it Working?” (1990) 21 Ocean Development and International Law 255.

36 For a more general discussion, see M Aronson and B Dyer Judicial Review of Administrative Action (2nd ed, 2000).


38 See, for example, SS Hanna “Institutions for Marine Ecosystems: Economic Incentives and Fisheries Management” (1998) 8 Ecological Applications 170. However, less attention has been devoted in the literature to the successes of the experiment.


40 SJ Kennelly “The Issue of Bycatch in Australia’s Demersal Trawl Fisheries” (1996) 5 Reviews in Fish Biology and Fisheries 213.


The increasingly complex legal, political, social, scientific and technical environments in which Australia's fisheries are managed has resulted in many fisheries stakeholders doubting the ability of existing institutional arrangements to achieve contemporary goals and objectives for fisheries management. The responses to fisheries management challenges have typically relied on controlling fishing effort so as not to exceed predetermined catch limits which are based on biological and, to a lesser extent, economic attributes of fisheries in conjunction with other regulatory tools. Some of the more recent developments in fisheries management practices have, however, relied on market type policy approaches, such as those of the Individual Transferable Quota philosophy. Many of the arrangements focus on achieving maximum sustainable exploitation of resources but often fail to address the complexity inherent in fisheries systems. Fisheries systems involve the interrelations of such dynamics as environmental variability, multispecies interactions and unpredictable effects of fishing on fish stocks. Such complexity not only influences the effectiveness of policy intervention, but also the accuracy of indicators used to assess the effectiveness of such intervention. It also precludes the predictability of the sort required to exercise the numerical control of fishing mortality envisioned by current theory. 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. It is, for example, a difficult if not a futile task to determine the maximum sustainable yield ('MSY') of a targeted species due to the need to identify the abundance of the stock when fish do not lend themselves to observation. However, figures on resource level do not suffice. In order 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 — information which may be unavailable or unreliable. 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 the target species prey, and variations in biomass competition.

It is inevitable that fisheries management will continue to take place in situations where there is irreducible uncertainty due to the massive and intractable information problems associated with describing and understanding the complex nature of most fisheries. As a result, decision-making under a


The dramatic collapse of the fishery for orange roughy (Hoplostethus atlanticus) off the east coast of Tasmania in the early- to mid-1990s neatly illustrates the need to be mindful of uncertainty and utilise foresight in the management of fisheries. Fishing fleet capacity and catch of orange roughy in this fishery were permitted to develop in the mid- to late-1980s by AFMA’s predecessor, the Australian Fisheries Service, in the absence of knowledge about the sustainability of such actions. This lack of foresight may be implicated in the resource decline and overcapitalisation problems which ultimately led to the collapse of the fishery. It is unlikely that this scenario would have been so severe had a more cautious approach been adopted in developing the fishery, such an approach involving establishing direct or indirect controls on fishing mortality consistent with conservative target reference points for the management of the fishery.  


D Nicholls and T Young note 11 above p 276.

development of arrangements for the management of skipjack tuna has, however, lagged behind the development of catch of skipjack in the respective fisheries, particularly in the ETBF. While there is evidence to suggest that the number of vessels fishing for skipjack tuna in the ETBF changes from year to year, there is no detailed information regarding the levels of fishing effort in the fishery to determine whether the variable catches are a result of the effects of fishing effort in the ETBF on the dynamics of skipjack tuna populations throughout the western Pacific. Much of the variation in catches in the EFTBF may, however, be driven by high inter-annual variability of the availability of the species in certain areas of the fishery. Since the ETBF and WCPTF are believed to share the same skipjack stock, wider trends in the WCPTF are relevant to the ETBF.

There is, as yet, no evidence to suggest that increased catches of skipjack tuna in Australian waters will depress the abundance of the species in the ETBF, STBF and WTBF, nor in the area of the broader WCPTF. The distribution and abundance of skipjack tuna is believed to be significantly influenced by changes in equatorial Pacific Ocean water temperature regimes driven by cycles of El Nino and La Nina conditions. If this is the case, regional oceanographic processes may largely determine recruitment of skipjack to the AFZ rather than the effects of fishing in the ETBF and the distant WCPTF.50 Ward et al argued that if this is the case, recruitment of skipjack to the AFZ is probably independent of the level of fishing effort for the species in preceding fishing seasons. As such, it could be inferred that the catch of skipjack in the AFZ could increase without threatening the sustainability of the wider skipjack resource of the Pacific, particularly when the species is considered to be underfished in the WCPTF and that there has been virtually no fishing for the species in the northeastern area of the AFZ where the availability of skipjack is likely to be less variable than in more southern components of the AFZ.51 However, the very lack of comprehensive information regarding the levels of catch and fishing effort for skipjack in the AFZ contributes to the uncertainty that exists with regard to the stock because there is less opportunity to infer the effects of fishing on the distribution and abundance of the species. Further, the extent to which skipjack tuna are isolated from other regional populations is not known. If there is a degree of isolation then a sharp increase in fishing effort may cause local stock depletions. As a result of these uncertainties, skipjack tuna present AFMA with considerable management challenges when it seeks to fulfil its potentially conflicting objectives of ecologically sustainable and economically efficient exploitation of fisheries resources. The two main management measures currently employed by AFMA in the regulation of skipjack catch are controls on purse seine net size and the adoption of a "limited access policy". The policy provides that permits to target the taking of skipjack tuna by the purse seine method in the ETBF, STBF and WTBF are not to be granted unless "cogent reasons" to the contrary are established. As will be seen, the lawfulness of this policy – in so far as it is not inconsistent with the purpose of the *Fisheries Management Act 1991* (Cth) – was of central importance to the decision in *AJKA v AFMA* because it was the

50 P Ward et al note 8 above.
51 As above.
making of decisions in accordance with that policy from which review was sought.

II. THE PRECAUTIONARY PRINCIPLE AND FISHERIES MANAGEMENT

In light of the uncertainties that bedevil fisheries management, it is not surprising that the precautionary principle has been a popular inclusion in fisheries policy in recent years. As the Appendix highlights, it has been explicitly included in a number of different pieces of fisheries legislation as well as arguably being implicitly included as part of the Australian omnibus definition of ecologically sustainable development. It is useful to note in some detail aspects of the precautionary principle before proceeding.

A. THE PRECAUTIONARY PRINCIPLE

The precautionary principle has been a high profile principle in environmental law in the last decade, both internationally and domestically. It appeared, in its present form, in West German environmental policy in the late-1970s and became a key principle in international environmental law by the early-1990s. The principle has been applied in numerous areas including food safety, chemicals, environmental impact assessment, marine pollution, and others.

53 See D Freestone and E Hey note 53 above; and J Cameron “The Principle Principle in International Law” in T O’Riordan, J Cameron and A Jordan (eds) note 53 above.
and of course fisheries. Despite its popularity the principle has remained controversial. In the main, that controversy has focused on what the principle actually means. For many the principle is a “no risk” principle while for others it seems to be nothing new.

While there are many formulations of the precautionary principle, a remarkable aspect of the Australian experience with the principle is that a common formulation of it is used throughout policy documents and legislation at all three levels of government. All legislative adoptions of the principle in Australia formulate the principle in the same manner as the 1992 Intergovernmental Agreement on the Environment (‘IGAE’). The Fisheries Management Act 1991 (Cth) provides no exception: s 4 provides that the principle has, for the purpose of the Act, the same meaning as in clause 3.5.1 of the IGAE. This formulation is an expanded but substantively identical version to that contained in Principle 15 of the 1992 Rio Declaration on Environment and Development. 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

60 International Tribunal for the Law of the Sea, Southern Bluefish Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) (1999) 38 International Legal Materials 1624.
B. CASES CONSIDERING THE PRECAUTIONARY PRINCIPLE AND FISHERIES REGULATION

The precautionary principle has been considered in over seventy merits and judicial review cases in Australia and overseas. In all the tribunal hearings or courts cases in which the principle has been considered, whether they concern fisheries or not, there have been two central concerns: first to define what the precautionary principle is, and secondly how that principle should be applied in specific cases.

The principle, as articulated above, states that where there are serious threats to the environment the fact that there is scientific uncertainty about those threats should not be used as the reason for not taking action to prevent harm. The principle is thus concerned with the decision-making process rather than determining a particular outcome. In particular, it ensures that decision-makers cannot hide behind a façade of 'facts' where none exists. The principle forces decision-makers to scrutinise the quality of the science they are using, the scientific uncertainties involved and the more general overarching reasons for making a decision. As seen above, scientific uncertainty has been one of the most problematic features of fisheries management. The ability to regulate has been severely limited by a lack of knowledge even though past experiences attest to the risks of overfishing.

(ii) an assessment of the risk-weighted consequences of various options."

Part (ii) indicates that precaution requires careful assessment of various management options and that they be balanced in any final decision. However, it does not enable easy implementation of the principle or remove confusion about its content because further necessary detail is lacking about exactly how, for example, decision-makers should assess "risk-weighted consequences". Another concern with this formulation 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. However, with this said, for our purposes the IGAE version of the principle is that which AFMA must consider, and thus the version which the AAT must consider in reviewing AFMA's decision.

As seen above, scientific uncertainty has been one of the most problematic features of fisheries management. The ability to regulate has been severely limited by a lack of knowledge even though past experiences attest to the risks of overfishing.

Substantive Precautionary Decision-Making


For a lengthier discussion of this see E Fisher above; and A Sifting "The Precautionary Principle and Science and Technology" in T O'Riordan, J Cameron and A Jordan (eds) note 53 above.

M McGarvin note 1 above.

For a review of some of these cases see E Fisher note 66 above.
principle means and, secondly, to determine what are the implications of that definition for decisions.

In regards to the first concern, the principle has been defined in numerous ways ranging from the rather general ("a commonsense duty to be cautious") to the more specific (a reversal or shifting of the burden of proof). In regards to the latter question, the case law has been in many ways disappointing. While courts have upheld the principle as a relevant consideration, it has seemingly had very little impact on decision-making processes. Prior to the decision in *AJKA v AFMA*, the AAT delivered three important decisions in 2000 in which AFMA's application of the principle was considered and fresh insights were given into the application of the principle. This section briefly summarises these cases and their contribution to understanding AFMA's precautionary principle objective. In each case one can see the AAT setting down clear but flexible standards for precautionary decision-making.

The first case to be discussed, *Dixon v AFMA*, concerned a review of AFMA's decision refusing to vary the area conditions on a commercial pelagic longline fishing permit. While a variation would have aided short term economic efficiency, there were concerns about long term overfishing and its implications for permit holders in other fisheries. AFMA justified its decision, in part, on the pursuit of the precautionary principle. The applicant argued that the principle was invalid because the threshold for its operation ("threats of serious or irreversible damage") had not been met and thus was construing the principle in such a way that its application was limited to a specific set of cases, the test for which was highly rigid. The AAT rejected such an argument and affirmed AFMA's decision. In doing so it made some important observations about AFMA's responsibility to act in pursuit of the principle. It stated that the applicant's contention, that AFMA cannot exercise the principle if the threshold test is not met, "has merit" if the measures undertaken are not in the pursuit of other Fisheries Management Act 1991 (Cth) s 3(1) objectives. However, there was nothing to prevent AFMA from exercising the principle if the threshold is not met, as long as it is properly acting in pursuit of other mandatory objectives. Thus, with regard to the onus of proof, AFMA could adopt a precautionary standard until such time as it was established that the removal of the standard

71 *Conservation Council of South Australia v Tuna Boat Owners Association (No. 2)* [1999] SA ERDC 86 and *A.P Pollution Control Board v Nayudu* 1999 (1) UJ (SC) 426.
72 For the reasons why this is the case, see E Fisher note 66 above at 322.
would not cause a risk of serious or irreversible damage. However, in such a case, it would be valid for AFMA to retain the standard if this would be in pursuit of other mandatory objectives. Thus the AAT was setting out two levels of operation. In cases where the “threshold test” had been met, the principle was obligatory, thus prohibiting inaction. However, in cases where the threshold had not been met the principle was still valid and relevant. It is to be noted that the Tribunal indicated that it might be that an AFMA decision will be invalid if it is properly in pursuit of the precautionary principle but gives that objective “undue paramountcy” over other mandatory objectives. On the facts, the AAT held that the reliance on the principle was consistent with the economic efficiency objective.

The next case, Arno Blank v AFMA, concerned a review of a decision to grant a fishing permit which excluded fishing in a certain area. AFMA had closed part of the scallop fishery due to significant falls in catch rates and concern that further fishing activity would destroy breeding stock and seriously reduce the chances for long term recovery of the fishery. Closure of the area effectively shut down the fishery given the known distribution of scallop beds in the fishery at that time. The applicant contended that the certainty of obtaining a commercial return by opening the area for the present season outweighed the uncertainty created by closing the area and hoping for spawning but risking scallop mortality which might occur if mature scallops were not fished. Moreover, the applicant argued the precautionary principle only applied to threats to long term sustainability. The Tribunal, in making its decision, recognised the uncertainties and the “risk weighted options” involved. It recognised the economic risks but considered that they were countered by the reality that if harvesting did occur, opportunities for spawning would definitely be lost. The Tribunal considered that the scallop bed should be given every opportunity to spawn and affirmed AFMA’s decision in pursuit of the precautionary principle. In doing so the Tribunal noted that the “onus of proof is on the operator (the applicant) to show harm is not being caused rather than on AFMA to prove safeguards are essential”.

The final recent decision to note is that of Latitude Fisheries Pty Ltd and Anor v AFMA. In this case, although the AAT affirmed AFMA’s decision which it had based in part on the precautionary principle, the Tribunal did not agree with AFMA’s justification of the decision as a proper exercise of the principle. The facts of the case are complicated and most issues litigated

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concerned matters unrelated to the present discussion. The AAT reviewed
AFMA's decision not to permit the applicant to take tuna by the longline
method. The applicant argued that the principle was of no or insignificant
relevance because there was no evidence of threats of serious or irreversible
environmental damage by the permit it sought. On this point the AAT agreed
although its decision created less of a 'bright line' threshold than the applicant
was arguing for. The AAT stated that the evidence before it did not support a
conclusion that to grant a fishing permit as sought "would offend against the
"precautionary principle" since there is not ... sufficient scientific evidence of a
serious threat to ecological sustainability of the three species in question using
the long-line method."84 The evidence that did exist was of the significant
"latent effort" (being the presently unused but usable rights to fish held by
existing permit holders) in the fisheries in question. However, AFMA was not
concerned about this in the short period for which the permit would be in effect.
The AAT stated that AFMA was satisfied with the effectiveness of the present
management measures "and that there is no present ESD risk"85 in the fisheries
from longline fishing. Notwithstanding this conclusion, the AAT affirmed the
decision on unrelated public interest grounds.

A number of points can be noted from these three cases. First, the
precautionary principle has very much developed into a full scale principle and
these decisions show that the principle can be a basis for judicial or merits
review.86 The reasoning in these three cases sets out when it is and is not
acceptable to apply the principle. Secondly, the principle clearly requires both
AFMA and the AAT to inquire more carefully into the scientific uncertainties
involved. A feature of these decisions is the lengthy analysis of the inadequacies
of scientific knowledge.87 The existence of scientific uncertainty is not being
used as a blanket excuse by either AFMA or the AAT but rather it structures
inquiry. Thirdly, while the cases clearly set out threshold tests for applying the
principle, those threshold tests do not result in a rigid 'all or nothing' approach.
Rather, as can be seen in Dixon v AFMA, the threshold test is really one of
whether the application of the precautionary principle is obligatory and whether
it could possibly be relevant, and as such must be weighed against other
principles. Finally, the application of the principle is not always resulting in a
particular outcome and the AAT is clearly ensuring that there is some flexibility
in its application.

84 Latitude Fisheries Pty Ltd and Anor v AFMA [2000] AATA 1025. Decision 22
85 Latitude Fisheries Pty Ltd and Anor v AFMA [2000] AATA 1025. Decision 22
86 Note in this regard the AAT’s discussion of their competence. See Arno Blank v AFMA
AATA 235 para 71.
87 For example, Arno Blank v AFMA [2000] AATA 1027. Decision 15 November 2000
paras 39-41.
III. AJKA LTD v AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY

In AJKA v AFMA the AAT was once again required to consider a challenge to AFMA’s use of the precautionary principle in relation to its refusal to grant a fishing permit. The AAT was thus given another opportunity to consider in detail the obligation placed on AFMA to pursue the principle and what this requires in a fact situation concerning increased fishing activity for a species about which many uncertainties exist.

A. THE PERMIT APPLICATIONS

On 18 February 1998, AJKA Pty Ltd (‘the applicant’) submitted an application to AFMA (‘the respondent’) pursuant to the Fisheries Management Act 1991 (Cth) s 32 to target the taking of skipjack tuna by the purse seine method in the AFZ, despite indications from AFMA that it would be unlikely to grant such permits because of its “limited access policy”. The application was refused on 5 March 1998. A second application was submitted on 12 March 1998 to target skipjack tuna in “Australian Waters Southern & Western Tuna Fishery”. On 1 April 1998, this application was also refused. Both decisions refusing the applicant’s two applications for permits were affirmed by AFMA on 3 August 1998 by way of internal review. AJKA then applied to the AAT for review of the internal review decision.

B. THE EVIDENCE

This section outlines the arguments put forward by the applicant for the permits to be granted, and the arguments put forward by the respondent seeking to justify the refusal to grant the permits.

(i) The case for the grant of permits to take skipjack tuna in the AFZ

The argument put forward on behalf of the applicant that the permits to take skipjack tuna should be granted rested on three main grounds. These were first, that there would be economic benefits if fishing were permitted; secondly, there was no evidence that skipjack stocks were under threat; and thirdly, the evidence that did exist indicated that the skipjack resource was abundant, not endangered and under-utilised. It was submitted that AFMA’s “limited access policy” was unlawful because there were “cogent reasons” in this case to depart from the policy. The main “cogent reason” put forward was that the granting of a new permit was appropriate because many existing permit holders were not using their permits due to the high cost and effort involved in catching skipjack. It was also submitted that Australian fishers take only “an infinitesimal quantity” of the skipjack tuna resource.

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88 Internal review is required by Fisheries Management Act 1991 (Cth) s 165(5) as a precondition for review of an AFMA decision by the AAT. See also s 165(7).
With regard to the economic benefits of granting the permit, it was explained that the vessel for which the permit was granted, the 35 metre Independence, had already been converted to fish in the purse seine method and currently operated for about two months each year to fill its quota of southern bluefin tuna. It then remained inactive for a further ten months each year. The benefits of granting the skipjack permit would be that the vessel could operate for a further six months each year and in doing so create employment for around ten people for this period. This would, according to the principal director of the applicant, “help the whole country” by enabling more tuna processing to be undertaken in Australia with clear employment benefits. In addition, by enabling better utilisation of an existing boat, it was argued that the granting of the permit would be consistent with the objective contained in s 3(1)(c) by enabling the operator to operate more effectively in another fishery. It was argued that this would be “consistent with the overall achievement of economic efficiency within the whole of the Australian fishery.”

The applicant’s counsel was careful to point out that the applicant was not advancing a case concerned with the individual economic efficiency of the operator of Independence. Rather, it

“pursued economic efficiency in broader terms, in that to allow the applicant a permit would assist the Australian economy by enabling the more efficient utilisation of a vessel already in existence and limiting the need to import so much skipjack tuna.”

This was a necessary argument to make in light of the Federal Court’s ruling in Bannister Quest, setting aside a decision by AFMA made after impermissible consideration of the social and equity circumstances of individual fishing operators. Justice Drummond stated that in considering the provision in s 3(1)(c) to maximise “economic efficiency in the exploitation of fisheries resources”:

“[I]t is out of place for AFMA to have regard to the efficiency of an individual fisherman’s operation relative to that of other fishermen or to social or equity considerations ... It is clear that the duty to pursue the efficiency objective does not require AFMA to protect or enhance the financial position of each operator ... AFMA will act to maximise economic efficiency in the exploitation of the resources of a fishery not by focusing on each of the individual operations in that fishery at a particular point in time and acting to increase the profits of each, but rather by acting to achieve a situation in which the aggregate of fishing effort (ie costs) equates to that just sufficient to harvest the aggregate of TACs set for the [fishery].”

89 AJKA Pty Ltd v Australian Fisheries Management Authority [2001] AATA 258, Decision 30 March 2001 para 36.
90 Bannister Quest v AFMA (1997) 77 FCR 503.
91 Bannister Quest v AFMA (1997) 77 FCR 503 at 521.
Despite the general acceptance in Australia that ESD is concerned with social and equity issues due to the inclusion of principles such as intragenerational equity in the main policy documents such as the National Strategy for Ecologically Sustainable Development, the phrasing of the term in the *Fisheries Management Act* does not match this common understanding. The court was required to interpret the meaning of the s 3(1)(b) by its clear words and supporting extrinsic material, principally the second reading speech and the policy statement which it sought to implement. As these supporting materials clearly envisaged the term "economic efficiency" applying to the whole of a fishery and made no reference to social or equity matters relating to individual operators, Justice Drummond concluded that the term must be interpreted in its broad sense. He thus set aside the decision of AFMA on the ground that it based its decision on an irrelevant consideration. This led - otherwise inexplicably - to the then Managing Director of AFMA to declare publicly that social and community matters were of no concern to AFMA.92

(ii) The case against the grant of permits to take skipjack tuna in the AFZ

The argument put forward by the respondent justifying its decision not to permit the applicant to take skipjack tuna rested on two main grounds. These were first, that there was a lack of knowledge of the impact of fishing for skipjack tuna and thus a cautious approach should be adopted in line with the objective contained in s 3(1)(b); and secondly, that the refusal to grant the permits was consistent with approaches in international fisheries management and AFMA's statutory objective of pursuing economic efficiency.

The approach AFMA took was that since not enough is known about skipjack tuna, limited entry policies were to be maintained "as the first step in containing the fisheries".93 One of AFMA's expert witnesses explained that the "generally agreed process" in a fishery about which one has inadequate knowledge, is to "limit the number of permit holders, investigate the stock levels, and then re-examine the number of permit holders."94 There was a lack of evidence concerning skipjack due to the limited catch and effort information for the species in the AFZ. In relation to the western region of the Southern and Western Fisheries - an area for which permits were sought - there was a complete absence of evidence about the availability of skipjack because no

92 FR Hardin Jones "A Problem with Ecologically Sustainable Development in Australian Waters" (2000) 133(3) *Papers and Proceedings of the Royal Society of Tasmania* 17. It is to be noted that social and equity considerations arise in the fisheries management context in situations other than an individual operator's economic well being. They also arise 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. See, for example, G Waitt and K Hartig note 35 above p 111.

93 *AJKA Pty Ltd v Australian Fisheries Management Authority* [2001] AATA 258. Decision 30 March 2001 para 27.

94 *AJKA Pty Ltd v Australian Fisheries Management Authority* [2001] AATA 258. Decision 30 March 2001 para 54.
vessels had fished in the area for more than ten years. Further, there was no means of knowing the tonnage of skipjack tuna which swim into the Western Australian Fishing Zone from the Indian Ocean and out again. AFMA further argued that because the species is migratory, it was not appropriate to consider it only in its localised sense. The approach it took was common in fisheries management. The accepted fisheries management approach, it was submitted, was a "safety first approach" whereby catches of no more than two-thirds of the MSY were permitted "so as to maintain a parental fish population bigger than the critical number required to get the maximum sustainable yield." Where the MSY could not be determined, such as was the case with the skipjack tuna where AFMA could only speculate as to what the MSY might be, it was argued that an even more cautious approach was warranted.

An economic argument was also presented on behalf of AFMA: if the total number of vessels permitted to operate in the fishery were to increase, the total cost of the effort involved in catching skipjack would also increase, "resulting in gradually diminishing returns". It was further argued that "the addition of another operator in skipjack tuna fishing would increase management costs and decrease the value of existing permits." This would also set a "dangerous precedent" of allowing operators to base claims for permits on the excess capacity in their vessels at certain times of the year. This would require AFMA to assess an individual operator's efficiency, a matter that, on the reasoning of the Federal Court in *Bannister Quest*, falls outside its functions. Further, it was argued that the applicant's application was "opportunistic" because there was nothing preventing it from entering the skipjack fishery by purchasing an existing permit, either from an inactive permit holder or one who considered it to be worth less than what the applicant was prepared to pay. Supporting arguments were put that to grant a new permit in an area that had not been fished would not further the goals of the *Fisheries Management Act* s 3(2)(a) because that section placed a responsibility on AFMA to consider future, not past, fishing practices. AFMA concluded that the "limited entry policy" was in place for sound policy reasons and that "the existence of permit holders not actively pursuing their permits is not a cogent reason" for departing from it.

95 AJKA Pty Ltd v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 52.
96 AJKA Pty Ltd v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 42.
100 AJKA Pty Ltd v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 72.
C. MERITS REVIEW OF THE DECISION AND THE LAW IN QUESTION

As the AAT is empowered to redecide the original decision, it, as the Tribunal itself noted, must exercise AFMA’s discretionary powers by standing “in the shoes” of AFMA. Its task as a merits review body is to arrive at the “correct or preferable decision”. The issue for the Tribunal to determine was whether or not the applicant should be granted the permits pursuant to the discretionary provisions of *Fisheries Management Act* s 32, in particular, s 32(1). This subsection reads, in part:

“AFMA may, upon application ... grant to a person a fishing permit authorising ... the use by that person ... of an Australian boat for fishing in a specified area of the AFZ or a specified fishery.”

The Tribunal stated that in exercising the discretion in s 32(1) it must consider: whether the “limited access policy” in place at the time is lawful and, if lawful, whether there are cogent reasons to depart from it.

If the Tribunal determined that the relevant policy is not lawful, its task was then to determine whether or not the discretion in s 32(1) should be exercised in favour of granting either or both of the permits sought. The determination of these questions required detailed consideration of the statutory objectives that “must be pursued” by AFMA in the performance of its functions.

The approach the AAT took in *AJKA v AFMA* with regard to the question of whether all or only some of the objectives need to be pursued was that if one or a number of the s 3(1) objectives were relevant to the case at hand, “then the decision must be one which is made in pursuit thereof”. Thus, it seems, the AAT considered that if the function that AFMA sought to carry out was in some way logically connected to the need to act with precaution, then the precautionary principle must be pursued in the carrying out of that function. However, the Tribunal also stated that although relevant objectives must be pursued, there is no requirement that they be achieved. This conclusion is correct. Despite the “imperative nature of the obligation cast on AFMA by s 3(1)”, the wording is non-mandatory with regard to results. The Tribunal, echoing Justice Sheppard’s decision in *Banister Quest*, was:

“mindful that in the making of a particular decision, varying degrees of weight and emphasis may be given to a particular objective and that there will be decisions made by the respondent from time to time ... where one or more of

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101 *AJKA Pty Ltd v Australian Fisheries Management Authority* [2001] AATA 258, Decision 30 March 2001 para 3.
102 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.
103 *AJKA Pty Ltd v Australian Fisheries Management Authority* [2001] AATA 258, Decision 30 March 2001 para 79.
104 *Banister Quest v AFMA* (1997) 77 FCR 503 at 513.
105 See discussion in Part I above.
the statutory objectives are irrelevant because of the nature of the particular
decision".\textsuperscript{106}

The focus for the AAT in \textit{AJKA v AFMA} was the construction of AFMA's
duty to exercise its functions in a manner consistent with the exercise of the
precautionary principle.

D. THE TRIBUNAL'S DECISION

The Tribunal proceeded on the basis that only the objectives in \textit{Fisheries
Management Act} ss 3(1)(b) and (c) were relevant to the situation at hand and
thus it was only those objectives that needed to be pursued. Subsection (b) has
two parts: ESD and the precautionary principle. Subsection (c) has one part:
economic efficiency in the exploitation of the fishery. The Tribunal turned first
to the consideration given to s 3(1)(b) by the Federal Court in \textit{Bannister Quest}
to determine whether it must be pursued in the exercise of AFMA’s function
pursuant to its power to grant permits under s 32. The question then moved to
what was the proper construction to be given to the subsection to enable a
determination of the correctness of AFMA’s decision purportedly made in
pursuit thereof.

The Federal Court in \textit{Bannister Quest} considered in detail the proper
construction to be given to the objectives contained in s 3(1)(b). The court was,
however, concerned with the subsection as it stood in 1996, prior to the 1997
amendment which inserted the precautionary principle into it. After considering
relevant extrinsic material including the second reading speech and the 1989
policy statement “New Directions for Commonwealth Fisheries Management in
the 1990s”, due to the “obscurity and ambiguity of much of the language in s
3(1)”,\textsuperscript{107} Justice Drummond concluded:

“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, ensuring the biological sustainability of fish
stocks and ensuring the protection of the marine environment upon which those
fish resources depend.”\textsuperscript{108}

After considering the above passage, the AAT stated that “[i]t goes without
saying that the pursuit of the 3(1)(b) objective is ... of the utmost importance.”
The Tribunal added that the matters to be considered under the subsection are
“paramount”.\textsuperscript{109} Although it did not clearly say so, it is assumed that the
Tribunal considered the objective to be of the “utmost importance” to the actual

\textsuperscript{106} AJKA Pty Ltd \textit{v} Australian Fisheries Management Authority [2001] AATA 258.
Decision 30 March 2001 para 77.

\textsuperscript{107} \textit{Bannister Quest v AFMA} (1997) 77 FCR 503 at 514.

\textsuperscript{108} \textit{Bannister Quest v AFMA} (1997) 77 FCR 503 at 526.

\textsuperscript{109} AJKA Pty Ltd \textit{v} Australian Fisheries Management Authority [2001] AATA 258.
Decision 30 March 2001 para 83.
decision under review, rather than in a more general sense regarding AFMA’s functions.

Once the paramountcy of the objective to the fact situation was established, the Tribunal then needed to determine whether the refusal to grant the permits to take skipjack tuna by the purse seine method, unless cogent reasons exist, “is pursuing the objective of ensuring the biological sustainability of the fish stocks”\textsuperscript{110} in some or any of the fisheries in question. This question was answered by the AAT in the affirmative due to “the great deal of evidence” placed before it “relevant to the biological sustainability of the fish stocks in the respective fisheries.”\textsuperscript{111} The AAT’s reasoning proceeded in the following manner:

1. The scientific information relating to the biological characteristic of skipjack tuna stocks in each of the respective fisheries is uncertain.
2. The capacity to place limits on the number of permits to fish in specified fisheries is perhaps the most fundamental measure in the capacity of fisheries managers to restrict fishing effort and thereby produce economically and biologically optimum results from the fishery and to prevent overfishing.
3. The subject fisheries are developing fisheries which present a difficult challenge to the respondent which has little or no knowledge of the size of skipjack tuna stocks or their productivity nor, with any exactitude, the catching capacity of individual boats permitted to operate in the fisheries. This situation is exacerbated when the catching method is by means of the extraordinarily efficient purse seine net where boats can target schools of fish, and have the capacity of catching almost entire schools of fish at the one time.”\textsuperscript{112}

The Tribunal was particularly mindful of the number of scientific uncertainties in the fishery. These included the extent to which the skipjack tuna in question are isolated from regional populations,\textsuperscript{113} the current level of exploitation of the skipjack tuna populations in the respective fisheries,\textsuperscript{114} the fishing mortality produced by the current level of fishing in the subject fisheries and the increased level that might be expected if all fishing permits were fully

\textsuperscript{110} \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 84.
\textsuperscript{111} \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{112} \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{113} The importance of this uncertainty is that if there is a degree of isolation, “then a sharp increase in fishing effort on the stocks in the subject fisheries could cause local depletions”: \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{114} Although catch rates are known for these fisheries, the proportion that this represents of standing stocks is “unclear”: \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 85.
activated.\textsuperscript{115} Importantly, the Tribunal considered that information systems sufficient to enable the assessment of the condition of skipjack tuna stocks—which at present do not exist—are necessary to enable the development of the fishery. This indicates that the AAT considered that the existence of an information base adequate to determine the stock size, together with its resiliency and adaptability, was a precondition to any purported exercise of power sourced in the pursuit of ESD.

The AAT concluded that in the absence of more detailed management arrangements, the permit restriction policy:

"represents the only restraint on an increase in the numbers of fish taken and hence an impediment to increasing the risk of unsustainable development of the fish stocks, bearing in mind that risk cannot be denied if the necessary meaningful scientific knowledge as to the status of the stock is absent."\textsuperscript{116}

It continued:

"The Tribunal is firmly of the view that extending the number of permits at this uncertain stage of each of the fisheries’ existence may run counter to ensuring the biological sustainability of their respective skipjack tuna fish stocks. It follows that the limited access policy, i.e. the non-issuing of extra permits unless for cogent reasons, does pursue the objective in s.3(1)(b) of the Act ... 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."\textsuperscript{117}

The Tribunal then specifically considered the precautionary principle in terms of whether it was triggered by the facts of the case (in addition to the object of pursuing ESD) and if so, whether the “limited access policy” pursues the principle. The AAT referred to the IGAE definition of the principle and stated that it “comes into play” where, in the wording of the IGAE, “there are threats of serious or irreversible environmental damage”. The Tribunal did not consider that the evidence placed before it established that this was the case, but what it did establish was that while “the necessary scientific evidence as to the state of the fish stocks in the fisheries remains, to say the least uncertain, there is, accordingly, a risk of serious environmental damage.” It found that the non-issuing of the permits was “a step which pursues” the precautionary objective and thus the “limited access policy” and the refusal to grant the permits “was a lawful pursuit of the s 3(1)(b) objective.”\textsuperscript{118}

\textsuperscript{115} AJKA Pty Lid v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{116} AJKA Pty Lid v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{117} AJKA Pty Lid v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 85.
\textsuperscript{118} AJKA Pty Lid v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 86.
The Tribunal considered that in relation to the decision whether to grant the permits the "pursuit of the s 3(1)(b) ... is ... paramount and transcends the pursuit of the other objectives." This is a critical statement because the Tribunal considered the weight to be given to the precautionary principle objective in this situation must, "of necessity" outweigh the pursuit of the other objectives. This proposition is supported by its finding that the pursuit of the principle in this case is not inconsistent with the pursuit of the other objectives, nor disregards the objectives in s 3(2).

The final matter for the Tribunal to consider was, after determining that the decision to refuse the permits was done lawfully in pursuit of the precautionary component of the objective s 3(1)(b), were there cogent reasons for departing from the policy and exercising the discretion in s 32 in favour of granting the permits, having regard to the circumstances of the case? The Tribunal concluded that it was "firmly of the view" that there were no such cogent reasons and that to do so would "fly in the face" of pursuing the s 3(1)(b) objective and would not have regard to the s 3(2) objectives. As a final note, however, the AAT reinforced the point that research is necessary to establish a fishery. It left the way open for the applicant and others "of his calibre" to be granted permits once the necessary knowledge of the fishery is obtained and the granting of permits would properly be in pursuit of other statutory objectives. This approach articulated by the Tribunal would be consistent the precautionary principle in so far as it does not seek to stop activities indefinitely or without reason, but rather seeks to permit activities once there is a reasonable degree of confidence that those activities will not result in non-negligible harm.

In May 2001, AJKA lodged an appeal against the AAT's decision in the Federal Court. It is expected that the Court will need to determine authoritatively when the precautionary principle must be pursued, and the content of the obligation to pursue it.

E. CASE ANALYSIS: AFFIRMING AFMA'S PURSUIT OF PRECAUTION

The significance of the decision in AJKA v AFMA lies directly in the interpretation and application of the responsibility placed on AFMA by Fisheries Management Act 1991 (Cth) s 3(1)(b) to ensure that the exploitation of

120 AJKA Pty Ltd v Australian Fisheries Management Authority [2001] AATA 258. Decision 30 March 2001 para 90.
121 W Gullett note 65 above p 57; and J Cameron "The Precautionary Principle: Core Meaning, Constitutional Framework and Procedures for Implementation" (1999) in R Harding and E Fisher note 53 above at 36. A recent progressive formulation of the principle is provided in the 1998 Wingspread statement on the precautionary principle: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically." See C Raffensperger and J Tickner (eds) note 53 above.
122 File number s 47 of 2001 Federal Court of Australia (Adelaide).
Australian fisheries resources is conducted in a manner consistent with the exercise of the precautionary principle. The main conclusion from the recent series of AAT decisions concerning AFMA is that when it is carrying out one of its functions which is in some way logically connected to the need to act with precaution, then the exercise of the precautionary principle must be pursued.

Two issues then arise. First, in what circumstances will a matter be sufficiently related to the need to act with precaution and secondly, in such circumstances, what amounts to sufficient pursuit of the exercise of precaution.

In relation to the first question, prior to the decision in AJKA v AFMA, the Federal Court had not been presented with an opportunity to determine the additional requirements placed on AFMA by the 1997 inclusion of the principle in the Fisheries Management Act. Regrettably, this issue was not specifically discussed by the AAT in AJKA v AFMA or in other cases. The Tribunal in AJKA v AFMA simply found, on the facts of the case, that it “goes without saying” that the pursuit of the s 3(1)(b) objective of ESD is “of the utmost importance”. In reaching this conclusion the AAT was motivated by considerations which fall within the field of the principle. It reasoned that the non-issuing of the permits was consistent with the principles of ESD due to the scientific uncertainty that surrounds the fishery and the potential impacts of fishing on it. The Federal Parliament’s decision specifically to include the principle in s 3(1)(b) in 1997 indicates that it was its belief that the principle is of particular relevance to the management of fisheries and that it intended that AFMA should exercise its powers in the pursuit of it. When the Tribunal specifically considered the objective of exercising precaution, it found that the non-issuing of permits was a “step towards” that objective because to do otherwise “may run counter to ensuring the biological sustainability” of the skipjack tuna fish stocks. 123 It is hoped that when the Federal Court decides the current case it will determine the issue of which of AFMA’s functions must be carried out in pursuit of the precautionary principle and what particular fact situations are relevant to the precautionary objective.

It is clear that the carrying out of a number of AFMA’s functions must be in pursuit of the principle. This is because consideration of the principle is appropriate in a myriad of situations. 124 It is submitted that AFMA must pursue the exercise of the principle when carrying out the following functions specified in the Fisheries Administration Act: devising management regimes for

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Australian fisheries;\textsuperscript{125} establishing priorities in respect of research relating to fisheries and arranging for the undertaking of such research;\textsuperscript{126} and establishing and allocating fishing rights.\textsuperscript{127} A large number of subsidiary matters also fall into the category of decisions which must be in pursuit of the principle. These include, in particular, the attachment of conditions to fishing permits to ensure the sustainability of the fishery in question. The conditions could, for example, be aimed at reducing bycatch, avoiding overfishing of the targeted species, or avoiding disruption of the recruitment to maturity of the targeted species such as by prohibiting fishing during spawning periods. Section 32(7) of the \textit{Fisheries Management Act} specifies some of the conditions that may be attached to fishing permits for these purposes. These include conditions specifying the:

- fish that may be taken;
- quantity of fish that may be taken;
- rate at which fish may be taken;
- methods or equipment that may be used to take fish; and
- fishing capacity of a fishery, time and place.

The second issue, concerning what amounts to \textit{sufficient} pursuit of the precautionary principle in circumstances where this must take place, is a matter that should be specifically addressed by the Federal Court in the present litigation. In \textit{AJKA Pty Ltd v AFMA} the AAT considered that the “limited access policy” was in pursuit of the principle because the state of skipjack stocks was uncertain and accordingly there was, in the words of the IGAE threshold, a risk of serious environmental damage. Thus, the policy of not issuing the permits was a “step towards” achieving the precautionary objective.\textsuperscript{128} Future AAT and Federal Court determinations on this issue will need to be made in conformity with the threshold and content of the principle as contained in the IGAE formulation due to its adoption in the \textit{Fisheries Management Act}. Despite indications from some judicial figures that the content of the duty could be satisfied by the mere taking into account of the principle in the decision-making process, the clear words of s 3 that the exercise of precaution “must be pursued” must be interpreted as requiring that the exercise of power in question must be capable of being seen to advance – although not necessarily achieve – the objectives of the principle as understood by the IGAE formulation of it. Thus, it is submitted, an action by AFMA would lawfully be in pursuit of the exercise of the precautionary principle if, on the facts, a “threat of serious or irreversible damage” is established and the action in some way operates to avoid the likelihood of environmental degradation, irrespective of the lack of scientific certainty that such degradation will result.

\textsuperscript{125} \textit{Fisheries Administration Act} 1991 (Cth) s 7(a).
\textsuperscript{126} \textit{Fisheries Administration Act} 1991 (Cth) s 7(e).
\textsuperscript{127} \textit{Fisheries Administration Act} 1991 (Cth) s 7(m)(i).
\textsuperscript{128} \textit{AJKA Pty Ltd v Australian Fisheries Management Authority} [2001] AATA 258. Decision 30 March 2001 para 86. The AAT in \textit{Dixon v AFMA} indicated that “pursuit” would be satisfied if the decision “is likely to assist to some extent in the pursuit” of the relevant objective: Para 203.
The formulation of the duty to exercise precaution contained in the *Fisheries Management Act*—that precaution must be "pursued"—is the strongest to be found in statutes in Australia. It is also advanced in the sense that the idea of "pursuing" precaution— but not necessarily achieving it—reflects the objectives of the principle that it must inform the way decisions are made. Such an approach is more precautionary than the typical lesser legislative duty that it be “taken into account” as a relevant consideration. This is because the application of the principle is best understood as instructing the way in which decisions are reached rather than mandating particular “precautionary” results. This issue is now explored.

F. CASE ANALYSIS: OVERALL PRECAUTIONARY DECISION-MAKING

The decision in *AJKA v AFMA* very much builds on the cases discussed before. It confirms that the precautionary principle is a substantive principle that requires decision-makers to be responsive to the problems of scientific uncertainty. It does so in such a way that the principle is not just a blanket excuse for arbitrary action but can play an important role in structuring discretion. However, that said, one should be wary of concluding that consideration of the principle will result in the application of precautionary standards. This is because the principle is not an end in itself, nor an isolated legal requirement, but rather is part of a larger package of broader decision-
making requirements aimed at overall precautionary decision-making and responsiveness to the array of challenges presented by scientific uncertainty. With regard to decision-making by statutory authorities such as AFMA, application of the principle is to be in the context of good – or precautionary – public administration.133 Understood in this way, it does not automatically follow that a particular decision-making process is precautionary simply because the principle was lawfully considered at some point in the process. Likewise, a truly precautionary process might have been initiated at the conception stage of an issue and followed through to the final decision which, on its own, may not be precautionary because on the facts other objectives properly outweighed the most precautionary option. To this end, it is important that the principle is conceptualised as a broad, sound and fair process for decision-making rather than a hard and fast rule providing for particular results. It is, however, of course appropriate for a range of precautionary outcomes to be deliberated.

AJKA v AFMA and the case law that precedes it would seem to confirm such a conceptualisation of the principle. Moreover, other Australian court decisions have looked at the overall reasonableness of decisions to assist in the determination of whether precaution was exercised.134 It has even been suggested that the adoption of a precautionary approach is necessary to accord procedural fairness.135 Nonetheless, most judicial or tribunal decisions have interpreted the principle in terms of an imprecise ‘commonsense’ “duty to be cautious”. This standard can be met relatively easily, such as by acting consistently with available scientific evidence,136 granting a shorter licence period than would otherwise be the case,137 imposing permit conditions that are flexible so that protective measures could be adapted over time,138 and prohibiting an activity and carrying out further studies.139 That courts have not


136 Greenpeace New Zealand Inc v Minister of Fisheries, unreported, High Court of New Zealand, CP 492/93, 27 November 1995, and Friends of Hinchinbrook Society Inc. v Minister for the Environment (1997) 142 ALR 632.


been too exacting in determining what is sufficient to have acted with the requisite level of precaution can be explained largely by two reasons.\textsuperscript{140} The first is that legislation provides a weak duty with regards to the principle — typically only that decision-making has “regard” to it. As discussed above, the \textit{Fisheries Management Act} is more innovative in this sense in that the duty is expressed that the principle “must be pursued”. The second reason for the current absence of judicial determinations imposing substantive requirements with regard to precaution is that in most cases in which the principle has been litigated it has been in situations where an objector has disputed the legality or the correctness of a decision for failing to have properly taken the principle into account. In these situations, courts and tribunals have largely been deferential to the interpretation and application of the principle undertaken by the public decision-making body in question. What we have seen in \textit{AJKA v AFMA, Dixon v AFMA} and \textit{Arno Blank v AFMA}, however, is the reverse. In each of these cases the objector was challenging a decision of AFMA for having improperly taken the principle into account in reaching the decision. Thus, we can see AFMA’s support and application of the principle and the AAT’s support for the lawfulness and correctness of it doing so.

\section*{IV. THE PRECAUTIONARY PRINCIPLE IN THE INTERNATIONAL FISHERIES MANAGEMENT CONTEXT}

In the Australian context, the application of the precautionary principle is only considered to be appropriate where there are threats of serious or irreversible harm. This conclusion is based on the decision-making processes which adopt formulations of the principle based on that contained in the IGAE. However, this formulation is by no means definitive of the precautionary concept. One only need look at the various definitions adopted around the world which each seek to address the central problem of decision-making in the face of scientific uncertainty but offer either different thresholds for applying precaution or more guidance as to how to do so in particular situations.\textsuperscript{141} The point to make here is that although the IGAE version is what has been adopted uniformly in Australia, it is one of the weakest formulations of the principle to be found. It is less precautionary than many legal standards accepted in, for example, international agreements.\textsuperscript{142} This is a point often overlooked in the Australian

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\textsuperscript{140} In this regard, note Justice Stein’s recent ex-curial call for courts to utilise the common law to assist in the development and fleshing out of ESD principles. He stated: “Our task is to turn soft law into hard law. This is an opportunity to be bold in spirits rather than timorous souls and provide a lead for the common law world.” PL Stein “Are Decision-makers too Cautious with the Precautionary Principle?” (2000) 17 \textit{Environmental and Planning Law Journal} 3. See also DE Fisher “Sustainability: The Principle, its Implementation and its Enforcement.” (2001) 18 \textit{Environmental and Planning Law Journal} 361 at 362.

\textsuperscript{141} See, for example, W Gullett note 65 above at 59.

\textsuperscript{142} See, for example, Part IV 31(4) Ministerial Declaration of the Fourth International Conference on the Protection of the North Sea, held at Esbjerg, Denmark 8/9 June 1995, which states that a party must “demonstrate to the satisfaction of the committees ... that
context. It is to be noted that there is no compulsion for Australian parliaments to continue to adopt the same formulation of the principle in future enactments. Lower and more precautionary thresholds can be set than contained in the IGAE, together with more legislative guidance for decision-makers to interpret and apply the principle. A shortcoming of the Australian version of the principle is that it largely sets a preventive rather than precautionary standard. This is because it focuses on avoiding "threats" of "serious or irreversible environmental damage". This standard, although partly subjective, requires a high level of scientific understanding before the principle can be invoked and reduces the ability of anticipatory action to be taken before the threshold of "threat" is reached. This limits action to situations where there is knowledge that a dangerous outcome is possible (or probable) rather than where there is uncertainty or only some indication that environmental harm may occur. It is important to note, as the AAT did in Dixon v AFMA, that in the fisheries management context, the lack of evidence pointing to a threat of serious or irreversible damage "is a product of the lack of knowledge about the main target species... and about bycatch species". Thus, a sufficient threat may exist, yet this remains unknown due to an absence of adequate data. In such situations, the precautionary principle is not triggered in Australia.

In response to the strengthening international standards on the precautionary principle in the fisheries management context, there has been increasing pressure for Australian fisheries management to embody standards set at the international level. The current review of Commonwealth Fisheries Policy recognises the need to give effect to the increasing array of international agreements in domestic fisheries policy and management. AFMA states that its principal output is fisheries management services "taking account of international compliance obligations and the need for participation in the international arena". The most notable measure to give effect to international agreements domestically is the recent amendment to the Fisheries Management Act, the objective of "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" was inserted into the Act upon ratification of the UN Fish Stocks Agreement on 11 December 2001.


144 Likewise, the South Australian Environment Resources and Development Court recently accepted that absence of evidence as to risk "did not mean that there was no risk": Conservation Council of South Australia v Tuna Boat Owners Association (No. 2) [1999] SA ERDC 86. See M Parnell "Southern Bluefin Tuna Feedlotting: ESD, the Precautionary Principle and Burden of Proof" (2000) 41 Plaintiff 18 at 21.
146 Australian Fisheries Management Authority note 49 above p 3.
The Commonwealth position to ensure that domestic fisheries management is consistent with approaches adopted in international fisheries instruments is a commonsense approach when one considers the complexity of the marine ecosystem and the transboundary nature of fish species and ecosystem effects of fishing. This commonsense approach is, however, grounded in international legal obligations. The Federal government has entered into a number of international agreements dealing with fishing and by doing so has accepted a number of obligations which relate to the management of domestic fisheries. Most notably, Article 7(2) of the UN Fish Stocks Agreement provides that conservation and management measures for straddling fish stocks and highly migratory fish stocks for the high seas and areas under national jurisdiction shall be compatible.\textsuperscript{149} Many of the measures adopted in this and other agreements explicitly incorporate a precautionary approach, such as Article 6 of the UN Fish Stocks Agreement. In some cases, such as Annex II of the UN Convention on the Law of the Sea, a large amount of detail is provided as to how precaution is to be effected. In fact, much of the development and application of the precautionary principle is owed to its widespread adoption and more recently, implementation, in the international fisheries management context.\textsuperscript{150} In addition, Australia is arguably obligated to give effect to the principle in the

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\item Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995.
\item \textsuperscript{148} Fishery Management Act s 3(2)(c).
\item \textsuperscript{150} Most recently, Australia relied on the precautionary principle in the international arena in the Southern Bluefin Tuna cases. See S Marr "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources" (2000) 11 European Journal of International Law 815. See also SB Kaye note 45 above; and D Freestone "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle" in A Boyle and D Freestone International Law and Sustainable Development: Past Achievements and Future Challenges (1999) at 135. FAO Code of Conduct for Responsible Fisheries Article 7.5 urges states "to apply a precautionary approach widely". The Code requires, among other things, that a precautionary approach be adopted to conserve aquatic resources and to protect the aquatic environment (Article 6.5). The widespread acceptance of the precautionary principle in the field of international fisheries management arguably is largely due to its appropriateness as a management guide for "tragedy of the commons" dilemmas. See SB Kaye note 45 above; G Hewison "The Precautionary Approach to Fisheries Management: An Environmental Perspective" (1996) 11 International Journal of Marine and Coastal Law 301; JM MacDonald "Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management" (1995) 26 Ocean Development and International Law 255 at 270 and 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.
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more general area of customary international law. Reinforcing this view are the statements of the High Court of Australia 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.

These developments foreshadow a number of emerging problems with existing fisheries legislation, particularly at the state level. It is evident that there is an inconsistency between, for example, the precautionary standards contained in international fisheries law and the almost universal absence of any such standards in state fisheries legislation. There is, as the Appendix illustrates, also a disparity between the precautionary standard adopted in the Commonwealth Fisheries Management Act and state fisheries legislation which, with the exception of New South Wales, does not explicitly embody the principle. It is clear that this disparity will become wider as international precautionary standards are refined.

V. CONCLUSION

The decision in AJKA v AFMA represents strengthening legal support for the application of precaution in public decision-making in Australia and demonstrates that AFMA is developing decision-making competence in the exercise of the precautionary principle. It has been seen that the particular wording of the principle in legislation - in terms of the definition given to it and the duty imposed to make decisions in accordance with it - is of critical importance to the ability of public decision-making bodies to give effect to it. A concern which remains is that the principle has the potential to be undermined if it conflicts with other statutory objectives which may properly be ascribed more weight by decision-makers. Thus, the need remains for clearer legislative guidance in regard to how the principle should be considered and how it should be acted upon to enable more effective precautionary fisheries management in Australia, consistent with the strengthening precautionary approach entrenched in the international fisheries arena. Clearer precautionary principle rules would also meet a major objective articulated in the current Commonwealth review of fisheries policy of providing certainty of access to fisheries resources for the entire range of users. Nonetheless, the decision in AJKA v AFMA has made it clear that persons aggrieved by a decision of AFMA will be unlikely to be successful in a legal challenge based on a submission that AFMA unlawfully pursued the precautionary principle. Likewise, it is also clear that AFMA is clearly obligated to advance the principle in the myriad of situations in which it is relevant to the exercise of its discretionary powers.

151 See O McIntyre and T Mosedale "The Precautionary Principle as a Norm of Customary International Law" (1997) 9 Journal of Environmental Law 221; and S Marr note 150 above.


APPENDIX:
INCLUSION OF THE PRECAUTIONARY PRINCIPLE OR SUSTAINABILITY OBJECTIVES IN AUSTRALIAN FISHERIES LEGISLATION

Cth  *Fisheries Management Act 1991* and *Fisheries Administration Act 1991*. Sections 3(1)(b) and 6(b) respectively state that 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 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 ... must be pursued”.

*Torres Strait Fisheries Act* 1984. Section 8 states the objectives to be pursued: “In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in particular to the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing.”

*Environment Protection and Biodiversity Conservation Act 1999*. Section 391(1) states: “The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.” (Note that decisions listed under s 391 has been amended by the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* to include Part 13A decisions concerning the international movement of wildlife specimens. Note also the requirements under Part 10 *Environment Protection and Biodiversity Conservation Act 1999* relating to the preparation of strategic assessments of Commonwealth managed fisheries).

NSW  *Fisheries Management Act 1994*. Objectives include s 3(2)(c): “to promote ecologically sustainable development, including the conservation of biodiversity.” Section 30(2) provides that “regard” is to be had to the precautionary principle in determinations of TACs: s 30(2).

Tas  *Living Marine Resources Management Act 1995*. Section 7(1) states the purpose of the Act is to “achieve sustainable development of living marine resources having regard to the need to ... (b) provide and maintain sustainability of living marine resources.”

*Inland Fisheries Act 1995*. There is no mention of the precautionary principle or sustainable development in this Act.

WA  *Fish Resource Management Act 1994*. Objects of the Act are “to conserve, develop and share the fish resources of the State for the benefit of present and future generations” in particular object s 3(2)(b) “to ensure that the exploitation of fish resources is carried out in a sustainable manner.”

Vic  *Fisheries Act 1995*. Objectives include: “to provide for the management of Victoria’s fisheries, aquaculture industries and associated aquatic biological resources in an efficient, effective and ecologically sustainable manner” and “to protect and conserve fisheries resources, habitats and ecosystems including the
maintenance of aquatic ecological processes and genetic diversity” and “to promote sustainable commercial fishing”: ss 3(a) and (b).

Qld  Fishery Act 1994. Objectives include “ensuring fisheries resources are used in an ecologically sustainable way”: s 3(1).

SA  Fishery Act 1982. Principal objectives include “ensuring, through proper conservation, preservation and fisheries management measures, that the living resources of the waters to which this Act applies are not endangered or overexploited”: s 20(a).

NT  Fishery Act 1988. The purpose of Part III (relating to fisheries management plans) includes to “provide for optimum yields from a fishery and maintain the quality of the yield”; to “ensure that the fisheries of the Territory are not endangered or overexploited”; and to “ensure that the habitats of fish or aquatic life and the general environment is not detrimentally affected”: ss 21(b),(c) and (d).
Fig. 1. Management areas of the WTBF, STBF and ETBF