



## Troubled waters: pearl farming in Port Stephens (Epilogue)

On 18 August 2004, the pearl farm opponents got the news they had been hoping for: NSW Planning, Infrastructure and Natural Resources Minister Craig Knowles rejected the application. The Minister cited the sensitivity of the Port Stephens environment and the uncertainty of the risks associated with the development amongst his reasons for refusal (*Exhibit A*). Port Stephens Pearls had 12 months to lodge an appeal with NSW's Land and Environment Court, an option the company took up. The case was heard by Justice Talbot over five days from late July to August 2005. After a shorter than anticipated deliberation, the parties were called back to Sydney to hear the Court's determination on August 15. Said Justice Talbot:

“Based upon the whole of the evidence I am satisfied that the fears and expectations of the doubters are not likely to materialise or if they do adequate regulation will be imposed. Therefore, notwithstanding the large numbers of objectors the pearl farming leases are entitled to the benefit of a conditional development consent on the basis that the many issues raised have been discounted, resolved or made the subject of conditions.”<sup>1</sup>

Although he noted that detailed monitoring of seagrasses and dolphin behaviour was required as part of the conditions of consent, he determined that recreational boating and tourism activities were probably displacing dolphins into the areas of the Port sought for

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This case was written by Marinella Padula, Australia and New Zealand School of Government, for Professor John Alford as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation. It has been prepared for teaching purposes to accompany the cases 2007-52.1 and 2007-52.2. The use of teaching materials is restricted to authorised persons.

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<sup>1</sup> *Port Stephens Pearls Pty Limited v Minister for Infrastructure and Planning* [2005] NSWLEC 426 (15 August 2005)

pearl farming. Talbot accepted that the proposition had raised a significant level of community concern and that “the concerns experienced [by the opponents] are a reflection of the honest and true belief of the persons who presented them.”<sup>2</sup> Nevertheless he did not accept the precautionary principle or public protest as sufficient reasons to deny consent, stating that:

“Whether or not there will be an adverse effect on amenity is a question of fact to be determined by the consent authority, in this case the Court. Although some of the conclusions by a consent authority may entail a subjective consideration, this nevertheless is carried out objectively in the weighing process. The community response to a proposal must be taken into account as part of the consideration of the public interest ... However, where the opinions expressed are not supported by evidence objectively expressed by experts in a particular field of expertise, then the views of those who do not have the essential expertise will be given little or no weight or, at the most, less weight than the expert opinion. It would be a political exercise to give determining weight to the number of objections based solely on the quantitative value of that evidence. That is not a value this Court is entitled to adopt.”

Though not surprised by the outcome, pearl farm opponents Darrell Dawson, Frank Future and Bob Westbury were disappointed by the decision and more than a little disillusioned. “Two ministers from the same government had rejected the Development Application,” said Future, “We thought we had a democratically elected government that made a decision based on risks involved. But then it was overturned at a Land and Environment Court sitting by a judge who was not privy to everything that had gone on anyway and was reassured by scientists employed by Port Stephens Pearls who put together a very solid case. We had no real financial backing: we did some fundraising but not enough to hire experts and mount a challenge.” But Dawson wasn’t sure it would have made much difference, “People were saying: ‘We’ve got to get some scientists.’ I said, ‘Well just remember this: for every scientist we get, they’ll get four.’” Looking back, Future suspected that in some ways, the outcome have been preordained:

“[The company] had an enormous amount of money invested in it by that stage. It should never, ever have gotten to that point. They were emotionally and financially involved way beyond the point of no return. I think in the end the government probably facilitated it to go through the back door because otherwise if they had indeed invited them in, they may have to compensate them.”

“It had all gone far too far before any real community involvement,” added Future, “Public submissions came seven years after they started and they’d already invested millions of dollars. It was a simple case of a government agency and big business conspiring to do whatever they wanted and they thought the community would just wear it.” He believed that greater openness would inevitably lead to fewer Development Application battles: “We think of democracy as being transparent and yet virtually the first things governments do is have secrecy. Any level of government that says, ‘We have to be secret and confidential, we’re dealing with a development issue here’ [creates a situation whereby] by the time a Development Application hits the deck, there’s so much

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<sup>2</sup> *ibid.*

that's been invested that developers are very reluctant to modify a plan." For Future, there was also a broader issue at stake:

"If politicians and bureaucrats want people participate and be supportive of politicians they need to ensure that decisions are seen through, not sold out to the person with the most money. Stuff like that does no end of damage to democracy when you think: 'What the hell is the point?'"

From Dawson's perspective, probity was one of the biggest issues to arise from the whole episode: "It's very important to have an arm's length relationship between government and private sector to maintain the integrity of government. It's quite clear that NSW Fisheries didn't understand that principle at all." He referred to instances during the submission process where Fisheries representatives used collective language like "us, we and our" when discussing the Development Application. The fact that a former manager at Fisheries, Dr Damian Ogburn, later went on to establish an aquaculture equipment company reinforced his suspicions. Dawson, however, didn't entirely blame the Department: "They put scientists into management positions and you felt sorry for them, they weren't trained for management or administrative tasks and were complaining internally," he claimed. Westbury was more cynical, stating: "A lot of it is about ego inside government departments. They're looking for business and promotion opportunities that are not appropriate."

Where Burt and Atkins were concerned, the result was a vindication of their plans and a long-overdue relief. According to Burt, the protracted wrangling had cost some \$40 million in lost revenue, forced him to retrench 17 staff after the second Development Application rejection and had benefited no-one besides lawyers and consultants. Atkins concurred, stating that:

"From the very start, everyone who has been involved as a professional bureaucrat has been nothing short of exemplary in their work and all the evidence came out in support of the pearl farm as a sustainable business. It seemed to us that it was more about the politics of the local area. We've also dealt with three ministers, two premiers and so on. We're now 10 years down the track and \$7 million into a project that has the support and endorsement of the Australian Museum, NSW Fisheries and the Department of Planning and now has been confirmed by the Land and Environment Court.

"It's interesting from the point of view that we funded the original research, won the tender, did everything we were asked to do but because of the political agenda we were stopped from doing what we were legally allowed to do. It was a deliberate, planned and sustained campaign to see if they could run us out of business."

The battle had also taken a considerable toll on Dawson and Future, "The whole process left a bad taste in my mouth," said Future, "I don't think there's much else we could have done, we did a hell of a lot. We were putting in dozen and dozens of hours a week unpaid time just trying to mount a case and had successfully done so, twice." Strained personal relationships were part of the price; there were also other costs, as Dawson recalled: "A number of us were sticking our necks out and were very aware of that. We were getting [anonymous] phone calls saying: 'You're a liar and a cheat.'"

Despite the controversy the Development Application caused both publicly and behind the scenes, Wayne O'Connor from NSW Fisheries observed that once the Land and Environment Court's decision had been handed down, the issue subsided considerably. Aside from a few protest letters to the local papers, he claimed that the general community had accepted the decision and moved on.

## **Looking ahead**

Burt and Atkins were keen to go forward with their plans for Port Stephens Pearls, although a year later the remaining sites had yet to be developed. For their opponents, the only positive in the court decision were the more than 130 conditions of consent the judge attached to the project. They hoped these requirements would prove too restrictive to meet. In the meantime, Dawson, Westbury and Future set to work on advancing plans for a Port Stephens marine park which some pearl farm opponents hoped would limit any future developments. Members of the Marine Park Advisory Committee, they claimed the court decision had actually bolstered community support for the park which would set out commercial, recreational and sanctuary zones. As details were being finalised by the NSW Government late in 2006, new divisions were occurring. Recreational and commercial fishermen were concerned that the Marine Park would unfairly limit their angling opportunities and threaten their livelihoods.<sup>3</sup> Whatever the outcome, the highly contested waters of Port Stephens were unlikely to be still anytime soon.

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<sup>3</sup> Jones, J. 'Fishing rules may cost \$9m' *Newcastle Herald* 21 October 2006

## Exhibit A: Pearl Farm Determination

**DETERMINATION OF A DEVELOPMENT APPLICATION  
FOR STATE SIGNIFICANT, DESIGNATED AND INTEGRATED DEVELOPMENT  
PURSUANT TO SECTION 80 OF THE  
ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979**

I, the Minister for Infrastructure and Planning, pursuant to section 80 of the *Environmental Planning and Assessment Act 1979* ("the Act") determine the development application ("the Application") referred to in Schedule 1 by refusing development consent.

The reasons for refusal are:

- a) The sensitivity of the Port Stephens receiving environment warrant that no additional level of environmental risk posed by the development is acceptable;
- b) The ongoing and residual risks associated with the development cannot be eliminated with any certainty; and
- c) The development is not in the public interest.



Craig Knowles MP  
Minister for Infrastructure and Planning

Sydney,

18 . 8 . 2004

File No. S01/02364

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