

Nature Conservation Council of NSW Inc
v
Minister for Environment and Water Resources & Ors

(The *Grey Nurse Sharks* Case)



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CASE NOTE

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

After years of campaigning to save the critically endangered east coast population of the 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. Unfortunately, the Administrative Appeals Tribunal (AAT), while recognising that Grey Nurse Sharks are at a high risk of extinction, 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. The judgment of the AAT goes against Federal Court decisions made under the Environment Protection and Biodiversity Conservation Act (1999) (EPBC Act) which have emphasised the need to interpret the EPBC Act in a way that promotes the survival of endangered species.

Background

Proceedings were brought in the Administrative Appeals Tribunal (AAT) seeking merits review of matters relating to the Commonwealth Environment Minister's decision to approve 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 the fishery to be 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, they have a fragile reproduction process. Females reach reproductive age at 12 and produce, on average, one pup per year. Females live no longer than 35 years. Of the twelve Grey Nurse Shark fatalities that occurred over the last twelve months, three were attributable to the OTLF. These three were female.

The NCC also presented evidence that the conditions placed on the fishery by the Minister 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 prevent 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*, as required by the EPBC Act.

The NCC sought the closure of specific key aggregation areas along the NSW coastline 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 of the known eighteen aggregation sites for Grey Nurse Sharks and the protections of those areas.¹

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 were *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 available on the size and stability of the east coast population of Grey Nurse Sharks but considered the population as likely to be between 500 and 1500. They acknowledged the risks caused to the Grey Nurse Shark from accidental hooking. In particular, they recognised that two female fatalities per year 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.²

Further, the Tribunal held that the protections proposed by the NCC, while desirable, would not have a measurable impact on the shark population.

Perplexingly, the Tribunal then stated that:

We are satisfied that the operation will not be detrimental to the survival of the sharks.

Despite 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.

¹ The aggregation sites included Julian Rocks and Spot X (off Byron Bay), Manta Arch (off South Solitary Island), the Steps/Anemone Bay (off North Solitary Island), E Gutters (off North West Solitary Island), Fish Rock and Green Island (off South West Rocks), Mermaid Reef (off Crowdy Head), Latitute Rock and Spot X/Latitude Reef (off Forster), the Pinnacle (off Forster), Big and Little Seal Rocks, White Top Rocks, Inner and Outer Edith Breaker, Skeleton Rocks and Sawtooth Rocks (Seal Rocks), Little Broughton Island (off Port Stephens), Foggy's Cave (Terrigal), Magic Point (Maroubra), Long Reef (off Sydney), Bass Point (off Shellharbour), Tollgate Islands (off Batemans Bay) and Montague Island (off Narooma), Cod Grounds (off Laurieton (Cth site), and Pimpernel Rock (off Brooms Head (Cth site)). More information can be found at www.nccnsw.org.au/

² *Nature Conservation Council of NSW Inc v Minister for the Environment and Water Resources & Ors* [2007] AATA 1876 at 125.

Their reasoning suggests that the OTLF must be the sole reason for the likely extinction of the Grey Nurse Sharks before the Tribunal will interfere.

The Tribunal placed considerable weight on the fact that there were other factors contributing to the endangerment of the species, in particular the biology of the shark and other causes of death outside the OTLF.

In regards to the proposed protection measures, the Tribunal held that there was little evidence to suggest that they would reduce the effects of the OTFL on the Sharks to nil.

The Tribunal stated that even if the OTFL had *no impact* on Grey Nurse Shark populations, “that... would not avoid what appears to be almost inevitable extinction from other causes”.³

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.⁴

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.⁵

The Tribunal distinguished this case from *Brown v Forestry Commission (No 4)*⁶ and went on to state that the measures proposed by the NCC “will give rise to no measurable change”.⁷ According to the Tribunal, 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 in their numbers could necessarily be expected. The Tribunal found that it did “not have the power to consider the position of Grey Nurse Sharks generally”.⁸ The Tribunal could only act within its jurisdiction and was unable to consider all causes of non-natural death. Secondly, the Tribunal found that the legislation concerning a WTO did not contemplate the kind of detailed enquiry undertaken by the Tribunal.

³ Ibid at 125

⁴ Ibid at 128

⁵ Ibid at 132

⁶ [2006] FCA 1729

⁷ *Nature Conservation Council of NSW Inc v Minister for the Environment and Water Resources & Ors* [2007] AATA 1876 at 133

⁸ Ibid at 134

The Tribunal also considered the timing of the decision. The Minister's decision to approve the fishery 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.⁹

The EDO has a number of concerns with the reasoning contained in the judgment and we have set these out below.

Inconsistency with the Precautionary principle:

One of the key concerns with the judgment of the AAT is that it is not consistent with the precautionary principle. The EPBC Act explicitly recognises the concept of ecologically sustainable development (ESD). Section 3A provides five principles of ESD:

- (a) integration of both long and short term economic, environmental, social and equitable considerations into decision-making processes;
- (b) precautionary principle – 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;
- (c) intergenerational equity – that the present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

The Tribunal was under a duty to consider the principles of ESD, in particular, the precautionary principle and the conservation of biological diversity as these are key principles to be considered in environmental decision-making (s391).

⁹ *ibid* at 137

A decision “about” a declaration made under s303FN is one of the decisions in which the Tribunal must consider the precautionary principle: s391(3). The facts show that the Grey Nurse Shark may become extinct which constitutes ‘irreversible environmental damage’ within the meaning of s391. The conditions put forward by the NCC represented the minimum required to address the environmental damage caused by the OTLF to Grey Nurse Sharks.

Despite the fact that the Tribunal found that three Grey Nurse Sharks had died in the last 12 months from the OTLF, and they had considered the precautionary principle, the application of the principle was flawed. The Tribunal failed to consider the application of the precautionary principle as set out in *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133. In that case, Chief Justice Preston stated that there is a shifting of an evidentiary burden of proof, to proving that the threat does not in fact exist.¹⁰

In the OTLF case there was clear evidence of the threat to the species and recognition by the Tribunal of the adverse impact of the OTLF on the shark. Despite this the Tribunal found it was not necessary to impose any additional conditions on the OTLF to protect the shark.

Conflict with international law obligations

One of the reasons for the EPBC Act is to give effect to Australia’s international obligations in relation to environmental law. In particular, the provisions of Part 13A were enacted to implement the *Convention on International Trade in Endangered Species (CITES)*. The extension of the EPBC Act beyond CITES species was aimed to give effect to Australia’s obligations under the *Convention on Biological Diversity*.¹¹ In particular, the objects of Part 13A include compliance with these obligations. A decision that suggests a species is doomed to extinction because of its biology, and other cumulative impacts, is not consistent with either of these international agreements or the known principles of ecologically sustainable development.

Inconsistency in EPBC decisions:

One of the key problems with the decision is that it now means there are conflicting authorities in relation to the interpretation of the EPBC Act.

The Tribunal’s findings about the OTLF not being detrimental to Grey Nurse Sharks was based not on an analysis of the impacts of the OTLF on the species, but in conjunction with other significant impacts on the species. In particular, the Tribunal emphasised the problems with the biology of the shark, and other causes of deaths including shark nets, and recreational fishing.¹²

¹⁰ at 150

¹¹ Explanatory Memorandum to EPBC Act at pg. 19.

¹² *Nature Conservation Council of NSW Inc v Minister for the Environment and Water Resources & Ors* [2007] AATA 1876 at 118-121

This approach is clearly inconsistent with the decision of the Full Federal Court in *Minister for Environment v Queensland Conservation Council* (known as the Nathan Dams Case).¹³ In that case, the Full Court found that when deciding whether a proposed action is a ‘controlled action’ requiring assessment under the EPBC Act, the Minister must take into account all ‘adverse impacts’ of the proposed action. This requires the Minister to consider all direct and indirect (including cumulative) adverse impacts of a proposal, including those done by persons other than the proponent. The Court also found that the term ‘impact’ is not confined to direct physical effects of the action on a matter of national environmental significance but includes ‘all adverse impacts’. Therefore, the Minister must take into account each consequence which can reasonably be considered as being ‘within the contemplation of the proponent of the action’, whether those consequences are within the control of the proponent or not. The difficulty is that clearly the Court used this principle in reverse to show that there was no detriment to the species in this situation because of the cumulative impacts on the Grey Nurse Sharks. This is inconsistent with construing the EPBC Act in a manner consistent with its objects and purposes.¹⁴

The NCC argued that where a species was already disturbed even minor impacts should be of significance (such as those in the OTLF). They relied on the judgment in the case of *Brown v Forestry Tasmania, Commonwealth of Australia and State of Tasmania (No. 4)*.¹⁵ While this decision is currently on appeal to the Full Federal Court, a key finding in that case was that the EPBC Act was to be construed to favour a construction that “views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened.”¹⁶

The case also emphasised the need to consider cumulative impacts. This was particularly appropriate in that case as it dealt in part with the Tasmanian wedge-tailed eagle. It was found that the impacts of logging in a given area were highly unlikely ever, on their own, to be capable of affecting the population of eagles as a whole.¹⁷ However in considering the biology of the species including its very wide range¹⁸, there being only 0.5 offspring per active territory and eagles being “very shy nesters” that are “very fussy in their choice of nesting sites”,¹⁹ and that the point of protection was to maintain an “ecologically functioning species, not a museum piece”²⁰ a conclusion was reached that even smaller impacts were significant.

The Court in *Brown* also emphasised the need to interpret the EPBC Act in order to comply with international conventions to which it was to give effect. Justice Marshall stated:

¹³ (2004) 139 FCR 24

¹⁴ See *Booth v Bosworth* (2001) 114 FCR 39 at 64 at [98].

¹⁵ FCA 1729

¹⁶ Para 300.

¹⁷ Para 95.

¹⁸ Para 96 and 98.

¹⁹ Para 101.

²⁰ Para 96.

(p)romotion of the conservation of biodiversity [as required by the object of the EPBC Act in s3(1)(c) of that Act] in context, can only be achieved by favouring a construction of the EPBC Act which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened.’²¹

In contrast, the Tribunal in this case has taken the opposite approach in seeking not to impose additional conditions that would assist in protecting the Grey Nurse Shark, basically because they were concerned that they would not address the ongoing detriment to the species.

Conclusions

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 and sets an unhelpful precedent for future action.

The NCC are unable to appeal the decision despite the clear legal errors in the reasoning of the AAT. This is because the WTO decision at issue expires on 16th December 2007. The judgment was delivered on 18th October 2007 giving the NCC insufficient time to lodge the appeal in order to have the matter heard and determined prior to 16th December 2007. The Full Federal Court would not hear the matter after that date as it would be giving an advisory opinion, as there would be no decision still in application. This is disappointing as it would have been helpful to have the Full Federal Court consider this matter and correct the errors of law and inconsistency in the EPBC decisions that now exists.

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²¹ Para 300.