



ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.

22 December 2003

EDO Alert! Conservationists win battle in Federal Court over proposed Nathan Dam!

On Friday 19 December 2003 we won the battle for better environmental assessment of the impacts of the proposed Nathan Dam in the Federal Court!!!

EDO (Qld) were the solicitors on the record for successful clients Queensland Conservation Council (QCC) and the World Wide Fund for Nature Australia (WWF).

The case was about the proper scope of the environmental assessment (at the Commonwealth level) of the proposed Nathan Dam, and whether impacts from agriculture which would be facilitated by the Dam should be considered an impact of the Dam itself for the purposes of the Commonwealth assessment and approval process under the *Environment Protection and Biodiversity Conservation Act* ('EPBC Act').

Surprisingly, the principle of holistic, cumulative environmental impact assessment had not been established at the Commonwealth level until this case!

In a welcome decision, Justice Susan Kiefel of the Federal Court found that Commonwealth Environment Minister Kemp had erred in excluding from consideration the impacts from agriculture to be enabled by the Dam, and held that the proper approach to environmental assessment under the EPBC Act was a wide one and properly extended to considering the "whole, cumulated and continuing effect" of the activity, including the impacts of activities of third parties.

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



Felicity Wishart (QCC) and Imogen Zethoven (WWF) with EDO Qld and supporters outside the Federal Court after the Nathan Dam case win.
Photo courtesy of the Courier Mail.

Minister Kemp must now reconsider the environmental assessment of the Nathan Dam, and, following the guidance of the court, it is likely that he will decide to include impacts on the Great Barrier Reef and migratory species in the matters which need to be addressed by the Dam developers in the environmental assessment document. The Minister will base his final decision on whether to approve the dam or not on that environmental assessment document.

We 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.

See the **following** short article by barrister Chris McGrath to learn more about the case and its broad-ranging implications.

Minister's dam decision overturned

Chris McGrath
Barrister-at-Law

In Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463 ("the Nathan Dam Case"), Justice Susan Kiefel of the Federal Court of Australia overturned decisions of the Federal Environment Minister for refusing to consider the impacts of major associated downstream agricultural development on the Great Barrier Reef World Heritage Area when assessing of the impacts of a major dam. This decision has far-reaching implications for the operation of environmental law in Australia.

In *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 ("the Nathan Dam Case") (19 December 2003), two conservation groups, the Queensland Conservation Council and World Wide Fund for Nature (Australia), successfully sought judicial review of decisions of the Federal Environment Minister under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act"). (1)

The decisions that were challenged involved a proposal to construct and operate the 880,000 megalitre Nathan Dam near Taroom on the Dawson River in central Queensland. The Dawson River joins the Mackenzie River to become the Fitzroy River flowing east to the coast and the Great Barrier Reef World Heritage Area ("GBR") at Rockhampton.

The purpose of building the Nathan Dam is to supply water for irrigation of 30,000 hectares of farmland, mostly cotton growing, in the lower Dawson River Valley and other development in the region. Major concerns were raised regarding the likelihood of agricultural chemicals, particularly endosulfan, polluting water flowing to the GBR. The Fitzroy River catchment is recognised as a high-risk area for activities causing pollution of the GBR.

Despite concerns over the likelihood of the associated downstream agricultural development causing significant impacts to the GBR, the Federal Environment Minister, Dr David Kemp, refused to consider these impacts. He stated "I found that potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, are not impacts of the ... construction and operation of the dam."

The statutory context of the Nathan Dam Case was that Part 3 (Chapter 2) and Parts 7-9 (Chapter 4) of the EPBC Act provide an offence, assessment and approval system for actions impacting upon matters of national environmental significance (as well as actions impacting on Commonwealth land and actions undertaken by the Commonwealth). As relevant to this case, "matters of national environmental significance" include the world heritage values of a declared World Heritage property and listed migratory species.

A person proposing to take an action that has, will have or is likely to have a significant impact on a matter of national environmental significance is required to refer the proposal to the Federal Environment Minister, who must then decide under s75 whether it is a "controlled action" requiring assessment and approval under the Act. If the Minister decides a proposal is a controlled action, it must then be assessed under the EPBC Act and either approved or refused under s133 of the Act. The Minister may also impose conditions on an approval.

The decision in the Nathan Dam Case concerned the extent of the enquiry necessary to be undertaken by the Federal Environment Minister under s75 of

the EPBC Act of the impacts which a proposed development or activity may have upon the matters protected by the Act.

In summary, the decision establishes three legal principles of broad application for the future operation of the EPBC Act, namely:

- When assessing the impacts of a proposal under the s75 of the EPBC Act, the enquiry of the Federal Environment Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.
- When assessing the impacts of a proposal under the s75 of the EPBC Act, the Federal Environment Minister is first to consider 'all adverse impacts' the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Minister should exclude from further consideration those possible impacts which lie in the realms of speculation.
- No narrow approach should be taken to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the Act.

This decision has fundamental and far-reaching implications for development approval and the operation of environmental law in Australia by recognising the broad scope of relevant impacts that must be considered by the Federal Environment Minister under s75 the EPBC Act.

The EPBC Act provides the overarching legal requirements for environmental impact assessment of development proposals in Australia and, by massively widening the scope of relevant impacts that must be considered for assessment under the Act, the decision dramatically strengthens the ability of the Act to protect the environment. The decision fundamentally improves the decision-making process for development approval under the Act by establishing that piecemeal decisions are unlawful. State and Territory governments performing environmental impact assessment under bilateral agreements on behalf of the Commonwealth Government under the EPBC Act will also be required to comply with the same principles. The implications of this decision are therefore likely to reverberate for decades in the Australian environmental legal system.

Endnotes

(1) The decision is available at

http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1463.html. In relation to the EPBC Act generally, see <http://www.deh.gov.au/epbc/>.

To help support EDO Qld lawyers to run other important cases to improve environmental laws, please consider making a donation or becoming a member by completing and returning a membership/donations form,

available from our website. If you are already a member and supporter, thank you, this case is your victory too!