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### **Full Federal Court Win for Conservationists in Nathan Dam Appeal!**

#### **A win for QCC and WWF Australia!**

This morning the Full Federal Court (Black CJ, Finn and Ryan JJ) delivered a unanimous joint judgement dismissing the appeal by the Commonwealth Minister for the Environment and Heritage against the decision of Justice Kiefel in the Nathan Dam case.

**That is, QCC and WWF Australia represented by EDO Qld and barristers Stephen Keim and Chris McGrath won for the environment again!**

The Court also ordered the Minister to pay QCC and WWF Australia's costs of the case.

#### **What does this mean for the proposed Nathan Dam, and other development generally?**

The Minister's original decision that the EPBC Act did not require him to consider the downstream pollution by irrigators as an impact of the construction and operation of the dam was wrong - those impacts were relevant according to the Full Federal Court. The decision on the "controlling provisions" (ie relevant matters of national environmental significance to be addressed in subsequent assessment) must now be re-made according to the proper interpretation of section 75(2) as given by the Full Court. The Minister's decision prescribing a public environment report as the level of environmental assessment must also be re-made.

If the Minister agrees with a report by the Great Barrier Reef Marine Park Authority which found that the impacts on the Reef from irrigation practices will be significant, the Minister must include the World Heritage values of the Reef and migratory species as controlling provisions for the assessment of the action, and must decide afresh what level of environmental assessment is appropriate. If significant impacts on the Reef are found to be likely, it may be that a public environment report is not a sufficiently thorough environmental assessment and that a more detailed Environmental Impact Statement or even a Public Inquiry should be required.

The Minister will base the final decision on whether to approve the dam or not on the environmental assessment document, and can still approve the action even if there are likely to be adverse significant impacts on the Reef. When that time comes, we hope that new Minister Ian Campbell will take this opportunity to refuse approval for the Dam and protect our important matters of national environmental significance.

In summary, the case may not stop the dam, but it will require a proper, broad consideration of the actual impacts of the dam (including the impacts of irrigated agriculture facilitated by the Dam).

Most importantly the case establishes the principle of a broad scope of inquiry into the impacts of proposed actions, a principle which will now apply to all EPBC Act referrals of proposed actions made to the Minister. The decision may also broadly influence state-level environmental assessment processes, but these decisions are made under their own specific laws.

**The case therefore has excellent implications for all environmental assessment under the EPBC Act in the future, with the Minister required to take a broad approach to adverse environmental impacts of proposed "actions", be they dams or not! This means better, more thorough Commonwealth environmental impact assessment!**

### **What in essence did the Full Court say?**

#### *Background*

As readers know, the case was primarily concerned with whether the impacts on the Great Barrier Reef from agriculture (and associated chemical application and run-off) which would be facilitated by the Dam should be considered an impact of the Dam itself.

Within that context, the case boiled down to the interpretation of the section 75 process of Ministerial consideration of "all adverse impacts" of an action. This step of the process is relevant for the Minister to then determine if those impacts were likely to be *significant* impacts on a matter of national environmental significance, hence determining controlling provisions and required environmental assessment.

#### *The Full Court decision*

The Full Court found that "all adverse impacts" was not confined to direct physical impacts but included indirect impacts and effects "which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter" (paragraph 53).

The Full Court further held that the width of the section 75 enquiry "in each case will depend on its facts and on what may be inferred from the description of the "action"", and agreed with Justice Kiefel that "the Minister can exclude from further consideration only those potential impacts "which lie in the realm of speculation" (para 61).

The Full Court went on to clarify that the consequences of the actions outside the control of the proponent but reasonably imputed as within the proponent's contemplation (such as the impacts of actions of third parties) are impacts of the proponent's proposed action (paragraph 57).

Because the referral document described the potential for cotton ginning and expansion of the existing cotton growing industry, the Full Court held it was "inescapable" that irrigation of cotton crops was within the contemplation of SUDAW as the proponent of the Dam.

### **Where can I read the judgement?**

The landmark judgement *Minister for the Environment and Heritage v Queensland Conservation Council Inc. and WWF Australia* [2004] FCAFC 190 (30 July 2004) is available on Austlii via <http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html> or contact EDO Qld for a hardcopy.

### **Could the Minister appeal again?**

The Minister has 28 days to decide whether to seek special leave to appeal the Full Court's decision to the High Court of Australia.

We will keep readers informed of the Minister's actions – be they an application for special leave or a reconsideration of his section 75 decision on the controlling provisions for the environmental assessment of the proposed Nathan Dam.

30 July 2004

*For more information, contact Jo Bragg or Larissa Waters at EDO Qld. Why not join or donate to EDO so we can continue to run test cases like Nathan? See our memberships-donations form on our website [www.edo.org.au/edoqld](http://www.edo.org.au/edoqld).*

EDO Qld would like to congratulate and thank barristers Stephen Keim and Chris McGrath for the tireless effort they put into this case, resulting in thorough and convincing written and oral arguments which ultimately led to the win! And similar congratulations of course go to the clients, QCC and WWF, for their courageous decision to pursue this case in the Court despite possible crippling adverse costs orders if they did not succeed.