

case notes

Conservationists Win Nathan Dam Appeal

By Larissa Waters, Solicitor, Environmental Defenders Office (Qld) Inc.

The Full Federal Court of Australia on 30 July 2004 has unanimously dismissed the appeal by the Commonwealth Minister for the Environment and Heritage in the Nathan Dam case. The implications of this landmark case are wide-ranging and will be felt across Australia as we see more thorough Commonwealth environmental impact assessment of developments referred under the EPBC Act.

What was the case about?

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 section 75 of the EPBC Act, which requires the Minister to consider “all adverse impacts” an action is likely to have.

What did the Full Court say?

The Full Court found that “all adverse impacts” were 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*”.

The Court clarified that even if the consequences of an action were beyond the *control* of a developer (such as actions by other parties), if they were within the developer’s *contemplation* (such as farmers using water from a dam) the Minister must treat them as impacts of the developer’s proposed action.

The Full Court’s judgement *Minister for the Environment and Heritage v Queensland Conservation Council Inc. and WWF Australia* [2004] FCAFC 190 (30 July 2004) is available online from www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html.

What does this mean for the proposed Nathan Dam, and other developments generally?

The Minister’s original decision that the EPBC Act did not require him to consider downstream pollution by irrigators as an impact of the construction and operation of the dam was wrong - those impacts are relevant.

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 enabled by the Nathan Dam will be significant), the proponent for the dam will have to assess the dam’s impact on the World Heritage Values of the Great Barrier Reef as part of its environmental assessment process.

After reading that assessment document the Minister can still approve the dam, even if there are likely to be adverse significant impacts on the Reef. So although the case will not stop the dam, it will require a proper, broad consideration of the actual impacts of the dam.

The case is important because it establishes the principle that a broad inquiry into the impacts of proposed actions is required. This decision can be expected to make consultants and developers work a lot harder before they submit a proposal for assessment. This means better, more thorough Commonwealth environmental impact assessment!

At its heart, the decision is just common sense – you can’t assess the impacts of a big project without looking at what it is being built for.

The Minister has until 27 August 2004 to seek special leave to appeal the Full Court’s decision to the High Court of Australia.

For more information, contact Jo Bragg or Larissa Waters at EDO Qld on (07) 3210 0275