

# Legislating for Ecologically Sustainable Development: The *Fisheries Act* 1994 (Qld)

Andrew Lynch\*

## INTRODUCTION

Towards the end of 1994, the Queensland Parliament enacted the *Fisheries Act 1994* (Qld). One of the aims of this legislation is to encourage management of the fisheries resource in an ecologically sustainable manner. Just how successful the Act is in achieving this goal, both in substance and form, is the question this article seeks to answer. Insightful observations can be drawn by analysis of the Act in conjunction with its ancestor, the now repealed *Fisheries Act 1976* (Qld). It is also essential to reflect upon the parallels with the Commonwealth statutes, as fisheries can be jointly managed by the Commonwealth and the States.

Through this process of comparative analysis, an appreciation can be had of the significant shift towards ecologically sustainable development ('ESD') that has occurred in the Queensland legislation. It is a change not only in the stated objectives of the legislation, but also in the operative provisions. The conclusion is also made that the restructuring of the Commonwealth legislation was a catalyst for many of the changes made in the Queensland jurisdiction.

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\* Faculty of Law, Griffith University.

## ECOLOGICALLY SUSTAINABLE DEVELOPMENT

Environmental management has reflected a number of views over the years. From an early position of exploitation of the natural resources,<sup>1</sup> the latter half of this century saw an awakening of environmental consciousness which appreciated the value of conservation and protection of those resources. And, as one author succinctly stated, '[N]ow there is ecologically sustainable development.'<sup>2</sup>

ESD is widely viewed as a desirable form of environmental management and is a popular catchcry of the modern environmental lawyer, yet until recently very few people seemed to be able to specifically define it, or even describe what it entails.<sup>3</sup> Currently, ESD is a little less of a mystery.<sup>4</sup> Common themes have started to recur. By far the most significant statement of ESD was provided by the Commonwealth Government's National Strategy for Ecologically Sustainable Development,<sup>5</sup> which received approval from the Council of Australian Governments in 1992. This document is similar in content to the earlier Draft,<sup>6</sup> though it is presented in a much more 'reader-friendly' style. This is a reflection of the fact that the strategy aims to influence thinking in all sectors of society, not just the government.<sup>7</sup> It quite simply defines ESD, and places it in the context of national and international developments.

ESD is said to be a 'development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations'.<sup>8</sup> This is analogous to what is called 'Australia's goal' — 'Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.'<sup>9</sup> These statements do little more than confirm our reasonable suspicions as to what ESD could mean. The strategy is more helpful when it says:

There are two main features which distinguish an ecologically sustainable approach to development:

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<sup>1</sup> J.M. Powell, *Environmental Management in Australia 1788–1914* (Oxford: Oxford University Press, 1976).

<sup>2</sup> D.E. Fisher, *Environmental Law — Text and Materials* (Sydney: Law Book Co., 1993), 438.

<sup>3</sup> On the importance of definitional certainty in achieving sustainability, see generally, E. Christie, 'Environmental Legislation, Sustainable Resource Use and Scientific Terminology: Issues in Statutory Interpretation' (1990) 7 *Environment and Planning Law Journal* 262.

<sup>4</sup> Even so, it has been accurately said that 'sustainable development can be seen as a frame of mind and a criterion against which things need to be assessed rather than as a precise standard.' S. Harris, 'Environment and Sustainable Development: An Australian Social Science Perspective' (Canberra: Academy of the Social Sciences in Australia — Occasional Paper, 1993), 13.

<sup>5</sup> Canberra: AGPS, 1992.

<sup>6</sup> *Draft National Strategy for Ecological Sustainable Development* (Canberra: AGPS, 1992).

<sup>7</sup> For a comprehensive socially scientific approach to ESD, see generally Harris, *supra* n. 4.

<sup>8</sup> *Supra* n. 6 at 6.

<sup>9</sup> *Id.* 8.

- we need to consider, in an integrated way, the wider economic, social and environmental implications of our decisions and actions for Australia, the international community and the biosphere; and
- we need to take a long-term rather than short-term view when taking those decisions and actions.<sup>10</sup>

These two ideas are combined in the first stated guiding principle:

... decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations.<sup>11</sup>

The concept of ESD most likely germinated from the flavour of the *Declaration of the United Nations Conference on the Human Environment*<sup>12</sup> which emphasised the responsibility of humankind to 'protect and improve the environment for present and future generations'.<sup>13</sup> Principle 13 comes closest to a description of ESD (and one in agreement with the Commonwealth's *National Strategy*):

In order to achieve a more rational management of resources and thus to improve the environment, states should adopt an integrated and co-ordinated approach to their development planning, so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population.

These ideas re-emerged 20 years later in the United Nations' *Rio Declaration on Environment and Development*<sup>14</sup> which contains the following clauses:

*Principle 3*

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

*Principle 4*

In order to achieve sustainable development, environmental protection shall constitute an integral part of the developmental process and cannot be considered in isolation from it.<sup>15</sup>

The *National Strategy* also stresses the importance of the *Brundtland Report*<sup>16</sup> in the evolution of ESD. It says that the Report made it clear that

<sup>10</sup> *Id.* 6.

<sup>11</sup> *Id.* 8, although note that the fact that this principle appears first does not mean it will 'predominate over the others'. *Id.* 9.

<sup>12</sup> Stockholm, 5–16 June 1972.

<sup>13</sup> *Id.* Principle 1.

<sup>14</sup> Rio de Janeiro, 3–14 June 1992.

<sup>15</sup> *Id.* Principles 3 and 4.

<sup>16</sup> World Commission on Environment and Development, *Our Common Future*, 1987.

'the world's current pattern of economic growth is not sustainable on ecological grounds and that a new type of development is required to meet foreseeable human needs'.<sup>17</sup>

Additionally, what is known as the precautionary principle is highly significant to the concept of ESD, although it is not enunciated as often as intergenerational equity<sup>18</sup> and an integrated approach. Essentially, the precautionary principle is that where an environment appears to be under threat of irreversible damage, lack of full scientific certainty as to this conclusion should not be used to justify a failure to protect that environment. Prevention is the best cure, as it may not be possible to wait for the complete scientific picture to emerge. The effect of the principle appears to be that 'the proponent of development must prove that harm will not occur, rather than the opponent prove that it will'.<sup>19</sup>

While not mentioned prominently in the Commonwealth's *National Strategy*, the precautionary principle is the first factor set down by the Commonwealth and the States under their *Intergovernmental Agreement on the Environment* (IGAE) of 1992, as promoting an ESD approach.<sup>20</sup> The IGAE is a political document between the Commonwealth Government and the States and Territories.<sup>21</sup> It aims to achieve a co-operative approach in the management of the Australian environment and a reduction in governmental overlap. The document shows a commitment to ESD when it recognises:

... that the concept of ecologically sustainable development including proper resource accounting provides potential for the integration of environmental and economic considerations in decision making and for balancing the interests of current and future generations.<sup>22</sup>

The fact that the precautionary principle is not referred to as regularly as the concepts of integrated decision-making and the needs of future

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<sup>17</sup> *National Strategy for Ecologically Sustainable Development* (Canberra: AGPS, 1992), 12.

<sup>18</sup> See Principle 3 above.

<sup>19</sup> G. Bates, 'Editorial — Implementing ESD' (1994) 11(4) *Environmental and Planning Law Journal* 251, 252.

<sup>20</sup> Clause 3.5.1 of the IGAE.

<sup>21</sup> As an aside, many commentators see the IGAE as a clear diminishment in the Commonwealth's environmental power, though this can be viewed in favourable or unfavourable lights. While Bates, *supra* n. 19, considers it as a 'retreat by the Commonwealth from using its undoubtedly superior constitutional powers to override state governments on environment/development conflicts, in favour of more consultative processes based on broad agreements of principle', R. Fowler, quoted in P. Toyne, *The Reluctant Nation: Environment, Law and Politics in Australia* (Sydney: ABC Books, 1994), 183, criticises the IGAE on the grounds that it 'represents a fundamental reversal of the steady trend towards an increased Commonwealth role in environmental matters ... henceforth there will be a political understanding that the Commonwealth generally will not initiate new measures by itself and will promote national environment policy only insofar as the states are also agreed upon the particular proposals.' Regardless of which view is to be preferred, it cannot be denied that the document shows a united commitment to ESD environmental management.

<sup>22</sup> IGAE, preamble.

generations is probably a reflection of the fact that it is seen largely as a matter of 'commonsense'.<sup>23</sup> The power of the principle was well demonstrated in the case of *Leatch v National Parks and Wildlife Service*,<sup>24</sup> where it was applied by the Land and Environment Court of New South Wales despite not having been mentioned in the relevant legislation. Stein J stated:

While there is no express provision requiring consideration of the 'precautionary principle', consideration of the state of knowledge of uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in the protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.<sup>25</sup>

Therefore, the effect of this decision would appear to be that ESD principles may become general principles of statutory interpretation 'to be applied to promote the objectives of environmental protection legislation whether referred to in that legislation or not'.<sup>26</sup> It is apparent that this eventuality is a long way off from the judgment of Talbot J in *Nicholls v Director-General of National Parks and Wildlife*<sup>27</sup> who found that the level of scientific knowledge in that case enabled an informed decision to be made. Nevertheless, in his judgment, Talbot J noted that the decision-maker and the court itself were not bound by the many various statements of ESD and the precautionary principle. Additionally, he questioned the practicality of the precautionary principle as a legal standard, saying that 'it might prove to be unworkable'.<sup>28</sup>

While the law is still in its early stages, it can clearly be seen that environmental protection legislation is increasingly being read in light of international and domestic standards and objectives. The precautionary principle is an example of this. While it is not as obvious as the predominant aspects of ESD — an integrated approach to decisions, taking into account both the financial, environmental and social considerations, and second a long-term perspective, thus enabling consideration of the needs of future generations — it is still very relevant to the topic at hand. Fisheries legislation has always had some degree of preventative flavour to it. However, whether the new fisheries legislation of Queensland encompasses the whole ESD approach, as recently expressed in the various political and legal documents, is essentially the question which this article seeks to explore. In doing so, it must be borne in mind that:

Although to implement ESD requires a legal framework that is clear and simple the existing environmental legal system in Australia is neither clear nor

<sup>23</sup> *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, 282, per Stein J.

<sup>24</sup> (1993) 81 LGERA 270.

<sup>25</sup> *Id.* 282–3.

<sup>26</sup> Bates, *supra* n. 19 at 253.

<sup>27</sup> (1994) 84 LGERA 397.

<sup>28</sup> *Id.* 419.

simple. Its application to ESD is complicated further by the imprecision of ESD itself and by the fact that ESD is an integrating process that imposes a new dimension on legal decision making.<sup>29</sup>

## A GENERAL OVERVIEW OF FISHERIES MANAGEMENT IN AUSTRALIA

The Commonwealth Constitution<sup>30</sup> grants the Commonwealth power to make laws with respect to 'fisheries in Australian waters beyond territorial limits'.<sup>31</sup> The territorial limit at the time of the Constitution's drafting was three nautical miles from the low water mark.<sup>32</sup> Therefore, the Commonwealth could only legislate with respect to waters beyond that limit. However, the *Seas and Submerged Lands Act 1973* (Cth) purported to extend the Commonwealth's jurisdiction to include the territorial sea<sup>33</sup> on the basis of the external affairs power.<sup>34</sup> This was upheld by the High Court in 1975.<sup>35</sup>

In 1980 the Commonwealth granted jurisdiction and proprietary rights over the territorial sea to the States.<sup>36</sup> One of the effects of this legislation was that even if the territorial sea was to be extended beyond the three nautical mile limit, the States' coastal waters would not be similarly extended.<sup>37</sup> (This has in fact occurred, and the territorial sea is now 12 nautical miles from the baseline.) This rule was reinforced, as far as fisheries legislation is concerned, by s. 4A of the *Fisheries Act 1952* (Cth) (the '1952 Commonwealth Act') and s. 5 of its successor, the *Fisheries Management Act 1991* (the '1991 Commonwealth Act'). Therefore, the States' legislative power is limited to coastal waters which only extend to three nautical miles from the baseline.

However, it is not the case that the States can pass fisheries legislation with respect to their coastal waters only, and no further. Such a situation would be clearly ridiculous, due to the mobile nature of the resource. Since 1980, the fisheries legislation<sup>38</sup> has implemented a scheme for joint management of the resource without reference to the three mile limit.<sup>39</sup>

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<sup>29</sup> Harris, *supra* n. 4 at 21.

<sup>30</sup> *Commonwealth of Australia Constitution Act 1900* (Imp.).

<sup>31</sup> Section 51(x).

<sup>32</sup> *Bonser v La Macchia* (1969) 122 CLR 177.

<sup>33</sup> Section 6.

<sup>34</sup> Section 51(xxix) of the Commonwealth Constitution.

<sup>35</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337.

<sup>36</sup> See *Coastal Waters (State Powers) Act 1980* (Cth), ss. 3 and 5; and *Coastal Waters (State Titles) Act 1980* (Cth), s. 4.

<sup>37</sup> D.E. Fisher, *National Resources Law in Australia* (Sydney: Law Book Co., 1987), 434.

<sup>38</sup> *Fisheries Act 1952* (Cth); *Fisheries Act 1976* (Qld); *Fisheries Act 1994* (Qld).

<sup>39</sup> Part IVA of the *Fisheries Act Amendment Act 1980* (Cth). This is provided for by all State legislation and expressly saved from repeal by the new Commonwealth statutes. Part 5 of the *Fisheries Management Act 1991* (Cth), which is similar, replaced Part IVA which was repealed in February 1995.

This greatly extends the States' legislative capacity, as is clear from s. 5(c) of the *Coastal Waters (State Powers) Act 1980* (Cth) which reads:

5. The legislative powers exercisable from time to time under the constitution of each State extends to the making of:
  - (c) laws of the State with respect to fisheries in Australian waters *beyond the outer limits of the coastal waters of the State*,<sup>40</sup> being laws applying to or in relation to those fisheries *only to the extent* to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.

Therefore, when the State acts jointly with the Commonwealth in managing the fisheries, it is entitled to do so beyond the three nautical mile limit of the coastal waters. The constitutional validity of this was upheld by the High Court in *Port McDonnell Professional Fishermen's Association Inc. v South Australia*.<sup>41</sup> The Joint Authority can in fact cover waters up to 200 nautical miles from the baseline, due to the Commonwealth's jurisdiction over the exclusive economic zone under its external affairs power.<sup>42</sup> Provision is made for this in the definition of 'Australian Fishing Zone' in s. 4 of both the 1952 Commonwealth Act and the 1991 Commonwealth Act.

The Commonwealth-State co-operative provisions were to be found in Part IVA of the now defunct 1952 Commonwealth Act. Section 36H of the former *Queensland Fisheries Act 1976* (the '1976 Queensland Act') provided that the State could make an arrangement under s. 12H of the 1952 Commonwealth Act to be represented on a Joint Authority, which would then have the responsibility of managing a particular fishery adjacent to the State.<sup>43</sup> Queensland would be a member of the Northern Australian Fisheries Joint Authority, which consists of the Queensland Minister, together with his or her Commonwealth and Northern Territory equivalents.<sup>44</sup>

The result of entering into such an arrangement is that the power to determine a plan of management for a fishery, which would have been otherwise exercisable by the Commonwealth Minister<sup>45</sup> under the 1952 Commonwealth Act, or the Australian Fisheries Management Authority (AFMA) under the 1991 Commonwealth Act,<sup>46</sup> is now within the power of the Joint Authority.<sup>47</sup> Similarly, certain of the State Minister's powers are to be exercised by the Joint Authority.<sup>48</sup> As to the question of how this

<sup>40</sup> Author's emphasis.

<sup>41</sup> (1989) 168 CLR 340.

<sup>42</sup> See Article 56 of the United Nations' Convention on the Law of the Sea, Montego Bay, 10 December 1982.

<sup>43</sup> How these provisions have been updated shall be examined in due course.

<sup>44</sup> Section 12D(3) of the *Fisheries Act 1952* (Cth).

<sup>45</sup> Section 7B(1) of the *Fisheries Act 1952* (Cth).

<sup>46</sup> Section 17 of the *Fisheries Management Act 1991* (Cth).

<sup>47</sup> Section 12MA of Part IVA of the *Fisheries Act 1952* (Cth).

<sup>48</sup> Section 36K of the *Fisheries Act 1976* (Qld).

management is to be conducted, Part IVA<sup>49</sup> and the 1976 Queensland Act<sup>50</sup> were agreed:

... the Joint Authority has the functions of keeping constantly under consideration, the condition of the fishery, formulating policies and plans for the good management of the fishery ...<sup>51</sup>

This arrangement between the Commonwealth and the States to manage the fisheries jointly makes excellent sense given the nature of the resource. It also significantly foreshadows the Intergovernmental Agreement on the Environment, which was 12 years away when Part IVA was introduced in 1980. For the purposes of this article, the result is that in examining the Queensland legislation, frequent reference must be made to the Commonwealth equivalent. With the two levels of government so closely linked with regards to fisheries, it is inevitable that the legislation of one will have a bearing upon the other. Just how powerful that influence has been will be revealed in due course.

## AN EXAMINATION OF THE PREVIOUS POSITION IN QUEENSLAND

The legislation which was in place prior to the enactment of the *Fisheries Act 1994 (Qld)* (the '1994 Queensland Act') was needlessly repetitive and complex, contradictory and confusing. In looking at the 1994 Queensland Act, it is essential to refer to earlier statutes as they explain the approach taken in 1994, and indeed, indicate why the later Act was drafted and subsequently passed.

The principal statute before the 1994 Queensland Act was the 1976 Queensland Act. It is especially interesting to try to elucidate the objectives of this Act. From the long title, the primary purposes of the legislation seem to be the management and development of the fishing industry, and the protection, conservation and management of the fisheries resources of the State. The long title is worth quoting in full, and reads as follows:

An Act to consolidate and amend the law relating to pearling, oystering and fisheries generally, to promote the good order, management, development and welfare of the fishing industry, to provide for the protection, conservation and management of the fisheries resources of the State and for incidental purposes.

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<sup>49</sup> Section 12M.

<sup>50</sup> Section 36J.

<sup>51</sup> Note that this is not the statement under Part 5 of the 1991 Commonwealth Act or under the 1994 Queensland Act.



Taking just this portion of the Act in isolation, a question immediately arises. The use of the word 'management' in regard to the second purpose may lead the reader to think that any conservation of the fisheries resource is done with an exploitative goal in mind, and is not in fact motivated by the highest environmental ideals. This is due to the use of 'management' in the developmental context which precedes, and thus seems to influence, its use in the second context of conservation.

However, it is submitted it is a mistake to read too much into the use of the word 'management'. It is a word which can quite easily relate to both development and conservation. Indeed, the National Conservation Strategy for Australia<sup>52</sup> defines conservation in terms of 'management'.<sup>53</sup> As a consequence, the ends to which the act of 'managing' is put may differ, but the term 'management' itself does not indicate what those ends may be. It is 'essentially a neutral term used to describe a process'.<sup>54</sup>

From an examination of the long title alone, it appears that whilst the 1976 Queensland Act is clearly concerned with the development of the industry, it also aims to protect those resources. Whether this marriage of development and conservation means the Act is based upon principles of ESD is impossible to say. The long title, though useful as a guide, is only a very small part of the Act which has close to 100 provisions. A pronouncement at this stage would be extremely premature. However, it can be stated that the language of the long title does not obviously reflect a system of ESD in keeping with that enunciated in the National Strategy for Ecologically Sustainable Development. An examination of the scheme of the legislation itself will be more enlightening in this regard.

The 1976 Queensland Act has basically the following structure. First, it contains administration provisions which deal primarily with the appointment of inspectors<sup>55</sup> and their powers.<sup>56</sup> These powers are quite extensive and include powers to search<sup>57</sup> and seize and remove fish or marine products in respect of which an offence under the Act has been committed.<sup>58</sup> Part IV is concerned solely with oystering,<sup>59</sup> while Part V deals with pearling,<sup>60</sup> and Part VI with 'Coral, Coral Limestone and the Like'.<sup>61</sup> Provisions detailing the granting of licences to engage in these activities are set out in their respective Parts.<sup>62</sup> Essentially the only offences in the

<sup>52</sup> Canberra: AGPS, 1983, 4.

<sup>53</sup> The definition given is that, conservation is the 'management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations'.

<sup>54</sup> *Supra* n. 2 at 439.

<sup>55</sup> Section 15.

<sup>56</sup> Section 18.

<sup>57</sup> Section 18(1)(g).

<sup>58</sup> Section 18(1)(h) and (i).

<sup>59</sup> Sections 24–29.

<sup>60</sup> Sections 30–34.

<sup>61</sup> Sections 35–36.

<sup>62</sup> Part IV — s. 25; Part V — s. 30; Part VI — s. 35.

three Parts are engaging in taking any of the items which they deal with, from the sea, without an appropriate licence. There are no references to amounts of the catch, limits thereto, or methods of catching.

As discussed generally above, the 1976 Queensland Act contains a Part entitled 'Commonwealth-State Management of Fisheries'<sup>63</sup> which was added in 1980. It is distinct and apart from the remainder of the legislation, in that it is intrinsically linked to Part IVA of the 1952 Commonwealth Act. As a consequence, it takes its true tone from that Act and deals primarily with the powers and functions of Joint Authorities. These provisions are clearly related to their federal counterparts.

Recall the earlier quoted passage from s. 36J of the Queensland Part, which talked of the Joint Authority 'formulating policies and plans for the good management of the fishery'. The use of 'good management' in this section<sup>64</sup> is quite ambiguous. It would not seem to be referable to any specific context — either development or conservation. Having established that 'management' is a neutral term,<sup>65</sup> it is arguable that to use it without connection to any determining phrases must surely be meaningless. Alternatively, 'management' in this section may have been deliberately left without specific reference — with the intent being that it encompasses both exploitation and conservation of the resource. Such an inference may be possible in light of the use of 'management' in both these contexts in the long title of the Queensland Act. However, it should be borne in mind that the long title predates s. 36J by five years, and s. 36J has its roots in the Commonwealth legislation. Therefore, any reading of the section in light of the long title should be undertaken with caution.

Part VII of the 1976 Queensland Act is concerned with the licensing of premises where marine products are processed. Once again, the offences are based upon use of premises without the requisite licence.

Part VIII is entitled 'Management and Protection of Fisheries Resources'. In this Part, the Governor in Council is given extensive powers to declare fish sanctuaries or reserves,<sup>66</sup> and also to declare closed seasons on any species of fish<sup>67</sup> or closed waters,<sup>68</sup> within which no fishing must occur after such declaration.<sup>69</sup> The only explanation the sections offer for the making of these declarations is that they are 'for the purposes of this Act'. Presumably this is a reference to the two objectives expressed in the long title — those seemingly diametrically opposed objectives of exploitation and conservation. But to simply refer to 'the purposes' does not illuminate the matter at all — for example, does the Governor in Council, by declaring closed waters, further the protection of a fishery whilst

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<sup>63</sup> Part VIA.

<sup>64</sup> And similarly in s. 12M of the *Fisheries Act 1952* (Cth).

<sup>65</sup> *Supra* n. 53.

<sup>66</sup> Section 51.

<sup>67</sup> Section 53.

<sup>68</sup> Section 54.

<sup>69</sup> Section 55.

simultaneously developing the fishing industry? Which purpose takes precedence over the other? Is it enough that the declaration be made for only one of the stated purposes? The actual circumstances in which the Governor in Council would intervene under the provisions of Part VIII are not mentioned. It appears that he or she may simply act at any time for the purposes of the Act. Given the broad ambit of those purposes and the fact that they are not easily reconcilable, this seems to be a vague and ultimately unsatisfactory system of management.

The remainder of Part VIII of the 1976 Queensland Act contains provisions pertaining to penalties for releasing various kinds of fish,<sup>70</sup> and using various devices for catching fish.<sup>71</sup> One wonders whether these restrictions are also 'for the purposes of this Act'. Obviously, a section prohibiting the release of a noxious fish into Queensland waters is concerned with the protection of the fisheries resource, yet it is ambiguous as to whether that protection has the industry or the ecosystem as its driving purpose. Given the tone of the Act, most of these provisions could fall within the first stated purpose of promoting the 'welfare of the fishing industry'.

The final Part of the 1976 Queensland Act<sup>72</sup> deals primarily with administrative matters, including proceedings for prosecutions and cancellation of licences granted.

It is submitted that the 1976 Queensland Act does not operate on principles of ESD. As discussed earlier, ESD's two 'main features'<sup>73</sup> are a consideration of the 'wider economic, social and environmental implications' of a decision, and the adoption of a long-term approach to planning. The 1976 Queensland Act bears little of these characteristics. First, little consideration is given to the implications of decisions and actions. Things are simply 'done' under the Act — licences granted, waters closed, reserves established, prohibitions imposed — without the public being given any justification other than that they occur 'for the purposes of the Act'. The purposes are development of the fishing industry and conservation of the fisheries resource. How many of the statute's provisions can achieve these aims is left unclear. It is apparent that conservation takes a back seat to regulation of the industry in virtually every Part. Use of the licensing system is the most striking example of this. There seems to be no obvious correlation between licence holding and environmentally responsible standards of behaviour. The only possible connection is s. 80(1)(d), which allows the revocation of a licence if the holder is convicted of an offence against the Act. As the motivation for these offences may not necessarily be conservation, but seems only to be industry standards, it appears to be a fairly tenuous connection.

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<sup>70</sup> Sections 65–70.

<sup>71</sup> Sections 59–64 and 72.

<sup>72</sup> Part IX — Miscellaneous Provisions.

<sup>73</sup> *Supra* n. 6 at 6.

Even more apparent is the failure of the 1976 Queensland Act to adopt a long-term approach to fisheries management. Not only are things just 'done' under the legislation, but they are done only as the need arises. A prime example is the Governor in Council's power to close a season on a species of fish.<sup>74</sup> This may be done at any time, and for any length of time. Presumably it is only when fish numbers are noticeably low that action is taken. This hardly seems to be a long-term or scientific approach for maintaining a sufficient population of a species of fish. A regular closed season, determined by numbers monitoring, would seem to be a more methodical course of action. Yet this is not the scheme which the Act adopts — it merely provides for the shutting and opening of seasons sporadically, when the Governor in Council sees fit.

As a whole, the 1976 Queensland Act fails to present a consistent approach to developing the fisheries resource in a way that allows it to be sustained. Rather, it seems to reflect what has been described as the 'contemporary system' in Australia, 'directed towards achieving a balance between the use and development of the resources of the environment, their conservation in certain circumstances and their preservation in much more limited contexts'.<sup>75</sup> The 1976 Queensland Act concentrates primarily upon the regulation of exploitation, with only a few provisions clearly committed to conservation. The mere combination of these two factors is not ESD, but merely a scheme whereby industry cannot totally exhaust a natural resource. It seeks merely to avoid acting 'contrary to its own *raison d'être* by destroying the thing that sustains it'.<sup>76</sup> There is no clear integration of the two concepts from the provisions of the statute.

### **The Fishing Industry Organization and Marketing Act 1982 (Qld)**

The 1976 Queensland Act was not the sole piece of legislation pertaining to the fisheries resource before the new statute was passed last year. From 1982 onwards, there also existed the *Fishing Industry Organization and Marketing Act 1982 (Qld)* (FIOMA). The Act's title indicates clearly that it deals with the fisheries as a resource capable of exploitation and development. The long title (even after the 1984 amendments) leaves the reader in no doubt that this is the case. There are three concepts in the long title. First, the Act is to provide for the 'management and control of the supply and marketing of fish'. This was the only phrase of importance in the original title, and clearly shows a commercial emphasis. The same

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<sup>74</sup> Section 53.

<sup>75</sup> D.E. Fisher, *supra* n. 2 at 441.

<sup>76</sup> Extracts from the 1994 Environmental Report of the German Council of Environmental Advisers, 'In Pursuit of Sustainable Environmentally Sound Development — Fundamentals of Environmental Ethics' (1995) 25(3) *Environmental Policy and Law* 90, 91.

comment can be made of the 1984 addition of 'management and development of the fishing industry'. However, nestled between these two is the phrase 'management of the fisheries resources' which was also added by the *Fishing Industry Organization and Marketing Act Amendment Act 1984* (Qld). Once again, the neutral term of 'management' was used, but in this case there can be little question as to context. The predominant emphasis in the long title is industry regulation and development, and 'management of the fisheries resources' does not serve to widen or displace that context.

The extensive provisions in the FIOMA confirm its exploitative nature. It is worth examining the general thrust of the statute, as the *Fisheries Act 1994* (Qld) builds upon and reforms many of its features. Part II, Division 1 establishes, and prescribes the powers of, the Queensland Fish Management Authority (QFMA). Under s. 27, it is given an extremely broad scope, which basically consists of ensuring there are sufficient fish to support the industry at all stages — from production to the sale of fish, and to confer with the Minister on any of these matters. Two particularly interesting additions to s. 27 are provisions (fa) and (fb), which state:

- (fa) to promote the good order, management and development of the fishing industry;
- (fb) to provide for the protection, conservation and management of the fisheries resources of the State...

It will be noted that these paragraphs are identical replications of the two limbs of the long title of the 1976 Queensland Act. However, they were not present in the FIOMA as originally passed, but rather were added by the 1984 amendment. While it is commendable that the QFMA shares its functions with the central piece of Queensland legislation in the area, one has to wonder why these provisions were not originally included in 1982 when the Act was first passed. Perhaps more importantly, why are the two objectives of the 1976 Queensland Act merely inserted between functions (f) and (g) on the Authority's function list? Surely, given their general nature and important status in the other Act, one would have expected them to have priority over other more specific functions. This may appear pedantic. Section 27 does not consciously prioritise the QFMA functions. However, there does not seem to be any logical reason for the placement of these two provisions between paras (f) and (g), instead of inserting them at the top of the list. It is difficult to discern whether there were deliberate reasons for amending the Act in this manner. Parliamentary Debates provide little assistance. From this position, it appears a clumsy attempt to link the Authority to the 1976 Queensland Act. If anything, it demonstrates a lack of cohesion and integration between the two Acts, which probably would not have been as obvious had the provisions not been lifted from one and placed so incongruously in the other.

The other important matters to note from the FIOMA are the bodies

which it established in addition to the QFMA. First, there was the Fish Promotion Advisory Committee,<sup>77</sup> which was to formulate recommendations and give advice to the QFMA in respect of the exercise of its powers.<sup>78</sup> Part III established the Fishing Industry Appeals Tribunal,<sup>79</sup> to which 'people aggrieved by a decision of the Authority'<sup>80</sup> could appeal. As if these new bodies were not sufficient, Part IV<sup>81</sup> preserved the Queensland Fish Board, constituted earlier under the *Fish Supply Management Act 1972* (Qld). Its functions and powers were extensive,<sup>82</sup> but it is stated that they are 'generally, to engage in the treatment, supply, delivery, storage, grading, preservation, distribution, transportation and sale of fish for use in the State or elsewhere'.<sup>83</sup> Any doubt as to the hierarchy of these organisations is laid to rest by s. 81(f) which allows the QFMA to delegate its powers to the Board, which then acts as the Authority's agent.

Division II of Part II relates to the granting and revocation of licences. Most of the provisions seem to be close copies of those in the 1976 Act, though the structure is better organised.<sup>84</sup> The bulk of Division IV was inserted in 1984 and also mirrors sections of the 1976 Queensland Act. The Division is entitled 'Fisheries Resources, Protection and Management', and contains provisions on such familiar topics as closed seasons and waters,<sup>85</sup> penalties for taking protected or specified fish,<sup>86</sup> and prohibitions on certain methods of fish catching.<sup>87</sup> These provisions resemble those of the 1976 Queensland Act, yet they were not added until two years after FIOMA was passed. Together with the other 1984 amendments (to the long title and s. 27), they demonstrate that a concerted effort was made at that time to link the two pieces of legislation by heightening the environmental management factor in the FIOMA, presumably with the aim of establishing a unified approach to the fisheries resources of Queensland.

In all, it is an unconvincing exercise. The mere duplication of these provisions in another Act can only serve to confuse the issue. Instead of a single regime with a consistent set of objectives, the previous Queensland system consisted of two Acts. The principal piece of legislation — the 1976 Queensland Act — aims to exploit and conserve the resources simultaneously. The substance of its provisions indicates a much higher

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<sup>77</sup> See Part IIA — ss. 45B–45F.

<sup>78</sup> Section 45E.

<sup>79</sup> Sections 46–61.

<sup>80</sup> Section 57.

<sup>81</sup> Sections 62–88.

<sup>82</sup> Section 81.

<sup>83</sup> Section 81(a).

<sup>84</sup> Recall how revocation was dealt with in the Miscellaneous Part of the *Fisheries Act 1976*, several sections away from the provisions concerned with the grant of a licence.

<sup>85</sup> Sections 45AG and 45AH.

<sup>86</sup> Sections 45AJ and 45AK.

<sup>87</sup> Section 45AM — use of apparatus; s. 45AQ — use of jaggings; s. 45AR — use of spear or spear-gun.

emphasis on the former than the latter. The FIOMA began its life in 1982, with industry regulation given as the reason for inception. It was significantly amended two years later by the insertion of provisions identical to those in the earlier piece of legislation. Apart from obvious problems inherent in this approach, such as choosing which Act to prosecute offenders under, neither statute is clear as to which purpose they are trying to achieve and when. Simply, the Acts reflect a pre-ESD movement in which it was recognised that development was inevitable and conservation was essential, but had little idea as to how legislation should set about achieving a balanced, uniform approach. In 1991, the Commonwealth Government attempted to show the way.

## THE COMMONWEALTH SYSTEM

The complete revision of the Commonwealth scheme in the 1991 Commonwealth Act heralded, and in all probability, instigated the changes made by the Queensland Parliament in 1994. The Commonwealth Acts will not be the subject of detailed examination, but it is worthwhile to highlight two of the changes made which show a move towards ESD, drawing parallels with Queensland where possible. These changes have occurred first in drafting style and second in the substance of the legislation.

### A Shift in the Stated Objects

The *Fisheries Act 1952* (Cth) (the '1952 Commonwealth Act'), now replaced by the *Fisheries Management Act 1991* (Cth) (the '1991 Commonwealth Act'), was actually without a statement of purposes until 1978, when s. 5B was inserted. The fact that these objectives came some time after 1952 does not automatically lessen the likelihood of them being reflected in the substance of the legislation. The Act's operative provisions were also significantly amended and added to (though not at the same time as s. 5B was introduced) and this may show that the legislature envisaged the new objectives could be met by the Act as amended. Regardless, s. 5B read as follows:

- 5B. In the administration of this Act, the Minister shall have regard to the objectives of —
- (a) ensuring, through proper conservation and management measures, that the living resources of the Australian fishing zone are not endangered by over-exploitation; and
  - (b) achieving the optimum utilization of the living resources of the Australian fishing zone, ...

It will be noted that the two limbs of this provision are analogous to the long title of the 1976 Queensland Act which also mentioned management of the industry and conservation of the resource. Section 5B also seeks to exploit and conserve, yet it differs, in that it is more specific in these aims. The result is that the ambiguity of reconciling such seemingly opposite objectives is not as apparent in this setting. However, the meaning behind the two provisions is not so dissimilar.

It was said earlier that the effect of the 1976 Queensland Act was the creation of a scheme 'whereby development cannot totally exhaust a natural resource'. It was suggested that such a scheme was not a reflection of ESD, and indeed, falls significantly short of achieving that status. It seems those comments are even more applicable when considering s. 5B. Paragraph (a) states that conservation is an objective of the Act, to the extent that 'the living resources of the Australian fishing zone *are not endangered*<sup>88</sup> by over-exploitation'. This would appear to be the lowest level of conservation. There is no reference to the maintenance of ecosystems or even of keeping the fish population at 'adequate levels'. Avoidance of endangerment is the extent of this objective.

Paragraph (b) compounds this by offering 'optimum utilisation' of the resource as the other purpose of the Act. This is no surprise in itself, and is a regularly occurring concept.<sup>89</sup> Combined with para. (a), the total effect seems to be that the resource can be fully utilised, *provided* it is not exploited out of existence. Extinction is the only limit to resource utilisation. In no respect does this resemble ESD. Section 5B does not take a balanced view, integrating economic and environmental considerations. Conservation is used as a safeguard against the expiry of the resource-based industry.

The 1991 Commonwealth Act offers an extremely interesting contrast with the above. It states five objectives,<sup>90</sup> four of which are related to the economic management of the industry. The fifth objective, para. (b), is of particular importance. It states that an objective of the Commonwealth Minister and the Australian Fisheries Management Authority is to be:

... 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, in particular the need to have

<sup>88</sup> Author's emphasis.

<sup>89</sup> However, it is interesting that Gummow J in *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151, 168-71 states that 'the phrase "optimum utilization" is not limited to avoidance, by proper conservation and management measures, of the danger of over-exploitation', which was, of course, the wording of the preceding paragraph of s. 5B. Why his Honour should determine that conservation in the terms of para. (a) is part of the meaning of 'optimum utilization' in para. (b) is somewhat unclear. It is a view reinforced by the wording of the headnote to the case which says that 'the meaning of "optimum utilization" is not limited' to avoidance of over-exploitation. It is submitted he may have meant 'optimum utilization' of the resource was not limited solely by the environmental concerns of para. (a).

<sup>90</sup> Section 3(1).



regard to the impact of fishing activities on non-target species and the marine environment...

This is the first time the phrase 'ecologically sustainable development' has been used in any fisheries legislation. While the appearance of this phrase seems conclusive that the Commonwealth has adopted it as the basis for its management of the fisheries resource, it is possible to draw more from s. 3 than just the mere mention of ESD.

First, the original phrase is of much importance. The concept of exploitation (allowable to the brink of endangerment), as expressed in the 1952 Commonwealth Act, is not a stated objective. The 1991 Commonwealth Act does not just substitute this phrase for 'ecologically sustainable development' in the place of this former purpose; rather, para. (b) uses ESD to tie in exploitation of the resource with the 'need to have regard to the impact of fishing activities on non-target species and the marine environment'. Even the use of the phrase 'have regard to the impact' shows a more sophisticated level of thinking than was demonstrated previously. Paragraph (b) not only mentions ESD expressly, but also reflects its principles by integrating economic and environmental factors and alluding to a more rational, long-term system of managing the effect of fishing activities.

## Environmental Objectives and the Decision-maker

As a corollary, the stated objectives of an Act, and more particularly fisheries legislation, may influence the decision-maker when exercising his or her discretion. One issue to address is whether it is possible to go beyond the enumerated objectives of the legislation.

Comments made by Bates on the value of statements of environmental purposes are of assistance. Bates states:

'Motherhood' statements of the objectives of legislation or of the responsibilities of regulatory and decision-making authorities, although difficult to enforce legally, do, however, at least promote the concept that principles of sustainability should underpin the approach of government agencies. They could also conceivably be used as a guide to interpretation of the legislation, particularly since courts are generally required to adopt interpretations of legislation which best achieve the purposes of the legislation.<sup>91</sup>

It is submitted that the new fisheries legislation in both the Commonwealth and Queensland jurisdictions, by stating ESD as an objective, seek to influence the approach of the Minister and the various statutory bodies. Such a conclusion is fairly self-evident, but it does not indicate what

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<sup>91</sup> Bates, *supra* n. 19 at 253.

may actually occur in practice. Must all decisions concerning the fisheries take sustainability into account? Can they go beyond the aims stated in the statute and consider other factors?

While fisheries legislation has been judicially considered and the judgments are instructive, two caveats must be noted. First, the decisions have not significantly dealt with sustainability. The prime focus has been on economic considerations. Second, not only are the cases all set within the Commonwealth jurisdiction, but due to the recent enactment of the 1991 Commonwealth Act, the majority of cases considered the 1952 Commonwealth Act.

Recent case law is, however, illuminating in two respects. Essentially, it answers the question posed above, by stating definitely that, at least as far as the 1952 Commonwealth Act is concerned, the stated objectives are not exhaustive and that the decision-maker may act in accordance with legislative aims not actually enunciated in the Act. O'Loughlin in *Fitti v Minister for Primary Industry and Energy*<sup>92</sup> noted:

The requirement in s. 5B, that in the administration of the Act, the Minister shall have regard to the objectives set out in paras (a) and (b) means only that he must give weight to them as fundamental issues when engaging upon any act of administration because they are matters to be taken into account ... it is incorrect to say that the objectives in and of the *Fisheries Act* are limited to those two matters that are listed in paras (a) and (b) of s. 5B.

Gummow J agreed in *Bienke v Minister for Primary Industry and Energy*<sup>93</sup> and concluded that the statement in s. 5B was not exhaustive 'having regard to the subject matter, scope and purposes of the Act'.<sup>94</sup> This approach follows cases such as *Woollahra Municipal Council v Minister for Energy*<sup>95</sup> where the exercise of the decision-maker's discretion was limited by objectives implied from the tenor of the relevant legislation.<sup>96</sup>

Interestingly, in regard to plans of management, it was indicated that the scope of their objectives is not to be qualified by those existing generally under the Act. This seems apparent from the words of French J<sup>97</sup> in

<sup>92</sup> (1993) 40 FCR 286, 300-1. This decision went on appeal as *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, but O'Loughlin J's remarks in this regard were not questioned. Later approval was obtained in Gummow J in *Bienke v Minister for Primary Industry and Energy* (1994) 125 ALR 151, 168, per Gummow J who, incidentally, delivered the majority judgment in *Davey's case*.

<sup>93</sup> (1994) 125 ALR 151.

<sup>94</sup> *Id.* 169.

<sup>95</sup> (1991) 23 NSWLR 710.

<sup>96</sup> In this case, the Director of the National Parks and Wildlife Service granted development approval and licences to a private university, under the *National Parks and Wildlife Act 1974* (NSW), in order to provide funds for national parks. The Supreme Court held the licensing powers under that Act were to be exercised only in accordance with the objectives of the legislation.

<sup>97</sup> Agreed with by Burchett J in *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, 169.

*Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy*<sup>98</sup> in reference to s. 7B(8) and (8A) of the 1952 Commonwealth Act. Section 7B(8) provides that once a plan of management for a certain fishery is in place, all decisions in respect of that fishery should be made in accordance with the plan of management. Subsection (8A) merely provides that an exercise of powers generally under the Act shall take into account any effects on any existing plans of management. French J held that subs. (8A) does not allow the Minister to act outside a plan of management's scope, and thus avoid the effect of s. 7B(8), when making decisions in regard to a particular fishery. Such a segregation of general objectives and specific plans of management is less appropriate since the passing of the 1991 regime, as this deliberately links all plans of management to the objectives stated in s. 3 of the 1991 Commonwealth Act.<sup>99</sup>

The second matter of importance from the recent case law is that in finding that a decision-maker is not restricted by the legislation's stated objectives, the courts have done so to justify decisions based upon largely economic considerations. Black CJ and Gummow J in *Davey's case* stated simply that an economic objective was consistent with s. 5B of the 1952 Act. In the later case of *Bienke*, Gummow J reiterated this view by discussing in detail the meaning of the phrase 'optimum utilization'.<sup>100</sup> The trend in decision-making that is illustrated by the cases is that economic factors are increasingly relevant. This is reflected, and was perhaps anticipated, by the largely economic objectives stated under the 1991 Acts. It should not mean, however, that sustainability is accorded a lower priority. As a stated objective, it must as O'Loughlin J said in *Fitti*, be given weight as a fundamental issue. In light of this and the increased prominence given to ESD by the new legislation, it is unlikely that any trend towards economics will lessen the theme of sustainability throughout those Acts.

## A Shift in the Substantive Provisions

As far as the operation of the two Acts is concerned, the 1952 Commonwealth Act model is similar to the 1976 Queensland Act in that it establishes a system of licences.<sup>101</sup> Section 9(5) of the 1952 Commonwealth Act stated that such a licence is subject to conditions:

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<sup>98</sup> (1992) 110 ALR 209, 230.

<sup>99</sup> Section 16 of the *Fisheries Management Act 1991* (Cth).

<sup>100</sup> *Supra* n. 89.

<sup>101</sup> Sections 9–9E. *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, 325, per Mason CJ, Deane and Gaudron JJ described licences in this context when they stated that a licence 'is an entitlement ... created as part of a system for preserving a limited public natural resource in a society which is coming to recognise that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.'

- (a) (i) specified in the licence;
- (ii) prescribed in relation to —
  - (A) all licences granted under this section;
  - (B) a class of licences granted under this section in which the licence is included; and
- (iii) in the case of a licence granted by virtue of paragraph (2)(b) or (3)(b)<sup>102</sup> — specified in the plan of management for the managed fishery in relation to which the licence has been granted...

Apart from para. (a)(iii), none of the conditions which the licence may be subject to are tied to any plan of management for either a specific fishery or for fisheries in general. The Minister or Secretary could simply impose conditions as he or she pleases — independent of any far-sighted vision of organising the fisheries. Under the Minister's power to set conditions,<sup>103</sup> he or she was able to prohibit a number of activities, including the rate and taking of fish of a specified class<sup>104</sup> or by a certain method.<sup>105</sup> Whether all, or perhaps more, of those conditions were present in a licence was indeterminable. Section 9(5A), in offering these possible conditions for inclusion in a licence, stated it does so 'without limiting the generality of sub-section (5)'. Therefore, the conditions to which a licence was subject could vary.

Although the 1991 Commonwealth Act is not radically different from this system, the emphasis is slightly heavier on permits tied to a plan of management for a fishery. Section 32 divides the types of fishing permits into two groups. First, it discusses conditions in respect to a permit authorising fishing in a specified managed fishery.<sup>106</sup> The conditions in such a case will be those imposed by the relevant plan of management, or by the AFMA under that plan.<sup>107</sup> The plan of management may be drawn up under s. 17 by the AFMA, which 'must pursue its objectives'<sup>108</sup> in doing so. Section 3 gives ESD as an objective of the AFMA. Therefore, this system allows for a 'trickle down effect', so that standards of ESD become relevant to permit holders. So important is this link between the plan of management and the conditions of the permit that the latter ceases to

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<sup>102</sup> These provisions refer to the granting of licences in respect of a specified managed fishery.

<sup>103</sup> Section 9(5A).

<sup>104</sup> Section 9(5A).

<sup>105</sup> Section 9(5A)(d).

<sup>106</sup> Section 32(5).

<sup>107</sup> As to the actual status of a management plan, Heerey J in *Secretary, Department of Primary Industries and Energy v Collins* (1992) 106 ALR 351, 356 stated that such a plan would have the force of law. *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 209, 228–9, per French J further discussed this matter and concluded that a plan of management was not a policy statement, guideline, regulation or by-law. Whether it was delegated legislation was debatable. It was held the preferred view was to 'focus upon identification of the rights, duties, powers and privileges which arise as a result of the determination of the plan'. However, note that the 1994 Act specifically states that a management plan is subordinate legislation: s. 32(2).

<sup>108</sup> Section 16.

have effect as soon as the plan is revoked.<sup>109</sup> The 1952 Commonwealth Act did not place as strong an emphasis between the two.

The 1991 Commonwealth Act still retains the ability of the AFMA to include specified and unspecified conditions in a permit.<sup>110</sup> These provisions resemble their 1952 counterparts, but presumably some flexibility is needed in respect of those areas without a plan of management. What is significant is the way the new Act has elevated the plan of management as a means of enforcing ESD standards through the granting of permits. Under the earlier legislation, the Minister did not have to determine a plan of management with reference to the Act's objectives, but could decide upon different, unspecified purposes for each plan. Consequently, that licence system was weak and unsuitable for setting unified environmental standards. The linking of the purposes of the 1991 Act to many of the permits granted under it<sup>111</sup> is a much more effective way of channeling the purpose of ESD which the Act strives for, to those individuals engaged in fishing activities. Purvis J of the Administrative Appeals Tribunal, in *Re Jetopay Pty Ltd and Australian Fisheries Management Authority*,<sup>112</sup> highlighted the unlimited influence of the Act's objectives when he stated:

There is no doubt that the statute imposes an obligation on AFMA to pursue the objectives set forth in s 3 of the Act. The section does not, however, specify the ways and means whereby such objectives are to be pursued.<sup>113</sup>

The conclusion is that the AFMA can make such decisions as it sees fit in order to 'carry into effect the legislative requirements'<sup>114</sup> of the Act.

The nature of the fishing rights under the 1991 Commonwealth Act is also worthy of comment. The relevant provision<sup>115</sup> says that a fishing right may be 'a right to a specified quantity of fish in, or a specified proportion of the fish in, a managed fishery'. It then proceeds to list other possible grounds for fishing rights under the Act. The emphasis is on fishing rights linked to quotas. This system has received praise for allowing 'the manager of a fishery to control fish numbers by adjusting the size of each ITQ ("Individual Transferable Quotas" — named "statutory fishing rights" under the *FMA*) in order to reflect a biologically desirable Total Annual Catch.'<sup>116</sup> While it can easily be appreciated that quotas are the simplest and most effective way of ensuring that a resource is sustained, McCamish warns 'They are not a perfect system for protecting fish numbers. The

<sup>109</sup> Section 32(5)(b).

<sup>110</sup> Section 32(6) and (7).

<sup>111</sup> That is, those specifically granted under s. 32(5).

<sup>112</sup> (1993) 32 ALD 209.

<sup>113</sup> *Id.* 215.

<sup>114</sup> *Ibid.*

<sup>115</sup> Section 21.

<sup>116</sup> C. McCamish, 'Fisheries Management Act 1991: Are ITQs Property?' (1994) 22(2) *Federal Law Review* 375, 375–6.

major problems are unrecorded catch, under-reporting of catch and dumping of ancillary species caught in a net and of low grade fish.<sup>117</sup> In spite of these recognised drawbacks, quota conditions attached to fishing permits are also given due prominence under the new 1994 Queensland Act, presumably for the same reasons.<sup>118</sup>

## The Influence of the Commonwealth's 1991 Legislation

The Commonwealth has made a serious attempt at regulating the use of the fisheries resources on ESD guidelines.<sup>119</sup> The improvement upon the previous statute is overwhelming. It clearly provided the impetus for the Queensland legislature to look at its own fisheries scheme. This is evidenced by the change made to the Commonwealth–State joint management scheme by Part 5 of the 1991 Commonwealth Act. Part 5 came into force on 7 February 1995 when the old Part IVA was repealed.<sup>120</sup>

Under Part 5, the functions of a Joint Authority remain fairly much as they were under s. 12M<sup>121</sup> of the 1952 Commonwealth Act. However, s. 78(3) of the 1991 Commonwealth Act insists that in performing those functions, the Joint Authority must now pursue the first four objectives of the Act, the second of which was based on ESD. Under the old Acts, the 1952 Commonwealth Act and the 1976 Queensland Act, the functions of a Joint Authority were expressed in identical terms. This is essential if the scheme is to work cohesively and effectively.

The Commonwealth in 1991 stated that functions are to be carried out on ESD grounds. What effect did this have on Queensland?<sup>122</sup> It had the option of leaving its statutes alone, thus causing an inconsistency and possibly damaging Commonwealth–State relations. This was not a realistic choice, especially in light of the unified stance the Australian governments have taken on the environment, embodied in the *Intergovernmental Agreement on the Environment*. Second, the State could amend its relevant provisions dealing with the joint management scheme. Third, the Queensland Parliament could take the opportunity to synchronise its entire approach with that of the Commonwealth. This would be especially timely, given its commitment to ESD under the terms of the *Intergovernmental Agreement on the Environment*.

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<sup>117</sup> *Id.* at n. 3.

<sup>118</sup> Section 61 of the *Fisheries Act 1994* (Qld).

<sup>119</sup> It would be a mistake to say that it *has* established a system based upon ESD, due in large part to the fact that 'there is no identifiable point where we can say we have achieved ESD': *supra* n. 6.

<sup>120</sup> See s. 7(3) of the *Fisheries Legislation (Consequential Provisions) Act 1991* (Cth), as amended by s. 24 of the *Primary Industries and Energy Legislation Amendment Act 1993* (Cth).

<sup>121</sup> See *supra* nn. 30–36; s. 78(2) of the *Fisheries Management Act 1991* (Cth).

<sup>122</sup> Or any other State for that matter.

The 1994 Queensland Act is an attempt by the Parliament to achieve the third of these alternatives — namely, by reorganising its approach to the fisheries resource on the grounds of ESD, just as the Commonwealth had done three years earlier.

## THE FISHERIES ACT 1994 (QLD)

From the above, three salient points can be noted:

1. The scheme which existed under the 1976 Queensland Act was complex, disjointed and not in keeping with the notion of ESD, which evolved since that Act was passed.
2. The Commonwealth repealed and replaced its fisheries legislation with a legislative scheme dedicated to ESD.
3. Due to the trend towards ESD, especially as evidenced by the new Commonwealth legislation (Part 5 of which impacts upon the State regimes and the IGAE), there was a need to reform the fisheries legislation of Queensland.

Evidence that the Queensland Parliament was aware of these factors when passing the 1994 Queensland Act is found in the Explanatory Notes to the Bill. Two passages are particularly revealing:

The Fisheries Bill has been introduced in part to consolidate and simplify current management arrangements which have existed under two separate pieces of fisheries legislation with two separate organisations involved in their administration.<sup>123</sup>

The Fisheries Bill 1994 will ... combine the relevant parts of the previous legislation and update the legislation to ensure that adequate structures and powers are in place to ensure the management of Queensland fisheries resources, and its associated habitat, is undertaken within the principles of ecologically sustainable development.<sup>124</sup>

Thus it seems clear that the two objectives of Parliament were to simplify the organisation of fisheries by repealing two Acts and replacing them with one, and to manage the resource in accordance with the principles of ESD.

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<sup>123</sup> Fisheries Bill 1994 — Explanatory Notes, p. 2.

<sup>124</sup> *Id.* 1.

## The Stated Objectives

Unlike its predecessor, the 1994 Queensland Act contains extensive provisions listing the objectives of the legislation.<sup>125</sup> The list is not exhaustive. The 1994 Queensland Act begins by saying that it aims to ensure 'fisheries resources are used in an ecologically sustainable way'.<sup>126</sup> As stated when looking at the purposes of the 1991 Commonwealth Act, the appearance of 'ecologically sustainable' is not particularly impressive. However, the meaning behind the legislation is supported by the next stated objective, which is to achieve 'the optimum community, economic and other benefits obtainable from fisheries resources'.<sup>127</sup> This integration of considerations in respect to the resource is in keeping with an approach based upon the ESD principles. Interestingly, however, the phrase does not mention environmental benefits/protection. This oversight most probably stems from Parliament assuming that conservation is a relevant factor under the Act. Certainly, the phrase 'ecologically sustainable development' would not appear as an objective if the environment was not on the drafter's mind.

The Act's long title also reflects ESD. The 1976 Queensland Act long title had two distinct limbs — development and conservation. The 1994 Queensland Act's long title does not segregate these concepts but declares it is:

An Act for the management, use, *development and protection*<sup>128</sup> of fisheries resources and fish habitats and the management of aquaculture activities, and for related purposes.

The marriage of these two perspectives of the environment as a statement of one purpose may not in itself embody ESD, but it is a vast improvement upon the earlier model, under which an integrated approach was not reflected by the semantics of the long title. Therefore, it can be claimed the Act *projects* itself as a piece of legislation firmly committed to development on ecologically sustainable grounds.

## Substantive Provisions of the Act

The myriad of bodies which existed under the *FIOMA* are replaced primarily by the Queensland Fisheries Policy Council (the 'Council') and the Queensland Fisheries Management Authority (the 'Authority'). Part 2 of the 1994 Queensland Act establishes the Council. It seems the nearest ancestor the Council has is the old FPAC under Part IIA of the *FIOMA*.

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<sup>125</sup> Section 3.

<sup>126</sup> Section 3(1)(a).

<sup>127</sup> Section 3(1)(b).

<sup>128</sup> Author's emphasis.



The similarity between the two bodies is that their functions are largely advisory in nature. While the FPAC advised the old QFMA with respect to the performance of its functions and only paid token attention to the Act's purposes,<sup>129</sup> the Council's recommendations are to be made directly to the Minister. The advice is primarily related to strategic issues of importance to fisheries, but also concerns 'the operation of this Act and achievement of the Act's objectives'<sup>130</sup> which include the ecologically sustained development of the resource.

While this consideration of ESD is noteworthy, it is perhaps more interesting to reflect upon the shift in the direction of Council advice. The link between the old QFMA and the FPAC might have led to some hierarchical problems when differences arose, and a blurring of responsibility between the two bodies. So that a clear distinction exists under the 1994 legislation, the Explanatory Notes expressly state that the Council 'will not become involved in the day-to-day activities necessary for the administration and management of the fisheries resources'.<sup>131</sup> In other words, the Council is the Minister's tool, totally without connection to the Authority. It pursues the Act's objectives — not the Authority's. In this system, the focus remains upon Parliament's agenda, not that of another entity. It also ensures that the Minister has a greater role in the resource management, whereas under the previous scheme, he or she had virtually been supplanted by statutory bodies.

The Authority is established as a body corporate under Part 4 of the Act.<sup>132</sup> The Authority's primary function is basically to ensure the fulfilment of the Act's long title — that is, appropriate management, use, development and protection of fisheries resources.<sup>133</sup> It is then stated that this primary function is to be 'achieved mainly through the formulation under this Act of regulations, management plans and declarations having regard to the principles of ecologically sustainable development'.<sup>134</sup>

Therefore, the operation of the fisheries on principles of ESD is doubly enforced — primarily by the objects of the Act itself, but also by this directive to the Authority which will be engaged in managing the resource on a daily basis. However, as far as the second imposition of an ESD standard is concerned, s. 25 stipulates its own definition of that concept, to which the Authority must have regard. It reads as follows:

- 'ecologically sustainable development'** means development —
- (a) carried out in a way that maintains biodiversity and the ecological processes on which fisheries resources depend; and
  - (b) that maintains and improves the total quality of present and future life.

<sup>129</sup> It will be recalled that these were largely focused upon the fishing industry, and had little to do with ESD.

<sup>130</sup> Section 16.

<sup>131</sup> Fisheries Bill 1994 — Explanatory Notes, p. 7.

<sup>132</sup> Section 24.

<sup>133</sup> Section 25(1).

<sup>134</sup> Section 25(3).

While this definition does blend development with maintenance of fish ecosystems, the question arises as to whether it is enough. Previously, it was concluded that the *National Strategy for Ecologically Sustainable Development* was following a long line of tradition when it identified two key principles of ESD — the integration of economic, social and environmental considerations in decision-making, and the need for a long-term approach.

It is slightly suspect as to whether the definition furnished by Parliament for the Authority is actually in accordance with this formulation. Certainly, without para. (b), there is a strong case for arguing that the two views of ESD are different. Paragraph (a) alone does not appear to encompass a broad look at the consequences of a decision, but rather seems to 'hark back' to the earlier model of development supported by conservation. However, while para. (a) appears inadequate, it is compensated by the language of para. (b), which implies consideration of broader issues when mention is made of maintaining and improving the 'total'<sup>135</sup> quality of present and future life'. Whilst clearly reflecting a long-term approach, this phrase also seems to accommodate the consideration of numerous factors in the decision-making process, thus bringing s. 25's formulation of ESD within the recognised pattern.

Therefore, the effect of s. 25 is that basically anything the Authority does must be done according to the principles of ESD. Thus, there is no need for this overall aim to be stated in respect of more specific circumstances. An example of this can be seen in Part 5, Division 1 which pertains to the making of management plans. No mention is made of ESD. Indeed, the remainder of the legislation is free from any reference to ESD, but the effect of the long title, the statement of objectives and s. 25 is that it is implicit within the terms of the Act. The provisions do not contradict this. Section 35, for example, reveals what a management plan must cover. This includes stating its own objectives. Yet reading that section subject to s. 25, ESD cannot fail to influence and determine the objectives in every case.

The final feature of interest contained in the 1994 Queensland Act is Part 7, which deals with Commonwealth–State management of the resource. Substantially different from its earlier counterpart, this Part is now in step with the Commonwealth legislation, but does not actually mention ESD at all. There really is no need. Section 129 states: 'A Joint Authority has the functions conferred on it by this Act or the Commonwealth Fisheries Act.' Essentially, both those Acts are now driven by ESD, and so, correspondingly, are the Joint Authorities which can exist under them. Section 134 makes it even clearer when it says, 'If, under a Commonwealth–State arrangement, a fishery is to be managed under Queensland law, Queensland law applies to the fishery.' The sheer saturation of ESD

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<sup>135</sup> Author's emphasis.

throughout fisheries legislation is more than enough to ensure that management will operate along those lines.

In all, it can easily be appreciated that the 1994 Queensland Act was a timely piece of legislation. The new Act is clearly infused with the language of ESD, and the provisions do attempt to reflect this in their operation. However, one can only speculate as to how the legislation will work in practice.

## CONCLUSION

The fisheries are an important natural resource, which are of interest nationally and locally. They are also the basis of a very viable industry upon which several thousand people depend for their livelihood. It is encouraging, therefore, to see such concentrated legislative attention in this area, by both the Commonwealth and Queensland parliaments. Other States have not been as diligent in turning their attention to this matter. For example, the Explanatory Memorandum of the *Fisheries Management Act 1994* (NSW) (the '1994 NSW FMA') listed four objectives of the new legislation, none of which included ESD. The 1994 NSW FMA itself is not so dismissive and offers the promotion of ESD as its fifth objective.<sup>136</sup> However, it does not bear close comparison to the 1994 Queensland Act as far as actually incorporating ESD is concerned.

Both the Commonwealth and Queensland have attempted to reorganise the manner in which the resource is managed, but, as stated earlier, the success of these changes is as yet untested. The Commonwealth has admitted there is no identifiable point where we can say we have achieved a system based on ESD.<sup>137</sup> However, it is submitted that the 1994 Queensland Act is definitely a step towards exactly such a system.

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<sup>136</sup> Section 3(1)(e).

<sup>137</sup> *Supra* n. 119.