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Contesting the merits of aquaculture development: Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426

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Contesting the merits of aquaculture development: Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426

Abstract

Australia's aquaculture industry has grown rapidly since the mid-1990s. It has become the fastest growing industry in the primary sector and is a valuable contributor to development in regional areas. However, there is increasing community concern about the potential environmental impacts of aquaculture. Concerns vary enormously depending on the type of aquaculture activities but they typically include habitat modification, marine floor degradation, diminished water quality, disease, translocation of aquatic organisms, cumulative impacts and, particularly in highly populated coastal stretches (such as in New South Wales ('NSW')), effects on amenity values. The challenge is to develop an approval process for aquaculture proposals that ensures that likely and potential environmental impacts are avoided, reduced or otherwise managed while not unnecessarily restricting the development of the industry. Compounding this challenge is the fact that many coastal ecosystems are already subjected to a range of anthropogenic stresses. Further, most Australian aquaculture operations are marine based and therefore involve the use of public space. This involves the perceived or actual alienation of public space for private purposes. As a result, the regulatory framework for aquaculture must, in addition to assessing environmental impacts, aim to achieve a balance between aquaculture needs and other legitimate uses of the marine environment. (This is commonly referred to as 'Integrated Coastal Zone Management'.) There are Australian and state government efforts to promote the development of the aquaculture industry, yet there is often public opposition to proposals, especially where these are seen to conflict with other industries, notably tourism and recreational pursuits (such as yachting). Two recent NSW aquaculture proposals have polarised regional communities: the extension of mussel culture in Twofold Bay at Eden on the State's south coast, and approval of pearl farming in Port Stephens on the State's central coast. In *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426* (decision 15 August 2005), the Land and Environment Court allowed the developer's appeal against the decision of the Minister to reject development consent. The Minister's decision had run counter to advice from his own department. The case highlights the protracted approval process for aquaculture development in NSW and how environmental issues are assessed and weighed by the Land and Environment Court.

Keywords

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CONTESTING THE MERITS OF AQUACULTURE
DEVELOPMENT: PORT STEPHENS PEARLS PTY LTD V
MINISTER FOR INFRASTRUCTURE AND PLANNING
[2005] NSWLEC 426

I INTRODUCTION

Australia's aquaculture industry has grown rapidly since the mid-1990s. It has become the fastest growing industry in the primary sector and is a valuable contributor to development in regional areas.¹ However, there is increasing community concern about the potential environmental impacts of aquaculture. Concerns vary enormously depending on the type of aquaculture activities but they typically include habitat modification, marine floor degradation, diminished water quality, disease, translocation of aquatic organisms, cumulative impacts and, particularly in highly populated coastal stretches (such as in New South Wales ('NSW')), effects on amenity values.

The challenge is to develop an approval process for aquaculture proposals that ensures that likely and potential environmental impacts are avoided, reduced or otherwise managed while not unnecessarily restricting the development of the industry. Compounding this challenge is the fact that many coastal ecosystems are already subjected to a range of anthropogenic stresses. Further, most Australian aquaculture operations are marine based and therefore involve the use of public space. This involves the perceived or actual alienation of public space for private purposes. As a result, the regulatory framework for aquaculture must, in addition to assessing environmental impacts, aim to achieve a balance between aquaculture needs and other legitimate uses of the marine environment. (This is commonly referred to as 'Integrated Coastal Zone Management'.)²

There are Australian and state government efforts to promote the development of the aquaculture industry,³ yet there is often public opposition to proposals,

¹ Productivity Commission, *Assessing Environmental Regulatory Arrangements for Aquaculture*, Research Paper (2004), 2.

² See, eg, D W Donnan, 'Aquaculture in the age of integrated coastal management (ICM)', in K D Black (ed), *Environmental Impacts of Aquaculture* (2001), 182; David VanderZwaag, Gloria Chao and Mark Covan, 'Canadian Aquaculture and the Principles of Sustainable Development: Gauging the Law and Policy Tides and Charting a Course' (2002–2003) 28 *Queen's Law Journal* 279, 286; and Edward Ho-Shon, 'Integrated natural resources management in aquaculture: realities and prospects' (2003) 20 *Environmental and Planning Law Journal* 223.

³ At the federal level, see, eg, *National Strategy on Aquaculture* (1994), *National Aquaculture Policy Statement* (2003) and the establishment in 2000 of the National Aquaculture Development Committee. In NSW, see, eg, *NSW Aquaculture Strategy 2002-2006* (2002).

especially where these are seen to conflict with other industries, notably tourism and recreational pursuits (such as yachting). Two recent NSW aquaculture proposals have polarised regional communities: the extension of mussel culture in Twofold Bay at Eden⁴ on the State's south coast, and approval of pearl farming in Port Stephens on the State's central coast. In *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 (decision 15 August 2005), the Land and Environment Court allowed the developer's appeal against the decision of the Minister to reject development consent. The Minister's decision had run counter to advice from his own department. The case highlights the protracted approval process for aquaculture development in NSW and how environmental issues are assessed and weighed by the Land and Environment Court.

II THE FACTS

In November 2003 the applicant, Port Stephens Pearls Pty Ltd, lodged a development application seeking consent to establish a pearl farm in Port Stephens. The application followed previous approvals (supported by an independent Commission of Inquiry)⁵ in 2002 under the *Fisheries Management Act 1994* (NSW) for a trial lease allowing the cultivation and harvest of oyster stock at the lease site, and the operation of a land based site. The 2003 application, accompanied by a 190 page Environmental Impact Statement, sought consent to establish sub-surface longline pearl farms at the existing (although expanded) lease site and at two other sites in the middle section of Port Stephens. The then NSW Department of Infrastructure Planning and Natural Resources recommended to the Minister approval of the proposal subject to various conditions. Nevertheless, in August 2004 the then Minister for Planning, Mr Craig Knowles, refused development consent for the following reasons:

- a. That the sensitivity of both the development and the receiving environment and the implications of the proposal for the establishment of a Marine Park in the waters of Port Stephens warrant that no additional level of environmental risk can be tolerated.
- b. That the ongoing risks associated with the proposal cannot be eliminated with any certainty; and
- c. Given the above and the level of community opposition to the proposal it is not in the public interest.⁶

⁴ Minister for Primary Industries (NSW), 'Determination of progression to Stage two of mussel aquaculture in Twofold Bay', 22 February 2005.

⁵ The Commission of Inquiry was set up under s 119 *Environmental Planning and Assessment Act 1979* (NSW). In June 2002 it recommended approval of the development application: Officer of the Commissioners of Inquiry for Environment and Planning (NSW), *Commission of Inquiry: Proposed Commercial Pearl Oyster Operation*, Port Stephens LGA (June 2002).

⁶ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [5].

The decision of the Minister to refuse development consent was then appealed by the developer to the NSW Land and Environment Court.⁷

III THE REGULATORY FRAMEWORK FOR APPROVAL

The regulatory framework for aquaculture in NSW is notoriously complex.⁸ The proposed development is subject to an array of state legislation⁹ and environmental planning instruments and controls.¹⁰ Here the proposal even had the potential to trigger the federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth).¹¹ Approval was required under the *Fisheries Management Act 1994* (NSW)¹² as well as under the *Environmental Planning and Assessment Act 1979* (NSW) because the proposal was also an 'integrated development',¹³ a 'designated development'¹⁴ and, as the law then stood, a 'state

⁷ *Environmental Planning and Assessment Act 1979* (NSW) s 97; *Land and Environment Court Act 1979* (NSW) s 17.

⁸ See, eg, Productivity Commission, *Assessing Environmental Regulatory Arrangements for Aquaculture*, above n 1. This report was highly critical of the complexity of the regulatory framework for aquaculture in Australia. NSW stood out as one of the jurisdictions with marine aquaculture planning less advanced than the leading states of South Australia and Tasmania which both have dedicated legislation (*Aquaculture Act 2001* (SA) and *Marine Farming Planning Act 1995* (Tas)).

⁹ State legislation of relevance to the proposal include the following: *Fisheries Management Act 1994*, *Environmental Planning and Assessment Act 1979*, *Rivers and Foreshores Improvement Act 1948*, *Aboriginal Land Rights Act 1983*, *Threatened Species Conservation Act 1995*, *Coastal Protection Act 1979* and *Crown Lands Act 1989*.

¹⁰ The proposal is subject to three State Environmental Planning Policies (SEPP 14 Coastal Wetlands, SEPP 44 Koala Habitat Protection, SEPP 71 Coastal Development), as well as the Port Stephens LEP 2000, Hunter Regional Environmental Plan, the NSW Coastal Policy, and the Port Stephens/Myall Lakes Estuary Management Plan.

¹¹ Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), approval of the Commonwealth Minister for the Environment is required for actions that may have a significant impact on matters of national environmental significance. The site of the proposed development is not near any Commonwealth marine area or an internationally protected Ramsar Wetlands or World Heritage Area. However, there was the potential for the proposal to have an impact on Commonwealth protected species. As a result, the proponent referred the proposal to the Commonwealth Minister on 22 August 2003. On 17 September 2003 a delegate of the Minister made a determination pursuant to s 75 of the Act that the proposed action was not a controlled action for the purposes of the Act.

¹² *Fisheries Management Act 1994* (NSW) s 144 prohibits persons from undertaking aquaculture without a permit. The Planning Minister is empowered to issue or refuse aquaculture permits under s 146(1).

¹³ *Environmental Planning and Assessment Act 1979* (NSW) s 91(1). Any development that requires an aquaculture permit under the *Fisheries Management Act 1994* (NSW) s 144 is an 'integrated development'.

¹⁴ *Environmental Planning and Assessment Regulation 2000* sch 3, Pt 1. Note that under this Part many (perhaps most) types of aquaculture in NSW are designated developments.

significant project'.¹⁵ As such, the development required approval under different pieces of legislation necessitating consideration of numerous, often overlapping, objectives and requirements contained in a number of provisions and regulations. In short, development consent required consideration of potential environmental impacts of the proposal and whether it was a suitable development for the location in the context of other uses of the surrounding marine environment.¹⁶

IV THE APPEAL

The Land and Environment Court, being empowered to conduct merits review of decisions, proceeded by addressing and weighing the environmental issues and other public interest concerns. The Court was assisted by reports prepared by an independent technical adviser and a court appointed expert in the field of aquatic ecology.

The evidence presented satisfied Talbot J that there were no significant risks to water quality or aquatic plants. Further, the visual impact of the proposal that would be caused by the creation of a plume in the water during cleaning and maintenance operations would not 'create the impression of a major industrial activity that is antipathetic to the environment of Port Stephens'. This was because oyster farming is an implicit characteristic of Port Stephens. Further, the discolouration of the water would arise only from material naturally occurring in the water column, and be visible only from sparsely populated areas.¹⁷

Most concern about the proposal related to its potential to adversely affect marine animals, in particular dolphins. There was concern that dolphins may become entangled in the equipment used to cultivate oysters, or be disturbed by increased vessel activity, or struck by vessels. The technical advice before the Court suggested that there was only minimal risk of entanglement and this risk could be mitigated by imposing conditions on project consent.¹⁸ Talbot J

¹⁵ *Environmental Planning and Assessment Act 1979* (NSW) s 76A(7)(b) (repealed 1 August 2005). It is possible, though unlikely, that large aquaculture developments could now be declared to be 'critical infrastructure projects' under the new s 75C (commenced 1 August 2005).

¹⁶ In particular, the Port Stephens LEP 2000 provides that aquaculture is permissible in the zone in which the proposed lease sites are located provided consent is obtained. It also provides that consent must not be granted unless the proposed development is consistent with the objectives of the zone in which it is intended to be carried out: cl 10(2). The objectives of the relevant Environment Protection Zone require the minimisation of impacts on marine life and ecology of commercial operations and to provide for activities which, among other things, are compatible with the character of the waterways, enable a balance to be achieved between marine industries and recreational uses and 'ensure there is provision for multiple use of the waterways': Port Stephens LEP 2000, 470.

¹⁷ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [50]–[53].

¹⁸ The conditions imposed include a monitoring program to assess behavioural response of dolphins to the development: *Ibid* Annex A part 8.3.

concluded that the main threat to the dolphins was not the proposed pearl farm itself but the cumulative impact of this activity in the context of other uses of Port Stephens, notably intensive dolphin watching tours and other recreational vessel activities. The principal concern here was that increased boating activity might drive dolphins to the lease areas (areas they currently rarely frequent due to the inferiority of the habitat compared to eastern portions of Port Stephens). According to Talbot J, such adverse cumulative impacts, if they occur, could be detected by ongoing research and monitoring activities. Any necessary remedial action would 'more likely ... be directed towards the amelioration and control of the tourism and recreation activities'.¹⁹ His Honour concluded:

[T]he trigger or cause for [potential cumulative impacts] ... will not lie with pearl farming aquaculture. The real straw that may break the back of the tolerance of the bay to anthropogenic activity is more likely to be intensive whale and dolphin watching as well as general tourism and recreational boating activities. Notwithstanding the high value placed upon the tourist industry and diverse recreational pursuits in Port Stephens it is reasonable to expect that the authorities will intervene in order to regulate them as the real offending cause of any disturbance to habitat.²⁰

Notwithstanding the absence of express reference to the precautionary principle in relevant sections of the *Fisheries Management Act 1994* (NSW) or the *Environmental Planning and Assessment Act 1979* (NSW), Talbot J considered it was required to be considered when determining development applications:

The requirement in s 79C(1)(e) of the [*Environmental Planning and Assessment Act 1979* (NSW)] to take account of the public interest brings with it the obligation to have regard to the principles of ecologically sustainable development including the precautionary principle.²¹

In so doing, Talbot J adds to the argument that the principle is a mandatory consideration by virtue of it being implicit in the concept of 'ecologically sustainable development' ('ESD') where the concept is included in legislation, but takes a further step and interprets 'public interest' in the environmental legislation as consonant with ESD. Stein J had advanced a similar line of reasoning in the famous *Leatch* case.²² Utilising the common Australian phraseology in relation to the precautionary principle, Talbot J considered that the proposal presents 'no real threat of irreversible environmental damage', but

¹⁹ Ibid [45].

²⁰ Ibid [46].

²¹ Ibid [54].

²² *Leatch v Director-General of National Parks & Wildlife and Shoalhaven City Council* (1993) 81 LGERA 270.

concluded that 'nevertheless the decision making process needs to take account of appropriate measures to prevent environmental degradation. Such an approach is axiomatic to the proper consideration of any environmental issue'.²³ Turning to the facts, Talbot J stated that the 'real issue to be confronted' was the cumulative impact on the habitat of dolphins:

The application of the precautionary principle as a driving force behind the consideration of the application does not lead to a determination to refuse consent. The element of caution nevertheless dictates that the Court, as the consent authority, needs to adopt every avenue open to it in order to minimise any potential risk of an adverse impact from the proposal no matter how remotely connected or unlikely the manifestation of that risk is. Conditions requiring ongoing surveys and monitoring with appropriate built in remedial mechanisms in the event of the detection of detrimental effects reflect this cautious approach.²⁴

Talbot J adopted the principle and, utilising the reasoning of the South Australian Environment Resources and Development Court,²⁵ found that the development

²³ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [55]. Note that the standard legal formulation of the principle in Australia provides a high threshold for its operation. Eg, the definition of the principle in s 6(2)(a) *Protection of the Environment Administration Act 1991* (NSW) commences thus: 'if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.' A review of Australian litigation concerning the principle reveals that some courts and tribunals, when considering whether reliance may be placed on it, do not enquire deeply to ascertain whether the threshold has been reached (eg, *AJKA Pty Ltd v Australian Fisheries Management Authority* [2001] AATA 258); whereas other cases indicate the need for credible evidence that the threshold has been reached to warrant refusal of development consent (eg, *Aldekerk P/L v City of Port Adelaide Enfield and Environment Protection Authority* [2000] SAERDC 47). See Warwick Gullett, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in Elizabeth Fisher, Judith Jones and René von Schomberg (eds), *Implementing the Precautionary Principle: Perspectives and Prospects* (2006) 182–201.

²⁴ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [56].

²⁵ *Conservation Council of SA v DAC & Tuna Boat Owners Association (No 2)* [1999] SAERDC 86 [22]. This case was a merits appeal against a decision to grant development consent for tuna farming. The Development Plan against which project approval was to be determined required that there be consideration of whether developments in the marine environment would be 'in an ecologically sustainable way'. Environmental concerns raised by the appellants included pollution of the water by uneaten food and tuna waste, proliferation of scavenging birds, potential for the introduction of exotic diseases, and dolphin mortality. The Court made use of the precautionary principle and held that development consent could only be granted if there existed a regime to monitor the range of potential environmental impacts. The Court determined there was a need for an adaptive management approach and concluded that the legislative framework could not satisfy this requirement. The Court then reversed the decision to approve the project. This decision was appealed to the Supreme Court of South Australia

could proceed because a monitoring regime could be imposed that would be able to detect any emerging adverse impacts on marine animals, water quality and sea-grasses, enabling them to be addressed later by appropriate authorities.²⁶

In seeking to defend the decision to refuse development consent, the Minister had argued that the grant of an aquaculture lease under s 179 *Fisheries Management Act 1994* (NSW) would create 'an inevitable exclusion zone'.²⁷ Talbot J rejected this contention because the section does not prohibit people from entering an aquaculture lease area. The Minister's argument was surprising for two reasons. First, it appears to reveal the view that marine aquaculture is inappropriate in multiple use marine areas. Secondly, it is expressly stated elsewhere in the Act that aquaculture leases do not confer a right of exclusive possession, and they are subject to the public right to fish.²⁸ It is in this respect that at law an aquaculture lease better resembles a 'licence' than a 'lease'.²⁹ Further, the design of the operation would not prevent other vessels from passing through the area, such as to fish. The proposal, being a sub-surface operation, would place gear at least four metres below the surface. Even though buoys would mark out the edges, this would not be hazardous or complicated for vessel operators.

Talbot J also dismissed the argument that development consent would compromise the government's ability to establish a marine park in Port Stephens. There is presently only speculation whether a marine park will be established here, and marine parks do not preclude aquaculture operations³⁰ except in sanctuary zones³¹ or habitat protection zones.³² Evidence was received from NSW Fisheries that the lease sites would be unlikely to be selected for such special protection zones because they were only bare sand mud flats. Talbot J thus concluded that the proposal would not be inconsistent with the *Marine Parks Act 1997* (NSW).

Finally, Talbot J considered the content and enormous volume of the public submissions received about the development application. He noted that many objections to the proposal were 'repetitive and uninformative' although others

(*Tuna Boat Owners Association of SA Inc v Development Assessment Commission & Conservation Council of SA* (2000) 110 LGERA 1). The Supreme Court was in broad agreement with the lower court but determined that the legislative framework could support the imposition of terms and conditions for the project that would ensure that the proposed development would be ecologically sustainable.

²⁶ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [58].

²⁷ *Ibid* [64].

²⁸ *Fisheries Management Act 1994* (NSW) s 164(2)–(3).

²⁹ Warwick Gullett, 'Fisheries' in David Farrier and Paul Stein (eds), *Environmental Law Handbook* (4th ed) (Redfern Legal Centre Publishing, 2006) 633–60.

³⁰ *Marine Park Regulations 1999* (NSW) cl 17.

³¹ *Marine Park Regulations 1999* (NSW) cl 8.

³² *Marine Park Regulations 1999* (NSW) cl 13.

were 'articulate, detailed and instructive'.³³ He was satisfied that the concerns expressed in this second group were mostly allayed by expert evidence presented to the Court. Also, the large number of objections could not sway the Court because that would be a political exercise and the submissions in any event were 'more or less balanced for and against the proposal'.³⁴

Talbot J concluded that the development application could be approved subject to many conditions involving ongoing monitoring and testing. These conditions were set out in an annexure to the judgment.

V CONCLUSION

The decision in *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 enabled the overturning of the Minister's decision to refuse consent and supports the approach and reasoning of the Minister's department. The reasons stated by the original Minister for rejecting development consent proved to be ill-founded. There were no particular concerns about the sensitivity of the receiving environment and there were no real hurdles presented by the proposal with respect to any future decision to establish a marine protected area. It could not be concluded that the proposal was not in the public interest. There was a significant number of objections to the proposal but most of their substantive points were directly countered by technical advice received by the court. The only reason given by the Minister which is difficult to refute is the amorphous claim that the 'ongoing risks associated with the proposal cannot be eliminated with any certainty'.³⁵ However, the Minister did not identify particular risks presented by the project and the evidence suggested that any risks were of a cumulative nature and are attributable to other activities. Although the Minister's reasons to refuse development consent resonate with the precautionary principle, as has been decided in a number of Australian cases, the principle cannot be used as a shield for decision-makers to deny development consent unless there are real risks associated with the proposal.³⁶

While the *Port Stephens* case reveals that the approval process was 'integrated' in the sense that environmental, economic, social and multiple use issues were assessed and considered in the development application and by the

³³ *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [70].

³⁴ *Ibid* [74].

³⁵ *Ibid* [5].

³⁶ See, eg, *Tuna Boat Owners Association of SA v Development Assessment Commission & Conservation Council of SA* (2000) 110 LGERA 1, *Histpark P/L v Maroochy Shire Council* [2001] QPEC 059, *Commercial Crash Repairs P/L v Corporation of the City of Adelaide* [2000] SAERDC 83 and *Aldekerk P/L v City of Port Adelaide Enfield and Environment Protection Authority* [2000] SAERDC 47.

Court, it also reveals that the process was protracted and complicated. Fortunately, proponents of aquaculture developments can easily lodge merits appeal applications when Ministers' decisions to deny development consent do not align with the evidence. However, the situation is more difficult for people opposed to aquaculture developments which have been granted development consent. There are no blanket third party rights to merits appeal of planning decisions in NSW. Third party merits appeal rights are restricted to 'objectors' to designated developments.³⁷ These are people who have previously submitted an objection to the project.³⁸ This means that persons who later may wish to contest the merits of a grant of development consent for an aquaculture proposal must first engage themselves in the public consultation and submission process. It is also necessary that cogent evidence be produced of the likelihood of real impacts arising from the development. This is because, as the *Port Stephens* case shows, there are likely to be strong reasons for approving development consent of marine aquaculture operations. Proponents can adduce evidence of economic benefits and argue that proposals are in keeping with existing living marine resource harvesting activities in the area. Further, even if evidence can be adduced pointing to the potential for environmental impacts, the Court is likely to grant development consent if it can be satisfied that appropriate conditions can be attached to a consent determination (notably a robust monitoring regime and a management framework that will enable the avoidance or management of emerging environmental impacts).

WARWICK GULLETT*

³⁷ It is important to note that the availability of objector merits appeal rights is only for aquaculture projects that are 'designated developments': *Environmental Planning and Assessment Act 1979* (NSW) s 98. There are no third party or objector rights to challenge on the merits the issue of an aquaculture lease/permit under the *Fisheries Management Act 1994* (NSW) (see s 146(4)) or a development that is dealt with exclusively as an 'integrated development' under the *Environmental Planning and Assessment Act 1979* (NSW) (see s 93B). For an example of an unsuccessful third party judicial review challenge to the grant of development consent for an 'integrated development' aquaculture proposal, see *Chambers v Maclean Shire Council* [2002] NSWLEC 1. For an example of a successful third party merits appeal of a grant of a development consent for an aquaculture operation in South Australia, see *Pidun v Development Assessment Commission & Struck & Minister of Agriculture, Food & Fisheries* [2004] SAERDC 10. In this case the appellant had standing because he had submitted a representation objecting to the development during the development application process.

³⁸ *Environmental Planning and Assessment Act 1979* (NSW) s 79(5). Of course, judicial review is still available to third parties with standing: s 123(1).

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