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Fishing policy all at sea as Ludwig and Burke trawl new depths

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ONE cannot but admire Joe Ludwig, the Minister for Agriculture, Fisheries and Forestry. After the triumph of the ban on live cattle exports, a lesser man might have rested on his laurels. But with the Abel Tasman episode, Ludwig has shown he can trawl new depths.

There is, however, no Sancho Panza without Don Quixote.

Having earned his aquatic credentials trashing the 2010 report of the Murray Darling Basin Authority, Environment Minister Tony Burke is among Australia's leading experts in ignoring experts.

Just as for Don Quixote "charging at his enemies was the work of a moment", so Burke has lost no time in giving himself the power to overturn the decisions of the independent regulator, the Australian Fisheries Management Authority, whenever he feels a twitch - or more properly, a tweet - of "significant environmental uncertainty".

How right Cervantes was that we live in an age in which even idiots have ideas! For what major decision does not involve significant uncertainties?

That more things could happen than will happen is the beauty and the anguish of life. And where public policy decisions are concerned, the interplay of unintended consequences with the complexity of natural and social systems makes perfect predictability a chimera.

But thinking about unintended consequences is hardly these ministers' strength. Were it, they would understand there are good reasons AFMA moved away from controls over inputs, such as vessel size, to a focus on outputs. For constraining one characteristic, such as size, merely leads fishing companies to replace the restricted feature with others, increasing costs and more often than not, environmental harm. Much better then to manage risks by regulating what vessels can do than to control exactly how they do it.

Not that regulating what vessels can do is simple or certain. But that is why AFMA exists. And far from disregarding uncertain environmental consequences, its legislation has long required it to respect the precautionary principle. Nowhere has the government suggested AFMA ignored that requirement: and understandably so, as AFMA has been remarkably conservative in setting allowed catch levels.

Moreover, even relative to those conservative levels, the fisheries the Abel Tasman intended to trawl are significantly under-fished. That is because costs in those fisheries have been inefficiently high, as scale economies associated with larger, more capable vessels such as the Abel Tasman have not been exploited. The resulting under-fishing is every bit as wasteful as over-fishing, as opportunities to provide consumers with affordable, sustainably harvested, food are foregone.

No surprise then that AFMA - without a peep of discomfort from the government - concluded in 2009 that it would be desirable for much larger, more cost-effective vessels to operate in this fishery. But investments in securing those larger vessels would not be made unless investors could bank on AFMA's planning decisions. Nor, absent such confidence, will the myriad other investments required to put our vast marine resources to good use.

But, warned the Man of La Mancha, those who play with cats must expect to be scratched. And these cats have little respect for business confidence and for regulatory processes. Not for Burke and Ludwig the old Latin dictum *pacta sunt servanda*: pledges must be honoured. Rather, they want the right to twist with the wind.

Yet if promises can be overturned on a whim, promisors will struggle to find promisees willing to make valuable commitments in return. As an American jurist put it, it is "the power to bind ourselves in exchange for similar concessions from others that gives us control over our lives". And that is as true for governments as for you or me.

That dilemma - that the advantages of being able to make and receive commitments come only at some cost in freedom to change our minds - is hardly a new one in the Australian federation. On the contrary, it helped shape the distinctive form of government that emerged when the Australian colonies became some of the world's first, but also most rambunctious, modern democracies. In particular, it underpinned "the long established Australian habit", highlighted by historian R. S. Parker, "of institutionalising the resolution of conflicts over the allocation of

values in a system of adjudication based on committees, boards, trusts and similar institutional devices", thus avoiding "ad hoc bargaining and shows of strength".

Having been given its independence, each such entity legitimised its decisions by developing "standards or policies by which to test the cases presented to it", providing investors, especially those overseas, with predictability as to how the system would work.

Hence the importance of respecting those institutions' credibility. It was with that in mind that Menzies, under intense backbench pressure in 1962 to neuter the Tariff Board, declared that while "the board is an instrument of policy, and not its master, it has been recognised by successive governments that it should possess a high measure of independence, that the integrity of its advice should be preserved and that it should not be subject to any form of day-to-day political instruction".

That is not to ignore the dangers such delegations of power create. The Tariff Board can and did make mistakes, though it was less protectionist than many parliamentarians wanted. And the greater the powers an agency has, the greater the risks. If regulation there must be, someone must regulate the regulators. But superimposing ad hoc ministerial decisions, as the government has done, is a cure worse than the disease.

It is a cure made even worse by its retrospective application. If the rules had to be changed, those changes should have been done prospectively, rather than by destroying the value of investments already made. And that is all the truer as the costs of the Abel Tasman were incurred in reliance on a decision-making framework Burke and Ludwig had themselves repeatedly endorsed.

One might have thought our good ministers would find such a volte-face troubling. Instead, like the British judge Lord Brampton when confronted with the argument that he should follow one of his own dicta, all they can say is that "the matter does not appear to me now as it appears to have appeared to me then".

So much for certainty. And so much for what was once this country's strength: the quality of its institutions, reflected in the calibre of its agency heads, including Gary Banks, who last week announced that he was leaving the Productivity Commission.

Banks will be sorely missed. But no fear: Ludwig and Burke are on the job. And the fish are safe. Pity about the people.
