



Australian National Sportfishing Association N.S.W. Branch

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11th July 2007

RE: GREY NURSE SHARK COURTCASE UPDATE
FROM: JOHN BURGESS – ANSA NSW

All of yesterday was consumed with oral presentations/ summaries of the respective written submissions put forward by respective counsels for each of the joined parties.

No further evidence was presented other than on behalf of the NSW Govt which surprisingly was physically represented by counsel. I haven't seen the additional evidence which I understood to be a couple of historic DPI internal emails in connection with additional GNS habitat areas (around Solitary islands) which were not originally gazetted as GNS protection sites - all of the joined parties had no objection to the additional evidence being presented which I believe was of little significance to the case. Counsel for the NSW Govt only attended for about 10 minutes so in reality the NSW Govt even though it was a party to the proceedings contributed virtually nothing.

The Tribunal is now in recess and will take the required time to consider all the evidence before it. It could be 4 weeks or a couple of months before the decision is handed down. It is difficult to predict which way the decision will go as all sides had constructive arguments and the final determination that Justice Downs has to make will require him to make some complex and challenging decisions including interpretations of the Commonwealth Environment Protection and Biodiversity Conservation Act which deals with approved wildlife trade operations.

The contentious and important issues as I see them are.

1) The interpretation of the sections of the EPBC Act dealing with permitted exports under an approved wildlife trade operation. The Commonwealth Govt (Minister for Environment) has approved the OTLF as an approved wildlife trade operation - this is valid until 14 Dec 2007. Under the terms of the EPBC Act the Minister must not declare an operation approved unless he is satisfied that the operation amongst other things will not be detrimental to (a) the survival of a taxon to which the operation relates and (b) the conservation status of a taxon to which the operation relates. The key words here being "to which the operation relates" It is the contention of the NCC that these words are all embracing and by that I mean they extends to any form of taxon (wildlife - fish, birds, whatever) that can be regarded as under threat of extinction. This includes GNS according to the NCC and this is the substantive basis for its appeal to the Tribunal. The interpretation our counsel has placed on these words is a very restricted one i.e. they extend to only the form of wildlife exported under the OTLF operation, namely spanner crabs. This being the case, the words "to which the operation relates" applies only to the spanner crabs - not GNS which are an accidental bycatch and certainly not exported. Counsel for the Commonwealth Govt has placed a slightly broader interpretation on the words to the effect that if the taking of spanner crabs was to directly

have an impact on the survival of another form of taxon (e.g. if another species relied on spanner crabs as a vital food source and faced possible extinction because the crab stocks had been diminished) this would fall within the meaning "to which the operation relates". This is going to require a challenging interpretive decision by Justice Downs. Usually such interpretations are ruled upon by the High Court. If Downs accepts the interpretations of our counsel or the Commonwealth then he would have little choice but to dismiss the NCC appeal against the Ministers approval of the OTLF as an approved wildlife trade operation.

2) There was considerable debate and conjecture over the actual estimates of the GNS population and whether or not the population was in decline or growth. Justice Downs conceded that potentially there could be a population number in the thousands but this was of little relevance if the GNS quasi extinction projection model developed by Otway was in fact correct. Otway has made the bold case that regardless of GNS population size the species will face ultimate extinction while ever hook style fishing is allowed (e.g. if the population is 300 - extinction 6yrs, population 1000 - extinction 45 yrs). During the cross examination of Otway last month he was quizzed extensively over his modeling calculations for the quasi extinction theory. Justice Downs had real problems coming to terms with the modeling formulae - so did I. If Justice Downs does not accept the validity of the Otway modeling formulae and takes the view that that species is growing in numbers and not declining towards oblivion then the whole issue of GNS being an endangered species is debatable. Likewise the need for GNS protective measures is also debatable but that's an argument for another day.

3) There was much debate on the logic for expanding the number of GNS protection zones by 4 or whatever and increasing the size of the no fish areas to 1500M. Our counsel and also counsel for the Commonwealth strongly argued that there was no scientific logic for such an action. Both counsels also argued that there was no evidence to suggest that the recorded deaths of GNS due to hooking actually occurred within or outside the existing GNS protection zones and quite to the contrary the existing zones and the MPAs were seemingly working effectively to reduce deaths and rejuvenate the species. In essence the case by the NCC to increase the no fishing areas by 500m was viewed as little more than a feel good gesture and a misapplication of the precautionary principle on the NCC's part. Justice Downs also conceded this to a certain point and having regard to the Otway quasi extinction model made the analogy that if Otway was correct the only way to save the east coast GNS population from extinction was to completely ban all manner of hook fishing off the NSW coast. This was not within the scope of the Tribunal as the NCC had not made this a case issue.

4) The current approval for the OTLF as a wildlife trade operation remains valid until 14 Dec 2007. While the NCC case is for the proposed additional GNS protective measures to be for a period of 3 years this may not be possible at law. Ordinarily when the Tribunal does make a ruling on an issue such as this then it only applies for the approved life of the operation with the caveat that if an extension approval is sought then the approving Government bodies will take heed of the Tribunal's ruling when deciding to approve (with conditions) or otherwise. My understanding though is that the approving Government bodies are not necessarily bound over by the Tribunal's ruling when deciding on an extension. If this is so then any win by the NCC could be very short-lived. The Tribunal has yet to decide if it has the power to accede to a 3 year period as now sought by the NCC. The original appeal application by the NCC had overlooked this issue

5) Taking the latter position a little further it is hard to see the Australian and NSW Government not giving tacit endorsement of whatever the Tribunal rules upon. However there is a very easy way for both Governments to save face here by simply dropping the export component of the OTLF. If commercial fishers don't export spanner crabs captured within the scope of the OTLF then there isn't a need for the OTLF to be an approved wildlife trade operation. Nothing else but spanner crabs are currently exported, I don't know exactly what the spanner export market is worth but it would make sense to buy this fishery out before the current wildlife trade approval lapses. Such an initiative would undermine the fundamental premise of the whole NCC case - i.e. No export - no need for approval as a wildlife trade operation - no role for the Commonwealth to play - no loophole for the NCC to exploit.

There are several other very fine points of law for the Tribunal to rule on but I believe the issues I have just addressed are the pivotal ones.

There was some suggestion that the NCC would appeal to the High Court if the Tribunal ruled against its appeal. I very much doubt this as the cost would be prohibitive for all parties and to be practical all it takes is for the NSW Govt to take spanner crabs out of the export equation and that's the end of it and the NCC is mindful of this. Its just a pity that someone within Govt, DPI or the Commercial fishing sector didn't have the foresight to do this sooner.

To sum up its even money bet which way the Tribunal may rule. Even if the ruling does go in favour of the NCC, I believe we can contain any flow on impact provided the NSW Government (DPI) gets smart about the future export of spanner crabs. This is an issue we will need to push politically but I am sure that there are people within Govt and DPI etc who would be thinking this way already - I hope!

Regards
John Burgess