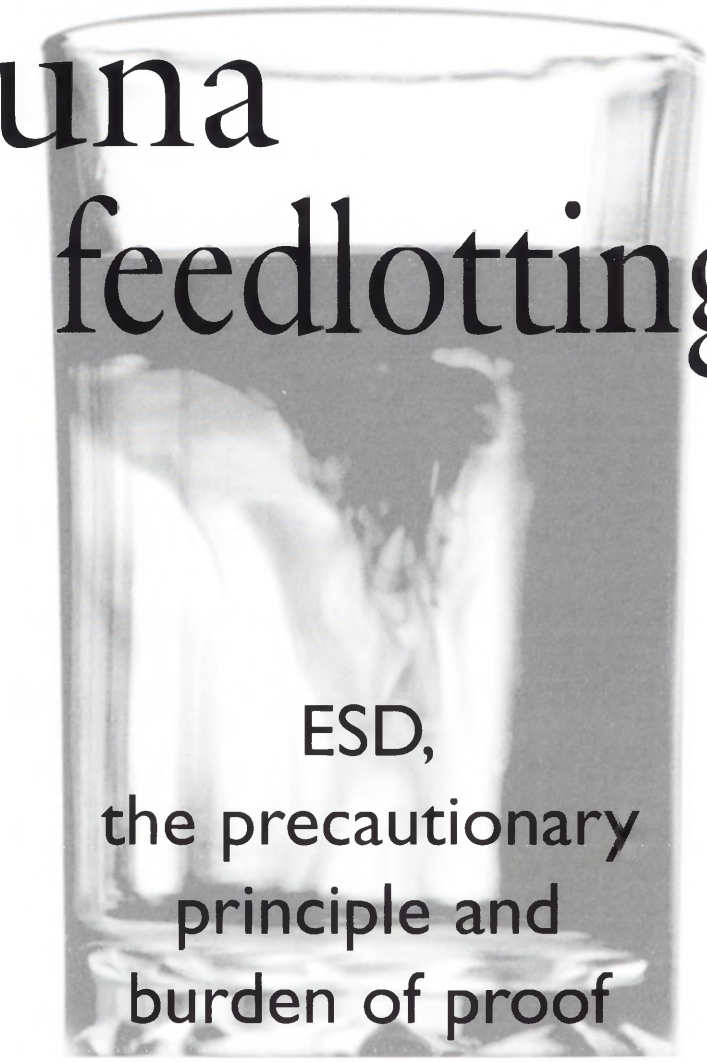
MARK PARNELL, ADELAIDE

Southern bluefin tuna feedlotting



ESD, the precautionary principle and burden of proof

This article discusses recent litigation in the South Australian Environment Resources and Development Court and Full Supreme Court. The cases involve the farming (or more accurately "feedlotting") of Southern Bluefin Tuna in the waters of Louth Bay near Port Lincoln. In what has become South Australia's longest environment trial, the tuna cases have pitted the State's peak community-based environment group (the Conservation Council of SA Inc.) against the combined forces of the powerful Tuna Boat Owners Association and the State Government. After a three week trial in the Environment Court and a day in the Full Supreme Court, the case has been remitted to the Environment Court for further consideration. In the meantime, the Government marches on with special fast-track Regulations and a proposed new Aquaculture Act which is likely to remove existing rights of public scrutiny and appeal over marine aquaculture.

Appeal to the Environment Court

A recent decision by South Australia's Environment Resources and Development Court ("Environment Court") has attracted world-wide attention because of the way it deals with "ecologically sustainable development" and the "precautionary principle".

On the face of it, the case is a fairly straight-forward planning merits appeal. The Conservation Council of SA Inc. (CCSA) had appealed against approval granted by the State's statutory planning authority (the Development Assessment Commission or DAC) for 42 new tuna feedlots in the waters of Louth Bay in Spencer Gulf near Port Lincoln.

The task of the Court in such cases is to determine "de novo" whether the proposed developments are "seriously at variance"[2] with the relevant planning scheme.[3] The Court stands in the shoes of the planning authority and can consider the same evidence as well as new material put forward by the parties. The Court is not strictly bound by the rules of evidence.

At the trial, the Conservation Council (represented by the Environmental Defenders Office (SA) Inc.) argued that a range of known and unknown environmental problems together with a lack of enforceable management by relevant government agencies meant that the developments would not be "ecologically sustainable" (as that term is used in the Development Plan).[4] Whilst other planning issues such as "visual amenity" were raised, these were not vigorously pursued.

The tuna feedlot industry

Because the case was confined to planning issues in South Australian waters, it was not possible to consider any of the broader sustainability issues associated with the tuna feedlot industry. Southern Bluefin Tuna (*Thunnus*

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Photos by Lucy Taylor.

Maccoyii) is a high value species fished by several countries, some of which are parties to an international convention aimed at restricting the global catch.[5] Australia's quota of around 5,000 tonnes is caught during Summer off the Great Australian Bight, then towed slowly in cages back to Port Lincoln where the fish are transferred to floating cages. The tuna are fattened on a diet of mostly imported pilchards, before being exported to Japan for the sashimi market. The fact that the species is listed on the World Conservation Union's "Red List of Critically Endangered Species" was not particularly relevant given that the only matter before the Court was the "development approval" for the "change in use"[6] of the subject land. It was also not possible to raise sustainability issues arising from the global trade in tuna feed such as the impact of taking tens of thousands of tonnes of pilchards away from one environment (eg American waters) and depositing them in another (Port Lincoln).

Environmental impacts

The Grounds of Appeal lodged by the Conservation Council highlighted a range of environmental issues. The tuna feedlot industry is a highly polluting industry with thousands of tonnes of tuna waste and uneaten food entering the marine environment each year. Whilst some of this nutrient waste might be thought of as "natural", it is certainly not natural in its concentration. The food conversion ratio of tuna is at best 10 to 1 and at worst, 25 to 1. This means that it can take up to 25 tonnes of pilchards to produce 1 additional tonne of tuna. The food that is not metabolised by the tuna is excreted as waste, falls to the sea floor uneaten, or is scavenged by other fish or sea birds.

The proliferation of scavenging silver gulls is a real problem for local wildlife. The gulls (which are the same species found at rubbish dumps and picnic grounds) are attracted to the tuna cages by an abundance of free feed, which is usually shovelled into the cages from boats moored alongside them. The proposed tuna feedlots are only a short distance from the Lincoln National Park, which is home to many rarer species of sea bird. Silver gulls are well known for their ability to destroy the nesting efforts of other birds, such as terns.

The Conservation Council also raised the issue of the potential introduction of exotic diseases from the use of imported pilchards as tuna feed. The fact that two of the world's largest ever mass mortalities of fish have occurred in the Port Lincoln area is still regarded by the tuna industry as circumstantial, even though many scientists regard the deaths of local pilchards as "likely" to have been caused by diseases brought in with imported pilchards.

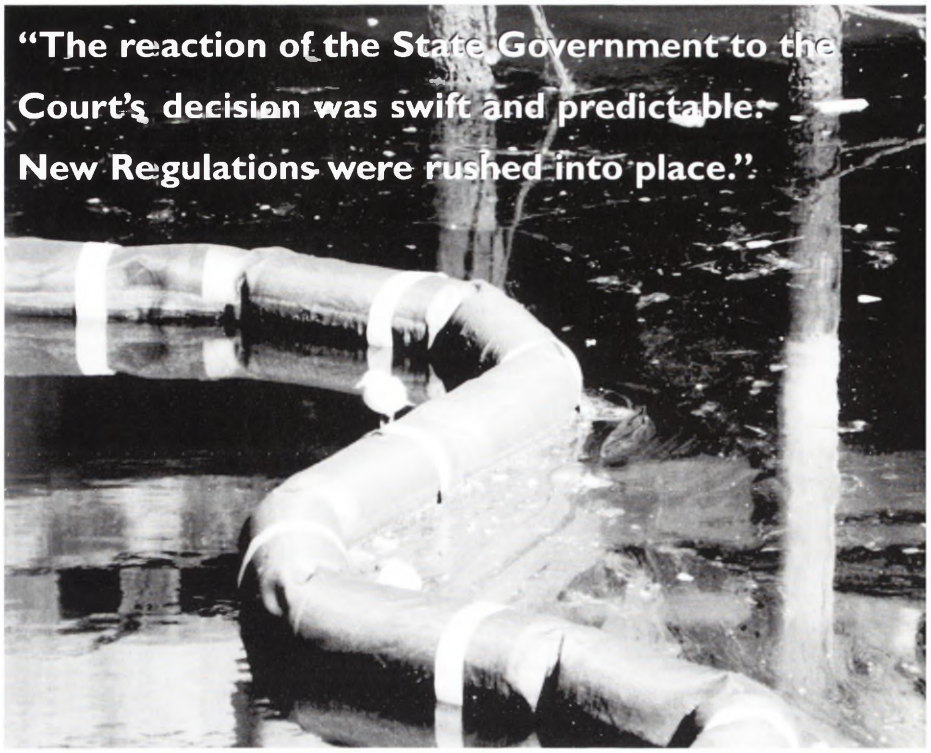
One of the most emotive issues in the case is the tuna feedlot industry's appalling record of dolphin deaths. In recent years 20 or so dolphins have been killed in the tuna cage nets. The industry is the single biggest human-induced killer of dolphins in South Australia. It is also likely that reported dolphin deaths represent only the tip of the iceberg.

Most of the 20 witnesses who gave evidence before the Court addressed these issues. Witnesses included environmental academics, publicly-employed scientists, industry representatives, environmental bureaucrats and local Louth Bay residents. The tuna industry also called economists to give evidence.

The Environment Court decision

In allowing the appeal and overturning the development approvals, the Court determined that existing industry practice and management regimes under the *Fisheries Act* and the *Development Act* could not be relied on to ensure that the proposed developments would be "ecologically sustainable". Of particular importance to the Court was the need for the developments to be subject to a "monitored, adaptive management regime".[7] An essential element of such a regime is the ability of regulators to respond to changed circumstances or increased knowledge by modifying licences and other approvals. The ability of the Minister for Fisheries to license tuna feedlot operators for up to 10 years with no capacity for licence review was regarded as contrary to the principles of ESD.

As an aside, it is ironic that the tuna industry succeeded in lobbying previous State governments to ensure that the



State's Environment Protection Authority (EPA) was not given any regulatory responsibility for marine aquaculture. Had the Government not side-lined the EPA, then the Court's conclusion "most likely would have been different"[8] because EPA licences are readily able to be amended or revoked as circumstances require and the EPA is at arms length from government in licensing decisions. EPA licences also require public notification, however there are no third party appeal rights.

Government to the rescue

The reaction of the State Government to the Court's decision was swift and predictable. New Regulations[9] were rushed into place just before Christmas 1999 which ensured that the defeated applications could be re-lodged and approved, without risk of further appeals. The "new" applications (which were identical to those overturned) were duly approved in February this year.

Relying on a fairly dubious interpretation of the Court's decision, the new Regulations provide that aquaculture development applications which are for periods of 12 months or less are not subject to third party notification and therefore third party appeal rights. The stated rationale for this approach is that it was a "short term measure ... to address the immediate needs of the valuable tuna industry".[10] The Regulations do not deal with any of the substantive environmental concerns raised by the Conservation Council.

The haste with which the new Regulations were drafted meant that there were numerous procedural irregularities which could have given grounds for judicial review. However it was also clear that the government was "beyond embarrassment" over this issue, so any success at judicial review would only have resulted in further Regulations to remedy the defects.

In Parliament, the Australian Democrats moved a motion of disallowance of the Regulations. This motion was ultimately lost on party lines despite a certain amount of unease on the part of some government back-benchers. In any event, any disallowance would not have been retrospective in its operation, so it would have been too late to prevent the tuna feedlots from being established.

A new Aquaculture Act

If the Government's fast-track tuna Regulations were a short-term measure, the long-term solution is likely to be a new Aquaculture Act to either replace, or run parallel to, existing fisheries and planning laws.

The removal of public notification and appeal rights is widely feared to be a permanent feature of any new Aquaculture Act. The Minister's stated preferred approach is for public participation to be limited to the preparation of management plans containing aquaculture zones rather than in relation to individual aquaculture development applications.[11] The threat by the Tuna Boat Owners Association to move their members' operations interstate unless they receive greater certainty in the approvals process, is likely to weigh heavy on a government desperate to invigorate sluggish regional economies.

Ecologically Sustainable Development

Even though tuna feedlots are now legally polluting the waters of Louth Bay,[12] the decision of the Environment Resources and Development Court is still important because it is one of only a handful of cases that have considered the meaning of "ecologically sustainable development" as that term is used in legislation or statutory policy instruments. Whilst there are definitions available,[13] these still leave unanswered important questions such as, "who has the burden of proof?" and "how do we handle scientific uncertainty?"

The approach adopted by the Court in the tuna case was to hold that the onus is on the developer to show that the feedlots are ecologically sustainable rather than the burden being on the conservationists to show that they are not. It is sufficient for those challenging the development to show that there is "a prospect of serious or irreversible damage to the environment"[14] in order to shift the burden of proof to the developers. The logic of this approach is clear given that opponents of a proposed development are rarely likely to be able to prove that harm will result. Proof often only emerges once the development is constructed, by which time it can be too late to reverse the damage. Often the best that opponents can do is to show that there are serious, unaddressed or unmanageable impacts if the development were to go ahead.

The Court also made several useful observations about science and ESD, particularly in relation to the risk associated with the use of imported frozen pilchards as food for caged tuna. Whilst no scientists were prepared to state categorically that two recent mass mortalities of local pilchards were due to disease brought in with imported pilchards,

many scientists were prepared to acknowledge that it is a highly risky practice. The Australian Quarantine and Inspection Service (AQIS) on the other hand was prepared to vouch for the safety of imported pilchards under its scientifically-based Import Risk Assessment (IRA) process. The Court accepted the appellant's argument that lack of evidence as to risk did not mean that there was no risk. Lack of evidence may be due to the fact that nobody has undertaken the necessary studies to determine whether a risk exists or not.[15]

Tuna Industry appeal to Full Supreme Court

The day after the decision of the Environment Resources and Development Court was handed down, the Tuna Boat Owners Association appealed to the Full Supreme Court. The comprehensive appeal challenged most of the findings of the Environment Court, including its findings on ESD, the Precautionary Principle and the onus of proof.

Decision

After hearing a full day of argument in May, the Full Court handed down its decision on 2 August this year.[16] Whilst the Court allowed the appeal, it did not re-instate the development approvals which had been over-turned in the Environment Court. The Full Court set aside the decision of the Environment Court and remitted the matter back to that Court for further consideration. In his judgment, the Chief Justice made it clear that it was open to the Environment Court to make the same decision it had previously made.

New Evidence

The purpose of the remission was to give the Environment Court the opportunity to consider further evidence from the Minister of Fisheries (who is not a party to the case) as to how the Minister proposes to regulate the 42 proposed tuna cages. If the Environment Court is satisfied that this new evidence will result in an ecologically sustainable industry, then development approval may be given. The Supreme Court made it quite clear, however, that the Environment Court is not obliged to re-open the evidence. It also left open the possibility of the Environment Court allowing the Conservation Council appeal (again) thereby forcing the tuna industry to lodge fresh applications.[17]

Does it matter?

At a practical level, a final win for the Conservation Council would still be a hollow victory. The tuna industry will probably again take advantage of the new fast-track Regulations and lodge further applications for 12 month development approval for the 2001 tuna feedlot season. These approvals will be immune from public scrutiny, representation and appeal. If the Government's new Aquaculture Act also precludes public participation, then the Louth Bay tuna litigation will have achieved very little.

On the other hand, the cases represent important precedents on the application of the principles of ESD including the Precautionary Principle. The Full Supreme Court generally agreed with the Environment Court's approach to this issue.[18] The Court thought that it was quite appropriate to consider unknown impacts on the environment. Whilst it did not say so explicitly, the Court's observations could be interpreted as supporting the proposition that if potential environmental impacts are serious and very little is known about the nature and extent of those impacts, then this is sufficient reason to say that the developments may not be ecologically sustainable and should not proceed.

Onus of proof?

In considering the application of ESD, the Environment Court concluded that an onus lies on the proponent to show that the proposed development would meet ESD requirements. This approach was endorsed by the Full Supreme Court.

It is true that generally there is no onus on an applicant for development consent to establish that the development consent should be granted. The relevant authority must simply assess the proposed development against the relevant Development Plan. But in this case, the Development Plan contains an objective and principle that invokes the concept of ESD. That in turn, in a case like the present, invites the use of the precautionary principle, simply because all of the consequences of the proposed development are not known and fully understood.

In such a case, assessing the proposal against the Development Plan requires a consideration of whether it is a development that is ecologically sustainable. As the longer term consequences of the proposed development are not known, it is appropriate to require measures that will avert adverse environmental impacts that might emerge.

"if potential environmental impacts are serious... the developments may not be ecologically sustainable."

The Court did not wrongly impose an onus on the Association in relation to the assessment of the proposal against the Development Plan. The approach of the Court simply reflected what was inherent in one of the matters that the Court had to consider, the issue of ESD.[19]

Costs

Importantly for the Conservation Council, the Supreme Court made no orders as to costs. In fact, the Conservation Council argued strenuously that even though it technically "lost" the case, its costs should be paid by the Tuna Boat Owners Association on the grounds that it had succeeded on most of the points it made and the industry had lost most of its arguments. The Conservation Council had expected to rely on "Oshlack"[20] costs arguments, however these were not necessary.

Once the matter has been remitted to the Environment Court, each party will bear their own costs. The Tuna Boat Owners Association is reported in the local media as saying its costs are already

$150,000, none of which can now be recovered from the Conservation Council. Whilst this may not be a significant amount for an industry with a $200 million p/a turnover, it does highlight the differences in the resources of the parties. Whereas the industry has clearly identifiable economic interest in the outcome of the appeal, the Conservation Council is motivated purely by its desire to protect the environment. The Council is a non-profit community organisation which relies mainly on public donations and subscriptions to undertake litigation. This includes supportive arrangements with the legal profession.

Conclusion

The importance of the South Australian Louth Bay tuna feedlot cases is that they provide useful judicial consideration of the concepts of ESD and the Precautionary Principle. For many years, these terms have been inserted into legal and policy documents, however there is very little case law on what the terms mean in practice.

The political circumstances surrounding the cases (described above) show that legal action to protect the environment can only ever be a single component of a broader campaign strategy. The global fate of Southern Bluefin Tuna is the subject of campaigns by Greenpeace and the Humane Society International. The South Australian cases represent only one small aspect of an industry whose sustainability at every level is very much in doubt. Once the tuna cases have exhausted the legal process in South Australia, the next step will be to ensure that any new aquaculture laws properly address environmental concerns and also provide for continuing public appeal rights over the use of the commons by polluting industries. PL

Notes:

1 *Conservation Council of SA Inc. v Development Assessment Commission & Tuna Boat Owners Association of Australia* (No.2) [1999] SAERDC 86. 16 December 1999. Full Bench comprising Judge Trenorden and Commissioners Hodgson and Berriman. The full text of the decision will eventually be located at http://www.austlii.edu.au/au/cases/sa/SAERDC/. In the meantime, scanned copies are available from the author. Please note that a case with the same parties from earlier in 1999 is available on austlii, but it relates to procedural matters only and not the issues raised in this article.

2 *Development Act* 1993 (SA) s.35(2) ... "a development that is assessed by a relevant authority as being seriously at variance with the relevant Development Plan must not be granted consent."

3 *Land Not Within a Council Area (Coastal Waters) Development Plan* 1997 (available from http://devplan.dhud.sa.gov.au/ or http://www.planning.sa.gov.au/)

4 Principle of Development Control 12 provides (in part):

"Marine aquaculture should be located, sited, designed, constructed and managed to be ecologically sustainable, to minimise interference and obstruction to the natural processes of the marine environment, and to allow maintenance of the environmental quality of the foreshore, coastline, ocean and ocean bed."

5 Australia, New Zealand and Japan are parties to the Convention for the Conservation of Southern Bluefin Tuna 1993. Other fishing nations such as Indonesia, Korea and Taiwan are not parties to the Convention.

6 See definition of "development" which includes "change in the use of land". Land includes land covered by water. *Development Act* 1993 s.4

7 Environment Court Judgment p.14

8 Environment Court Judgment p.17

9 Amendments to clause 9 of Schedule 9 Development Regulations 1993

10 Media Release, Hon Rob Kerin MP, Deputy Premier, Minister for Primary Industries, "Way Ahead for Aquaculture", 21 December 1999.

11 See for example the Fisheries (Aquaculture Management Committee) Regulations 1999 which were revoked before coming into operation following successful lobbying of Legislative Councillors by the Conservation Council and EDO.

12 Whilst the appeal related to "new" development applications, the industry has been using the area without approval for several years.

13 The Court adopted the definition in the Intergovernmental Agreement on the Environment 1992 and the National Strategy on ESD.

14 Environment Court Judgment p.10

15 Environment Court Judgment p.12

16 *Tuna Boat Owners Association of SA Inc. v Development Assessment Commission and Conservation Council of SA Inc.* Judgment no. [2000] SASC 238. At the date of writing, this judgment was not yet on austlii, however copies are available in printed or electronic format from the author.

17 Supreme Court Judgment paras 57 - 60

18 Supreme Court Judgment paras 25 - 34

19 Supreme Court Judgment paras 27 - 29

20 *Oshlack v Richmond River Council* [1998] HCA 11 (25 February 1998)