http://www.hectorsdolphins.com/uploads/9/5/9/0/9590633/j_environmental_law-2012-wheen-jel_eqs017.pdf

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How the Law Lets Down the 'Down-Under Dolphin'-- Fishing-Related Mortality of Marine Animals and the Law in New Zealand

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Abstract Regulatory control of fishing in response to fishing-related mortality of endemic marine animals in New Zealand waters has been weak and slow. The handful of populations and species that have been 'protected' from fishing activities are still probably declining or are unlikely to recover without further protection. The government itself recognises the inadequacies of its measures for protecting seabirds. Some species directly affected by fishing receive no protection at all from this threat. I argue that a legal framework that is almost wholly discretionary, allows fisheries interests to dominate decision-making and obscures and nullifies the intended effect of the precautionary approach is to blame. It follows that when in 2009 Members of the New Zealand Parliament rejected off-hand simple legislative changes capable of addressing these problems, they belied their own expressions of concern for marine animals threatened by fishing.

Keywords: fishing-related mortality, bycatch, New Zealand, conservation, precaution

1. Introduction

Commercial and recreational fisheries bycatch in New Zealand waters includes several endangered seabird species, the 'nationally critical' New Zealand sea lion (*Phocarctos hookeri*) and Hector's **dolphin** (*Cephalorhynchus hectori*)--the 'down-under **dolphin'**. Hector's **dolphin** is itself an endangered species and includes the critically endangered subspecies, Maui's **dolphin** (*Cephalorhynchus hectori maui*).[1] Although these animals are fully protected by law in New Zealand, incidental 'takings' during the course of fishing are excused so long as they are reported. If fishing-related mortality[2] threatens to or does adversely affect a population or a species of marine wildlife or mammal, either or both of the Ministers of Fisheries and Conservation can take steps, including setting mortality limits and creating sanctuaries and reserves, to avoid or mitigate those effects. The Ministers' powers arise under the Fisheries Act 1996, the Conservation Act 1987, the Marine Animals Protection Act 1978, the Wildlife Act 1953 and the Marine Reserves Act 1971. To date, measures have been

introduced to reduce fishing-related mortality in some areas; however progress has been very slow in many cases and the efficacy of other measures can be questioned.

This article argues that the failure to implement measures sufficiently robust to support the recovery of these species is attributable in three key ways to the law. First, although the legislation provides a range of measures to respond to fishing-related mortality, these have not been used 'sufficiently or effectively'[3] for procedural and political reasons. 'The tools already exist to manage the situation', but there is a need 'to ensure that they are used'.[4] Second, although the legislation appears to deliver an integrated approach to fisheries because, under it, fishing-related mortality is managed by the Minister of Fisheries as a fisheries issue,[5] in reality this approach simply serves to disintegrate fishing-related mortality from the wider conservation management of the mammals and birds affected, and allows fisheries interests to dominate decision-making about fishing-related mortality. Third, although the idea of precaution is present in the legislation, it has been framed and applied in a way that compromises the very policy preference for environmental conservation that this principle was designed and adopted to secure.

As well as commenting on existing law, this article considers proposals made to strengthen the law in the Marine Animals Protection Law Reform Bill.[6] This Bill sought to ensure that more protective fishing-related mortality measures are implemented, to strengthen the role of the Minister of Conservation in fishing-related mortality management, and generally to promote the sounder management of marine mammals.[7] Described in Parliament as 'one of the most robust pieces of legislation on marine protection to come before the House',[8] the Bill was defeated on its First Reading. Its opponents claimed it would 'tip the scales' too far in favour of conservation and result in increased litigation spurred by a polarised industry intent on protecting its commercial interests.[9]

...3.2.4 Information principles and precaution

The crucial issue of precaution was inadequately addressed in the Marine Animals Protection Law Reform Bill. The New Zealand legislation is not deeply precautionary it allows reported incidental takings, and for measures to prevent or reduce fishing-related mortality provided a need is first established. This puts the burden on the proponents of conservation, whereas the precautionary principle ought to place the burden on fishers to establish the harmlessness of their activities before proceeding.[107]

Nevertheless, the New Zealand legislation does address precaution in section 10:

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

a. Decisions should be based on the best available information:[108]

b. Decision makers should consider any uncertainty in the information available in any case:

c. Decision makers should be cautious when information is uncertain, unreliable, or

inadequate:

d. The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

When the Act was enacted, paragraph (d) attracted all the attention.[109] However, paragraph (a) has been emphasised in litigation and section 10 has resulted only in 'precautionary decisions' made by the Minister being struck down by the courts.[110]

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107 Warwick Gullett ‘Environmental Protection and the ‘‘Precautionary Principle’’: A Response to Scientific Uncertainty in Environmental Management’ (1997) 14 Environmental and Planning LJ 52; J Hunt, ‘The Social Construction of Precaution’ in T O’Riordan (ed), Interpreting the Precautionary Principle (Earthscan 1994) 117. Not that this principled approach to precaution has been readily adopted: one referee on this paper notes that ‘in the international fisheries context it was decided as early as 1994 during the negotiation of the 1995 UN Straddling and Highly Migratory Fish Stocks Agreement that the precautionary approach to fisheries does not shift the burden of proof’. **Contra see Lawrence Kogan who argues that the recently issued advisory opinion of the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (Advisory Opinion in Case No. 17 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (1 February 2011) ‘confirms . . . that the [United Nations Convention on the Law of the Sea] incorporates within its provisions . . . perhaps even, EUROPE’S PRECAUTIONARY PRINCIPLE’: ‘International Tribunal on the Law of the Sea Finally Renders Advisory Opinion Establishing that the Precautionary Principle is Incorporated Within UNCLOS Law’ (*ITSSD Journal on the UN Law of the Sea Convention Blog*, 22 March 2011)5 http://itssdjournalunclos-lost.blogspot.com/2011/03/international-tribunal-on-law-of-sea.html accessed 1 December 2011. Kogan has previously defined ‘Europe’s precautionary principle’ as ‘burden of proof-reversing’: Lawrence A Kogan, ‘What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe’s Precautionary Principle as US Law’ (2009) 7 Santa Clara JIL 21, 24.**

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