

**OPENING OF THE MANAGING MARINE FARMING
CONFERENCE BY THE HONOURABLE PETER UNDERWOOD
AC, GOVERNOR OF TASMANIA, UNIVERSITY OF TASMANIA
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Thank you for inviting me to be present this morning and to open the Environmental Defenders Office Conference “Managing Marine Farming – have we achieved best practice?” I have to say at the outset I am unable to express an opinion on that question for I know next to nothing about marine farming. But I do understand that there is some disquiet about the workings of the *Marine Farming Planning Act* 1995, as it was amended by an Act passed in 2011. When I learnt of this disquiet I did feel a little nervous for although I was not appointed Governor until 2004, I did indeed, just three days before last Christmas, sign into law that amending Act!

Now, before you all say “Aha so it is all your fault” I confess to you that although I always read the Bills before I sign them, I don’t claim to understand them all – especially those amending Bills that make *prima facie* unintelligible statements like section 15 (1) (b) amends section 56 subs (9), pars (a) and (b) of the Principal Act by deleting the words, “subject to section 59(4)(c)(i)” and substituting therefore the words “section 59(4)(c)(ii)”. However, you may take a little comfort from the fact that my reading of Bills does keep a sharp eye out for such matters as retrospective enactments, and enactments that take away well established rights or restrict access to the Courts.

I thought as I had been asked to open this conference I should read the *Marine Farming Planning Act* and read again the 2011 amendment but it wasn't long before I realised that this was a matter for experts who understand what the business of marine farming is all about and for environmental scientists.

Now, as a barrister and then a judge for many years I am very aware that expert knowledge is something that expands exponentially and consequently fields of expertise become narrower and narrower and more and more specialised. I frequently had to lead evidence from experts, and cross examine them and later, when on the Bench, listen to their evidence. Although often very detailed, the evidence was always tightly focused on the narrow issues raised by the case at hand, each case was quite different, and the trouble was that once the case was over you forgot all that you had learnt and just got on with the next case which involved another, quite different, but equally narrow field of expertise.

Thus, it has been said of experts that they are people who know a great deal about very little, and who go along learning more and more about less and less until they know practically everything about nothing.

Lawyers, on the other hand, are people who know very little about many things, and who keep learning less and less about more and more until they know practically nothing about everything.

But judges are people who start out knowing everything about everything, but end up knowing nothing about anything, due to their constant association with experts and lawyers.

Although I am no longer a judge, and have never been an expert I do understand the importance of marine fish farming because it helps meet the need to feed growing populations; it helps preserve wild fish stocks, especially stocks of endangered species; and it provides employment and contributes to the economy. On the other hand, consideration must be given to the consequential and equally important matter of preserving the environment that might be adversely affected by marine farming.

Here in Tasmania, protection of the River Derwent and the D'Entrecasteaux Channel is singularly important now that these waterways are so much cleaner than they were a few years ago, thanks in no small measure to the efforts of Nystar and Norske Skog. Evidence of this improvement was seen last year when a whale gave birth to her calf in the river and brought it to the suburbs of Hobart. Evidence of improvement can also be seen in the presence of fairy penguins nesting in the rocks at the foot of built up areas along the shores of the Derwent and in the regular presence of seals and dolphins frolicking about on the river with the pleasure boats.

So maintaining this improvement to the water environment is very important and marine farming of aquatic species can alter or destroy existing wild habitat, increase local pollution levels and have a negative impact on local species' genetic makeup. In addition, marine fish farming can interfere with the recreational use of the waterways; a legitimate use of the environment that can be enjoyed with minimal or no impact on the environment.

So, as is the case with most human activity, including - if I dare mention the "f-word" - forestry - the issue is how to manage it so that the right balance is struck between mankind's demands, in this instance for food, and on the other the obligation to preserve the environment affected by the activity. And I guess that's what this conference is all about.

As I knew I was coming here this morning I had a look at the *Marine Farming Planning Act 1995* & found that section 4 of the Act spelled out that the purpose of the Act was to achieve "well planned sustainable development of marine farming activities having regard to" and as you know, there follow five subparagraphs referring to that balance of which I have just spoken. The section concludes with an admonition that those exercising the powers conferred by the Act must do so in a manner which furthers that balance. I thought that there can't be any complaint about that.

I see that there is a Panel to review plans for marine farming, to hold hearings and to advise the Minister about his approval of marine farming plans. Section 8 provides that the Panel must comprise persons who have expertise in the fields that Section 4 says must be taken into account when exercising powers under the Act. On the face of it I can't see anything wrong about that either. The Act provides for public input to draft plans that must be taken into account by the Panel and provides for rights of appeal. Basically, these procedures are relatively common in statutory enactments of this kind.

Now, I happened upon an article in a recent edition of *The Tasmanian Conservationist* that was critical of the work of those exercising the powers under the *Marine Farming Planning Act*.¹ However, a careful reading of this article gave me the impression that the author's criticisms were directed not to the terms of the legislation, but to the manner in which the powers were exercised and the resultant outcomes. He wrote of the Panel²

"This is supposed to be an expertise-based committee that can represent the interests of disparate members of our community. Instead, it has repeatedly failed to take into account genuine concerns about the visual and noise pollution, water pollution resulting

¹ The Tasmanian Conservationist No 324, December 2011 page 14

² Supra

from the release of nutrients antibiotics and anti-pollutants into the water and environment impacts.”

If this is right then plainly the members of the Panel are not exercising their powers in accordance with the Act, and their decisions are subject to review for failing to do that, but that is no reason to change the Act. The author refers to the 2011 amendment and complains that it “puts even more power into the hands of the Minister.” That is an interesting observation and one that is often made these days with respect to the exercise of power by a Minister, but I rhetorically ask, are not Ministers elected to exercise power? Is this not the basis of a democracy – that executive power is better exercised by persons whose work is subject to regular periodic review at the ballot box than by persons who are not answerable to the public at all?

The trouble is that the powers exercisable under the *Marine Farming Planning Act* call for the making of value judgments. It’s not a mechanical or mathematical business. The task is to find a balance between different views and different interests and of course, there will always be people who are dissatisfied with the outcome of a value based decision. There is no perfect way. Every day the judiciary has to make value judgments; did the defendant’s action amount to negligence; did the Municipality owe the swimmer a duty of care; what is the measure of damages for this injury and so on. But the judges have an advantage over those who make executive value-

based judgments - they have the doctrine of precedent and a structured appeal system to guide them.

As I said, and as is no doubt plainly apparent, I know nothing about marine farming planning nor about any shortcomings in the system, but as you discuss this matter today I urge you to bear in mind that there will always be a multitude of different, but legitimate views on issues involving values and merit that call for a balance to be struck, and it is very hard to legislate for the perfect human judgment.

However, it is time I stopped hectoring you and let you get on with the matters that are on the programme so I now formally open this conference and wish you all a productive, stimulating and interesting day.