

CASE NOTE

Nature Conservation Council of NSW Inc. v. Minister for Environment and Water Resources and Ors. [2007] AATA 1876

After years of campaigning for greater protections for the critically endangered grey nurse shark, the Nature Conservation Council (NCC) decided that it had no alternative but to try and convince the Courts of the need for greater protection of the shark. Unfortunately, the Administrative Appeals Tribunal, while recognising that grey nurse sharks are at a high risk of extinction due to the threats faced by the species, did not agree with the submissions made by the NCC that greater protections for the grey nurse shark would have a measurable impact on the survival of the species.

Facts

Proceedings were brought in the Administrative Appeals Tribunal (AAT) seeking merits review of the decision by the Commonwealth Minister for the Environment relating to the NSW Ocean Trap and Line Fishery (OTLF). The OTLF is a multi-species targeted fishery that operates within the habitat areas of the Grey nurse shark and a number of other threatened species. In July 2006, the Minister declared this was an approved Wildlife Trade Operation (WTO) under section 303BA and section 303FN of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The Nature Conservation Council (NCC) presented evidence to the AAT that the OTLF would have a significant impact on the east coast population of the Grey nurse shark, which is nationally listed as being critically endangered. Grey nurse sharks have a number of characteristics that predispose them to population decline, in particular, that they have a fragile reproduction process. Females reach their reproductive age at 12 and produce, on average, one pup per year. Female grey nurse sharks live no longer than 35 years. Of the twelve grey nurse shark fatalities occurred over the last twelve months, three of which occurred in the OTLF. These three were female.

The NCC also presented evidence that the conditions placed on the fishery which are designed to afford some protection to the Grey nurse shark do not go far enough to ensure the recovery of the species and the prevention of extinction. The NCC also argued that in declaring the OTLF to be an approved WTO, the Minister did not take into account the precautionary principle, which he is required to do under the EPBC Act. The NCC sought the implementation of fishery closure of specific key aggregation areas and the banning of the use of wire traces in deeper waters. Most of the time at the hearing was spent debating the significance of each aggregation site and the protections of those areas.

Decision

The NCC's arguments were unsuccessful and the decision of the Minister was affirmed. Justice Downes, President and Member Davis viewed the task of the tribunal as being to decide whether the operations of the OTLF are detrimental to the

survival of grey nurse sharks or inconsistent with other environmental objects of Part 13A of the EPBC Act.

After reviewing the expert evidence on grey nurse sharks, the Tribunal found that there was limited material on the size and stability of the east coast population of grey nurse sharks and considered the population is likely to be between 500 and 1500. They acknowledged the risks caused to the grey nurse shark from accidental hooking. In particular, they recognized that two deaths of female will mean a continuing decline of the shark population. There are nine recorded deaths per year caused by fishing, half of which are caused by the OTLF. Some deaths have been away from the aggregation sites that were the focus of where greater protection was needed.

The Tribunal found that:

It is true that on the evidence, deaths caused by the OTLF will also have an adverse impact on the sharks. However, this adverse impact will not add to the detriment which will continue whatever action we take.¹

They further held that the proposed protections proposed by the NCC would not have a measurable impact on the shark population despite being desirable. Perplexingly, the Tribunal then states that “we are satisfied that the operation will not be detrimental to the survival of the sharks.” Despite the finding that the OTLF was having an adverse impact on grey nurse sharks, the Tribunal appeared to adopt a higher test than detriment to the survival of the species. Their argument suggested that it was necessary that the OTLF was the sole reason for extinction of the grey nurse sharks. They in particular, mentioned that there were other causes of the problem, particularly the biology of the shark and that there were other causes of deaths outside the OTLF.

In regards to the proposed measures, the Tribunal held that there was little evidence to suggest that they would reduce the effects of the OTFL to nil. They stated that even if the OTFL did have no impact on grey nurse shark populations, “that... would not avoid what appears to be almost inevitable extinction from other causes.”²

The Tribunal stated:

We have ultimately concluded that the correct decision is that the operation of the OTLF is not detrimental to the survival of grey nurse sharks when compared to the position they would otherwise be in.³

In making this statement, the Tribunal considered the potential impact of the OTLF compared with outside factors. One of the reasons, though ‘not central’, for the Tribunal’s decision was that:

The relevant object of the Act is not exclusively the protection of wildlife. The Act recognises and regulates commercial activities respecting wildlife.⁴

The Tribunal distinguished this case from *Brown v Forestry Commission (No 4)*⁵ and went on to state that the measures proposed by the NCC “will give rise to no

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⁵ [2006] FCA 1729

measurable change”⁶. The ‘real risk’ came from the already depleted population together with the biology of Grey nurse sharks.

The Tribunal criticised the way in which this case was presented. Firstly, the claim sought increased protection around grey nurse shark key aggregation sites but not to a level at which the species would necessarily survive, or where even improvement could necessarily be expected. The Tribunal found that it did “not have the power to consider the position of grey nurse sharks generally.”⁷ The Tribunal can only act within its jurisdiction and is unable to consider all causes of non-natural death. Secondly, legislature concerning a WTO did not contemplate the kind of detailed enquiry undertaken by the Tribunal.

The Tribunal also considered the timing of the decision. The decision extended only to 14 December 2007 meaning that the decision handed down by the Tribunal is only effective for two months. The NCC sought an extended declaration by the Tribunal, however they were reluctant to make a declaration that extended past that of the Minister.

Finally, the Tribunal stated that administrative decision-making inevitably involved discretion. They stated that:

“The requirements for the decision-maker’s satisfaction ... are other than absolute. However, what amounts to satisfaction and what factors may be taken into account in achieving satisfaction are not so certain. The Minister will not be entitled to take into account irrelevant matters, nor to leave relevant matters out of account. However, there will be a discretion, particularly at the level of satisfaction, in the sense that not all decision-makers will necessarily come to the same conclusion”.⁸

The Tribunal’s decision is disappointing because they have found it too hard to take the necessary steps, however small to help the grey nurse shark population. This is contrary to the idea behind threatened species legislation. NCC are currently considering whether to appeal the decision to the Federal Court.

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