NEW SOUTH WALES

PRECAUTIONARY PRINCIPLE ADOPTED IN ENDANGERED SPECIES CASE
Leatch v. Director General of National Parks & Wildlife & Anor
Unreported, Land and Environment Court, Stein J, 23 November 1993

The precautionary principle has recently received an enormous amount of publicity. Unfortunately, for all the h that has been generated by conferences, publications and journal articles there appears to be little light. As witl "ecologically sustainable development" the meaning and true implications of the concept appear to be slow to ta hold amongst environmental decision-makers and hence slow to have any impact "on the ground".

The judicial manifestation of environmental decision-making comes in the form of merits appeals from decision- makers with responsibilities in the environmental and planning area. Although arguments based on the precautionary principle have been raised in such merit cases they have not been accepted as relevant to the decis at hand. In so far as such decisions influence the approach taken by first instance decision-makers they are regrettable. The decision of the Land and Environment Court in *Leatch v. Director General of National Parks & Wildlife & Anor* (unreported, Land and Environment Court, 23 November 1993) comes as a welcome relief in one c areas most appropriate for the application of the precautionary principle.

FACTS

Leatch was the first merits appeal to be heard pursuant to the provisions inserted in the **National Parks and Wildlife Act** 1974 by the **Endangered Fauna (Interim Protection) Act** 1991. The **Endangered Fauna (Interim Protection) Act** was passed after the decision in *Corkill v. The Forestry Commission of NSW* ((1991) 73 LGRA 126 affirmed in the Court of Appeal (1991) 73 LGRA 247; see also (1992) 9 EPLJ 1). The legislation makes provision fc the licensing of the "taking" of endangered fauna. "Taking" of endangered fauna includes "significant modificati of the habitat of the fauna which is likely to adversely affect essential behavioural patterns" (**National Parks Wildlife Act** s.5). Applications for licences to "take" endangered fauna must be accompanied by a fauna impact statement prepared in accordance with the Act and the application must be advertised (s.92B). Any person who makes a submission on the application has a right of appeal to the Land & Environment Court if the licence is granted by the Director (s.92C).

The *Leatch* case involved an application by Shoalhaven City Council for a general licence to take endangered fa during the construction of a road through the Bomaderry Creek Gorge near Nowra on the New South Wales south coast. A licence was granted by the Director subject to conditions. Leatch, an objector to the licence, appealed to t Court.

The two principal species considered in the case were the Yellow Bellied Glider (*Petaurus australis*) and the Gia Burrowing Frog (*Heleioporus australiacus*). Both species are listed as endangered in Schedule 12 of the *Nationa Parks & Wildlife Act*.

The consideration of the precautionary principle arose from the submissions made on the application for the licer and the submissions of the applicant during the hearing. Counsel for the Director-General also considered that t precautionary principle may be relevant. The Court considered the inclusion of the precautionary principle in rec international environmental law, in particular the *Rio Declaration on Environment and Development, Principle UN Framework Convention on Climate Change 1992, Art. 3(3); Amendments in 1990 to the Montreal Protocol on Substances that Deplete the Ozone Layer; Convention on Biological Diversity 1992.*

The Court also referred to the inclusion of the precautionary principle in the Intergovernmental Agreement on the Environment and the **Protection of the Environment Administration Act 1991 (NSW).**

Although counsel for the Director General made submissions relating to the inclusion of principles of internationa law into domestic law, the Court considered such submissions unnecessary. This was because the precautionary principle:

is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. (Judgment p.20)

DECISION

The Court then moved on to determine whether the precautionary principle was a relevant consideration in the circumstances and statutory context of the case.

On appeal the Court is required to take into account matters including public submissions made on the licence application (s.92B(6)(b)), any other matter that the Court considers relevant (s.92A(6)(e)), the circumstances of the case and the public interest (s.39(4) **Land & Environment Court Act 1979**).

Even though a matter is not specifically referred to in a statute it may be relevant to consider it if the subject matter scope and purpose of the enactment shows it not to be an extraneous matter (*Minister for Aboriginal Affairs v. Peko-Wallsend* (1985) 162 CLR 24).

The Court then examined Part 7 of the Act relating to the protection of endangered species and concluded that, in th light, the precautionary principle was not an extraneous consideration.

It was in relation to the Giant Burrowing Frog that the precautionary principle was most significant. The Court was driven to the conclusion that there was very little knowledge of the frog in this particular habitat. Despite the assertions by the second respondent that there would be "a very small loss of foraging habitat and no loss or interference with access to food or breeding patterns" the Court concluded that

... caution should be the keystone to the Court's approach. Application of the precautionary principle appears to me to be most apt in a situation of scarcity of a scientific knowledge of the species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to "take or kill" the species until much more is known ... In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to "take or kill" should be granted. Accordingly the licence ... is refused." (Judgment p.24)

Whilst obviously particularly apt in the case of endangered species protection where the situation of the species is perilous and there is often little scientific knowledge upon to which a base a decision, the approach taken in this case would appear to be applicable in other areas such as planning and development merit appeals generally. Following the rationale in *Leatch*, a court must consider whether, in light of the subject matter, scope and purpose of the enactment the precautionary principle can be taken into account.

It is submitted that most planning legislation is not so imbalanced as to preclude such an approach. Therefore, following *Leatch*, the precautionary principle or a cautious approach when faced with scientific uncertainty may have more influence where it counts, amongst first instance environmental decision-makers and, where available, in merits appeals to courts.

David Mossop
Environmental Defenders Office
Sydney