

NATURE CONSERVATION COUNCIL OF NSW INC.

Applicant

MINISTER FOR THE ENVIRONMENT AND WATER RESOURCES

Respondent

**STATEMENT OF FACTS AND CONTENTIONS OF THE
RECREATIONAL FISHING INTERESTS**

Introduction

1. This statement is filed on behalf of the following persons and bodies, who are applicants to be joined as parties under s.30(1A) of the *Administrative Appeals Tribunal Act 1975* (“the AAT Act”):
 - (a) Australian Recreational and Sport Fishing Industry Confederation Inc (“**Recfish**”);
 - (b) ECOfishers Inc.;
 - (c) Dr Philip Creagh as representative of the Narooma Port Committee;
 - (d) NSW Spearfishing and Freediving Association Pty Ltd;
 - (e) the Charter Vessel Association of NSW Inc. (named as the “Commercial Vessel Association” in its application to be joined);
 - (f) New South Wales Fishing Clubs Association Inc.;
 - (g) NSW Charter Boat Operators Association Inc.

Filed on behalf of the Australian Recreational and Sport Fishing Industry Confederation & Others by:

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2. These persons and bodies will be referred to for brevity as “**the recreational fishing interests**”.
3. Each of the incorporated bodies listed above, except for the NSW Charter Boat Operators Association Inc, has filed an application for joinder which is expressed to be in the name of a natural person as representative. In each case the proper party is the corporate entity. Appropriate steps will be taken to regularise this position.
4. This Statement sets out the position for which the recreational fishing interests will contend if they are joined pursuant to s.30(1A).
5. The Statement adopts the same abbreviations as that filed by the Minister on 5 April 2007.

Facts

6. The estimates of the size of the East Coast population of Grey Nurse Sharks relied upon by the Applicant¹ and the Minister² are based on studies which are flawed in their methodology and probably underestimate the true population size.
7. There is no sound basis for a precise estimate of the population, but it is probably significantly greater than the upper limit of 800 individuals suggested by Dr Otway.³
8. Further, while there may well have been a substantial decline in the population during the twentieth century⁴ (and this as a result of human interaction rather than habitat changes),⁵ there is also evidence which is indicative of an increase in the population since about 1999. Accordingly, while the present regime of

¹ Applicant's Statement of Facts and Contentions, filed [date] (“**Applicant's SFC**”) paras 15-16.

² Statement of Facts and Contentions of the Respondent, filed 5 April 2007 (“**Minister's SFC**”) para.77.

³ Minister's SFC para.77 (presumably referring to Dr Otway's 2004 study, T12, at 415).

⁴ Minister's SFC paras 100-102.

⁵ Minister's SFC para.103.

protection remains in place, suggestions of impending "quasi-extinction"⁶ are misplaced.

9. The statements in the previous paragraphs will be supported by reference to evidence which is to be filed on behalf of the recreational fishing interests.

Contentions

- (1) Nature and permissible scope of conditions

10. The declaration made by the Minister relates to:

... the operations for the harvesting of specimens that are, or are derived from, fish or invertebrates taken in the New South Wales Ocean Trap and Line Fishery, as defined in Schedule 1 of the New South Wales *Fisheries Management Act 1994*.⁷

11. The Ocean Trap and Line Fishery (OTLF) is a commercial fishery, and thus a "wildlife trade operation" as defined in s.303 FN (10) of the EPBC Act. It is described in the Minister's SFC at paras 21-31.
12. The exhaustive nature of s.303FN(10) means that, absent some relevant provision in the regulations, recreational fishing is not capable of being a "wildlife trade operation" or a part thereof. Recreational fishing is not an aspect of the OTLF.
13. Section 303FT(4)(c) allows the Minister to make a WTO declaration under s.303FN even if he or she considers that the relevant operation (here, the OTLF) should be the subject of a declaration only "while a certain condition is complied with". In such a case the condition is to be specified in the instrument of declaration; and contravention of the condition may lead to revocation of the declaration (s.303FT(9)).
14. In this context, "condition" must be taken to mean a condition imposed on (and able to be complied with by) the "operation" that is the proposed subject of a

⁶ Applicant's SFC paras 18-20.

⁷ T37 p.2003.

declaration. It cannot describe any state of affairs that the Minister might think desirable.

15. In the case of the OTLF, the Minister may properly require as "conditions" of a WTO declaration that the fishing activities which comprise the OTLF be conducted in particular ways and not be conducted in particular areas. A requirement that activities which are not part of the OTLF be conducted in particular ways, or excluded from particular areas, is not properly described as a "condition" applicable to a declaration of the OTLF.
16. Of course, there is no power under the EPBC Act to close an area to fishing. The most that the Minister (or the Tribunal) can do is to withhold a WTO declaration under s.303FN in respect of particular fishing operations unless satisfied of the matters referred to in s.303FN(3), in respect of those operations. To withhold a WTO declaration unless some other authority (e.g. the government or legislature of the relevant state) uses its powers to prohibit fishing in a particular area would be to usurp the management role of those authorities.
17. For these reasons the Tribunal cannot, or alternatively should not, vary the Minister's decisions so as to impose conditions which would purport to apply to recreational fishing.

(1) Implications of population evidence

18. The recreational fishing interests do not seek to re-open the Minister's determination of appropriate conditions for declaration of the OTLF.
19. More stringent conditions could only be necessary, as a prerequisite for the Tribunal being satisfied that a declaration is appropriate, on the basis that the East coast population of Grey Nurse Sharks is presently numbered in the hundreds and is in danger of being reduced to a level that is biologically unviable. If they are not necessary in that sense, such conditions should not be imposed.


20. As outlined above, the population is significantly larger than claimed by the Applicant. Further conditions are not justified.
21. Alternatively, to the extent that any onus lies on the proponents of a WTO declaration, there is sufficient evidence to proceed on the basis that the relevant population is *not* so small that its viability is threatened by a few deaths per year resulting from fishing operations. The Tribunal is in a position to reach the state of satisfaction referred to in s.303FN(3), on the basis of the conditions specified by the Minister.

Conclusions and orders

22. The recreational fishing interests may seek to amend or supplement this Statement as necessary, including in the light of:
- (a) further evidence (the witness statements to be filed by the recreational fishing interests themselves not having been settled at the time of writing); and
 - (b) contentions advanced by the other parties in answer to this Statement.
23. The recreational fishing interests concur in the order sought by the Minister.⁸

Dated 30 May 2007

Signature
Name


.....
Edward Lindsay Roux Houghton

Capacity

Solicitor for Australian Recreational and Sport Fishing Industry
Confederation Inc. and Others
(Recreational Fishing Interests)

⁸ Minister's SFC para.159.